

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Charles B. Simmons, Jr., Master in Equity

Civil Action No. 2017-CP-23-06301
Appellant Case No. 2018-001209

Raymond A. Wedlake, individually and derivatively, on behalf of all Members
of the Woodington Homeowners' Association, Inc.,.....Appellant,

v.

Benjamin Acord, William Craigo, Denis Esteve, and Brian James in their
capacity as the current Board of Directors of the Woodington Homeowners'
Association, Inc.,..... Respondents.

RECORD ON APPEAL
VOLUME II

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April 10, 2018

The Honorable Charles B. Simmons, Jr. – Master-in-Equity, Greenville County – By: email
Suite 313, County Courthouse
Greenville, SC 29601
cc. Ely Grote, Esq., By Express Mail & email / Raymond Wedlake – By Hand & email

Re: Pre-Trial Brief – Wedlake v. Acord, et. al. – 2017-CP-06301

Parties: Raymond A. Wedlake, individually, and derivatively, on behalf of all Members of the Woodington Homeowners' Association, Inc. v. Benjamin Acord, William Craig, Denis Esteve, and Brian James in their capacity as the current Board of Directors of the Woodington Homeowners' Association SC, Inc.

Witnesses: NONE, other than Client, Ray Wedlake; to testify on matters strictly related to the stipulated issues, and more specifically, as to his knowledge as a member of past Boards regarding the drafting of the By-Laws and the provision on Ballots. This is an action requesting the Court to provide a Declaratory Judgment on various disputes arising from the WHOA By-Laws for this Board, for future Boards, and for WHOA Members alike, and, accordingly, we would argue that all witness testimony should be limited to such interpretation of the By-laws.

Dear Judge Simmons:

We are pleased to provide our Pre-Trial Brief, which we have sought to keep clear and concise. As you may note from the caption, a copy has been provided, with all attachments, to Ely Grote, Esq., counsel for the Defendants. This Pre-Trial Brief of course incorporates all existing pleadings, including our Complaint and Memorandum in Response to Defendants' Memorandum in Support of Motion to Dismiss and Alternatively for a More Definite Statement, along with related Affidavits and Exhibits.

A. Overview -

Plaintiff, Raymond Wedlake, is a long-time resident of Woodington (since 1999) and a former two-term member of the Board of Directors of the Woodington Homeowners' Association (WHOA), where he served on the Board's By-Law Committee. The WHOA is a SC Nonprofit Corporation. Disputes relate back as early as 2016 as to interpretation and adherence by the

Board of the WHOA to the By-Laws, which disputes continue to this day. Such early, 2016 Board disputes include the Board Members extending their terms to 7 years, contrary to a five-year term limit, without holding any elections in 2015 nor in 2016 nor providing for special election, without soliciting additional members to fill Board vacancies, and without sending a Board-election ballot in 2015 nor in 2016. Plaintiff is bringing this action on behalf of the Members of the WHOA with the hope and expectation that issuance of declaratory judgments resolving ongoing By-Law disputes will provide critical guidance not only for the current Board but for future Boards, thus reducing the risk of ongoing controversy and conflict.

B. Fundamental & Stipulated Issues - Nature of Action

I. Fundamental Issues

-Court interpretation of By-Laws to resolve disputes for the benefit of all Boards and for WHOA Members – Dec. Judgment Requested

-Requirement for this HOA Board to adhere to the By-Laws, and to stipulate that future Boards must also adhere to the By-Laws.

II. Stipulated Issues

-We have agreed to stipulate the following issues for the purpose of judicial efficiency. Plaintiff is flexible in terms of wording.

-It is Plaintiff's position that the Board Defendants and the 2016 Board before them, have engaged in continuing violations of the By-Laws despite clear and repeated notification and explanation by Plaintiff, and that such violations will continue to occur with future Boards to the detriment of Members without confirmation of violations as claimed by Plaintiff, and without clear direction from this Court that the By-Laws must be followed (See attached Original Affidavit 14 – 23, 49, 61 – 63, 66).

Plaintiff seeks a declaratory judgment and declaratory relief as follows:

a. A declaration that the Board of the Woodington Homeowners' Association, Inc. (the "Association") must comply with, and enforce in accordance with their terms, the Association's bylaws. *[Note: All HOA Boards in SC are required to adhere to their By-Laws, and also to act for the "...betterment of homeowners ..."* (Exhibit A, Article 2 of By-Laws).]

b. That the court construe the Bylaws of the Association and declare that the bylaws place a duty on the Board of Directors to fill a vacancy on the Board of Directors and the Board of Directors must make reasonable efforts to do so. *[Note: The Board recently did fill such position after this lawsuit was filed, denying at the same time it was required to do so, and continues to refuse to acknowledge it is required to do so pursuant to the By-Laws. It is our position that the plain language of the By-Laws trumps the language of the SC Nonprofit Corporation Act, which clearly states that in the event of a conflict the By-Laws prevail. (Affidavit: 41-45; Exhibit A: Article VIII, Section 2(f); Exhibit E; Nonprofit Corporation Act excerpts attached as Exhibit 2);*

c. That the court construe the Bylaws of the Association and declare that the bylaws require a majority of all members to both enter into, and to renew, a management contract.

[Note: Although the Board renewed the last management contract by a majority of the Members it did so under threat of an injunction and only after nearly ten years of renewals without such majority and the Board refuses to agree that a Majority is required by the By-Laws (Affidavit 46-49);]

d. That the court construe the Bylaws of the Association and declare that the bylaws do not permit a Director to remain beyond a five-year term, and in any event, for not more than one additional year beyond such five-year period. [Note: The prior Board members extended their terms to 7 years despite a five-year term limit, and refused to acknowledge a duty they must take reasonable steps to avoid extending their terms without election – they should announce and execute an election using a “Special Meeting”; or by sending a ballot, where By-Laws provide for both of these means to be applied, regardless of an Annual-Meeting event where a quorum is not available, which though not the case with the current Board, they refuse to confirm a 5-year-term limit applies (Affidavit, 32-33, 41-45, Exhibit E);]

e. That the court declare that the Bylaws of the Association do not permit delegation of the role or authority of the Board. [Note: We recognize that the Board may delegate duties with proper supervision, but the Board delegated its authority without such supervision to the prior Management Company, AMG, and will not acknowledge that the authority of the Board may not be delegated (Affidavit: 49, 58, 60);]

f. That the court construe the Bylaws of the Association and declare that the Bylaws require the Board of Directors to send out a ballot to the membership for voting if a proposed amendment to the Bylaws is submitted by an eligible member. [Note: The Board disagrees with Plaintiff’s interpretation that the ballot provision in the By-Laws, which he helped draft as attested by Plaintiff in the attached Affidavit (item 8), requires the Board to send out by ballot a proposed amendment by Plaintiff to amend the By-Laws to require Alternative Dispute Resolution. (Affidavit 13, Exhibit C);]

All such disputes are known to the Board (Affidavit, 50).

Plaintiff seeks an award of Nominal Damages against defendants. [Note: Nominal Damages are sought, only, since no desire to damage WHOA has ever existed.]

Plaintiff also seeks an award of court costs and legal fees if such costs and fees are paid by the Association’s insurance carrier.

III. Nature of Action –

Declaratory Judgment requested on stipulated issues, pursuant to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. Title 15; Chapter 53, Section 15-53-10, et. seq., as amended (Complaint 16, 77). (For legal analysis see Section VI, pp. 4-5).

Suit is being brought Derivatively – on behalf of all Members of WHOA; and, Individually on behalf of Plaintiff for refusal by Defendants to abide by the By-Laws and appoint Plaintiff to a vacant seat on Board in May 2017 as requested at that time, after Plaintiff met the two-tier test of being a Member that is both “eligible and willing”.

For a legal analysis of appropriateness of derivative action see Section VI, Summary Legal Analysis, beginning on page 4.

IV. Plaintiff's Efforts to Resolve Disputes & Avoid Court

1. In 2016 and 2017 sought agreement on key By-Law issues, requesting meetings to resolve key issues – only one meeting was held with no approved resolutions, with the Board shunning any attempt to resolve disputes over the entirety of 2017 and to date in 2018;
2. Ultimately, demands were made expressly, clearly and repeatedly, in writing – (See, Affidavit 36-40, and Exhibits O, P & Q to Complaint);
3. Three requests to mediate by Plaintiff, beginning in March 2017, with Plaintiff offering to pay mediation expenses – no response was ever received until late in 2017;
4. Finally, recourse was made by Plaintiff to the office of the Attorney General who advised Plaintiff after review that this was not a matter of public policy and suggested Plaintiff seek judicial relief (Exhibit 3 as attached); leaving Plaintiff with a need for Equity and nowhere else to go!
5. Pre-filing notice with copy of Draft Complaint was provided to the Board and a response that they would simply let their insurance carrier select an attorney (Exhibit 7 as attached);
6. Plaintiff advised the Board in writing that they likely would not be covered given nature of action (which apparently is the case), and waited further without any response (Exhibit 20 as attached);
7. The filing was made in the least conflicting manner, by seeking Declaratory relief, and against the Members of Board in that capacity and not against them for breach of fiduciary duty individually; and not seeking damages or Court Costs unless costs can be paid by insurance;
8. AMG – Managing Agent was dropped as Defendant from Case – Approved Settlement;
9. Post-filing- the Plaintiff repeatedly requested that Defendants join in the declaratory action for the benefit of all.WHOA Members, and also asked them to join in Mediation again, which was ultimately done, with Defendants' attorney communicating that the process had reached “Impasse”; and,
10. Plaintiff continues to seek resolution of issues with Defendants.

V. Administrative History – Motion to Dismiss Denied - Court Order

Defendant moved to dismiss and in the alternative for a more definite statement and to Strike – arguing, among other things, lack of standing to bring the derivative suit - Judge Stilwell denied Defendants' Motion on all counts – with the Judge suggesting parties re-consider mediation (Plaintiff agreed) and also the possibility of proposing a transfer to the Master in Equity (Plaintiff agreed). A copy of the Transcript, as well as the Court Order, are attached (Exhibits 21 & 22).

VI. Summary Legal Analysis:

Declaratory Judgment requested on stipulated issues, pursuant to the South Carolina Uniform Declaratory Judgment Act, S.C. Code Ann. Title-15, Chapter 53, Section 15-53-10, et.

seq., as amended (the "Act"). As stated in the Complaint, this action arises out of a "contract" within the meaning of the Statute, i.e., the By-Laws of the WHOA, and interpretation and assertion of the rights pursuant to such contract, and accordingly, falls directly under the auspices of such Statute, as set forth in the Complaint (Complaint at 16). The Act provides in pertinent part:

"Any person interested under a ...written contract...may have determined the question of construction or validity arising under the...contract...and obtain a declaration of rights, status or other legal relations thereunder."

