THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2012-212842

Litchfield Plantation Association, Inc., Joseph E. Johnson, Thomas Eckard, Carol E. Kirby, Robert F. McMahan, Jr., and Thomas Martin Phillips . . . . Appellants,

v.

Litchfield Plantation Company, Inc. . . . . Respondent,

AND,

E. Scott Trotter . . . . Intervenor.

**INITIAL BRIEF
OF APPELLANTS**

Timothy W. Bouch
Michael S. Seekings
Yancey A. McLeod III
Leath Bouch & Seekings, LLP
92 Broad Street
Charleston, S.C. 29401
Attorneys for Appellants

Mark D. Neill, Esquire
The Neil Law Firm
P.O. Box 2810
Murrells Inlet, S.C. 29576
Attorney for Respondent
Litchfield Plantation Company, Inc.

Robert S. Shelton
Bellamy Law Firm
P.O. Box 357
Myrtle Beach, S.C. 29578
Attorney for Respondent/Intervenor
E. Scott Trotter

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A. The trial court erred in granting summary judgment to Developer where Developer repeatedly breached its fiduciary duty to the Association, including taking almost $1,000,000.00 of Association money.

B. The trial court erred in granting summary judgment to Developer where Developer failed to meet its financial obligations to the Association under the controlling documents.

1. The trial court erred in granting summary judgment to Developer because after Developer failed to meet its financial obligations the Association was without an adequate remedy at law.

2. The trial court erred in permitting Developer to regain control of the Association by re-paying only 15% of the total monies owed to the Association.

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STATEMENT OF THE CASE

Litchfield Plantation is a coastal real estate development located in Georgetown County, South Carolina. The Plaintiff-Appellant, Litchfield Plantation Association, Inc. ("Association") is the official Homeowners' Association of Litchfield Plantation. The individual Plaintiffs/Appellants, Joseph E. Johnson, Thomas Eckard, Carol E. Kirby, Robert F. McMahan Jr., and Thomas Martin Phillips, are all property owners in Litchfield Plantation (collectively with Appellant Association, "Appellants"). The Respondent is the Developer of Litchfield Plantation, Litchfield Plantation Company, Inc. ("Developer").

The Appellants filed suit against the Developer after a special meeting was held pursuant to the Association Bylaws, and a new Board of Governors was elected. The new Board then brought this action against the Developer, which formerly controlled the Board. The Appellants' claims set forth two distinct causes of action. Specifically, the Appellants sought a circuit court declaration that: (1) the newly elected Board of Governors was the lawfully and duly elected Board; and (2), the Developer's majority voting power and control over the Association ended due to (a) the Developer's breaches of fiduciary duties to the Association, and/or (b), the failure of Developer to meet its financial obligation to the Association. The circuit court permitted Developer's former President, E. Scott Trotter, to intervene. Developer filed several counterclaims that were ultimately dismissed.

Both parties moved for Summary Judgment on differing theories and on differing grounds. The circuit court heard numerous motions on September 8, 2011, December 8, 2011, and April 19, 2012. By way of order filed May 25, 2012, the circuit court denied Appellants' motion for Summary Judgment and granted Developer's Motion for Summary Judgment on Appellants' second cause of action only, finding it did not have the authority to grant the relief requested, but ordering that Developer could not exercise its voting rights until it paid a small percentage of the arrears owed to the Association. The circuit court denied Appellants' Motion for Reconsideration on August 17, 2012. The Appellants appealed the May 25, 2012 order granting Developer Summary Judgment on August 24, 2012.

On September 7, 2012, Developer filed a Motion for Temporary Injunction. The circuit court hears the Motion on September 20, 2012. By way of order dated October 22, 2012, the circuit court granted the Motion and entered a Temporary Injunction, ordering the individual Plaintiffs not to interfere with the voting rights of the Developer. The circuit court's Injunction Order also found its May 25, 2012 Summary Judgment Order was not automatically stayed by Appellants' appeal because the majority voting rights in question constituted both personal property and real property and therefore fell within the exceptions found in Rule 214(b), SCRAP. The Appellants appealed the Temporary Injunction Order on October 31, 2012. Appellants' appeal of the May 25, 2011 Summary Judgment Order and the October 22, 2012 Injunction Order have been consolidated into one appeal, Appellate Case No. 2012-212842.

FACTS

The Developer has exercised control over the Association through its majority voting power since the 1960's. As well documented and reported, the Developer has abused this majority voting power to the detriment of the Association and the Litchfield Homeowners for over three decades. (1986 circuit court Order; *Peoples Fed. Sav. & Loan Ass'n of S. Carolina v. Res. Planning Corp.*, 358 S.C. 460, 596 S.E.2d 51 (2004); Convents, Article 5, sec. 5.5). The Developer's control over the Association has essentially caused the two entities to merge. Arms-length transactions between the two entities have been non-existent. This lawsuit concerns Developer's most recent string of abuses, including taking almost $1,000,000.00 in Association Money. (Promissory Notes, Accounting).

History of Abuse

In 1984, the Litchfield Homeowners' were forced to file suit against the Developer and the developer-controlled Association after the Developer continued to use Association money for its own benefit. (1986 Circuit Court Order). In December of 1986, the circuit court found that the Developer breached its fiduciary duty to the Association by "abus[ing] its voting control of the Association by adopting budgets including those items which directly benefited the [Developer] at the sole expense of the assessment-paying members of the Association." (1986 Circuit Court Order, pg. 18). The circuit court exercised its equitable powers and revoked the Developer's majority voting status. (1986 Circuit Court Order, pg. 27). This suit ultimately resulted in a settlement wherein the Developer was allowed to retain its voting majority for an additional 10 years.

Peoples Fed. Sav. & Loan Ass'n of S. Carolina v. Res. Planning Corp., 358 S.C. 460, 467, 596 S.E.2d 51, 55 (2004) (describing settlement terms of 1984 case).

In the 1990's, the Developer's actions, through its continued control over the Association, again caused the Association to face legal action, this time for intentionally deflating a foreclosing bank's property values. *Id.* Ultimately, the Supreme Court upheld the trial court's judgment in favor of the bank, including an award of punitive damages against the Association because of the Developer's conduct, even though the Association was "subject to the voting control of [Developer]." *Id.* at 475, 496 S.E.2d at 59. The Developer remains in control of the Association today as a result of the circuit court's orders which are the subject of this appeal. (May 25, 2012 Order; October 10, 2012 Order; Covenants, Article 5, section 5.5).

