THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master in Equity

Civil Action No. 2017-CP-23-06301
Appellate Case No. 2018-001209

Raymond Wedlake, individually and derivatively, on behalf of all Members of the Woodington Homowners' Association, Inc., ...Appellant,

v.

Benjamin Acord, William Craigo, Denis Esteve, and Brian James in their capacity as the current Board of Directors of the Woodington Homeowners' Association, Inc., and Association Management Group SC, Inc.,..... Respondents.

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant Ray Wedlake is a long-standing member of the Woodington Homeowners' Association, Inc. ("WHOA"). Respondents are current or former board members of WHOA, who denied him his right to fill an open vacancy on the Board. He filed suit on behalf of himself and other members of the WHOA (individually and derivatively) seeking judicial interpretation of the WHOA Bylaws.

Respondent asserts that this action was brought "primarily relating to various corporate governance matters, legal principles applicable to nonprofit corporations." (Respondent's Brief, p .1). Rather, this case was simply asking for a judicial interpretation of provisions of the Bylaws to resolve an ongoing dispute between the Appellant and the Respondents.

Appellant attached a copy of the Bylaws as Exhibit A to his Complaint (R. pp. 35 - 45). Plaintiff's Pretrial Brief incorporated by reference the Complaint with the Bylaws. The parties pre-marked the trial exhibits. Appellant marked the Bylaws as Plaintiff's Exhibit 4. Respondents contend, contrary to the official Transcript, that Plaintiff's Exhibit 4 was something else (R. pp. 349 - 352). Appellant relies on the official Transcript, p. 3 (R. p. 231). Respondents also pre-marked the Bylaws as Defendant's Exhibit 24 (R. p. 232).

Throughout Appellant's testimony, Appellant testified repeatedly to the Bylaws, their substance, their provisions, their application, and the conflict over their interpretation. Throughout this extensive testimony, Defendants raised **no objection** as to its authenticity or lack of foundation (R. pp. 229 - 326).

At the conclusion of the trial, the Court invited the Respondents to make a motion.

Respondents stated that the Bylaws had not been admitted into evidence. Appellant stated that key provisions of the Bylaws have been discussed in the Pretrial Brief, and that they were attached as Exhibit A to the Complaint, which was incorporated by reference in the Pretrial Brief and was part of the Court's official record. Moreover, the Court did not allow Appellant the opportunity to reopen his case to tender the Bylaws as an exhibit (R. pp. 323 - 326).

Regardless of whether the Bylaws were formally tendered, the Court did not rule on this basis. At the end of the trial, the Trial Court articulated *de facto* rulings or findings on several issues, with many findings in favor of the Appellant on the stipulated issues. The Court stated:

> In looking at the **stipulated issues** for trial, and I think this is already been established, but the Court will issue an Order stating that **the Board must act in compliance with the Bylaws**. From what I understand, they're already stipulated to that. And that certainly includes the criteria and **the time frames for filling of vacancies on the Board of Directors, as well as the term of the Board of Directors**. I think in here is the Board – there may or may not be some delegable duties. But as a general rule the Board has a role and the authority to act in accordance with the Bylaws. And I think also, in accordance with the rules and Bylaws, you know, as far as the ballots being sent out for the membership and records being kept, minutes being provided; I think all those are proper and appropriate.

(R. pp. 325, Transcript, p. 97, ll. 2-14). The Court deemed the Appellant's testimony about the Bylaws and their provisions sufficient to make the foregoing findings.

The Court ruled that the Appellant did not act in a derivative capacity for the homeowners' association because he did not represent a majority of its Members: "On the larger issue, you know, it's just clear to the Court that – Mr. Wedlake, . . . your view and the majority of the neighbors' views are drastically different." (R. pp. 325, Transcript, p. 97, ll. 15 - 22). The Trial Court made Appellant's right to bring a derivative action conditional upon a *de facto* popularity contest.

After making findings in open court on the record, apparently as to both the derivative claims and the individual claims, the written order does not address the individual claims at all. Nevertheless, final order concludes the entire case, with the judgment being granted for the defendants (R. pp. 7 - 17). "[T]he Court grants judgment against Plaintiff and declined to issue the declarations requested by Plaintiff per Stipulated issues 1(b), 1(d), 1(e), and 1(f) for this reason as well." (R. p. 14, Order entered May 29, 2018, p. 8).

