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.

AMENDED FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Appellant, Raymond Wedlake, is a homeowner in the Woodington Subdivision and is a member of the Woodington Homeowners' Association, Inc. (the "Association"), a nonprofit corporation. (R. p. 7)[1]. On October 5, 2017, Appellant filed this lawsuit, primarily relating to various corporate governance matters, legal principles applicable to nonprofit corporations and their directors, and interpretation of the bylaws of the Association. (R. pp. 19-34). In response to the Complaint, on November 6, 2017, Respondents filed a Motion to Dismiss, and Alternatively to Strike and For a More Definite Statement. (R. pp. 117-122). On the same date, Association Management Group SC, Inc. ("AMG") also filed a Motion to Dismiss, and Alternatively to Strike and For a More Definite Statement. (R. pp. 112-116). Prior to a hearing on the Motions to Dismiss, and Alternatively to Strike and For a More Definite Statement, Appellant and AMG reached a settlement. On January 3, 2018, the Honorable Robin B. Stillwell, Circuit Court Judge, approved the settlement between Appellant and AMG and an Order approving the settlement was filed on January 23, 2018. (R. pp. 1-3). Pursuant to the Order approving the settlement between Appellant and AMG, AMG was dismissed from the action with prejudice. (R. p. 2). Also on January 3, 2018, the Honorable Robin B. Stillwell heard the Motion to Dismiss and Alternately to Strike and For a More Definite Statement of Respondents, Benjamin Acord, William Craigo, Denis Esteve and Brian James. (R. p. 4). The Respondents' motion was denied and an order denying the motion was filed on January 23, 2018. (R. pp. 4-6). As a result of the denial of their motion, the Respondents served an Answer to the Complaint, which was filed on January 18, 2018. (R. pp. 99-111).

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

Prior to trial, Appellants and Respondents stipulated to the issues for trial and filed a Stipulation of Issues For Trial on March 29, 2018. (R. pp. 178-179). Per the Stipulation of Issues for Trial, the stipulated issues were as follows:

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

1. *Plaintiff seeks a declaratory judgment and declaratory relief as follows:*
    a. *A declaration that the Board of the Woodington Homeowners' Association, Inc. (the **"Association"**) must comply with, and enforce in accordance with their terms, the Association's bylaws.*
    b. *That the court construe the Bylaws of the Association and declare that the bylaws place a duty on the Board of Directors to fill a vacancy on the Board of Directors and the Board of Directors must make reasonable efforts to do so.*
    c. *That the court construe the Bylaws of the Association and declare that the bylaws require a majority of all members to both enter into, and to renew, a management contract.*
    d. *That the court construe the Bylaws of the Association and declare that the bylaws do not permit a Director to remain beyond a five-year term, and in any event, for not more than one additional year beyond such five-year period.*
    e. *That the court declare that the Bylaws of the Association do not permit delegation of the role or authority of the Board.*

f. That the court construe the Bylaws of the Association and declare that the Bylaws require the Board of Directors to send out a ballot to the membership for voting if a proposed amendment to the Bylaws is submitted by an eligible member.

2. *Plaintiff seeks an award of Nominal Damages against defendants.*
3. *Plaintiff seeks an award of court costs and legal fees if such costs and fees are paid by the Association's insurance carrier.*
4. *Defendants Benjamin Acord, William Craigo, Denis Esteve, and Brian James (collectively, **"Defendants"**) preserve all defenses to Plaintiff's claims and nothing herein shall be construed to infer a waiver of any defenses by Defendants or that Defendants in any way stipulate that the matters raised by Plaintiff or the relief sought by Plaintiff are proper matters before the Court or proper matters to be heard by the Court.*

(R. pp. 178-179). On April 20, 2018, a nonjury/bench trial was held before the Honorable Charles B. Simmons, Jr., Greenville County Master in Equity. (R. p. 7). Appellant was the Plaintiff, and at the close of Appellant's case, the Honorable Charles B. Simmons, Jr. granted involuntary nonsuit in favor of Respondents pursuant to Rule 41(b), SCRCP, and an Order of Judgment was filed on May 29, 2018. (R. pp. 7-17). Appellant now appeals the Order of Judgment filed on May 29, 2018.

STATEMENT OF FACTS

At the outset, Respondents would raise issues with Appellant's Statement of Facts. First, Respondents assert that Appellant's Statement of Facts (as stated in Appellant's Initial Brief) and Appellant's Administrative History materially fail to comply with Rule 208, SCACR by failing

to contain appropriate references to the record. Rule 208(b)(4), SCACR requires that a brief contain references to materials which may be properly included in the Record on Appeal to support the salient facts alleged. Rule 208(b)(4), SCACR further provides that "[i]n the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced; e.g., Answer p.7, Motion for Judgment p.2, Transcript p. 231." Appellant just generically appears to provide that the Statement of Facts is based on "Appellant's e-filed verified Complaint, and Exhibits and Affidavits made part thereof, along with the Pre-Trial brief." Appellant's Statement of Facts fails to include references to the record meeting the detail and requirements mandated by Rule 208(b)(4), SCACR. Likewise, Appellant's Administrative History generally suffers from the same failure to abide by the requirements of Rule 208(b)(4), SCACR. In fact, this theme continues throughout much of Appellant's brief. Appellant's failure to comply with Rule 208(b)(4), SCACR results in prejudice to Respondents in formulating a response. It is somewhat difficult for Respondents to fully know and understand what information or records are being relied upon to support some of the statements in Appellant's brief, due to the insufficient references to the record. Likewise, Respondents would raise issue with Appellant's reference throughout much of his brief to pleadings, pretrial affidavits, pretrial submissions, or other information which was not admitted into evidence at trial, to try to establish a factual basis for his claims of error in the trial court's Order of Judgment. Respondents would respectfully assert that review of the trial court's Order of Judgment and the propriety of the rulings therein must be based on the evidence actually admitted at trial and properly before the trial court at trial.

Further, Respondents would also take this opportunity correct a misstatement contained in the Administrative History set forth in Appellant's brief and also elsewhere in Appellant's

brief. Appellant's brief asserts that the document pre-marked as Plaintiff's Exhibit 4 was a copy of what Appellant purported to be the Bylaws of the Woodington Homeowners' Association, Inc. Although the Exhibit Index to the trial transcript suggests that Exhibit P-4 was "Bylaws of Woodington Home Association Revision 3 dated August 15, 2012", an examination of the official exhibits obtained from the trial court reporter reveals that Exhibit P-4 is actually a March 26, 2018, letter written by Raymond Wedlake, and not what Appellant purports to be the Bylaws of the Association. (R. pp. 349-352). Thus, there is simply a typographical error in the Exhibit Index. In fact, an examination of the official exhibits obtained from the trial court reporter reveals that none of the exhibits pre-marked by Appellant are actually anything that Appellant could purport to be a complete copy the Bylaws of the Association. (R. pp. 328-381).

Respondents will set forth and cite to the relevant facts in in their discussion of each argument.

STANDARD OF REVIEW

Appellant's brief asserts that upon review, this Court must review all evidence and all inferences in the light most favorable to Appellant, the party who opposed the motion for involuntary nonsuit. However, such standard is inapplicable to the granting of dismissal under Rule 41(b), SCRCP, after the close of Appellant/Plaintiff's case in this matter. The correct standard is set forth below.

Initially, it must be determined whether this action is an action at law or an action in equity. As evidenced by the stipulated issues for trial,[2] Appellant's action is primarily one for declaratory judgment to construe the Bylaws of the Association. "A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Felts v. Richland Cty., 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991). A Declaratory judgment action

[2] Set forth supra.

to construe a contract is an action at law. Id.; W. Anderson Water Dist. v. City of Anderson, 417 S.C. 496, 502, 790 S.E.2d 204, 207 (Ct. App. 2016). See also, Duncan v. Little, 384 S.C. 420, 424, 682 S.E.2d 788, 790 (2009) ("An action to construe a contract is an action at law."). Bylaws are construed in the same manner as a contract. Shuler v. Tri-Cty. Elec. Co-op., Inc., 374 S.C. 516, 523, 649 S.E.2d 98, 101 (Ct. App. 2007), aff'd, 385 S.C. 470, 684 S.E.2d 765 (2009). Therefore, since this action is primarily to construe a contract, it is an action at law.

As noted above, this case was an action tried by the trial court without a jury, and the trial court granted judgment in favor of Respondents pursuant to Rule 41(b), SCRCP, after the Appellant/Plaintiff completed presentation of his evidence. (R. pp. 7-17). Rule 41(b), SCRCP, provides in relevant part:

> After the plaintiff in an action tried by the court without a jury has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.
>
> The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all evidence.

"Under Rule 41 in a nonjury trial, the trial judge clearly may dismiss the action even though the plaintiff may have established a *prima facie* case." Johnson v. J.P. Stevens & Co., 308 S.C. 116, 118, 417 S.E.2d 527, 529 (1992). "Rule 41(b) allows the judge as the trier of facts to weigh the evidence, determine the facts and render a judgment against the plaintiff at the close of his case if justified." Id. See also, Waterpointe I Prop. Owner's Ass'n, Inc. v. Paragon, Inc., 342 S.C. 454, 458, 536 S.E.2d 878, 880 (Ct. App. 2000). Rule 41(b) does not require the trial judge to view the evidence in the light most favorable to the party resisting the motion. See Johnson, 308 S.C. at 118, 417 S.E.2d at 528. Therefore, Appellant's appeal is from the trial court's findings of fact as a judge in a non-jury action at law. Waterpointe I Prop. Owner's Ass'n, Inc. v. Paragon, Inc., 342

S.C. at 458, 536 S.E.2d at 880. "In an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings." Duncan, 384 S.C. at 425; 682 S.E.2d at 790. See also, Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773 (1976); Jordan v. Judy, 413 S.C. 341, 347-348, 776 S.E.2d 96, 100 (Ct. App. 2015) ("On appeal of an action at law tried without a jury, we will not disturb the trial court's findings of fact unless no evidence reasonably supports the findings."). "The trial court's factual findings in a law action are equivalent to a jury's findings" and "[q]uestions regarding credibility and the weight of the evidence are exclusively for the trial court." Jordan, 413 S.C. at 348, 776 S.E.2d at 100. The appellate court may not consider the case based on its view of the preponderance of the evidence, "but must construe the evidence presented to the [trial court] so as to support [its] decision whenever reasonably possible." Id. The appellate court "must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." Id.

