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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
The Honorable Edward W. Miller, Judge of Circuit Court

Case No. 2019-CP-23-01501
Appellate Case No.: 2020-000506

Raymond A. Wedlake, as Member of Woodington Homeowners' Association, Inc. — Appellant,

v.

Scott Bashor, William Craigo, Christopher Edwards, Dennis Esteve and Charles Koshis in their capacity as Members of the current Board of Directors of Woodington Homeowners' Association, Inc. and Doe Entities 1-10, and John & Jane Does 1-10, — Respondents.

BRIEF OF RESPONDENTS

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1) DID THE CIRCUIT COURT CORRECTLY GRANT THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT AND DETERMINE THAT THE RESPONDENTS DID NOT BREACH THEIR FIDUCIARY DUTY TO THE WOODINGTON HOMEOWNERS ASSOCIATION?

STATEMENT OF THE CASE

This matter arises out of a lawsuit brought by the Appellant on March 23, 2019, in which he alleged that the Respondents breached their fiduciary duty to the Woodington Homeowners' Association (hereafter "WHOA") by violating the WHOA Bylaws and the South Carolina Non-Profit Corporation Act of 1994 (SCNPCA). (R. 33-42).

The Appellant had filed a previous lawsuit against the WHOA Board titled: *Raymond A. Wedlake, individually and derivatively, on behalf of all Members of The Woodington Homeowners'Association, Inc., 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.,and, Association Management Group SC, Inc., C.A. No.: 2017-CP-23-06301.* This was the first of many lawsuits the Appellant filed against various incarnations of the WHOA Board.[1] On May 29, 2018, following the Appellant's presentation of his case at trial, the Honorable Judge Charles Simmons issued an Order granting the WHOA Board's motion for an involuntary non-suit under rule 41(b) and dismissed Appellant's case. (R. 1-11). Appellant's lawsuit was for a declaratory judgment as it pertained to the interpretation of the WHOA bylaws. The Appellant also sought nominal damages and attorney's fees. Following Appellant's presentation of his evidence at the trial of this case, the Court granted defendants' motion to dismiss plaintiff's case.

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[1] On July 14, 2018, the Appellant filed a separate defamation lawsuit against individual WHOA board members, Kristine Lynch and Dawn Vonderbecke, in the Greenville County Court of Common Pleas, titled: *Raymond A. Wedlake, as a Member of the Woodington Homeowners' Association, Inc. vs. Kristine Lynch and Dawn Vonderbecke and John Does & Jane Does numbers 1-10 and Doe Legal Entities numbers 1-10, C.A. No.: 2018-CP-23-03758.* This firm defended the individually named defendants in this case. The Appellant filed another lawsuit in the Greenville County Court of Common Pleas entitled: *Raymond A. Wedlake, as a member of the Woodington Homeowners' Association, Inc. vs. Chris Edwards, Charles Koshis, Dennis Esteve, Michael Keels and William Craigo, in their capacity as Board of Directors of Woodington Homeowners' Association, Inc., C.A. No.: 2019-CP-23-00269.*

The Appellant appealed the Court's decision, and this matter is currently pending in the South Carolina Court of Appeals.[2] The WHOA Board at the time of this first lawsuit brought by the Appellant retained the services of the law firm of McCabe, Trotter & Beverly, P.C. to represent them in that action. The WHOA Board in that action is still being represented by the law firm of McCabe, Trotter & Beverly, P.C. in the pending appeal of that case.

On July 13, 2018, the 2018 WHOA Board received a legal bill from McCabe, Trotter and Beverly, P.C. in the amount of $53,684.50 for legal services rendered in the defense of Appellant's lawsuit against the 2017 WHOA Board and subsequent Appeal. (R. 319-349). On July 27, 2018, the WHOA Board prepared and sent a letter to all WHOA members giving them notice of a Special Meeting that was to take place on August 21, 2018. (R. 350). This special meeting was held on August 21, 2018, to update all members on events affecting the WHOA, including the pending lawsuits brought against the WHOA Board by the Appellant. The Appellant was present at this meeting. (R. 351-356)

On October 11, 2018, the WHOA Board sent a mailing to all members of the WHOA which included:

- Minutes from the Special Meeting held 8/21/18
- Cover sheet explaining each ballot with information as to the required number of responses/votes in order for the balloted item to be accepted by the Association
- Separate ballots for indemnification and a proposed 'Payment Plan' for the legal services owed to McCabe, Trotter and Beverly, P.C. for their representation of the WHOA Board in the first lawsuit brought by plaintiff

[2] The pending Appeal is titled, *Raymond Wedlake, individually and derivatively, on Behalf of all Members of the Woodington Homeowners' Association, Inc.' Appellant, v. Benjamin Accord, William Craigo, Dennis Esteve, and Brian James in their capacity the current Board of Directors of the Woodington Homeowners' Association, Inc., and Association Management Group SC, Inc., Respondents., Docket No.: 2018-001209*

and a third ballot which proposed an amendment to the bylaws as it relates to lawsuits brought by individual WHOA members.

