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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 08 2019

SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Charles B. Simmons, Jr., Master In Equity

Appellate Case No. 2018-001209
Common Pleas Case No. 2017-CP-23-6301

Raymond A. Wedlake, individually and
derivatively, on behalf of all Members of
Woodington Homeowners' 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. Respondents.

RESPONDENTS' MOTION TO DISMISS AND SUPPORTING MEMORANDUM

Ely O. Grote
McCabe, Trotter & Beverly, P.C.
4500 Fort Jackson Blvd., Suite 250 (29209)
P.O. Box 212069, Columbia, SC 29221
Phone: (803) 724-5000 Fax: (803) 724-5001
Email: ely.grote@mccabetrotter.com
Attorney for Respondents

The Respondents, Benjamin Acord, William Craigo, Denis Esteve, and Brian James, respectfully move the Court for an order dismissing the appeal filed by Appellant on the grounds that this appeal and this action are now moot; and alternatively, if this appeal is not dismissed in its entirety, for dismissal of Respondents Benjamin Acord, William Craigo, Denis Esteve, and Brian James.

The parties have already filed their Final Briefs. In an effort to avoid unnecessary duplication, Respondents would crave reference to the contents of their Brief, including the background, factual recitations, and analysis of the issues in this action and this appeal set forth therein. Respondents hereby incorporate their Final Brief herein by reference. Nonetheless, Respondents would reiterate the following background for ease of reference.

Appellant, Raymond Wedlake, is a homeowner in the Woodington Subdivision and is a member of the Woodington Homeowners' Association, Inc. (the "Association"), a nonprofit corporation. (R. p. 7)¹. On October 5, 2017, Appellant filed this lawsuit, primarily relating to various corporate governance matters, legal principles applicable to nonprofit corporations and their directors, and interpretation of the bylaws of the Association. (R. pp. 19-34). Prior to trial, Appellants and Respondents stipulated to the issues for trial and filed a Stipulation of Issues For Trial on March 29, 2018. (R. pp. 178-179). Per the Stipulation of Issues for Trial, the stipulated issues were as follows:

The parties hereto, by and through their undersigned counsel, hereby stipulate and agree to the following issues for trial and that the trial shall be limited to such issues:

1. *Plaintiff seeks a declaratory judgment and declaratory relief as follows:*

¹ This is also admitted by the allegations of Appellant's Complaint (R. p. 22).

- a. *A declaration that the Board of the Woodington Homeowners' Association, Inc. (the "Association") must comply with, and enforce in accordance with their terms, the Association's bylaws.*
 - b. *That the court construe the Bylaws of the Association and declare 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.*
 - c. *That the court construe the Bylaws of the Association and declare that the bylaws require a majority of all members to both enter into, and to renew, a management contract.*
 - d. *That the court construe the Bylaws of the Association and declare that 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.*
 - e. *That the court declare that the Bylaws of the Association do not permit delegation of the role or authority of the Board.*
 - f. *That the court construe the Bylaws of the Association and declare that 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.*
2. *Plaintiff seeks an award of Nominal Damages against defendants.*
 3. *Plaintiff seeks an award of court costs and legal fees if such costs and fees are paid by the Association's insurance carrier.*

4. *Defendants Benjamin Acord, William Craigo, Denis Esteve, and Brian James (collectively, “Defendants”) preserve all defenses to Plaintiff’s claims and nothing herein shall be construed to infer a waiver of any defenses by Defendants or that Defendants in any way stipulate that the matters raised by Plaintiff or the relief sought by Plaintiff are proper matters before the Court or proper matters to be heard by the Court.*

(R. pp. 178-179). On April 20, 2018, a nonjury/bench trial was held before the Honorable Charles B. Simmons, Jr., Greenville County Master in Equity. (R. p. 7). Appellant was the Plaintiff, and at the close of Appellant’s case, the Honorable Charles B. Simmons, Jr. granted involuntary nonsuit in favor of Respondents pursuant to Rule 41(b), SCRCF, and an Order of Judgment was filed on May 29, 2018. (R. pp. 7-17). Appellant has appealed the Order of Judgment filed on May 29, 2018. With respect to Appellant’s requests for declaratory relief identified in the Stipulation of Issues for Trial above, this appeal appears to only involve the trial court’s rulings concerning those declarations requested in items 1(b), 1(d), 1(e), and 1(f), as Appellant does not appear to contest the trial court’s findings in the Order of Judgment as to items 1(a) and 1(c).

