

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

The Honorable Maite Murphy, Circuit Court Judge

Case No. 2012-CP-18-02583

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SC Court of Appeals

Jennifer McFarland and Carlton Holcombe,

Appellants,

v.

Thomas Morris and David Hannemann,

Respondents.

INITIAL BRIEF OF RESPONDENTS

THOMAS MORRIS AND DAVID HANNEMANN

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UNCLEAN HANDS?**

STATEMENT OF THE CASE

This matter involves disputes between residents of the Live Oak Village subdivision located in Summerville, South Carolina. Live Oak Village is a small community that includes seven lots and common areas governed by the Declaration of Covenants and Restrictions for Live Oak Village, Summerville, South Carolina, as amended, and Bylaws of Live Oak Village Homeowners Association, Inc. ("HOA"). [Ex. 2, Amended Declaration of Covenants and Restrictions for Live Oak Village, Summerville, South Carolina; Trial Ex. 3, Bylaws of Live Oak Village HOA]. The HOA is governed by the Board of Directors ("Board"), which is comprised of three elected directors. [Ex. 3, Bylaws of Live Oak Village HOA]. The three directors of the Board at all times relevant hereto unless otherwise specified are William McFarland, David Hannemann, and Thomas Morris. [Tr. Trans. p. 189:10-17].

William McFarland, purportedly on behalf of the HOA, and three individual homeowners, Jennifer McFarland, Carlton Holcombe, and Ute Holcombe, filed a Complaint in the Dorchester Court of Common Pleas on November 16, 2012 against Thomas Morris ("Morris"), David Hannemann ("Hannemann"), Sofia Mazell, and Michael Mazell. [Compl.]. An Amended Complaint was filed on October 31, 2014, asserting the following causes of action: (1) declaratory judgment alleged by all Plaintiffs as to Morris and Hannemann; (2) conspiracy alleged by all Plaintiffs against all Defendants; (3) slander alleged by Plaintiff Jennifer McFarland against Defendants Sofia and Michael Mazell; and (4) breach of the covenants and restrictions alleged by all Plaintiffs against Defendants Sofia and Michael Mazell. [Amend. Compl.].¹ The Plaintiffs'

¹ The Amended Complaint filed on October 31, 2014 is the most recently filed complaint and the operative complaint. [See Amend. Compl.]. The Amended Complaint is identical to the original

cause of action against Morris and Hannemann for declaratory judgment sought, in sum, a declaration that Morris and Hannemann acted outside the scope of their authority as Board members and failed to abide by the HOA's Declaration of Covenants and Restrictions and Bylaws. [Amend. Compl. ¶ 8]. In connection with the declaratory judgment action, Plaintiffs also sought "injunctive relief prohibiting [Morris and Hannemann] from taking further action and/or serving on the Board of Directors for the Live Oak Village Homeowner's Association." [Id. at ¶ 9.]. On or about November 11, 2014, Morris and Hannemann filed an Answer to the Amended Complaint, Counterclaims, and a Third-Party Complaint against William McFarland alleging causes of action for breach of fiduciary duty, negligence/negligence per se, conversion of HOA funds, accounting, and indemnity. [See generally Morris & Hannemann's Ans. to Amend. Compl., Counterclaims, and Third-Party Compl.].²

On or about January 16, 2015, Morris and Hannemann filed an amended motion for summary judgment with respect to Plaintiffs' claims on the bases that: (1) the Plaintiffs lacked standing because (a) Jennifer McFarland, Carlton Holcombe, and Ute Holcombe had not suffered any damages or injury in fact required to seek declaratory relief and (b) the HOA failed to follow the requirement for Board approval prior to filing a lawsuit pursuant to the HOA's Bylaws; and (2) the Plaintiffs had no damages and their claims fail as a matter of law where (a) Ute Holcombe has no claim and has not been damaged and (b) the Plaintiffs have suffered no special damages

Complaint but added a fourth cause of action for breach of the covenants and restrictions alleged by all Plaintiffs against Defendants Sofia and Michael Mazell. [See Compl.; see also Amend. Compl.].

² Plaintiffs and Third-Party Defendant William McFarland ultimately moved for summary judgment with respect to Morris' and Hannemann's counterclaims/third-party claims, which was granted by order of the Honorable Diane S. Goodstein filed March 13, 2015. [See Order Granting Plaintiffs' and Third-Party Defendant's Motion for Summary Judgment filed March 13, 2015]. This ruling was not appealed by Morris and Hannemann.

required to sustain an action for conspiracy. [See Defendants Thomas Morris' and David Hannemann's Amended Motion for Summary Judgment filed January 16, 2015]. By order filed March 13, 2015, the Honorable Diane S. Goodstein granted in part and denied in part Morris and Hannemann's motion for summary judgment and dismissed all causes of action other than the conspiracy action asserted by Plaintiffs Jennifer McFarland and Carlton Holcombe. [Order Granting in Part and Denying in Part Defendants Thomas Morris' and David Hannemann's Amended Motion for Summary Judgment filed March 13, 2015].

Plaintiffs Jennifer McFarland, Carlton Holcombe, and Mr. McFarland (improperly acting in the name of the HOA) appealed Judge Goodstein's order granting Morris and Hannemann partial summary judgment. [See Notice of Appeal filed March 20, 2015].³ The Court of Appeals issued an unpublished opinion on December 21, 2016 affirming in part and reversing in part holding: (1) Plaintiff HOA failed to follow the requirement for Board approval prior to filing a lawsuit pursuant to the HOA's Bylaws and, thus, the order granting summary judgment as to the HOA's causes of action was affirmed; and (2) Plaintiffs Jennifer McFarland and Carlton Holcombe did, in fact, have standing to assert the declaratory judgment action and, thus, the order granting summary judgment in this respect was reversed. [Live Oak Village Homeowners Association, Inc., et al. v. Thomas Morris, et al., Unpublished Opinion No. 2016-UP-519 (S.C. Ct. App. Dec. 21, 2016)]. The remittitur was filed on January 25, 2018 leaving the following remaining causes of action before the trial court: (1) Plaintiffs Jennifer McFarland's and Carlton Holcombe's declaratory judgment action against Defendants Thomas Morris and David Hannemann; (2)

³ Plaintiff Ute Holcombe did not join in the appeal. Jennifer McFarland, Carlton Holcombe, and the HOA also appealed Judge Goodstein's separate order granting partial summary judgment in favor of Defendants Sofia and Michael Mazell with respect to the causes of action asserted against them by the HOA. [Order Granting Defendants Sofia and Michael Mazell's Motion for Partial Summary Judgment filed March 3, 2015].

Plaintiff Jennifer McFarland's action for slander against Defendants Sofia and Michael Mazell; and (3) Plaintiffs Jennifer McFarland's and Carlton Holcombe's action for civil conspiracy against all Defendants.

By consent order filed March 23, 2018 and executed by the Honorable Maite Murphy, the parties agreed, in pertinent part, as follows:

- (1) Plaintiff Jennifer McFarland's slander cause of action against Defendants Sofia and Michael Mazell was voluntarily dismissed with prejudice;
- (2) Plaintiffs Jennifer McFarland's and Carlton Holcombe's civil conspiracy cause of action against all Defendants was voluntarily dismissed without prejudice and with leave to re-file within one year after the filing of the consent order;⁴ and
- (3) With the only remaining claim being the declaratory judgment action, the case was transferred to the non-jury docket.

On October 30 and 31, 2018, the declaratory judgment action and action for injunctive relief was tried before the Honorable Maite Murphy. At the conclusion of trial, the trial court held the record open for additional post-trial submissions by the parties. The Plaintiffs timely submitted a proposed order to Judge Murphy on or about November 13, 2018 and the Defendants timely submitted a proposed order to Judge Murphy on or about November 26, 2018. [See Pls.' Proposed Order; Defs.' Proposed Order]. By order dated January 14, 2019, Judge Murphy entered a Final Order and Judgment in favor of the Defendants. [Final Order and Judgment in Favor of Defendants filed January 14, 2019]. The Plaintiffs then filed a Motion to Alter, Amend, and/or Reconsider or, Alternatively, for a New Trial on or about January 24, 2019. [Plaintiffs' Motion to Alter, Amend, and/or Reconsider or, Alternatively, for a New Trial filed January 24, 2019]. This motion was granted in part and denied in part by order filed March 14, 2019 wherein Judge Murphy amended

⁴ Of note, the civil conspiracy cause of action was never re-filed within one year of the date of the consent order and, thus, the dismissal is now with prejudice. [See Consent Order filed March 23, 2018].

four findings of fact and adopted and incorporated by reference conclusions of law set forth in the January 14, 2019 Final Order and Judgment in Favor of Defendants. [Order Granting in Part and Denying in Part Plaintiffs' Motion to Alter, Amend, and/or Reconsider or, Alternatively, for a New Trial filed March 14, 2019].

On April 12, 2019, Plaintiffs filed a notice of appeal of the January 14, 2019 Final Order and Judgment in Favor of Defendants and the March 14, 2019 Order Granting in Part and Denying in Part Plaintiffs' Motion to Alter, Amend, and/or Reconsider or, Alternatively, for a New Trial. [Notice of Appeal filed April 12, 2019].