Appellant contends that he properly pled and proved both his derivative claims and his individual claims. Appellant further submits that the construction of the Association's Bylaws is a matter of law for the Court, and that in *refusing* to construe the Bylaws, for the Appellant, in a derivative capacity and as to the individual claims, the Trial Court erred.

STANDARD OF REVIEW

The standard of review is whether the Trial Court made errors of law. The Trial Court wrongly made Appellant's right to bring a derivative action conditional on a *de facto* popularity contest. Second, after making *de facto* findings and rulings related to the Bylaws, the Trial Court, nevertheless granted an involuntary nonsuit on both the Appellant's derivative claims and individual claims. Appellant contends that both rulings constitute errors of law.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING AN INVOLUNTARY NONSUIT ON APPELLANT'S DERIVATIVE ACTION.

The Trial Court erred in denying Appellant the opportunity to bring an action in representative or derivative capacity. Appellant contends that as a matter of law, he properly pled and proved his entitlement to a ruling in a derivative capacity, and that the Court erred in denying judgment on the basis that he and his views were not popular in the neighborhood. The Court ruled,

> [B]ased on the evidence presented, it appears that Plaintiff's views and interests are significantly different from and are in conflict with the views and interests of the majority of the members. Additionally, the evidence indicates that Plaintiff lacks the support of the majority, if any, of the other members of the Association. Plaintiff did not provide any evidence tending to suggest that any other members of the Association supported this action or supported Plaintiff in pursuing this action, but rather, there was evidence to the contrary. Consequently, I find that the Plaintiff does not fairly and adequately represent the other members of the Association that are similarly situated. As a result, to the extent Plaintiff's claims were brought derivatively or must be brought derivatively, such claims must be dismissed.

(R. p. 12, Order entered May 29, 2018, p. 6).

The Trial Court has turned a right to bring a derivative representative action into a popularity contest.

The South Carolina Court of Appeals addressed the requirements for derivative action when a member of a homeowners' association sought to challenge actions of the homeowners Association and persons associated with it. *Walbeck v. The I'On Company, LLC*, Appellate Case No. 2015-001590 (August 8, 2018). In fairness to the Trial Court, *Walbeck* was issued after the Trial Court's erroneous ruling.

In *Walbeck*, two members of a homeowners' association brought in derivative

action against the homeowners' association and the developers. The developers contended that the plaintiffs failed to establish the right to bring a derivative action. The Court of Appeals disagreed and affirmed the judgment of the Circuit Court. The analytical criteria for the right to proceed in a derivative capacity is whether the Plaintiff is represented by qualified counsel and whether he is similarly situated to the other members of the homeowners' association. There is no numerical limit, and it is not a popularity contest. The Court of Appeals ruled:

> [T]he circuit court properly found Walbeck and Adkins fairly and adequately represented the interests of the other HOA members because Walbeck and Adkins were represented by highly **qualified counsel** and were **similarly situated** to the other HOA members. *See* Rule 23(b)(1) ("The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members *similarly situated* in enforcing the right of the corporation or association." (emphasis added)); *cf. Runion v. U.S. Shelter*, 98 F.R.D. 313, 317 (D.S.C. 1983) (interpreting the fourth class action requirement under Rule 23(a), FRCP, and holding, "In determining whether [the plaintiff] would be an adequate class representative, this court should look at two criteria—(1) the representative must have **common interests** with the unnamed members of the class; and (2) it must appear that the representative will vigorously prosecute the interests of the class through **qualified counsel**."); *Jordon v. Bowman Apple Prod. Co.*, 728 F.Supp. 409, 412 (W.D. Va. 1990) ("Rule 23.1 places **no minimum numerical limits** on the number of shareholders who must be 'similarly situated.' In appropriate circumstances **a single shareholder** may be situated in a unique position and thus constitute a legitimate 'class of one.'" (citation omitted) (quoting *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177, 180 (N.D. Ill. 1987))); *Halsted*, 115 F.R.D. at 180 ("Rule 23.1[, FRCP] does not require a derivative action plaintiff to represent the interests of shareholders with whom he is not similarly situated.").

Id., at *13 (emphasis added). Accordingly, a derivative action is not a popularity contest. The construction of the Association's Bylaws is a matter of law for the Court. In *refusing* to construe bylaws, as a matter of law, in a derivative capacity, the Trial Court erred.