- An article from an industry expert explaining Indemnification as it relates to Directors of Non-Profits Corporations in South Carolina (Woodington Homeowner's Association, Inc. is a South Carolina Non-Profit Corporation)

(R. 357-375)

On October 30, 2018, a Special Meeting was held to discuss current events, detail the ballots and their purpose, and answer any questions WHOA members had as it related to the Ballots. (R. 376-381) (See also R. 406-415)

November 9, 2018 was the due date for the ballots that were sent out October 11, 2018. Forty One (41) total ballots were returned. Below are the results of those ballots.

- Ballot #1 (Indemnification) – PASSED
  - 53 FOR (29 returned and 24 Board Proxies)
  - 12 Against
- Ballot #2 (Payment Plan) – PASSED
  - 56 FOR (32 returned and 24 Board Proxies)
  - 9 Against

(R. 406-415).

These ballots, specifically the ones that were not returned, were counted as per Article 17, Section 3, of the Woodington HOA Bylaws. This section states:

> "Any and all issues may be resolved per the simple majority result of vote by ballot by all Association Members. The Board Secretary shall deliver a ballot to every Member, with a specified return date determined by the Board. The return date shall be no earlier than twenty-one (21) days from date of delivery. The voting period shall include at least three Saturdays and three Sundays, where end of the voting period shall be neither Saturday nor Sunday. Ballots of members not returned by the specified return date shall be voted by the Board. The Board's vote for non-returned

ballots shall be clearly specified on ballots at the time they are delivered to Members."

(R. 312-318.)

On December 6, 2018, a Special Meeting was held in which the ballot results were provided to all WHOA members. (R. 382-383) (R. 406-415). Subsequently, on January 11, 2019, the WHOA Board sent a letter out to all WHOA members which detailed the ballot results and advised of the annual meeting scheduled for January 24, 2019. (R. 384-386) (R. 406-415). On January 24, 2019, the Annual Meeting of the WHOA was held. The annual WHOA budget was presented in detail by the Treasurer, Denis Esteve. The budget included line items matching the additional funds to be collected by the approved Payment Plan and corresponding payments of Legal Fees. The Budget was passed by verbal vote of those in attendance. It is believed that the Appellant, Raymond Wedlake, was the only WHOA member present who voted against the proposed budget. (R. 387-389) (R. 406-415).

The Appellant then filed this instant lawsuit against the named Respondents in their capacity as Board members, claiming that the Respondents breached their fiduciary duty to the WHOA by first accepting the invoice for legal services rendered by McCabe, Trotter & Beverly, P.C., and further violated their fiduciary duty by counting the ballots that had been sent out to the community in October of 2018 (ballots pertaining to indemnification and payment plan for legal fees) that were not returned by WHOA members as proxy "Yes" votes in favor of the proposed plan. (R. 33-42). On January 7, 2020, Respondents filed a Motion for Summary Judgment. (R. 161-175). A hearing on that motion was held in the Greenville County Circuit Court on February 27, 2020 before the Honorable Judge Edward W. Miller. Following oral arguments by both the Appellant and Respondents, Judge Miller granted Respondents' Summary Judgment motion. (R. 260-274).

On March 16, 2020, Appellant served his Notice of Appeal. (R. 418).

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329–30, 673 S.E.2d 801, 802 (2009). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001).

"Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, 'it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.' " *Id.* (quoting *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013)). "The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact." *Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 578, 588–89, 635 S.E.2d 649, 654 (Ct. App. 2006). If the moving party is successful, the nonmoving party must then come forward with specific facts showing there is a genuine issue for trial. *Id.* The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *McCall v. State Farm Mut. Auto. Ins. Co.*, 359 S.C. 372, 597 S.E.2d 181 (Ct.App.2004). Once the party moving for summary

judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Regions Bank v. Schmauch,* 354 S.C. 648, 582 S.E.2d 432 (Ct.App.2003). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. *Rife,* 363 S.C. at 214, 609 S.E.2d at 568.

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields,* 354 S.C. 58, 580 S.E.2d 433 (2003); *Rumpf v. Massachusetts Mut. Life Ins. Co.,* 357 S.C. 386, 593 S.E.2d 183 (Ct.App.2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.,* 357 S.C. 631, 594 S.E.2d 455 (2004); *Hawkins v. City of Greenville,* 358 S.C. 280, 594 S.E.2d 557 (Ct.App.2004). "The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial.'" Id. "A complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Id. Moreover, a party cannot rely upon mere allegations to overcome a motion for summary judgment. Instead, a party must present admissible evidence which establishes that questions of material fact exist. Strickland v. Madden, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct.App.1994).