STANDARD OF REVIEW

“Declaratory judgment actions are neither legal nor equitable, and therefore, the standard of review depends on the nature of the underlying issues.” Auto-Owners Ins. Co. v. Hamin, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct.App. 2006); see Noisette v. Ismail, 299 S.C. 243, 246, 384 S.E.2d 310, 312 (Ct.App. 1989) rev'd in part, 304 S.C. 56, 403 S.E.2d 122 (1991) (stating that “[a] declaratory judgment action is like a chameleon . . . [i]ts color is determined by its background, *i.e.*, the underlying action.”). “Where an action is filed for declaratory judgment seeking affirmative relief, the movant must prove his material allegations by a preponderance of the evidence.” Vermont Mut. Ins. Co. v. Singleton By & Through Singleton, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994). “In actions at law, on appeal of a case tried without a jury, the lower court must be affirmed where there is any evidence which reasonably supports the judge’s findings.” Sloan v. Greenville Cnty., 356 S.C. 531, 544, 590 S.E.2d 338, 345 (Ct.App. 2003) (citations omitted). “In an action in equity, however, the appellate court may ‘find facts in accordance with its views of the preponderance of the evidence.’” Id. The standard of review is determined by the “main purpose” of the lawsuit. Id. “A case with legal and equitable issues presents a divided

scope of review.” Id. “When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal.” Id. “The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review.” Wright v. Craft, 372 S.C. 1, 17-18, 640 S.E.2d 486, 495 (Ct.App. 2006) (citing Jordan v. Holt, 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005)).

In this case, the amended complaint seeks declarations related to the HOA’s master deed and bylaws and also seeks injunctive relief. [See Amend. Compl.]. As it pertains to the matters at issue in this appeal, the Appellants’ amended complaint seeks the following relief: “(a) Declaratory Judgment against Defendants Thomas Morris and David Hannemann declaring that Defendants are acting outside the scope of their authority on the Live Oak Village Homeowner’s Association Board of Directors; and (b) Injunctive relief prohibiting Defendants Thomas Morris and David Hannemann from taking further action and/or serving on the Live Oak Village Homeowner’s Association Board of Directors contrary to the express terms of the covenants and by-laws.” [See Amend. Compl. (prayer for relief)].

To the extent the nature of the underlying issues depend on the court’s interpretation of the master deed and bylaws, the character of the underlying action is one at law. Even if the nature of the action is considered one at equity based on the equitable relief sought, that relief is dependent upon the outcome of a legal interpretation, i.e. the interpretation of the master deed and bylaws. “A legal question in an equity case receives review as in law.” Sloan, 356 S.C. at 545, 590 S.E.2d at 345. “Even if a case is tried in equity if it is actually a law case, the appellate court will apply the scope of review in law cases.” Id. Therefore, this Court should review the declaratory judgment action as one at law to the extent the trial court’s findings of fact and conclusions of law are based on the trial court’s interpretation of the master deed and bylaws.

Upon review of an action in equity seeking injunctive relief, this Court may find facts in accordance with its own view of the evidence. Buffington v. T.O.E. Enterprises, 383 S.C. 388, 391, 680 S.E.2d 289, 290 (2009) (citing Townes Assoc. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)). “While this standard permits a broad scope of review, an appellate court will not disregard the findings of the trial court, which saw and heard the witnesses and was in a better position to evaluate their credibility.” Id. (citing Tiger, Inc. v. Fisher Agro, Inc., 301 S.C. 229, 237, 391 S.E.2d 538, 543 (1989)); see also Cedar Cove Homeowners Ass’n, Inc. v. DiPietro, 368 S.C. 254, 258-59, 628 S.E.2d 284, 286 (Ct.App. 2006) (acknowledging “the superior position of the trial judge to assess witness credibility” and stating that “[w]e would not, even under *de novo* review, lightly disregard a trial judge’s credibility determinations.”). Where the resolution of an appeal turns largely on application of undisputed facts to unambiguous restrictive covenants, matters of construction are questions of law. See id. (citing Moser v. Gosnell, 334 S.C. 425, 430, 513 S.E.2d 123, 125 (Ct.App.1999) (holding that when a covenant or contract is clear and unambiguous, matters of construction are questions of law for the court).

ARGUMENT

This Court should dismiss this lawsuit and appeal for lack of subject matter jurisdiction because the declarations sought would not settle any legal rights of the parties and any injunctive relief sought is moot. If not dismissed for lack of subject matter jurisdiction, this Court should dismiss this appeal for failure to set forth with specificity the bases for appeal pursuant to SCACR 208. The Appellants do not clearly set forth the manner in which the trial court’s alleged errors in

reaching findings of facts and conclusions of law are related to any specific relief sought.⁵ That said, the Appellants' claims generally fall into three categories for which declarations or injunctive relief are sought against Morris and Hannemann: (1) the alleged improper handling of the Mazell tenancy; (2) the alleged improper approval of the Morrisses' landscaping plan and reduced find levied by the HOA against the Morrisses; and (3) the alleged improper handling of the Mazells' annual dues payment. None of these issues associated with alleged improper conduct over six years ago present an actual case or controversy. Rather, the issues are moot and incapable of repetition that could evade review.

In the alternative, this Court should affirm the trial court's finding that the Appellants are not entitled to any of the declarations nor injunctive relief sought because Morris and Hannemann did not exceed the scope of their authority as members of the Board and officers of the HOA. The trial court's Order and Judgment sets forth twenty enumerated findings of fact (four of which were

⁵ The amended complaint alleges "Defendants willfully operated outside the scope of their authority by taking action or failing to take action as required by the covenants and restrictions, including but not limited to the following acts:

- (a) Voting to waive fines that applied to themselves;
- (b) Failing to hold timely or properly noticed Homeowners Association or Board of Directors meetings;
- (c) Allowing unauthorized persons to vote and participate in Board of Directors meetings;
- (d) Voting on matters in which they have a personal financial interest;
- (e) Voting in violation of South Carolina Code § 33-31-830;
- (f) Failing to properly handle HOA funds;
- (g) Failing to enforce covenants and restrictions in a uniform and unbiased manner; and
- (h) Violating the covenants and restrictions."

[See Amend. Compl. ¶ 6.].

subsequently amended)⁶ and eight enumerated conclusions of law. [See Order and Judgment; Order Granting in Part and Denying in Part Plaintiffs' Motion to Alter, Amend, and/or Reconsider, or, Alternatively For a New Trial]. The Appellants assert that the trial court erred as to nearly all findings of fact and every conclusion of law.⁷ The trial court correctly held with respect to all claims asserted by the Appellants that Morris and Hannemann "did not exceed the scope of their authority as members of the HOA's Board of Directors and as officers of the HOA" and "committed no act or omission that breached the standard of care of directors of nonprofit corporations pursuant to S.C. Code Ann. § 33-31-830." [Order and Judgment p. 15, Conclusion of Law Number 1]. Although the Appellants allege incorrect, omitted, or inconsistent findings of fact, there is no clearly stated nexus between the alleged errors and the manner in which they constitute reversible error with respect to the relief sought. However, with respect to each conclusion of law and supporting findings of fact, the trial court correctly applied the law and correctly determined based on a preponderance of the evidence that the Appellants are not entitled to the relief sought.

I. THIS APPEAL SHOULD BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION

This Court should dismiss this appeal for lack of subject matter jurisdiction because any declarations sought would not settle any legal rights nor afford any relief between the parties and any injunctive relief sought cannot demonstrate irreparable harm, would serve no useful purpose, and the issues are moot. As such, the trial court lacked subject matter jurisdiction and, respectfully,

⁶ The trial court amended Findings of Fact Numbers 4, 7, 9, and 19. [See Order Granting in Part and Denying in Part Plaintiffs' Motion to Alter, Amend, and/or Reconsider, or, Alternatively For a New Trial].

⁷ The Appellants do not contest Findings of Fact Numbers 1, 2, 3, and 9.

this Court lacks subject matter jurisdiction. “The appellate court must always take notice of the lack of subject matter jurisdiction.” Town of Hilton Head Island v. Godwin, 370 S.C. 221, 223, 634 S.E.2d 59, 60 (Ct.App. 2006) (citing Amisub of S.C., Inc. v. Passmore, 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994)). “The lack of subject matter jurisdiction can be raised at any time, can be raised for the first time on appeal, and can be raised *sua sponte* by the court.” Id. (citing Lake v. Reeder Constr. Co., 330 S.C. 242, 248, 498 S.E.2d 650, 653 (Ct.App.1998) (holding issues related to subject matter jurisdiction may be raised at any time). “The acts of a court with respect to a matter as to which it has no jurisdiction are void.” Id. at 223, 634 S.E.2d at 61 (citing State v. Guthrie, 352 S.C. 103, 107, 572 S.E.2d 309, 311-12 (Ct.App. 2002). “This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy.” Byrd v. Irmo High Sch., 321 S.C. 426, 431, 468 S.E.2d 861, 864 (1996) (citing Jones v. Dillon–Marion Human Resources Dev. Comm’n, 277 S.C. 533, 291 S.E.2d 195 (1982)).

