



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

November 30, 2018

The Honorable Jeanette W. McBride
Clerk of Court, Richland County
PO Box 2766
Columbia SC 29202-2766

REMITTITUR

Re: Allen Patterson v. Herb Witter
Lower Court Case No. 2013-CP-40-02655
Appellate Case No. 2016-002343

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court along with the earlier decision of the South Carolina Court of Appeals is enclosed.

Very truly yours,

Daniel E. Shearouse
65

CLERK

cc:

James Edward Bradley, Esquire

S. Jahue Moore, Esquire

Pope D. Johnson, III, Esquire

Burl F. Williams, Esquire

James Lynn Werner, Esquire

Lawrence Michael Hershon, Esquire

William W. Wilkins, Esquire

The Supreme Court of South Carolina

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, Petitioners,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2016-002343

ORDER

After careful consideration of Respondents' petition for rehearing, the Court grants the petition for rehearing, dispenses with further briefing, and substitutes the attached opinion for the opinion previously filed in this matter.

s/ Donald W. Beatty C.J.

s/ John W. Kittredge J.

s/ Kaye G. Hearn J.

s/ John Cannon Few J.

s/ George C. James, Jr. J.

Columbia, South Carolina
November 14, 2018

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, Petitioners,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2016-002343

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 27841
Heard May 24, 2018 – Re-Filed November 14, 2018

REVERSED AND REMANDED

James Edward Bradley and S. Jahue Moore, both of Moore Taylor Law Firm, PA, of West Columbia, for Petitioners.

William W. Wilkins and Burl F. Williams, both of Nexsen Pruet, LLC, of Greenville, James Lynn Werner and Lawrence M. Hershon, both of Parker Poe Adams & Bernstein, LLP, and Pope D. Johnson, of Johnson & Barnett, LLP, all of Columbia, for Respondents.

JUSTICE KITTREDGE: This case involves the South Carolina Home Builders Self Insurers Fund (Fund), which was created by the Home Builders Association of South Carolina, Inc. "for the purpose of meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act." The Fund at issue here was established in September 1995 by an "Agreement and Declaration of Trust" (Agreement) between the Home Builders Association of South Carolina, Inc. (Association) and the Fund's Board of Trustees (Board). The underlying dispute arose after the Board announced plans to wind down the Fund and use the Fund's remaining assets to finance a new mutual insurance company. Petitioners, who were members of the Fund, disagreed with that decision and challenged the Board's authority to use the Fund's assets in such a way. The trial court twice dismissed Petitioners' suit, first on the basis that it involved the internal affairs of a trust and therefore should have been filed in probate court, then in a subsequent proceeding, on the basis that the lawsuit was a shareholder derivative action and that the complaint failed to comply with the pleading requirements of Rule 23(b)(1), SCRCF.

On appeal, the court of appeals affirmed the dismissal of Petitioners' complaint, finding the trial court properly concluded (1) the Fund was not a trust; (2) Petitioners' claims were derivative in nature; and (3) Petitioners' complaint was properly dismissed as it did not properly allege a pre-suit demand as required by Rule 23(b)(1). *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (Ct. App. 2016). We issued a writ of certiorari to review the court of appeals' decision. We reverse and remand, for Petitioners have satisfied the pleading requirements of Rule 23(b)(1), irrespective of whether the Fund is properly characterized as a trust.

I.

All employers conducting business in South Carolina must secure the payment of compensation to their injured employees. S.C. Code Ann. § 42-5-10 (2015). This may be accomplished either by purchasing workers' compensation liability insurance or by qualifying as a "self-insured" employer. To become self-insured, an employer must demonstrate to the Workers' Compensation Commission (Commission) that it has the "financial ability to pay directly the compensation in the amount and manner and when due as provided" by the Act. S.C. Code Ann. § 42-5-20 (2015).

The Act also allows employers to create a self-insured workers' compensation liability fund or "pool." *Id.* § 42-5-20 ("The [C]ommission may, under such rules and regulations as it may prescribe, permit two or more employers in businesses of a similar nature to enter into agreements to pool their liabilities under the Workers' Compensation Law for the purpose of qualifying as self-insurers."). For a self-insurance fund to be approved, an officer of the proposed organization must submit to the Commission various documents, financial statements, and notably, "[a]n indemnity agreement which jointly and severally binds each member of the fund, signed by each proposed member." S.C. Code Ann. Regs. 67-1501(E)(1)–(8) (2012).¹ A self-insured fund must be approved by the Commission before it may begin operation. *Id.* § 67-1502 (2012).

The Agreement identified its purpose as:

meeting and fulfilling an employer's obligations and liabilities under the South Carolina Workers' Compensation Act; *to form an overall self-insurers fund* pursuant to Laws of the State of South Carolina, which provides for workers' compensation coverage and benefits; to provide, as appropriate, allowable advance discounts on premium payments made by employers for workers' compensation coverage; and to minimize the cost of providing workers' compensation coverage by developing and refining specialized claim services and a loss prevention program within the South Carolina Home Building Industry.

¹ This requirement of joint and several liability for fund membership is not unique to South Carolina. *See infra* note 8.

(emphasis added).

In addition to establishing the authority of Board members and extensive guidelines for the administration of the Fund, the Agreement further provided that amendments to the Agreement may be made by a majority of the Board, "However, this Agreement may not be amended so as to change its purpose as set forth [above] *or to permit the diversion or application of any of the funds of the [Fund] for any purpose other than those specified herein.*" (emphasis added). The Agreement also provided that "In the event of termination, the remaining funds available in the [Fund], after providing for all outstanding obligations, shall be distributed, through a formula determined by the [Board], to the participating members."

In the fall of 2003, the Board began discussing the idea of winding down the Fund and using the remaining monies on hand to capitalize a mutual insurance company, presumably to be comprised of the members of the Fund. Over the next several years, the Board continued to explore this "conversion" with the Association, the Commission, and the Department of Insurance (DOI); the two biggest challenges were identified as accumulating the \$5 million necessary for the mutual insurance company's starting capital reserve and upgrading the Fund's existing computer systems to enable compliance with DOI's regulatory requirements.

In furtherance of the plan to create a mutual insurance company, the Board authorized expenditures from the Fund to purchase a custom computer software program; purchase office space costing \$1.6 million; include "operations of the insurance company" in the scope of its directors and officers insurance coverage; and to subscribe to a national workers' compensation insurance-rating and data-collection bureau.

In May 2011, the Board notified the Commission it planned to cease accepting new members into the Fund effective July 1, 2011, and planned to withdraw the Fund from the self-insured program effective January 1, 2012. The Board also sought and received "approval" from the Commission to use \$5 million in Fund assets to capitalize the reserve fund for the mutual insurance company; however, this "approval" included no evaluation of whether this use of Fund monies complied with the terms of the Agreement. Indeed, the director of the self-insurance division of the Commission wrote to the Fund's administrator:

In response to your request[,] we have approved the release of \$5 million in non-pledged assets of the SC Home Builders Self-Insurers

Fund to be used solely to capitalize the SC Builders Insurance Group, Inc., in conjunction with the closure of the self-insured [F]und. It is understood that the [F]und will cease accepting new members effective July 1, 2011[,] and will become no longer self-insured for workers' compensation in South Carolina effective January 1, 2012. *The outstanding liabilities of the [F]und at the time of closure, January 1, 2012, will remain the responsibility of the self-insured [F]und and its membership under joint and several liability.* The [F]und is required to provide a final audited financial statement following closure and will continue to provide the Commission[']s Form 11, Fund Quarterly Financial Report, until further notice. The [F]und will also be required to comply with Self-Insurance Tax and Second Injury Fund Assessment requirements following the [F]und[']s closure.