As is required, the nature of the disputes in this case are distinct and subject to full resolution, by an immediate and definitive resolution by this Court of the parties' rights, thereby avoiding the necessity of litigation.

Derivative Action – on behalf of Members of WHOA –

As discussed in greater detail in the Complaint and Memorandum, despite Defense counsel's argument in his Motion to Dismiss that Plaintiff lacks standing to act in a representative capacity, Plaintiff prevailed.

Analysis and Application of Rule 23(b)(i):

As stated in Plaintiff's Memorandum addressing the issue: "The Heart of the Matter – Rule 23(b)(1)" pp. 2-6, the key points can be summarized as follows:

To be allowed to bring an action under Rule 23(b)(1), Plaintiff must meet all the requisite five elements. Rule 23 of the South Carolina Rules of Civil Procedure spells out these requirements for bringing a derivative action as follows:

"(b)(1) Derivative Actions by Shareholders. In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

(i) Notice: clearly notice via multiple, concise written demands have been made over a period of several months (See Complaint, Exhibits W & X, and Affidavit of Plaintiff dated October 5, 2017.)

- (ii) That Plaintiff be a Member at the time the issue(s) arose (Complaint item 20 and Affidavit item 4);
- (iii) Complaint must be verified (it was);
- (iv) Complaint must specify with particularity the efforts made by Plaintiff to obtain the action desired and reasons for not being successful (see Section IV above); and,
- (v) Plaintiff must "fairly and adequately represent" the shareholders or members "similarly situated". Plaintiff is a member in good standing of the WHOA, has a seasoned attorney, and has been and continues to be, diligent in his pursuit of his platform of transparency and has other Members who endorse his position, as shown by the fact he received a number of votes at the last election of directors and has already received proxies for the upcoming election.

Neither the cases in SC, nor the statute on its face, require a majority of members (or shareholders) to be represented to "fairly and adequately represent" those for whom he is seeking relief – indeed, the statute provides that he must "fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. Plaintiff garnered several votes at the last Annual Meeting when he ran for a seat on the Board, and has received proxies for the upcoming election, based upon his platform of transparency, transmittal of minutes, open meetings with prior agendas, adherence to the By-Laws, and his recommendation for an amendment to the By-Laws to provide for ADR, in lieu of litigation. Indeed, the proper standard to apply is that applied in a recent Supreme Court Virginia case, *Cattano v. Bragg*, recognizing the right of a single shareholder to file a derivative suit (along with an individual suit), despite apparent animosity (since that is typical of such actions), citing numerous cases (*Cattano*, 727 S.E. 2d 625, 283 V. 638 (Sup. C. Va. 2012)). The court adopted the factors test used in *Jennings v. Kay Jennings Family Limited Partnership*, 275 Va. 594 (2008), focusing its attention "on whether the totality of the circumstances suggest that the plaintiff will vigorously pursue the suit and that the remedy sought is in the interests of the corporation." (*Cattano* at 627). It found that the reason for the suit was for protection of the shareholders (as here for the Members) and thus was appropriate.

Action Brought Individually on Behalf of Plaintiff - Plaintiff has filed individually as well, for Defendants' refusal to abide by appointment of Plaintiff to vacant seat on Board, given that Plaintiff meet the two-tier test of being a Member that is both "eligible and willing". As stated in the Plaintiff's Memorandum in Opposition (p. 8) (Exhibit 23 as attached), and in the Complaint, Plaintiff fulfilled the requirements to fill a vacant Board seat (eligible Member and willing to serve) and requested to fill such position but was denied that opportunity; leaving his platform and others that agreed with such platform, disenfranchised. The law clearly allows such an individual action, to be brought together with a derivative suit (See, *Brown v. Steward*, 557 N.E.2d, 684 (S.C. Ct. App. 2001).

Arguments Presented by Defense Counsel at Hearing on his Motion to Dismiss, or in the Alternative to Strike or for a More Definite Statement, Were Properly Rejected by Judge Stilwell, including:

a) **Business Judgment Rule** – As argued before Judge Stillwel, while a critical component to assure Boards the ability to use their discretion, it has no applicability in a Declaratory Judgment action where adherence is also sought and the By-Laws are depository and not discretionary (Board “shall” appoint a director where a vacancy exists”).

b) **Purported Action by Written Consent** – Defense counsel may seek to enter an alleged “Action by Written Consent” to which Plaintiff would object on the primary ground that it was solicited door-to door by the Board Defendants themselves; there is no explanation of the nature of the action being brought, and in any event, it is Hearsay. Judge Stillwell certainly did not find it dispositive in denying Defendants’ Motion to Dismiss, and, as noted by Plaintiff’s counsel at the hearing, 20% did not sign; and at the core and as case-law provides, it is the minority which needs protection of the court and such protection is the very essence of derivative suits.

Additional Anticipated Defenses –

We anticipate Defense Counsel will argue again, as he did at the hearing before Judge Stilwell, on his Motion to Dismiss, that the wrong parties are named as Defendants and Plaintiff should have named the Corporation not the Board Members, even though the Board Members were named in their capacity as members of the Board. This is incorrect. Of course, by naming the Corporation the By-Law provision on indemnification would presumably apply. It appears that the insurance carrier has denied coverage and without member approval for any one budget item, the maximum amount a Board may spend is \$1500, and the Board has never sought Member approval for the legal work on this case (Exhibit A: Article X, Sections 3, 4). Given that the Complaint was brought derivatively on behalf of the Members of WHOA, and Nominal Damages, only, are asked to be assessed, WHOA is not a proper party defendant. In the event that the Court should decide that the Corporation is a proper party defendant, then joinder would be the correct remedy.

PRAYER FOR RELIEF

Plaintiff’s prayer for relief is now greatly limited from that requested in the Complaint, pursuant to the stipulations, and accordingly, as the Complaint similarly stated, we are seeking the following:

- A. That this Court tender a Declaratory Judgment confirming Plaintiff’s position that the Board may not extend its term beyond five years, even where their successor has not been elected or appointed, without first seeking nominees for such position, and, failing such, soliciting a vote by ballot or special meeting.
- B. That this Court confirm Plaintiff’s position that the By-Laws require a majority of all Members to renew a management contract.
- C. That the Court confirm the Plaintiff’s understanding that the Board Defendants must fill any open Board vacancies, pursuant to the By-Laws.

- D. That this Court confirm that the Board of Directors are subject to the By-Laws and it is their duty is to adhere to the By-Laws (subject to the Nonprofit Corporation Act, or related Covenants of the WHOA).
- E. That this Court confirm the Board Defendants must send out a ballot to Members containing Plaintiff's proposed Amendments to the By-Laws requiring ADR, within 20 days of the Order.
- F. That this Court enjoin any future delegation of duties by the Board Defendants unless and until such delegation is authorized by an amendment to the Articles of Incorporation of the WHOA.
- G. That this Court adjudge, declare and decree the rights and other legal relations with the subject matter here in controversy, in order that such declaration shall have the force and effect of a final judgment.
- H. That this Court retain jurisdiction of this matter for the purpose of enforcing this Court's order.
- I. That this Court award Plaintiff nominal damages.
- J. That this Court award Plaintiff the reasonable costs and expenses of this action, including reasonable attorney's fees, if paid for by WHOA insurance.

We recognize that not all these issues are inarguable nor are they all clear-cut. It is for these reasons we are bringing them before the Master in Equity so that we may have clarity for this Board, for future Boards, and for the Members of the WHOA.

We thank the Court for the opportunity to submit this Pre-Trial Brief in support of our request for Declaratory relief.

Respectfully Submitted,

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STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

IN THE COURT OF COMMON PLEAS
FOR THE 13TH JUDICIAL CIRCUIT
C/A No.: 2017-CP-23-06301

Raymond A. Wedlake, individually and)
derivatively, on behalf of all Members of)
the Woodington Homeowners')
Association, Inc.,)

Plaintiff(s),)

v.)

Benjamin Acord, William Craigo, Denis)
Esteve, and Brian James in their capacity as)
the current Board of Directors of the)
Woodington Homeowners' Association,)
Inc.,)

and,)

Association Management Group SC, Inc.,)

Defendant(s).)

DEFENDANTS' PRETRIAL BRIEF

017402.00009

Defendants Benjamin Acord, William Criago, Denis Esteve, and Brian James (collectively the "**Board Defendants**") respectfully submit this Pre-trial Brief in advance of the trial scheduled for April 20, 2018.

SUMMARY STATEMENT OF FACTS

Plaintiff, Raymond Wedlake, is a homeowner in the Woodington subdivision and is a member of the Woodington Homeowners' Association, Inc. (the "**Association**"), a South Carolina nonprofit corporation. Benjamin Acord, William Craigo, Denis Esteve, Stacey Krause, and Brian James were elected to the board of directors at the Association's annual meeting held on January 10, 2017. Plaintiff ran for election at the Association's annual meeting held on January 10, 2017,

but was not elected. Stacey Krause subsequently resigned her position from the Board of Directors. Scott Price was later appointed by Board Defendants to fill the Board vacancy. Currently, the Board of Directors consists of Board Defendants, plus Scott Price (total of five directors). The next annual meeting is scheduled to take place on April 26, 2018, and an election of directors is scheduled to take place at such annual meeting.

Plaintiff has purported to bring a derivative action against the Board Defendants, primarily relating to various corporate governance matters, legal principles applicable to nonprofit corporations and their directors, and interpretation of certain bylaws provisions, which will be set forth in more detail below. Association Management Group SC, Inc. was a party previously, but a settlement was previously reached between Plaintiff and Association Management Group SC, Inc.

STIPULATED ISSUES FOR TRIAL

The parties have stipulated to the following issues for trial and a stipulation has been filed with the Court. The stipulation generally sets forth the following issues for trial:

1. Plaintiff seeks a declaratory judgment and declaratory relief as follows:
 - a. A declaration that the Board of the Association must comply with, and enforce in accordance with their terms, the Association's bylaws.
 - b. That the court construe the Bylaws of the Association and declare that the bylaws place a duty on the Board of Directors to fill a vacancy on the Board of Directors and the Board of Directors must make reasonable efforts to do so.
 - c. That the court construe the Bylaws of the Association and declare that the bylaws require a majority of all members to both enter into, and to renew, a management contract.

