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-23-6301

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.

RETURN TO APPELLANT'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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The Respondents, Benjamin Acord, William Craigo, Denis Esteve, and Brian James, through their undersigned counsel, respectfully submit this Return to Appellant's Memorandum in Opposition to Respondents' Motion to Dismiss in order to address various arguments and matters raised in Appellant's Memorandum in Opposition. In submitting the following, and craving reference to the arguments previously raised in Respondents' Motion to Dismiss, Respondents reassert that this case is decidedly moot and nonjusticiable as to Respondents, and therefore the appeal should be dismissed.

I. This appeal and the case are moot, as the individually named Respondents are no longer Board members and therefore no longer have the authority to carry out any declaratory judgment craved by Appellant even if Appellant were to prevail, and therefore the Court cannot grant effectual relief.

Appellant's arguments challenging mootness on the basis that there are ongoing disputes or that the matter is ongoing are misplaced. As set forth in Respondents' Motion to Dismiss and supported by the affidavits of Respondents attached thereto, all of the Respondents have left the Board since the time of trial. If Appellant were to prevail in this action, the declaratory judgment would be ineffectual as it would apply only to the four Respondents, named in their capacity as the "current Board of Directors," none of which would have any authority or means to effectuate any declaratory judgment requested as they are no longer Board members.

To the extent Appellant asserts a declaratory judgment against the Respondents would somehow be binding upon Woodington Homeowners' Association, Inc., this is contrary to the Uniform Declaratory Judgment Act. S.C. Code Ann. § 15-53-10 et. seq. Pursuant to the Act, Woodington Homeowners' Association, Inc. cannot be bound by a declaratory judgment from this action:

> When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.

S.C. Code Ann. § 15-53-80.

Appellant did not name the corporate entity, Woodington Homeowners' Association, Inc. (hereinafter, the "Association"), as a defendant in this action, but rather chose to solely name the four Respondents individually, and the Association would not be bound by a declaratory judgment. This principle that a person not made a party to a declaratory judgment action is not bound by the declaratory judgment is axiomatic and well-espoused throughout South Carolina case law. In *Rowe v. City of Columbia*, the plaintiff was the administrator of the estate of a woman killed by a city-owned fire truck. *Rowe v. City of Columbia*, 300 S.C. 447, 388 S.E.2d 789 (1989). In a separate action between the City and its insurer arising from the same events, a declaratory judgment was issued determining that the insurance policy excluded coverage for the City's fire truck. *Id.* at 448-449, 388 S.E.2d at 790. In *Rowe*, the trial court considered the aforementioned declaratory judgment in granting summary judgment to the City when Rowe sued for recovery. However, the Supreme Court held that the trial court should not have considered the declaratory judgment because Rowe was not a party to the declaratory judgment action and "no declaration shall prejudice the rights of persons who were not parties to the action." *Id.* at 449; *See also, Pharr v. Canal Ins. Co.*, 233 S.C. 266, 104 S.E.2d 394 (1958) (finding that declaratory judgment rendered in action between insurer and insured regarding insurance coverage was not binding upon injured third party who was not a party to the declaratory judgment action).

Appellant, as the plaintiff in this action, named the Respondents as defendants in their capacity as directors. All of the Respondents have now ceased to be directors. "A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy." *Sloan v. Greenville County*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App.

2009). In keeping with South Carolina case law, a declaratory judgment as to the four Respondents would not bind the Association, which was not named in the action. The inability of the four named Respondents to effectuate any declaratory judgment that could rendered in this action renders this case decidedly moot, and this appeal should be dismissed accordingly. Had Appellant desired to obtain a declaratory judgment that would transcend a turnover in the board of directors, he could have named the corporate entity itself (the Association) in the suit, but he chose not to do so.

Further, while Appellant alleges in his Memorandum in Opposition that Respondents maintain a material interest in this case because of an alleged issue regarding indemnification payments, the issue of indemnification is not part of this case or this appeal. No issue of indemnification was included in the stipulated issues for trial, nor was indemnification part of the trial court's Order of Judgment that has been appealed. (R.pp. 7-17, 178-179). In fact, the issue of indemnification, at least in part, appears to be a matter alleged in at least one of the several other separate lawsuits filed by appellant, Raymond Wedlake – *see Raymond A. Wedlake, as a Member of Woodington Homeowners' Association, Inc. v. Scott Bashor, William Craigo, Christopher Edwards, Denis Esteve, and Charles Koshis, in their capacity as Members of the current Board of Directors of Woodington Homeowners' Association, Inc. and Doe Entities 1-10, and John & Jane Does 1-10* (Case No. 2019-CP-23-1501). Since any issue regarding indemnification of Respondents is not one of the issues in the present case or this appeal, such alleged issue cannot constitute or create a justiciable controversy for purposes of this case and this appeal.