(emphasis added).

Petitioners are members of the Fund who, in February 2012, filed suit against the Fund, the Board, and the individual members of the Board (collectively, Respondents). Petitioners alleged breach of fiduciary duty; breach of trust; breach of contract; and breach of contract accompanied by a fraudulent act. Petitioners alleged that the Board committed *ultra vires* acts in breach of its fiduciary duties by removing more than \$5 million from the Fund to establish the mutual insurance company—monies which should have been returned to the Fund's members under the terms of the Agreement. Petitioners also alleged that in addition to not receiving their share of the \$5 million paid-in surplus, they have suffered or will individually suffer additional tax consequences and additional liability exposure to cover the Fund's obligations. Petitioners alleged that all improper expenditures should be reimbursed to the Fund to reduce the amounts for which Fund members might ultimately be jointly and severally liable. Additionally, Petitioners sought an accounting and a declaration that Fund assets could not be used for the purpose of establishing a mutual insurance company.

Respondents moved to dismiss the complaint, asserting eight separate bases for dismissal, including (1) the circuit court's lack of subject matter jurisdiction because the complaint involved the internal affairs of a trust, which fell within the exclusive jurisdiction of the probate court;² and (2) that the action was derivative in

² See S.C. Code Ann. § 62-7-201(a) (Supp. 2017) (providing "the probate court has exclusive jurisdiction of proceedings initiated by interested parties concerning the

nature and did not meet the pleading requirements of Rule 23(b)(1), SCRCF.³ Respondents' motions sought protection from responding to Petitioners' discovery requests during the pendency of the motions; incorporated by reference an affidavit of the Fund's administrator, to which twelve separate exhibits were attached; and stated "the Court will be asked, pursuant to Rule 12(b)(6), SCRCF, to consider matters outside of the Complaint and treat the motion as one for summary judgment."

On September 4, 2012, a hearing was held on Respondents' motions to dismiss, during which the circuit court indicated it was inclined to dismiss the complaint based on the probate court's exclusive jurisdiction of the internal affairs of trusts and requested proposed orders. On January 30, 2013, after the hearing but before the circuit court issued its written order, Petitioners sent a written demand letter to Respondents' counsel itemizing specific requests:

In particular, our clients believe the following actions are necessary and should be taken on behalf of the [F]und:

1. The \$5,000,000 which was taken out of the [F]und as excess funds to establish a competing mutual fund should be distributed immediately to the beneficiaries of the Trust as it is not needed for the operation of the South Carolina Builders Self Insurers Fund.

internal affairs of trusts").

³ Rule 23(b)(1) provides:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and . . . the reasons for his failure to obtain the action or for not making the effort.

2. An accounting should be made of all remaining funds in custody of the South Carolina Home Builders Self Insurers Fund. All funds not necessary to insure liability should be distributed to members of the Trust.
3. Elections have not been held as required by the Trust documents. Elections should be held for all positions of the Trustees.
4. The Trust should be dissolved as it appears in the Trustees' decision that a competing entity should be set up and that the Trust no longer serves its functions. As a result, the Trust should be dissolved with requisite amounts kept on hand to insure against future liabilities with the remaining assets distributed to members of the Trust.
5. All assets contemplated for use by the Mutual Fund and purchased with that intent should be sold with the proceeds to be distributed to beneficiaries of the Trust.

The letter also stated:

[We] believe previous correspondence in the lawsuit set forth the basis for these requests of the Trust. We are just sending this to you to make clear to you that under Rule 23 of the South Carolina Rules of Civil Procedure we are asking that these actions be taken. [We] believe these requests have already been made to you as well as your clients. It is our understanding that your clients have refused to take these actions.

If your clients' position is any different, please let [us] know so we can discuss this matter. If [we] do not hear from you regarding this, [we] will assume your clients refuse to take the actions as requested above, and we will take appropriate action.

Respondents did not immediately respond.

On March 5, 2013, the circuit court issued a written order of dismissal finding "[i]t is clear from the documents submitted to the Court that this dispute concerns a trust" and concluding the circuit court therefore lacked subject matter jurisdiction.

Nevertheless, the dismissal was without prejudice, allowing Plaintiffs to refile their complaint in Probate Court and subsequently remove the re-filed matter back to circuit court.⁴

Still having received no response to their January 30, 2013 letter, Petitioners refiled their lawsuit in probate court on April 9, 2013, alleging the same causes of action and including a new paragraph, which stated:

8. To the extent required by South Carolina Rule of Civil Procedure 23, the Plaintiffs allege:
 - a. The Plaintiffs were beneficiaries of the trust at all times relevant including when the transactions complained of were made.
 - b. The Plaintiffs, their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to counsel for the Defendants, meetings with counsel for the Defendants, correspondence to the Trust and a previous lawsuit to no avail.

The re-filed suit was removed to circuit court.

Respondents moved to dismiss this second complaint, alleging, among other things, that the lawsuit *did not involve a trust* but rather was a shareholder derivative action and that the complaint failed to comply with the pleading requirements of Rule 23(b)(1) and therefore should be dismissed; Respondents submitted an affidavit in support of their motion.⁵

⁴ See S.C. Code Ann. § 62-1-302(d)(4) ("Notwithstanding the exclusive jurisdiction of the probate court over the foregoing matters, any action or proceeding filed in the probate court and relating to the following subject matters, on motion of a party, or by the court on its own motion, made not later than ten days following the date on which all responsive pleadings must be filed, must be removed to the circuit court and in these cases the circuit court shall proceed upon the matter de novo: . . . (4) matters involving the internal or external affairs of trusts . . .").

⁵ Respondents also alleged Petitioners lacked standing; that the contract claims failed because Petitioners were not parties to the Agreement; and that the complaint failed to meet the heightened pleading standard of Rule 9(b), SCRC, as

Ultimately, the circuit court dismissed Petitioners' complaint, finding the Fund was an unincorporated association, not a trust, and that the complaint was therefore subject to Rule 23(b)(1). The circuit court held that the complaint failed to comply with Rule 23(b)(1). Petitioners then filed a Rule 59(e) motion, arguing the pre-suit demand was properly made and that the trial court's order elevated form over substance. In their motion, Petitioners also sought to supplement or amend their pleadings if more detailed pleadings were required. The circuit court denied this motion.

On appeal, the court of appeals affirmed, finding the circuit court properly concluded (1) the Fund was an unincorporated association and not a trust; (2) Petitioners' claims were derivative in nature; and (3) Petitioners' complaint was properly dismissed as it did not properly allege a pre-suit demand as required by Rule 23(b)(1). *Patterson v. Witter*, 418 S.C. 66, 791 S.E.2d 294 (Ct. App. 2016). This Court issued a writ of certiorari to review the court of appeals' decision.

II.

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citation omitted). "In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Id.* (citation omitted). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Id.* at 395, 645 S.E.2d at 247–48 (quoting *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)). "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." *Id.* at 395, 645 S.E.2d at 248 (citation omitted).

In considering a motion for dismissal under Rule 12(b)(6), if "matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Rule 12(b), SCRCP; *see also, e.g., Brown v. James*, 389 S.C. 41, 47 n.5, 697 S.E.2d 604, 607 n.5 (Ct. App. 2010) (citations omitted) (finding that the trial

to the breach of contract accompanied by a fraudulent act claim.

court's consideration of matters beyond the pleadings converted the motion to dismiss into a motion for summary judgment). Because the parties submitted matters outside the pleadings that were not excluded by the court and certain factual findings in the circuit court's order exceeded the scope of the facts alleged in the complaint, we find this motion to dismiss was converted into a motion for summary judgment and we review it as such.