- d. That the court construe the Bylaws of the Association and declare that the bylaws do not permit a Director to remain beyond a five-year term, and in any event, for not more than one additional year beyond such five-year period.
 - e. That the court declare that the Bylaws of the Association do not permit delegation of the role or authority of the Board.
 - f. That the court construe the Bylaws of the Association and declare that the Bylaws require the Board of Directors to send out a ballot to the membership for voting if a proposed amendment to the Bylaws is submitted by an eligible member.
2. Plaintiff seeks an award of Nominal Damages against defendants.
 3. Plaintiff seeks an award of court costs and legal fees if such costs and fees are paid by the Association's insurance carrier.
 4. Board Defendants preserve all defenses to Plaintiff's claims and nothing herein shall be construed to infer a waiver of any defenses by Board Defendants or that Board Defendants in any way stipulate that the matters raised by Plaintiff or the relief sought by Plaintiff are proper matters before the Court or proper matters to be heard by the Court.

OUTLINE OF ISSUES AND APPLICABLE LAW

- a) General Legal Concepts Pertinent to Defenses: Standing, Justiciable Controversy, Subject Matter Jurisdiction, Burden of Proof, Business Judgment Rule, Statutory Construction, and Contract Construction

“For a plaintiff to possess standing three elements must be satisfied.” Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014).

First, the plaintiff must have suffered an injury-in-fact which is a concrete, particularized, and actual or imminent invasion of a legally protected interest. Second, a causal connection must exist between the injury and the challenged conduct. Third, it must be likely that a favorable decision will redress the injury.

Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (internal citations omitted). In order for an injury to be particularized, it must affect the plaintiff in a personal and individual way rather than affecting the public as a whole. Id. at 75-77, 753 S.E.2d at 850-851. "The party seeking to establish standing carries the burden of demonstrating each of the three elements." Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res., 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001).

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

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

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

to the level of actual controversy.” Tourism Expenditure Review Comm., 403 S.C. at 81-82, 742 S.E.2d at 374 (citing with approval the following cases: *Dep't of Cmty. Affairs v. Mass. State Coll. Bldg. Auth.*, 378 Mass. 418, 392 N.E.2d 1006, 1009 (1979) (“A mere difference of opinion or uncertainty over the meaning to be ascribed a statute does not, without more, rise to the level of a justiciable controversy.”); Harrington v. State Office of Court Admin., 114 Misc.2d 351, 451 N.Y.S.2d 595, 596–97 (1982) (finding the court was without power to grant declaratory relief on the grounds that any declaration would be “merely an advisory opinion evaluating the accuracy of the statutory interpretation and would not determine any justiciable controversy between the parties” where there existed no genuine controversy, but rather the parties sought only an abstract resolution of their different interpretations of a law)). The existence of a justiciable controversy is a matter of subject matter jurisdiction. Tourism Expenditure Review Comm., 400 S.C. at 81, 742 S.E.2d at 373. Power, 255 S.C. at 153, 177 S.E.2d at 552.

Generally, plaintiff bears the burden of proving jurisdiction when jurisdiction is challenged by the defendant. See, Eldridge v. City of Greenwood, 331 S.C. 398, 408-10, 503 S.E.2d 191, 196-97 (Ct. App. 1998). In an action for declaratory judgment, “the burden of proof rests with the party seeking the declaration, and that party must meet its burden by a greater weight or preponderance of the evidence.” *SPUR at Williams Brice Owners Ass'n, Inc. v. Lalla*, 415 S.C. 72, 82, 781 S.E.2d 115, 121 (Ct. App. 2015) (citing *Vt. Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994)).

Pursuant to the business judgment rule, “absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action.” Baumann v. Long Cove Club Owners Ass'n, Inc., 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008),

quoting Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993).

“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.” *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993)). Under the plain meaning rule, where the language of a statute is clear and unambiguous and conveys a clear and definite meaning, the courts should not give the statute any other meaning. *Id.* Only when the language of the statute gives rise to doubt or uncertainty as to the legislative intent should the construing court search for that intent beyond the language of the statute. *State v. Sweat*, 379 S.C. 367, 665 S.E.2d 645 (Ct. App. 2008), *aff'd as modified*, 386 S.C. 339, 688 S.E.2d 569 (2010). “A statute as a whole must receive a practical, reasonable, interpretation consonant with the purpose, design, and policy of the lawmakers.” *Savannah Riverkeeper v. S.C. Dep't of Health & Env'tl. Control*, 400 S.C. 196, 202, 733 S.E.2d 903, 906 (2012) (citing *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011)). Courts must reject any interpretation that would lead to a result “so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention.” *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000) (citing *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994)).

“In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties.” *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 184 (2013) (citing *D.A. Davis Constr. Co. v. Palmetto Props., Inc.* 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984)). Where the terms of the contract are clear and unambiguous, extrinsic evidence is not permitted to give the contract a different meaning. *C.A.N.*

Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm'n, 296 S.C. 373, 378, 373 S.E.2d 584, 586 (1988). “On the other hand, a contract is ambiguous when its terms are capable of having more than one meaning when viewed by a reasonably intelligent person who has examined the entire agreement. When a written contract is ambiguous, parol and extrinsic evidence may be admitted regarding the parties' intent.” *Progressive Max*, 405 S.C. at 46–47, 747 S.E.2d at 184. (citations omitted).

The purpose of the rules of contract construction is to ascertain the intention of the parties as gathered from the contents of the entire document and not from any particular provision within the contract. *Litchfield Co. of S. C., Inc. v. Kiriakides*, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct.App.1986). Where one interpretation of a contract makes it unusual or extraordinary and another interpretation, equally consistent with the language employed, would make it reasonable, fair, and just, the latter construction prevails. *Farr v. Duke Power Co.*, 265 S.C. 356, 362, 218 S.E.2d 431, 434 (1975). An interpretation which establishes the more reasonable and probable agreement of the parties should be adopted while an interpretation leading to an absurd result should be avoided. *Id.*

Koon v. Fares, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008).

b) Derivative Action Requirements

Board Defendants assert that Plaintiff is required to bring this suit as a derivative action, a principle that Plaintiff must acknowledge, as he has attempted to bring this action as a derivative action. However, Board Defendants assert that Plaintiff has failed to comply with the requirements for a derivative action pursuant to Rule 23(b), SCRCF and South Carolina law. A more full recitation of this argument and supporting law is set forth in Board Defendant's memorandum in support of their motions to dismiss, which was filed with the Court on December 31, 2017. Board Defendants assert that the evidence will show that Plaintiff has not complied with the requirements of a derivative suit and, in particular, including without limitation, that he does not fairly and adequately represent the interests of the members, necessitating dismissal pursuant to Rule 23(b), SCRCF.

c) Plaintiff Issue 1: A declaration that the Board of the Association must comply with, and enforce in accordance with their terms, the Association's bylaws.

It appears that Plaintiff is seeking a declaration against Board Defendants as to what the general law is and to affirm that persons have a general obligation to follow the law. Board Defendants do not dispute there is a general obligation to follow the law; however, they do dispute that there is any justiciable controversy and assert that this request is merely a request for a general advisory opinion confirming a general obligation to follow the law for which no meaningful relief can be granted against Board Defendants. Likewise, Board Defendants assert that there is no standing for such a claim. It appears that Plaintiff is simply seeking a declaration as to what the law is in general without there being any particular issue or controversy. Board Defendants would assert that this requested declaration does not seek to remedy or redress any specific injury or harm and just seeks a general declaration "as to what the law is." Board Defendants also assert that such a general declaration does not seek to redress any particularized injury that is personal to Plaintiff or the membership of this Association as compared to all other members or shareholders of all other corporations as a whole. Board Defendants assert that any alleged or threatened violations of the law or bylaws would have to be addressed on case by case basis. Additionally, Board Defendants assert that a general proclamation that directors must follow the bylaws does not account for nuances in the law and is fraught with problems, as it difficult to craft such a generalized statement when the obligation to follow the bylaws is dependent on the facts of a particular circumstance. For example, there may not be an obligation to follow the bylaws if the bylaws conflict with the Articles of Incorporation, the restrictive covenants, the Nonprofit Corporation Act or other provisions of the law, or in other situations where the law otherwise excuses compliance with the bylaws. Further, Board Defendants dispute that there is a cognizable claim to allow one person to hail another into court if such person doesn't agree to stipulate to another's view on a legal topic or agree to the form and content of such stipulation, absent some

specific justiciable controversy and particularized harm. Similarly, Board Defendants dispute that there is any legally cognizable claim to allow one person to hail another into court if a person doesn't wish to engage in an academic debate over what the law is or the obligation to follow the law. Otherwise, it would open the flood gates to allow any person to ask another if they agree with his/her position, and then hail the other into court for a judicial interpretation to settle an academic dispute. For example, if such a claim were allowed, any person could go up to any other person and demand that they stipulate or confirm that they have an obligation to follow the speed limit under the law, and if such person refuses to engage in the debate or refuses to agree to stipulate to the same in the form or fashion demanded, then they could be hailed into court for a declaratory determination on that issue. Clearly, this is contrary to the intent the requirements of standing and a justiciable controversy. Additionally, Board Defendants believe the evidence will show that this issue is nonetheless moot in any event. Finally, to the extent jurisdiction exists for this claim and to the extent Plaintiff asserts that such a determination is needed to provide guidance for future Boards, it would seem that the proper party to such claim, if anyone, would likely be the corporate entity itself, rather than Board Defendants who comprise less than the full board of directors and who may potentially be serving as directors for only a few more days after the trial date.

- d) Plaintiff Issue #2: That the court construe the Bylaws of the Association and declare that the bylaws place a duty on the Board of Directors to fill a vacancy on the Board of Directors and the Board of Directors must make reasonable efforts to do so.

Board Defendants again assert that there is no justiciable controversy and the court lacks jurisdiction to entertain this request for declaratory relief. Board Defendants believe that the evidence will show that there is no longer any vacancy on the Board of Directors, therefore, the

issue has become moot and a declaratory judgment would not provide meaningful relief, especially against Board Defendants who comprise less than the full current Board of Directors and who may potentially be in office for only a few days after the trial. To the extent Plaintiff asserts that such a determination is needed to provide guidance for future boards, it would seem that the proper party to such claim, if anyone, would likely be the corporate entity itself, rather than Board Defendants. Further, Board Defendants believe that the evidence will show that the vacancy on the Board of Directors created by the resignation of Stacey Krause was due to Plaintiff's conduct. Board Defendants assert that a person should be precluded from asserting a justiciable controversy or standing over an issue that would not exist, but for his/her actions. In other words, Board Defendants assert that Plaintiff should not be allowed to claim a justiciable controversy or standing, including the existence of an injury in fact or that an injury in fact is causally related to Board Defendant's conduct, if the Plaintiff's improper conduct is a proximate cause of the Board Defendants being placed in a position to address an issue that would not have arisen but for the actions of Plaintiff. Simply put, Board Defendants assert that Plaintiff should not be able to hail them into Court to complain about how Board Defendants handled an issue or situation if the situation was created by Plaintiff and would not have existed but for the actions of Plaintiff. Such concept is akin to the application of the unclean hands doctrine in an equitable action, and such doctrine provides:

"The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct.App.1998). " 'He who comes into equity must come with clean hands. It is far more than a mere banality. It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief.