Under South Carolina jurisprudence, an action for breach of fiduciary duty is an action at law and the trial judge's findings of fact will be upheld unless without evidentiary support." *Id.; Future Group, II v. Nationsbank,* 324 S.C. 89, 478 S.E.2d 45 (1996). In an action at law, on appeal of a case tried without a jury, *the findings of fact of the judge will not be disturbed upon appeal*

unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.,* 263 S.C. 565, 211 S.E.2d 876 (1975)." *Townes Assocs. v. City of Greenville,* 266 S.C. 81, 221 S.E.2d 773 (1976) (emphasis added).

Here, the Appellant brought a case against the Respondents alleging that they breached their fiduciary duty to the WHOA by accepting a legal bill for legal services rendered in a previous lawsuit brought by the Appellant against the WHOA Board. (R. 33-42). The Appellant further alleged that the Respondents breached their fiduciary duty to the WHOA by having the members of the WHOA vote on a proposed indemnification and payment plans to satisfy the proper, due and owing legal debt, which if passed, would satisfy payment of the legal debt owed to the law firm that represented the WHOA Board in the Appellant's first lawsuit. The Appellant, in his pleadings, various submissions and argument before the court did not produce a scintilla of evidence as to how the Respondents breached their fiduciary duty. Additionally, the Appellant in his appeal cites allegations he stated in his pleadings as evidence that "genuine issues of material fact exist." (R. 33-42). The Circuit Court held that the Respondents did not breach their fiduciary duty, that no issues of material fact existed and granted the Respondents' motion. (R. 260-274, 419-429). Therefore, unless there is some evidence that the Respondents breached their fiduciary duty to the WHOA, the Circuit Court's decision should be upheld.

ARGUMENT

A. The lower court correctly held that the Respondents did not breach their fiduciary duty

Appellant asserts that Respondents breached their fiduciary duty by accepting an invoice from a law firm that represented the Respondents in a previous lawsuit brought by the Appellant.

The Appellant further argues that the referendum process and tabulation of the votes according to the Bylaws, which Appellant now argues was in violation of the Covenants, and subsequent payment of the due and owing legal debt also constituted a breach of fiduciary duty on the part of the Respondents.

"To establish a claim for breach of fiduciary duty [a claimant] must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the [claimant] by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant. " *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012).

There is no dispute that as the elected governing Board of Directors for the WHOA, the Respondents owed the WHOA a fiduciary duty to uphold its responsibilities and obligations under the covenants and bylaws of the WHOA. *Murphy v. Yacht Cove Homeowners Ass'n*, 289 S. C. 367, 345 S. E. 2d 709 (1986). However, owing a fiduciary duty to the WHOA is not being disputed by the Respondents this is the only element that is satisfied. As set forth below, Respondents did not breach their fiduciary duty and the Appellant did not incur damages as a result of any alleged breach. As such, the Appellant has failed to establish his claim that the Respondents were in breach of their fiduciary duty.

B. Respondents were not in conflict with the Covenants when they adhered to the WHOA Bylaws

As an initial matter, the Appellant did not make any allegations in his complaint that the Covenants of the WHOA had been violated and/or that the WHOA Bylaws that the Respondents adhered to were in conflict with the Covenants. (R. 33-42). The Appellant is only raising the issue of a potential conflict between the Covenants and Bylaws in his Appeal, and is claiming the Circuit Court's Order did not address this issue.

It is well settled that on an appeal, the defendant [Appellant] cannot complain that the Circuit Court signed its order prepared by the opposing counsel before the defendant [Appellant] was given an opportunity to review it and object to its contents where the defendant [Appellant] failed to move under Rule 59(e), SCRCP, to alter or amend the judgment. *Grant v. South Carolina Coastal Council* (S.C. 1995) 319 S.C. 348, 461 S.E.2d 388.

Here, the Appellant made no such motion and/or objection to the proposed Order to the Court. The lower court gave the Appellant an opportunity to do so, and Appellant declined. (R. 416-417). As such, Appellant cannot now attempt to impugn the lower Court's order by alleging that the Order did not address the issue of a potential conflict between the Covenants and Bylaws, which again was never plead in the Appellant's complaint.

However, assuming arguendo, and this Court elects to examine this issue, it is clear that by adhering to the WHOA Bylaws, that the Respondents in no way violated the Covenants as alleged by the Appellant.

Under South Carolina law, "restrictive covenants are construed like contracts and may give rise to actions for breach of contract." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct.App.2006). "An action to construe a contract is an action at law reviewable under an 'any evidence' standard." *Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n,* 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001). On appeal of an action at law tried without a jury, this court's review is limited to correction of errors at law. *Epworth Children's Home v. Beasley,* 365 S.C. 157, 164, 616 S.E.2d 710, 714 (2005). The trial court's findings are equivalent to a jury's findings in a law action. *King v. PYA/Monarch, Inc.,* 317 S.C. 385, 389, 453 S.E.2d 885, 888 (1995). Questions regarding credibility and the weight of the evidence are exclusively for the trial court. *Sheek v.*

Crimestoppers ***424** *Alarm Sys.*, 297 S.C. 375, 377, 377 S.E.2d 132, 133 (Ct.App.1989). "We must look at the evidence in the light most favorable to the respondents and eliminate from consideration all evidence to the contrary." *Id.*

Here, the Appellant has not made a breach of contract claim, and only alleges that the Respondents have breached their fiduciary duty to the WHOA. However, assuming that this Court allows the Appellant's argument to proceed and treats this as a breach of contract claim, then this Court should apply the business judgment rule when determining if the Respondents breached their contract/duties to the WHOA.