"[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact[, then] the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006) (citations omitted). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008) (quoting *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 479, 465 S.E.2d 765, 771 (Ct. App. 1995)).

A. Unincorporated Association or Trust

The court of appeals found that although the Agreement, by its terms, purported to create a trust, the Fund possessed many characteristics typically associated with business corporations, and thus, the Fund was properly considered an unincorporated association for the purposes of the pre-suit demand and pleading requirements of Rule 23. Petitioners argue the court of appeals erred in categorizing the Fund as anything other than precisely what it purports to be—a trust—and therefore, Petitioners argue the pre-suit demand and pleading requirements of Rule 23(b)(1) are inapplicable. Petitioners alternatively assert that in any event they satisfied the pleading requirements of Rule 23(b)(1). On this latter point, we agree with Petitioners. Nevertheless, we address the dispute over the proper characterization of the Agreement and its impact on the applicability of Rule 23(b)(1).

In construing a trust agreement, "a court must resort first to the language of the instrument, and if the language is perfectly plain and capable of legal construction, the language determines the form and effect of the instrument." *Germann v. N.Y. Life Ins. Co.*, 286 S.C. 34, 38, 331 S.E.2d 385, 388 (Ct. App. 1985) (citing *Chiles v. Chiles*, 270 S.C. 379, 242 S.E.2d 426 (1978)). "If the intention of the settlor

appears on the face of the agreement, then the court will effectuate it, unless it is in conflict with principles of law." *Id.* (citing *Citizens & S. Nat'l Bank of S.C. v. Auman*, 259 S.C. 263, 191 S.E.2d 511 (1972)).

Despite this black-letter law, we acknowledge the truth in the court of appeals' observation that the Fund is, in many ways, dissimilar to a garden-variety trust. *Patterson*, 418 S.C. at 78–80, 791 S.E.2d at 301–02. Nevertheless, that dissimilarity is not dispositive. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462–66 (1980) (rejecting an argument that a business trust should be treated as an unincorporated association simply because it resembled a business association in several aspects, finding instead that the entity was an express trust, just as it purported to be, and that there was no basis for disregarding the trust's legal form). But many states permit (indeed, one state even requires⁶) workers' compensation self-insured funds to be organized as trusts.⁷ Also, it is common in many other

⁶ *See* 77 Pa. Stat. and Cons. Stat. Ann. § 1036.2(b)(8) (West 2018) (allowing a group of employers to create a workers' compensation self-insured fund if the group "[e]xecutes a trust agreement under which each member agrees to jointly and severally assume and discharge the liabilities arising under this act").

⁷ *See, e.g.,* Ariz. Rev. Stat. Ann. § 23-961.01(A) (2018) ("Two or more employers, each of whom are engaged in similar industries, may enter into contracts to establish a workers' compensation pool to provide for the payment and administration of workers' compensation claims . . . [b]y the execution of a trust agreement . . ."); Ala. Admin. Code r. 480-5-3-.08(9) (2018) ("Each Fund shall have a set of Bylaws or shall enter into a trust agreement which shall govern the operation of the Fund."); 099-00-1 Ark. Code R. § 099.05(III)(A) (requiring a workers compensation self-insured group "to be administered under the direction of an elected board of trustees"); Ill. Admin. Code tit. 50, § 575.110 (2018) (defining the governing body of a workers' compensation self-insured fund as "any member of the pool's Board of Trustees, if the pool is a trust, or any member of the pool's Board of Directors, if the pool is any other type of entity"); 211 Mass. Code Regs. 67.06(2)(b)(2) (2018) (requiring self-insured group applicants to submit "a copy of the articles of association, trust agreement, or articles of organization"); Mich. Admin. Code r. 408.43d (2018) (requiring workers' compensation self-insured funds "to be administered under the direction of an elected board of trustees and to provide workers' compensation coverage for a group of private employers in the same industry or for public employers of the same type of unit"); Mo. Code Regs. Ann. tit. 8, § 50-3.010(1)(A)(13) (2018) (defining a workers compensation self-insured trust as "[a] combination of persons, businesses, firms,

states for fund participants to be subject to joint and several liability.⁸ The

or corporations bound together to secure, jointly and severally, workers' compensation liability by holding the individual interests of each subservient to a common authority for the common interests of all. This shall also include the written instrument that creates the trust."); Tenn. Comp. R. & Regs. 0780-01-54-.04(2)(a)(1) (2018) (requiring workers' compensation self-insured fund applicants to submit "[t]he articles of incorporation, trust agreement, or any other similar document from which the pool is formed").

⁸ See Ga. Code Ann. § 34-9-151(9) (2018) (requiring workers' compensation self-insured fund agreements to include a provision "through which each member agrees to assume and discharge, jointly and severally, any and all liability under this article relating to or arising out of the operations of the fund"); Tex. Lab. Code Ann. § 407A.056(a) (requiring applicants for a certificate of approval to operate a workers' compensation self-insured fund to submit an indemnity agreement that "jointly and severally bind[s] the group and each employer who is a member of the group to meet the workers' compensation obligations of each member"); Ala. Admin. Code r. 480-5-3-.08(6) (2018) ("All participants shall sign Participation Agreements providing for joint and several liability for claims against the Fund during the coverage periods of their participation."); 099-00-1 Ark. Code R. § 099.05(III)(A)(1)(a) (2018) (requiring all fund participants to execute "[a]n indemnity agreement jointly and severally binding the group and each member thereof to comply with the provisions of the Arkansas Workers' Compensation laws and Rules and Regulations of the Commission"); Cal. Code Regs. tit. 8, § 15479(a)-(b)(1) (2018) (requiring each member of a group self-insurer to execute an "agreement under which each member of a group self-insurer agrees to assume and discharge, jointly and severally, any compensation liability under Labor Code Section 3700-3705 of any and all other employers that are parties to the group self-insurer indemnity agreement"); Colo. Code Regs. § 702-2:2-2-2(7) (2018) (requiring pool agreements to "jointly and severally bind each member to pay claims and comply with all provisions of the workers' compensation laws of the State of Colorado"); Fla. Admin. Code Ann. r. 69O-190.068(1) (2018) ("Each self-insurers fund member shall enter into an indemnity agreement jointly and severally binding the self-insurers fund and each member thereof to comply with the provisions of the Florida Workers' Compensation Law"); La. Admin. Code tit. 37, § 1111(A) (2018) ("Each self-insurance fund member shall enter into an indemnity agreement jointly and severally binding the self-insurance fund and each member thereof to comply with the provisions of the applicable Louisiana Revised Statutes and rules, regulations, and directives of the Department of Insurance."); 02-031-