Indeed, Respondent's Brief **acknowledges** that Appellant represented a "similarly situated" group:

> Further, Respondents respectfully assert that Appellant **is similarly situated** with the rest of the members of the Association and this is not one of those rare closely held corporation situations where Appellant is not similarly situated with any other members/shareholders. This is clear from the Stipulation of Issues for Trial itself. All of Appellant's requested declarations relate to interpretations of the bylaws that would apply as equally to him as they would to the rest of the community."

(Respondents' Brief, p. 30) (emphasis added).

Later in their Brief, Respondents again confirm that Appellant is "similarly situated:"

> We are simply not dealing with a situation present in many closely held corporations where the majority shareholder(s) are making decisions or taking actions to benefit themselves to the detriment of a minority shareholder. . . . **In this case, the outcome of any determination by the trial court on the requested declarations would not have affected Appellant or any other members in a disparate or different way**. Appellant has set forth no rationale for, nor can he demonstrate that that (sic) he is somehow situated differently from any other member of the Association, or that his interests would be impacted or affected any differently than any other member. Likewise, a mere difference of opinion does not necessarily mean that members are not similarly situated.

(Respondent's Brief pp. 30-31) (emphasis added).

The Respondents further contended that it is only "in rare circumstances, primarily in closely held corporation situations, that a derivative plaintiff can be found not to be similarly situated with any other member/shareholder, this is not one of them." (Respondents' Brief, p. 31). Respondents clearly articulated why this Court should conclude that indeed Appellant was "similarly situated."

Appellant addressed the second element of the *Walbeck* case, "adequately represented", in the Complaint, his Brief in Opposition to the Motion to Dismiss, and in the Pre-Trial Brief (R. pp. 18 - 33; 123 - 128; 474 - 481). Counsel for Appellant served as an Editor of the Law Review, won Best Brief in National Competition in the Jessup Cup International Moot Court Competition, has taken and passed five Bar Examinations, and

has been an active member of the Bar for over 40 years. Accordingly, Appellant established a right to bring a derivative or representative action, yet the Trial Court ruled just the opposite. Accordingly, the Trial Court erred.

Respondent argues that Appellant was not popular, but a derivative action, by its very nature, is one brought to give voice to an unpopular position. *Walbeck v. The I'On Company, LLC*, Appellate Case No. 2015-001590 (August 8, 2018).

Appellant represents an unpopular position, with an unpopular platform directed at governance reform. However, Appellant did represent **some** others "similarly situated," and he had qualified counsel. (Appellant's Brief pp. 9-11; 16-17). Appellant received 10 % of the vote for his Board candidacy (R. pp. 389 - 391, Defendants' Exhibit 5). The Trial Court's ruling that Appellant could not bring a derivative action because he did not represent the majority is based upon an error of law and should be reversed.

II. THE TRIAL COURT ERRED IN GRANTING AN INVOLUNTARY NONSUIT ON APPELLANT'S INDIVIDUAL ACTION.

Appellant presented evidence of an individual claim for relief. Mr. Wedlake testified that the Board members' proper terms ended in 2014, but they failed to elect new members at the end of 2014, 2015, or 2016 (R. p. 293, Transcript, p. 65, ll. 1-17). Furthermore, he testified that he volunteered to serve on the Board of Directors in 2016 (R. p. 289, Transcript, p. 70, ll. 8-22). Appellant sought the opportunity to work within the system and serve on the Board, but the Board denied him that opportunity. Appellant testified, "I had sought election 2016 to the Board. In neither of 2015 nor in 2016 were there elections held in the Association to have Board members be elected. The Bylaws are quite clear on this point. They say each Board member must be elected every year." (R. p. 236, Transcript, p. 8, ll. 3-7).

Appellant further testified that he had volunteered when a vacancy came available in 2017.

> Q. Okay. It's a duty of the Board and they shall fill the vacancy. Did a vacancy arise?
>
> A. In May, and I believe it was early May 2017, the then presiding Board secretary decided to resign, opening up such vacancy. I petitioned the Board at that time that I was willing and eligible to fill the vacancy, and they did not fill the vacancy until January of 2018, with the sole purpose of being able to come to this court and say they had filled the vacancy.
>
> * * *
>
> Q. How did that vacancy arise?
>
> A. The Board secretary resigned, which is, again, specifically specified and allowed in the Bylaws.
>
> Q. Okay. And did they give you a reason why they weren't appointing you to that – oh, are there any qualifications to the provision that says the Board shall -- or has the duty and they shall fill the vacancy? Are there any qualifications? Doesn't require that the individual be eligible and available or willing?
>
> A. Yes. And I specifically stated such to the current Board in my request that I was eligible and was willing to fill the vacancy. But, again, they basically ignored my request and did nothing.

