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SC Court of Appeals

STATE OF SOUTH CAROLINA
The South Carolina Court of Appeals

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

Civil Action No. 2019-CP-23-01501
Appellate Case No. 2020-000506

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

v.

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

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REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE ISSUES ON APPEAL

Respondents Erroneously State there is only One Issue on Appeal

Brief of Respondents (BOR) erroneously states only one issue, that being:

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?

In "Initial Brief of Appellant" (BOA) five "Issues on Appeal" were listed, where a main issue is the fact that Summary Judgment (SJ) was granted based upon errors of law. Determination of whether or not Respondents breached their fiduciary duty must come before a jury, as in Respondent's Answer (R. 106) by their own demand: "Jury Trial Demanded". Further, the question of whether or not Respondents breached their duty is in itself an issue for a jury, as evidenced and supported by the Supreme Court of South Carolina (*infra*). Hence, all these things dictate that granting of SJ must be reversed.

Moreover, BOR seems to want to focus on their-one-stated issue, but then expounds upon all sorts of irrelevant, additional issues throughout its content. All issues as stated in BOA must be subject to review by this Court, including BOR's-one issue.

II. STATEMENT OF THE CASE

A) Appellant's-United-States-Constitutional Rights were denied by Summary Judgment Being Granted

BOA is supported by a verified Complaint, numerous evidentiary Exhibits, and Affidavits, including that of the prior attorney, whereas the BOR contains a host of irrelevant matter. In respondents' "Statement of the Case" which begins on page 2 of BOR, they seem to suggest that Appellant, who in Woodington Homeowners' Association, Inc. (WHOA) is a long-time-WHOA member (Member) (BOA p. 4), a former member of its Board of Directors (Board)

(R. 390), a law-abiding citizen, and similarly expects for Respondents to act in a law-abiding manner, was/is not justified to seek relief from Appellant's-personal injury suffered, in a Court of Law. Contrary to Respondents' innuendos, no Court of Law rightfully seeks to punish law-abiding Members for seeking to assure good governance, as was and still is Appellant's mission. Nor would any Court, as Respondents seek to do, deny that person's United-States-Constitutional right to enjoy due process of law, or "… equal protection of the laws …", particularly when injury resulted from alleged-law-breaking actions perpetrated by the WHOA Board. BOR's "Statement" makes many irrelevant comments about several other cases, which only remotely and with stretch of imagination are relevant to this Appeal.

As such, none of this sort of content is relevant to Appellant's Appeal, which requests reversal of SJ. This is the relevant issue which is, and should be, the focus of this Appeal. In BOA, like comments are found on pages: 3 – 5, 13, 21, 24, and 26.

Factually as found on BOA page 22, the Judge chided Appellant when he merely wanted to reply to Counsel's other-case-irrelevant comments:

> THE COURT: We're not here to argue some other case, Mr. Wedlake. Let's get ---
> MR. WEDLAKE: That's correct, ---
> THE COURT: --- to the points --- (R. 265, ll. 11-14)

> THE COURT: Mr. Wedlake, don't interrupt me. I won't interrupt you, so don't interrupt me. Okay? We're not going to argue the other case. Respond to this motion for summary judgment. Thank you. (R. 265, ll. 18-21)

B) Brief of Respondents Confirms Genuine Issues of Material Fact

Much of what is brought in BOR confirms genuine issues of material fact, which thereby necessitates reversal of SJ. One such genuine issue is that a majority (34 votes) of WHOA

Members did not vote to approve ballots, where the Board claimed otherwise, as admitted in BOR on page 4, which showed a mere 29 Members voted to approve on Ballot 1 (approve indemnification for 2017 Board), and only 32 Members on Ballot 2 (approve payment plan), both short of the required 34 to comprise a majority of Member votes. Hence, neither of these ballots were approved by Members, and consequently the Board's claim of "PASSED" is unlawful under the "South Carolina Nonprofit Corporation Act of 1994" (NPCA), Section 33-31-140(1)(b). In BOA, like comments are found on pages: 6-7, and 17-19.