It is well settled that a corporation can only exercise the powers granted to it by law, its charter or articles of incorporation, and any by-laws made pursuant thereto. *Lovering v. Seabrook Island Prop. Owners Ass'n,* 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct.App.1986) *aff'd as modified on other grounds,* 291 S.C. 201, 352 S.E.2d 707 (1987) *overruled on other grounds by* S.C.Code Ann. § 33–31–302 "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Goddard v. Fairways Dev. Gen. P'ship,* 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct.App.1993); *see also Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct.App.2000) ("Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith."). "Acts beyond the scope of a corporation's powers as defined by law or its charter are *ultra vires.*" *Lovering,* 289 S.C. at 82, 344 S.E.2d at 865. The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones. *Kuznik,* 342 S.C. at 605, 538 S.E.2d at 28.

Here, the WHOA Covenants, specifically, Article 5, Section 3 states:

> "(3) The Homeowners Association shall be entitled to collect dues, on an annual basis, assessed against each lot in an amount to be determined by the Board of Directors. These dues shall be administered by the officers of the Association and used for the payment of necessary expenses for the operation of the Homeowners Association and for the maintenance of any vacant and untended lot or unkept improved lot and for the payment of any common utility expenses and for the maintenance of any property deeded to the Homeowners Association." (R. 284-285)

As stated, the WHOA incurred $53,684.50 for legal services rendered in the defense of Appellant's lawsuit against the 2017 WHOA Board. (R. 407). This was a valid legal debt that became due and owing to the WHOA. Failure of the WHOA Board to pay the debt would have exposed the WHOA members to a lawsuit for non-payment and subsequently more attorney's fees in defending that lawsuit. Ultimately, the WHOA would have been dissolved and the individual members of the WHOA would have been held responsible for paying the debt. Clearly, paying for legal fees incurred by the WHOA in defending a prior lawsuit brought by the Appellant was necessary for the operation of the WHOA, and therefore valid under the Covenants and not in conflict with the Bylaws. The WHOA Board was within its authority, acted without corrupt motives and in good faith under both the Covenants and Bylaws when they issued ballots to propose increasing WHOA assessments in order to pay for the WHOA's legal fees.

Further, under the business judgment rule, the Respondents acted within its authority and acted without corrupt motives and in good faith in accordance with the vote tabulation that is specified in the WHOA Bylaws. The Respondents, within their authority and in good faith, properly counted the ballots both returned and not returned in accordance with the WHOA Bylaws, and in no way breached its fiduciary duty and/or contract to WHOA members as is alleged by the Appellant. Article 17, Section 3, which is the applicable section of the Bylaws states the following:

Ballots: Ballots are only mentioned in **Article XVII (3) of the Woodington By-Laws**. Article XVII (3) of the Woodington By-Laws states:

> *"Any and all issues may be resolved per the simple majority result of vote by all Association Members. The Board Secretary shall deliver a ballot to every Member, with a specified return date determined by the Board. The return date shall be no earlier than twenty-one (21) days from date of delivery. The voting period shall include at least three Saturdays, and three Sundays, where end of the voting period shall be neither Saturday nor Sunday. Ballots of Members not returned by the specified return date shall be voted by the Board. The Board's vote for non-returned ballots shall be clearly specified on ballots at the time they are delivered to Members."*
>
> (R. 316)

All balloting by the 2018 Board was done strictly by the procedure detailed in this section of the Bylaws. Each ballot sent to members contained the following disclosure as required by the bylaws:

> "** THE BOARD'S VOTE OF "FOR" SHALL BE CAST IN THE EVENT THIS BALLOT IS NOT RETURNED BY FRIDAY, NOVEMBER 9TH**"
>
> (R. 372-374)

In regard to the first ballot on Indemnification, the Board received 29 returned ballots in favor of indemnification and 12 ballots against indemnification. (R. 406-415). 24 ballots were not returned and as per the bylaws, were counted as "For" votes for indemnification, giving the Board a total of 53 votes in favor of indemnification. (R. 406-415). It should be noted that a total of 34 votes is needed for a majority. As clearly evidenced, and as per the bylaws, the Board received 53 votes in favor of indemnification, well over the majority. As such, plaintiff's assertion that the Board violated its fiduciary duty by accepting the legal invoice by McCabe, Trotter & Beverly, P.C. and assessed payments on WHOA members for the incurred legal fees without a majority of votes from the community needed to pass the indemnification ballot is erroneous.