Morris and Hannemann raised subject matter jurisdiction as an affirmative defense and argued at trial that the plaintiffs failed to present any evidence of an existing case or controversy and the claims are moot. [See Morris & Hannemann’s Ans. to Amend. Compl., Counterclaims, and Third-Party Compl.; Tr. Trans. p. 292:9-17]. The Appellants’ declaratory judgment action seeks, in sum, declarations from the court that alleged past instances of acts or omissions related to the conduct of Morris and Hannemann as members of the Board were improper. The Appellants’ action for equitable relief seeks, in sum, an order directing Morris and Hannemann not to engage in the same alleged improper conduct as members of the Board as well as an order enjoining Morris and Hannemann from serving on the Board. However, none of the declarations sought would settle any legal rights or afford any relief between the parties and the acts or omissions for which injunctive relief are sought are moot.

As to any declarations sought that Morris or Hannemann acted unreasonably or outside the scope of their authority, South Carolina Code Section 15-53-30 provides the following:

Any person interested under a deed, will, written contract or other writings constituting a contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

S.C. Code Ann. § 15-53-10. In order to state a cause of action under the Declaratory Judgment Act (the “Act”), a party must demonstrate a justiciable case or controversy. Holden v. Cribb, 349 S.C. 132, 137, 561 S.E.2d 634, 637 (Ct.App. 2001); [see Order and Judgment p. 5]. The Act is a proper vehicle in which to bring a controversy before the court when there is an existing controversy or at least the ripening seeds of a controversy. See Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 423, 593 S.E.2d 462, 466 (2004) (holding that “[a]n adjudication that would not settle the legal rights of the parties would only be advisory in nature and, therefore, would be beyond the intended purpose and scope of the [Act].”); [see Order and Judgment p. 5].

As to any injunctive relief sought, the South Carolina Supreme Court has stated that “[a]n injunction is a drastic remedy issued by the Court in its discretion to prevent irreparable harm suffered by the plaintiff.” Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc., 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). “To obtain an injunction, the plaintiff must allege facts sufficient to constitute an action for injunction and demonstrate the injunction is reasonably necessary to protect the legal rights pending in the litigation.” Cnty. of Richland v. Simpkins, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App. 2002). “To obtain an injunction, a party must demonstrate irreparable harm, a likelihood of success on the merits, and the absence of an adequate remedy at law.” Denman v. City of Columbia, 387 S.C. 131, 140, 691 S.E.2d 465, 470 (2010).

The Appellants broadly couch their claims for declaratory and injunctive relief alleging they “are entitled to Declaratory Judgment declaring that Defendants Thomas Morris and David Hannemann are acting outside the scope of their authority and injunctive relief prohibiting Defendants from taking further action and/or serving on the Board of Directors of the Live Oak Village Homeowners Association.” [See Amend. Compl. at ¶ 9]. As set forth above, the Appellants assert three general categories of alleged improper past conduct of Morris and Hannemann. First, the Appellants seek a declaration that Morris and Hannemann improperly handled the Mazell tenancy issue where the alleged tenant moved out over six years ago and the Mazells no longer reside in the neighborhood.⁸ There is no request that court impose fines against the Mazells or the current owners of the Mazell residence for the Mazells’ alleged violation of HOA bylaws. Second, the Appellants seek a declaration that Morris and Hannemann improperly approved the Morrises’ landscaping plan and the fine levied against the Morrises by a vote of all homeowners was improper. There is no request that the Morrises’ landscaping project completed many years ago should be removed. There is no request that the court declare that any increased fine should be imposed. Finally, the Appellants seek a declaration that Morris and Hannemann acted improperly in the manner in which they handled the Mazells’ annual dues payment in 2012. There is no request that the court declare that the Mazells failed to pay their dues or that the court issue a fine against the Mazells or current owners of the Mazell residence. No declarations are sought other than the Appellants’ request that the court issue declarations that Morris and

⁸ Although there is nothing in the record that demonstrates that the Mazells’ home was purchased and the Mazells moved out of the neighborhood, the Appellants did not challenge this argument at trial. The Respondents argued that “As to the tenant issue, the Mazells moved out of the neighborhood and [Morris and Hannemann] made a reasonable investigation into the issue and determined that there were no fines that needed to be imposed. Nothing that they are complaining about is ongoing.” [Tr. Trans. p. 292:21-25].

Hannemann acted improperly. The court could not issue any of the requested declarations that Morris and Hannemann acted improperly that would settle any legal rights or afford any relief between McFarland or Holcombe and Morris or Hannemann and any such declarations, if issued, would not comport with the plain meaning or purpose of the Act.

Further, the Appellants set forth no case or controversy nor irreparable harm associated with any injunctive relief sought. The injunctive relief the Appellants seek is an order prohibiting Morris and Hannemann from taking further action as members of the Board and that Morris and Hannemann no longer serve on the Board. [See Amend. Compl. at ¶ 9]. There is no injunction that the court could issue as to the alleged prior misconduct of Morris and Hannemann as the issues are moot and could not potentially prevent irreparable harm. As to any future conduct, the Appellants do not articulate any basis for existing, imminent, or future irreparable harm generally nor any in relation to the three categories of alleged prior misconduct that have the potential to take place again. Moreover, the future conduct of Board members is already governed by HOA bylaws.

For these reasons, this appeal and this lawsuit should be dismissed for lack of subject matter jurisdiction. To the extent the Appellants' purported assignments of error are tethered in any cogent manner to any requests for declaratory or injunctive relief actually sought, no declarations would settle any legal rights of the parties and no order could enjoin Morris or Hannemann from past conduct nor future conduct that cannot possibly recur. As such, the Appellants' claims should be dismissed for lack of subject matter jurisdiction as they are barred as moot. "Mootness has been defined as follows: '[a] case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy.'" Byrd, 321 S.C. at 431, 468 S.E.2d at 864 (citing Mathis v. South Carolina State Highway Dep't, 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973)). "This is

true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief.” Id. South Carolina recognizes an exception to the mootness doctrine that allows courts to address matters that are capable of repetition and evading review. See id. Here, there is no such potential. The Appellants seek proverbial slap on the wrist declarations that have no potential to settle any legal rights nor afford any relief between the parties. As such, the Appellants have not and cannot demonstrate any existing controversy nor the ripening seeds of any controversy for which any declaratory relief is properly sought. See Holden, 349 S.C. at 137, 561 S.E.2d at 637; Sunset Cay, 357 S.C. at 423, 593 S.E.2d at 466. To the extent the Appellants further seek injunctive relief prohibiting Morris and Hannemann from further engaging in the alleged improper past conduct, the record is clear that no such recurrence is possible, there is no existing case or controversy, and the Appellants cannot articulate any need for an injunction to prevent irreparable harm. As such, the claims for injunctive relief are moot. Therefore, this Court should dismiss this lawsuit and appeal because the trial court and this Court lack subject matter jurisdiction over the Appellants’ alleged claims for declaratory or injunctive relief.

II. THIS APPEAL SHOULD BE DISMISSED BECAUSE THE APPELLANTS FAIL TO STATE THE ISSUES ON APPEAL IN CONFORMANCE WITH SCACR 208

The Appellants have not preserved their arguments on appeal because they have failed to set forth anything other than the broadest statement of issues on appeal that could apply to nearly any case or fact pattern. See Rule 208(b)(1)(B), SCACR (stating that “[o]rdinarily, no point will be considered [that] is not set forth in the statement of the issues on appeal.”); see, e.g., Brown v. Odom, 425 S.C. 420, 436, 823 S.E.2d 183, 191 (Ct.App. 2019) (finding in appeal of divorce decree that appellant’s argument regarding the proper date for valuation of property unpreserved because appellant failed to include argument in the statement of issues on appeal). The Appellants’

Statement of Issues on Appeal fails to conform with SCACR 208(b)(1)(B) by couching the issues in terms of whether the trial court erred “in making findings of fact and conclusions of law that are materially incomplete, not supported by the evidentiary record, and/or erroneous as a matter of law.” [Appellants’ Initial Brief p. 1]. The Appellants’ Statement of Issues on Appeal does not set forth (1) the specific grounds and legal bases for the appeal; (2) which of the unstated grounds allegedly constitute errors associated with findings of fact or conclusions of law or both; nor (3) which alleged errors allegedly result from the broad categories of alleged error couched in the alternative, i.e. findings of fact or conclusions of law that are “materially incomplete, not supported by the evidentiary record, and/or erroneous as a matter of law.” [See *id.*; Rule 208(b)(1)(B), SCACR (requiring that “[t]he statement shall be concise and direct as to each issue, and may be stated in question form.”)]. The Appellants fail to set forth the issues on appeal and, therefore, no issues are properly submitted for this Court’s consideration on appeal. [See *id.*; *Tobias v. Rice*, 379 S.C. 357, 365, 665 S.E.2d 216, 220-21 (Ct.App. 2008), rev’d on other grounds, 386 S.C. 306, 688 S.E.2d 552 (2010) (finding “[i]n order for an issue to be properly presented for appeal, [appellant’s] brief must set forth the issue in the statement of issues on appeal.”) (citing Rule 208(b)(1)(B), SCACR; *Silvester v. Spring Valley Country Club*, 344 S.C. 280, 285, 543 S.E.2d 563, 566 (Ct.App. 2001))].