By-Laws Article 17, Section 3 (R. 86) is "inconsistent with law" and thus By-Laws cannot contain such provision, and this provision must be recognized as null and void under NPCA Section 33-31-206(b), together with NPCA Section 33-31-831(f), which states specifically that "Board controlled votes" "… may not be counted in a vote of members to determine whether to authorize, approve, …". In BOA, like comments are found on pages: 9, 17 – 19, and 27.

III. STANDARD OF REVIEW

Appellate-Case Law Supports Appellant's Position that Existence of a Material Fact Precludes Granting a Motion for Summary Judgment, and Per South Carolina Supreme Court, a Breach of Fiduciary Duty is a Matter for a Jury to Decide

BOR affirms with many references to case law a basic point: SJ cannot be granted if even one-genuine issue of material fact exists. Indeed, many points brought in BOR's "Standard" actually speak for Appellant. BOR's affirmation of many genuine issues of material fact means that SJ was granted erroneously, and with error of law. The question: "… did Respondents breach their fiduciary duty? …" must come before a jury, by their own demand: "Jury Trial Demanded" (R. 106). This question is not a proper one as related to SJ, nor to its granting. Indeed:

> When material facts are in dispute, then the case must go to a jury, whether the argument is that … , *Bell v. Irwin*, 321 F.3d 637 (2003), United States Court of Appeals, Seventh Circuit, February 25, 2003

and similarly since Appellant alleged negligence (R. 36, par. 12) by Respondents in performance of their duties, "… the question should be left to the jury" :

> [i]f ... under the undisputed facts there is room for reasonable difference of opinion as to whether such act was negligent or foreseeable, the question should be left to the jury. S*olimene v. B. Grauel & Co., KG*, 399 Mass. 790 (1987), 507 N.E.2d 662, Supreme Judicial Court of Massachusetts, Middlesex, May 4, 1987.

> We conclude Wingate owed a **fiduciary duty** to his former client, Mrs. Spence. This **duty** included, among other obligations, the obligation not to act in a manner adverse to her interests in matters substantially related to the prior representation. **We agree with the Court of Appeals that whether Wingate breached a duty regarding the congressional life insurance policy is a question of fact for a jury to determine.** Thus, we uphold the decision of the Court of Appeals to **reverse the grant of summary judgment** and remand this matter for trial. To the extent the Court of Appeals indicated whether a **duty** was owed was a **question** of fact for the **jury**, the decision is modified to recognize that whether a fiduciary relationship exists between two classes of persons is a matter to be determined by a court. … *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920, (S.C. 2011), South Carolina Supreme Court

In BOA, like comments are found on pages: 4 and 5.

IV. BRIEF OF RESPONDENTS CONTAINS ERRONEOUS ARGUMENTS

BOR Item A erroneously states, *Inter Alia*:

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

No such statement is found in the Order (R. 22-32), nor in the Transcript (R. 260-274) from the Hearing where SJ was granted. This question is in itself a genuine issue of material fact. Respondents admit in BOR that: "… owing a fiduciary duty to the WHOA is not being disputed by the Respondents …". The fact that Respondents perpetrated actions in violation of law

proves a breach of their fiduciary duty, as alleged by Appellant. In BOA, like comments are found on pages: 5 – 6, 9, 12, and 26.

BOR Item B erroneously states:

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

Respondents are in direct violation of "Declaration of Covenants, Conditions and Restrictions for Woodington Subdivision" (Covenants) (R. 278-288) as they assumed power and authority to assess Members for legal fees, where assessment for this purpose is not a power given to them by the Covenants. Likewise, such extended power and authority cannot be "approved" by amending the By-Laws (R. 306). The Covenants control where By-Laws conflict with the Covenants (R. 86), which makes BOR's claim: "… when they adhered to the WHOA Bylaws", immaterial and irrelevant. Contrary to BOR which states:

> 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. 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.