Straight v. Goss, 383 S.C. 180, 106-207, 678 S.E.2d 443, 457-458 (Ct. App. 2009).

Should the Court entertain jurisdiction over this issue, the Board Defendants will assert that they acted reasonably relating to the vacancy created by the resignation of Stacy Krause, which is really not one of the stipulated issues before the court and no claim for damages is being sought relative to the Board Defendant's actions. Therefore, really the only issue that may be before the Court is how the bylaws should be interpreted and applied in the future by future Boards, and the Board Defendants as named in this suit really are not proper parties to such an action or determination. Therefore, the requested Declaration really seeks to force Board Defendants to take an academic position on an issue that may be moot as to them, but may theoretically or hypothetically arise in the future for future Boards.

- e) Plaintiff Issue #3: That the court construe the Bylaws of the Association and declare that the bylaws require a majority of all members to both enter into, and to renew, a management contract.

Plaintiff appears to seek a declaration as whether the following provision of the bylaws requires approval of a majority of all members to renew a management contract in addition to when entering into a new contract with a management company: *"With the approval of a simple majority vote of the Members, the Board of Directors may enter into a contract with an association management company to assist in carrying out the duties and responsibilities specified below for the Board of Director positions."*

Board Defendants simply assert that there is no justiciable controversy or standing as to them over this issue and that they are simply being dragged into an academic debate over the meaning of this provision of the bylaws. Board Defendants believe the evidence will show that they have neither entered into, nor renewed any management contract during their tenure as

directors. Board Defendants would assert that to the extent there is any issue relating to this provision, it involves conduct of prior directors and involves no actions of the Board Defendants. Thus, Board Defendants assert that there is no injury in fact causally related to any conduct of Board Defendants, nor is there any justiciable controversy with Board Defendants. Therefore, really the only issue before the Court is how the bylaws should be interpreted and applied in the future by future Boards. Thus, the Board Defendants as named in this suit really are not proper parties to such an action and the corporate entity itself, if anyone, would seem like the proper party for a request for such relief.

Should the Board Defendants be required to take an academic position on this matter, they would assert that as long as automatic renewal is provided by the terms of the management contract that was approved by the membership, then subsequent renewals pursuant to the automatic renewal provision would not require membership approval, as automatic renewals would simply be an extension of a contract already approved by the membership. The intent and purpose of this provision of the Bylaws seems to be that the membership should approve the terms and content of a contract with a management company before it is entered into. If, at the inception of the contract, the membership approved the content of a contract that allowed automatic renewals, then the membership has already approved and agreed to the premise of automatic renewal. It doesn't seem to make sense nor does it seem to further the purpose of the bylaws provision to require the membership to again approve of each automatic renewal that they have already agreed to when they approved the contract. If the members don't want automatic renewals without membership approval, they could simply decline to approve a contract with an automatic renewal provision and only approve of a contract that can't be automatically renewed, thus requiring a new contract that must be approved each year. Likewise, if the contract that is approved by the membership contains

terms allowing the Board of Directors to adjust the contract rate from time to time without membership approval, then the membership has already approved and agreed to that concept, and it would not make sense for rate changes pursuant to such a provision to require membership approval. If the membership wanted to require membership approval of all rate changes, it could simply decline to approve any contract that allows the Board of Directors to change the rate without membership approval.

Further, Board Defendants would assert that the interpretation sought by Plaintiff would not necessarily be in the best interests of the community. If there is low community participation, it could cause unnecessary and detrimental turnover in management companies and could also result in the community altering between having a management company and being self-managed. Such turnover and also being self-managed could place an undue burden on Board members and discourage persons from volunteering to serve on the Board. Likewise, such turnover could have detrimental impacts on the ability to collect past due assessments, as it could create evidentiary issues relating to establishing the debt incurred under a prior servicer.

Further, given that the Bylaws provision is silent on renewals, Board Defendants assert that the Board of Directors has discretion to interpret the provision and its judgment/interpretation must govern and control, and cannot be set aside by judicial action absent a showing of bad faith, dishonesty, or incompetence, as dictated by the business judgment rule. Board Defendants assert that Plaintiff simply does not have a right to substitute his judgment for that of the Board or to seek judicial relief as long as the Board's interpretation is reasonable. The Court is simply not an appellate tribunal for business decisions of a corporation.

- f) Plaintiff Issue #4: That the court construe the Bylaws of the Association and declare that the bylaws do not permit a Director to remain beyond a five-year term, and in any event, for not more than one additional year beyond such five-year period.

Plaintiff appears to seek an interpretation of Article V, Section 2 of the Bylaws, relating to terms for Board of Directors. This provision provides as follows:

Section 2 – SELECTION AND TERM OF OFFICE: *Annually, the membership shall normally elect five (5) directors from the membership for the term of one (1) year. Each Board Member must be elected every year. When a Board Member has served for five (5) consecutive terms, that person will not be permitted to seek a sixth consecutive term, unless the Board of Directors has been unable to find another eligible Association Member who is willing to serve on the Board. When this is true, the current Board by simple majority vote may waive the five (5) consecutive term limit. Any waiver is valid for only one year. After a Member has been off the Board of Directors for at least one term, that Member can seek re-election to the Board of Directors with the same rights of any other member.*

Again, Board Defendants simply assert that there is no justiciable controversy or standing as to them over this issue and that they are simply being dragged into an academic debate over the meaning of this provision of the bylaws. Board Defendants believe the evidence will show that they are all in their first term as directors and are not currently serving a consecutive term. Board Defendants would assert that to the extent there is any issue relating to this provision, it involves conduct of prior directors and involves no actions of the Board Defendants. It is purely conjectural, hypothetical, and abstract that Board Defendants may be elected to four additional successive terms, and even if this occurred, this provision wouldn't come into play for another four years. Thus, Board Defendants assert that there is no injury in fact causally related to any conduct of Board Defendants, nor is there any justiciable controversy with Board Defendants. Therefore, really the only issue before the court is how this provision of the bylaws should be interpreted and

applied in the future by future Boards, assuming speculatively that such a situation were to ever arise in the future. The Board Defendants as named in this suit really are not proper parties to such an action and the corporate entity itself, if anyone, would likely be the proper party for a request for such relief.

Should the Board Defendants be required to take an academic position on this matter, they would assert that Plaintiff's interpretation conflicts with law and is not in the best interests of the community. Terms of directors are addressed by Section 33-31-805 of the Nonprofit Corporation Act and a complete copy of that section, including the Official Comments and the South Carolina Reporter's Comments, is attached as **Exhibit 1**. Section 33-31-805(d) provides that "[d]espite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated or appointed, and qualifies, or until there is a decrease in the number of directors." The official comments to Section 33-31-805 provide with respect to the aforementioned provision that it "prevents chaos by continuing directors in office until their successors are elected, designated, or appointed, and qualify." The official comments further state that "Even if successor directors are not elected, or if elected do not qualify, continuity on the board will be provided as the incumbent directors continue until their successors take office." Likewise, South Carolina law recognizes the validity of actions taken by de facto directors that may not technically be de jure directors. See Southeastern Hous. Found. v. Smith, 380 S.C. 621, 642, 670 S.E.2d 680, 691 (Ct. App. 2008). "When a 'de facto' director or officer acts under color of right in assuming or performing a duty of that office, the action is sustainable" Id. By law, a nonprofit corporation must have a board of directors and the minimum number of directors is three. S.C. Code Ann. § 33-31-801 (A corporation must have a board of directors); S.C. Code Ann. § 33-31-803 (A board of directors must consist of three or more directors). If Plaintiff's position were

accepted, it would be contrary to the carryover provision set forth in Section 33-31-805 and would be contrary to the de facto director doctrine. Plaintiff's position could lead to absurd results because it could place the corporation in a situation where it is left without a board of directors or a sufficient number of directors in violation of the law, a situation that Section 33-31-805(d) was specifically designed to prevent. To the extent the bylaws conflict with Section 33-31-805(d), Section 33-31-805(d) would control. See S.C. Code Ann. § 33-31-206 (bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation).

g) Plaintiff Issue #5: That the court declare that the Bylaws of the Association do not permit delegation of the role or authority of the Board.

Again, Board Defendants simply assert that there is no justiciable controversy or standing as to them over this issue and that they are simply being dragged into an academic debate over "what the law is" without any specific action or conduct by Board Defendants being alleged to be improper or in dispute. Rather, Plaintiff seems to simply be seeking judicial clarification of the meaning of S.C. Code Ann. § 33-31-801. Thus, this issue seems to be purely a question of statutory interpretation and nothing further. As noted above, "[q]uestions of statutory interpretation, by themselves, do not rise to the level of actual controversy." Tourism Expenditure Review Comm., 403 S.C. at 81-82, 742 S.E.2d at 374.

To the extent that Board Defendants are required to take an academic position, they would note that Section 33-31-801 provides that "all corporate powers must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board." (emphasis added). A copy of Section 33-31-801, including the Official Comments and the South Carolina

Reporter's Comments, is attached as **Exhibit 2**. This statutory provision clearly allows corporate powers of the Association to be exercised by persons other than the Board, as long as done under the authority of the board and under the direction of the board, which is supported by a reading of the Official Comments to the Section, which provide:

The role played by the boards of nonprofit corporations varies widely due to the nature, size, characteristics and needs of the organizations. Absent a contrary article provision "[a]ll corporate powers shall be exercised by or under the authority of" the board.

In some nonprofit organizations the board is actively involved in the day-to-day activities of the corporation. Board members may carry on all or substantially all of the work of the corporation. In such instances the corporate powers are exercised by the board and the affairs actively managed under the direction of the board.

In other nonprofit corporations the board is significantly involved in fund-raising or other activities and also validates or approves a policy and other decisions made by the corporation's officers and employees. In such instances the corporate powers are exercised under the authority of the board and the affairs are managed under the direction of the board.

In each of the above instances the board has the ultimate authority and responsibility. The authority is exercised and responsibility is carried out in different ways.

(Emphasis added). Clearly, others can exercise corporate powers under the direction of the Board. To provide otherwise would lead to absurd results. For example, if the Bylaws placed a duty on the Association to maintain common areas, under the narrow interpretation that appears to be put forward by Plaintiff, it would mean that the board of directors themselves would have to do the physical labor and couldn't hire a landscaper or contractor to perform those functions. Clearly, this is an absurd result. In fact, Board Defendants would assert that the bylaws themselves speak to delegating certain authority and responsibility to a management company.

h) Plaintiff Issue #6: That the court construe the Bylaws of the Association and declare that the Bylaws require the Board of Directors to send out a ballot to the membership for voting if a proposed amendment to the Bylaws is submitted by an eligible member.