Current Law Suit

Litchfield Plantation is currently governed by the Amendment to the Declaration of Protective Covenants, Conditions and Restrictions for Litchfield Plantation ("Covenants") filed May 2, 2005, and the Amended and Restated Bylaws ("Bylaws") promulgated thereunder. (2005 Covenants and Bylaws). Developer's current control over the Association stems from its status as "Declarant" under Article 5, section 5.5 of the Covenants, which provide:

> **5.5** <u>**Voting**</u>. The Association shall have two classes of Membership, Class "A" and Class "B".
>
> (A) Class "A". Class "A" Members shall include all Owners except for the Class "B" member, if any. Class A members shall have one equal vote form each lot for which they hold the interest required for membership under section 5.4; there shall be only one vote per lot.

> (B) Class "B". The sole Class "B" Member shall be the Declarant. The rights of the Class "B" Member, including the right to disapprove actions of the Board and any Committees, are specified in the relevant sections of this Declaration and the Bylaws. During the Class "B" share period; the Class "B" Member shall have the number of votes equal to all Class "A" Members plus (1) vote.

(Covenants, Article 5, sec. 5.5) (emphasis added).

In April 2010, the Developer's president, E. Scott Trotter ("Trotter"), informed the Litchfield Homeowners that the Association would be out of funds in 2011 and that the Developer would be unable to fund the deficit as required. (Trotter Letters; Covenants, Article 5, sec. 5.8). Trotter was also the Association's president. (Trotter June 7 Affidavit). Thereafter, concerned Litchfield Homeowners convened and elected a committee to investigate the financial condition of the Association (Trotter December 23, 2010 Letter). The results of this investigation concluded that once again Developer had abused its control over the Association, including numerous breaches of its fiduciary duty to the Association by:

- Failing to pay Federal income taxes had been filed for the Association for the years 2008 and 2009;
- Permitting the Plantation Beach House, an Association property, to be sold for non-payment of taxes;
- Making loans to itself from Association funds at below market interests rates, which it secured with worthless collateral.

- Subordinating one of the Association's mortgages to a mortgage given by the Developer to its Law Firm to prevent Developer from being sued for unpaid legal fees;

- Transferring property from the Developer to the Association which was in disrepair;

- Failing to fund the Association's capital reserve account despite collecting the money from over 100 property sales;

- Using Association funds for purposes other than the expenses of the Association;

- Failing to meet its financial obligations to the Association by paying either the budget shortfall or assessments on its property;

- Operating the Association for over eighteen months with only two Board members where the Covenants require five; and

- Failing to hold Association annual meetings.

(Charles Nation Feb. 25, 2011 Memo; Boselli Affidavits; Kirby Affidavits; Prom. Notes; Accounting; 2005 Covenants and Bylaws; April 19, 2012 Trans. Pg. 24, 27 47). Further, without notice to or the knowledge of the Homeowners, Developer took $740,839.87 of Association money, and gave back to the Association promissory notes. (Accounting; Prom. Notes; Affidavits; Nation Feb. 25 Memo). In each instance, the signatory on the promissory note was an officer of both the Developer and the Association. (Prom Notes; Nations Memo). On May 22, 2009, the Developer took $570,000.00 from the Association and gave the Association a promissory note signed by Alan Kidston. (May 22, 2009 Prom Note; Nations Memo). At the time, Kidston was president of both Developer and Association. (May 22, 2009 Note; Nations Memo). On June 10, 2009, the

Developer took $75,00.00 from the Association and gave it a note signed by Jefferry Van Tresse. (June 10, 2009 Note). At the time, Van Tresse was the vice president of the Developer and a board member of the Association. (Id.). On June 21, 2010, the Developer took $50,000.00 from Association and gave it a promissory note signed by Trotter. (June 21, 2010 Note, Nation Memo) At the time, Trotter was the president of both Developer and Association. (Id.; Trotter June 7 Affidavit). In total, four promissory notes were given to the Association, all of which were in default. (June 1, 2010 Mortgage; Notes, Accounting).

Article VI, Section 5.17 (B) of the Covenants provides that Association money shall be used only for Association expenses. (Covenants, Article 5, sec. 8). The Developer is required to either fund the shortfall of the Association Budget or pay assessments on all of its unsold property. (Bylaws, Article VI, section 8). The Developer did not pay the required budget shortfall to the Association. (Trotter Letters, Kirby Affidavit). In all, Developer owed the Association $987,895.54 of wrongfully taken Association money. (Accounting; Notes; Jun 1, 2010 Mortgage). This money remains substantially unpaid. (Accounting, Notes, Affidavits, May 25, 2012 Circuit Court Order). Moreover, no Annual Meeting of the Association had been held since 2008, and the Association Board only consisted of two of the required five members. (Kirby Affidavit, para 2, 3, and 6; December 8, 2011 Transcript pg. 43). These two Board members were also officers and directors of the Developer.

On February 2, 2011, five Litchfield Homeowners met with Trotter and asked that he schedule the required Annual Meeting. (Kirby Affidavit; Johnston

Affidavit). Trotter refused. (Kirby Affidavit). Therefore, pursuant to Article VI, section 5 of the Bylaws, the concerned Homeowners noticed a special meeting. (Article VI, section 5; Kirby Affidavit, para. 3, 6; Special Meeting Notic4). On February 26, 2011, the Homeowners held a Special Meeting to remove the two Board members and elect a new board. (Kirby June 7, 2011 Affidavit 3, 6). Over ninety (90) members attended the meeting (Id.). Eighty-three (83) members voted to remove Trotter. (Id.). Ninety-four (94) voted to remove Jeffrey Van Treese. (Id.). The members then elected a new Board of Governors, consisting of the individual Plaintiffs/Appellants Joseph E. Johnson, Thomas Eckard, Carol E. Kirby, Robert F. McMahan Jr., and Thomas Martin Phillips. (Id.; Special Meeting Ballots).

On March 9, 2011, the individual Plaintiff-Appellants filed this action in circuit court on behalf of the Association and themselves, seeking a circuit court declaration that: (1) the newly elected Board was the lawfully and duly-elected Board; and (2), the Developer's majority voting power and control over the Association ended due to (a) the Developer's breach of fiduciary duties to the Association, and/or (b), Developer's to meet its financial obligations to the Association. (Complaint).

