

THE STATE OF SOUTH CAROLINA
In the 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-23-06301

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SC Court of Appeals

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.

MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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Dated: August 23, 2019

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Appellant, Raymond Wedlake, through his undersigned counsel, respectfully submits this “Memorandum in Opposition to Respondent’s Motion to Dismiss” the Appeal, based upon allegations of mootness, both as to the case and to the individual Board Members named.

BRIEF ADMINISTRATIVE HISTORY

After several on-going violations of the By-Laws, from a prior Board and then subsequently from the Board of Directors comprised of Respondents, of the Woodington Homeowners’ Association, Inc.(WHOA), Appellant, a member in good standing of the WHOA, sought a declaratory judgment which Respondents admit, regarding interpretation of the By-Laws of the WHOA:

“ ... 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)

At a pre-Trial Hearing of January 3, 2018 (R. pp. 4-6), Respondents' Motion to Dismiss was heard and **DENIED** by the Honorable Judge Robin B. Stilwell, in which Judge Stilwell noted:

“ I'll also tell you this, this is one of those cases, again, and y'all heard me say it in the case before you this, that just needs a hearing on the merits ...

[W]hat I find is there are a few lawsuits on the face of this earth that just have legs. That is, they never want to go away. Because people hold them so closely and so dearly. Among those are divorces and custody issues. Among those are probate matters. And the third one is homeowners association. ...

... So, I think the courts are better served to have hearings on the merits. The fully adjudicate the issues that come before the court. ...

... I think until you have a final
hearing ...
there's not going to be any closure in this case. ..." (R. pp. 224-226)

Appellant brought his action both derivatively as well as individually for individual harm sustained. Following denial of Respondent's Motion to Dismiss, by consent of the parties this case was transferred to the Master in Equity. The Master entered a finding of involuntary nonsuit as to the derivative action, determining that an individual member of a Homeowner Association does not have standing to bring an action derivatively on behalf of the homeowner association, and dismissed without comment Appellant's individual action for particularized injury. Appellant has appealed on multiple grounds, including that the wrong standard was used to determine standing for derivative actions, and that the individual action was improperly dismissed.

FINAL BRIEF AND RECORD ON APPEAL FILED

The Parties have already filed their Final Briefs, and the "Record on Appeal". To avoid unnecessary duplication, Appellant refers to contents of his Brief, including the background, factual recitations, and analysis of the issues in this action and this Appeal set forth therein. Appellant hereby incorporates his Final Brief herein by reference.

LEGAL ANALYSIS

I. The Appeal is Not Moot as to the Case, nor as to the Individually Named Respondents

A. Several Issues Remain Open - Respondents acknowledges in their Motion to Dismiss that several of the issues raised remain extant, namely requests for interpretation of the By-Laws, including, for example, determination as to whether a Board of the Association must, per the

language of the By-Laws, fill a Board vacancy if there is a member in good standing that is willing to so serve:

“12. The parties dispute whether a current vacancy must be filled or not; it being the position of the Plaintiff that the provisions of the By-Laws clearly mandate that vacancies on the Board be filled and that the express language of the By-Laws prevails on this issue and not the language of the NPCA [South Carolina Nonprofit Corporation Act of 1994] (Exhibit E, Affidavit 41 - 45).” (R. p. 21)

This is an ongoing dispute, and the basis for Appellant’s individual action, inasmuch as Respondents, as well as the current Board, refused to fill a Board vacancy despite notice from Appellant of willingness to fill such vacancy. The fact that Respondents are no longer on the Board does not negate the ongoing nature of the need for judicial interpretation of the By-Laws.