Such reference to the Covenants, and the: "… the issue of potential conflict between the Covenants and Bylaws …", was brought to the Court well before the Appeal. Prior to the Appeal, this issue - which is itself another genuine issue of material fact - was raised before the Court in Appellant's "Memorandum in Opposition to Defendants' Motion for Summary Judgment" (MOP), filed 02/24/20 (R. 202-209) but was not mentioned in the Circuit Court's Order, where MOP p. 3 showed:

5d1. that the by-laws supposedly "approving" the payment of fees was invalid, where Exhibit 1 (p. 2) shows:

> Defendants' motion (Motion) must be denied on the basis that the cited By-Laws Amendment is invalid, as clarified below. Assuming arguendo such Amendment may be recognized as valid, several other arguments dictate that Motion must be denied:
>
> A. By-Laws Cannot be Used in the Manner Desired by Defendants Without Specific Granting of Authority Stated in Restrictive Covenants; Additionally, By-Laws Are Invalid When, as Here, They are Inconsistent With Law; (R. 204)

In BOA, like comments are found on pages: 15 and 17.

BOR also states erroneously:

> 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 … Appellant made no such … objection to the proposed Order to the Court. The lower court gave the Appellant an opportunity to do so, and Appellant declined. (See email as Exhibit). (R. 416)

Appellant Was Denied A Reasonable Opportunity to Review the Proposed Order Which was Flawed as a Matter of Law

Appellant was not given a reasonable opportunity to review the proposed Order (PO) prepared by opposing counsel, nor to object to its contents. A PO became known to Appellant late in the day on 03/10/20, with the Order being filed around 10 AM on 03/13/20. This interval gave too short a time for Appellant to reply substantively to the PO. However, a short list of objections to the PO was sent to Judge Miller on 03/10/20 (Sup. R. 4-5), and thus objections were before the Court, so Appellant did not decline the opportunity to object. Previously on 02/04/20, Appellant filed a "Notice of Unavailability" (Sup. R. 6-8) to inform the Court and all parties of limited-time availability to work on Court tasks. Appellant also filed a "Motion to Exclude Content from the

Record on Appeal" (Sup. R. 9-13), as related to Respondents bringing: "e-mail as Exhibit" (R. 416), newly on Appeal, where such evidence was never previously before the Court.

BOR also states erroneously:

> ... this Court should apply the business judgment rule when determining if the Respondents breached their contract/duties to the WHOA.

As Appellant cited alleged-violation of law, and other statutory bars against applying the "Business Judgment Rule" (BJR), also as set forth in his-original Complaint, any contention that BJR applies is wholly improper. A Board may not exercise business judgment which results in violation of law, or is otherwise excluded from exculpation. This is another genuine issue of material fact.

BOR also confirms several of Appellant's claims, verifying that BJR can only apply in instances: "… absent a showing of bad faith, dishonesty, …", where it is easily recognized that Respondents desire to indemnify 4-prior-Board members, as opposed to acting in the interest of 62-other-Member-voting units – a very lopsided majority - is not exercising good faith for WHOA. Further, a dishonest act based upon corrupt motives is easily recognized relative to assessing Members for legal fees, for which the Covenants do not give the Board power nor authority to do. This is another genuine issue of material fact.

Respondents also confirm that BJR does not apply unless a Board acts within it authority and with good faith, which is clearly not the case as evidenced by Appellant's pleadings, contrary to as found in BOR (emphasis added):

> … "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 Feruy 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**.").

BOR also confirms a Board must act within its charter, or its actions are *ultra vires*. When this is true, BJR can not apply (emphasis added):

> "**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.

BOR also confirms that the Covenants do not give the Board power to assess Members for legal fees (which was done here by Respondents), so thus the Board's assessing for this purpose is *ultra vires*, and BJR cannot apply (emphasis added):

> (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 unkempt 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)

BOR also states erroneously several items relative to the clearly improper-legal invoice that was accepted by the Board. WHOA did not incur a bill for legal services; the 2017 Board incurred this bill in violation of the By-Laws which require prior approval, which was never sought nor approved by Members, for expenses in excess of $1500 (R. 85). WHOA was not a Defendant in the referenced case; WHOA was a co-Plaintiff with Appellant (R. 37, par. 23). Thus, this was not: "… a valid legal debt that became due and owing to the WHOA …". As shown in BOA on page 8, the very same law firm who billed WHOA admitted that:

> Notably, Woodington Homeowners' Association, Inc., the corporate entity itself, was never made a party to this proceeding. [the referenced case] (R. 142)

and consequently in violation of their "Lawyer's Oath", billed a party who was not their client.