The Appellants also take a generalized approach with respect to potentially applicable standards of review without stating in the argument section that follows whether this Court should reverse based on errors of law or its own view of the evidence. The Appellants’ arguments as a whole are not tied to any standard of review nor specific relief sought but simply identify alleged errors in the trial court’s determination of the facts or purported failure to take into consideration certain facts. [See, e.g., Appellants’ Initial Brief p. 19 (stating without explaining the manner in

which the alleged error is associated with any claim for which the Appellants seek reversal that “[t]he record also shows Messrs. Morris and Hannemann’s odd involvement in respect of the Mazells’ 2012 annual HOA assessment.”]. This Court is provided no road map for considering the purported reversible error in relation to the relief sought and this absence of specificity disadvantages the Respondents in their endeavor to identify the bases for the appeal and respond accordingly.⁹ As such, this Court should find that the appeal fails to state the issues pursuant to SCACR Rule 208(b)(1)(B) at the outset rather than chase loose hanging arguments as to alleged erroneous findings of fact and conclusions of law. The task of setting forth a structured basis for appeal supported by articulated errors belongs to the Appellants in accordance with the rules and should not be turned into one for the Respondents or the Court to decipher. See Tobias, 379 S.C. at 365, 665 S.E.2d at 221 (stating that “it is error for the appellate court to consider issues not properly raised to it.”) (citing First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (stating appellant must provide authority and supporting arguments for his issue to be considered raised on appeal)).

III. THE TRIAL COURT CORRECTLY FOUND THAT HANNEMANN ACTED REASONABLY AND WITHIN THE SCOPE OF HIS AUTHORITY REGARDING THE TENANT ALLEGEDLY RESIDING AT THE MAZELL RESIDENCE

The trial court correctly held that Hannemann acted reasonably, within the scope of his authority, and in good faith in the best interests of the HOA in response to complaints regarding an alleged unauthorized tenant residing in the Mazells’ home. [Order and Judgment p. 15,

⁹ Further, as there were no opening or closing arguments by the either party nor any motion for directed verdict by the Appellants, general references to the trial transcript also provide no direction. Neither the Respondents nor this Court should be required to assemble the Appellants’ collection of purported errors in the trial court’s findings of fact and conclusions of law into specific discernable arguments that relate to the relief sought for which the Appellants seek reversal. [See generally Tr. Trans.].

Conclusion of Law Number 2]. The declaratory or injunctive relief the Appellants now seek in order to redress any issues associated with Hannemann's purported shortcomings seek are unclear. However, it appears the Appellants argue that the trial court erred by failing to issue declarations or injunctive relief with respect to the alleged failure to properly investigate the alleged improper tenancy at the Mazells' residence in 2011; failure to properly investigate the alleged improper tenancy at the Mazells' residence in 2012; or failure to enforce the fine that Ms. Greene informed the Mazells would be levied with respect to the alleged improper tenancy at the Mazells' residence in 2012.

As to the alleged improper tenancy in 2011, the trial court recognized that McFarland provided notice of a non-family member living at the Mazells' residence by letter dated September 7, 2011 requesting that the Board remedy the alleged violation. [See Order and Judgment p. 8, Finding of Fact Number 5; Ex. 8, Sep. 7, 2011 Letter from Plaintiff McFarland to Board of Directors for Live Oak Village Homeowners Association; Ex. 2, Amended Declaration of Covenants and Restrictions for Live Oak Village at Art. VII, § 7.6]. The Appellants argue that the trial court incorrectly found in Finding of Fact Number 5 that McFarland was a member of the Board for well over a year during the tenant's alleged improper residence in the Mazells' home and that the record was devoid of any evidence that McFarland took any action to address the issue while serving on the Board. [Appellants' Initial Brief pp. 21-22; Order and Judgment p. 8 fn. 3]. The Appellants argue that the trial court erred in this finding of fact because although McFarland was aware of the alleged improper residency for some time prior to her letter to the Board of September 7, 2011, it was not until August, 2011 when McFarland's daughter told McFarland that the alleged tenant was looking at McFarland's daughter in a "creepy" fashion and informed McFarland accordingly that McFarland had reason

to focus her attention on the issue of the alleged improper tenancy. [Appellants' Initial Brief p. 22]. True to the Appellants' empty litigious form, there is no theory by which the trial court's footnote in Finding of Fact Number 5 potentially constitutes reversible error. The trial court acknowledged the notice from McFarland by letter of September 7, 2011. The trial court further found that the tenant issue was resolved as the individual moved out of the Mazells' residence. [Order and Judgment p. 13, Finding of Fact Number 17; Ex. 8, Sep. 7, 2011 Letter from Plaintiff McFarland to Board of Directors for Live Oak Village Homeowners Association]. The Order and Judgment does not indicate that the trial court's conclusion of law finding that Hannemann acted reasonably, within the scope of his authority, and in good faith in the best interests of the HOA in response to complaints regarding an unauthorized tenant residing in the Mazells' home was related in any way to whether McFarland served on the Board or any delay in addressing the alleged unauthorized tenancy. [Order and Judgment p. 15, Conclusion of Law Number 2]. Further, the issue associated with the alleged 2011 tenancy is clearly moot.

As to the alleged improper tenancy in 2012, the trial court correctly found that "Hannemann made a reasonable inquiry into the alleged tenant returning to the Mazell's residence and determined that the alleged tenant was not living with the Mazells." [Order and Judgment p. 14, Finding of Fact Number 18; Tr. Trans. p. 184:21-24]. The Appellants argue that "[w]hen Mr. F resumed living with the Mazells in the fall of 2012 as a non-family member/renter in violation of the Governing Documents, Messrs. Morris and Hannemann disregarded credible evidence of the violation presented to them by Ms. Greene and refused to take even so modest an investigatory step as to ask Mr. F to provide a copy of a utility bill that could prove he did indeed reside elsewhere." [Appellants' Initial Brief p. 20]. However, the trial court found that Hannemann determined from Mr. Mazell "that the alleged tenant was simply a houseguest and 'upon

occasion, he [would] spend the night babysitting [the Mazells'] dog.” [Order and Judgment p. 14, Finding of Fact Number 18; Ex. 70, Oct. 4-17, 2012 Email Correspondence between Kathleen Greene, Defendants, and Michael Mazell; Ex. 66, Oct. 8, 2012 Email Correspondence from Kathleen Greene to Defendants, McFarlands, and Michael Mazell; Ex. 67, Oct. 8-9, 2012 Email Correspondence between Defendants and Kathleen Greene]. Thereafter, as the trial court found, Hannemann requested that Greene “present any evidence to the contrary and, when Greene could not do so, directed Greene to stop imposing fines upon the Mazells.” [See *id.*]. As such, the trial court’s order clearly supports the conclusion that Hannemann acted reasonably, within the scope of his authority, and in good faith in the best interests of the HOA in response to complaints regarding an unauthorized tenant residing in the Mazells’ home in 2012. [Order and Judgment p. 15, Conclusion of Law Number 2]. Further, just as with any declarations or injunctive relief sought with respect to any purported failure to investigate the alleged improper 2011 tenancy, any issues associated with the alleged improper 2012 tenancy are clearly moot.

As to Morris and Hannemann’s alleged failure to impose the fines that Greene sought to levy on the Mazells for the alleged improper tenancy in 2012, the trial court correctly interpreted Section 15(c) of the Bylaws and found this procedure for levying fines was required under the Bylaws and not followed. “The required procedure delineated in Section 15(c) of the Bylaws was never followed prior to the issuance of any fines against the Mazells.” [Order and Judgment p. 14, Finding of Fact Number 17; Tr. Trans. pp. 107:21-25; 108:1-3; 278:23-25; 279:1-3; 313:7-9; 313:15-18]. The Appellants argue that the trial court’s reference to Section 15(c) of the Bylaws ignores the fact that the Board had become dysfunctional because Morris and Hannemann had aligned themselves against Mr. McFarland; that Greene documented the fact that Morris and Hannemann had aligned themselves against Mr. McFarland; and Morris and Hannemann

disregarded credible evidence of the violation provided by Greene and failed to undertake an investigation. [Appellants' Initial Brief pp. 36-37]. However, the Appellants offered no evidence that Section 15(c) of the Bylaws was in fact followed. [See Order and Judgment p. 8, Finding of Fact Number 6]. The Appellants' arguments premised on alleged bias against Mr. McFarland and purported Board dysfunction do not change the outcome that the trial court properly based upon application of the Section 15(c) of the Bylaws.