In regard to the second ballot on the proposed payment plan for the legal fees incurred by the Board, the Board received 32 returned ballots in favor of the payment plan and 9 returned ballots against the payment plan. (R. 406-415). 24 ballots were not returned and as per the Article 17, Section 3 of the Bylaws, the ballots not returned were voted on by the Board in support of the payment plan, giving the Board a total of 56 votes in favor of implementing the proposed payment plan. (R. 406-415). Again, it is reiterated that a total of 34 votes is needed for a majority. As clearly evidenced, and as per the Bylaws, between the ballots that were received and the ballots not returned which counted as proxy votes, the Board received 56 votes in favor of indemnification of the Board Members legal fees, well over the majority. As such, plaintiff's assertion that the Board did not receive a majority of votes needed to pass the payment plan proposal and thus violated their fiduciary duty is incorrect.

Based on the clear language of the Bylaws, it is evident that the defendants acted in accordance with the WHOA Bylaws, specifically Article 17, Section 3, when counting the votes (all returned and non-returned votes) for indemnification and payment plan for legal fees incurred from a previous lawsuit brought against the Board by the plaintiff. (R. 316). Moreover, these Bylaws do not appear to be in conflict with the Covenants. The Respondents disclosed the proxy stipulation as per the Bylaws in bold writing on the ballot and were not attempting to conceal the intention of the proposed assessment referendum. Respondents did not act improperly and did not violate their fiduciary duty to the members of the WHOA. There was no violation of fiduciary duty on the part of the Respondents and since there was no breach of that duty, the entire basis of Appellant's case fails. As such, the lower court was correct in granting Respondents' Motion for Summary Judgment.

C. Respondents were not in violation of the South Carolina Non-Profit Corporation Act

The defendants were not in violation of the South Carolina Non-Profit Corporation Act (SCNPCA) as it pertains to the approval for the proposed ballot referendum for indemnification and payment of legal fees. The Appellant argues that the proxy voting by the WHOA Board for unreturned ballots was not allowed under Section 33-31-724 of the SCNPCA, and therefore should supersede the "absentee proxy" counting of votes as permitted by the WHOA Bylaws.

However, under Section 33-31-140 of the SCNPCA, the votes for the proposed referendum for indemnification and payment and legal fees was valid and adhered to by the Respondents. Section 33-31-140, subsection 1 states:

> (1) "Approved by the members" or "approval by the members" means approved or ratified by the members entitled to vote on the issue through either:
>
> (a) the affirmative vote of a majority of the votes of the members represented and voting at a duly held meeting at which a quorum is present or the affirmative vote of the greater proportion including the votes of any required proportion of the members of any class as the articles, bylaws, or this chapter may provide for specified types of member action; or
>
> (b) a written ballot or written consent in conformity with this chapter.
>
> Additionally, the official definitions of this section state:
>
> **1. Approved by (or Approval by) the Members.**

This definition sets forth the minimum statutory requirements for having a matter approved by the members. Approval may be by a vote of the members at a membership meeting or by written ballot or written consent. Compare sections

To be approved by the members the following minimum conditions must be met:

1. A quorum must be present. Presence may be established by physical presence, presence by proxy or by signing a written consent or written ballot.

2. A majority of the votes represented and voting must vote in favor of a proposal. While abstentions may be counted in the quorum, abstentions are not counted as no votes in determining whether a majority of the votes have been cast in favor of approving a proposal.

3. The votes cast for a proposal must constitute a majority of the required quorum.[3]

Here, as per the WHOA bylaws, a quorum is one quarter ¼ of the membership, which currently requires seventeen members needing to be present to satisfy the quorum requirements. (Bylaws Exhibit). Based on Section 33-31-140 of the SCNPCA, that would mean that nine (9) votes would be required for majority for in a 17 member quorum in order to pass a proposal. (R. 312). Forty-one (41) votes were cast for the indemnification proposal which is clearly greater than the seventeen (17) votes required for the quorum. Twenty-nine (29) votes were returned in favor of the proposal ("Yes" votes) and twelve (12) were returned against the proposal ("No" votes). In regard to the proposal for the "Payment Plan," forty-one (41) votes were cast, which again, is greater than the required seventeen (17) votes needed for a quorum. Thirty-two (32) votes were returned in favor of the proposal ("Yes" votes) and nine (9) against ("No" votes).