Plaintiff appears to be seeking an interpretation of Article XVII, Section 3 of the Bylaws, which provides:

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

South Carolina Code Section 33-31-708 provides, in part, that “[u]nless prohibited or limited by the articles or bylaws, any action that may be taken at any annual, regular, or special meeting of members may be taken without a meeting if the corporation delivers a written or electronic ballot to every member entitled to vote on the matter.” Section 33-31-708 goes on to specify further requirements for an valid action by written or electronic ballot and the full text of Section 33-31-708, including the Official Comments and the South Carolina Reporter’s Comments, is attached as **Exhibit 3**.

The Board Defendants would show that the Article V(2) of the restrictive covenants for the Woodington Subdivision provides that “The affairs of the Association shall be controlled by a Board of Directors, duly elected by the members.” Further, the Board Defendants would show that Article VIII, Section 1(a) of the Bylaws vests in the Board of Directors with the power to “Exercise for the Association all powers, duties, and authority vested in or delegated to this association and not reserved to the membership by other provisions of these By-Laws, or the ‘Covenants’ (Reference 1).” Likewise, as noted above, S.C. Code Section 33-31-801 provides

that "all powers must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board." Members simply are not vested with authority to manage or control the affairs of the corporation, as that role is vested in the Board of Directors.

The bylaws provision that Plaintiff seems to seek an interpretation of seems to be a layperson's attempt at an acknowledgement of South Carolina Code Section 33-31-708; however, to the extent the bylaws conflict with Section 33-31-708, the statute would control, as set forth above. Under Section 33-31-708, ballots are to be delivered by the Corporation, which must act by and through its Board of Directors, as set forth above. As specified previously, the Board of Directors is afforded business discretion and judgment in the performance of its duties, including the management of the operations and affairs of the Association. Thus, it is the Board of Directors' decision, in its business discretion, as to whether to send out a ballot for a vote on a bylaws amendment proposed by a member. If the Board of Directors, in its business judgment, determines that a proposed amendment is not in the best interests of the corporation, a member simply cannot force the Board of Directors to send out a ballot on an amendment that it does not support. To do so would allow members to usurp the role and function of the board of directors and render the role of the board of directors essentially meaningless by allowing any issue to be put to a community vote any time that a single member wants. The Nonprofit Corporation Act simply does not envision or allow for a socialism approach to the operation of a nonprofit corporation. Instead, the power and authority is centralized in the board of directors. It could also be very time consuming and expensive if members were allowed to force a vote by ballot on any and all issues that they want.

Instead of allowing a member to force a vote by ballot, the Nonprofit Corporation Act and the bylaws provide a different remedy instead. That remedy is to force a special meeting to be

called. S.C. Code Ann. § 33-31-702 provides that a corporation with members shall hold a special meeting of members “if the holders of at least five percent of the voting power of the corporation sign, date, and deliver to any corporate officer one or more written demands for the meeting describing the purpose or purposes for which it is to be held.” Likewise, the Bylaws provide the right of a members to force a special meeting upon written request of a sufficient number of members. Art. IV, Section 2 of Bylaws. Thus, the Nonprofit Corporation Act and the Bylaws provide a remedy to force a vote on a proposed amendment in the event the Board of Directors exercises is business judgment and chooses not to send out a ballot on a proposed amendment. This remedy is to force a special meeting. Notably, the Bylaws require that amendments be approved by 75% of the membership. If Plaintiff cannot get the minimum threshold of members to support calling a special meeting to force a vote on a proposed amendment, then any such amendment has no chance of succeeding in any event. Board Defendants believe that the evidence will show that Plaintiff has failed to exhaust his remedy of a special meeting as provided by the Nonprofit Corporation Act and the Bylaws.

i) Plaintiff Issue #7: Plaintiff seeks an award of Nominal Damages against defendants.

Board Defendants contend that nominal damages are not appropriate in a request for simply declaratory relief to construe the bylaws of a corporation, as Plaintiff has not asserted any cause of action for which damages can be awarded. To the extent nominal damages are allowable, Board Defendants would contend that an award of nominal damages is not warranted and in any event, they are immune from monetary damages pursuant to S.C. Code Ann. § 33-31-202(b).

- j) Plaintiff Issue #8: Plaintiff seeks an award of court costs and legal fees if such costs and fees are paid by the Association's insurance carrier.

Board Defendants assert that there is simply no contract or statute allowing for the recovery of attorney's fees against Board Defendants. In any event, Plaintiff is only seeking attorney's fees if paid by the Association's insurance carrier rather than personally against Board Defendants, and Board Defendants believe that the evidence will show that the Association's insurance carrier has denied coverage for the claims in this suit.

k) Other Defenses

Board Defendants reserve the right to preserve any remaining defenses not specifically mentioned herein, including without limitation, their defense of lack of personal jurisdiction concerning service of an unstamped version of the Summons and Complaint on Defendants.

ANTICIPATED WITNESSES AND TESTIMONY

The following may be anticipated witnesses:

1. Board Defendants

- a. Anticipated testimony: It is anticipated that some or all of them may testify as to the actions and conduct of Plaintiff, whether Plaintiff adequately represents the interests of the members of the community, their actions as directors, the corporate records of the Association, the operations and affairs of the Association, the facts and circumstances surrounding this suit, and their positions in this suit.

2. Plaintiff

a. Anticipated testimony: It is anticipated that he may testify as to the facts and circumstances surrounding this suit and his positions in this suit.

3. Gary Krause

a. Anticipated testimony: It is anticipated that he may testify as to actions and conduct of Plaintiff and whether Plaintiff adequately represents the interests of the members of the community.

4. Stacey Krause

a. Anticipated testimony: It is anticipated that she may testify as to her reasons for resigning from the board of directors, her service on the Board of Directors, the facts and circumstances surrounding this suit, the actions and conduct of Plaintiff, and whether Plaintiff adequately represents the interests of the members of the community.

5. Richard LaCroix

a. Anticipated testimony: It is anticipated that he may testify as to threats of litigation by Plaintiff against former board members (including himself), Plaintiff's actions and conduct, his prior service on the Board of Directors, and whether Plaintiff adequately represents the interests of the members of the community.

/s/ Ely O. Grote

Ely O. Grote (SC Bar No.: 75379)
McCabe, Trotter & Beverly, PC.
4500 Fort Jackson Blvd., Suite 250 (29209)
P.O. Box 212069 · Columbia, SC 29221
Phone: (803) 724-5000 · Fax: (803) 724-5001
Email: ely.grote@mccabetrotter.com
Attorney for Defendants

Exhibit 1

Code of Laws of South Carolina 1976 Annotated

Title 33. Corporations, Partnerships and Associations (Refs & Annos)

Chapter 31. South Carolina Nonprofit Corporation Act (Refs & Annos)

Article 8. Directors and Officers

Subarticle a. Board of Directors

Code 1976 § 33-31-805

§ 33-31-805. Terms of directors generally.

Currentness

(a) The articles or bylaws may specify the terms of directors. Except for designated or appointed directors, the terms of directors may not exceed five years. In the absence of a term specified in the articles or bylaws, the term of each director is one year. Directors may be elected for successive terms.

(b) A decrease in the number of directors or term of office does not shorten an incumbent director's term.

(c) Except as provided in the articles or bylaws:

(1) the term of a director filling a vacancy in the office of a director elected by members expires at the next election of directors by members; and

(2) the term of a director filling another vacancy expires at the end of the unexpired term that such director is filling.

(d) Despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated or appointed, and qualifies, or until there is a decrease in the number of directors.

Credits

HISTORY: 1994 Act No. 384, § 1.

Editors' Notes

OFFICIAL COMMENT

Section 8.04(a) allows the initial directors and directors elected by the members or the board to serve for up to five-year terms.

The members' right to vote is illusory unless it can have an impact on the board. In the case of self-perpetuating boards, five-year terms allow continuity and also provide a graceful way of removing directors who may otherwise think they have life tenure. See section 8.04(b) which allows a self-perpetuating board to elect successor directors.

Designated or appointed directors may serve any term prescribed by the articles or bylaws. See section 8.09 for provisions governing removal of designated or appointed directors.

In the absence of a contrary article or bylaw provision, the term of directors is one year.

The term of a director filling a vacancy of a director elected by members expires at the next election of directors by members. This election may be at the annual meeting or by written ballot. See sections 7.01 and 7.08. The members may elect the director filling the vacancy for the remainder of the unexpired term.

The term of a director filling the vacancy of a designated or appointed director or filling a vacancy on a self-perpetuating board is for the unexpired term of the director being replaced. See section 8.05(c). Section 8.11 sets forth the ways in which vacancies can be filled.

Section 8.05(a) prevents chaos by continuing directors in office until their successors are elected, designated, or appointed, and qualify. Even if successor directors are not elected, or if elected do not qualify, continuity on the board will be provided as the incumbent directors continue until their successors take office.

SOUTH CAROLINA REPORTERS' COMMENTS

Previously applicable statutory law, found at Section 33-8-105 of the South Carolina Business Corporation Act, limited directors to terms of a single year, except for members of staggered boards. Present law extends the permissible term to five years, and imposes no limits on appointed or designated directors' terms.

Subsections (b) and (d) are identical to the analogous subsections of Section 33-8-105, and thus represent no change from prior law. Subsection (c) differs from Section 33-8-105(c) and (d) in making its provisions variable in the articles of incorporation or bylaws.

The word "may" in the first sentence of subsection (a) has replaced the word "must" in the Model Act, for purposes of clarification.

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Code 1976 § 33-31-805, SC ST § 33-31-805

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Exhibit 2

Code of Laws of South Carolina 1976 Annotated

Title 33. Corporations, Partnerships and Associations (Refs & Annos)

Chapter 31. South Carolina Nonprofit Corporation Act (Refs & Annos)

Article 8. Directors and Officers

Subarticle a. Board of Directors

Code 1976 § 33-31-801

§ 33-31-801. Requirement for and duties of board.

Currentness

(a) Each corporation must have a board of directors.

(b) Except as provided in this chapter or subsection (c), all corporate powers must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board.

(c) The articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized, the person or persons shall have the duties and responsibilities of the directors, and the directors shall be relieved to that extent from the duties and responsibilities.

Credits

HISTORY: 1994 Act No. 384, § 1.

Editors' Notes

OFFICIAL COMMENT

The Model Act allows considerable flexibility in structuring nonprofit corporations. While every corporation must have a board of directors, the articles may authorize a person or persons to exercise some or all of the powers of the board.

Insofar as the powers of the board are delegated to some other person or persons, that person or persons assume the duties of the board and must meet the standards set forth in sections 8.30-8.33. If the board had no corporate power it would have no duties under sections 8.30-8.33.