On April 27, 2011, the Developer's President, Trotter, assigned almost $1,000,000.00 in promissory notes, in his capacity as the Association's President, to a related Trotter entity, "Litchfield Plantation Buyout Group, LLC." (Assignment of Prom. Notes). This act led to Trotter's arrest and indictment for Grand Larceny. (Warrant; Sept. 20 Trans, pg. 3-9). The indictment was later dismissed with leave to re-file. (Sept. 20 Trans, pg. 5). When the Appellants were finally allowed to take Trotter's deposition, Trotter terminated the deposition. (Sept. 20 Trans. Pg. 3-9).

Both parties moved for Summary Judgment. (Summary Judgment Motions). The Motions were heard on September 9, 2012, and December 8, 2012. (Transcripts). At the December 8, 2012 Hearing, the circuit court ordered an Accounting of "all funds which are due to the Association by [Developer]." (Dec. 8 Transcript pg. 52). By way of a Form 4 order filed December 9, 2012, the circuit court granted Developer's Motion for Summary Judgment, indicated a formal order was to follow, and required Developer's Attorney to submit a proposed order. (Dec. 9, 2011 Form 4 order).

On April 19, 2012, a Hearing was held on ten (10) outstanding Motions, none of which involved the court-ordered Accounting. (April 19, 2012 Transcript). Notwithstanding Appellants' objection, the Court heard arguments concerning the Accounting, and ultimately issued a formal order granting Developer's Motion for Summary Judgment on May 25, 2012. (May 25, 2012 Summary Judgment Order; April 19, 2012 Transcript). In granting Summary Judgment to Developer, the court found Developer's voting rights were suspended until it paid $149.981.60 of the $987,895.54 it owed to the Association. (Summ. Judgment Order). Appellants filed a motion to reconsider on June 6, 2012. (June 6, 2012 Motion to Reconsider).

The Developer paid the Association the $149.981.60 on August 3, 2012. (Oct. 22, 2012 Injunction Order, pg. 2). Developer then called its own Special Meeting to oust the individual Plaintiff/Appellants as board members. (Temp Inj.

Order). On August 16, 2012, the court heard Appellant's Motion to Reconsider. (Aug. 16, 2012 Transcript). The court denied Appellant's Motion on August 17, 2012. (Form 4 Order). Appellants appealed the Summary Judgment order on August 24, 2012. (Notice of Appeal).

On August 25, 2012, the Developer's Special Meeting was held for the purpose of removing the individual Plaintiff/Appellants from the board of Governors. At the meeting, the individual Plaintiff/Appellants informed the Developer that the May 25, 2012 order was stayed pending appeal, and that Developer's voting rights were still suspended. (Miller Sept. 7, 2012 Affidavit). With the exception of Martin Phillips who did not run for re-election, the Litchfield Homeowners again voted the individual Plaintiff/Appellants to the Board of Governors. (*Id.*). After everyone left the meeting, the Developer allegedly used its purported "majority" voting rights and voted to remove the individual Plaintiff/Appellants from the board. (*Id.*). The Developer then "voted" to appoint "new" board members: John Miller, Carson Benton, Jason Morris, Billy Deagan, and Paul Suter. (*Id.*).

On September 7, 2012, the Developer filed a Motion for Temporary Injunction, requesting the circuit court to enter an order finding that (1) the Appellants appeal of the May 25, 2012 order did not trigger an automatic stay of the order, (2) granting injunctive relief restraining the individual Plaintiff-Appellants from not recognizing the "newly elected" board, or (3) in the alternative, in the event the court determined an automatic stay was triggered, an order lifting the stay.

(Resp. Motion for Inj.). On September 20, 2012, a Hearing was held on the Temporary Injunction Motion. (Sept. 20 Transcript.).

The circuit court granted the Developer's Motion on October 22, 2012. (Injunction order). Specifically, the circuit court found "(1) the Filing of the notice of appeal did not stay the execution of this court's prior Order; (2) The [Developer] will suffer immediate and irreparable injury, loss, and/or damages without entry of the requested injunctive relief; (3) Any legal remedy would be inadequate." (Injct. Order pg 6). The circuit court order required Developer to post a $25,000.00 Bond. (Injct. Order pg 7). No bond has been posted. Appellants timely appealed the circuit court's October 22, 2012 Injunction Order. (Notice of Appeal). Both appeals have been consolidated.

ARGUMENT

I. SUMMARY JUDGMENT WAS IMPROPER WHERE DEVELOPER WRONGFULLY TOOK ALMOST ONE MILLION DOLLARS IN ASSOCIATION MONEY AND REPEATEDLY BREACHED ITS FIDUCIARY DUTY TO THE APPELLANT ASSOCIATION FOR OVER THREE DECADES.

Standard of Review

"In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP." *Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc.*, 369 S.C. 388, 390, 631 S.E.2d 915, 916 (Ct. App. 2006) (Citations omitted). Summary judgment is only appropriate when "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. "Our standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." *Companion Prop. & Cas. Ins. Co., 369* at 390-392, 631 S.E.2d at 916 (quoting *Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App.1991)). "Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Evening Post Pub. Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011).

"To determine the standard of review for a claim brought under the Declaratory Judgment Act, we look to the main purpose of the complaint, as reflected by the character of the claims, evidence, and relief sought." *Baugh v. Columbia Heart Clinic, P.A.*, Op. No. 5074 (S.C. Ct. App. filed Jan. 16, 2013) (Shearouse Adv. Sh. No. 3 at 70). "[A] breach of fiduciary duty may sound in equity if the relief sought is equitable." *Verenes v. Alvanos*, 387 S.C. 11, 17, 690 S.E.2d 771, 773 (2010). This court "review[s] factual findings and legal conclusions in an equitable action *de novo*." *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011). "*De novo* review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654 (2011).

A. The trial court erred in granting summary judgment to Developer where Developer had repeatedly breached its fiduciary duty to the Association and took almost $1,000,000.00 of Association money.

It is undisputed the Developer converted Association's money. (Notes, Mortgages, Accounting). It is undisputed the Developer turned over amenities to the Association in a state of disrepair. (Trotter Affidavit/Accounting). It is undisputed Developer failed to fund the Capital Reserve account as required. (Trotter Affidavit; Nations Memo; Bosselli Affidavits). To the Litchfield Homeowners, it is inconceivable that Developer was granted Summary Judgment in light of these actions.