250 Me. Code R. § III(B)(2)(d) (2018) (requiring members of workers' compensation group self-insured plans to submit an executed indemnity agreement); Md. Code Regs. 31.08.09.08(C)(13) (2018) (requiring a workers compensation self-insured fund to submit "[c]opies of executed agreements with each member assuming joint and several liability for obligations of the group in the event of insolvency of the Self-Insurers' Guaranty Fund"); 211 Mass. Code Regs. 67.06(2)(b)(17) (2018) (requiring that all members of a workers' compensation self-insured group are jointly and severally liable for all workers' compensation obligations); Mich. Admin. Code r. 408.43g(5)(j) (2018) (requiring workers' compensation group self-insured fund records to include "[i]ndividual membership applications containing signed indemnity agreements"); Minn. r. 2780.2800(3) (2018) (providing a workers' compensation self-insured group "shall not accept any liability for a new member until a signed indemnity agreement in the form set forth in part 2780.9920 has been completed by that new member and filed with the commissioner"); 20-1 Miss. Code R. § 1.7(B)(2)(b)(8) (conditioning approval of a workers compensation self-insured fund upon the workers compensation commission's receipt of "[a]n indemnity agreement jointly and severally binding the group self-insurer and each member thereof to meet the workers' compensation obligations of each member"); Mo. Code Regs. Ann. tit. 8, § 50-3.010(5)(A)(1) (2018) (requiring that workers' compensation self-insured trusts include in the trust agreement "an indemnity clause which jointly and severally binds the group and each member thereof for payment of benefits to employees of members of the group and all other liability pursuant to Chapter 287, RSMo"); Mont. Admin. R. 24.29.621(1)(c)(i) (2018) (requiring members of a workers compensation self-insured group to execute an "agreement to accept joint and several liability for all workers' compensation benefits and occupational disease obligations incurred by the employer group"); N.J. Admin. Code § 11:15-1.3(b)(5) (2018) (requiring workers' compensation self-insured groups to obtain "[a]n indemnity and trust agreement, in a form satisfactory to the Commissioner, jointly and severally binding the group and each member thereof to meet the workers' compensation obligations of each member, and establishing a trust for the benefit of persons qualifying to receive workers' compensation awards or payments from employers participating in the group"); N.Y. Comp. Codes R. & Regs. tit. 12, § 317.9(b)(7) (2018) (allowing a group self-insurer "to immediately levy an assessment upon the group members or take such other action as may be appropriate in order to make up the deficiency"); Okla. Admin. Code 810:25-11-15(a)(1) (2018) (requiring "[e]very member of a group self-insurance association shall execute an indemnity agreement . . . under which each member agrees to assume and discharge, jointly and severally, liability under the AWCA of any and all employers party to such

presence of joint and several liability among Fund members does not necessarily undermine a trust's identity as such; rather it is a function of the overriding policy concern of ensuring injured workers' claims are paid.

The Agreement resembles a trust in some respects, and it does not resemble a trust in other respects. However, the question of whether the Fund is a trust need not be resolved, for we elect to follow the precedent from other jurisdictions applying Rule 23(b)(1) to all actions which are derivative in nature, even if the entity in question is a trust. *See, e.g., Accredited Aides Plus, Inc. v. Program Risk Mgmt., Inc.*, 46 N.Y.S.3d 246, 255 (App. Div. 2017) (finding the "analysis applicable to derivative actions against corporations has been held to apply to trusts" and finding that the joint and several liability of workers' compensation group self-insured trust

agreement"); Or. Admin. R. 436-050-0270(1)(g) (2018) (requiring employers applying for certification as a self-insured employer group to submit a "Group Self-Insured Indemnity Agreement" or another form authorized by the director, that jointly and severally binds each member for the payment of any compensation and moneys due to the director by the group or any member of the group"); 34 Pa. Code § 125.133(c)(8)(i) (2018) (requiring workers' compensation group self-insured applicants to submit to the workers compensation bureau the group's "proposed trust agreement and bylaws, which shall include: (i) A pledge that each member will be jointly and severally liable for the expenses and other obligations of the fund and for each other member's workers' compensation liability which is incurred while it is a member, including liability for assessments on claims incurred during a member's membership but not issued until after it has terminated membership"); Tenn. Comp. R. & Regs. 0780-01-54-.04(2)(e)(2) (2018) (requiring workers' compensation self-insured pool applicants to submit for approval "[i]ndemnity agreements between the pool and each member establishing each member's joint and several liability to the pool for all expenses, liabilities, and claims asserted against the pool by any person or entity"); 14 Va. Admin. Code § 5-370-40(A)(1) (2018) (providing "[a]n application submitted by a group self-insurance association shall be accompanied by the following items . . . 1. A copy of the members' indemnity agreement and power of attorney required by 14 VAC 5-370-120 binding the association and each member of the association, jointly and severally, to comply with the provisions of the Act and copies of any other governing instruments of the proposed group self-insurance association"); Wash. Admin. Code § 296-15-024(3)(a)(v) (2018) (requiring members of a workers' compensation group self-insurance fund to submit "[a]n indemnity agreement jointly and severally binding the group and each member to comply with the provisions of Title 51 RCW").

members "does not require us to set aside the legal distinction [] between derivative and direct claims"); *see also In re Mortg. & Realty Tr. Sec. Litig.*, 787 F. Supp. 84, 86 (E.D. Pa. 1991) (applying the Rule 23 demand requirement to a derivative action against the board of trustees of a real estate investment trust). The key inquiry is whether the underlying challenge is properly characterized as derivative in nature. Accordingly, the applicability of the pre-suit demand and pleading requirements of Rule 23(b)(1) are to be determined not on the basis of whether the entity involved is or is not a trust, but rather, whether the claims at issue are direct or derivative. We turn now to that issue.

B. Direct or Derivative

Petitioners argue that the court of appeals erred in finding all of their claims were derivative in nature. Specifically, Petitioners allege that based on the joint and several liability the Act imposes upon members of the Fund, "the injury is to each beneficiary who must, individually, make up for any shortfall in trust assets." Based on this individual liability exposure, Petitioners argue their actions are direct rather than derivative. We agree in part and disagree in part, and we find Petitioners' complaint includes both direct and derivative claims.

"An action seeking to remedy a loss to the corporation is generally a derivative one." *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (citation omitted). An action regarding the fiduciary obligation of a director is ordinarily enforceable through a derivative action. *Id.* (citation omitted). "A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation." *Id.* (citation omitted).

"If misconduct by the management of a corporation has caused a particular loss to an individual stockholder, the liability for the mismanagement is an asset of the individual stockholder." *Id.* (quoting *Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 703-04 (Ct. App. 1988)). "Of course, a suit based on the misconduct can be brought by the individual stockholder." *Id.* at 49, 557 S.E.2d at 684-85 (quoting *Ward*, 295 S.C. at 221, 367 S.E.2d at 703-04). "It becomes material, therefore, to inquire whether the acts of mismanagement charged to the directors affected the plaintiffs *directly*, or as their interests were submerged in the corporation whose assets were thus dissipated." *Id.* at 49, 557 S.E.2d at 685 (quoting *Stewart v. Ficken*, 151 S.C. 424, 427, 149 S.E. 164, 165 (1929)).

"Specifically, to distinguish a derivative claim from a direct one, the court considers: (1) who suffered the alleged harm, the corporation or the suing

stockholders, individually, and (2) who would receive the benefit of any recovery or other remedy, the corporation or the stockholders individually." 19 Am. Jur. 2d *Corporations* § 1923 (2015). Direct and derivative claims may be brought simultaneously. 19 Am. Jur. 2d *Corporations* § 1922 (2015). "When determining whether a claim is derivative or direct, some injuries affect both the corporation and the stockholders; if this dual aspect is present, a plaintiff can choose to sue individually." *Id.* (citing *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618 (Del. Ch. 2013)); see also *Horizon House-Microwave, Inc. v. Bazzzy*, 486 N.E.2d 70, 74 (Mass. App. Ct. 1985) (observing a shareholder may pursue both direct and derivative claims in a single action).

In evaluating Petitioners' claims in the underlying complaint, the court of appeals found:

In the instant case, [Petitioners] allege the Board's decision to remove \$5 million from the Fund harmed the Fund's ability to adequately cover its risks. Thus, the action is premised on the alleged harm to the overall Fund, not to individual members. Accordingly, we find the circuit court correctly held [Petitioners'] claims were derivative and subject to the pleading requirements of Rule 23(b)(1).