The Appellants also take the position that Morris and Hannemann's prior treatment of Greene as property manager ratifies the fines that Greene endeavored to levy against the Mazells despite the fact that Section 15(c) of the Bylaws was not followed. The Appellants concede that the trial court correctly determined that there was never any Board meeting approving the hiring of a property manager nor unanimous written consent of the Board members as required under the Bylaws. [Appellants' Initial Brief p. 23]. They argue, however, that Morris and Hannemann acted as if Greene was the property manager in their direct communications with Greene and by way of her inclusion on HOA related communications and documents. [Id.]. However, as the trial court correctly found, it was McFarland, who was not a Board member, who unilaterally and without Board approval contacted Greene to see if she would serve as property manager and oversee community violations. [Order Granting in Part and Denying in Part Plaintiffs' Motion to Alter, Amend, and/or Reconsider or, Alternatively, for a New Trial, Finding of Fact Number 7; Tr. Trans. p. 302:13-25].¹⁰ Although Greene reported to and took directives McFarland and Mr. McFarland, [see id.; Tr. Trans. pp. 307:8-11, 20-25; 308:1-4; 309:12-23], and Greene assumed any directives had been voted upon by the Board or came from Mr. McFarland in his capacity as

¹⁰The Order Granting in Part and Denying in Part Plaintiffs' Motion to Alter, Amend, and/or Reconsider or, Alternatively, for a New Trial, filed March 14, 2019 amended the Order and Judgment as to Finding of Fact Number 7.

president, [see id.; Tr. Trans. pp. 305:18-25; 306:1-7], the trial court correctly found that “it is evident from the testimony and evidence that the Board of Directors never voted upon Greene’s levying of fines against homeowners. [See id.; Tr. Trans. pp. 218:22-25, 219:1; 271:7-9; Ex. 33, May 30-31, 2012 Email Correspondence between Defendants, McFarlands, Brandt P. Shelbourne, Esq., and Kathleen Greene].

Additionally, the specious argument is advanced that the trial court “does not address the contradiction between this finding and Mr. Hannemann’s testimony that he thought the property manager was only going to ‘[h]andle the bills’ and would not be involved in addressing violations of the Governing Documents.” [Id. p. 22]. The Appellants maintain that the record does not reasonably support the finding or conclusion that Morris and Hannemann did not believe that Greene not properly hired as HOA property manager and that her actions were illegitimate. [Id. p. 12]. It is further argued that the trial court’s order supports the fact that Morris and Hannemann acted in conformance with Greene’s legitimacy as property manager because Morris and Hannemann participated in special meeting was held where the homeowners voted to reduce the fine that Greene issued to the Morris. [Id. p. 24]. Again, the Appellants fail to identify the manner in which these contentions potentially change the outcome with respect to any specific relief sought that would support reversing the trial court’s judgment. The Appellants clearly believe that Hannemann’s trial testimony on the issue of Greene’s limited role as property manager was not credible. However, the Appellants articulate no rational relationship between the trial court’s supposed error in “failing to reconcile” Hannemann’s testimony with the trial court’s denial of any declaratory or injunctive relief sought. The Appellants cite no authority that supports any theory of alleged ratification that would circumvent the fact that Greene was never hired by the Board and no fines were properly levied against the Mazells in accordance with

Section 15(c) of the Bylaws. The trial court reached the correct conclusion that “Hannemann conducted a reasonable inquiry into the matter and acted reasonably and within the scope of his authority in contacting Greene and requesting that she abstain from imposing fines, as no hearing had occurred and the Board of Directors had not voted to approve the levying of fines against the Mazells.” [Order and Judgment p. 15, Conclusion of Law Number 2]. Therefore, the trial court correctly determined that “Hannemann acted in good faith and in the best interests of the HOA in attempting to enforce its Bylaws, and any fines issued thereunder, properly.” [Id.]

IV. THE TRIAL COURT CORRECTLY FOUND THAT MORRIS DID NOT EXCEED THE SCOPE OF HIS AUTHORITY OR BREACH THE STANDARD OF CARE AS A DIRECTOR OF A NONPROFIT CORPORATION BY VOTING TO APPROVE HIS LANDSCAPING PLAN

The trial court correctly held that “Morris did not exceed the scope of his authority or breach the standard of care as a director of a nonprofit corporation in casting his vote at the May 2, 2012 special Board of Directors meeting to approve his landscaping plan.” [Order and Judgment p. 15, Conclusion of Law Number 3]. The court correctly determined that S.C. Code § 33-31-831 “does not prohibit and, indeed, contemplates an interested director potentially casting a vote; therefore, Morris did not exceed the scope of his authority in actually casting the vote.” [Id.]. Additionally, the trial court was correct in finding that that “Morris acted in good faith and in the best interests of the HOA, as voting to improve the landscaping plan would allow the work to proceed and, once finished, benefit the community as a whole.” [Id. (citing S.C. Code § 33-31-831(a) (providing that “[a] conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair to the corporation at the time it was entered into . . .”)]].

As set forth in the trial court’s Order and Judgment, Section 33-31-830 of the South Carolina Nonprofit Corporation Act “sets forth the general standards of conduct for directors of

nonprofit corporations” and “settles the dispute as to whether directors of nonprofit corporations should meet the general business standards or the trustee standards.” Id.; S.C. Code Ann. § 33-31-830, Official Comment 1]. Under S.C. Code § 33-31-830(a):

A director shall discharge his duties as a director, including his duties as a member of a committee:

- (1) in good faith;
- (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (3) in a manner the director reasonably believes to be in the best interests of the corporation.

S.C. Code Ann. § 33-31-830(a). Section 33-31-830(d) further provides that “[a] director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.” S.C. Code Ann. § 33-31-830(d).

S.C. Code § 33-31-831 governs “conflict of interest” transactions which, according to the statute, are “transaction[s] in which a director of a corporation has a direct or indirect interest.”

S.C. Code Ann. § 33-31-831(a). Section 33-31-831 provides that “[a] conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair to the corporation at the time it was entered into” S.C. Code Ann. § 33-31-831(a).

The trial court noted that the Morrises made prior improvements to their home including the front staircase for which they did not receive Board approval. [See Order and Judgment p. 9, Finding of Fact Number 8; Tr. Trans. pp. 253:22-25; 254:1-8; 254:9-11]. For the staircase project, then HOA president, Mr. McFarland, directed Morris to simply write the Board and Morris complied. [See id.; Tr. Trans. p. 254:14-19; Ex. 6, April 10, 2010 Letter from Defendant Morris to President of Live Oak Village Homeowners Association]. The trial court found that Morris followed the same procedure with respect to the removal of a deceased tree from his yard several months later. [See id.; Ex. 7]. Based on these prior experiences and relying on the instructions of

Mr. McFarland, the trial court found that “Morris reasonably believed that this was the process to be followed.” [See id.; Tr. Trans. pp. 256:24-25; 257:1-3]. Moreover, the court noted that on these prior occasions, Morris received no complaints from Appellants McFarland or Holcombe, who were members of the Board of Directors at that time. [See id.; Tr. Trans. pp. 37:2-4; 38:22-25; 39:1-8; 257:16-21].

With respect to the landscaping project, Morris sent another letter to the Board regarding the removal and replacement of his existing landscape as well as the addition of lighting. [See id. pp. 9-10; Ex. 17, April 1, 2012 Letter from Defendant Morris to Board of Directors of Live Oak Village Homeowners Association; Tr. Trans. p. 261:3-12]. Thereafter, Morris proceeded with the landscaping project in the same manner as the two prior occasions involving the staircase and tree removal. [See id. p. 10; Tr. Trans. p. 260:19-22]. McFarland’s attorney at the time, Brandt Shelbourne, sent a letter to the Board of Directors stating that McFarland “is specifically concerned with what appear to be covenant violations by Mr. and Mrs. Morris. . . . While she is not necessarily opposed to them improving their landscaping, she is concerned that proper procedure was not followed . . .” [Order Granting in Part and Denying in Part Plaintiffs’ Motion to Alter, Amend, and/or Reconsider or, Alternatively, for a New Trial p. 3, Finding of Fact Number 9; Ex. 18, April 17, 2012 Letter and Email Correspondence from Brandt P. Shelbourne, Esq. to Defendants].¹¹ Two days later, Holcombe sent an email to Greene memorializing their conversation the prior day where Holcombe echoed McFarland’s complaints. [See id.; Ex. 21, April 19, 2012 Email Correspondence from Plaintiff Holcombe to Kathleen Greene and

¹¹ The Order Granting in Part and Denying in Part Plaintiffs’ Motion to Alter, Amend, and/or Reconsider or, Alternatively, for a New Trial, filed March 14, 2019 amended the Order and Judgment as to Finding of Fact Number 9.