At the time of the filing of Appellant/Plaintiff’s Complaint in this action, the Board of Directors for the Association consisted solely of the four Respondents, Brian James, William Craigo, Denis Esteve, and Benjamin Acord. (Affidavits of Brian James, Benjamin Acord, William Craigo, and Denis Esteve – attached hereto as **Exhibits A, B, C, and D**). At the time of trial on April 20, 2018, all of the Respondents were still serving as directors and constituted four out of the five directors for the Association. (*Id.*) However, since the time of trial, the

composition of the Board of Directors of the Association has changed. (Id.). At present, none of the Respondents are continuing to serve as directors or officers of the Association. (Id.).

“The court does not concern itself with moot or speculative questions.” Sloan v. Greenville Cnty., 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct.App.2009). “Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable.” Curtis v. State, 345 S.C. 557, 567, 549 S.E.2d 591, 596 (2001). “An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists.” Sloan, 380 S.C. at 535, 670 S.E.2d at 667. “A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy.” Id. “Mootness also arises when some event occurs making it impossible for the reviewing court to grant effectual relief.” Id.

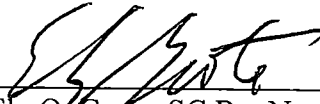
In addition to any other mootness, ripeness, and/or justiciability issues previously existing (as found in the Order of Judgment and as addressed in Respondents’ brief), this case and this appeal are now also moot and further nonjusticiable in light of the post-trial intervening event of the turnover in the Board of Directors of the Association. Specifically, Respondents assert that this appeal is now also moot and nonjusticiable² because the four (4) Respondents, individually named in their capacity as the current board of directors, no longer represent the Association’s managerial authority. Proceeding with an appeal of the Order of Judgment on the merits of Appellant’s claims would thus be ineffectual in resolving any alleged controversy, if there be any. In this matter, Appellant seeks declaratory relief in the form of judicial construction and interpretation of certain bylaws provisions. (R. pp. 178-179). When Appellant initiated this action, the individual Respondents comprised the entire board of directors, and thus

² The legal standard for a justiciable controversy is set forth in Respondents’ final brief at pages 44-45.

possessed the managerial authority of the Association. This action was instituted against Respondents in their capacity as the current Board of Directors of the Association. Notably, Woodington Homeowners' Association, Inc., the corporate entity itself, was never made a party to this proceeding. Because none of the Respondents are currently serving as directors or officers of the Association, the Respondents no longer individually or collectively possess the managerial authority of the Association or the decision making capacity of the board of directors for the Association. Likewise, since all of the Respondents are no longer serving as directors or officers, they no longer serve in any corporate capacity. As such, they no longer possess a material interest in the matters alleged by Appellant/Plaintiff, and no longer serve in the capacity in which they were named in this suit (they were named in their capacity as directors). At this time, the Respondents, both individually and collectively, lack the ability to effectuate any of the declarations that Appellant continues to seek, and any declaration, if rendered, would be merely advisory in nature. In the same vein, Respondents no longer have the individual or collective authority to agree, on behalf of the Association, to any of the requested declarations even if they wanted to. Therefore, this case and the issues raised in the appeal are now also moot and nonjusticiable due to the post-trial turnover of the board of directors, in addition to any other previously existing mootness, ripeness, and/or justiciability issues.

Based on all of the foregoing, Respondents assert that this case and this appeal are now moot and nonjusticiable, and this appeal should be dismissed. Alternatively, if this appeal is not dismissed in its entirety, at a minimum, Respondents Benjamin Acord, William Craigo, Denis Esteve, and Brian James should be dismissed.

Respectfully submitted,



Ely O. Grote, SC Bar No. 75379

MCCABE, TROTTER & BEVERLY, P.C.

4500 Fort Jackson Blvd., Suite 250 (29209)

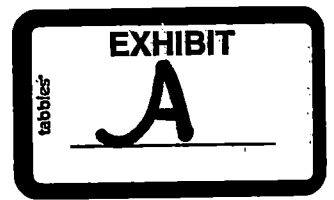
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Phone: (803) 724-5000 Fax: (803) 724-5001

Email: ely.grote@mccabetrotter.com

ATTORNEY FOR RESPONDENTS

August 6, 2019
Columbia, South Carolina



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In The Court of Appeals

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

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Raymond A. Wedlake, individually and
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v.