The returned votes for both proposals clearly exceeded number of votes that would be required to approve the matter (9 votes would be required for majority for a 17 member quorum). As 41 votes were returned for each proposal, and the indemnification and payment plan proposal had twenty-nine (29) and thirty-two (32) "Yes" votes respectively, both measures passed overwhelmingly under Section 33-31-140 of the SCNPA (29 "yes" votes out of 41 for the indemnification proposal and 32 "yes" votes out of 41 for the "Payment Plan" proposal). Therefore, regardless of whether this Court accepts the Appellant's argument that the SCNPCA is the law that governs the voting process over the WHOA Bylaws, both the indemnification

[3] The following example illustrates the interplay of these requirements. A quorum is a majority of the votes entitled to be cast. Assume the number of votes entitled to be cast is 100, the number of votes present is 60. If 26 votes are cast in favor of a proposal, 17 against the proposal and 17 abstain, the proposal is approved. The 26 votes for the proposal constitute a majority of the required quorum of 51. If, however, there are 25 votes in favor of a proposal, 12 against the proposal and 23 abstain, the proposal is defeated. The 25 votes for the proposal are not a majority of the required quorum. Consequently, the proposal is defeated even though the number of affirmative votes is greater than the number of negative votes.

proposal and "Payment Plan" proposal were voted on and approved in adherence to the SCNPCA.

D. The WHOA is a registered Non-Profit Corporation, and thus individually named Board members are immune from liability.

The Appellant intentionally named the various individual members of the different incarnations of the WHOA Board of Directors as defendants in this lawsuit and all of his prior lawsuits, rather than suing the WHOA entity itself in order to try to pin the legal fees for the actions on the individuals and discourage them from challenging him. Despite the Appellant's assertions, the WHOA is a registered Non-Profit Corporation in the state of South Carolina. Therefore, the plaintiff's current lawsuit against the individually named Respondents is in direct violation of the SCNPCA. Specifically, Section 33-31-834(a) states:

Immunity From Suit: Section 33-31-834 (a):

"All directors, trustees, or members of the governing bodies of not-for profit cooperatives, corporations, associations, and organizations described in subsection (b) are immune from suit arising from conduct of the affairs of these cooperatives, corporations, associations, or organizations. This immunity from suit is removed when the conduct amounts to willful, wanton, or gross negligence. Nothing in this section may be construed to grant immunity to the not-for-profit cooperatives, corporations, associations or organizations."

This Act specifically protects individual Board members from suit in cases such as this, providing that all "directors, trustees, or members of the governing bodies of not-for-profit cooperatives, corporations, associations, and organizations described in subsection (b) are immune from suit arising from the conduct of the affairs of these cooperatives, corporations, associations, or organizations." S.C.Code Sec. 33-31-834(a). Subsection (b) specifies that 501(c)(3) organizations, such as the WHOA, are covered by this provision. While the WHOA itself can be sued, under per Article 20, Section 1 of the WHOA Bylaws, individual board

members cannot, unless it is shown that the members were grossly negligent and did not act in the best interests of the WHOA. (R. 316-317). The Appellant has proffered no evidence that the individually named Respondents acted in such a matter that would cause them to be held personally liable. Additionally, Article 20, Section 1 of the WHOA Bylaws states:

> "Association (WHOA) must indemnify certain persons and hold them harmless who are parties to an eligible proceeding or are threatened to be parties. The persons eligible for indemnification are:
>
> 1) "Directors, officers, employees or agents of the Association;...

(R. 316-317)

Therefore, the individually named Respondents, as per the WHOA Bylaws, "must" be indemnified by the WHOA. Moreover, in addition to the foregoing, South Carolina law also requires challenges to the corporate action of a nonprofit corporation based on lack of power or authority to act to be brought derivatively. An action against directors and officers for breaching their fiduciary duties belongs to the corporation and must be asserted derivatively by a shareholder. The rationale for this rule is that the directors' duties of loyalty and care run to the corporation, not to the individual shareholders. If the corporation is unwilling to join the suit as a plaintiff because it is controlled by the defendants, it may be named as a nominal defendant.

S.C. Code Ann. § 33-31-304 provides:

> § 33-31-304. Ultra vires.
>
> (a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.
>
> (b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.
>
> (c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be

brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee, or other legal representative, or in the case of a public benefit corporation, by the Attorney General.

The South Carolina Reporters' Comments to Section 33-31-304 make clear that any claims predicated on lack of power or authority of a nonprofit corporation to act must be brought derivatively and the comments specifically provide that:

> "Under this section of the Nonprofit Act, a member of a nonprofit corporation has no right to bring a direct attack against a proposed action. The claim may only be brought derivatively. If an action has been accomplished and the members believe that the directors or others in charge have done something wrong, have acted "ultra vires," the members may bring a derivative action against the alleged wrongdoers."

It is clear that the Appellant's claims primarily amount to a challenge to the managerial authority of the board of directors and their authority to act, specifically, the allegations of breaches of fiduciary duties on the part of the Respondents. The Appellant is the only member of the WHOA who has brought suit. Further, the Appellant has not provided a petition evidencing support for his action. Consequently, Appellant's claims must be brought derivatively and cannot be brought individually. Based on the lack of and/or no support by the WHOA community of the Appellant's lawsuit, the Appellant's action amounts to an individual claim against the individually named Respondents and should be dismissed.