ARGUMENTS

I. THE TRIAL JUDGE DID NOT ERR IN REFUSING TO ADMIT INTO EVIDENCE ANY DOCUMENTS PRE-MARKED AS EXIBITS FOR IDENTIFICATION BY PLAINTIFF, AND EVEN IF THERE WAS ANY ERROR, IT WOULD BE HARMLESS ERROR

Appellant asserts that the trial judge erred by refusing to allow Appellant/Plaintiff to admit into evidence all of the records that Appellant/Plaintiff had pre-marked for identification prior to the start of the trial. Respondent disagrees and asserts that no error occurred, and even if there had been any error, such error would be harmless.

Prior to the start of the trial, Judge Simmons required the parties to pre-mark for identification any records that may be referred to during trial or that may be moved into evidence during the trial. Presumably, this was to expedite the trial process. Therefore, Plaintiff pre-

marked eleven exhibits denoted as Plaintiff's Exhibits 1 through 11, inclusive. (R. p. 231; R. pp. 328-381). However, the parties didn't stipulate to the admissibility of any records or other evidence. At trial, Raymond Wedlake was presented as Appellant/Plaintiff's sole witness. (R. p. 235, line 2-p. 323, line 16). During direct examination of Mr. Wedlake, counsel for Appellant/Plaintiff acknowledged to the Court that he had been reluctant to provide exhibits because he had not numbered them. (R. p. 267, lines 9-17). After counsel for Appellant had rested his direct examination of Mr. Wedlake, a colloquy took place with the Court regarding the exhibits admitted into evidence. (R. p. 269, line 6-p. 270, line 22). At that time, counsel for Respondents sought clarification from the Court regarding the exhibits actually admitted into evidence and the following colloquy transpired:

> MR. GROTE: Your Honor, before I proceed, I guess I have a quick clarification. I'm a little bit unclear on what exactly they've admitted into evidence. They've marked several things. I think they referenced maybe two of them, but it doesn't appear to me that they moved ---
> THE COURT: The only -- there have been two documents referenced, so I don't know, absence some stipulation that all the exhibits are in, then I think only two documents are in evidence.
> MR. GIBSON: Well, if Mr. Grote would permit, I'd ask him to stipulate that they would all be in evidence.
> MR. GROTE: I haven't really had an opportunity to review those. I think it's his obligation to admit his exhibits. At this point, Your Honor, ---
> THE COURT: If you're objecting, then the only two documents that are in are Plaintiff's 5 and Plaintiff's 10.
> MR. GIBSON: Your Honor, if I could ---
> THE COURT: I'm sorry. I need you to be standing up when you're addressing the Court under the Rules of Civil Procedure.
> MR. GIBSON: Yes, Your Honor. I apologize, Your Honor. Would this be an appropriate time to try to submit them in chronological order?
> MR. GROTE: I think he's rested his questions at this point.
> THE COURT: In light of Mr. Grote's objection, I have

22 no option but to sustain the objection.

(R. p. 269, line 21-p. 270, line 22). As can be seen from the foregoing passage of the trial transcript, counsel for Appellant did not move to re-open direct examination of Mr. Wedlake at that time. Thereafter, counsel for respondents sought a ruling from the trial court regarding leave to call Mr. Wedlake as a witness in Respondents' case in chief and reserving all of Respondents' questions for Mr. Wedlake until that time, including a ruling concerning the ability to use leading questions if the questioning of Mr. Wedlake by Respondents' counsel was reserved until Respondents' case in chief. (R. p. 270, line 23-p. 271, line 17). Ultimately, Judge Simmons, as the trial judge, indicated that he likely would not allow leading questions by Respondents' counsel if Respondents reserved their questions and called Mr. Wedlake as a witness in Respondents' case in chief. (R. p. 270, line 23-p. 271, line 17). Therefore, Respondents' counsel chose to proceed with cross-examination of Mr. Wedlake. (R. p. 271, line 15-p. 320, line 3). Thereafter, counsel for Appellant was given an opportunity to conduct re-direct examination of Mr. Wedlake and did in fact do so. (R. p. 320, line 4-p. 323, line 8). Despite being given the opportunity to conduct re-direct examination, counsel for Appellant did not seek to admit into evidence any additional records during re-direct, including any pre-marked exhibits that he failed admit into evidence during direct examination of Mr. Wedlake. (R. p. 320, line 4-p. 323, line 8). Thereafter, Respondents' counsel did not ask any further questions of Mr. Wedlake and Mr. Wedlake was allowed to step down from the witness stand. (R. p. 323, lines 9-14). Appellant/Plaintiff did not present any further witnesses and rested his case. (R. p. 323, lines 15-16). The trial court then entertained motions, leading to the granting of involuntary nonsuit under Rule 41(b), SCRCP. (R. p. 323, line 17-p. 326, line 20). During the colloquy, the trial court acknowledged that the Bylaws of the Association had not been admitted into evidence. (R. p.

323, lines 19-24). During the colloquy, Appellant/Plaintiff's counsel never asked the trial court to re-open Appellant's case. (R. p. 324, lines 11-17). Further, Appellant did not make any post-trial motions.

"The admission or exclusion of evidence is within the sound discretion of the trial court and the trial court's decision will not be disturbed on appeal absent an abuse of discretion." Conner v. City of Forest Acres, 363 S.C. 460, 467, 611 S.E.2d 905, 908 (2005). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support." Id. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, *i.e.,* there is a reasonable probability the jury's verdict was influenced by the wrongly admitted or excluded evidence." Id.

During Appellant's counsel's direct examination of Mr. Wedlake, only two exhibits were referenced and deemed admitted into evidence – Plaintiff's Exhibits 5 and 10. (R. p. 269, line 21-p. 270, line 22; R pp. 239-241; 267-268). During direct examination, no reference was made to the documents pre-marked for identification as Plaintiff's Exhibits 1, 2, 3, 4, 6, 7, 8, 9, and 11. Therefore, such records had not been identified or authenticated, as required by our evidentiary rules. See Rule 901, SCRE. Appellant simply laid absolutely no foundation for the admissibility of Plaintiff's Exhibits 1, 2, 3, 4, 6, 7, 8, 9, and 11, including their authenticity, genuineness, relevance, purpose, and compliance with the evidentiary rules. Therefore, the trial court did not err in refusing to admit Plaintiff's Exhibits 1, 2, 3, 4, 6, 7, 8, 9, and 11 after the close of Appellant's counsel's direct examination of Mr. Wedlake.

Even if an error did occur, which Respondents deny, any such error would nonetheless be harmless and would not warrant reversal, as there was no prejudice to Appellant. First, as noted

above, since Respondents' counsel chose to cross-examine Mr. Wedlake, Appellant's counsel was given another opportunity subsequent to the evidentiary ruling complained of to further examine Mr. Wedlake on re-direct and to introduce further evidence and records through Mr. Wedlake's testimony on re-direct. During such re-direct, Appellant's counsel could have sought to try to identify, authenticate, lay a foundation for, and introduce a copy of what Appellant asserted to be the Bylaws of the Association, but failed to take advantage of the second chance opportunity to do so. As noted above, Appellant's counsel did not try to admit any exhibits into evidence during re-direct of Mr. Wedlake. Since counsel for Appellant had an opportunity to cure any alleged error by simply seeking to admit a copy of what Appellant asserted to be the Bylaws of the Association during re-direct examination of Mr. Wedlake, but failed to do so, Appellant cannot claim prejudice from the trial court's ruling.

Second, as set forth supra under the "STATEMENT OF FACTS" heading, none of Appellant/Plaintiff's pre-marked exhibits were actually anything that Appellant could purport to be a complete copy the Bylaws of the Association. Although Appellant's brief asserts that the document pre-marked as Plaintiff's Exhibit 4 was a copy of what Appellant purports to be the Bylaws of the Association, an examination of the official exhibits obtained from the trial court reporter reveals that what was pre-marked for identification as Plaintiff's Exhibit 4 is actually a March 26, 2018, letter written by Raymond Wedlake, and not a purported complete copy of the Bylaws of the Association. (R. pp. 349-352). Therefore, there is no prejudice to Appellant by the trial court's exclusion of Plaintiff's Exhibits 1, 2, 3, 4, 6, 7, 8, 9, and 11 because even if all of those exhibits had been admitted into evidence, it still would not have cured the issue of failing to admit a complete copy of the Bylaws of the Association into evidence. Thus, even if there was any error (which is denied), it would be harmless. In the same vein, the Order of Judgment also

states that "even had the bylaws been introduced, from what the record does show, Plaintiff would still not be entitled to the relief he seeks", thus further suggesting Plaintiff was unlikely to prevail even if the bylaws had been admitted into evidence and making any alleged error harmless. (R. p. 14).

Further, Appellant's reference to and reliance upon pretrial briefs is misplaced and improper. Rule 16(c), SCRCP, provides that "The pre-trial brief is solely for the use of the court at the pre-trial hearing, and shall not be filed with or made part of the record in the action." Therefore, the pre-trial briefs are not part of the record in this action, and reference to and reliance thereupon is improper. Likewise, Respondents would respectfully assert that any reference to what was pre-marked before trial by Respondents for identification as Defendants' Exhibit 24 is also misplaced an improper, as such document was never referred to at trial, never offered into evidence, nor admitted into evidence. Further, if Appellant wanted to use such document at trial to establish his case by seeking to admit it into evidence, Appellant certainly could have attempted to do so. Respondents simply are under no obligation to help an opposing party establish his/her/its case, and in many cases, if an attorney did so, it could be a violation of the attorney's ethical obligations owed to his/her client. Further, to the extent that Appellant suggests there has been a "technicality", Respondents would respectfully disagree. Neither the Rules of Evidence nor a plaintiff's burden of proof are technicalities.

II. THE TRIAL JUDGE DID NOT ERR IN REFUSING TO TAKE JUDICIAL NOTICE OF WHAT APPELLANT PURPORTED TO BE THE BYLAWS OF THE ASSOCIATION, AND THIS COURT SHOULD DECLINE TO TAKE JUDICIAL NOTICE AS WELL

Appellant essentially argues that the trial court erred in refusing to take judicial notice of the contents of a document attached to Appellant's Complaint as Exhibit A, which Appellant

contends are the Bylaws of the Association. Alternatively, Appellant suggests that this Court should take judicial notice of the contents of the same document for the first time on appeal.