The circuit court ruled that it had "no authority" to grant the equitable relief requested. (May 25, 2012 Summary Judgment order; December 8, 2011

Transcript pg 39-53). This ruling was clear error. "Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 252, 715 S.E.2d 348, 354 (Ct. App. 2011) (citing *Ex Parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (Ct. App.1983)). "[A] breach of fiduciary duty may sound in equity if the relief sought is equitable." *Verenes*, 387 S.C. at 17, 690 S.E.2d at 773. Here, the Complaint sought the equitable relief of having the Developer's "Class B" voting rights converted to "Class A" status. Indeed, this is not the first time Developer's conduct warranted this remedy. (1986 circuit order).

The circuit court based its ruling on the finding that the controlling documents were "clear and unambiguous," stating that none of the scenarios contemplated by the Covenants had occurred. (May 25, 2012 Summary Judgment Order). This, again, is error. The Associating seeks relief from the court, its only avenue remaining, where the Developer repeatedly violated the Covenants, breached its fiduciary duty to the Association, and took Association money for the Devleoper's own purpose. In this instance, the law allows equity to step in and craft a remedy. The circuit court erred in finding it had no authority to do so. *See Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993) (implying master could have awarded homeowner plaintiffs the equitable remedy requested even though the covenants provided otherwise); *Ex Parte Dibble*, 279 S.C. at 595, 310 S.E.2d at 442 ("Court's have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible."); *see also Arbor Hill Concerned Citizens v. County* *of Albany*, 357 F.3d 260, 262 (2nd Cir. 2004) (finding courts have the inherent equitable power to order special government elections even where legislation does not provide for such remedy). If the court has no power to correct the undisputed wrongs, who does?

In *Goddard*, this court held that a developer with superior voting rights owes a fiduciary duty to the homeowner's association. 310 S.C. at 415, 426 S.E.2d at 832. Like the Appellants here, the *Goddard* homeowner plaintiffs sought an equitable remedy not contemplated by the covenants. *Id.* at 410, 426 S.E.2d at 830. The *Goddard* plaintiffs sought to have the PUD dissolved based on the Developer's alleged fraud and misrepresentation. The *Goddard* developer had superior voting rights. *Id.* at 417, 426 S.E.2d at 833. Importantly, the *Goddard* covenants specifically provided that the PUD could only be dissolved with 100% of the homeowner's vote. *Id.* at 410, 426 S.E.2d at 830. Because the *Goddard* plaintiffs did not have the required 100% of the vote, the relief requested necessarily required the court to impose an equitable remedy not contemplated by the covenants. In deciding whether the lower court erred in failing to dissolve the PUD, the *Goddard* court held, "[b]ecause Ullman is an indispensible party and is opposed to a dissolution of the PUD, the master could not have dissolved the PUD in her absence." *Id.* at 413, 426 S.E.2d at 831. The *Goddard* trial court could have dissolved the PUD had all necessary parties been joined, even though the covenants did not specify this as an option.

Here, the circuit court erred in finding it did not have the authority to grant the equitable relief the Appellants requested. Pursuant to *Ex Parte Dibble*, the circuit court, and this court, "have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible." 279 S.C. at 595, 310 S.E.2d at 442. This error was prejudicial for the following reasons.

First, a fiduciary relationship exists between a vote-controlling Developer and the Homeowners' Association. *See, e.g., Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002) ("The developer of a PUD owes a duty to the POA to turn over common areas that are not substandard."); *Goddard*, 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993) (finding Fiduciary Relationship between developer and homeowner association); *see generally Jordan v. Holt*, 362 S.C. 201, 206, 608 S.E.2d 129, 131 (2005) (finding ignoring requests for financial information and meetings, using LLC monies for payment of personal debts and obligations, self-dealing, and selling or transferring LLC property without the knowledge and consent of the LLC and then pocketing the monies constituted breach of fiduciary duties and supported award of punitive damages).

Second, undisputed evidence establishes numerous Developer fiduciary duty breaches while the Developer controlled the Association. Developer took nearly $1,000.000.00 in Association money, and its president assigned the promissory notes to himself after the Appellant Association filed suit. No federal Income Taxes were filed for the Association for years 2008 or 2009. Developer transferred, or off loaded, the Beach House amenity in a state of disrepair. Association property was sold for non-payment of taxes. The Association made loans to the Developer secured by worthless collateral. Developer failed to fund the capital reserves pursuant section 5.18 of the Covenants. Association funds were used to pay expenses of Respondent Developer. Developer subordinated one of the Association's mortgages to a mortgage Developer gave to its Law Firm to prevent Developer from being sued for unpaid legal fees. No Annual Association Meeting had been held since 2008. The Association Board only consisted of two individuals in violation of both the Bylaws and South Carolina Code. (Bylaws, Article VI, section 4; S.C. Code Ann. §33-31-701and §33-31-803).

The foregoing establishes serious breaches of fiduciary duty on Developer's part. These facts are undisputed. Even if they were it would constitute factual questions precluding summary judgment. The trial court erred in failing to grant the Appellants the requested equitable relief and further erred in granting summary judgment to Respondent Developer. *See Goddard*, 310 S.C. 408, 415, 426 S.E.2d 828, 832 (Ct. App. 1993) (finding Fiduciary Relationship between developer and homeowner association); *Concerned Dunes W. Residents, Inc. v. Georgia-Pac. Corp.*, 349 S.C. 251, 257, 562 S.E.2d 633, 637 (2002) (finding Developer has a fiduciary duty to turn over common areas that are not substandard). Appellants assert that the evidence of Developer's fiduciary duty breaches is so overwhelming that this court can properly grant the requested remedy and convert the Developer's Class B majority voting status to Class A, the same voting rights as all other property owners. See *Ex Parte Dibble*, 279 S.C. at 595, 310 S.E.2d at 442 (stating the court's authority in equitable cases); *Lewis*, 392 S.C. at 390, 709 S.E.2d at 654 (noting the equitable standard of review allows appellate court fact-finding).

Even if the record is insufficient to grant the Appellants equitable relief, summary judgment in favor of Respondent Developer was still inappropriate. Discovery was on going. In Appellant's Memorandum in Support of (Plaintiffs) Motion for Summary Judgment, the Appellants informed the circuit court that they were not seeking summary judgment as to their second cause of action based on the breach of fiduciary duty ground, stating "[t]hat ground is not being asserted as a basis for Plaintiffs' summary judgment motion due to discovery not being completed on that issue." Nevertheless, the circuit court, on cross motions for summary judgment, granted Respondent Developer's Motion in full. This too, was in error. See *Cunningham v. Anderson County*, Op. No. 5072 (S.C. Sup. Ct. filed Jan. 16, 2013) (Shearouse Adv. Sh. No. 3) ("Summary judgment is a drastic remedy and must not be granted until the opposing party has had a full and fair opportunity to complete discovery."); Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) ("This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery."); *see generally Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 415, 426 S.E.2d 828, 833 (Ct. App. 1993) ("We hold that the trial court must consider [breach of fiduciary duty] as a prerequisite to determining the liability of the Developer.").