(R. pp. 244 - 245, Transcript, p. 16, l. 16 – p. 17, l. 15). Accordingly, Appellant has suffered a concrete and particularized injury; he pled and proved his individual claim, and he is entitled to declaratory judgment on his individual claim, related to the applicability and enforceability of the Bylaws as stated in stipulated issue (1)(b): whether "the Bylaws place a duty on the Board of Directors to fill a vacancy . . . and [whether] the Board of Directors must make reasonable efforts to do so." (R. p. 178).

III. APPELLANT PROPERLY PRESERVED FOR APPEAL THE TRIAL COURT'S INVOLUNTARY NONSUIT OF HIS DERIVATIVE ACTION.

Respondents contend that the Appellant failed to preserve the issue of whether the Appellant had met the requirements to support a derivative action (Respondents' Initial

Brief, pp. 23-25). Respondents further contend that a Rule 59 motion is an absolute prerequisite for preserving an issue for appeal. This argument misstates the rule. The issue must simply be raised and ruled on.

> [A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. **Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court**. *E.g., 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 trial judge to be preserved for appellate review."); *Long v. Dunlap,* 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler,* 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court).
>
> In recently clarifying the law on the presentation and use of additional sustaining grounds in an appeal, we emphasized we did 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**." *I'On, L.L.C. v. Town of Mt. Pleasant,* 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000);[4] *see also* Jean Hoefer Toal, et al., *Appellate Practice in South Carolina* 55–60 (2002).
>
> Third, our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004) (italics in original; underlining and bold added). Accordingly, the Supreme Court has ruled that a Motion under Rule 59 is **not** a necessity for preserving an issue for appeal; what is necessary is that the issue has been presented to the Trial Court and ruled upon.

Appellant **did** present the issue to the Trial Court, and the Court ruled on it. Accordingly, the issue is properly preserved for appellate review.

A. Appellant Properly Presented Derivative Issue to the Trial Court.

First, the Appellant properly presented to the Trial Court the fact that he was acting in a derivative capacity. The Complaint is captioned, "Raymond A. Wedlake, individually, ***and derivatively***, on behalf of all Members of the Woodington Homeowners Association, Inc." The introductory paragraph of the Complaint states that Appellant is bringing this action derivatively (R. p. 19). Paragraph number 69 states that the Appellant, both individually, ***and as a member of the WHOA collectively***, has tangible legal interests that have been abridged by the Defendants." (R. p. 29). Accordingly, Appellant presented the derivative issue to the Trial Court.

B. Respondents Also Presented Derivative Issue to the Circuit Court.

Respondents also presented derivative issue to the Circuit Court. The Respondents filed a Motion to Dismiss response to the Complaint, in which they alleged, "Plaintiff has failed to meet the requirements of Rule 23, SCRCP, and therefore lacked standing to bring a derivative suit." (R. p. 113, Motion to Dismiss, p. 2.) Respondents argued the need for popular support:

> Plaintiff does not fairly and adequately represent the members of the Woodington Homeowners' Association, Inc., and Plaintiff's Complaint fails to allege that he does. In fact, the allegations of Plaintiff's Complaint, on their face, actually demonstrate that Plaintiff does not fairly and adequately represent the members of the Woodington Homeowners' Association, Inc. Notably, the members of the Woodington Homeowners' Association, Inc. voted overwhelmingly to ratify many of the issues alleged by Plaintiff in the suit at the last Annual Meeting, such ratification being noted and identified in Plaintiff's Complaint. Such ratifications, as referenced in the Plaintiff's Complaint, are a clear indicia that Plaintiff does not represent the interests of the members of the Woodington Homeowners'

Association, Inc. or the community. Therefore, Plaintiff's claims must be dismissed.

(R. p. 113, Motion to Dismiss, p. 2).