A. The "capable of repetition yet evading review" mootness exception does not apply to this case.

Appellant's reliance on the "capable of repetition yet evading review" exception to the

mootness doctrine is misplaced. South Carolina law does provide that a court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. *Byrd v. Irmo High School*, 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996). However, the case at bar is not the type of controversy contemplated by this exception, as the exception has been applied in cases where the entity capable of conceivably carrying out the repetition was actually named in the action rather than only individual decision-makers or employees that are subject to turnover. For example, in *Byrd*, the Supreme Court of South Carolina held that an issue concerning a students' suspension, even if moot due to the fact that that the student had since returned to school and the suspension had been cleared from the student's record, was capable of repetition, but evading review. *Id.* at 430-432, 468 S.E.2d at 864. However, in *Byrd*, the school, the school district, and the respective counties were named as parties, rather than solely the individual decision makers, such as the principal or superintendent. Thus, any judgment rendered would be binding on such entities and would affect the future conduct of those entities, a principal that seems to underlie the rationale for the "capable of repetition yet evading review" exception. Moreover, in *S.C. Pub. Interest Found. v. S.C. Dep't of Transportation*, the Supreme Court found the issue of whether SCDOT's inspection of private bridges in a housing development violated the state constitution satisfied the "capable of repetition but evading review" criteria despite the fact the bridges had already been inspected. *S.C. Pub. Interest Found. v. S.C. Dep't of Transportation*, 421 S.C. 110, 121, 804 S.E.2d 854, 861 (2017). Again, in that case, the SCDOT was actually a named party, and the suit wasn't solely brought against individual employees or decision makers. The distinction between the cases in which South Carolina courts have applied this exception and the case at bar is clear: the plaintiffs in those actions named the entity or entities actually capable of conducting the "repetition" and any

determination would be binding on the entity, thus the judgments would be binding on and affect the future conduct of those entities, transcending a turnover in individual decision makers. The ability to affect and dictate future conduct appears to be a rationale underpinning the "capable of repetition but evading review" exception, which is something missing in the case at hand. As set forth above, any judgment rendered against Respondents would not bind the Association itself and would thus serve no practical or useful purpose going forward in the future. Further, to the extent that any issue in this case may evade review, that is simply a consequence of how Appellant knowingly chose to pursue the case solely against individual directors, and could have potentially been avoided had Appellant chose to pursue this case in a different manner.

II. It would not be "inequitable" to dismiss the appeal, as Respondents' motion to dismiss was not untimely.

In Appellant's Memorandum in Opposition, Appellant argues it would be "inequitable" to permit the Respondents from being discharged in this action because "it took counsel for Respondent over six months before seeking to have Respondents dismissed from the case." Respectfully, Appellant apparently misapprehends the timing of Respondents' filing and implications of Respondents no longer serving in their capacity as Board members, a capacity in which they were named in this action.

Only recently did all the Respondents lose managerial control over the Association, thus rendering the case moot. The South Carolina Nonprofit Corporation Act provides that a quorum for meetings of directors requires a majority of the directors. S.C. Code Ann. § 33-31-824(a). At the time Appellant filed his Complaint, the Board consisted solely of the four Respondents. *See* Ex. A, B, C, and D to Respondents' Motion to Dismiss and Supporting Memorandum. Later, at the time of trial, Respondents constituted four out of the five Board members. *Id.* Pursuant to the Nonprofit Corporation Act, once a quorum is present, a Board decision can then be made by a

majority of the directors present. S.C. Code Ann. § 33-31-824(b).

Thus, even if the number of directors had remained at five throughout this action, only three would be needed for a quorum. Then, with a quorum of three directors, if two of the directors present were Respondents, then those two Respondents would still have the managerial control of the corporation. Therefore, as long as two of Respondents remained on the Board, some of Respondents would have had managerial control in some circumstances. This managerial control and authority would not have ended until recently when the final two Respondents on the Board resigned, one of whom moved out of the subdivision. *See* Ex. B and C, Motion to Dismiss. While Respondents still held the possibility of managerial control, Respondents could still have potentially effectuated a holding in this action (for at least as long as they held such managerial control), and therefore the case was not yet completely moot.