McFarlands]. Shortly thereafter, Greene informed Morris that fines would be imposed in the amount of \$100.00 per day not to exceed \$1,000.00 for failure to obtain Board approval. [See Order and Judgment p. 10, Finding of Fact Number 10; Ex. 22, Email Correspondence from Kathleen Greene to Morris dated April 25, 2012]. The trial court noted that landscaping work at the Morrises' residence then ceased leaving the yard to look like a "barren landscape." [See Order and Judgment p. 11, Finding of Fact Number 11; Tr. Trans. p. 231:1-8]. In order to address the Appellants' concerns and follow the requested process, the Respondents noticed a special Board meeting for the purpose of approving or disapproving the Morrises' landscaping and lighting project request. [See *id.*; Ex. 24, May 2, 2012 Live Oak Village Homeowners Association Special Board of Directors Meeting Minutes; Tr. Trans. pp. 149:24-25, 150:1-6]. The trial court found that there was a quorum of Board members present consisting of Morris and Hannemann who attended the May 2, 2012 meeting and that Mr. McFarland did not appear nor participate in the meeting. [See *id.*]. The trial court found that "Morris and Hannemann voted to approve Morris' landscaping plans, believing to be acting in the best interests of the HOA and to be following the correct procedure." [See *id.*; Tr. Trans. pp. 191:10-25, 192:1, 231:17-23].

The Appellants argue that the Morrises performed impermissible landscaping work in April, 2012 for which Morris sought Board approval but admitted moving forward with the landscaping work without obtaining Board approval. [Appellants' Initial Brief pp. 15-16]. In relation to the alleged impermissible landscaping work, the Appellants argue that Morris improperly took the position that the HOA's prior failure to enforce restrictions on the performance of work and landscaping rendered any requirement that he obtain Board approval for landscaping work performed in April-May, 2012 null and void. [*Id.* p. 16]. However, the trial court's findings of fact and conclusions of law do not depend on Morris' initial performance

of landscaping work that was not Board approved nor any admission that the work was not Board approved. As set forth above, the trial court recognized that Morris began the work without Board approval but nevertheless determined that Morris neither exceeded his authority nor breached the standard of care as a director of a nonprofit corporation by casting his vote at the May 2, 2012 special Board meeting to approve the landscaping plan. [Order and Judgment p. 15, Conclusion of Law Number 3].

The Appellants further argue that the trial court's finding regarding Morris' belief as to the process to be followed for approving his landscaping project is not supported by the evidentiary record. [Appellants' Initial Brief p. 25]. Namely, the Appellants argue that the finding as to Morris' belief cannot be reconciled with the governing HOA documents providing that the HOA's failure to enforce the governing documents does not constitute a waiver of the HOA's rights. [Id. pp. 25-26]. The Appellants maintain that Morris admitted that the governing documents contradicted his position that any prior leniency associated with prior violations of governing documents absolved him of any responsibility for following the rules on future projects. [Id. p. 26]. Further, the Appellants contend that the trial court erred by overlooking the difference between Morris' prior unapproved projects moving a staircase and removing a tree with the substantial landscaping project in April-May, 2012. [Id. pp. 26-27]. Moreover, the Appellants contend that Morris mischaracterized the scope of the project by indicating the project would involve "some" landscaping. [Id. p. 27]. In sum, the Appellants contend that the trial court's order disregards the plain language of the Governing Documents, rewards Mazell's misconduct, and punishes the HOA for its prior neighborly leniency. [Id.]. Again, however, the trial court recognized that Morris began the work without Board approval but concluded that Morris neither exceeded his authority nor breached the standard of care of a director of a non-profit corporation

by voting to approve the landscaping plan. [Order and Judgment p. 15, Conclusion of Law Number 3].

The Appellants argue that Morris and Hannemann improperly voted to provide the Board's retroactive approval and that the Respondents' own expert, Capers Barr, testified that Morris had a conflict of interest in voting to approve the Morris's landscaping project. [Appellants' Initial Brief p. 16]. However, Mr. Barr testified as to the operation of the South Carolina Nonprofit Corporation Act in circumstances where a director has a conflict of interest and testified to a reasonable degree of professional certainty that Morris had the authority to vote:

The code section after the general director standard for direction is [S.C. Code § 33-31-831] that deals with director conflict of interest. Assuming for the sake of this hearing that the matter of the approval of Mr. Morris's landscaping plans were [] a transaction as contemplated by that section, that section doesn't prohibit an interested director such as Mr. Morris from casting his vote. Okay? In fact the statute actually contemplates that the interested director may cast his vote [and] the comments to the section even refer to that. And so the act of casting the vote, in my opinion, was not beyond his authority as a director. He had the authority to vote.

[See Tr. Trans. 351:8-18.]. The trial court specifically acknowledged this aspect of the South Carolina Nonprofit Corporation Act by holding consistent with Mr. Barr's testimony that "Morris did not exceed the scope of his authority or breach the standard of care as a director of a nonprofit corporation in casting his vote at the May 2, 2012 special Board of Directors meeting to approve his landscaping plan." [Order and Judgment p. 15, Conclusion of Law Number 3 (emphasis added)]. The court correctly determined that S.C. Code § 33-31-831 "does not prohibit and, indeed, contemplates an interested director potentially casting a vote; therefore, Morris did not exceed the scope of his authority in actually casting the vote." [Id. (emphasis added)]. The trial court correctly held that "Morris acted in good faith and in the best interests of the HOA, as voting to improve the landscaping plan would allow the work to proceed and, once finished, benefit the community as a whole." [Id. (citing S.C. Code § 33-31-831(a) (providing that "[a] conflict of

interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair to the corporation at the time it was entered into . . .”) (emphasis added)].

The Appellants further argue that the trial court’s finding that the Appellants’ complaints led to work stopping on the Mazzells’ landscaping project leaving the yard a “barren landscape” is not supported by the evidentiary record. [Appellants’ Initial Brief p. 28]. The Appellants reference Finding of Fact Number 9 where the trial court found that Holcombe sent an email to Greene on April 19, 2012 echoing McFarland’s complaints in which he indicated that the backhoe had been present for over a week, [see id.]; that Morris sent an email to Greene on April 22, 2012 apologizing for the appearance of his yard indicating that the landscaping project had been delayed due to a death in the family, [see id., pp. 28-29]; that Morris testified that he did not recall any delay in the project caused by a letter from the McFarlands’ counsel, [see id., p. 29];¹² that the trial court incorrectly referred to the special meeting as one to address the “requested” approval process because the process is “required” under the Bylaws, [see id.]; that notice of the May 2, 2012 meeting was not sent to Mr. McFarland’s proper address, [see id., p. 30];¹³ that the proceedings were out of proper order and tainted by conflict of interest and self-dealing, [see id.]; and an email exchange between the McFarlands’ counsel, Mr. Shelbourne, and Morris and Hannemann regarding a prohibition against a conflict of interest vote “illustrates the problem for which the Appellants seek declaratory relief.”; [see id., pp. 30-31]. The Appellants’ references to each of these issues in their argument on appeal do not set forth any clear bases for reversal. Rather, the

¹² The Appellants cite the trial transcript where there is no reference to this issue for this the proposition asserted. [See Appellants’ Initial Brief p. 29 (referencing Tr. Trans. p. 300:4-20)].

¹³ The Appellants cite the trial transcript where there is no reference to this issue for this the proposition asserted. [See Appellants’ Initial Brief p. 30 (referencing Tr. Trans. pp. 159:3-160:6)].

Appellants argue that the trial court's finding that Morris and Hannemann believed they were following proper procedure is (1) unsupported by the evidentiary record and (2) ultimately irrelevant particularly as to procedure. [See *id.*]. In sum, as the Appellants expressly state, these issues pertain to the alleged "mindset that led to the HOA/Board dysfunction that is at the heart of the Declaratory Judgment Claim." [See *id.* p. 31]. Returning to the actual declarations sought, the trial court correctly found that neither Morris nor Hannemann exceeded the scope of their authority or breached the standard of care in voting to approve the Morrises' landscaping plan. [Order and Judgment p. 15, Conclusion of Law Number 3; *id.* p. 16, Conclusion of Law Number 4]. Rather, the Board properly noticed and voted to approve the project. [See Order and Judgment p. 11, Finding of Fact Number 11].

V. THE TRIAL COURT CORRECTLY FOUND THAT HANNEMANN DID NOT EXCEED THE SCOPE OF HIS AUTHORITY OR BREACH THE STANDARD OF CARE FOR DIRECTORS OF NONPROFIT CORPORATIONS IN VOTING TO APPROVE MORRIS' LANDSCAPING PLAN

The trial court correctly held that "Hannemann did not exceed the scope of his authority or breach the standard of care for directors of nonprofit corporations in voting to approve Morris' landscaping plans, as Hannemann had no interest in the transaction." [Order and Judgment p. 16, Conclusion of Law Number 4]. The trial court further correctly determined that "Hannemann's voting to approve the landscaping plans was done in good faith and in the best interests of the HOA . . ." [Id.].

As with the claim directed to Morris, the Appellants contend that Hannemann improperly voted to approve the Morris's landscaping project retroactively. [Appellants' Initial Brief p. 16]. However, as set forth, *supra*, the trial court correctly determined that the vote was proper. [See Order and Judgment p. 11, Finding of Fact Number 11 (finding a quorum of Board members

present for the May 2, 2012 meeting consisting of Morris and Hannemann where “Morris and Hannemann voted to approve Morris’ landscaping plans, believing to be acting in the best interests of the HOA and to be following the correct procedure.”; see also Tr. Trans. pp. 191:10-25, 192:1, 231:17-23]. Further, the trial court correctly determined that Hannemann had no interest in the transaction and neither exceeded the scope of his authority nor breached the standard of care as a director of the HOA by voting to approve Morris’ landscaping plans. [Order and Judgment p. 16, Conclusion of Law Number 4].