However, even if this Court accepts the Appellant's argument that the individually named Respondents are not afforded immunity under § 33-31-834 of the SCNPCA, the Respondents would be immune from individual liability under § 33-31-830 of the SCNPCA. § 33-31-830 of the SCNPCA states:

> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) in good faith;
>
> (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner the director reasonably believes to be in the best interests of the corporation.

(b) In discharging his or her duties, a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation who the director reasonably believes is reliable and competent in the matters presented;

(2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence;

(3) a committee of the board of which the director is not a member, as to matters within its jurisdiction, if the director reasonably believes the committee merits confidence; or

(4) in the case of religious corporations, religious authorities and ministers, priests, rabbis, or other persons whose position or duties in the religious organization the director believes justify reliance and confidence and who the director believes is reliable and competent in the matters presented.

(c) A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable to the corporation, a member, or any other person for any action taken or not taken as a director, if the director acted in compliance with this section.

The Respondents could only be found individually liable under § 33-31-830 subsection (d), if it was found that they did not act in good faith, exercise ordinary care that a reasonable prudent person would exercise under similar circumstances and/or not in a manner the director reasonably believes to be in the best interests of the corporation. There has been no evidence presented that the Respondents did not act in good faith and/or exercise ordinary care and/or act in what they believed was in the best interests of the WHOA. The Respondents, in good faith accepted the legal invoice, and adhered to all Covenants and Bylaws when sending the ballots for the proposals to all WHOA members. Further, the Respondents followed the Bylaws during the

entirety of the voting process and tabulated the votes as the Bylaws explicitly state. Therefore, since there is no evidence the Respondents did not act in good faith, did not exercise ordinary care and/or did not act in the best interests of the WHOA, the Appellant's claim against the individual Respondents fails.

E. The lower court correctly pointed out that Rule 11 Sanctions are appropriate in this matter.

At the hearing on the Respondents' Motion for Summary Judgment, the court addressed the Appellant.

> The Court: So, if I understand you correctly that these attorney's fees – these attorney's fees that were incurred to defend your lawsuits, you're saying it's your position that the board should have just rolled over and let you win your lawsuits? I'm not asking for a response. I would suggest – you're a very studious individual. And I think I've told you before that we welcome pro se litigants. But we hold them to the same standards we do attorneys. And I suggest that you review Rule 11 with respect to sanctions for pleadings or lawsuits that are – have no valid basis or merit.
>
> (R. 272)

This lawsuit is just the latest in a series of lawsuits the Appellant has filed against the various incarnations of WHOA Board and its members over the years. The genesis of these lawsuits stem from the Appellant painting a red "sailboat" and/or "jack-o-lantern" on his garage door in 2016, without seeking the proper approval from the WHOA Architectural Committee. The WHOA Board at the time, politely asked the Appellant to remove the "art" on his garage, which apparently triggered the onslaught of lawsuits that have since been brought by the Appellant.

The Appellant currently has three other cases in which he sued the WHOA, pending on Appeal, after having each of his lawsuits dismissed by the lower courts. At this point, homeowners in the WHOA have become frustrated and angry over the Appellant's continuous filing of frivolous lawsuits. In the past, WHOA members have been reluctant to identify

themselves in an accompanying affidavit or other public correspondence for fear of being named in the Appellant's next lawsuit or being subject to other abusive and harassing backlash from him. The Appellant has created a climate of fear in his neighborhood through his seemingly continuous lawsuits against the WHOA Board. However, the members of the WHOA have recently filed a class action suit against the Appellant for Abuse of Process and are alleging damages, including but not limited to, increased assessments and decreased home values, because of Appellant's abuse of the legal system in filing numerous frivolous lawsuits against the WHOA Board Members. This case is pending the Greenville County Circuit Court titled: *Beverly Taylor, Marvin Taylor, and Ada Alvarez, individually and on behalf of all similarly situated individuals vs. Raymond A. Wedlake, Case No.: 2020-CP-23-01458.* Additionally, a defamation lawsuit has been filed against the Appellant by the law firm that was engaged to represent the individually named WHOA Board Members in case 2019-CP-23-00269. That case against the Appellant is currently pending in the Greenville County Circuit Court titled: *Campbell Teague LLC vs. Raymond A. Wedlake, Case No.: 2020-CP-23-01679.*

Throughout this instant lawsuit, and all the prior ones before it, the Appellant has altered his arguments when legally challenged in such a manner that contradicts his prior positions or otherwise shows his intent to use the system to his advantage, no matter the consequences. An example of this is reflected in this lawsuit and current Appeal. The Appellant is arguing against the validity of the Bylaws that he proposed or otherwise helped enact during his tenure on the Board in 2000-2001. The crux of the Appellant's case is that these Bylaws, which he helped propose and enact in 2001, are now invalid, and the Respondents are in breach of their fiduciary duty for following them.