C. The Circuit Court Rejected the Respondents' Argument.

The Circuit Court initially rejected Respondents' argument and denied their Motion to Dismiss. "After hearing oral argument of counsel, and following review of Appellant's Complaint, the Defendants' motion, Board Defendants' Memorandum in Support and related Affidavits and Exhibits, and Appellant's Memorandum in Opposition and related Affidavits and Exhibits, I find in favor of Plaintiff, denying Board Defendants' motion in all respects." (R. pp. 4 - 5, Order entered January 23, 2018, pp. 1-2). Accordingly, the Circuit Court ruled on the issue.

D. Appellant Presented Derivative Issue to the Trial Court in the Pretrial Brief.

Appellant presented the argument for his derivative capacity a second time in the Plaintiff's Pretrial Brief presented to the Court on April 10, 2018. Appellant stated, "[D]espite Defense counsel's argument in his Motion to Dismiss that Plaintiff lacks standing to act in a representative capacity, plaintiff prevailed." (R. p. 478, Plaintiff's Pretrial Brief, p. 5). Appellant addressed the requirements of derivative action under Rule 23 and presented authority and argumentation that he did not need to win a popularity contest before he could present a derivative action to the Court: "Neither the cases and SC, nor the statute on its face, require a majority of members (or shareholders) to be represented to 'fairly and adequately represent' those for whom he is seeking relief." *Id.* Appellant cited authority allowing a ***single*** shareholder to bring a derivative action "despite apparent animosity." *Id.* Accordingly, Appellant presented the issue to the Court a second time.

E. The Trial Court Acknowledged Having Read the Pretrial Brief.

At the beginning of the trial, the attorney for the Appellant offered to make an opening statement, and the Court declined: "No, sir, I don't need one. You can call your first witness. We've pretried the case. I've looked over everything. And if I don't understand it by now, we've got worse problems than that." (R. p. 233, Transcript, p. 5, ll. 22-25). Thus, the Trial Court acknowledged the Pretrial Brief, which included arguments related to the derivative action and the authorities articulating the proper rule for judging a derivative action.

Accordingly, this issue was properly presented to the Trial Court, and the Trial Court made a ruling, albeit an incorrect one, as demonstrated above.

IV. APPELLANT PROPERLY PRESERVED FOR APPEAL THE TRIAL COURT'S INVOLUNTARY NONSUIT OF HIS INDIVIDUAL ACTION.

Respondents also alleged that the Appellant failed to preserve the issue that the Trial Court erred in dismissing his individual action (Respondent's Brief, p. 25). Again, the entire basis of the Respondent's argument is that the Appellant did not file posttrial motion. As stated above, the issue is whether the Appellant presented the issue to the Trial Court, and whether the Court ruled on it.

A. Appellant Properly Presented Individual Issue to the Trial Court.

As noted above, the case caption states that the Appellant brings the action both individually and as a derivative action representing the other members of the Homeowners' Association. Again, paragraph 69 of the Complaint states that the Appellant brings the action in both capacities (R. p. 29). Accordingly, Appellant raised the issue of his individual claims to the Trial Court.

B. Respondents also Raised the Issue of Appellant's Individual Standing to the Circuit Court.

Respondents' Motion to Dismiss challenged the Appellant's alleged failure to articulate a "legally cognizable claim," presumably referring to his individual capacity (R. p. 121, Motion to Dismiss, p. 5). The Circuit Court denied the Motion to Dismiss in its entirety.

Again, in the Respondents' Pretrial Brief, the Respondents alleged the Appellant lacked standing, and argued that the Appellant and failed to articulate a concrete and particularized injury (R. pp. 484 - 485, Defendants' Pretrial Brief, pp. 3-4). They argued he had failed to articulate a "justiciable controversy." (R. pp. 486, Defendants' Pretrial Brief, p. 5). Accordingly, Respondents likewise presented the issue to the Circuit Court.

C. Appellant Presented his Individual Issue to the Trial Court in the Pretrial Brief.

Plaintiff's Pretrial Brief articulated nature of Appellant's individual claim, separate and apart from the derivative claim already articulated:

> Defendants' refusal to abide by appointment of Plaintiff to vacant seat on Board, given that plaintiff [met] the two-tier test of being a Member that is both "eligible and willing". . . . Plaintiff fulfilled the requirements to serve a vacant board seat (eligible member and willing to serve) and requested to fill such position but was denied the opportunity, leaving his platform and others that agreed with such platform, disenfranchised.

(R. p. 479, Plaintiff's Pretrial Brief, p. 6).