B. **The trial court erred in granting summary judgment to Developer where Developer failed to meet its financial obligations to the Association under the controlling documents.**

1. **The circuit court erred in granting summary judgment to Developer because after Developer failed to meet its financial obligations the Association was without an adequate remedy at law.**

The additional ground for Appellants' second cause of action pertains to Developer's failure to meet its financial obligations to the Association. The Developer admits to this breach. (Trotter Letter, Affidavit). The Developer has utterly failed to meet its financial obligations under the Controlling Documents. Appellants have no other remedy at law because the Developer is insolvent. Continuing to file legal action is pointless.

The Class B period is established in Article 5, section 5.5 of the Covenants. During the Class B period, the annual assessment of the homeowners is capped pursuant to section 5.11 of the Covenants and Article VI section 7 of the Bylaws. Importantly, during the Class B period the Respondent Developer is obligated to either fund the shortfall of the Association budget or pay assessments on its unsold property. (See Article VI, section 8 of Bylaws). The Developer did neither. The circuit court erred.

The annual budget is approximately $300,000.00 per year. The assessments paid by the homeowners contribute approximately $200,000.00 per year. (Eckard Affidavit). This leaves a shortfall of approximately $100,000.00. (*Id.*) Prior to 2010, the Respondent Developer always funded the shortfall rather than paying assessments on its unsold property. (Trotter Affidavit). Since 2005, the assessment date for the Class A members has been April 1 of each year. (*Id.*). On April 1, 2010, the maximum assessment of $1,900.00 was levied upon the homeowners. (Eckard Affidavit).

Scott Trotter's Affidavit documents an additional assessment was levied on the Homeowners in January 2011. The January assessment was rendered because the Association had run out of money due to Developer's wrongful taking of almost a million dollars of Association money. The Developer was unable to fund the shortfall in the Association budget. The evidence is uncontroverted that the Developer has neither funded the shortfall nor paid assessments on its unsold property. These facts are undisputed. Yet during this time the Developer sold over 100 lots and converted the proceeds to its own use. It would be inequitable to allow Developer to retain its voting rights in this situation.

Declaratory relief is a well-recognized remedy for construction and violation of covenants. *Marathon Fin. Co. v. HHC Liquidation, Corp.*, 325 S.C. 589, 483 S.E.2d 757 (Ct. App. 1997); *Buffington v. T.O.E. Enterprises*, 383 S.C. 388,680 S.E.2d 289 (2009). Under South Carolina law, restrictive covenants are contractual in nature and the language used in them is construed according to its plain and ordinary meaning. *Penny Creek v. Fenwick Tarragon*, 375 S.C. 267 (Ct. App. 2007). The enforcement of covenants does not depend on whether monetary relief is claimed. *Houck v. Rivers*, 316 S.C. 414, 450 S.E.2d 106 (Ct. App. 1994). In this case, the Covenants are clear and unambiguous as to the financial obligation of the Declarant/Developer during the Class B period. Factually, there is no dispute that the Declarant/Developer breached that obligation when it failed to fund the shortfall in the Association budget in January 2011

Despite Appellants' argument to the contrary, the circuit court found the Appellants had an adequate remedy at law. Specifically, the circuit court found that the Bylaws provided an adequate remedy where Developer could simply re-pay the money owed to the Association and regain its majority voting status. This finding was in error. "An 'adequate' remedy at law is one which is as certain, practical, complete and efficient to attain the ends of justice and its administration as the remedy in equity." *Nutt Corp. v. Howell Rd., LLC*, 396 S.C. 323, 328, 721 S.E.2d 447, 450 (Ct. App. 2011) (quoting *Milliken & Co. v. Morin*, 386 S.C. 1, 8, 685 S.E.2d 828, 832 (Ct. App. 2009)). After all, the sins of this Developer against the Association have been well documented for over 30 years. (1986 circuit court order; *Peoples Fed. Sav. & Loan Ass'n of S. Carolina v. Res. Planning Corp.*, 358 S.C. 460, 467, 596 S.E.2d 51, 55 (2004)).

Certainly, to allow the Developer to regain its majority voting power and the resulting complete control over the Association by paying only 15% of the amount owed cannot and will not be "efficient to attain the ends of justice." *Id.* Enough is enough. Certainly three decades is enough. In fact, a monetary judgment against the Developer serves no purpose nor provides any remedy because the Developer is insolvent. (Trotter Affidavit, Para 6 & 8). All of the Developer's unsold property in Litchfield Plantation is currently in foreclosure.[1]

[1] The foreclosure actions against the Company pending in Georgetown County at the time this action was filed were BDC Capital LLC v. Carriage House Club, Inc., et al, Civil Action No. 20 I 0-CP-22-1265; First National Bank of South

(Nations Memo). The South Carolina Secretary of State reports that Developer was dissolved on October 8, 2012 due to forfeiture.[2] To allow the Developer to retain its voting majority will only insure that justice continues to escape the Litchfield Plantation Homeowners, as it has for nearly three decades. It is undisputed that Developer breached its financial obligation to the Association. There is no adequate remedy at law because the Developer is insolvent. Equity required the circuit court to grant the Appellants their requested relief. After three decades of abuse, it would be grossly inequitable to allow the Developer to retain majority-voting rights and remain in control of the Association.

2. The circuit court erred in permitting Developer to regain its control of the Association by re-paying only 15% of the total monies owed to the Association.

Appellants asserted that the only adequate remedy available is the requested equitable conversion of Developer's Class B majority voting status to the same Class A rights as all other property owners. The circuit court ruled it did not have authority to grant the requested relief. It found that Appellants had an adequate remedy under Article IV, Paragraph 3 of the By-Laws. While the Appellants continue to dispute that this section of the Bylaws provides an adequate remedy, where the Developer continues to maintain its control over the Association, *see Nutt Corp.*, 396 S.C. at 328, 721 S.E.2d at 450, the circuit court nevertheless ruled that Developer's voting rights were "suspended until such time

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Carolina v. RPC, et al, Civil Action No. 2010-CP-22-1839; and Lawrence A. Shapiro v. Litchfield Plantation Company, et al, Civil Action No. 2010-CP-22-1967. (*See* Nations Memo).