The Appellant held the position of Secretary on the WHOA Board in 2001 when Article 17, Sections 1 and 3 were proposed by the WHOA Board to the WHOA members. (R. 308), (R. 309-310). Both the aforementioned ballot and proxy vote have the address of 703 Creekview Drive, Greenville, SC 29607 as the address heading. The 703 Creekview Drive address is that of the Appellant in this action, Raymond Wedlake. Additionally, the Appellant, as Secretary of the Board in 2001, wrote a letter to all WHOA members, dated July 5, 2001, in which he advises members of the results of the vote. (R. 311). In his letter, the Appellant proclaims, "Results from the meeting were very positive, as all proposed "By-Laws" amendments were accepted!" (R. 311) Additionally, the July 5, 2001 letter penned by the Appellant states "The Board will commit resources, if necessary, to defend the By-Laws" if a legal challenge is brought forth." (R. 311). Moreover, in 2003, a proposed assessment to help finance a fence initiative in the WHOA, which consisted of taking down a fence and installing a new fence was passed, using the proxy voting outlined in Article 17, Section 3 of the Bylaws that the Appellant had helped propose and enact during his time on the Board. These are the same proxy vote counting methods the Appellant now claims are invalid on this Appeal. In 2003, the Appellant did not file any lawsuits or allege the Bylaws were invalid or in conflict with Covenants or the SCNPA when the fence initiative was passed. Further, the Appellant, who is now claiming that the Respondents are somehow in breach of their fiduciary duty by approving the indemnification and payment plan initiatives based on Bylaws that the Appellant himself approved, drafted and implemented 19 years ago, is disingenuous at best. The Appellant had been well aware of Article 17, Section 3 which allowed the Board to vote non-returned ballots as proxy votes to be determined by the Board. As such, the Appellant's allegations that the Respondents violated their fiduciary duty by adhering to the WHOA Bylaws is baseless and without merit.

F. The Appellant has not incurred damages as a result of the approval of the Indemnification and/or Payment Plan assessments

As stated, the Appellant has alleged that Respondents have breached their fiduciary duty. The third element of proving a claim for breach of fiduciary duty is "(3) damages proximately resulting from the wrongful conduct of the defendant." *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335–36, 732 S.E.2d 166, 173 (2012). The Appellant has never specified what his damages are, and has repeatedly claimed that he is only "seeking nominal damages of $1.00." However, based on the Appellant's Motion for an Emergency Temporary Injunction, which was hear before the Greenville County Circuit Court and subsequently denied, it appears Appellant's claim for damages incurred from the Respondents' alleged breach of fiduciary duty, is in the form of increased dues and assessment fees. (R. 119-123). The legal bill following the litigation and trial in response to the Appellant's initial lawsuit (*2017-CP-23-06301)* totaled $53,684.50, which was reduced to $33,000.00. (R. 406-415). The ballot for the repayment of the legal fees, which was approved by WHOA members, consisted of five payments of $6600.00 to repay the bill, which equates to $500.00 per household. (R. 124-136). (There are 66 households in the WHOA community). The first payment was made with cash the WHOA already had in its account. (R. 124-136). The ballot that was voted on and approved by WHOA members included a one-time $100 assessment fee, followed by a temporary $50.00 increase in dues for members for the years 2019 and 2020 in order to pay for the legal fees incurred. (R. 124-136). No additional money was assessed to homeowners. The second payment of $6600.00 was made after 2019 HOA dues were collected, which was an additional $50.00 per household. (R. 124-136). The third payment was made after the one- time $100 assessment in the summer of 2019. (R. 124-136). The fourth payment of $6600.00 was made at the end of 2019 from cash on hand. The

fifth payment will be made after 2020 HOA dues are collected, which as stated above is a temporary $50.00 increase in the dues collected.

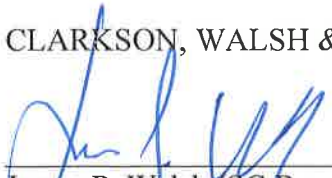
The entirety of the increase, which includes the assessment and two yearly dues increases, total $200.00. per household. It should be noted that the Appellant currently has brought 4 prior lawsuits against the various incarnations of the WHOA Board, and three of those lawsuits, including this one, are currently pending Appeal. Prior to proceeding pro se, the Appellant had retained his own attorney to represent him in these lawsuits, who we understand is still working with the Appellant as a "consultant." Clearly, if the Appellant has the means to afford counsel to represent him in multiple lawsuits, and is able to pay the costs of filing three (3) Appeals, he cannot seriously profess that paying $200.00 over the course of a two year period is causing him damages. As such, the Appellant cannot prove the third element of his breach of fiduciary duty claim.

CONCLUSION

The lower court correctly held that the Respondents did not breach their fiduciary duty, and were entitled to Summary Judgment in this case. Therefore, Respondents respectfully request that the lower court's order granting Respondent's Motion for Summary Judgment be affirmed.

Respectfully Submitted by:

CLARKSON, WALSH & COULTER, P.A.



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