In addition, Appellant presented evidence of this individual claim in the course of the trial. *See* Transcript, pp. 16-17 (R. pp. 244 - 245). At the end of the trial, Appellant's counsel raised the issue again:

> MR. GIBSON: . . . We brought the suit derivatively, which I'd did get your clear guidance on a moment ago. But also, individually, with regard to the fact that the Board refused to appoint him and allow his platform to be

presented and he did suffer individually as a consequence and he is asking for one dollar in nominal damages.

THE COURT: I'm going to decline to award that.

(R. p. 326, Transcript of trial, p. 98, ll. 10-17).

Appellant presented his individual claim to the Court, and the Court ruled on it. Accordingly, it is properly preserved for appeal. *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004).

V. STIPULATED ISSUES 1(B), 1(D) 1(E), AND 1(F) ARE JUSTICIABLE CONTROVERSIES.

Respondent contends that several stipulated issues are not justiciable controversies (Respondent's Brief, pp. 43-50). Essentially, the Respondents argue that the Appellant has not suffered a "concrete and particularized injury" in relation to these four issues. Accordingly, they seem to be arguing that the Appellant lacked standing to raise such issues. "There are three ways in which a party can acquire [the] fundamental threshold of standing: (1) by statute; (2) through what is called 'constitutional standing'; and (3) under the public importance exception." *Bodman v. State*, 403 S.C. 60, 67, 742 S.E.2d 363, 366 (2013). "As to constitutional standing, one of the core requirements is that the plaintiff suffered a 'concrete and particularized' injury" as opposed to an injury that is common to the general public. *Id.*

At the end of the trial, the Trial Court articulated *de facto* rulings or findings on several issues, many findings in favor of the Appellant on the stipulated issues. Nevertheless, the Court also ruled with the Respondents that stipulated issues 1(b), 1(d), 1(e), and 1(f) are nonjusticiable. In doing so, the Court erred.

A. The Court Ruled on Stipulated Issue 1(a).

The Court ruled on stipulated issue (**a**), "that the Association must comply with and enforce in accordance with their terms, the Association's bylaws." The Court ruled that the Respondents had conceded and stipulated on this issue prior to trial: "I find that the evidence presented shows that the Defendants had already admitted or stipulated pre-suit that they have an obligation to follow the law and the bylaws." (R. p. 11, Order entered May 29, 2018, p. 5).

B. The Court Ruled on Stipulated Issue 1(b).

The Court also ruled on stipulated issue (**b**). "That the bylaws place a duty on the Board of Directors to fill a vacancy on the Board of Directors and the Board of Directors must make reasonable efforts to do so."

The Court ruled: "[T]he Board must act in compliance with the Bylaws. . . . And that certainly includes the criteria and the time frames for filling of vacancies on the Board of Directors, as well as the term of the Board of Directors." (R. p. 325, Transcript, p. 97, ll. 4-8). The fact that the Court made a finding on this issue on the record, in open court, would indicate that the issue was justiciable.

C. The Parties Stipulated to Resolve Issue 1(c).

During the trial, the parties stipulated to a resolution of stipulated issue (**c**). The stipulation is recorded in the Order:

> Approval by a majority vote of the members of the Association is not needed for the Board of Directors of the Association to renew a contract with an association management company that was previously approved by a majority vote of the members of the Association, as long as the contract contains provisions for automatic renewal. Likewise, approval by a majority vote of the members of the Association is not needed for changes in the amount of consideration or rate paid to an association management company under a contract with an association management company that was previously approved by a majority vote of the members, as long as the

contract contains provisions providing for such rate/consideration adjustments.

(R. p. 10, Order entered May 29, 2018, p. 4). The Court further ruled, "I find that the stipulation is binding pursuant to Rule 43 (K), SCRCP, and it is also hereby incorporated into and made a part of the Court's ruling in order by the consent of the parties." *Id.*

D. The Court Ruled on Stipulated Issue 1(d).

Court also ruled on stipulated issue (**d**): "the bylaws do not permit a director to remain beyond a five-year term, and in any event, for not more than one additional year beyond such five-year period." Here again, the Appellant had suffered a concrete and particularized injury, as referenced above, because board members were serving longer than the five-year limit called for in the Bylaws of the homeowners' association. In addition, he volunteered to remedy that violation of the Bylaws, and the Board refused him the opportunity to remedy that violation. Accordingly, he suffered another concrete and particularized injury in relation to the five-year term limits for the Board of Directors.