Conjectures in BOR portraying possible, but unlikely, future events are vague, ambiguous, and can not be brought on Appeal, as Appellant is not aware that any such similar arguments were previously before the Court. Conjectures are also moot and unripe at this time, and therefore should be stricken from BOR. As such, conjectures cannot be claimed as: "… necessary for the operation of the WHOA …". Conjectures do not lead to a conclusion of: "… valid under the Covenants …". The WHOA Board acted outside its authority as given by the Covenants, with corrupt motives by violating powers that they presumed to possess, but are unauthorized by the Covenants, which in no stretch of imagination can be viewed as "good faith", nor as "proper". Thus, in several ways, it has been shown the Board breached it duty to WHOA.

BOR's cited Article 17, Section 3, allowing the Board to vote as Proxy for non-returned ballots is "inconsistent with law", and therefore must be viewed as null and void under the law: NPCA 33-31-206, 33-31-734, and 33-31-831(f), as seen in BOA pp. 18-19. The Board did not comply with NPCA 33-31-206 when using Board votes, not Member votes, to claim "Member approval". In summary, the Board's actions relative to the legal bill violated the Covenants and is unlawful under the NPCA, as has been alleged by Appellant. All these things are further examples of genuine issues of material fact.

As rebutted above, arguments as below were shown to be erroneous as found in BOR:

> As stated, the WHOA incurred $53,684.50 for legal services rendered in the defense of Appellant's lawsuit against the 2017 WHOA Board. 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. … 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, …

BOR Item C erroneously states:

> **C. <u>Respondents were not in violation of the South Carolina Non-Profit Corporation Act</u>**

NPCA 33-31-140 is clear that "Member approval" requires votes by Members, not counting votes over which the Board has control, which cannot be counted as part of Member votes towards a conclusion of approval, per NPCA 33-31-831(f). In an apparent effort to obfuscate the facts and law, BOR brings a host of irrelevant arguments related to "quorum", which do not apply since no voting was done in meetings. Voting was done via ballot which was sent to each and every Member. Each and every Member had an opportunity to vote their ballot, or to execute and to deliver to the Board Secretary their proxy authorization as required by NPCA 33-31-724; see BOA p. 18. The Board had no such proxies which authorized them to

vote ballots under their control. Ballots themselves properly stated number of votes required for approval as found in "Special Meeting of the Woodington HOA", 10/30/18, pp. 16-18 (R. 357-358):

> BALLOT #1 [Majority Vote Needed to Pass (34 of 66)] (R. 93)
> BALLOT #2 [Majority Vote Needed to Pass (34 of 66)] (R. 94)
> BALLOT #3 [75% of Members Needed to Pass (50 of 66)] (R. 232)

The conclusion found in BOR must be discounted as fantasy due to a myriad of Appellant's claims to the contrary, which showed violations under the NPCA [= SCNPCA below]:

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

This is another issue confirmed by BOR as a genuine issue of material fact.

BOR Item D erroneously states:

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

Respondents misrepresent Appellant's desire not to "sue himself". As a Member of WHOA, Appellant has no desire to bring suit against "… the WHOA entity …", that is: himself, and has no obligation to do so under any-known-statutory law. Appellant believes the Constitution of the United States also precludes a suit brought against himself, as Appellant is protected from "self incrimination". No suit brought against a Board sought more than "Nominal Damages" of $1, so in truth, nobody "was sued". No additional-punitive damages were sought against any Board. Appellant pleaded with all Boards to negotiate and/or mediate, all to no avail as Boards continue to manifest a "take a hike" attitude towards Appellant, preferring instead to force Appellant to bring judicial action as part of his quest to improve

WHOA, and to bring improvements to its Members, rather than let a Court of Law help to resolve disputed issues. Appellant believes resolution of disputed issues, as aided by Court judgments being rendered for the benefit of all of WHOA, certainly can be appreciated by Respondents. But, Respondents simply want to "fight", telling Appellant to "take a hike". BOR states erroneously:

> 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.