Patterson, 418 S.C. at 81, 791 S.E.2d at 302 (citations omitted).

While we agree with the court of appeals that Petitioners' claim that the removal of the \$5 million impacted the Fund's ability to cover its risk is derivative in nature, this claim is by no means the *only* claim asserted in the complaint. Indeed, the court of appeals overlooked various other causes of action and forms of relief requested in the complaint.

Though discovery has not been conducted, one or more of Petitioners' additional claims may be direct in nature. We thus find the court of appeals erred in concluding that the complaint alleged *only* derivative claims. See *Accredited Aides Plus*, 46 N.Y.S.3d at 255 (finding certain claims by members of a workers' compensation group self-insured trust were direct, not derivative, in nature and observing that "just as the trust's deficits are eventually passed through to employer members as assessments by the Board, any recovery by the Board upon its claims on behalf of the trust will benefit the employer members by reducing the trust's deficit and the employer members' corresponding liabilities"). To the extent the court of appeals affirmed the dismissal of Petitioners' direct claims based on Rule 23, this was error.

Although we believe Petitioners' complaint may involve some direct claims, we nevertheless believe the court of appeals correctly found that certain claims were derivative in nature. Accordingly we turn now to what we view as the critical question before the Court—whether Petitioners' complaint met the pleading requirements of Rule 23 (b)(1).

C. Compliance with Rule 23(b)(1)

Lastly, Petitioners argue that even assuming Rule 23(b)(1) applies to their claims, the court of appeals erred in finding the requirements of that rule were not satisfied. We agree, for even if all claims are derivative and Rule 23(b)(1) applies, the demand and pleading requirements of Rule 23(b)(1) have been met.

Both the trial court and the court of appeals found evaluation of whether Petitioners' complaint complied with Rule 23(b)(1) was governed by the court of appeals decision in *Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct. App. 2000). In *Whittle*, three shareholders of Carolina First Corporation brought a derivative action seeking to recover disproportionate stock bonuses paid to three executives. *Id.* at 180, 539 S.E.2d at 405. The complaint included general allegations that the plaintiffs made pre-suit demands upon the Board of Directors; however, the complaint stated "merely that the plaintiffs demanded 'certain information' and 'certain actions.'" *Id.* at 189, 539 S.E.2d at 409. The court of appeals concluded these allegations were not sufficiently particularized to satisfy the requirements of Rule 23(b)(1), holding "[a]t a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief." *Id.* (citation omitted). The court of appeals noted that although the plaintiffs submitted copies of letters purporting to meet the pre-suit demand requirement, the letters could not be considered because they were not attached to the complaint; and in any event, the letters did not satisfy the pleading requirements of Rule 23(b)(1). *Id.* at 189–90, 539 S.E.2d at 410. Therefore, the court of appeals concluded the trial court did not err in refusing to consider them. *Id.* at 190, 539 S.E.2d at 410.

The facts of this case are distinguishable from those in *Whittle*. Here, although the January 30, 2013 pre-suit demand letter was not expressly incorporated by reference into the complaint, unlike in *Whittle*, the January 30, 2013 letter *does* constitute an adequate demand in this case. Another issue here is Petitioners' failure to include the magic phrase "which is incorporated herein by reference" in their discussion of the letter in paragraph 8 of their complaint. Indeed, the

allegations concerning the pre-suit demand in Petitioners' complaint are appreciably more detailed than those in *Whittle*. And certainly, when the January 30, 2013 letter is considered in conjunction with the complaint, there is ample evidence that Rule 23 is satisfied.⁹ The trial court simply found it was precluded from looking at the January 30, 2013 letter, which was error.

Moreover, in light of the parties' submissions and the trial court's willingness to consider multiple affidavits and documents outside the four corners of the complaint, we reject an approach that approves of a trial court's consideration of everything *except* the pre-suit demand letter that was actually sent and received. *See L-7 Designs, Inc. v. Old Navy, LLC*, 647 F.3d 419, 422 (2d Cir. 2011) (explaining a complaint may be "deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are 'integral' to the complaint" (quoting *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004))); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 155 (2d Cir. 2002) (explaining that "when a district court considers certain extra-pleading materials and excludes others, it risks depriving the parties of a fair adjudication of the claims by examining an

⁹ We reject Respondents' contention that such a finding eviscerates Rule 23(b)(1) and the business judgment rule. Petitioners' primary allegation is that the trustees failed to adhere to the absolute terms of a written contract—the Agreement—which provides: (1) "[T]his Agreement may not be amended so as to change its purpose as set forth [above] *or to permit the diversion of application of any of the funds of the [Fund] for any purpose other than those specified herein*"; and (2) "*In the event of termination, the remaining funds available in the [Fund], after providing for all outstanding obligations, shall be distributed, through a formula determined by the [Board], to the participating members.*" (emphasis added); cf. *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016) ("A corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto."). As a result, the gravamen of Petitioners' complaint is that *the Fund* failed to honor the non-discretionary terms of a written contract with its members, not that *the trustees* failed to exercise good faith, prudent judgment in the best interest of the corporate entity. While the latter might have implicated the business judgment rule, the former certainly does not. Our opinion today should in no way be read to denigrate the important role the business judgment rule plays in limiting *post hoc* secondguessing of the decisionmaking and conduct of corporate managers.

incomplete record"). Accordingly, we reverse the dismissal of Petitioners' complaint on the basis that it failed to comply with Rule 23(b)(1), SCRCP.

III.

For the foregoing reasons, we reverse the decision of the court of appeals and remand this case for further proceedings.

REVERSED AND REMANDED.

BEATTY, C.J., HEARN, FEW and JAMES, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., Privette Enterprises, Ellis Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC, on behalf of themselves and others similarly situated, Appellants,

v.

Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, Jim Gregorie, individually and as Trustees of the South Carolina Homes Builders Self Insurers Fund, and the South Carolina Home Builders Self Insurers Fund, Respondents.

Appellate Case No. 2014-000963

Appeal From Richland County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5416
Submitted December 1, 2015 – Filed June 15, 2016

AFFIRMED

James Edward Bradley and S. Jahue Moore, both of Moore Taylor Law Firm, P.A., of West Columbia, for Appellants.

William W. Wilkins and Burl F. Williams, of Nexsen Pruet, LLC, of Greenville, for Respondents; James Lynn Werner and Lawrence M. Hershon, of Parker Poe Adams & Bernstein LLP, of Columbia, for Respondent South Carolina Home Builders Self Insurers Fund and Respondents Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund; and Pope D. Johnson, III, of Johnson & Barnette, LLP, of Columbia, for Respondents Herb Witter, Colin Campbell, Eddie Weaver, Tom Markovich, Keith Smith, and Jim Gregorie, individually and as Trustees of the South Carolina Home Builders Self Insurers Fund.

WILLIAMS, J: In this civil matter, Allen Patterson and several others¹ (collectively "Appellants") appeal the circuit court's grant of the South Carolina Home Builders Self Insurers Fund (the Fund) and its trustees' (collectively "Respondents") Rule 12(b)(6), SCRCP, motion to dismiss. Appellants argue the court erred in (1) finding the Fund was not a trust; (2) ruling the action involved derivative claims subject to the pleading requirements of Rule 23(b)(1), SCRCP; and (3) holding Appellants' complaint did not comply with such requirements. We affirm.