[2] *See* http://www.sos.sc.gov/index.asp?n=18&p=4&s=18&corporateid=82980.

as it pays to the Association monies in arrears totaling $149,981.60, together with any interests accruing on the notes as set forth above."

The finding that Developer could not vote until it paid monies owed to the Association has not been appealed. Appellants are appealing the amount owed to the Association. The circuit court erred in finding the amount owed was only $149.981.60 of the $987,895.54 total.

The undisputed evidence shows Developer owed the Association a total of $987,895.54, excluding interest. This includes $804,806.54 in monies wrongfully taken from the Association, and $63,911.00 to repair the Beach House that was turned over to the Association in a state of disrepair. However, the circuit court included only the budget shortfall ($119,148.00) and two promissory notes ($17,887.72 + $12,946.48) in its calculation. This leaves $868, 717.54 still owed to the Association. (May 22, 2009 promissory note; June 10, 2009 promissory note). This ruling was in error.

Under the Bylaws, "[d]eclarant shall not have a vote for any Lot as to which Declarant is more than sixty (60) days in arrears with respect to *all money owed to the Association*." (Bylaws, Article IV, section 3) (emphasis added). Therefore, to the extent the Developer owes <u>any</u> money to the Association, it cannot vote. (April 19 Transcript pg. 42). The record is clear that Developer owes significantly more than the $149,981.60 the circuit court ordered it to pay. (See Accounting, Notes, June 1, 2010 Mortgage).

First, the Developer owes money it collected but wrongfully diverted from the Reserve Account. Section 5.18 of the Covenants sets forth the following:

> Each lot Owner purchasing from the Declarant, or lot Owner purchasing a Lot from a Bulk Sale, shall pay the Association a working capital contribution equal to 12 months of base assessments for each Lot sold after this Declaration is recorded. Each such working capital contribution shall be paid to the Association at the time of closing. One-third (1/3) of each Working Capital Assessment shall be deposited in the Association's Reserve Account . . .

(Covenants). Intervenor and Former Developer President of Trotter confirmed that Developer is obligated to fund the reserve account with deposits equal to one-third of each working capital assessment collected. (See Trotter Affidavit and attached handout). The Developer failed to fund the reserve account. It owes $63,966.67 to this account. The circuit court erred in failing to compel repayment to the Appellant Association.

Second, the Developer owed a total of $740,839.87 in promissory notes, excluding accrued interest, to the Association, rather than the mere $30,834.20 the circuit court ordered. The Developer took the money from the Association on four (4) separate occasions. (Promissory Notes). Each time, the Developer gave promissory notes to the Association. The developer admits two of the notes are in default. (April 19, 2012 Transcript pg. 28, 31, 36; August 16 Transcript Pg. 7). However, contrary to the circuit court's finding, the other two notes are also in default because of the cross-collateralization of all four notes. (December 8 Transcript. Pg 51; June 1, 2010 Mortgage).

On the date of the last note, the Developer gave a mortgage to secure the obligation to repay all of four promissory notes. (June 1, 2012 mortgage). Drafted by Developer, this mortgage is titled:

COMMERCIAL MORTGAGE OF REAL PROPERTY AND SECURITY AGREEMENT FOR FOUR LOANS

Paragraph 3.01(e) contemplates the event of default and provides:

> "The term event of Default, wherever used in this Mortgage shall mean any one of the following events . . .
>
> (e) A default in either of the Promissory Notes shall constitute a default in the Notes and a default in this Mortgage.

(June 1, 2010 Mortgage; April 19, 2012 Transcript pg. 29). The term "Notes" is defined on Page 2 as all four promissory notes that the Mortgage secures. (Mortgage). The Association gave notice of default to the Developer Respondent in a letter dated February 6, 2012 that transmitted the Accounting to the Defendant to the Defendant. (Accounting; Attached Letter). Developer admitted in open court that two of the promissory notes were due. (April 19, 2012 Transcript). Based on the cross-collateralization of the four promissory notes, all four promissory notes are in default and due to the Appellate Association. The circuit court erred in finding the May 22, 2009 and June 10, 2009 notes were not in default.

Finally, the Developer owes the Association money for the repairs to the Beach House. The Developer turned over this amenity in substantial disrepair. The circuit court erred in failing to add the estimated cost to repair the amenity to the total arrears. *See Goddard*, 310 S.C. at 415, 426 S.E.2d at 833 (finding fiduciary duty to turn over common elements to the Association in good repair, and holding "the trial court must consider this issue as a prerequisite to determining the liability of the Developer."). The court ordered Accounting listed the amount owed to the Association as $63,966.67. (Accounting). It is undisputed the Developer owed this money to the Association. (Charles Nation February 25, 2011 Memo). The circuit court erred in not requiring Developer to pay this amount. Appellants assert the record is sufficient for this court to find the Developer is required to pay an additional $868,717.54 before it regained it can regain its voting rights. However, to the extent any factual issue remained, summary judgment was inappropriate.

In addition to the circuit court's error in its calculating the amount owed to the Association, the circuit court also committed procedural errors, particularly given that its ruling came at the summary judgment stage. At the December 8, 2011 Hearing, the circuit court orally required the Appellants to provide an Accounting to the Developer for the purpose of determining the amount Developer owed to the Association. On February 6, 2012, the Association served the Accounting on the Developer. The Developer never objected to this Accounting. On April 19, 2012, the circuit court conducted a hearing on all outstanding motions. There was no motion concerning the Accounting on the docket. (April 19, 2012 Trans. Pg. 52). Nevertheless, with no prior notice to the Appellants, the circuit court took up the Developer's issues relating to the Accounting. This was the first time the Appellants were aware of any objections to Accounting. Appellants requested the circuit court to schedule an evidentiary hearing. (April 19 Transcript. Pg 12, 18, 32, 37). Over the Appellants' objections, the circuit court continued and heard Developer's oral arguments on the Accounting. This violated the Appellants' due process rights and was in error.

"The fundamental requirements of due process include *notice*, an opportunity to be heard in a meaningful way, and judicial review." *Kurschner v. City of Camden Planning Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (emphasis added). Summary judgment is only appropriate when "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. Finally, "[b]ecause summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial. *Spence v. Wingate*, 395 S.C. 148, 156, 716 S.E.2d 920, 925 (2011), reh'g denied (Nov. 17, 2011). Although Appellants assert the evidence in the record is sufficient to establish Developer owes a total of $987, 895.54, rather than the $149,981.60 the circuit court arbitrarily determined, at the very least the Appellants were entitled to notice and a full evidentiary hearing. (Dec. 8 Transcript pg. 52-53)(see April 19 Transcript. Pg. 48) ("He says you owe him more; you say you owe him less.") To the extent a factual dispute exists, if at all, the circuit court erred in granting summary judgment as to this issue.