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Esteve, and Brian James in their capacity
as the current Board of Directors of the
Woodington Homeowners' Association, Inc. Respondents.

AFFIDAVIT OF BRIAN JAMES

Respondents' Motion to Dismiss
and Supporting Memorandum
Exhibit A

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

PERSONALLY APPEARED before me, Brian James, who after being sworn, deposes and says that:

1. The facts stated herein are true and are based on my own personal knowledge. Further, I am of the age of majority and am competent to testify as to the matters stated herein.
2. I was elected to serve as one of the Directors for Woodington Homeowners' Association, Inc. at an annual meeting held on January 10, 2017.
3. At the time of the filing of Appellant/Plaintiff's Complaint in this action, the Board of Directors for Woodington Homeowners' Association, Inc. consisted solely of the four Respondents, Brian James, William Craigo, Denis Esteve, and Benjamin Acord. At the time of trial on April 20, 2018, all of the Respondents were still serving as directors and constituted four out of the five directors for Woodington Homeowners' Association, Inc. However, since the time of trial, the composition of the Board of Directors has changed. I did not run for re-election and am no longer a director or officer for Woodington Homeowners' Association, Inc. At this time, none of the four (4) Respondents are serving as directors or officers for Woodington Homeowners' Association, Inc.

FURTHER AFFIANT SAYETH NOT.

Brian James
Brian James

Sworn to and subscribed before me
this 15 day of July, 2019.

Michelle Armitage
Notary Public for South Carolina
My Commission Expires: 6/8/2020





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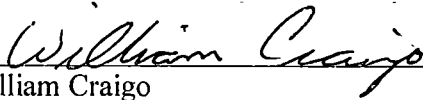
AFFIDAVIT OF WILLIAM CRAIGO

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

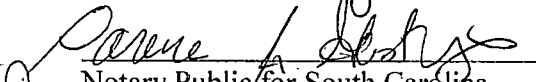
PERSONALLY APPEARED before me, William Craigo, who after being sworn, deposes and says that:

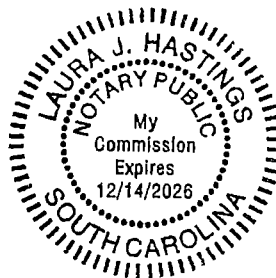
1. The facts stated herein are true and are based on my own personal knowledge. Further, I am of the age of majority and am competent to testify as to the matters stated herein.
2. I was elected to serve as one of the Directors for Woodington Homeowners' Association, Inc. at an annual meeting held on January 10, 2017.
3. At the time of the filing of Appellant/Plaintiff's Complaint in this action, the Board of Directors for Woodington Homeowners' Association, Inc. consisted solely of the four Respondents, Brian James, William Craigo, Denis Esteve, and Benjamin Acord. At the time of trial on April 20, 2018, all of the Respondents were still serving as directors and constituted four out of the five directors for Woodington Homeowners' Association, Inc. However, since the time of trial, the composition of the Board of Directors has changed. Brian James and Benjamin Acord did not run for re-election and are no longer Directors for Woodington Homeowners' Association, Inc. While I was re-elected after the time of trial, I have resigned my position on the Board of Directors. Consequently, I am no longer serving as a director or officer for Woodington Homeowners' Association, Inc. At this time, none of the four (4) Respondents are serving as directors or officers for Woodington Homeowners' Association, Inc.

FURTHER AFFIANT SAYETH NOT.


William Craigo

Sworn to and subscribed before me
this 23 day of July, 2019.


Notary Public for South Carolina
My Commission Expires: 12/14/2026





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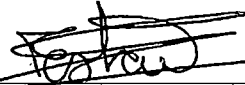
AFFIDAVIT OF DENIS ESTEVE

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

PERSONALLY APPEARED before me, Denis Esteve, who after being sworn, deposes and says that:

1. The facts stated herein are true and are based on my own personal knowledge. Further, I am of the age of majority and am competent to testify as to the matters stated herein.
2. I was elected to serve as one of the Directors for Woodington Homeowners' Association, Inc. at an annual meeting held on January 10, 2017.
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FURTHER AFFIANT SAYETH NOT.