FACTS/PROCEDURAL HISTORY

Home Builders Association of South Carolina, Inc. (HBASC) is a nonprofit corporation organized under the laws of South Carolina. HBASC's membership is comprised of individual and corporate homebuilders throughout the state. On September 27, 1995, HBASC created the Fund in a document titled "Agreement and Declaration of Trust" (the Agreement). Pursuant to the Agreement with HBASC, as the "Settlor," the contemporaneously formed "Board of Trustees" (the Board) was to direct the affairs of the Fund. According to the Agreement, the

¹ The other named appellants in this matter are Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC, Tilton Group, Sendler Construction Co., Inc., The Barry Davis Company, Inc., Great Southern Homes, and J. Carter, LLC.

Fund's purpose was to meet and fulfill HBASC members' obligations and liabilities under the South Carolina Workers' Compensation Act² (the Act).

The Fund is regulated and controlled by the South Carolina Workers' Compensation Commission (the Commission) and is not an insurance company. To become a member of the Fund and satisfy workers' compensation obligations under the Act, a homebuilder must first submit an application to the Commission. If the Commission approves the application, then the homebuilder receives a certificate confirming membership in the Fund. Five weeks following approval, the Fund begins to bill the new member for the premium relating to its business. Each Fund member pays a predetermined rate for protection from workers' compensation claims of its employees. Additionally, each member is jointly and severally liable for the obligations of the Fund.

Appellants are members of the Fund. On February 16, 2012, Appellants filed a complaint (First Complaint) against Respondents, bringing causes of action for, *inter alia*, breach of fiduciary duty, breach of trust, and breach of contract. Appellants alleged the Board breached its fiduciary duties by voting to remove approximately \$5 million from the Fund to establish a separate member-owned insurance company that Appellants argue would not provide any benefit to existing Fund members.³

After Appellants amended the First Complaint, Respondents moved to dismiss under Rule 12(b)(6), SCRCPP, arguing Appellants failed to meet the pleading requirements for derivative suits under Rule 23(b)(1), SCRCPP. Respondents alternatively asserted the suit involved the internal affairs of a trust and, thus, was under the exclusive jurisdiction of the probate court pursuant to section 62-7-201 of the South Carolina Code (Supp. 2015).

On March 4, 2013, the circuit court accepted Respondents' alternative argument and dismissed the action without prejudice, holding it lacked subject matter jurisdiction to hear the case. The court ruled Appellants must initially file the

² S.C. Code Ann. §§ 42-1-10 through -19-50 (2015 & Supp. 2015).

³ The \$5 million transfer to a new mutual insurance company was ratified by 96.5% of Fund members and approved by the Commission. Respondents returned the \$5 million to the Fund after failing to reach an agreement with HBASC on the formation of the company.

action in probate court, but could subsequently remove it to circuit court under section 62-1-302(d)(4) of the South Carolina Code (Supp. 2015).

Appellants filed another complaint (Second Complaint) on April 9, 2013, in probate court and moved to remove the case to circuit court. On April 22, 2013, the probate court granted Appellants' motion to remove. In the circuit court, Respondents again filed a motion to dismiss the Second Complaint, arguing the lawsuit was a shareholder derivative action and Appellants failed to comply with the pleading requirements of Rule 23(b)(1). On November 8, 2013, the circuit court denied Respondents' motion to dismiss, holding the Fund was a trust and, as such, was not subject to the pleading requirements of Rule 23(b)(1).

Respondents subsequently filed a Rule 59(e), SCRCP, motion to alter or amend judgment. The circuit court granted Respondents' motion on February 11, 2014, and dismissed Appellants' Second Complaint.⁴ In reaching its decision, the court found the Fund was not a trust, but instead resembled an unincorporated association. The court further explained the "gravamen of the [Appellants' c]omplaint alleges that the [F]und has been injured, not that the members have been injured." Thus, the court found the claims were typical of derivative claims subject to the pleading requirements of Rule 23(b)(1), requiring particularized allegations that Appellants first made a demand on the Board to obtain the relief they sought. The court found Appellants' complaint did not include sufficient allegations of such a demand and, therefore, did not comply with Rule 23(b)(1).

The circuit court, however, recognized Respondents had agreed to accept a January 20, 2013 letter from Appellants as a demand under Rule 23. After giving Respondents sixty days to respond to the letter, the court ruled Appellants "may pursue whatever legal action they determine is appropriate." On March 3, 2014, Appellants filed a motion to alter or amend the order of dismissal, which the circuit court denied. This appeal followed.

ISSUES ON APPEAL

⁴ Upon our review of the record on appeal, we cannot determine whether the Agreement was attached to the Second Complaint. Nevertheless, given that no party raised an issue on appeal regarding the circuit court's review of the Agreement under a Rule 12(b)(6) motion, we find it is the law of the case. See *Trans. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 431, 699 S.E.2d 687, 691 (2010) ("An unappealed ruling is the law of the case and requires affirmance.").

- I. Did the circuit court err in finding the Fund was not a trust?
- II. Did the circuit court err in ruling the action involved derivative claims subject to Rule 23(b)(1), SCRCP?
- III. Did the circuit court err in holding Appellants' complaint did not comply with the pleading requirements of Rule 23(b)(1), SCRCP?

STANDARD OF REVIEW

The appellate court applies the same standard of review as the circuit court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case." *Fleteau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003). "The question is whether, in the light most favorable to the plaintiff and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Cole Vision Corp. v. Hobbs*, 394 S.C. 144, 149, 714 S.E.2d 537, 539 (2011).

LAW/ANALYSIS

I. Unincorporated Association or Trust

A. Judicial Estoppel

As a preliminary matter, Appellants contend Respondents are judicially estopped from arguing the Fund is not a trust because Respondents previously took an inconsistent position in their first motion to dismiss Appellants' First Complaint. We disagree.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004). "The purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary." *Id.* To prevail on a judicial estoppel claim, a party must prove the following:

(1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Id. at 215–16, 592 S.E.2d at 632. In South Carolina, the doctrine of judicial estoppel applies only to matters of fact, not conclusions of law. *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

In its motion to dismiss Appellant's First Complaint, Respondents argued Appellants failed to meet the pleading requirements for derivative suits under Rule 23(b)(1). Respondents alternatively asserted the suit involved the internal affairs of a trust and, thus, was under the exclusive jurisdiction of the probate court. The circuit court accepted Respondents' alternative argument when it dismissed the case for lack of subject matter jurisdiction. After Appellants filed their Second Complaint in probate court and removed the case to circuit court, Respondents filed another motion to dismiss, contending the Fund was not a trust.

Here, Respondents have not misrepresented facts or changed their version of events to gain an advantage in the instant litigation. *See Bailey*, 327 S.C. at 252, 489 S.E.2d at 477 ("When a party has formally asserted a certain version of the *facts* in litigation, he cannot later change those facts when the initial version no longer suits him." (emphasis added)). Rather, Respondents argued alternative legal theories concerning the essence of the Fund. *See id.* at 251, 489 S.E.2d at 477 (stating the doctrine of judicial estoppel "does not apply to conclusions of law or assertions of legal theories"). Therefore, we find the doctrine of judicial estoppel is inapplicable to this case.

B. Merits

As to the merits of this issue, Appellants argue the circuit court erred in finding the Fund was not a trust. We disagree.

"A trust is an 'arrangement whereby property is transferred with intention that it be administered by [a] trustee for another's benefit.'" *State v. Parris*, 363 S.C. 477, 482, 611 S.E.2d 501, 503 (2005) (quoting *State v. Jackson*, 338 S.C. 565, 570, 527 S.E.2d 367, 370 (Ct. App. 2000)). To prove the existence of a trust, one must show (1) a declaration creating the trust, (2) a trust *res*, and (3) designated beneficiaries. *Whetstone v. Whetstone*, 309 S.C. 227, 231, 420 S.E.2d 877, 879 (Ct. App. 1992).