II. THE TRIAL COURT ERRED IN FINDING THE APPELLANTS' NOTICE OF APPEAL DID NOT AUTOMATICALLY STAY THE EXECUTION OF THE MAY 25TH, 2012 ORDER.

On September 7, 2012, Developer filed a Temporary Injunction Motion. The Motion asserted the Developer was entitled to an order finding that (1) Appellants' notice of appeal did not trigger an automatic stay of the May 25, 2012 order; (2) granting injunctive relief restraining Appellants from not recognizing Developer's voting rights; or (3) in the alternative, for an order lifting the automatic stay pursuant to Rule 241, SCACR. (Temp. Inj. Motion; Sept. 20 Trans. Pg 9-10).

On October 22, 2012, the circuit court entered an order captioned "Order Granting Motion for Temporary Restraining Order." In the order, the circuit court ruled that Appellants' Notice of Appeal of the May 25, 2012 Summary Judgment Order did not result in an automatic stay of the order because the Respondent Developer's voting rights constituted personal property and real property under the exceptions provided for in Rule 241(b)(2) and (4), SCACR. This finding was in error. Voting rights are not personal property or real property as contemplated by the exceptions of Rule 241(b).

The interpretation of Statutes and Rules of Procedure are questions of law. *See Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) (holding the issue of interpretation of a statute is a question of law for the court); *Whitehead v. State*, 310 S.C. 532, 534, 426 S.E.2d 315, 316 (1992) ("Rules of procedure, like statutes, should be given their plain meaning."). "Statutory interpretation is a question of law for the court to be made without any particular deference to the lower court." *Stewart v. Charleston County Sch. Dist.*, 386 S.C. 373, 378, 688 S.E.2d 579, 581 (Ct. App. 2009).

Rule 241, SCACR, provides, in pertinent part:

> **(a) General Rule.** As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision

> on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision . . .
>
> **b) Exceptions.** The exceptions to the general rule are found in statutes, court rules, and case law. Where specific conditions must be met before the exception applies, those conditions must be strictly complied with. A list of some, but not all, of the exceptions to the general rule is:
>
> . . .
>
> > **(2)** Judgments directing the assignment or delivery of documents or personal property as provided in S.C. Code Ann. § 18-9-150.
> >
> > . . .
> >
> > **(4)** Judgments directing the sale or delivery of possession of real property as provided in S.C. Code Ann. § 18-9-170.
>
> . . .

Rule 241, SCACR. For the exceptions to apply, voting rights must constitute either personal property as contemplated by S.C. Code Ann. § 18-9-150 or real property as contemplated by S.C. Code Ann. § 18-9-170. Voting rights are neither personal property nor real property.

Section 19-9-150 of the South Carolina Code provides:

> **Deposit or surety when judgment requires delivery of documents or personalty.**
>
> If the judgment appealed from directs the assignment or delivery of *documents or personal property*, the execution of the judgment shall not be stayed by appeal unless the things required to be assigned or delivered be brought into court or placed in the custody of such officer or receiver as the court shall appoint or unless an undertaking be entered into on the part of the appellant, with at least two sureties and in such amount as the court or a judge thereof shall direct, to the effect that the appellant will obey the order of the appellate court upon the appeal.

S.C. Code Ann. § 18-9-150 (1985) (emphasis added). Voting rights are not "documents." Voting rights are not "property." The right to vote is a "privilege," capable of being revoked or suspended. The voting rights of the Developer are derived from the Covenants and Bylaws, and are not "property" as contemplated by section 18-9-150. The controlling documents provide that "Membership shall be appurtenant to and may not be separated from ownership of any Lot." *See* Covenants, Sec. 5.4 and 5.5; Bylaws, Art. IV, Sec. 3 & 4. It is clear that the voting rights here are mere privileges derived from property ownership. The right to a vote is not, however, considered property in and of itself.

Voting rights are likewise not real property. Section 18-9-170 of the South Carolina Code states:

> **Staying judgment for sale or delivery of land**
>
> If the judgment appealed from direct the sale or delivery of possession of real property, the execution of the judgment shall not be stayed unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon and that if the judgment be affirmed he will pay the value of the use and occupation of the property . . .

S.C. Code Ann. § 18-9-170 (1985). Voting rights are not real property. Real property is land. The instant voting rights are merely privileges that arise out of the real property ownership. They are not themselves real property. (*See* Covenants, Sec. 5.4 and 5.5; Bylaws, Art. IV, Sec. 3 & 4). Indeed, the circuit court's order continually refers to voting rights as "rights," rather than personal or real "property." The right to vote is neither personal property nor real property as contemplated by rule 241, SCRCR.

In any event, Rule 241(b)(2) contemplates the "assignment or delivery of documents or personal property." The circuit court's Summary Judgment Order neither "assigns" nor "delivers" Developer the right to vote. The order only provided that Developer's right to vote was suspended until it paid the Association a small portion of what it owed pursuant to the controlling documents. Rule 241(b)(2) does not contemplate this circumstance. Likewise, Rule 241(b)(4) contemplates "the sale or delivery of possession of real property." Rule 241(b)(4), SCACR. The circuit court order neither sells or delivers the Developers right to vote.

The circuit court's reliance on *Harman v. Wagner*, 33 S.C. 487, 12 S.E. 98, 101 (1890) is misplaced. *Harman* involved the appointment of a receiver to take the "*personal property* of [a] testatrix out of the control of the executor . . ." *Id.* (emphasis added). *Harmon* involved personal property. The instant case does not. Moreover, unlike the circuit court's May 25, 2012 Summary Judgment order, the order appealed in *Harmon* directed the delivery of the personal property, triggering the exceptions in the Rule. *See* Rule 241(b)(2), SCACR ("Judgments *directing* the assignment or *delivery* of . . . personal property"); Rule 241(b)(4), SCACR ("Judgments *directing* the sale or *delivery* of possession of real property"); *see also* S.C. Code Ann. §§ 18-9-150 and 170 (1985)(emphasis added). In contrast, the circuit court's Summary Judgment order ruled that Developer could regain its voting privileges once it re-paid the Association a percentage of the money it owed.