B. Respondent Misstates the Law – Ignoring Key Applicable Exceptions to Mootness

(i) The Matter is Ongoing - As stated on the record, Appellant is a former two-term member of the Board of the Association:

“20. In early 2000's, I was an active, twice-elected member of two Boards of the WHOA, and also was a co-author of By-Laws (Rev 2);” (R. p. 462)

and is actively seeking to promote his agenda of transparency and close adherence to the By-Laws by Board Members. Such efforts commenced with Boards prior to that upon which Respondents served, and is ongoing with the current Board:

“I. Basis and Reason for Bringing Declaratory Judgment Action – After all the efforts at dialogue, at mediation, and even petitioning the office of the AG for an advisory opinion, this is our last resort (as we understand it should be) – **and it is being done for the benefit of the members of the WHOA, to get clarity for current and more importantly at this point, for future Boards; to enforce the By-Laws which protect the homeowners, rather than have them enforced, if at all, in an ad hoc manner; and it is brought for protection of all ...**” (emphasis added) (R. p. 174-175);

“ ... This is an issue for resolution of the bylaws. It will effect this board but it will effect the future of the association. Clarification is what is needed at this point in time for the benefit of both sides. ...” (R. p. 220, ll. 10-14);

“A. The intent, again, is to clarify what the Bylaws say and mean for this Board, for the members and for future Boards.” (emphasis added) (R. p. 317, ll. 2-3);

This is a matter that will not be resolved short of judicial intervention on the merits, i.e., on the issue of both the interpretation of the By-Laws as well now as the issue of the correct standard for the courts in South Carolina to apply regarding the right of an individual member to bring an action derivatively against a homeowner association board on behalf of the homeowner association. The Supreme Court of South Carolina has made clear that the court should only grant a motion to dismiss based upon the case becoming moot “where there remains no actual controversy.” {*Curtis v. The State of South Carolina, et al*, 345 S.C. 557, 549 S.E.2d 591 (2001)}. There has been no intervening event that would render the issues in this case moot, since the issues continue to involve interpretation of the By-Laws, which is independent of the fact that Respondents left the Board. It is clear that judicial determination as to interpretation of the By-Laws would result in “effectual relief” in this case.

The fact that Respondents: “ ... no longer represent the Association's managerial authority. ...”, is of academic interest, only, since under the “South Carolina Nonprofit Corporation Act of 1994” (NPCA) a yearly election of new Board members is required, and “continuity of a Board” has been assured via required elections, always leaving and having a Board acting in managerial authority. The Court is advised that all Respondents except Acord and James were elected to continue to serve as Board members in Annual-Meeting elections of 2018 and 2019, and advised further that a change in the membership of a Board

has no relevance to the issue in this action and Appeal, brought to the Court, of interpreting the By-Laws which at this time are still in need of the Court's interpretation.

(ii) Case Law in South Carolina Supports Appellant's Position

This Court is well aware of, indeed was instrumental in formulating, the law regarding exceptions to the doctrine of Mootness. This case clearly falls into the doctrine of "capable of repetition yet evading review" enunciated in *Weinstein v. Bradford*, 423 U.S. 147, 96 S.Ct. 347, 46 L. Ed.2d 350 (1975). In fact, as provided for in the NPCA, most Boards of Directors of Homeowner Associations change yearly; a period of time "to short to be fully adjudicated" against Board Members (*Ibid*), clearly requiring it to be heard.

See also: *Treasured Arts, Inc. v. Watson*, 319 S.C. 560, 463 S.E.2d 90 (S.C. 1995), *Byrd v. Irma High School*, 468 S.E. 2d 861 (S.C. 1996). Appellant acknowledges that a decision must have real, practical effect on an existing controversy {*Holden v. Cribb*, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct. App. 2002)}, and would assert that the issues raised in the request for a Declaratory Judgment, namely interpretation of By-Laws, remain extant.

"... they followed the Bylaws, are you asking Ben Acord, are you looking for a resolution or some sort of codification, in the sense of Court here, to provide clarification for the future?"

A. That is the intent of stipulated item, again, as was said earlier, put this matter to bed that the Bylaws must be followed on all issues, not only the vacancy issue." (R. p. 322, ll. 17-22);

"10. Proper interpretation of the By-Laws, as requested from this Court, has implications for the prior Board, the current Board, and for all future Boards, and is needed to restore integrity within WHOA;" (emphasis added) (R. p. 452).