Appellant testified, "The [Board] members had served consecutively in 2016 for seven years, which is a violation of both the Bylaws, as well as the nonprofit corporation [Act], both of which say that five years is the maximum term limit." (R. pp. 236, 239, 248 - 251, Transcript, pp. 8, ll, 20 - 23).

The Court ruled: "[T]he Board **must act** in compliance with the Bylaws. . . . And that certainly **includes** . . . **the term of the Board of Directors**." (R. p. 325, Transcript, p. 97, ll. 4-8. Transcript, p. 97, ll. 2-14) (emphasis added). The fact that the Court made a ruling on this issue in open court would indicate that the issue was justiciable. In addition, the Appellant has suffered a concrete and particularized injury, because certain members of the Board were serving seven consecutive years when the Bylaws require that they serve

no more than five. In addition, he volunteered to serve to remedy the problem, and was denied the opportunity do so.

E. The Court Ruled on Stipulated Issue 1(f).

Finally, the Court seemed to rule on stipulated issue (**f**): "the Bylaws require the Board of Directors to send out a ballot to the membership for voting if a proposed amendment to the bylaws is submitted by an eligible member." The Court ruled: "But as a general rule **the Board has** a role and the **authority to act in accordance with the Bylaws**. And I think also, in accordance with the rules and Bylaws, you know, **as far as the ballots being sent out for the membership** and records being kept, minutes being provided; I think all those are proper and appropriate." (R. p. 325, Transcript, p. 97, ll. 9-14) (emphasis added). Here again, the fact that the Court made a ruling on this issue would indicate that the issue was justiciable.

Furthermore, on this issue, Ray Wedlake has suffered a concrete and particularized injury. He testified, "I was one of the five authors creating that Revision, which brought the ballot provision into the bylaws." (R. p. 235, Transcript, p. 7, ll. 16-17).

Appellant further testified:

> Q. Okay. So what you're thinking, then, that valid provision was violated when they didn't send out ballots with regard to your proposed amendment?
>
> A. Per the strict language of the Bylaws that the Board shall send a ballot, that's correct.

Accordingly, the Appellant suffered a concrete and particularized injury as to stipulated issue (f).

The stipulated issues 1(b), (d), (e), and (f) are justiciable, because the Court ruled on them in open court, and ruled in favor of the Appellant, Ray Wedlake. Furthermore,

the Appellant demonstrated a concrete and particularized injury as to each stipulated issue.

VI. THE TRIAL JUDGE ERRED IN NOT TAKING JUDICIAL NOTICE OF THE BY-LAWS.

Appellant's Brief clearly presented the Trial Court's error in failing to take judicial notice of the By-Laws. Appellant addressed the issue again in the Statement of the Case, *supra*. Respondents "acknowledge that an appellate court can take judicial notice for the first time on appeal." (Respondent's Brief, p. 14).

Respondents' Brief also asserts without support: "such judicial notice would not be appropriate in this case." Respondents cite many cases, but few have any relevance. In one case the court refused to take judicial notice of a former opinion (p. 16). Other cases refused to take judicial notice of hearsay (pp. 16-17). All these cases are easily distinguishable. Respondents assert: "a party's allegations are not a source of unquestionable accuracy" (p. 18). This assertion is simply not helpful here.

Respondents rely heavily on *Moss v. Aetna Life Ins. Co.*, which held that taking judicial notice of the private sale of stock was not appropriate. *Id.* 267 S.C. 370, 377, 288 S.E.2d 108, 112 (1976). (Respondents' Brief, pp. 15-18). In *Moss*, the Supreme Court used its discretion to assure Plaintiff received his day in court. Thus, *Moss* is more helpful to the Appellant than to the Respondents.

Similarly, Respondents cite other South Carolina cases that hold that recitals in deeds are not proper for judicial notice or that "recitals on the face of a mortgage do not constitute indisputable proof of the date the underlying debt was discharged" (pp. 16-17). Again, Respondents miss the mark. Respondents assert that the By-Laws at issue were not "something that is capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." This assertion is incorrect. Both the Appellant

and the Respondents had a pre-marked an exhibit containing the By-Laws, and the By-Laws had been attached to the Complaint as Exhibit A (R. p. 35).