The circuit court erred in finding the automatic stay was not triggered, and Appellants were not required to post a bond pursuant to S.C. Code § 18-9-150 and S.C. Code § 18-9-170. Because Appellants' appeal of the May 25, 2012 Summary Judgment order stayed the order pursuant to Rule 241, SCACR, Developer was required to obtain an order lifting the automatic stay pursuant to Rule 241, SCACR. See Rule 241(a), SCACR ("This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court."); Rule 241(c), SCACR ("After service of notice of appeal, any party may move for an order lifting the automatic stay in cases which involve the general rule."). Developer never obtained an individual order lifting the stay. The October 22, 2012 Injunction Order states that even if the automatic stay were triggered, "[t]he [Developer] would be entitled to an Order lifting the Stay." No such Order was entered.

Regardless, the Injunction order itself was never in effect because Developer failed to post the required $25,000.00 bond. "The granting of supersedeas or the lifting of the automatic stay under this Rule may be *conditioned* upon such terms . . . as the lower court . . . may deem appropriate." Rule 241(c)(3), SCACR (emphasis added); see also *Harman*, 33 S.C. 487, 12 S.E. 98, 101 (1890) (finding order staying further proceedings "by its own terms, became a nullity" were applicant failed to post the required bond). The October 22, 2012 Injunction order required a $25,000.00 bond to be posted. The Developer failed to post the bond. The order is null and void in its entirety.

The automatic stay was triggered by Appellants' notice of Appeal. Even if the circuit court lifted the automatic stay, the Developer's failure of to post the required bond necessarily means the stay is still effective. Developer's August 25, 2012 "election" was therefore improper. The current duly-elected board is comprised of the individual Plaintiff/Appellants.

III. THE TRIAL COURT ERRED IN ISSUING A TEMPORARY INJUNCTION WHERE RESPONDENT PRODUCED NO EVIDENCE OF ITS LIKELIHOOD OF SUCCESS ON THE MERITS OR IRREPARABLE HARM.

The October 22, 2012 Temporary Injunction order is null and void due to Developer's failure to post the $25,000.00 bond. Regardless, the circuit court made several errors in granting the Temporary Injunction. "[T]he power of the court to grant an injunction is in equity. *Strategic Res. Co. v. BCS Life Ins. Co.*, 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "In equitable actions, the appellate court may review the record and make findings of fact in accordance with its own view of the preponderance of the evidence." Grosshuesch v. Cramer, 367 S.C. 1, 4, 623 S.E.2d 833, 834 (2005). "A preliminary injunction should issue only if necessary to preserve the status *quo ante*, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586-87, 694 S.E.2d 15, 17 (2010). The Developer failed to produce any evidence of irreparable harm or its likelihood of success of the merits on the appeal.

There is absolutely no evidence of irreparable harm. "An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff." *Scratch Golf Co. v. Dunes W. Residential Golf Properties, Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). In its Injunction Order, the circuit court found "Defendant's ability to sell its property within Litchfield Plantation has also been thwarted by Plaintiffs." (Oct. 22 Injunction Order pg. 6). The Record on Appeal is devoid of any evidence that Appellants in any way "thwarted" the Developer's ability to sell any property. After three decades of abuse, it is clear that the Appellants have the greatest interest in the community's success, not the Developer. To say otherwise is a gross inaccuracy. The Developer's properties are in foreclosure. The South Carolina Secretary of State has dissolved Developer. Quite simply, the Developer, not the Association, has "thwarted" the ability to sell property.

The circuit court's finding that "[i]t is axiomatic that a potential purchaser would be less likely to purchase the [Developer's] property knowing [Appellants] refuse[d] to recognize the fundamental voting rights connected with the ownership of that property" is simply not true. The Class B majority voting rights have nothing to do with property. There can only be one Class B majority voter, the Declarant. Potential purchasers are in no way affected by conversion of Developer's Class B voting rights. If potential purchasers are turned off by anything, it is Developer's current insolvency and decades of abuse against the Homeowners and their Association. The record is devoid of any evidence that Appellants interfered or intended to interfere with Respondent Developer's sale of lots. There is absolutely no evidence of irreparable harm, and the circuit court erred in granting the injunction.

Developer made absolutely no showing that it was likely to succeed on the merits of the appeal. To be entitled to a temporary injunction, "a party must demonstrate . . . a likelihood of success on the merits." *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct. App. 2002). A review of the transcript shows the Developer never even attempted to make such a showing. A showing of a likelihood of success is required for the issuance of a temporary injunction. The circuit erred in granting the injunction without this showing. (Cite).

CONCLUSION

It is undisputed that Developer took almost $1,000,000.00 in Association money. It is undisputed that Developer breached its fiduciary duties to the Association. It is undisputed that Developer failed to meet its financial obligations to the Association. It is undisputed that this abuse has been ongoing for over three decades. Because the controlling documents do not provide a remedy for this conduct, the Litchfield Homeowners' only remedy is through the court's equitable powers.

The Developer's outrageous conduct entitles the Litchfield Homeowners to the requested equitable relief. Pursuant to *Ex Parte Dibble*, 279 S.C. 592, 310 S.E.2d 440 (Ct. App. 1983) and other relevant case law, the circuit court had the authority to equitably convert the Developer's Class B majority voting rights to Class A status. This was the only effective remedy available to Appellants. Anything less would allow the Developer to continue its complete and unfettered control over the Association.

In light of the equitable standard of review, this court can make its own findings of fact. *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654 (2011). The overwhelming record evidence shows the Developer has wrongfully taken almost $1,000,000.00 from the Association, most of which has not been re-paid. The Developer breached its fiduciary duties to the Association. This conduct has been ongoing for over three decades. Given the substantial non-payment of its financial obligations and the numerous breaches of fiduciary duty, the Appellants respectfully request this court award the equitable remedy requested and convert the Developer's Class B majority voting rights into Class A rights.

In the alternative, Appellants request the court remand the case to the circuit court, with instructions that the circuit court has the authority to grant Appellants the relief requested. The Appellants are entitled to the equitable relief requested in light of the record evidence. Additionally, Developer must pay the entire $987,895.54 owed to the Association before it is allowed to vote at all.

Respectfully submitted,

LEATH, BOUCH & SEEKINGS, LLP

By:____________________
Tim W. Bouch, Esq.
Michael S. Seekings, Esq.
Yancey A. McLeod III, Esq.
92 Broad Street
P. O. Box 59
Charleston, SC 29402
(843) 937-8811
Attorneys for the Appellants

Charleston, South Carolina

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