Plaintiff's arguments fail for several reasons. First, and foremost, Appellant never actually requested that the trial court take judicial notice of Exhibit A to the Complaint. After the close of Appellant's case, the following colloquy took place:

> THE COURT: All right. Thank you, sir. You can step down.
> Any other witnesses from plaintiff?
> MR. GIBSON: No, sir.
> THE COURT: All right. Be glad to entertain any motions?
> MR. GROTE: Yes, Your Honor. At this time I would move for a directed verdict on several issues. One, and I don't mean to be facetious in this sense, but this is a case about interpretation of the Bylaws. I don't even know that the Bylaws have been admitted into evidence.
> THE COURT: They have not.
> MR. GROTE: There's really nothing before the Court to make a decision on. I'm not saying that in a facetious nature. It seems to me that if they want an interpretation of the Bylaws, the Bylaws have to be part of the evidentiary record and be before the Court. Without that, I mean, I don't know that the Court has enough information that it can even make a determination on these without -- you know, looking outside of the trial record.
> As far as the specific issues, ---
> THE COURT: Let me hear briefly from plaintiff's counsel, then I'm going to address and rule on the motion.
> MR. GIBSON: Yes, sir. Several factors, Your Honor. Certainly the key provisions of the Bylaws were discussed in the pretrial brief. But more importantly they are Exhibit 3 to the Complaint and they are filed officially, e-filed officially, and they were cross-referenced as a result in all the written material. That would be my response, Your Honor, that it's part of the record.
> THE COURT: Okay. Here's what I'm going to do, gentlemen. I'm going to take this as a motion for an involuntary non-suit, which I'm going to grant.

(R. p. 323, line 13-p. 324, line 20). As can be seen, Appellant's argument was simply that since he attached a document to the Complaint, which was referenced in other pretrial submissions, that it was part of the court record and thus was automatically admitted as evidence that could be considered at trial. As can be seen, Appellant never actually sought or argued that the trial court should take judicial notice of such document or the contents thereof. "In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial court. Issues not raised and ruled upon in the trial court will not be considered on appeal." Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 505, 812 S.E.2d 438, 441 (Ct. App. 2018). Therefore, it is respectfully asserted that the issue of whether the trial court erred in refusing to take judicial notice at the request of Appellant's counsel is not preserved for review.

Even if Appellant is deemed to have requested that the trial court take judicial notice of the document attached to Appellant/Plaintiff's complaint, Respondents assert that no reversible error occurred. Likewise, while Respondents acknowledge that an appellate court can take judicial notice for the first time on appeal, Respondents assert that such judicial notice would not be appropriate in this case and that this Court should decline to do so.

As noted above, the admission or exclusion of evidence is within the sound discretion of the trial court and the decision of the trial court must stand absent an abuse of discretion. Conner, 363 S.C. at 467, 611 S.E.2d at 908. Judicial notice is governed by Rule 201, SCRE, which provides:

> **RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS**
> **(a) Scope of Rule.** This rule governs only judicial notice of adjudicative facts.
> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
> **(c) When Discretionary.** A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.
(g) Instructing Jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

Judicial notice takes the place of proof and "simply means that the court will admit into evidence and consider, without proof of the facts, matters of common and general knowledge." Moss v. Aetna Life Ins. Co., 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976). "For a fact to be subject to judicial notice, it must be so notorious that the court may property assume its existence without proof." Masters v. Rodgers Dev. Group, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984). See also, Bowers v. Bowers, 349 S.C. 85, 94, 561 S.E.2d 610, 615 (Ct. App. 2002) (finding judicial notice improper for valuation of residence); Moss, 267 S.C. at 377, 228 S.E.2d at 112. "Unless the fact is either of such common or general knowledge that it is accepted by the public without qualification or contention, or its accuracy is capable of verification by reference to readily available sources of indisputable reliability, it is not subject to judicial notice." Masters, 283 S.C. at 255, 321 S.E.2d at 196. See also, Bowers, 349 S.C. at 94, 561 S.E.2d at 615. "Ordinarily, the internal affairs and transactions of a private corporation are not a proper subject for judicial notice." Moss, 267 S.C. at 377, 228 S.E.2d at 112. In fact, the South Carolina Supreme Court has refused to take judicial notice of the bylaws of a corporation appended as an exhibit to a party's Answer. Simpson v. S.C. Mut. Ins. Co., 59 S.C. 195, 37 S.E.18, 19-20 (1900).

"A court can take judicial notice of its own records, files[,] and proceedings for all proper purposes including facts established in its records." Wise v. Wise, 394 S.C. 591, 601, 716 S.E.2d

117, 122 (Ct. App. 2011) (*quoting* Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325 (Ct. App. 1984) (emphasis added). "It is not error for a judge to take judicial notice of what was stated in a former opinion in a prior action of the same case." Freeman, 280 S.C. at 494, 313 S.E.2d at 327 (emphasis added). See also, Wise, 394 S.C. at 601, 716 S.E.2d at 122. While the South Carolina courts have recognized taking judicial notice of matters stated in former court opinions, it does not appear that our courts have extended judicial notice to the truth of allegations contained in a party's pleadings. In fact, while a court make judicial notice of its own records, other jurisdictions have expressly confirmed that judicial notice of the truth of facts asserted is limited to "facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments." Garcia v. Sterling, 176 Cal. App.3d 17, 22, 221 Cal. Rptr. 349 (Ct. App. 1985). The Garcia court further went on to state that a "mistaken notion exists that taking judicial notice of court records means noticing "'...the existence of facts asserted in [all the documents in] a court file ... a court *cannot* taken judicial notice of *hearsay allegations* as being true, just because they are part of a court record or file....'" Garcia, 176 Cal. App.3d at 22, 221 Cal.Rptr. 349 (Cal. Ct. App. 1985) (*quoting* Day v. Sharp, 50 Cal. App.3d 904, 914, 123 Cal.Rptr. 918) (emphasis in original). Likewise, other jurisdictions are in accord. See, e.g., Guyton v. Monteau, 332 S.W.3d 687, 693 (Tex. App. 2011) ("[Court may not take judicial notice of the *truth* of factual statements and allegations contained in the pleadings, affidavits, or other documents in the file.") (emphasis in original); In re Marriage of Kells, 897 P.2d 1366, 1369 (Ariz. Ct. App. 1995) (court can only take judicial notice of the procedural fact that an affidavit had been filed, but not the truth of its assertions); NationsBank, N.A. (South) v. Tucker, 500 S.E.2d 378, 380-381 (Ga. Ct. App. 1998) (court can judicial notice of existence of an exhibit to a pleading, but cannot "take judicial notice that the exhibit was admissible, relevant, identified,

authenticated, or the highest and best evidence, because such issues are a matter of proof that cannot be judicially noticed.").

While an appellate court can take original judicial notice, "[a]ppellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable." Masters, 283 S.C. at 256, 321 S.E.2d at 197. Original judicial notice of adjudicative facts at the appellate level is limited to matters which are *indisputable*. Masters, 283 S.C. at 256, 321 S.E.2d at 197 (recitals in deed to not constitute indisputable matter subject to judicial notice) (emphasis added); Hemingway v. Small, 284 S.C. 42, 46, 324 S.E.2d 335, 338 (Ct. App. 1984) (value of land is not indisputable matter subject to judicial notice); Sanders v. Salley, 283 S.C. 458, 460-461, 322 S.E.2d 829, 830-831 (Ct. App. 1984) (refusing to take judicial notice of publicly recorded mortgage, recitals on face of the mortgage don't constitute indisputable proof of the date the underlying debt was discharged).

In this case, taking judicial notice that Exhibit A to Appellant's Complaint is in fact the Bylaws of the Association is not appropriate. In order to do so, the Court would have to assume: (1) the truth and veracity of hearsay allegations of Appellant, including those in the Appellant's Complaint or in other pre-trial submissions; (2) the identity, authenticity, and genuineness of Exhibit A to Appellant's Complaint; and that (3) Exhibit A to Appellant's Complaint meets the requirements of the Best Evidence Rule as set forth in Rules 1001-1004, SCRE and common law. These are matters of proof and are not indisputable. Whether Exhibit A to Appellant's Complaint is, or is not, actually the Bylaws of the Association is not a matter generally known within the territorial jurisdiction of the courts of South Carolina, nor is it something that is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Likewise, neither is the authenticity and genuineness of Exhibit A to

Appellant's Complaint. As set forth above, the internal affairs and transactions of a private corporation are ordinarily not a proper subject for judicial notice and the South Carolina Supreme Court has refused to take judicial notice of bylaws of a corporation appended as an exhibit to a party's pleading. Moss, 267 S.C. at 377, 228 S.E.2d at 112; Simpson v. S.C. Mut. Ins. Co., 59 S.C. 195, 37 S.E.18, 19-20 (1900). Further, a party's allegations are not a source of unquestionable accuracy. If the court were to assume the unquestionable accuracy of allegations in a Plaintiff's pleadings, it would completely abolish the necessity of proof and abrogate the Plaintiff's burden of proof. In this case, the burden of proof rested with Appellant to establish entitlement to the requested declarations. SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla, 415 S.C. 72, 82, 781 S.E.2d 115, 121 (Ct. App. 2015) (In an action for declaratory judgment, "the burden of proof rests with the party seeking the declaration, and that party must meet its burden by a greater weight or preponderance of the evidence."). This burden of proof would necessarily include proving the terms and contents of the Bylaws of the Association. To prove the content of a writing, the original writing or a "duplicate" (as defined by Rule 1001(4) SCRE[3]) is required. Rules 1001-1003, SCRE. That is a matter of proof, and thus inappropriate for judicial notice.

In fact, Respondents had challenged the genuineness and authenticity of Exhibit A to Appellant's Complaint prior to trial, further making judicial notice inappropriate. Respondents' Motion to Dismiss filed on November 6, 2017 included a motion to strike the exhibits from Plaintiff's Complaint, noting that the exhibits contain improper evidentiary matters, unofficial versions of records, impertinent matters, excerpted documents, and otherwise inadmissible

[3] Rule 1001(4) defines a "duplicate" as follows: "A 'duplicate' is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original."

matters. (R. p. 122). Likewise, Respondents' memorandum in support of their motion to dismiss and alternatively to strike and for a more definite statement filed on December 30, 2017, again raised these issues, specifically noting that "the exhibits to Plaintiff's Complaint contain numerous improper evidentiary matters, unofficial/retyped versions of records, impertinent matters, excerpted documents, and other inadmissible matters." (R. pp. 166-167). Likewise, the memorandum specifically noted that "several of the Exhibits to the Complaint do not appear to be the original or official versions [of] records and appear to be versions that have been re-typed by Plaintiff or someone on his behalf." (R. p. 167). The memorandum specifically raised an issue with the genuineness and authenticity of Exhibit A to Appellant/Plaintiff's Complaint. (R. p. 167). Likewise, during oral argument on the motion at the hearing before Judge Stillwell on January 3, 2018, Respondents continued to raise these same issues, and specifically raised issues with the accuracy, authenticity, and genuineness of the exhibits to Appellant/Plaintiff's Complaint, specifically referencing and including Exhibit A to Appellant/Plaintiff's Complaint. (R. p. 213, line 8-p. 215, line 21). Additionally, in their Answer filed on January 18, 2018, Respondents re-asserted and re-alleged all defenses and matters raised in their Motion to Dismiss and Alternatively to Strike and for a More Definite Statement. Further, item number four of the Stipulation of Issues for Trial makes clear that Respondents were preserving all defenses. (R. p. 179). Therefore, based on all of the foregoing, Appellant was on notice that Respondents had raised issues with the authenticity and genuineness of the exhibits to Appellant/Plaintiff's Complaint, including Exhibit A, and the need for proof at trial.