In some organizations corporate authority is exercised by a representative assembly or a convention. The board may have little or no corporate power when the assembly or convention is meeting. Corporate power between assemblies or conventions may reside in a board of directors or some other person or persons. The person or persons under whose authority

corporate power is exercised has the responsibilities of the board of directors.

The role played by the boards of nonprofit corporations varies widely due to the nature, size, characteristics and needs of the organizations. Absent a contrary article provision "[a]ll corporate powers shall be exercised by or under the authority of" the board.

In some nonprofit organizations the board is actively involved in the day-to-day activities of the corporation. Board members may carry on all or substantially all of the work of the corporation. In such instances the corporate powers are exercised by the board and the affairs actively managed under the direction of the board.

In other nonprofit corporations the board is significantly involved in fund-raising or other activities and also validates or approves a policy and other decisions made by the corporation's officers and employees. In such instances the corporate powers are exercised under the authority of the board and the affairs are managed under the direction of the board.

In each of the above instances the board has the ultimate authority and responsibility. The authority is exercised and responsibility is carried out in different ways. Each director must meet the standards and is entitled to the protection afforded by sections 8.30-8.33.

Boards of nonprofit corporations are sometimes called boards of trustees, regents, overseers, or by some other name. Section 8.01 applies to the person or group under whose authority corporate powers are exercised and under whose direction the affairs of the corporation are managed, regardless of the name of the person or group.

SOUTH CAROLINA REPORTERS' COMMENTS

This section does not represent a substantial change from previously applicable statutory law, which was found at Section 33-8-101 of the South Carolina Business Corporation Act. The major change is the absence of Section 33-8-101's recognition of a unanimous shareholders' agreement as a corporate governance document.

Similar to the Business Corporation Act, this section authorizes a corporation to include, for example, a provision in the articles which specifies that the members have the authority to appoint all or certain officers of the nonprofit corporation. Note, however, that section 33-31-843(b) gives the board carte blanche authority to remove any officer with or without cause--and possibly this section 33-31-843 would trump an additional simple provision in the articles that the board may not remove an officer appointed by the members. On the other hand, if the articles stated that not only do the members have the exclusive authority to appoint officers but they shall have the exclusive authority to remove officers, this later provision would seem to divest the power of the board to remove the officers appointed by the members.

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Code 1976 § 33-31-801, SC ST § 33-31-801

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Exhibit 3

Code of Laws of South Carolina 1976, Annotated

Title 33. Corporations, Partnerships and Associations (Refs & Annos)

Chapter 31. South Carolina Nonprofit Corporation Act (Refs & Annos)

Article 7. Members, Meetings and Voting

Subarticle a. Meetings and Action Without Meetings

Code 1976 § 33-31-708

§ 33-31-708. Action by written or electronic ballot.

Currentness

(a) Unless prohibited or limited by the articles or bylaws, any action that may be taken at any annual, regular, or special meeting of members may be taken without a meeting if the corporation delivers a written or electronic ballot to every member entitled to vote on the matter.

(b) A written or electronic ballot shall:

(1) set forth each proposed action; and

(2) provide an opportunity to vote for or against each proposed action.

(c) Approval by written or electronic ballot pursuant to this section is valid only when the number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

(d) All solicitations for votes by written or electronic ballot shall:

(1) indicate the number of responses needed to meet the quorum requirements;

(2) state the percentage of approvals necessary to approve each matter other than election of directors; and

(3) specify the time by which a ballot must be received by the corporation in order to be counted.

(e) Except as otherwise provided in the articles or bylaws, a written or electronic ballot may not be revoked.

Credits

HISTORY: 1994 Act No. 384, § 1; 2006 Act No. 255, § 1, eff April 8, 2006.

Editors' Notes

OFFICIAL COMMENT

Section 7.08 authorizes election of directors and approval of actions by written ballot. The ballots must be distributed to every member, provide specified information and allow a reasonable time for their return.

Most nonprofit corporations do not have sophisticated means of counting ballots. To ease the problem of counting ballots subsection (e) provides that a written ballot cannot be revoked unless revocation is authorized by the articles or bylaws.

Section 7.08 does not prohibit cumulative voting when directors are being elected by written ballot. However, the board of a corporation should think twice before allowing cumulative voting by written ballot. If election is by written ballot, contesting factions cannot sensibly decide how to allocate their votes to maximize the number of directors they can elect.

Action by written ballot may not serve as a substitute for an annual or special meeting of members.

SOUTH CAROLINA REPORTERS' COMMENTS

This section had no counterpart in prior statutory law. Significantly, ballots submitted pursuant to this section are not revocable, unlike proxies under Section 33-31-724.

"Deliver", as used in subsection (a), is defined in Section 33-31-140(8) to include "mail". The affidavit of an appropriate agent of the corporation that delivery has been made should shift the burden of proof to the party alleging failure of delivery.

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Code 1976 § 33-31-708, SC ST § 33-31-708

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STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Raymond A. Wedlake, individually, and)
derivatively, on behalf of all Members of the)
Woodington Homeowners' Association, Inc.)

Plaintiff(s))

vs.)

Benjamin Acord, William Craigo, Denis Esteve,)
and Brian James in their capacity as the current)
Board of Directors of the)
Woodington Homeowners' Association, Inc.)

Defendants)

IN EQUITY COURT

THIRTEENTH JUDICIAL CIRCUIT

Civil Action No.

2017-CP-23-06301

AFFIDAVIT OF PLAINTIFF,

RAYMOND A. WEDLAKE

AFFIDAVIT OF RAYMOND A. WEDLAKE

Raymond A. Wedlake, personally appearing before me, being duly sworn, deposes and says,
under penalty of perjury, that:

1. I am over 18 years of age and am competent to make this Affidavit;
2. The information set forth below is based upon my personal knowledge, unless otherwise specified as being based upon knowledge and belief;
3. I am a member ("Member") in good standing of the Woodington Homeowners' Association, Inc. ("WHOA");
4. The WHOA consists of 66 voting units;
5. Due to an agreed Settlement with "Association Management Group of SC, Inc." (AMG), and as so ordered by Judge Robin B. Stilwell per a Hearing held January 3, 2018, all prior claims against AMG have been released, this Affidavit does not show AMG on its first page, and no

further mention of AMG appears herein;

6. This Affidavit is being brought before this Court as a supplement, to an original Affidavit filed on October 5, 2017, to specify continued non-adherence by the Board to the By-Laws;
7. On September 13, 2017, a courtesy copy of a final draft of a pending complaint was sent to Defendants requesting we seek a resolution which they did not accept to do; thus, leaving me no other alternative but to proceed and to file my Case with the Court (Exhibit 7);
8. I was a co-author along with four other Board members of "By-Laws Rev 2" which added "ballot" provisions which say (CAPS emphasis added): "... Board Secretary SHALL deliver a ballot ...", so I know exactly and full well that the "legislative intent" of this statement was to preclude a Board from blocking a ballot proposed by a Member (Exhibit 13);
9. Defendants to date did not disclose they voted as a Board to exceed a 2017 budget of \$1000 for "legal expenses"; nor did they seek approval via Member vote to exceed \$1500 to pay their attorney – both of which are, yet again, other samples of By-Laws violations;
10. On October 12, 2017, after receiving a request from Mr. Esteve that I no longer contact him since he had been served with my Summons & Complaint, I responded to Mr. Acord thusly: "... Mr. Esteve's request is both **unfortunate and wrongful** and whomever suggested it **gave improper advice** ...", adding that: "... if a Board member **refuses to communicate** with an HOA member regarding HOA business (emphasis added), then they are **not fulfilling their duties** ..." (Exhibit 1);
11. On December 12, 2017, a letter to Defendants requested: "Please consider my suggestion to save both the WHOA, and me, from additional expenses of paying attorneys to attend mediation ...", but Defendants failed to respond to this request as well (Exhibit 3);

12. Prior to a mediation session of December 14, 2017, Defendants were asked about their goals and desired outcomes from mediation, but made no response; their attorney advised the Mediator that his services were no longer required, which led to a declaration of "impasse" (Exhibit 4);
13. After a July 8, 2017 meeting with me where Defendants agreed to take specific actions, they have **done nothing** (Exhibit 5);
14. In their Answer, Defendants say: "As to Paragraph 8 [send ADR ballot] ... denied as stated.", whereas they reneged on their July-8-meeting promise to "act as a By-Laws Review Committee", and having done nothing since (Exhibit 5);
15. Defendants have acted contrary to "Objections" (Exhibit I to Complaint) by seeking to continue to ignore all of my requests and suggestions for improvements to WHOA, without ever giving explanations as to why (as requested), and with no intent to act to fulfill their duty to provide for "... the betterment of homeowners ..." which is the stated purpose of WHOA per By-Laws Article 2;
16. In their Answer, Defendants say: "As to Paragraph 41 ... have worked with Plaintiff in good faith to try to resolve differences; ... denied.", but factually Defendants met with me only once for one hour, and reneged on their promises made in the July 8 meeting, where they agreed to do more in further attempts to try to resolve differences (Exhibit 5);
17. In their Answer, Defendants say: "As to Paragraph 45 [can't combine offices] ... filled the secretary position, but deny any wrongdoing in doing so; ... denied.", where they did not fill the Secretary vacancy in May 2017 as required, and did not fill the vacancy until early in January 2018; thus, their action to have the Treasurer also serve as Secretary between the

dates of May 2017 until January 2018 was a direct violation of the By-Laws;

18. WHOA "Articles of Incorporation" show no provisions allowing delegation of Board responsibility and authority, which is specifically required by the "Nonprofit Corporation Act of 1994" ("NPCA", Exhibits F & R to Complaint);
19. In their Answer, Defendants say: "Paragraphs 81 ... and 82 [send out ADR ballot] are denied.", but they have not delivered any ballot for Member approval to date;
20. In their Answer, Defendants say: "As to Paragraph 83 ... no longer exists any vacancy ... moot ...", whereas Defendants have refused to agree or acknowledge, as requested, that they had a duty to do so under the By-Laws;
21. In their Answer, Defendants say: "Paragraph 84 [assure accuracy of Annual Meeting Minutes] is denied.", with full knowledge they reneged on their promise made in the July 8 meeting to schedule another meeting for further review of 2017 Annual Meeting Minutes, and have done nothing more;
22. Several of Defendants' Answer items were already covered in the Hearing of January 3, 2018, and were **DENIED** by Judge Robin B. Stilwell, including items numbered: 69, 70, 71, 73, 74, 75, 80, and 82, regardless of continued claims to the contrary;
23. In their Answer, Defendants say: "To the extent Plaintiff's Complaint seeks damages or an award of money ...", which is inconsistent and contrary to a Complaint statement which says: 'No damages beyond "nominal damages" are sought, unless covered by insurance.';
24. A letter of January 23, 2018, sent to appointed Board Secretary Mr. Scott Price, asking for his contact information since he was now a member of the Board, was ignored with no reply being received, contrary to his duty as Secretary of WHOA;

25. On January 6, 2018, in a letter to Defendants titled: “Next Steps – Court Denial of All Three Motions”, they were asked:

“... may I suggest we stop paying lawyers and move forward for the benefit of all WHOA Members by letting a Master rule?”

and requested

(i) ... to join me in asking the Court to decide!