Appellant did not dispute that: "... WHOA is a registered Non-Profit Corporation in the state of South Carolina.". As BOA, section 3.1 on page 20, Appellant showed: "… a tax exempt status is required before immunity from suit applies …". WHOA as a "mutual benefit corporation" is not, and never can be, exempt from taxation under any of the prerequisite income-tax-code sections 501(c)(3) – which is reserved for charitable and like organizations - nor under 501(c)(6) nor 501(c)(12); see IRS Publication 557: "Tax-Exempt Status for Your Organization" (R. 403-405). Consequently, none of WHOA, its Board, nor its individual Board members are immune from suit, pursuant to NPCA Section 33-31-834. Appellant's Complaint of 03/23/19 (R. 33-42) also showed:

> 11. Moreover, WHOA is a mutual benefit corporation, and thus, Plaintiff asserts that Defendants are not insulated by S.C. Code Section 33-31-834 since it does not apply to mutual benefit corporations.
> 12. Plaintiff asserts further that if protections afforded by such statute applied then in any event the actions of the Defendants constituted "gross negligence or willful or wanton conduct" which denies Defendants from such protection. (R. 36)

These issues also represent genuine issues of material fact.

BOR mistakenly brings a false claim since WHOA has not, and can never be, granted tax-exempt status as a 501(c)(3) "charitable" organization:

> Subsection (b) specifies that 501(c)(3) organizations, such as the WHOA, are covered by this provision.

BOR continued with mistaken claims, where Complaint paragraph 12 as cited above belies BOR's claim: "… Appellant has proffered no evidence … personally liable", since actions by named Respondents were negligent, as alleged by Appellant. Further, BOA evidence contradicts BOR's claim: "… Appellant has proffered no evidence … Respondents … personally liable.", citing NPCA as found in BOA on pp. 8 and 9 (emphasis added):

> SECTION 33-31-202. Articles of incorporation.
>
> (b) Unless the articles provide otherwise, no director of the corporation is personally liable for monetary damages for breach of any duty to the corporation or members. However, **this provision shall <u>not</u> eliminate or limit the liability of a director**:
>
> (1) for any **breach of the director's duty of loyalty** to the corporation or **its members**;
>
> (2) for **acts or omissions** not in good faith or which involve intentional misconduct or a **knowing violation of law**;
>
> (3) for any transaction from which a director derived an **improper personal benefit**;

where Appellant has alleged all of: "breach", "acts or omissions not in good faith", "knowing violation of law", and "improper personal benefit". BOR shows:

> 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. 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.

Arguments related to indemnification (R. 86-87) of Board members cannot be brought on appeal, since no such arguments were before the Court at any previous time. These issues also represent genuine issues of material fact.

BOR also states erroneously "… must be brought derivatively …", citing NPCA Section 33-31-304(b). The "Bill of Rights, Amendment XIV" (Sup. R. 14) from the "Constitution of the United States" specifically shows: "… no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States …", and: "… nor deny to any person within its jurisdiction the equal protection of the laws". Any conclusion that 304(b) applies would abridge Appellant's privileges and immunities as a citizen of the United States. Similarly, applying 304(b) would deny Appellant from equal protection of the laws, due to Appellant having suffered damages due to unlawful actions of the Board, as alleged:

> AMENDMENT XIV [excerpted, emphasis added]
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States**; nor shall any State deprive any person of life, liberty, or property, without due process of law; **nor deny to any person within its jurisdiction the equal protection of the laws**. (Sup. R. 14)

Since the issue of application of Section 33-31-304(b) is not an argument before the Court at any previous time, it may not be brought newly on Appeal. However, Appellant's breach of duty claim is based primarily upon unlawful action by the Board, not upon whether: "… the corporation lacks or lacked power to act. …", which is therefore a moot and irrelevant citing of law, and annuls 304(a) restriction to 304(b), only. BOR also shows 304(c), which plainly states the power to act may be challenged as brought directly:

§ 33-31-304. Ultravires.