Accordingly, Respondents timely filed a Motion to Dismiss upon the recent occurrence of the resignations of Denis Esteve and William Craigo, which actually rendered the present action completely moot.

III. Appellant's untimely retroactive challenge to the "Stipulation of Agreement" is not preserved for review and, notwithstanding, meritless because there was a valid stipulation.

Appellant now alleges, for the first time in his Memorandum in Opposition to Respondents' Motion to Dismiss, that a "stipulation of agreement" does not exist as to issue 1(c) set forth in the Stipulation of Issues for Trial.[1] As an initial matter, this new allegation of error as to the Order of Judgment is irrelevant to Respondents' Motion to Dismiss which Appellant opposes in his Memorandum in Opposition. Moreover, this is the first time this issue has been

[1] *See* R.p. 178 for issue 1(c), which states: "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."

raised, and it is therefore not preserved for review and should not be considered.

"Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. Further, "[i]t 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." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Further, an objection must be sufficiently specific to inform the trial court of the point being urged by the objector. *Id.* (citing *Broom v. Southeastern Highway Contracting Co.*, 291 S.C. 93, 352 S.E.2d 302 (Ct. App. 1986)). If an issue is raised but not ruled upon by the trial court, a Rule 59(e) motion is required to preserve the matter. *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) (citing *Wilder*, 330 S.C. at 77). Appellant never raised any alleged error or other issue with this stipulation at trial. (R. pp. 229-327). Additionally, Appellant never filed any post-trial motion concerning the stipulation, nor did Appellant raise this issue in his appellate briefs. Appellant never gave any indication there was any issue to be made of the stipulation at all. As such, this new issue raised in Appellant's Memorandum in Opposition, in addition to being irrelevant to Respondents' Motion to Dismiss, is not preserved for review and should not be considered.

Notwithstanding the fact that this issue is not preserved for review, there is nothing in the record to support Appellant's attempted retroactive attack on the stipulation. "No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, ***or unless made in open court and noted upon the record***, or reduced to writing and signed by the parties and their counsel..." Rule 43(k), SCRCP (emphasis added). Here, the stipulation was made in open court and noted upon the record, and thus held by the trial court to be valid under

Rule 43(k). (R. pp. 10; R. p. 258, line 9 to p. 262, 4). The trial transcript reveals the following exchange:

> Q. With regard to the stipulation that require -- for the requirement of a majority of members to approve management contracts or their renewals, are you okay in modifying such language to permit no renewal in the event that the original contract has a renewal provision?
>
> A. My understanding was there would be some stipulation to remove that item from the stipulated issues before the Court, and I'm not aware of the status at this time.
>
> Q. Okay. And would you further agree that in the event that there was an automatic escalation or a cost of living or CPI adjustment for the compensation in the original agreement, that that, too, should be allowed?
>
> A. This was the intent of originally asking the Court to declare that renewals without member approval shouldn't be allowed because a lesson learned has shown that the prior management company continually modified the terms of their contract and relied on the automatic renewal provision to effectively slip it by the members who were not approving it, so they were basically unaware that such changes in the contract had occurred.
>
> MR. GIBSON: If I may, Your Honor, I believe that Mr. Grote is going to speak on the issue of stipulation on this point.
>
> MR. GROTE: I guess this maybe should have been done before the witness got on the stand. But before this started, Mr. Gibson and I did reach an agreement, and I think we're willing to stipulation to at least one of the issues, to try to resolve that whenever the appropriate time would be to limit whatever testimony on that issue.
>
> THE COURT: All right.
>
> MR. GROTE: If you would like, I could ---
>
> THE COURT: Is it one of the six that are set out in ---
>
> MR. GIBSON: Yes, sir.
>
> MR. GROTE: Yes, Your Honor.
>
> THE COURT: Hold on. I haven't even finished my statement, so I don't know what y'all are agreeing to. It may be something different than what I'm agreeing to. Defendant's Pretrial Brief, that was -- well, it's not dated, but it's a twenty-two-page document. On page two and on page three, it has six stipulations. Are these the stipulations we're referring to, gentlemen?