(ii) Your immediate reply is requested.

being advised

(iii) No more of your time, nor effort, is involved in simply letting the Court rule - a direct benefit to the Board, and, most importantly, to the Members of the Association.

(iv) The Judge suggested the parties work this out or refer it to a Master in Equity, which is a fast and inexpensive way for a judge to listen and decide promptly the merits of each side; but Defendants made no response to any items listed here, and continue to stand in defiance of these requests and advice (Exhibit 15); thereafter, they finally agreed to come before a Master In Equity;

26. Defendants did not accept my challenge to cite, nor to date have they cited, any Complaint item, transferred to “Stipulation of Issues for Trial”, as **not** being in the best interest of WHOA (Exhibit 15);

27. Appointed Board Secretary Mr. Scott Price ignored my request of February 5, 2018, for information from a Special Meeting, including minutes from this meeting; no information as requested has been provided (Exhibit 16);

[SIGNATURE ON NEXT PAGE]

SWORN to and subscribed before me this 10 day of April 2018.

Martha Rogers

Official Signature of Notary

South Carolina Notary Public

My Commission expires:

May 30, 2024

Raymond A. Wedlake

Raymond A. Wedlake, Plaintiff

EXHIBIT 1 - Dereliction of Duty by Board Member

[Defendant Mr. Denis Esteve was appointed Board Secretary of WHOA, and has not supplied requested Board-meeting minutes; as Secretary of the Board, he has an obligation to respond to **information requests** from a WHOA Member]

From: Denis Esteve <cndesteve@gmail.com>

Date: Fri, 6 Oct 2017 18:09:44

Subject: Re: Educational FW RE Open Meetings of Board

To: Ray Wedlake <wedlakera@mail.com>

Cc: Ben Acord <ben.acord@gmail.com>, William Craigo <craigow@bellsouth.net>, "Brian James (remaj616@aol.com)" <remaj616@aol.com>

Ray,

As you are fully aware, I have just been served with a legal action against me. It is unfortunate but at this time, I will cease any communication with you. Do not contact me again.

EXHIBIT 2 – Vacancy on board (as/excerpted in relevant part)

CHAPTER 31 - South Carolina Nonprofit Corporation Act of 1994

ARTICLE 8
Directors and Officers

SECTION 33-31-811. Vacancy on board.

(a) Unless the articles or bylaws provide otherwise ...

EXHIBIT 3 – No Attorneys in Mediation

Attorneys are Unnecessary - Mediator Controls

ben.acord@gmail.com,

atty@ggibsonassociates.com, cndesteve@gmail.com, craigow@bellsouth.net, remaj616@aol.com

Raymond A. Wedlake

703 Creekview Drive

Greenville, SC 29607

December 12, 2017

Subject: Attorneys are Unnecessary - Mediator Controls

Dear Mr. Acord:

Please consider my suggestion to save both the WHOA, and me, from additional expenses of paying attorneys to attend mediation.

In mediation, it is the mediator who controls. A mediator “runs the show”, and Upstate Mediation Center (“UMC”) is Court approved, with a long history of proper mediation practices. As such, attorneys are “bystanders” during mediation, and are not required. Normally, mediation is done before attorneys become involved. Having no attorneys at our session on Thursday, December 14, at 3 PM at UMC Suite 101 office, 27 Cleveland Street, Greenville, SC, will save costs.

My attorney, Mr. Gibson, Esq., could remain as simply a silent observer during mediation or, if you or your attorney prefer, he would not attend our mediation session. If Mr. Grote does not attend, a bill for more than \$1000 for legal services to WHOA will be avoided (4 hours travel time, plus 2-3 hours mediation time).

Again, the mediator will “run the show”. Let's try to save ourselves from costs involved! The Board will make this choice, and I hope sensibility to minimize costs will prevail.

Obviously, if you wish to pursue this approach, your confirmation is needed by tomorrow so that both attorneys can be advised. Your early response would be appreciated.

Thank you.

Sincerely,

Raymond A. Wedlake

wedlakera@mail.com

EXHIBIT 3 – South Carolina Attorney General Responds

David Jones <DJones@scag.gov> Oct 24 at 10:48 AM

To: Grant Gibson

Dear Mr. Gibson:

It was a pleasure to speak with you by phone this morning. While you and I have discussed our Office's response to Rep. Henderson's request on behalf of Mr. Wedlake before, I understand that this latest conversation helped clarify the additional issues raised in Mr. Wedlake's most recent letter, such as timing of our response. I understand that Mr. Wedlake is disappointed that our Office could not opine in this case, but I appreciate you recognizing our good faith. I also understand that you and Mr. Wedlake have petitioned the court for a declaratory judgement regarding this dispute, as contemplated in our response letter. I sincerely hope that this process results in a clear and definitive resolution of all underlying issues.

Warmest regards,

David S. Jones

Assistant Attorney General

Office of the Attorney General

State of South Carolina

PO Box 11549

Columbia, SC 29211

803-734-3188

EXHIBIT 4 – Defendants' Attorney Declares “Impasse”, Releases Mediator

On Dec 27, 2017, at 3:07 PM, Ely Grote <Ely.Grote@mccabetrotter.com> wrote:

Mr. Tucker,

Thank you for your services in this matter. I have spoken to Mr. Gibson and remain hopeful that the settlement discussions will continue. However, I have not received any authorization from my client to continue an actual mediation, nor to incur any additional mediation costs. My thought is that the mediation was held and although it appeared that progress was being made, it resulted in impasse, as no mediation settlement agreement was signed at the mediation. I think the parties are free to continue the settlement discussions on their own and hopefully that will occur. A second mediation could possibly be considered if the case is not worked out or otherwise resolved outside of mediation. Thanks again.

Ely O. Grote
Attorney
McCabe, Trotter, & Beverly, P.C.
140 Stoneridge Drive, Suite 650 (29210)
P.O. Box 212069
Columbia, South Carolina 29221
Main: 803-724-5000
Direct: 803-724-5018
Fax: 803-724-5001
Email: ely.grote@mccabetrotter.com

EXHIBIT 5 – Minutes from July 8 Meeting (as excerpted in relevant part)

[These minutes are marked "PRELIMINARY DRAFT" since Defendants would not acknowledge, nor comment upon, nor seek modifications of, this draft]

Minutes of Meeting 08 July 2017 - Preliminary Draft 070817
ben.acord@gmail.com, craigow@bellsouth.net, cndesteve@gmail.com, remaj616@aol.com
Bcc: atty@ggibsonassociates.com

**** PRELIMINARY DRAFT ****

Attendees - Woodington Board:
Ben Acord, William Craigo, Denis Esteve
Member: Ray Wedlake
Where - Mauldin Fire Department Substation 3
When - 08 July 2017

A first meeting to negotiate resolution of issues within Woodington Homeowners' Association (WHOA) convened at 8 AM. Six questions as posed per the Agenda were discussed.

Positions are denoted by:
WBP : Woodington Board Position
RWP : Ray Wedlake Position

An appendix contains excerpts from: "South Carolina Nonprofit Corporation Act of 1994 (NPCA)"

and also from: "By-Laws of Woodington Homeowners' Association, Inc. (BLS)"

**** PRELIMINARY DRAFT ****

Question 1 - Board Vacancy

WBP: only three directors are required per NPCA. Board member Denis Esteve was appointed as Secretary (in addition to his elected role as Treasurer) to fill the vacancy. NPCA does not require a Board to fill a vacancy. See NPCA Sections 33-31-803, a, b; and 811.

RWP: BLS require a 5 member board. Mr. Esteve's appointment is not sanctioned by the BLS. The Board "may combine one or more offices when necessary due to a lack of eligible Association Members who are willing to serve on the Board". With no lack, as was previously documented to the Board, offices can not be combined. BLS require the Board to fill a vacancy. See BLS: Article 5, Sections 1 and 3; A8, S2(f); and A9, S6.

**** PRELIMINARY DRAFT ****

Question 2 - Renewal of Management Contract

WBP: An existing contract may be renewed without approval by the members. A process of requesting bids with subsequent selection of a low-cost provider of management services on an annual basis is "overkill" and will not be done. BLS say nothing about contract renewal requirements.

RWP: BLS show clearly approval of a management contract is required; see BLS A8, S1(d)

**** PRELIMINARY DRAFT ****

Question 3 - By-Laws Review Committee (BLRC)

WBP: A committee for this purpose would be counter-productive. Member approval of proposed BLS amendments are required; see NPCA, S825 e(4) and BLS A17, S1 (75% approval is required) and S3. The Board decided not to appoint a BLRC, since the Board desires to act in this capacity.

RWP: Board statements to date showed: "no BLRC". The Board did not indicate willingness to accept proposed revisions to the BLS. Proposals will be forthcoming for needed BLS amendments.

**** PRELIMINARY DRAFT ****

Question 4 - Annual Meeting Minutes, Revision 2

WBP: Detailed review of desired changes is needed. The Board recognized documents for this purpose were previously provided. The Board will review and schedule another meeting, but this will not happen until a third-quarter-year Board meeting.

RWP: Non-truths in Revision 1 still need to be removed. Dissemination of attachment was not included with Revision 1 as sent; to be included with Revision 2. The Board was told they need to plan other special meetings to address this issue much sooner, rather than later.

**** PRELIMINARY DRAFT ****

Question 5 - Request for Bids

WBP: On an annual basis, the Board will not seek bids for a management company contract, nor for an insurance contract. No bids will be requested at this time, nor at any time in 2017.

RWP: A proper process of "bids / selection" is needed on an annual basis for both management company as well as insurance. Such process would provide cost-savings benefits consistent with a best interest for all WHOA members.

**** PRELIMINARY DRAFT ****

Question 6 - Contractual Payments to AMG

WBP: No known contract showing \$285/mo. fee for management company services is known to exist. With intent to uphold contractual obligations, the Board is discussing with AMG. Before a third-quarter-year Board meeting, if no contract showing more than \$250/mo. can be produced, the Board will be seeking remuneration of excess funds (over \$250/mo.) paid to AMG. The Board agreed to keep Ray Wedlake informed.