The Tucker case decided by the Georgia Court of Appeals and referenced supra, is directly on point and is instructive to the case at hand. Tucker, 500 S.E.2d 378. In that case, the Plaintiff attached a notice as an exhibit to its Complaint, but never tendered it into evidence at

trial. Id. at 380. The notice was necessary to establish a claim for attorney's fees under Georgia law. Id. Therefore, the court held that the claim for attorney's fees was not proven at trial, and the trial court did not err in granting directed verdict on the attorney's fees claim. Id. The plaintiff in that case also contended that the court should have taken judicial notice of the notice attached to the complaint to establish the required notice. Id. at 380-381. The court found that judicial notice was not appropriate and held that "the trial court could not take judicial notice that the exhibit was admissible, relevant, identified, authenticated, or the highest and best evidence, because such issues are a matter of proof that cannot be judicially noticed." Id. at 381. Correspondingly, the court concluded that it could not take judicial notice that the exhibit to the complaint was, in fact, what it purported to be – a notice of intent to seek attorney's fees in compliance with Georgia law. Id.

In the same vein, in the case at hand, the court cannot take judicial notice that Exhibit A to Appellant/Plaintiff's Complaint is in fact what Appellant purports it to be, i.e., the Bylaws of the Association.

Further, the case law cited by Appellant is either inapposite and/or distinguishable from this case. First, Appellant's reliance on Colonial Penn Insurance Company v. Coil is misplaced. In that case, the Fourth Circuit Court of Appeals took judicial notice of insureds' (the Coils) guilty pleas to arson of the very property for which they sought insurance benefits. Colonial Penn Ins. Co. v. Coil, 887 F.2d 1236, 1239-1240 (4th Cir. 1989). In Coil, the court determined that the guilty pleas were not subject to reasonable dispute. Id. at 1240. The Coil court did not take judicial notice of the truth of matters stated in the pleadings filed by a party in that case or in exhibits filed therewith. Additionally, Appellant's reliance on Wise v. Wise is also misplaced. The issue in the Wise case involved the taking of judicial notice in a worker's compensation case

that the claimant had filed a third-party tort action against the employer and had obtained a default judgment against the employer. Wise, 394 S.C. at 600-601, 716 S.E.2d at 122. Again, Wise did not involve taking judicial notice of the truth of matters asserted in pleadings filed by a party in the worker's compensation case (or in exhibits filed therewith) to try to establish the party's claims in the worker's compensation case. Whether a third-party complaint was filed and whether a default judgment was rendered are indisputable matters that are capable of accurate determination, unlike the matters which Appellant seeks to have the court take judicial notice of. Further, Appellant's citation to Tellabs, Inc. v. Makor Issues & Rights, Ltd. is also misplaced. Tellabs dealt with ruling on the sufficiency of pleadings for purposes of a 12(b)(6) motion. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007). For purposes of a motion to dismiss under Rule 12(b)(6), the allegations in a complaint (and consequently exhibits thereto) are presumed to be true. Morrow Crane Co. v. T.R. Tucker Const. Co., 296 S.C. 427, 429, 373 S.E.2d 701, 702 (Ct. App. 1988); See Burns v. Gardner, 328 S.C. 608, 614, 493 S.E.2d 356, 359 (Ct. App. 1997). However, in the present case, we are not dealing with a motion to dismiss. Rather, we are dealing with trial and evidence at trial. At trial, the allegations of a party's pleadings are not presumed to be true, but rather, the party must prove the allegations according to the applicable burden of proof.

Further, as set forth more fully supra, Appellant's continued reliance on pretrial briefs is improper and misplaced pursuant to Rule 16(c), SCRCP. Additionally, as set forth supra, Appellant's reference to or reliance on what was pre-marked before trial by Respondents for identification as Defendants' Exhibit 24 is also misplaced and improper, as such document was never referred to at trial, never offered into evidence, nor admitted into evidence. Further, if Appellant wanted to use such document at trial to establish his case by seeking to admit it into

evidence, Appellant certainly could have attempted to do so. Again, as set forth above, Appellant's continued reference to Plaintiff's Exhibit 4 is misplaced, as Plaintiff's Exhibit 4 is actually a March 26, 2018, letter written by Raymond Wedlake, and not something purporting to be the bylaws of the Association. (R. pp. 349-352). Finally, as set forth supra, the Order of Judgment also states that "even had the bylaws been introduced, from what the record does show, Plaintiff would still not be entitled to the relief he seeks." Therefore, Plaintiff was unlikely to prevail even if the bylaws had been admitted into evidence, making any alleged error harmless.

III. ISSUES I, IV, and V, FROM APPELLANT'S STATEMENT OF ISSUES ARE NOT PRESERVED FOR APPEAL AND SHOULD NOT BE CONSIDERED

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "[W]hen an appellant neither raises an issue at trial nor through a Rule 59(e), SCRCP, motion, the issue is not preserved for appellate review." Doe v. Doe, 370 S.C. 206, 212, 634 S.E.2d 51, 55 (Ct. App. 2006). The South Carolina Supreme Court has explained the rationale underlying the requirement for issue preservation by an appellant as follows:

> The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. *E.g., Smith v. Phillips,* 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court); *State v. Williams,* 303 S.C. 410, 401 S.E.2d 168 (1991) (same); *Sumter Building & Loan Ass'n v. Winn,* 45 S.C. 381, 23 S.E. 29 (1895) (same).
>
> If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to

> preserve the issue for appellate review. *E.g., Pelican Bldg. Centers of Horry–Georgetown, Inc. v. Dutton,* 311 S.C. 56, 427 S.E.2d 673 (1993); *Hoffman v. Powell,* 298 S.C. 338, 380 S.E.2d 821 (1989); *see also* Rules 52(b) and 59(e), SCRCP.
>
> Imposing this preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments. *See Roche v. South Carolina Alcoholic Beverage Control Comm'n,* 263 S.C. 451, 211 S.E.2d 243 (1975) (purpose of an appeal is to determine whether the trial judge erroneously acted or failed to act and when appellant's contentions are not presented or passed on by the trial judge, such contentions will not be considered on appeal). The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case. *See Brown v. Singletary,* 226 S.C. 482, 85 S.E.2d 738 (1955) (party may not neglect or ignore vices in the trial, then expect to assert those vices on appeal in case of disappointment at trial); *State v. Warren,* 207 S.C. 126, 134, 35 S.E.2d 38, 41 (1945) (same).

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724–25 (2000). A post-trial motion must be made preserve for review any alleged errors or inconsistencies in a trial court's final order. Jean Hoefer Toal, Amelia Waring Walker, Margaret E. Baker, Appellate Practice in South Carolina, 189 (3d ed. 2016); Grant v. S.C. Coastal Council, 319 S.C. 348, 355–356, 461 S.E.2d 388, 392 (1995) (finding that where party failed to move under Rule 59(e) to alter or amend the judgment, the party's arguments concerning inaccuracies and prejudicial matters in the court's order were not preserved for appeal); Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 152, 723 S.E.2d 835, 840 (Ct. App. 2012) (argument that trial court order misstated the law was not preserved when the appellant failed to raise the issue in a Rule 59(e), SCRCP, motion); Miller v. Miller, 375 S.C. 443, 652 S.E.2d 754 (Ct. App. 2007) (issue concerning discrepancies between language used during a temporary hearing and in the order from the hearing was not preserved when no post-trial motion addressing the issue of discrepancies was made).

1. *Issue I From Appellant's Statement of Issues*

Appellant asserts that the trial court erred by applying the incorrect legal standard in its Order of Judgment when addressing the requirements for bringing a derivative action under Rule 23(b)(1), SCRCP. However, Appellant never filed any post-trial motion(s), including no motions under Rules 52(b), 59(a), or 59(e), SCRCP. Consequently, after being served with the Order of Judgment, Appellant never filed any post-trial motion(s) to raise to the trial court any alleged error with the Order of Judgment, including the legal standard applied under Rule 23(b)(1). Thus, this issue with the Order of Judgment was never raised to or ruled upon by the trial judge and is not preserved for review.

2. *Issue IV From Appellant's Statement of Issues*

Appellant also asserts that the trial court erred by dismissing Appellant's individual action without specifying the basis for doing so. Again, since Appellant never filed any post-trial motions, this alleged error with the Order of Judgment was never raised to or ruled upon by the trial court. Thus, it is not preserved for review.

3. *Issue V from Appellant's Statement of Issues*

Appellant also asserts that the trial court erred in granting involuntary nonsuit, alleging there was evidence of violation of the bylaws of the Association. In support of this contention, Appellant argues that the trial court's Order of Judgment failed to fulfill the requirements of Rule 52, SCRCP, and applied the wrong legal standard for involuntary nonsuit. Again, Appellant never filed any post-trial motion under Rule 52, SCRCP, or any other post-trial motion(s), thus these alleged errors with the Order of Judgment were never raised to or ruled upon by the trial court and are not preserved for review.

IV. EVEN IF THE ISSUE IS PRESERVED, THE TRIAL COURT DID NOT ERR IN FINDING THAT APPELLANT FAILED TO MEET THE REQUIREMENTS OF RULE 23(B)(1) TO PURSUE A DERIVATIVE ACTION

Respondents asserted as a defense that Appellant could not maintain a derivative action because Plaintiff has not complied with the requirements of Rule 23(b)(1), SCRCP. Specifically, Respondents asserted that Appellant did not fairly and adequately represent the interests of the other members of the community that are similarly situated. Rule 23(b)(1), SCRCP, provides, in relevant part that: "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association."

A derivative plaintiff is generally serving in a fiduciary capacity representing persons whose interests are in his/her hands, and the "requirement of adequate representation flows from the Due Process Clause of the United States Constitution and the protection it affords the non-parties on whose behalf the representative plaintiff purports to litigate. South v. Baker, 62 A.3d 1, 21 (Del. Ch. 2012).