"An unincorporated association is a body of individual persons organized without a charter for the prosecution of some common enterprise." *Graham v. Lloyd's of London*, 296 S.C. 249, 255, 371 S.E.2d 801, 804 (Ct. App. 1988). An unincorporated association is not a legal entity separate from its members. *Id.* Moreover, the liability of its members is joint and several. *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 96, 186 S.E. 651, 658 (1936); *see also* S.C. Code Ann. § 15-35-170 (2005) ("On judgment being obtained against an unincorporated association[,] . . . the individual property of any copartner or member thereof found in the State shall be liable to judgment and execution for satisfaction of any such judgment.").

We acknowledge that, at first glance, the Agreement contains language that could be indicative of the Fund being a trust. The Agreement refers to HBASC as the "Settlor." Further, the Agreement grants the Board all powers conferred by the South Carolina Uniform Trustee's Powers Act⁵ and authorizes it to invest assets of the Fund. *Cf.* S.C. Code Ann. § 62-7-933 (Supp. 2015) (providing the prudent investor rule for trustees). Additionally, the Agreement mentions the Fund's compliance with the rule against perpetuities and states the situs of the Fund is the State of South Carolina.

The Agreement, however, also contains provisions usually associated with business corporations. The Board, for example, is elected by the Fund's members. *Cf.* S.C. Code Ann. § 33-8-103(d) (2006) (providing for the election of board of directors by the shareholders). In addition, the Agreement provides notice requirements for regular and special meetings of the Board. *Cf.* S.C. Code Ann. § 33-8-220 (2006) (stating the notice requirements for meetings of the board of directors). Likewise, the Agreement requires that the Board establish an office to house the Fund's books and records. *Cf.* S.C. Code Ann. § 33-16-101 (2006)

⁵ The South Carolina Uniform Trustee's Powers Act was repealed by the South Carolina Uniform Trust Code in 2005. *See* Act No. 66, 2005 S.C. Acts 280–518 (codified as amended at S.C. Code Ann. §§ 62-7-101 through -1106 (Supp. 2015)).

(requiring corporations to maintain a principal office for corporate records). Under the Agreement, the Fund must indemnify the Board for negligence in all actions made in good faith. *Cf.* S.C. Code Ann. § 33-8-510 (2006) (granting authority to corporations to indemnify board of directors for actions made in good faith). Moreover, the Agreement authorizes the Board to obtain liability insurance at the expense of the Fund for all actions, except those made in bad faith or in gross negligence. *Cf.* S.C. Code Ann. § 33-8-570 (2006) (allowing corporations to purchase and maintain liability insurance for their board of directors).

Based upon our review of the Agreement and applicable law, we find the circuit court correctly held the Fund was not a trust. *See* 1 S. ALAN MEDLIN, ESTATE PLANNING IN SOUTH CAROLINA: THE LAW OF WILLS AND TRUSTS § 501.1 (2002) (stating "a settlor may fail to create a trust despite using the word trust"). While the Agreement—arguably a declaration—most likely satisfies the first element for creating a trust, Appellants cannot prove the remaining elements. *See Whetstone*, 309 S.C. at 231, 420 S.E.2d at 879. First, HBASC did not transfer any money or property to the Board to hold in trust for the Fund's members. *See* S.C. Code Ann. § 62-7-401 (Supp. 2015) (stating a trust may be created by a "transfer of property to another person as trustee"); *Whetstone*, 309 S.C. at 231, 420 S.E.2d at 879 (holding one must show a trust *res* to prove the existence of a trust); MEDLIN, *supra*, § 501.1 (noting "[a] settlor cannot create a trust in property not currently owned"). After the Fund was created, its members began to contribute membership dues and premiums into the Fund in exchange for protection for its workers' compensation obligations.

Second, the Agreement contains no provision for "beneficiaries." *See* S.C. Code Ann. § 62-7-402(a)(3) (Supp. 2015) (requiring a trust to have definite beneficiaries); § 62-7-402(c) ("A beneficiary is definite if the beneficiary can be ascertained now or in the future . . ."). Homebuilders must apply to become Fund members. Further, a third party—the Commission—must approve Fund members. Thus, even assuming the Agreement is a declaration of trust, potential Fund members are not ascertainable from the Agreement.

Moreover, we agree with the circuit court that the Fund resembles an unincorporated association. *See Graham*, 296 S.C. at 255, 371 S.E.2d at 804 (holding an unincorporated association is a "body of individual persons organized without a charter for the prosecution of some common enterprise"). The Fund is a common enterprise of homebuilders who have voluntarily joined together to form a fund to provide workers' compensation coverage for their businesses. Additionally, the Fund's members are joint and severally liable for any shortfall in

Fund assets. *See Elliott*, 181 S.C. at 96, 186 S.E. at 658 (stating the liability of an unincorporated association's members is joint and several).

Therefore, we find the circuit court properly concluded the Fund was an unincorporated association and not a trust.

II. Direct or Derivative Claims

Appellants next argue their claims are not derivative and, thus, do not need to comply with the pleading requirements of Rule 23(b)(1), SCRCF. We disagree.

At the outset, because Rule 23(b)(1) covers derivative suits for both corporations and unincorporated associations, we find that principles of South Carolina law concerning derivative suits for corporations apply in this case. *See* Rule 23(b)(1), SCRCF (outlining the requirements for "derivative action[s] brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association").

"In South Carolina, the authority to direct the business and affairs of a corporation is delegated to a board of directors, not the shareholders." *Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000). Individual shareholders may not directly sue corporate directors for losses suffered by the corporation. *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419 (1991). "An action seeking to remedy a loss to the corporation is generally a derivative one." *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001) (quoting *Hite v. Thomas & Howard Co.*, 305 S.C. 358, 361, 409 S.E.2d 340, 342 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995)).

"A derivative action is, in essence, a challenge to a board's managerial authority." *Whittle*, 343 S.C. at 408, 539 S.E.2d at 187. "[A] shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." *Brown*, 348 S.C. at 49, 557 S.E.2d at 684 (quoting *Hite*, 305 S.C. at 361, 409 S.E.2d at 342).

Nevertheless, the general rule that a shareholder cannot bring a direct suit for injuries to a corporation has two exceptions: (1) when the shareholder suffers an injury separate and distinct from that suffered by other shareholders, and (2) when the alleged wrongdoer owes a fiduciary relationship to the shareholder and full relief cannot be accomplished through recovery by the corporation. *Rice-Marko v.*

Wachovia Corp., 398 S.C. 301, 308, 728 S.E.2d 61, 65 (Ct. App. 2012) (quoting *Brown*, 348 S.C. at 49, 50, 557 S.E.2d at 684, 685).

In the instant case, Appellants allege the Board's decision to remove \$5 million from the Fund harmed the Fund's ability to adequately cover its risks. Thus, the action is premised on the alleged harm to the overall Fund, not to individual members. Accordingly, we find the circuit court correctly held Appellants' claims were derivative and subject to the pleading requirements of Rule 23(b)(1). *See* Rule 23(b)(1), SCRCF (noting the rule applies to members bringing a derivative action to enforce a right of an unincorporated association); *Brown*, 348 S.C. at 49, 557 S.E.2d at 684 (stating "a shareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder").