RWP: Acting to "get our money back" is a proper action in the best interest of WHOA, and should be pursued. This action should focus on all years in which AMG was in breach of contract. As agreed, the Board must keep Ray Wedlake informed of status as changes unfold.

The meeting adjourned a couple minutes past 9 AM.

**** PRELIMINARY DRAFT ****

----- Appendix -----

Chapter 31 - South Carolina Nonprofit Corporation Act of 1994

By-Laws of Woodington Homeowners' Association, Inc.

EXHIBIT 7 – Courtesy Copy of Final Draft of Pending Complaint

Courtesy Copy of Final Draft of Pending Complaint

ben.acord@gmail.com, craigow@bellsouth.net, cndesteve@gmail.com, remaj616@aol.com

Bcc: atty@ggibsonassociates.com

703 Creekview Drive
Greenville, SC 29607
September 13, 2017

To: Members of Board of Directors – Woodington Homeowners' Association
Subject: Courtesy Copy of Final Draft of Pending Complaint

Mr. Benjamin Acord
20 Southfield Drive
Greenville, SC 29607
ben.acord@gmail.com

Mr. William Craig
18 Southfield Drive
Greenville, SC 29607
craigow@bellsouth.net

Mr. Denis Esteve
205 Woodington Drive
Greenville, SC 29607
cndesteve@gmail.com

Mr. Brian James
4 Southfield Drive
Greenville, SC 29607
remaj616@aol.com

By: e-mail & Priority Mail

Gentlemen:

As a final **courtesy before filing**, please find attached a copy of a Final Draft (except for references to Exhibits) of the pending Complaint on behalf of all Members of the WHOA, for Declaratory and Injunctive relief.

May all the Board know that, with the help of my attorney, with assured and earnest intent, these documents were prepared and are complete:

- * Summons - PREPARED
- * Cover Sheet - PREPARED
- * Affidavit - PREPARED
- * Exhibits - PREPARED

All of the work above was such an unnecessary step. By working together, with the **Board** showing even a **modicum** of **good faith**, we could so easily have avoided court.

Please let me know if you are represented, and if so by whom. Thank you!

See you in court!

Very Sincerely,

Raymond A. Wedlake

Enc. – Final Draft of Pending Complaint

< complaint091317.odt > (This is an "OpenOffice Document Text" file)

EXHIBIT 13 - BY-LAWS Rev 2 (as excerpted in relevant part)

BY-LAWS OF WOODINGTON HOMEOWNERS ASSOCIATION, INC. Revision 2
15 June 2005

ARTICLE 1 - NAME AND LOCATION

The name of the Corporation shall be called "Woodington Homeowners Association, Inc. " ...

IN WITNESS WHEREOF, we, being all of the Directors of Woodington Homeowners Association, Inc., have hereunto set our hands this 15th day of June, 2005.

_____ Denis Esteve, President

_____ Mary Ellen Craft, Vice-President

_____ Dana Tucker, Treasurer

_____ Raymond Wedlake, Secretary

_____ Paul Thompson, Maintenance

EXHIBIT 15 - Next Steps – Court Denial of All Three Motions

ben.acord@gmail.com, craigow@bellsouth.net, cndesteve@gmail.com, remaj616@aol.com
Bcc: atty@ggibsonassociates.com

703 Creekview Drive
Greenville, SC 29607
January 6, 2018

Mr. Benjamin Acord
20 Southfield Drive
Greenville, SC 29607
ben.acord@gmail.com

Mr. William Craigo
18 Southfield Drive
Greenville, SC 29607
craigow@bellsouth.net

Mr. Denis Esteve
205 Woodington Drive
Greenville, SC 29607
cndesteve@gmail.com

Mr. Brian James
4 Southfield Drive
Greenville, SC 29607
remaj616@aol.com

(sent via E-mail and Priority Mail)

Subject: Next Steps – Court Denial of All Three Motions

Woodington Board:

As the Judge at the hearing Wednesday stated in denying all your motions, we need to seek to resolve this matter together. At this time, will you now please show some good faith? Would you please consider doing at least:

- coming forward with a list of Complaint items which the Board claims are not in the best interest of Members of WHOA?
- honor "agreements" made in recent mediation?

Frankly, is there anything in my Complaint that is not in the best interest of the WHOA? Now with the AMG Settlement Approved, and AMG no longer a party, the Complaint is simplified as well. We need to get back to the agreements which **both** attorneys think were made at our mediation.

The alternative is to remain in Court. As the Board knows, **I strongly suggested that you join me in asking the Court to decide! Why not? This case is not adversarial at all – simply a request for clarification on the By-Laws! What possible harm would it do to get that done for everyone’s benefit, including future Boards.** No more of your time, nor effort, is involved in simply letting the Court rule - a direct benefit to the Board, and, most importantly, to the Members of the Association.

Spending WHOA funds on attorney's fees, and wasting time on legal issues is very questionable, since we should have resolved our disputes earlier. In addition, the reality is that I am not suing, nor have I sued anyone, including the Board members. Monetary damages are not being sought (other than "nominal", normally \$1). **Thus, WHOA Member money is being spent unnecessarily!**

May I ask you to reconsider carefully if you have been receiving good advice concerning all matters? Regarding the issue of insurance, you may recall I advised you that coverage would likely not be available.

Basically as you know, **the Court rejected all your attorney's arguments, and denied all three motions he made, including your Motion to Dismiss.** The Judge suggested the parties work this out or refer it to a Master in Equity, which is a **fast and inexpensive way** for a judge to listen and decide promptly the merits of each side.

So, may I suggest we stop paying lawyers and move forward for the benefit of all WHOA Members by letting a Master rule? Your immediate reply is requested. Thank you.

Sincerely,

Raymond A. Wedlake
wedlakera@mail.com

P.S. - I will be following up separately on the agreements we made at our July 8 meeting.

EXHIBIT 20 - Insurance Coverage for Board Members Likely Does Not Apply

Re: Courtesy Copy of Court Summons
Sent: 9/24/17 at 12:22 PM
From: Ben Acord <ben.acord@gmail.com>
To: Ray Wedlake <wedlakera@mail.com>, craigow@bellsouth.net, cndesteve@gmail.com, Brian James <remaj616@aol.com>, Rea Tinsley <rtinsley@amgworld.com>
Cc: atty@ggibsonassociates.com

Hello Ray

If the Board of Directors is summoned the Woodington HOA insurance provider will select a lawyer to represent the Board. The Board met this week and decided we will not be responding to your communications since these are pending legal action. Instead the lawyers will facilitate future interaction between the parties involved.

Sincerely,

Ben Acord

Original Message

Insurance Coverage for Board Members Likely Does Not Apply
ben.acord@gmail.com
craigow@bellsouth.net, cndesteve@gmail.com, remaj616@aol.com
Bcc: atty@ggibsonassociates.com

703 Creekview Drive
Greenville, SC 29607
September 24, 2017

To: Mr. Benjamin Acord
ben.acord@gmail.com
cc: Mr. Denis Esteve
cndesteve@gmail.com

cc: Mr. William Craigo
craigow@bellsouth.net
cc: Mr. Brian James
remaj616@aol.com

Dear Mr. Acord:

Thank you for your brief reply. Would you please be kind enough to send me a copy of the "Minutes" of this recent Board Meeting, along with a copy of the previously requested minutes from the 28 June meeting?

As you are likely fully aware, Errors & Omissions insurance policies for officers or directors of a HOA Board are frequently limited in scope. I assume you have put such carrier on "Notice" of my pending judicial action in the form of a Declaratory Judgment complaint, in which no litigation in the normal sense is envisioned; and where no money damages are being

sought. As Board President, you may want to double check to see if, in fact, the Board is covered in such case prior to our proceeding as you propose. A quick phone call by you to the carrier should resolve the issue, and you may find the **Board has "no coverage"** for matters such as this. This suggestion is provided in good faith and as a courtesy to the Board.

Per courtesy copies previously sent, hopefully it was clear that the pending judicial action is being brought on behalf of all WHOA members. My complaint is not being brought against WHOA, but rather it is being brought by me as a member and friend of WHOA. I am seeking Judicial confirmation that my interpretation of the By-Laws is correct as opposed to that of the four members who currently comprise the Board. Again, my complaint is being brought **derivatively, on behalf of WHOA members**, and is being done with the **best interest of all members** in mind! (Indeed, that has always been my position, and I have never brought nor threatened legal action against WHOA.)

In any event, the Summons will be served on each member of the Board individually.

Please advise if you will be checking with WHOA's insurance carrier, or not.

Thank you once again.

Sincerely,

Raymond A. Wedlake
wedlakera@mail.com

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
IN THE COURT OF COMMON PLEAS FOR THE 13th JUDICIAL CIRCUIT

Charles B. Simmons, Jr., Master In Equity

Case No. 2017-CP-23-06301

Raymond A. Wedlake,
individually and derivatively,
on behalf of all Members of
the Woodington Homeowners'
Association, Inc.,

Plaintiff(s)

Appellant

v.

Benjamin Acord, William
Craig, Denis Esteve, and
Brian James in their capacity
as the current Board of
Directors of the Woodington
Homeowners' Association,
Inc.,
and,
Association Management
Group SC, Inc.,

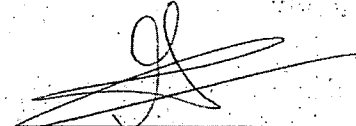
Defendant(s).

Respondent

NOTICE OF APPEAL

Raymond A. Wedlake appeals the "Order of Judgment" of the Honorable Charles B. Simmons, Jr., dated May 29, 2018. Appellant received written notice of entry of this order on May 29, 2018.

June 26, 2018


Grant H. Gibson, Esq.

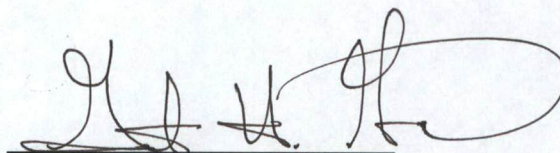
G. Gibson & Associates, LLC
1200 Woodruff Road A-3
Greenville, South Carolina 29607
(864) 630-7471
Attorney for Appellant

Other Counsel of Record:
Ely O. Grote, Esq.
McCabe, Trotter & Beverly, P.C.
4500 Fort Jackson Boulevard Suite 250
Columbia, South Carolina 29209
Attorney for Respondent
(803) 724-5000

Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

April 9, 2019



Grant H. Gibson, Esquire
SC Bar No. 9269
G. Gibson & Associates, LLC
1200 Woodruff Rd. Bldg. A-3
Greenville, SC 29607
Tel: (864) 630-7471
Fax: (866)677-2509
atty@ggibsonassociates.com

Attorney for Appellants

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APR 15 2019
SC Court of Appeals