Jurisdictions that have addressed the "fairly and adequately represent" requirement seem to focus on the following factors:

1. Whether the named plaintiff is the real party in interest
2. The plaintiff's familiarity with the litigation and willingness to learn about the suit
3. The degree of control exercised by attorneys over the litigation
4. The degree of support given to the plaintiff by the other shareholders/the degree of support the plaintiff is receiving from the shareholders he purports to represent
5. The plaintiff's personal commitment to the action
6. The remedies sought by the plaintiff

7. The relative magnitude of the plaintiff's personal interests as compared to the plaintiff's interest in the derivative action itself
8. The plaintiff's vindictiveness toward the other shareholders/defendants.
9. Economic antagonisms between the representative and the shareholders
10. Indications that the named plaintiff was not the driving force behind the litigation
11. Other litigation pending between the plaintiff and the defendants

See e.g., Beckworth v. Bizier, 138 F.Supp.3d 144, 150-153 (D. Conn. 2015); Caulfield v. Packer Grp., Inc., 56 N.E.3d 509, 520 (Ill. App. Ct. 2016); Aztec Oil & Gas, Inc. v. Fisher, 152 F. Supp. 3d 832, 843 (S.D. Tex. 2016); Cattano v. Bragg, 727 S.E.2d 625, 628–29 (Va. 2012); HER, Inc. v. Parenteau, 770 N.E.2d 105, 109 (Ohio Ct. App. 2002); Larson v. Dumke, 900 F.2d 1363, 1367 (9th Cir. 1990). However, the foregoing factors are not exclusive and a determination is to be based on the totality of the circumstances on a case by case basis. See, Cattano 727 S.E.2d at 629; Rothenberg v. Sec. Mgmt. Co., 667 F.2d 958, 961 (11th Cir. 1982). A derivative plaintiff may be disqualified where there is a conflict between his interests and the interests of the parties he represents. Caulfield v. Packer Grp., Inc., 56 N.E.3d 509, 520 (Ill. App. Ct. 2016). Further, a derivative plaintiff "must not have ulterior motives and must not be pursuing an external personal agenda." Sved v. Chadwick, 783 F. Supp. 2d 851, 859 (N.D. Tex. 2009); Smith v. Ayres, 977 F.2d 946, 949 (5th Cir. 1992).

The determination of whether a derivative plaintiff fairly and adequately represents the interests of the shareholders or members similarly situated is within the sound discretion of the trial court and is only reviewable for an abuse of discretion. Smith v. Ayres, 977 F.2d 946, 948 (5th Cir. 1992); Owen v. Modern Diversified Indus., Inc., 643 F.2d 441, 443 (6th Cir. 1981) (issue is addressed to the sound discretion of the trial court and will not be set aside by appellate

court unless the appellate court has a definitive and firm conviction that the lower court committed a clear error of judgment when reaching its conclusion after weighing of the relevant factors.); Robbins v. Tweetsie R.R., 126 N.C. App. 572, 579, 486 S.E.2d 453, 456 (1997) (trial court's determination reviewed on abuse of discretion standard); Jordon v. Bowman Apple Prod. Co., 728 F. Supp. 409, 412 (W.D. Va. 1990); Roberts v. Alabama Power Co., 404 So. 2d 629, 636 (Ala. 1981) (such a determination rests largely within the discretion of the trial judge and will only be reversed on an abuse of discretion).

While it does not appear to be a universal rule, Respondents do acknowledge that there is case law from certain jurisdictions indicating that there can be a single "class of one" derivative plaintiff in certain rare and unique situations when the derivative plaintiff is not similarly situated with any other shareholders/members of the corporation. However, "[only] in the rarest instances may there be a shareholder derivative action with a class of one." Smith v. Ayres, 977 F.2d 946, 948 (5th Cir. 1992). These rare circumstances seem to be generally confined to situations involving shareholders in closely held corporations. See, e.g., Cattano 727 S.E.2d 629 (derivative suit by single shareholder against the only other shareholder in a two-shareholder closely held corporation); Eye Site, Inc. v. Blackburn, 796 S.W.2d 160 (Tex. 1990); Halsted Video, Inc. v. Guttillo, 115 F.R.D. 177, 178 (N.D. Ill. 1987) (five shareholders); HER, Inc.,770 N.E.2d 105 (only two shareholders).

Appellant asserts that the trial court erred by applying the wrong legal standard, asserting that the trial court required Appellant to represent a majority of the members of the Association. Respondents disagree that the trial court applied the wrong legal standard. Instead, Respondents assert that the trial court, after considering the totality of the circumstances, correctly concluded that Appellant was not a proper derivative plaintiff because he did not fairly and adequately

represent other members similarly situated. (R. p. 12). Respondents respectfully assert that the trial court did not abuse its discretion in making such determination and that such determination is supported by the facts and evidence adduced at trial. Appellant's primary assertion of error seems to center around the trial court's statements in the Order of Judgment that Appellant did not have the support of a majority, if any, members of the Association. Appellant seems to contend that such statements somehow translate into the trial court requiring the Appellant to have had the support of a majority of the members in order to be able to fairly and adequately represent members similarly situated. Respondents respectfully assert that while the Order of Judgment notes that Appellant did not have the support of a majority of the homeowners, it did not impose this as an absolute requirement to be a fair an adequate representative. Instead, when that statement is not read in isolation, it is clear that the trial court considered the totality of the circumstances based on all of the evidence at trial. Notably, the trial court found there was a lack of evidence to suggest that Appellant was acting derivatively on behalf of the Association or that Appellant was acting in a representative capacity or representing the interests of the members of the Association. (R. p. 12). Therefore, while the trial court mentioned that Appellant did not have the support of a majority of members, a fair reading of the Order of Judgment indicates that the trial court did not impose that as a mandatory requirement.

Further, applying the factors and legal principles set forth above and the evidence at trial, it is evident that the trial court did not abuse its discretion in finding that Appellant was not a proper derivative plaintiff.

Appellant, Raymond Wedlake, testified at trial that there are sixty-six voting units in the Association. (R. p. 279, lines 5-7). There is no evidence or basis to indicate that Appellant is not similarly situated with the other members of the Association. In fact, Appellant has conceded as

much on multiple occasions. First, Appellant's Complaint is captioned "Raymond A. Wedlake, individually, and derivatively, on behalf of all Members of the Woodington Homeowners' Association, Inc." Thus, in the Complaint itself, Appellant purported to be representing all (not just some) members of the Association. "It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992). "The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." Id. Therefore, Appellant is bound by his pleading asserting that he represents all members of the Association. Likewise, in his affidavit filed on October 5, 2017, Appellant stated and confirmed that he was seeking relief on behalf of himself "and all members of the Woodington Homeowners' Association, Inc." (R. p. 433). Appellant should be bound by this admission as well. Further, Respondents respectfully assert that Appellant is similarly situated with the rest of the members of the Association and this is not one of those rare closely held corporation situations where Appellant is not similarly situated with any other members/shareholders. This is clear from the Stipulation of Issues for Trial itself. All of Appellant's requested declarations relate to interpretations of the bylaws that would apply as equally to him as they would to the rest of the community. We are simply not dealing with a situation present in many closely held corporations where the majority shareholder(s) are making decisions or taking actions to benefit themselves to the detriment of a minority shareholder. Those are the types of situations where a minority shareholder has been found to not be similarly situated with the rest of the shareholders. In this case, the outcome of any determination by the

trial court on the requested declarations would not have affected Appellant or any other members in a disparate or different way. Appellant has set forth no rationale for, nor can he demonstrate that that he is somehow situated differently from any other member of the Association, or that his interests would be impacted or affected any differently than any other member. Likewise, a mere difference of opinion does not necessarily mean that members are not similarly situated. If that were the case, any time an otherwise similarly situated member had a difference of opinion on corporate decisions or matters, he or she could pursue an unsupported derivative suit, opening the floodgates for homeowner litigation and discord among communities. Clearly, this is not a desirable result. Thus, while there is case law to suggest that in rare circumstances, primarily in closely held corporation situations, that a derivative plaintiff can be found to not be similarly situated with any other member/shareholder, this is not one of them. Appellant's brief relies heavily on the Cattano case in support of his argument of a "class of one". However, Cattano is readily distinguishable, as in that case, there were only two shareholders and one was acting as a derivative plaintiff against the other in claims relating to potential financial malfeasance by the defendant shareholder. Cattano 727 S.E.2d 629. That case did not involve a mere difference of opinion, but dealt with two shareholders in materially different positions – one shareholder potentially taking actions for personal financial gain to the detriment of the other shareholder, and the outcome of that dispute would have materially different impacts on each shareholder. Cattano 727 S.E.2d 629.

Additionally, the trial record shows that based on the factors set forth above and the totality of the circumstances, the trial court did not abuse its discretion in finding that Appellant was not a proper derivative plaintiff.

Ample evidence was presented that Plaintiff lacked the support of other members of the Association that are similarly situated. Plaintiff did not provide any evidence tending to suggest that any other members of the Association supported this action or supported Plaintiff in pursuing this action, but rather, the evidence was to the contrary. The evidence indicates that Plaintiff led an active election campaign leading up to the January 10, 2017, annual meeting, but he was not elected as a director by the membership of the Association. (R. p. 271, line 20-p. 279, line 12); (R. pp. 382-386)[4]. The evidence also indicates that despite Appellant's multiple attempts to garner support for this action through correspondence to the community and through community social media postings, no such support was received from the community. Specifically, for example, Mr. Wedlake sent out a letter to the community dated December 15, 2017, asking volunteers to give affidavits to the court; however, he never received any from community members. (R. pp. 394-395)[5]; (See R. p. 303, line 20-p. 305, line 8). Likewise, there was evidence at trial that Mr. Wedlake posted materials on the Next Door social media platform, but never received any supportive replies. (R. p. 306, lines 4-24). Rather, the evidence suggests that the only feedback Plaintiff received was negative feedback. (See R. p. 306, line 25-p. 309, line 13). Further the evidence at trial indicates that Mr. Wedlake sent out a communication to the community seeking the community's assistance and statements at trial, but he did not receive any replies. (R. p. 309, lines 9-25); (R. pp. 402-403)[6]. Further, it begs the question that if Appellant truly felt that he was a "class of one" not similarly situated with the rest of the members, why was he seeking the help and support of the rest of community? This is yet another acknowledgement by Appellant that he was similarly situated with the other members. In fact, his correspondence seeking assistance from the members confirms this. For example, his

[4] Admitted into evidence.
[5] Admitted into evidence.
[6] Admitted into evidence.

communication documented by Defendants' Exhibit 12 (admitted into evidence) seeking the assistance of the community says "Please think seriously about helping to support YOUR RIGHTS as a Member of the WHOA, and acting in the BEST INTEREST OF WHOA for the BENEFIT of all MEMBERS". (R. p. 403)[7]. Further, in his communication documented by Defendants' Exhibit 8 (admitted into evidence), Mr. Wedlake states: "Please think seriously about helping to support **your rights** as a Member of WHOA, and acting in the **best interest of WHOA** for the **benefit** of all **Members**." (R. p. 394)[8]. Clearly, Mr. Wedlake viewed himself as representing the other members and being similarly situated with them.