.

(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.

If the Court intends to allow bringing on Appeal of whether or not 304(b) or 304(c) applies, it represents yet another genuine issue of material fact.

BOR also states erroneously that NPCA Section 33-31-830 grants immunity to Respondents:

> 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 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.
>
> .
>
> (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.

Appellant's pleadings to date have alleged Respondents have no immunity under any section of the NPCA. Contrary to BOR's mistaken claim, BOA page 6 cited evidence from the original Complaint (R. 33-42)):

> 10. Plaintiff alleges, moreover, that with respect to the duty of care, Defendants did not act in good faith and indeed their misconduct was knowing and intentional, and thus Defendants are subject to personal liability pursuant to Section 33-31-830. (R. 35)

Contrary to BOR's "prudent person" claim, BOA on pp. 11-12 denied that Respondents acted consistent with 830(a)(2):

> d) mistakenly and wrongfully claimed Appellant caused the Board to incur more legal fees to fight his suits, which has been willful, wanton, and grossly-negligent decisions made by the Board, given that Appellant asked the Court for "Nominal Damages" of $1; no reasonably-prudent person in a similar situation would act in such manner, and decide to fight, incurring multi-tens-of-thousand dollars against $1 in potential damages; this is yet another genuine issue of fact, which shows Respondents breached their duty;

Contrary to BOR's "best interest" claim, BOA on p. 8 alleged that Respondents acted out of malice towards Appellant, and did not act in a best interest for WHOA, contrary to 830(a)(3):

> **1.1c** **<u>Specifics of Legal Analysis</u>**
>
> The fact that a fiduciary duty exists for every Board of every Homeowners Association (HOA) is a clearly self-evident fact, and too trivial to warrant counter argument. The Board is the controlling and governing body of an HOA, and as every governing body holds a duty to act in a best interest of Members and to represent every Member, regardless of personal dislike or discriminatory feelings towards a Member. The Board owes to Appellant both of "Duty of Care" and "Duty of Loyalty" in performance of their governing actions …

These issues represent additional genuine issues of material fact.

BOR Item E erroneously and improperly states:

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

BOR again delves into all sorts of irrelevant matter: '… triggered the onslaught of lawsuits …', '… Appellant is arguing against the validity of the Bylaws that he proposed or otherwise helped enact …', 'letter penned by the Appellant states "The Board will commit resources, if necessary, to defend the By-Laws" ', and 'These are the same proxy vote counting methods the Appellant now claims are invalid on this Appeal.' Appellant has brought lawsuits due to continued unlawful actions by the Board, as alleged. Appellant has a right under the US Constitution to enjoy "… equal protection of the laws". May the Court note particularly: "… **<u>to actively push back against any improper action</u>** … if the **association <u>abuses</u> their power … may <u>resort to the courts for a remedy</u>** …", found on pp. 12-13 of BOA:

> f) Appellant notes Counsel's opinion: "... it's just got to stop and he's got to quit filing suits", but counters that alleged-unlawful-Board actions can be resolved by no other means, since Respondents will not negotiate with Appellant; additionally, Counsel's opinion is contrary to advice published by the South Carolina Attorney General in an opinion to Sottile of January 3, 2017 (R. 294-302, **emphasis** added):
> … We hasten to add that we are mindful of the real and **legitimate concerns that constituents may have regarding the conduct of their HOAs**, and the cost of pursuing judicial remedies. But because **homeowners have** both the incentive and the **<u>ability</u> to hold their associations accountable**, we have not prioritized investigations of these organizations over **other organizations which do not have built-in watchdogs. Homeowners' associations are uniquely self-policing** among nonprofit corporations, and are capable of robust self-government. ... a homeowner has a strong **vested interest in monitoring** the actions of their association closely, and **<u>to actively push back against any improper action</u>**. Where homeowners are **<u>elected</u> to the boards** of associations through a **vote by the members**, the homeowners are democratically represented, ... if the **association <u>abuses</u> their power** so as to overstep the governing **covenants** and bylaws, then all **members** generally **have** the