Indeed, a finding that a case has been rendered moot in declaratory judgment cases, appears to arise most commonly where the basis for seeking the declaratory relief, such as

determination of ownership of an item, has been resolved by the parties themselves.

Respondent cites no cases on point, since by their very nature By-Laws are normally static, unless modified, which is not the case here.

Thus, based upon the foregoing, judgment on Appellant's case will have effectual, practical, and final legal effect to resolve all of disputed "Stipulation of Issues for Trial" (R. pp. 178-179) as applied to the current, acting Board of WHOA, and future Boards; thus Respondents' Motion should be denied.

II. The Named Respondents Should Remain in the Case

Appellant acknowledges that at this time all four of Respondents have left the Board – indeed some did not run for re-election at the meeting of members held April 26, 2018 namely Mr. Acord, and Mr. James. It is important to note that it was not until **AFTER** such election of new Board Members, that heavy lifting began in terms of the Briefs for this Appeal, starting with the Initial Brief filed by attorney for Respondents, Ely Grote, Esq., on January 11, 2019.

Significant time, as well as accumulation of significant legal fees have occurred during the period after which two Respondents left the Board. Thus, it took counsel for Respondents over six months before seeking to have Respondents dismissed from the case. Subsequently and substantively, all named Respondents engaged in an undertaking to reimburse the WHOA for legal fees which originally totaled \$53,684.50, but were later reduced to \$33,000, in the event that they lose this case (Exhibit A). Thus, it would be inequitable to permit them to be discharged from the case.

It should also be noted that Respondents maintain and possess a material interest in matters alleged by Appellant, regardless of whether or not they continue to serve in the capacity

in which they were named in this suit, since as specified in the NPCA, premature indemnification payments being made by WHOA on behalf of Respondents still apply to them, where recently Respondents complied with NPCA requirements (Exhibit A) to promise to "... repay indemnification ...".

NEW FINDINGS – ITEM 1(c)

ALLEGED: “STIPULATION OF AGREEMENT” DOES NOT EXIST

Finally, Appellant would note that, per information verified over time, Appellant contests the trial court's findings related to “Stipulation of Issues for Trial”-item 1(c) (R. p. 178), as also found (R. p. 8) in the Order of Judgment, more specifically:

“During the trial, the parties stipulated in open court and on the record that they mutually agreed to an interpretation of the bylaws in substance as follows:

I find that the stipulation is binding pursuant to Rule 43(k), SCRCPP, and it is also hereby incorporated into and made part of the Court’s ruling and order by consent of the parties.” (R. p. 10)

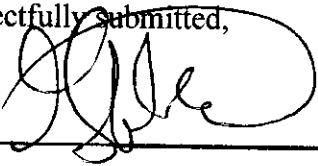
since a “Stipulation of Agreement” (Stipulation) as referred to during trial does not exist regarding such item, and confusion over intended meaning of discussion in Court was evident; nor were any pre-trial-verbal discussions agreed to in final form and signed, where it must be recognized that Respondents presented their own, otherwise unsubstantiated, understanding of preliminary-verbal discussions related to a suggestion that a formal Stipulation be agreed to, and signed, which was never executed.

However, without conceding this issue, assuming arguendo that a stipulation during trial as to that solitary-item-1(c)-By-Laws provision was made, all other “Stipulation of Issues for Trial”-By-Laws provisions would still remain in dispute.

CONCLUSION

It is clear from the foregoing that this Court should, and we respectfully request this Court to, **DENY** Respondents' Motion to Dismiss the Case, and also **DENY** Respondents' Request, in the alternative, to dismiss named Respondents, additionally respectfully requesting this Court to proceed to a full review of all issues on appeal, as presented by Appellant in its Final Brief and in the Record on Appeal.