Further, the evidence presented indicates that Appellant actually has taken several positions and actions that were contrary to the interests of the members of the Association and to the corporate entity itself. Plaintiff's election platform leading up to the January 10, 2017, annual meeting included getting rid Association Management Group (AMG) (the property management company for the community). (R. p. 272, line 25-p. 273, line 2); (R. p. 382)[9]. However, the community apparently did not agree with Appellant's election platform, and voted at the January 10, 2017, annual meeting to keep AMG as the property manager. (R. p. 281, lines 6-17). Further, evidence was presented that despite a majority of the membership voting to retain the services of AMG for another year at the January 10, 2017, annual meeting, Appellant continued to advocate for termination of AMG's contract, against the expressed wishes of the community that he purports to represent. (R. 282, line 6-p. 284, line 10); (R. p. 426)[10]. Mr. Wedlake's trial testimony also indicates that even though he was purporting to represent the interests of the community, he didn't necessarily think the community members should be

[7] Admitted into evidence.
[8] Admitted into evidence.
[9] Admitted into evidence.
[10] Admitted into evidence.

involved in the discussions. (R. p. 285, lines 15-25). Evidence was also presented that at the January 10, 2017, annual meeting, the membership voted to ratify the terms of the prior board of directors, but Plaintiff nonetheless still continued to raise and pursue purported issues over the prior board's terms despite the community's apparent expression of a desire to put the purported issues to rest. (See R. p. 294, line 3-p. 297, line 6). Further, the evidence and testimony presented suggests that Plaintiff proposed dissolving the Association in August 2016. Specifically, Mr. Wedlake testified that he wrote to the members suggesting that the Association be dissolved. (R. p. 237, line 19-p. 238, line 2); (R. pp. 387-388)[11]. Dissolving the corporation is clearly an action contrary to the best interests of the corporation itself. Further, despite being a proponent for strict compliance with rules, including the bylaws of the Association, Appellant has also apparently taken the position that the architectural restrictions for the community are unenforceable against him and has threatened to paint his garage door whatever color he wanted. (R. p. 392)[12]; (See also, R. p. 299, line 4-p. 302, line 14). In fact, there was evidence that Mr. Wedlake had previously painted some sort of face on his garage door, without regard to his fellow community members. (R. p. 393)[13]; (See R. p. 302, line 13-p. 303, line 4). This could be detrimental to his neighbors' interests and property values, and again is another example of putting his personal interests above those of the community and fellow homeowners he purports to represent.

The evidence from trial also shows a certain level of vindictiveness by Appellant toward Respondents and other members of the community as well economic antagonisms between Appellant and Respondents, and between Appellant and other members of the community. For example, evidence was presented at trial that Appellant had suggested litigation against Respondents at the time they became nominees for the election to the board of directors and

[11] Admitted into evidence.
[12] Admitted into evidence.
[13] Admitted into evidence.

before they were even elected. (R. p. 275, line 8-p. 277, line 11); (R. p. 384)[14]. Evidence was also presented at trial that Appellant had threatened a lawsuit against the prior board members (the 2016 Board), Richard LaCroix, Kristine Lynch, and Dawn Vanderbecke, and demanded that they make amends to him, in part, by admitting that their terms as directors were improper, even though the constituents that Appellant purports to represent in this suit had voted to ratify their terms. (See R. p. 314, line 19-p. 315, line 21); (R. pp. 416-418)[15]. Evidence was also presented at trial that Appellant has used remarks that could be viewed as disparaging toward AMG, referring to them as "the malevolence", and toward the prior board of directors, referring to them as the "Board Pretenders". ((R. p. 383)[16] – stating that "If enough forms empower me to vote for you at the 2017 Annual Meeting, the malevolence which calls themselves AMG can be purged from our neighborhood straight away at this meeting"); (R. p. 274, lines 5-10); ((R. p. 384)[17] – referring to litigation against the "2016 Board Pretenders" being in progress). Further, despite Respondents' prior admission of an obligation to follow the law and the bylaws, Appellant still continued to pursue this suit against Respondents over that issue. (See, R. p. 310, line 1-p. 312, line 8); (R. p. 406)[18]. Additionally, the evidence presented suggests that Stacey Krause resigned from the Board of Directors due to Appellant's conduct, yet he brought this suit against Respondents over how they handled such vacancy that the evidence suggests that he caused. (See R. p. 312, line 13-p. 314, line 18); (R. p. 414)[19] – email from Stacey Krause to Appellant stating: "Due you your obsession with the WHOA board and your excessive communication, I have resigned from the WHOA board. Therefore, you have NO REASON to contact me via email, US Postal, phone,

[14] Admitted into evidence.
[15] Admitted into evidence.
[16] Admitted into evidence.
[17] Admitted into evidence.
[18] Admitted into evidence.
[19] Admitted into evidence.

etc. If it continues, I will be forced to file a complaint with the police department.") Further, there was evidence at trial to suggest that despite Respondents being in their first terms and the membership having voted to ratify the terms of the prior board of directors, Appellant still brought suit against Respondents over the length of the terms of the prior directors. (See R. p. 293, line 21-p. 297, line 6).

Further, there is evidence that Appellant used this litigation to pursue his external personal agenda. For example, Mr. Wedlake testified at trial that part of his election campaign for the Board of Directors in 2017 included getting rid of AMG – the property manager for the community. (R. p. 272, line 25-p. 273, line 2). Likewise, this is confirmed by Defendant's Exhibit 1 – stating that part of his platform was to "get rid of AMG". (R. p. 382)[20]. He in fact used this lawsuit pursue his personal agenda of getting rid of AMG, as a term of the AMG settlement was that AMG would terminate its management agreement. (R. p. 137, 469). This is just another indication that Appellant has used this lawsuit as a means to pursue his personal platform and agenda, since he has not been able to successfully pursue is platform and agenda through political means.

Likewise, other evidence at trial suggested that Appellant has been looking out for his own self-interests, rather than promoting the common interest of the community. For example, Mr. Wedlake testified at trial that it would be best to elect five directors to the Board of Directors, nonetheless, at the January 10, 2017, annual meeting, he voted solely for himself and no one else. (R. p. 292, lines 5-21); (R. pp. 389-391)[21].

Therefore, based on the foregoing, there was ample evidence supporting the trial court's determination that Appellant did not fairly and adequately represent the interests of other

[20] Admitted into evidence.
[21] Admitted into evidence.

members similarly situated and was not a proper derivative plaintiff under Rule 23(b)(1), SCRCP. Therefore, no abuse of discretion has occurred and the decision of the trial court should be affirmed.

Finally, Appellant cites to the case of Walbeck v. The I'on Company, LLC in support of his argument. Walbeck v. The I'on Company, Op. No. 5588 (Ct. App. Filed August 8, 2018).[22] Notably, this case had not been decided at the time of trial, nor the time that the Order of Judgment was filed. Further, it appears that this case may still be subject to a petition for rehearing. In any event, Respondents assert that Walbeck is distinguishable from the present case and does not mandate reversal of the trial court's finding that Appellant was not a proper derivative plaintiff. First, that case involved a derivative suit on behalf of the homeowners association against the developer regarding conveyance of certain recreational facilities. Id. at p. 3-5). Therefore, it was a derivative action by the HOA against third-parties, and not against the HOA board itself over corporate governance matters. Likewise, in Walbeck, the defendants (developer entities) had veto power over the decisions of the HOA board, preventing the HOA board from instituting litigation directly or acting on its own behalf. Id. at 12. Additionally, there were multiple persons serving as derivative plaintiffs in Walbeck, and not just a single representative. Id. at 4, 11. Most importantly, in Walbeck, there were at least three members of the HOA who actually testified that the derivative plaintiffs' assertions of the derivative claims advanced the interests of the HOA's members. Id. at 13. Therefore, in Walbeck, there was evidence of community support for the derivate suit, something clearly lacking in the case at

[22] Please note that the following discussion of Walbeck v. The I'on Company is retained from Respondents' Brief previously filed with the Court, as the Court's Order filed on November 8, 2019, granted leave to amend Respondents' Initial Brief only to address the issue of mootness. However, please note that on May 17, 2019, (subsequent to the filing of Respondents' prior Brief), Respondents did file a Supplemental Citation pursuant to Rule 208(b)(7), SCACR, relating to a substituted opinion being filed in Walbeck v. The I'on Company on February 27, 2019, which substituted opinion no longer addresses the "fairly and adequately represent" requirement of Rule 23(b(1), SCRCP. Reference is hereby craved to the Supplemental Citation filed by Respondents on May 17, 2019, relating to the substituted opinion being filed in Walbeck v. The I'on Company.

hand. Based on all of the foregoing, Walbeck is distinguishable and does not warrant reversal of the trial court's decision.

Lastly, Respondents would again raise issue with Appellant's apparent attempt, at least in part, to rely on information that was not evidence at trial to try to support his claim that the trial court erred, including the lack of adequate citations to the record.

In sum, based on all of the foregoing, the trial court did not abuse its discretion and did not otherwise err, therefore, the trial court's finding should be upheld.

V. EVEN IF THE ISSUE IS PRESERVED FOR REVIEW, THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S PURPORTED INDIVIDUAL ACTION

Appellant asserts that he has some sort of individual cause of action for nominal damages relative to an alleged failure to by Respondents to appoint him to fill a vacancy on the Board of Directors for the Association. However, the exact legal theory or cause of action being asserted by Appellant in this respect is somewhat unclear, as neither Appellant's Complaint nor the Stipulation of Issues seem to specify the specific individual legal cause(s) of action being asserted with regard to his claim for nominal damages. The Complaint really only attempts to assert causes of action for Declaratory Relief and Injunctive Relief, although the Prayer for Relief does mention nominal damages. (R. pp. 19-34). Further, the stipulated issues for trial center around declaratory relief. (R. pp. 178-179). While the Stipulation of Issues for Trial mention's Appellant's desire for an award of nominal damages, it does not specify the legal cause of action or legal theory under which such request was made. (R. pp. 178-179). Therefore, failure to clearly plead and specify the asserted individual cause of action for nominal damages would be an additional sustaining ground for the trial court's decision. Nonetheless, the trial court properly dismissed any potential or asserted individual cause action and properly denied the claim for nominal damages, and the Order of Judgment sets forth a sound basis for doing so.

As set forth in the Order of Judgment, the trial court found that Appellant failed to present sufficient evidence to allow the trial court to issue the requested declarations and that Appellant had failed to establish his burden of proof as to the requested declarations. (R. pp. 13-15). As stated in the Stipulation of Issues for Trial, one of Appellant's requested declarations was that the "court construe the Bylaws of the Association and declare that the bylaws place a duty on the Board of Directors to fill a vacancy on the Board of Directors and the Board of Directors must make reasonable efforts to do so." (R. p. 178). Thus, the trial court found that Appellant failed to meet his burden of proof to establish that Respondents owed a duty under the bylaws to fill a vacancy on the Board of Directors. (R. pp. 13-15). Since the Court found that Appellant failed to establish that Respondents owed a duty to fill a vacancy on the Board of Directors under the bylaws, any claim predicated on a breach of such a claimed duty must necessarily fail. Therefore, the trial court specifically and correctly denied any claim for nominal damages. (R. p. 15).