VII. THE TRIAL COURT ERRED IN GRANTING AN INVOLUNTARY NONSUIT, USING THE WRONG LEGAL STANDARD, DISREGARDING APPELLANT'S EVIDENCE ON THE STIPULATED ISSUES, AND APPELLANT'S INDIVIDUAL ACTION.

A. Involuntary Non-Suit as to Appellant's Derivative Action Was Error.

As stated above, Appellant did not need to represent a majority of the homeowners to have standing under Rule 23(b)(1). This ruling was contrary to South Carolina law. Accordingly, the involuntary nonsuit on this basis was improper.

B. Under the Facts in this Case, to Uphold a Finding of Involuntary Non-Suit on the Basis that the By-Laws were not formally entered at Trial Would Be an Injustice.

This was a Bench Trial. In addition to the arguments set forth in Appellant's Initial Brief, with regard to the entry of the By-Laws into the Trial record, the Court could have permitted the Appellant to enter formally into the record the By-Laws when he requested to do so. This ruling would have advanced the interests of justice and assured adjudication on the merits, particularly when Appellant asked the Court to do so, just after the close of the testimony (R. p. 324, Transcript p. 96). Moreover, the Court did not allow Appellant the opportunity, upon request, to provide a copy of Exhibit A to the Complaint, even though the Trial Court was aware of it. The Court should have avoided the draconian finding of Involuntary Non-suit in favor of permitting the Appellant to easily cure the By-Laws issue and thus assure adjudication on the Merits. Adjudication of cases on their merits is a fundamental policy of the courts in South Carolina, as detailed in Appellant's Brief. Involuntary non-suit should only be entered where there is no evidence in support of a claim, not on the basis of the failure to enter formally a document, as it appears to be the

case here.

C. Respondents Admission That There Was Evidence Regarding the By-Laws should Preclude a Finding of Involuntary Non-Suit.

Respondent acknowledges that there was evidence relative to the By-Laws (Respondent's Brief, p. 42). Accordingly, there was a basis for the trial to proceed, and the Trial Court's finding of Involuntary Nonsuit was improper. As noted in Appellant's Initial Brief and in this Reply Brief, the Trial Court Transcript is replete with reference to the By-Laws, including specific testimony by Appellant, Ray Wedlake.

D. Appellant's Individual Action Was Improperly Swept Up in the Court's Finding of Involuntary Nonsuit.

The Trial Court's Order contains no reference to Appellant's individual action. Accordingly, the basis for dismissal of Appellant's individual action remains unclear. It appears to have been swept up in a finding of involuntary non-suit, as set forth in the Appellant's Brief. At the close of the trial, Appellant specifically asked the Judge to affirm Appellant's individual action, which had not been the subject of comment from the Bench, and for which there was substantial evidence. The Court simply stated: "I am going to decline to award that." (R p. 326, Trial Transcript, p. 98, l. 17). Thus, Appellant respectfully submits that Appellant's individual action was improperly swept up in the Court's finding of Involuntary Non-Suit and should be reversed.

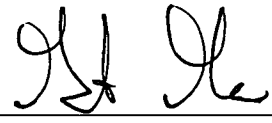
CONCLUSION

The Trial Court erred as a matter of law in its denial of Appellant's derivative action and the Appellant's individual action. Appellant properly preserved for appeal the Trial Court's denial of his derivative action and his individual action. The stipulated issues are all justiciable controversies, and all issues were properly preserved for appeal. Finally, the Trial Court should have taken judicial notice of the Bylaws, which had been filed previously in this action, and were testified to without objection throughout the trial.

For all these reasons, Appellant respectfully requests the Court to reverse the judgment of the Trial Court and remand for further proceedings.

Respectfully Submitted,

May 1ST, 2019



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Charles B. Simmons, Jr., Master in Equity

Civil Action No. 2017-CP-23-06301
Appellate Case No. 2018-001209

Raymond Wedlake, individually and derivatively, on behalf of all Members of the Woodington Homowners' Association, Inc., ...Appellant,

v.

Benjamin Acord, William Craigo, Denis Esteve, and Brian James in their capacity as the current Board of Directors of the Woodington Homeowners' Association, Inc., and Association Management Group SC, Inc.,..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

May 1st, 2019

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PROOF OF SERVICE

I, Grant H. Gibson, Esq., certify that I have served, or caused to be served, the Final Reply Brief on counsel for the Respondents by depositing one bound copy of the same in the United States mail, postage prepaid, addressed as follows:

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