> incentive and the ability **to discover those abuses**, and **may <u>resort to the courts for a remedy</u>** if the matter cannot be resolved internally. ... "
> (R. 299-300)

Contrary to BOR, resolution of an issue which did not trigger an onslaught of lawsuits is shown on p. 8 of BOA:

> **1.2 <u>The Order Itself Attests To Genuine Issues Of Fact, All Of Which Confirm Alleged Breach Of Duty</u>**
>
> Counsel's-previous statements made during the Hearing, and as found in the Order, acknowledges Board-conduct faults, and thus breach of fiduciary duty, in "... any neighborhood that has a homeowners association …", but:
> a) mistakenly and wrongfully claimed "... a fine ..." which never entered the picture in an amicably-resolved dispute related to paint applied to Appellant's garage door, which happened in long-past-calendar years 2015-2016, and was resolved long before any lawsuits were filed;

Appellant objects to unfounded and unsubstantiated statements by Respondents related to: "… he proposed …", and "… defend the By-Laws". Appellant was but one of a five-member Board at the time of his service, and opposed several provisions of the adopted "By-Laws Rev 2". Appellant particularly recollects he opposed the "… proxy vote counting method …", where subsequently he, as Secretary, was forced by the Board to issue the "… defend the By-Laws …" statement. But, properly as a member of the Board at that time, according to both: "Board Code of Conduct" and "Board Code of Ethics", did not air in public that he dissented with this decision made by a majority of the Board, and thereafter forced upon all Members. It should also be noted that the all-Member ballot to approve "By-Laws Rev 2" was not approved by a majority of Member votes.

All these irrelevant and false claims brought by Respondents require proof before they become ripe for review by this Court, and should not have been brought by Respondents, without substantiating evidence. However, they have none, since there is none.

BOR confirms that the Judge ignored the fact that the original Complaint (R. 33-42) was signed by an attorney (R. 41). With no previous claim nor pleading having been brought by Respondents relative to: "… Rule 11 with respect to sanctions …", nor any claims that Appellant's lawsuit had: "… no valid basis or merit. …", the Judge showed his discriminatory bias towards Appellant, who was appearing in the Hearing which granted SJ as a *Pro-Se* party. The Judge acted unethically based upon his own volition to conclude, without Respondents having brought any such issues, and without any substantive statements nor rationale made nor given by the Judge to explain, that Appellant's case was invalid and without merit. BOA page 24 shows:

> The Judge also improperly cited "Rule 11", where Counsel at no previous time brought any such claim, nor was any similar claim voiced during the Hearing, showing again what Appellant perceived as personal bias against him. The Judge ignored that Appellant's case was brought under the guidance of an Officer of the Court (who only later was relieved as Appellant's Counsel of Record) . The Judge's claim of "... no valid basis or merit ..." was the only reason stated during the Hearing for granting of SJ, where Appellant does not understand this claim as a valid reason upon which SJ may be granted, since Counsel did not present any-such argument of "no merit", particularly when Rule 56(c) was argued extensively in documents and at the Hearing …

BOR Item F erroneously states:

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

BOR again delves into all sorts of irrelevant matter, but freely admits that Appellant suffered damages due to alleged-unlawful increments of dues, and alleged-unlawful additional assessment of Members to pay for legal fees, neither of which powers are granted pursuant to the Covenants. Three claims of note, however, where one claim is a false claim, appear in BOR. A first claim

of "… never specified …", is made but then later BOR defines and confirms damages are: "… increased dues and assessment fees.", where BOR shows:

> The Appellant has never specified what his damages are … 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.