Appellant seems to assert that because he testified as to what he believes the bylaws state or require regarding filling a vacancy, that it somehow automatically entitles him to relief. The trial court's order does acknowledge that while there was some testimony or evidence at trial as to what Plaintiff asserts that certain clauses or phrases mean, the court found that it could not issue the requested declarations without having a true and accurate copy of the bylaws, so that the court could assess the truth an veracity of any such statements and so that the bylaws could be construed as a whole rather than viewing particular phrases or clauses in isolation. (R. pp. 13-15). Such a ruling is also consistent with Rules 1001-1003, SCRE (requiring the original or a duplicate to prove the content of a writing). As set forth above, in connection with the Rule 41(b) motion, the trial court can weigh the evidence. Therefore, the trial court did not have to view

evidence in the light most favorable to the plaintiff, nor did the trial court have to accept Appellant's statements as the undisputable truth. The trial court simply weighed the evidence and found that Appellant had failed to provide sufficient evidence to meet the burden of proof of establishing the existence of a duty. As stated above, "in an action at law, tried without a jury, the trial court's findings of fact will not be disturbed unless found to be without evidence which reasonably supports the court's findings." Duncan, 384 S.C. at 425; 682 S.E.2d at 790. "The trial court's factual findings in a law action are equivalent to a jury's findings" and "[q]uestions regarding credibility and the weight of the evidence are exclusively for the trial court." Jordan, 413 S.C. at 348, 776 S.E.2d at 100. The appellate court may not consider the case based on its view of the preponderance of the evidence, "but must construe the evidence presented to the [trial court] so as to support [its] decision whenever reasonably possible." Id. Based on the foregoing, the trial court did not err, and the trial court's findings must be upheld.

Finally, Appellant's brief seems to rely on Appellant's Counsel's statements to the trial court to support his basis of evidence of damages sustained by Appellant; however, the law clearly provides that "counsel's statements regarding the facts of a case and counsel's arguments are not admissible evidence." Ex parte Morris, 367 S.C. 56, 64, 624 S.E.2d 649, 653 (2006). There does not appear to be any other evidence of claimed damages.

Finally, even if Appellant had established a duty under the bylaws for the Board of Directors to fill a vacancy on the Board of Directors, Appellant also failed to establish that he had any specific entitlement any such vacant position on the Board of Directors. Certainly, South Carolina recognizes that directors are afforded discretion under the business judgment rule, which would necessarily include discretion with regard to vetting candidates for any positions that they may be able to appoint. See Baumann v. Long Cove Club Owners Ass'n, Inc., 380 S.C.

131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008) ("absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action."). As set forth supra, there was evidence at trial suggesting that the vacancy was caused by Appellant's conduct, yet he was demanding to be appointed to fill a vacancy he created.

Based on the foregoing, the trial court did not err and the trial court's decision should be upheld.

VI. EVEN IF THE ISSUE IS PRESERVED FOR REVIEW, THE TRIAL COURT DID NOT ERR IN GRANTING INVOLUNTARY NONSUIT

Appellant asserts that the trial court erred in granting involuntary nonsuit, alleging there was evidence of violation of the bylaws of the Association. In support of this contention, Appellant argues: (1) that the trial court's Order of Judgment failed to fulfill the requirements of Rule 52, SCRPC; and (2) that the trial court applied the wrong legal standard for involuntary nonsuit.

Respondents respectfully assert that the Order of Judgment sufficiently states the basis for the trial court's ruling and that there is no reversible error. Further, as set forth above, if Appellant took issue with the specificity of the Order of Judgment, he should have sought the available remedy of a motion under Rule 52(b), SCRCP and/or Rule 59(e), SCRCP to raise that issue, rather than trying to raise it for the first time on appeal. Further, South Carolina case law is clear that the mandates of Rule 52, SCRCP, regarding the court finding facts specifically and stating conclusions of law thereon are "merely directory and provides no basis for invalidating a judgment." Borg Warner Acceptance Corp. v. Darby, 296 S.C. 275, 279, 372 S.E.2d 99, 101 (Ct. App. 1988). Thus, Appellant's allegations concerning the specificity of the Order of Judgment under Rule 52, SCRCP are not a proper basis for invalidating the judgment.

Further, the trial court applied the correct standard for declaring involuntary nonsuit. The trial court cited the language of Rule 41(b) and specific case law interpreting and applying such standard. (R. pp. 9-10). Further, please see Heading I, supra, for Respondents arguments and legal authority concerning the correct legal standard under Rule 41(b), SCRCP. Simply put, Appellant is incorrectly trying to apply a directed verdict standard, when the established case law under Rule 41(b) clearly allows the trial court to weigh the evidence without viewing it in the light most favorable to the nonmoving party. As set forth in the Order of Judgment, the court weighed the evidence and set forth detailed and sound reasoning for finding that Appellant and failed to establish his burden of proof regarding interpretation and construction of by bylaws. (R. pp. 13-15). The Order of Judgment recognized that while there was "some" evidence relative to the bylaws, it was insufficient to meet the burden of proof and to allow the trial court to interpret and construe the bylaws. (R. pp. 13-15). The trial court's weighing of the evidence and finding in this respect is entitled to a highly deferential review, as set forth supra. Therefore, Respondents respectfully assert that such finding should not be disturbed on appeal.

VII. THE TRIAL COURT DID NOT ERR IN DISMISSING APPELLANT'S ACTION FOR DECLARATORY JUDGMENT

Per Issue VI from Appellant's Statement of Issues, Appellant seems to suggest that the trial court found that Appellant's request for declaratory relief is improper and erred by doing so. However, it is somewhat unclear from Appellant's brief as to the exact nature of the alleged error or the specific finding being challenged. Instead, Appellant's brief seems to merely regurgitate or paraphrase portions of Appellant's Complaint relative to his asserted cause of action for Declaratory Judgments, including matters that were not even part of the stipulated issues for trial. (see ¶¶ 66-73 of Appellant's Complaint); (R. pp. 29-31). Nonetheless, the Order of Judgment did not actually contain some finding that the general subject matters upon which Plaintiff sought

declaratory relief were *per se* improper subject matters under the Uniform Declaratory Judgments Act (S.C. Code Ann. §§ 15-53-10 to -140). Rather, the trial court made specific findings regarding why it was not granting certain requested declarations under the specific facts of this case, including: (1) failing to meet the requirements of Rule 23(b)(1) to pursue a derivative action; (2) lack of evidence/insufficient evidence to issue the requested declarations; and (3) lack of justiciable controversies. (R. pp. 11-15). Appellant has challenged each of these findings separately and each is addressed separately in Appellant's brief and in this brief. Therefore, Issue VI from Appellant's Statement of Issues appears to be repetitive and duplicate of Appellant's other grounds for appeal and does not appear to be alleging any additional error. For the reasons set forth herein, Respondents would respectfully assert that the Order of Judgment should be affirmed.

VIII. THE TRIAL COURT DID NOT ERR IN FINDING THAT STIPULATED ISSUES 1(b), 1(d), 1(e), AND 1(f) WERE MOOT, ADVISORY IN NATURE, OR OTHWERWISE FAILED TO PRESENT ACTUAL JUSTICIABLE CONTROVERSIES

Appellant also contends that the trial court erred in concluding that stipulated issues 1(b), 1(d), 1(e), and 1(f) were moot, advisory in nature, or otherwise failed to present actual justiciable controversies. Respondents respectfully assert that there has been no error.

In his brief, Appellant primarily just makes general reference to his Complaint and the exhibits attached thereto to argue his assertion that a justiciable controversy exists, but he does not cite to any evidence from trial. In fact, Appellant really does not make any citation to evidence or testimony in the record to support his allegation of alleged error, nor does Appellant cite any legal authority. Therefore, this issue should be deemed abandoned and not considered in this appeal. Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 505, 812 S.E.2d 438, 441 (Ct. App. 2018), reh'g denied (Apr. 26, 2018), cert. denied (Aug. 21, 2018) (an "issue is deemed

abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority.")

Additionally, any suggestion by Appellant that the parties stipulated to the justiciability of Appellant's requested Declarations is misplaced. The Stipulation of Issues for Trial clearly states that Respondents were preserving their defenses, and that "nothing herein shall be construed to infer a waiver of any defenses by Defendants or that Defendants in any way stipulate that the matters raised by Plaintiff or the relief sought by Plaintiff are proper matters before the Court or proper matters to be heard by the Court." (R. p. 179).

Further, to the extent that Appellant asserts that the denial of Respondents' motion to dismiss is somehow the law of the case or precluded Respondents from challenging justiciability or standing at trial, such assertion is contrary to established law. The denial of a motion to dismiss, including one based on subject matter jurisdiction, does not finally determine anything and does not establish the law of the case – the matter can be raised again later in the case. McLendon v. S.C. Dep't of Highways & Pub. Transp., 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 (1994) ("Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings."); Bessinger v. Bi-Lo, Inc., 366 S.C. 426, 431, 622 S.E.2d 564, 567 (Ct. App. 2005) ("It is clear from South Carolina case law that '[t]he denial of a Rule 12(b)(6) motion does not establish the law of the case nor does it preclude a party from raising the issue at a later point or points in the case.'"). See also, Woodard v. Westvaco Corp., 319 S.C. 240, 243 n.2, 460 S.E.2d 392, 394 (1995), overruled by Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002) ("An order *denying* a motion to dismiss for lack of subject matter jurisdiction does not *finally* determine anything.")

Even if the Court determines that this issue has not been abandoned and decides to address this issue, Respondents would nonetheless assert that the trial court did not err and the trial court's findings should be affirmed.

"The Uniform Declaratory Judgment[s] Act is not an independent grant of jurisdiction." Tourism Expenditure Review Comm. v. City of Myrtle Beach, 403 S.C. 76, 81, 742 S.E.2d 371, 374 (2013). Before a court may render a declaratory judgment, an actual, justiciable controversy must exist. Pee Dee Elec. Co-op., Inc. v. Carolina Power & Light Co., 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983).

> Before any action can be maintained, there must exist a justiciable controversy. *Midland Guardian Co. v. Thacker,* 280 S.C. 563, 314 S.E.2d 26 (Ct. App.), *cert. denied,* (1984). A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character. *Guimarin & Doan, Inc. v. Georgetown Textile & Mfg. Co.,* 249 S.C. 561, 155 S.E.2d 618 (1967). This Court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jones v. Dillon–Marion Human Resources Dev. Comm'n,* 277 S.C. 533, 291 S.E.2d 195 (1982). Mootness has been defined as follows: "A case becomes moot when judgment, if rendered, will have no practical legal effect upon existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis v. South Carolina State Highway Dep't,* 260 S.C. 344, 346, 195 S.E.2d 713, 715 (1973).