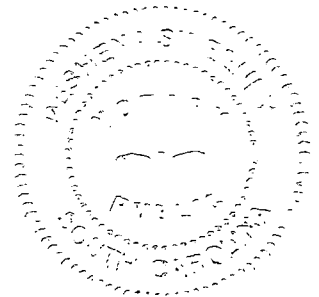


Denis Esteve

Sworn to and subscribed before me
this 12 day of July, 2019.



Notary Public for South Carolina
My Commission Expires: 30 July 2019





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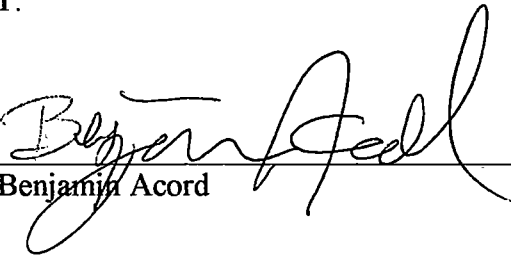
AFFIDAVIT OF BENJAMIN ACORD

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

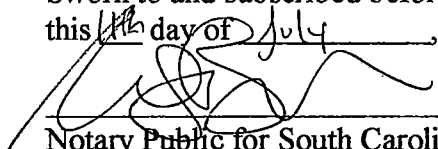
PERSONALLY APPEARED before me, Benjamin Acord, who after being sworn, deposes and says that:

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FURTHER AFFIANT SAYETH NOT.


Benjamin Acord

Sworn to and subscribed before me
this 14th day of July, 2019.


Notary Public for South Carolina
My Commission Expires: 02/07/2022

MEAGAN BAUMGARNER
NOTARY PUBLIC
SOUTH CAROLINA
MY COMMISSION EXPIRES 02/07/22

THE STATE OF SOUTH CAROLINA
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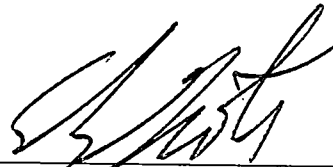
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Woodington Homeowners' Association, Inc. Respondents.

PROOF OF SERVICE

I, Ely O. Grote, certify that I have served, or caused to be served, Respondents' Motion to Dismiss and Supporting Memorandum, on counsel for Appellant, Grant H. Gibson, by depositing one copy of the same in the United States mail, postage prepaid, addressed as follows:

Grant H. Gibson, Esq.
G. Gibson & Associates, LLC
1200 Woodruff Road, Suite A-3
Greenville, South Carolina 29607
atty@ggibsonassociates.com



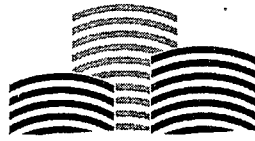
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Phone: (803) 724-5000 Fax: (803) 724-5001
Email: ely.grote@mccabetrotter.com
Attorney for Respondents

August 6, 2019; Columbia, SC

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Ely O. Grote
Shareholder

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Columbia, SC 29221



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Myrtle Beach, SC

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Phone: (803) 724-5000
Fax: (803) 724-5001

Licensed to practice in South Carolina

August 6, 2019

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1220 Senate Street (29201)
Post Office Box 11629
Columbia, South Carolina 29211

Re: Raymond A. Wedlake v. Benjamin Acord
Appellate Case No. 2018-001209
MTB File No.: 017402.00009

Dear Ms. Kitchings:

Enclosed, you will find the original and seven copies of Respondents' Motion to Dismiss and Supporting Memorandum for filing in the above-captioned matter. Also enclosed is my firm's check in the amount of \$50.00 for associated filing fee. Please have a member of your staff return one file-stamped copy to me in the envelope provided herewith.

Should you have questions or concerns, please do not hesitate to let me know.

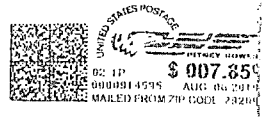
Respectfully,

Ely O. Grote

EOG/bdp
Enclosures
cc: Grant H. Gibson, Esq. (via U.S. Mail and email, w/ enclosures)

McCabe, Trotter & Beverly, P.C.
PO Box 212069
Columbia, SC 29221

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Clerk of Court, South Carolina Court of Appeals
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