MR. GIBSON: Yes, sir.

MR. GROTE: Yes, Your Honor. And there is a stipulation of issues for trial. There was a separate document that was actually e-filed with the Court on March 29, 2018, as well.

THE COURT: Okay. Thank you.

MR. GROTE: But I essentially copied and pasted that into the Pretrial Brief. There may be some slight differences, but should be pretty close.

THE COURT: So which of the six ---

MR. GROTE: That the Court construe the Bylaws of the Association and declare that the Bylaws require a majority of all members to enter into and to renew a management contract. It's my understanding that the parties have come to an agreement that they're willing to stipulate to an interpretation of the Bylaws that an automatic -- if there is an automatic renewal provision in the contract itself that the contract can automatically renew each year without having to get membership approval. Likewise, if there's a provision already in the contract that is approved by the members that has a provision that provides for a rate increase or change of rate, when the contract automatically renews that also would not require an automatic renewal. Or excuse me, would not automatically require a membership approval for the automatic renewal.

Essentially the issue was -- I think they had taken the position that, okay, you have to get membership approval of the contract every year, even though it has an automatic renewal provision. I believe they were willing to stipulation between the both of us that as long as the contract has the automatic renewal provision it can renew each year without having to get a majority of the members to approve it. Likewise, the rate can change without the majority of members approving it, if that provision is in the contract. So that was approved by the membership.

THE COURT: So that is on page two of the Brief, paragraph one, subparagraph C; is that correct? Let me read what I think y'all are telling me. That the Court construe that 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. That's the language?

MR. GIBSON: That is, sir.

THE COURT: All right. So you're telling me that's no longer a contested issue?

MR. GROTE: Right. I mean, we're not stipulating that that's -- I guess we're not stipulating that a majority of all members has to be required to renew. We're stipulating to the

opposite essentially.

MR. GIBSON: If it's in the original contract.

MR. GROTE: If it's in the contract that's been approved by the membership.

THE COURT: All right. Thank you. Then let's move on to the testimony.

MR. GIBSON: Excellent, Your Honor. Thank you so much.

(R. p. 258, line 9 to p. 262, 4).

To the extent Appellant challenges the stipulation because it was not originally reduced to writing, that argument fails as the requirements set forth by Rule 43(k) provide an agreement of counsel shall be binding if made in open court and noted upon the record, as was the case here, as evidenced by the record. The above-noted exchange reveals Counsel for Appellant is the one who actually paused the proceedings and requested that the undersigned counsel for Respondents set forth the stipulation on the record. The stipulation was then placed on the record by undersigned counsel for Respondents without objection from Appellant's counsel. In fact, Appellant's counsel participated in clarifying the stipulation. Appellant's counsel even concluded the exchange with: "Excellent, your Honor. Thank you so much." Appellant then moved on with his case at trial without challenging or contesting the stipulation in any way. The issue was not raised until Appellant's Memorandum in Opposition to Respondents' Motion to Dismiss. Based on the record, there is ample evidence to support the trial court's finding that a Rule 43(k) agreement was reached as to issue 1(c).

Accordingly, this untimely argument from Appellant is both unpreserved and meritless.

CONCLUSION

For the reasons stated herein and in Respondent's Motion to Dismiss and Supporting Memorandum, this appeal should be dismissed.

Respectfully submitted,

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August 30, 2019
Columbia, South Carolina

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Charles B. Simmons, Jr., Master In Equ

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PROOF OF SERVICE

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

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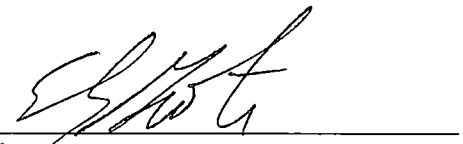

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August 30, 2019

The Honorable Jenny Abbott Kitchings
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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 the Return to Appellant's Memorandum in Opposition to Respondents' Motion to Dismiss for filing in the above-captioned matter. 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)

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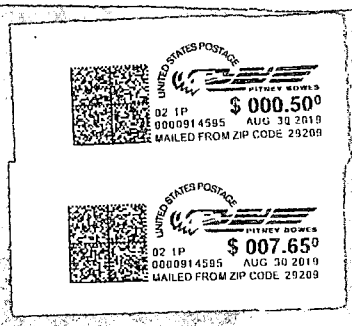

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