Appellants also argue their action falls under the fiduciary relationship exception to the general rule for derivative suits because the Board owed a special fiduciary duty to the Fund's members to protect the Fund's assets. *See Rice-Marko*, 398 S.C. at 308–09, 728 S.E.2d at 65–66. The circuit court did not rule on the special duty argument, and it is nowhere mentioned by Appellants in their complaints, the transcript of the motions hearing, or their Rule 59(e) motion to alter or amend judgment. Because Appellants raise this argument for the first time on appeal, we find the issue is not preserved for appellate review and decline to address it. *See Chastain v. Hiltabidle*, 381 S.C. 508, 514–15, 673 S.E.2d 826, 829 (Ct. App. 2009) ("[A]n appellate court cannot address an issue unless it was raised to and ruled upon by the [circuit] court.").

Therefore, we find the circuit court properly concluded Appellants' claims were derivative and, thus, subject to the requirements of Rule 23(b)(1).

III. Compliance with Rule 23(b)(1)

Finally, Appellants assert that, even if their claims are derivative, they properly complied with Rule 23(b)(1) by alleging a demand on the Board. We disagree.

In pursuing a derivative suit, shareholders must first make a demand on the board of directors to take the action they desire or allege that such demand would be futile. *Whittle*, 343 S.C. at 188, 539 S.E.2d at 409 (quoting *Allison ex rel. Gen. Motors Corp. v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1112 (D. Del. 1985)). The purpose of the demand requirement is to ensure compliance with the most fundamental principle of corporate governance: directors are answerable to the

shareholders and responsible for managing all aspects of corporate affairs. *Id.* (quoting *Gen. Motors Corp.*, 604 F. Supp. at 1117). "A demand alerts the board so that it may take the corrective action, if any, which it deems necessary." *Id.*

Rule 23(b)(1) governs the manner in which a shareholder must bring a derivative action and provides as follows:

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. . . .

"The demand requirement of Rule 23 balances a shareholder's right to assert a derivative claim against a board's duty to decide whether to invest the resources of the corporation in pursuit of the shareholder's claim of a corporate wrong." *Whittle*, 343 S.C. at 187, 539 S.E.2d at 408 (quoting *Blasband v. Rales*, 971 F.2d 1034, 1048 (3d Cir. 1992)).

The heightened and particularized pleading requirements of Rule 23(b)(1) are intended to allow the court to perform a gatekeeping function to prevent the unrestrained use of derivative actions. *Id.* at 185, 539 S.E.2d at 408 (quoting 5 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, ¶ 23.1.02[4] (3d ed. 2000)). "A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRCP, is properly dismissed pursuant to Rule 12(b)(6)." *Clearwater Tr. v. Bunting*, 367 S.C. 340, 351, 626 S.E.2d 334, 339 (2006).

This court has previously upheld the dismissal of a derivative suit when the shareholders' complaint failed to comply with Rule 23(b)(1). See *Whittle*, 343 S.C. at 184–91, 539 S.E.2d 406–10. In *Whittle*, a group of shareholders brought a

derivative suit against a bank's parent corporation, seeking rescission of bonuses paid to various bank officers in the form of stock in another company. 343 S.C. at 181, 539 S.E.2d at 405. The shareholders alleged the bonuses were devised as a method of self-dealing to the detriment of the bank and its parent corporation. *Id.* at 182, 539 S.E.2d at 406. The circuit court granted the bank and other defendants' motion to dismiss the action, finding the shareholders failed to allege particularized facts showing they complied with the demand requirements of Rule 23(b)(1) and the demand thereafter was wrongfully refused. *Id.* at 183, 539 S.E.2d at 406. In their complaint, the shareholders only alleged they demanded "certain information" and "certain actions" and made a "supplemental demand." *Id.* at 189, 539 S.E.2d at 409. Because the complaint did not contain allegations regarding what the shareholders demanded and what the bank's board of directors rejected, this court held the shareholders failed to comply with the demand requirements of Rule 23(b)(1) and affirmed the circuit court's dismissal of the action. *Id.*

In the instant case, Appellants assert they complied with Rule 23(b)(1), pointing to paragraph eight of their complaint:

8. To the extent required by South Carolina Rule of Civil Procedure 23, the [Appellants] allege:

- a. The [Appellants] were beneficiaries of the trust at all times relevant including when the transactions complained of were made.
- b. The [Appellants], their agents or others on their behalf have made efforts to obtain the action they desire in this matter including correspondence to Counsel for the [Respondents], meetings with counsel for the [Respondents], correspondence to the Trust and a previous lawsuit to no avail.

Contrary to Appellants' contention, we find they failed to allege sufficient particularized facts in their complaint to demonstrate they made a demand on the Board. We first note Appellants' allegations concerning their demand are vague and similar to those made in *Whittle*. 343 S.C. at 189, 539 S.E.2d at 406 (noting the shareholders only alleged in their complaint that they demanded "certain information" and "certain actions" and made a "supplemental demand"). In paragraph 41 of their complaint, Appellants requested that the circuit court (1) remove the entire Board for their breach of fiduciary duties, (2) provide for the

election of a new Board, (3) order that all assets be returned to the Fund, (3) order all damages incurred and money taken from the Fund be awarded, (4) enjoin future violations of fiduciary duties, and (5) award Appellants actual and punitive damages.

In paragraph eight of the complaint, however, Appellants provided no guidance on exactly what recourse they sought from the Board prior to this suit. Therefore, the circuit court could not discern whether Appellants simply requested the \$5 million be returned to the Fund or whether they, among other things, demanded that members of the Board resign or called for a new election. As a result, the circuit court was not in a position to determine whether the Board's refusal of the demand was wrongful and decide whether to allow the lawsuit to proceed. *See Whittle*, 343 S.C. at 189, 539 S.E.2d at 409 (holding shareholders did not comply with Rule 23(b)(1) because their complaint did not contain allegations regarding what they demanded and what the board of directors rejected).

Appellants nevertheless counter that their January 20, 2013 letter—a proper demand on the Board—was incorporated by reference in their Second Complaint.⁶ We find Appellants did not specifically incorporate the letter by reference in merely stating they sent "correspondence" to Respondents. Moreover, Appellants conceded the letter was not attached to the complaint, but rather was only included with their memorandum in opposition to Respondents' motion to dismiss. *See* Rule 10(c), SCRPC ("A copy of any plat, photograph, diagram, document, or other paper which is an exhibit to a pleading is a part thereof for all purposes if a copy is attached to such pleading."); *McCormick v. England*, 328 S.C. 627, 632–33, 494

⁶ After Respondents alerted Appellants to the Rule 23(b)(1) requirements by moving to dismiss the First Complaint for failure to comply with the rule, Appellants sent the January 20, 2013 demand letter. Respondents replied, stating they were withholding a substantive response until the circuit court ruled on their motion to dismiss. The circuit court dismissed the First Complaint for lack of subject matter jurisdiction on March 5, 2013. Respondents contend that, before they were able to provide a substantive reply, Appellants filed the Second Complaint in probate court on April 9, 2013, and removed the matter to circuit court. The circuit court then dismissed the Second Complaint and gave Respondents sixty days to respond to the demand letter, allowing Appellants to file another complaint that complied with Rule 23(b)(1). Appellants, however, instead chose to appeal the circuit court's dismissal.

S.E.2d 431, 433 (Ct. App. 1997) ("A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the complaint.").

Therefore, we find the circuit court properly concluded that Appellants failed to comply with the requirements of Rule 23(b)(1).

CONCLUSION

Based on the foregoing, we hold the circuit court properly concluded the Fund was not a trust, Appellants' claims were derivative, and Appellants failed to comply with the pleading requirements of Rule 23(b)(1). Accordingly, the circuit court's grant of Respondents' motion to dismiss is

AFFIRMED.⁷

HUFF and THOMAS, JJ., concur.

⁷ We decide this case without oral argument pursuant to Rule 215, SCACR.