Byrd v. Irmo High Sch., 321 S.C. 426, 430–31, 468 S.E.2d 861, 864 (1996). South Carolina courts "will not issue advisory opinions for which no meaningful relief can be granted." In Interest of Kaundra C., 318 S.C. 484, 486, 458 S.E.2d 443, 444 (Ct. App. 1995). See also, West v. West, 263 S.C. 146, 149-150, 208 S.E.2d 530, 532-533 (1974); Power v. McNair, 255 S.C. 150, 153-155, 177 S.E.2d 551, 552-553 (1970). "Questions of statutory interpretation, by themselves, do not rise to the level of actual controversy." Tourism Expenditure Review Comm., 403 S.C. at 81-82, 742 S.E.2d at 374

The existence of a justiciable controversy is a matter of subject matter jurisdiction. Tourism Expenditure Review Comm., 403 S.C. at 81, 742 S.E.2d at 373. Power, 255 S.C. at 153, 177 S.E.2d at 552. Generally, a plaintiff bears the burden of proving jurisdiction when jurisdiction is challenged by the defendant. See, Eldridge v. City of Greenwood, 331 S.C. 398, 410, 503 S.E.2d 191, 197 (Ct. App. 1998).

In this case, the evidence at trial supports the trial court's findings regarding lack of a justiciable controversy. Further, as set forth in detail supra, and as reiterated here, Respondents respectfully assert that Appellant cannot rely on his pleadings and pretrial submissions to try to establish his burden of proof at trial – Appellant is required have come forth with evidence at trial to establish that a justiciable controversy exists as to all of his requested declarations.

1. *Stipulated Issue 1(d): That the court construe the Bylaws of the Association and declare that the bylaws do not permit a Director to remain beyond a five-year term, and in any event, for not more than one additional year beyond such five-year period.*

At trial, Raymond Wedlake conceded that Respondents were serving their first terms as directors at the time of trial, rather than serving in a consecutive term. (R. p. 293, lines 21-24). He also agreed that the Respondents were not in violation of any term limits. (R. p. 293, line 25-p. 294, line 2). In fact, Mr. Wedlake testified at trial that it was the board members serving in 2016 that he felt had served terms in excess of what was allowed under law or the bylaws, and that is what gave rise to stipulated issue 1(d). (R. p. 236, line 17-p. 237, line 18; R. p. 262, lines 5-10). As testified to by Mr. Wedlake, the 2016 Board members were Richard Lacroix, Kristine Lynch, and Dawn Vanderbecke (not Respondents). (R. p. 257, line 24-p. 258, line 2). Therefore, any issue relating to purported violations of term length relates to the terms served by the prior board of directors and not any of the Respondents' terms. Thus, there was simply no controversy over the propriety of the Respondents' terms. It was purely conjectural, hypothetical, and

abstract at the time of trial that the Respondents may be elected to four additional successive terms, and Appellant acknowledged that the issue of the length of Respondents' terms would not be an issue until they had served five years. (See R. p. 296, line 21-p. 297, line 6). Consequently, any potential issue as to terms of the Respondents was unripe for adjudication. Appellant essentially just sued Respondents to get a declaration about what persons other than Respondents had done and to try to force the Respondent to acknowledge that the prior Board members had done something wrong. (See R. p. 295, line 9-p. 296, line 20). In addition, there was evidence at trial indicating that the membership voted at the annual meeting on January 10, 2017, to ratify the terms of the prior board of directors. (R. p. 294, lines 3-24). Thus, any purported issues with the prior board's terms had become moot in any event. In sum, the evidence indicates that Appellant sued Respondents over actions that were not their own and that had nonetheless already been ratified by the membership. Therefore, there is substantial evidence to support the trial court's finding of a lack of justiciable controversy.

2. *Stipulated Issue 1(b): That the court construe the Bylaws of the Association and declare that the bylaws place a duty on the Board of Directors to fill a vacancy on the Board of Directors and the Board of Directors must make reasonable efforts to do so.*

There was evidence at trial indicating that the vacancy on the Board had been filled prior to the time of trial and there was no vacancy on the board at the time of the trial. In fact, during his testimony, Mr. Wedlake conceded that the Board vacancy had been filled in January 2018. (R. p. 244, lines 18-23). Therefore, such issue had become moot and the trial court's decision is supported by the evidence at trial. Further, as set forth supra, there was evidence at trial that Appellant's conduct is what caused the vacancy to be created. As such, Respondents would respectfully assert that the party asserting a justiciable controversy cannot be the causation of the claimed controversy. Based on the foregoing, the trial court's ruling should be affirmed.

3. *Stipulated Issue 1(e): That the court declare that the Bylaws of the Association do not permit delegation of the role or authority of the Board.*

While Appellant raised the issue of the board of directors delegating duties, it seems clear from the stipulated issues and the evidence at trial that Appellant was seeking a general advisory opinion regarding what duties can be delegated and what cannot, rather than seeking a declaration as to whether any specific action by the Respondents was an improper delegation of the board's role or authority. As set forth above, South Carolina courts "will not issue advisory opinions for which no meaningful relief can be granted." In Interest of Kaundra C., 318 S.C. at 486, 458 S.E.2d at 444. Likewise, as set forth above, "[q]uestions of statutory interpretation, by themselves, do not rise to the level of actual controversy." Tourism Expenditure Review Comm., 403 S.C. at 81-82, 742 S.E.2d at 374. As a result, any determination would have to be addressed on a case by case basis, based on the specific action being challenged, as opposed to a request for a general advisory opinion determining the scope of delegable duties in general. In sum, the evidence at trial and the Stipulation of Issues for Trial support a finding that merely an advisory opinion was being sought. Therefore, the trial court's determination should be upheld.

4. *Stipulated Issue 1(f): That the court construe the Bylaws of the Association and declare that the Bylaws require the Board of Directors to send out a ballot to the membership for voting if a proposed amendment to the Bylaws is submitted by an eligible member.*

As set forth above, the trial court found that there simply was not enough evidence to construe the bylaws. Without sufficient evidence of the bylaws, there cannot be a justiciable controversy. Further, "[g]enerally, in order for a stockholder to be able to sue for corporate injuries, he must allege that he has exhausted his remedies within the corporation or show a sufficient reason for not doing so." Grant v. Gosnell, 266 S.C. 372, 374, 223 S.E.2d 413, 414 (1976). "Because of the fear that shareholder derivative suits could subvert the basic principle of management control over corporate operations, courts have generally characterized shareholder

derivative suits as a remedy of last resort." Aztec Oil & Gas, Inc., 152 F. Supp. 3d at 858–59. Based on the evidence at trial, it is clear that Appellant had not exhausted his remedies within the corporation. Specifically, Plaintiff failed to exhaust his remedy of trying to force a special meeting to vote on a proposed amendment. At trial, Raymond Wedlake's testimony acknowledged that there is a procedure under the bylaws to allow him to force a special meeting to vote on a proposed amendment, but he never attempted to pursue that remedy. (R. p. 317, line 23-p. 320, line 1). Likewise, S.C. Code Ann. § 33-31-702 of the South Carolina Nonprofit Corporation Act, provides that a corporation with members shall hold a special meeting of members "if the holders of at least five percent of the voting power of the corporation sign, date, and deliver to any corporate officer one or more written demands for the meeting describing the purpose or purposes for which it is to be held." Again, Mr. Wedlake's testimony indicates that he never attempted to purse that remedy. (R. p. 317, line 23-p. 320, line 1). By failing to pursue his available remedies within the corporation, his derivative action is improper. Therefore, he Appellant lacks standing and there is no justiciable controversy.

IX. THIS ACTION AND THIS APPEAL ARE NOW MOOT

By Order of this Court filed on November 8, 2019, Respondents were granted leave to amend their brief to address the issue of mootness, such issue having been raised in Respondents' Motion to Dismiss filed with this Court on August 8, 2019.

At the time of the filing of Appellant/Plaintiff's Complaint in this action, the Board of Directors for the Association consisted solely of the four Respondents, Brian James, William Craigo, Denis Esteve, and Benjamin Acord. (R. pp. 534-541). At the time of trial on April 20, 2018, all of the Respondents were still serving as directors and constituted four out of the five directors for the Association. (Id.) However, since the time of trial, the composition of the Board

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

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

Respondents assert that this appeal is now moot and nonjusticiable because the four (4) Respondents are no longer serving as officers or directors of the Association. Because none of the Respondents are currently serving as directors or officers of the Association, the Respondents no longer individually or collectively possess any managerial authority on behalf of the Association. Also, since the Respondents are no longer serving in any corporate capacity, they no longer possess a material interest in the matters alleged by Appellant/Plaintiff, and no longer serve in the capacity in which they were named in this suit (they were named in their capacity as directors). At this time, the Respondents, both individually and collectively, lack the ability to effectuate any of the declarations that Appellant continues to seek, and any declaration, if rendered, would thus be ineffectual at granting any relief and would be merely advisory in nature. In the same vein, Respondents no longer have the individual or collective authority to agree, on behalf of the Association, to any of the requested declarations even if they wanted to,

nor do they now have the authority to bind the Association to the requested declarations. Based on the foregoing, Respondents assert that this case and this appeal are now moot and nonjusticiable, and this appeal should be dismissed. Alternatively, if this appeal is not dismissed in its entirety, at a minimum, Respondents Benjamin Acord, William Craigo, Denis Esteve, and Brian James should be dismissed.

CONCLUSION

The trial court's Order of Judgment sets forth multiple grounds for finding in favor of Respondents, including (1) lack of sufficient evidence of the bylaws to allow the trial court to interpret and construe them; (2) failure to meet the requirements for a derivative suit under Rule 23(b)(1), SCRCP; and (3) lack of justiciable controversies/lack of standing. Respondents respectfully assert that the case is fully resolved based on the trial court's finding of insufficient evidence of the bylaws to allow it to interpret and construe the bylaws, ultimately rendering a determination of the remaining issues unnecessary. However, each of the remaining findings constitute additional sustaining grounds. Further, as set forth herein, this appeal has now also become moot due to the post-trial intervening event of the turnover in the board of directors. In sum, for the reasons set forth herein and for any other reason apparent to this Court, Respondents respectfully request that the trial Court's Order of Judgment be affirmed and upheld.

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January 8, 2020
Columbia, South Carolina

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Amended Final Brief of Respondents complies with Rule 211(b), SCACR.

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