Respectfully submitted,



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ATTORNEY FOR APPELLANT

August 23, 2019

EXHIBIT A - Respondents Promise to Repay to WHOA Premature Indemnification Payments

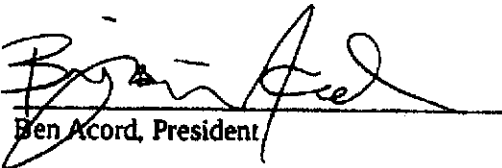
Woodington Homeowner's Association, Inc.

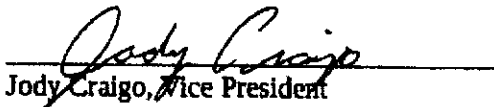
The 2017 Board of Directors (the "Directors") for the Woodington Homeowner's Association, Inc. (the "Association") reasonably believe that we conducted ourselves in good faith toward the Association and its members and reasonably believe our conduct during our term was in the Association's best interests and in a lawful manner. The Directors have no reasonable cause to believe otherwise.

The Directors seek indemnification based on our understanding of South Carolina law and the Association's By-Laws for the legal actions taken against us in our capacity as directors.

The Directors request the Association advance fees or reimburse the reasonable expenses incurred during our legal defense as no liability or wrong-doing on our part was alleged or proven. Further, the Association By-Laws permit prepaid defense expenses before the final disposition (Article XX – Indemnification, Section 1 – Indemnification of Directors and Officers, g. Prepaid Defense Expenses).

If it is later ultimately determined that we, the directors, did not meet the standard of care to be indemnified we shall repay the advance. However, we have no reasonable cause to believe so as no misconduct was alleged in the complaint's request for declaratory judgment.


Ben Acord, President


Jody Craigo, Vice President


Denis Esteve, Treasurer


Brian James, Maintenance

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The Honorable C. Simmons, Master in Equity

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v.

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and Brian James in their capacity as the current
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Respondents

Appellate Case No. 2018-001209

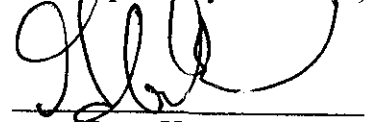
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CERTIFICATE OF SERVICE

It is hereby certified that a copy of “**Memorandum in Opposition to Respondents’ Motion to Dismiss**” was served upon the following via the United States Post Office, Priority Mail on August 23, 2019, Tracking Number: 9505 5265 1566 9235 0096 74

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Respectfully submitted,



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August 23, 2019

The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
PO Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals

Re: Memorandum in Opposition to Respondents' Motion to Dismiss,
and Certificate of Service


Raymond A. Wedlake v. Benjamin Acord, *et. al.* Appellate Case No: 2018-001209

Dear Ms. Kitchings:

Enclosed please find our response: "**Memorandum in Opposition to Respondents' Motion to Dismiss**", comprised of an original plus six copies, and "**Certificate of Service**" served on counsel for Respondents: Ely O. Grote, Esquire. It is understood filing is free, except for when a Motion is being submitted, when a \$50 fee would apply.

Thank you very much and should you have any questions please do not hesitate to call me at: 864-630-7471.

Respectfully,

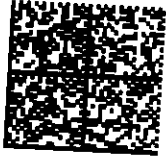


Grant H. Gibson, Esq.

Enclosures

cc. Ely Grote, Esq. (via U.S. Mail)

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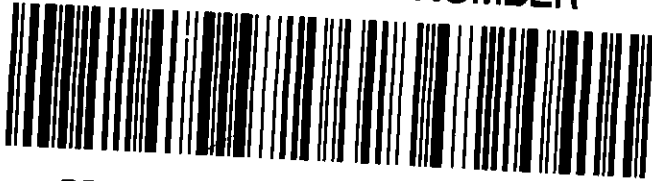
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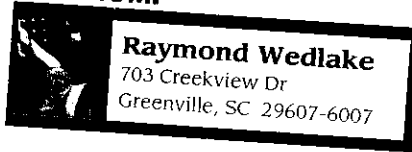
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