VI. THE TRIAL COURT CORRECTLY FOUND THAT MORRIS AND HANNEMANN DID NOT EXCEED THE SCOPE OF THEIR AUTHORITY OR BREACH THE STANDARD OF CARE IN VOTING TO REDUCE THE FINE LEVIED AGAINST THE MORRISES

The trial court correctly held that Morris and Hannemann “did not exceed the scope of their authority or breach the standard of care for directors of nonprofit corporations in voting to reduce the fine levied against the Morrises from \$1,000.00 to \$100.00.” [Order and Judgment p. 16, Conclusion of Law Number 5]. As the trial court found, Section 15(c) of the Bylaws requires the following:

- (1) A written demand to cease and desist from an alleged violation served upon the owner by the Board providing a time period of not less than ten days during which the violation may be abated without penalty;
- (2) If the violation continues past the period allowed in the demand for abatement without penalty, or if the same violation subsequently occurs, written notice of a hearing served upon the homeowner by the Board; and
- (3) A hearing held in executive session by the Board pursuant to the notice in which the alleged violator is given a reasonable opportunity to be heard prior to the enforcement of any sanction.

[Id. pp. 10-11, Finding of Fact Number 10; Ex. 3, Bylaws of Live Oak Village Homeowners Association]. The trial court correctly determined that the Board never voted to impose any

finer on the Morrises and no hearing for the purpose of imposing such fines in accordance with Section 15(c) of the Bylaws was ever held. [See *id.* p. 11; Tr. Trans. p. 271:7-11]. Rather, three owners/HOA members--the Cummings, Knights, and Mazells--requested a special homeowners' meeting that was ultimately held on May 31, 2012. [See *id.* pp. 11-12, Finding of Fact Number 12; Ex. 27, May 8, 2012 Letter from Defendants, Norbert Cummings, Michael Mazell, and Michael Knight to Plaintiff Holcombe and William McFarland; Ex. 30, May 19, 2012 Letter from Defendants, Norbert Cummings, Michael Mazell, and Michael Knight to Plaintiff Holcombe and William McFarland; *see id.* p. 12, Finding of Fact Number 13; Ex. 36, Draft HOA Special Homeowners Meeting Minutes]. Thus, the trial court correctly found that the vote to approve the amount of the fine levied against the Morrises took place at a special homeowners' meeting and not a Board meeting. [See *id.* p. 16, Conclusion of Law Number 5]. The trial court further correctly found that "[t]he vote was not made in Defendants' respective capacities as members of the Board of Directors and, therefore, Defendants were not discharging their duties as directors." [See *id.*].

The Appellants again argue that the trial court's reference to Section 15(c) of the Bylaws ignores the fact that the Board had become dysfunctional because Morris and Hannemann had aligned themselves against Mr. MacFarland. [Appellants' Initial Brief p. 27]. However, the trial court's order applies the Bylaws to the facts presented and correctly determines that the fine that Greene sought to impose against the Morrises was not Board approved and did not follow the procedure required under Section 15(c) of the Bylaws. [Order and Judgment p. 16, Conclusion of Law Number 5]. The Appellants argue that it would have been impossible for Morris and Hannemann to take action against Morris because the HOA's procedures beginning with a written cease and desist letter could not be followed where Morris' violation was already full and complete.

[See Appellants' Initial Brief p. 28]. However, the vote as to the fine imposed on the Morrises was again a vote of the homeowners at a properly noticed meeting requested by homeowners other than Morris and Hannemann. [See Order and Judgment pp. 11-12, Finding of Fact Number 12, Finding of Fact Number 13]. Although the Appellants seek to avoid the outcome of the special meeting at which the fine against the Morrises was imposed as a result of the homeowners' majority vote, the trial court correctly found that the vote to approve the amount of the fine levied against the Morrises took place at a special homeowners' meeting and not a Board meeting. [See *id.* p. 16, Conclusion of Law Number 5]. The trial court correctly held that Morris and Hannemann "did not exceed the scope of their authority or breach the standard of care for directors of nonprofit corporations in voting to reduce the fine levied against the Morrises." [*Id.*].

VII. MORRIS AND HANNEMANN DID NOT EXCEED THE SCOPE OF THEIR AUTHORITY OR BREACH THE STANDARD OF CARE FOR DIRECTORS OF NONPROFIT CORPORATIONS WITH RESPECT TO THEIR HANDLING OF THE MAZELLS' ANNUAL HOA DUES

The trial court correctly found that "Hannemann did not exceed the scope of his authority in the handling of the Mazells' dues check, nor did he breach the standard of care of directors of nonprofit corporations." [Order and Judgment p. 16, Conclusion of Law Number 6]. Rather, "Hannemann acted in good faith and in the best interests of the HOA in assisting another homeowner in turning in their annual dues to the HOA." [*Id.*]. The trial court correctly found that "Morris did not exceed the scope of his authority or breach the standard of care of directors of nonprofit corporations in purchasing a cashier's check in the event the Mazells' annual dues payment was not received on time." [*Id.*]. Further, the trial court correctly determined that "Morris was not acting within the scope of his capacity as a director or officer of the HOA and, rather, was acting in his capacity as a neighbor, friend, and fellow member of the HOA." [*Id.*].

The Appellants argue, in sum, that Morris and Hannemann's involvement in the Mazells' 2012 annual assessment was "odd." [See Appellants' Initial Brief p. 18]. The Appellants argue that the Mazells gave Hannemann a personal check for their assessment that the Appellants contend Hannemann held for an inordinate amount of time. [See *id.*]. The Appellants further contend that Hannemann sent the check to the wrong mailbox for Mr. McFarland and then accused the McFarlands of improprieties associated with the check. [See *id.*]. The Appellants also take issue with the fact that Morris brought a cashier's check to a Board meeting attended by Morris and Hannemann in case it was needed that was also attended by Mr. Mazell despite the fact that he could not vote at which meeting Mr. McFarland was voted out as HOA president and Hannemann was voted in as HOA president. [See *id.* pp. 17-18]. However, the Appellants do not state the manner in which any of the alleged issues raised with respect to the Mazells' payment of HOA dues constitutes reversible error in relation to the relief sought.

The trial court found that Mr. Mazell was hospitalized recovering from a serious staph infection in June, 2012. [See Order and Judgment p. 13, Finding of Fact Number 16, Tr. Trans. p. 193:2-5]. Hannemann and his wife went to visit Mr. Mazell in the hospital where Mrs. Mazell gave Hannemann their 2012 annual HOA dues check. [See *id.*; Tr. Trans. pp. 192:24-25, 193:1, 6-8]. Thereafter, Hanneman sent the Mazells' check to the HOA's mailbox which could not be delivered due to the absence of any physical address so the certified mailing was returned to the post office from and Mazell had to retrieve the envelope and check because he was the addressee, who then gave it back to Hannemann, who then sent the check to McFarland. [See *id.*; pp. 193:12-17; 194:4-18; Ex. 40]. Therefore, as the trial court found, in the event the Mazells' check was not received by McFarland, Morris "acting as a "good neighbor" and not in his capacity as a member of the Board of Directors—purchased a cashier's check to give to William McFarland to cover

the Mazell's dues payments." [See *id.*; Ex. 60, Oct. 4, 2012 Live Oak Village Homeowners Association Special Board of Director Meeting Minutes; Tr. Trans. p. 281:23-25].¹⁴

VIII. THE TRIAL COURT CORRECTLY DETERMINED THAT MORRIS AND HANNEMANN ACTED WITHIN THE SCOPE OF THEIR AUTHORITY AS MEMBERS OF THE BOARD AND OFFICERS OF THE HOA AND COMMITTED NO BREACH OF THE STANDARD OF CARE OF DIRECTORS OF NONPROFIT CORPORATIONS

As set forth above, the trial court correctly held that Morris and Hannemann "did not exceed the scope of their authority as members of the HOA's Board of Directors and as officers of the HOA" and "committed no act or omission that breached the standard of care of directors of nonprofit corporations pursuant to S.C. Code Ann. § 33-31-830." [Order and Judgment p. 15, Conclusion of Law Number 1]. The Appellants argue that Morris and Hannemann acted out of bad faith, dishonesty, or incompetence and, therefore, their decisions as directors should be set aside because they are *ultra vires*. [See Appellants' Initial Brief p. 40]. "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors

¹⁴ The trial court correctly found that Morris and Hannemann properly noticed a special Board meeting that was held on October 4, 2012, with the sole purpose of electing new officers. [See Order and Judgment p. 14, Finding of Fact Number 19; Ex. 56, Letter Hannemann to Mr. McFarland regarding special meeting of the Board on October 4, 2012; Ex. 3 Bylaws of Live Oak Village Homeowners Association at § 5(b)]. A quorum was present and the actions voted on and approved by the quorum of directors present constituted a duly authorized action of the Board of Directors. [See *id.*; Ex. 3, Bylaws of Live Oak Village Homeowners Association at § 5(c)]. As such, the trial court correctly found that Hannemann was properly elected to serve as President and Treasurer as a result of the meeting. [See *id.*]. The Appellants dispute the validity of the October 4, 2012 special Board meeting and the actions taken at the meeting arguing that notice was mailed to Mr. McFarland on October 1, 2012 and three full days would not have transpired until October 5, 2012. [See Appellants' Initial Brief p. 20 fn. 40]. However, the trial court correctly determined that the October 4, 2012 Board meeting was properly noticed and, because a quorum was present, the actions voted and approved upon by the Board constituted the duly authorized actions of the Board. [See Order and Judgment p. 14, Finding of Fact Number 19; *id.* pp. 14-15, Finding of Fact Number 20, Ex. 60, Oct. 4, 2012 Live Oak Village Homeowners Association Special Board of Director Meeting Minutes].

should be judged by the ‘business judgment rule’ and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action.” Goddard v. Fairways Dev. Gen. P’ship, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct.App. 1993) (citing 4 S.C.Juris. *Condominiums* § 42 (1991); Dockside Ass’n, Inc. v. Detyens, 291 S.C. 214, 352 S.E.2d 714 (Ct.App.1987), aff’d, 294 S.C. 86, 362 S.E.2d 874 (1987)). “A court should be reluctant to question action taken *intra vires* by the governing board of a non-profit corporation.” Id. (citing Papalexiou v. Tower West Condominium, 167 N.J.Super. 516, 401 A.2d 280, 286 (Chanc.Div.1979) (“[i]f the corporate directors’ conduct is authorized, a showing must be made of fraud, self-dealing or unconscionable conduct to justify judicial review.”). “This is especially true where the action taken by the governing board of a non-profit corporation requires the board’s business judgment.” Id. “In such instances, the governing board is entitled to have the validity of its *intra vires* action tested by the ‘business judgment’ rule.” Id. (citation omitted). “Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.” Id. at 217, 352 S.E.2d 714 at 716 (citing H. Henn, *Law of Corporations*, § 242 at 482-83 (2d. ed. 1970)). The burden is on the alleged aggrieved party to demonstrate the board’s lack of good faith. See id.

The Appellants make the broad assertion that the record contradicts every conclusion of law and is “replete with evidence of the Defendants’ dereliction of their duties of care and honesty in favor of bad faith, self-dealing, incompetence, and dishonesty. . .” [See Appellants’ Initial Brief p. 41]. However, the Appellants do not meet their burden of establishing that Morris or Hannemann made any Board decisions that were in bad faith, dishonest, or incompetent. See Goddard, 310 S.C. at 414, 426 S.E.2d at 832. The Appellants argue that Hannemann’s trial

testimony regarding Greene's service as property manager demonstrates dishonesty. [See Appellants' Initial Brief p. 42]. Further, the Appellants argue that Morris and Hannemann acted in bad faith by disregarding evidence that the alleged tenant had returned to the Mazells' residence for a second time. [See id.]. The Appellants argue that the HOA Governing Documents must be followed as no "reasonable alternative" is permitted. [See id.] As such, the Appellants contend that Morris violated the Governing Documents with his April, 2012 landscaping project contending that the trial court's order excuses Morris' violation on the basis of reasonableness which proves that Morris violated the applicable legal standard. [See id.]. Finally, the Appellants argue that breach of the applicable legal standard along with bad faith, self-dealing, incompetence, and dishonesty is evidenced by Morris and Hannemann's efforts to "use their positions on the Board, not to promote the HOA's interest in ridding the community of violations of the Governing Documents, but to rid themselves of the nuisance of following the Governing Documents whenever it did not suit them." [See id.].

Again, however, the Appellants fail set forth their bases for reversible error in this regard with any specificity in contrast to the trial court's well reasoned findings of fact and conclusions of law. As set forth above, at every turn where the Appellants argue that either Morris or Hannemann acted improperly and outside the scope of their authority as Board members, the trial court found despite the Appellants' arguments that all of Morris and Hannemann's actions were proper. As such, the trial court correctly determined that all of Morris and Hannemann's decisions were *intra vires* decisions as members of the Board and they neither acted improperly nor exceeded the scope of their authority as members of the Board or officers of the HOA.

IX. THE TRIAL COURT CORRECTLY FOUND IN ADDITION TO THE ABSENCE OF ANY ACT OR OMISSION BY MORRIS AND HANNEMANN OUTSIDE THE SCOPE OF THEIR AUTHORITY THAT

THE APPELLANTS' EQUITABLE INJUNCTION CLAIMS WERE BARRED BY UNCLEAR HANDS

Finally, the trial court correctly found that that even if Morris or Hannemann acted improperly and outside the scope of the authority, the court determined upon a balancing of the equities that the Appellants are not entitled to the injunctive relief sought. [See Order and Judgment, p. 7, Conclusion of Rule Number 7]. As set forth in the Order and Judgment, “[i]n evaluating a request for an injunction, the equities of both sides are to be considered, and each case must be decided on its own particular facts through a balancing of the equities.” Siau v. Kassel, 369 S.C. 631, 641, 632 S.E.2d 888, 893 (Ct.App. 2006) (rev’d on other grounds); see also Anderson v. Buonforte, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005) (“[w]hen [the] court is sitting in equity . . . [it is] to consider the equities of both sides, balancing the two to determine what, if any, relief to give.”); Foreman v. Foreman, 280 S.C. 461, 464-65, 313 S.E.2d 312, 314 (Ct.App. 1984) (stating that the court has long recognized that in deciding whether to award equitable relief, “the equities on both sides must be taken into account.”). “The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant.” First Union Nat’l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App. 1998).

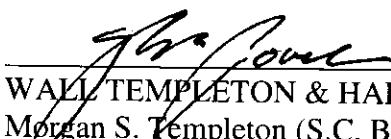
Here, the trial court properly found that neither McFarland nor Holcombe are entitled to injunctive relief. The trial court found that McFarland has unclean hands by virtue of acting as an officer or director and directing Greene to act without approval of the board. [See Order and Judgment p. 17; Tr. Trans. pp. 302:13-25; 307:8-11, 20-25; 308:1-4; 309:12-23]. The trial court found that Holcombe has unclean hands because he loaned the HOA money for attorney’s fees associated with the litigation of this matter and planned a special assessment to the homeowners

for reimbursement without a vote of either the Board or the homeowners. [See id.; Tr. Trans. pp. 81:22-25; 82:1-6]. As such, the trial court properly found that the Appellants actions violated the very Covenants and Bylaws for which they assert violations by Morris and Hannemann. [See id.]. Therefore, the trial court correctly found as an alternative basis for denying any equitable relief sought that the Appellants' claims are barred by the doctrine of unclean hands.

CONCLUSION

Wherefore, based on the arguments and authorities set forth herein, Respondents Morris and Hannemann respectfully request that this Court dismiss this appeal or, in the alternative, that this Court affirm the trial court decision in favor of the Respondents, and that this Court issue an award of all attorneys' fees and costs and for such other and further relief as this Court deems just and proper.

Dated this 22nd day of August, 2019.


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August 22, 2019

Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Live Oak Village Homeowners' Association, Inc., et al. vs. Thomas Morris and David Hannemann, et al.*
Case No.: 2015-000599
Claim No.: 72-3238-2012


Dear Ms. Kitchings:

Please find enclosed an original and one copy of Initial Brief of Respondents, Thomas Morris and David Hannemann, Designation of Matter to be Included in the Record on Appeal, and Proof of Service in the above referenced matter. Please file the originals and return filed copies to me in the envelope enclosed. By copy of this letter to counsel for the Appellants, I am serving them with the enclosed.

Thank you for your time and attention to this matter.

Sincerely,

WALL TEMPLETON & HALDRUP, P.A.


Graham P. Powell

RECEIVED

AUG 27 2019

SC Court of Appeals

GPP/sds
Enclosures
cc: Russell G. Hines

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Maite Murphy, Circuit Court Judge

RECEIVED
AUG 27 2019
SC Court of Appeals

Case No. 2012-CP-18-02583

Jennifer McFarland and Carlton Holcombe,

Appellants,

v.

Thomas Morris and David Hannemann,


Respondents.

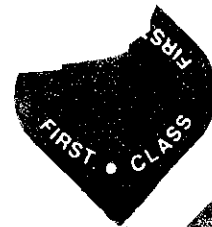
PROOF OF SERVICE

I certify that I have served Initial Brief of Respondents Thomas Morris and David Hannemann and Designation of Matter to be Included in the Record on Appeal of Respondents Thomas Morris and David Hannemann on counsel for Appellants, Russell G. Hines, Young Clement Rivers, LLP, 25 Calhoun Street, Suite 400, Charleston, South Carolina 29401 by depositing same in U.S. Mail this date.

Dated this 22nd day of August, 2019.

By:


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