The Court is asked to recall Appellant's arguments that: "… approved assessment …", is false. Appellant specified damages in BOA on page 9:

> Relative to Order claim (3) "damages proximately resulting from the wrongful conduct of the defendant", a recent-WHOA invoice (R. 289-290) received by Appellant proves Respondents' breach of duty by imposing an allegedly-unlawful assessment, where the invoice clearly shows:
>
> Past Due Amounts
> 2019 $150 (R. 290)
>
> and also erroneously states a dues amount, but then admits the $250 amount includes the alleged-unlawful imposition of an assessment (which leaves required dues at $200), which has caused and continues to cause damage to Appellant and to Members, showing on page 1:
>
> The annual Woodington Homeowners Association dues for 2020 will remain at $250 and are due to be paid by April 15, 2020. This $250 includes the $50 approved assessment for the legal bills dues to the McCabe law firm. … If you have a past due balance, that amount appears separately on the invoice. … (R. 289)

Relative to a second BOR claim, since damages amount to $500 per WHOA-voting unit as found on page 17 in "Special Meeting …" of 10/30/18 (R. 357-358) ($500 per lot becomes immediately due and payable …) (R. 94) , $200 is mistaken as shown by BOR:

> The entirety of the increase, which includes the assessment and two yearly dues increases, total $200.00. per household.

Relative to a third BOR claim, Respondents themselves confirm that damages exist. The amount of current damages are $500 per WHOA-voting unit, not $200. The Court also needs to be advised that this initial $500 is but the "tip of the iceberg". With almost certain probability,

the Board will expect Members to pay for legal expenses which now total upwards of $130,000, all of which are due to the Board's denial, and breach, of their fiduciary duty to all WHOA Members, not to incur such legal expenses. Made known in the 01/30/20 Annual Meeting are additional-legal fees, where the 2020 Budget (Sup. R. 15) shows:

Potential Additional Legal Fees as of This Date:
2017 Appeal: $63,000
2018 Case: $30,000

The Court is reminded that Appellant asked to be awarded a mere $1 in "Nominal Damages" in his cases. May the Court be reminded that no Board sought Member approval, as required by the By-Laws for expenditures in excess of $1500 (R. 85), and none of incurred legal fees to date were approved by Members. Appellant proceeds exclusively at this time as a *Pro-Se* party; Counsel does not represent him in any lawsuit, bar one, that being the referenced case. Appellant remains a *Pro-Se* party so he does not have to pay legal counsel, since he no longer has a desire to "afford counsel". Two later Appeals proceed *Pro Se* to minimize "damages" to Appellant's financial resources. Appellant does "seriously profess" that no unlawful-WHOA fees are justified nor justifiable, that: "… over the course of a two year period …", is irrelevant and immaterial as to the actual drain on a Member's resources, and that damage caused to Appellant as well as to other-similarly-situated Members cannot, and should not, be belittled nor "swept away under the rug". So, it is with an erroneous concept that BOR with conjecture shows:

> 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 [$500] over the course of a two year period is causing him damages.

V. CONCLUSION

In BOR the Conclusion on page 25 states:

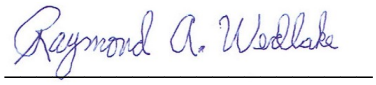
> The lower court correctly held that the Respondents did not breach their fiduciary duty, and were entitled to Summary Judgment in this case, …

Appellant contends nothing could be further from the truth. The only grounds for granting of SJ heard from the Judge were nothing of the sort. The Transcript (see BOA, pp. 24-25) shows the Judge took it upon himself to assume other grounds upon which to warrant granting of SJ, saying nothing about "… did not breach …" :

> [THE COURT:] . . . And I suggest that you review Rule 11 with respect to sanctions for pleadings or lawsuits that are -- have no valid basis or merit. Having said that, I am going to grant the motion for summary judgment. . . . (R. 272-273, ll. 23-25, 1-2)

Appellant reminds the Court of Affidavit (R. 275-277) of the original-case-filing attorney: Grant H. Gibson, Esq., which opposes this opinion held by the Judge.

Dated this 21st day of July, 2020.



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