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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

James E. Chellis, Master-in-Equity

Case No. 2016-CP-18-01812
Appellate Case No. 2020-001029

David Hannemann,
as President of the Live
Oak Village Homeowner's
Association, Inc., Respondent,

v.

William McFarland, Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. With respect to the parties' cross-motions for summary judgment, specifically, Mr. Hannemann's[1] motion for summary judgment as to all claims, i.e., for summary judgment as to all his claims against Mr. McFarland[2] and all Mr. McFarland's claims against him, and Mr. McFarland's motion for partial summary judgment, i.e., for summary judgment only as to Mr. Hannemann's claims against him, not his claims against Mr. Hannemann, did the master err in granting Mr. Hannemann's motion and denying Mr. McFarland's motion?

A. As an initial matter,[3] did the master err in disallowing Mr. McFarland's Supplemental Submission?[4]

B. Should the master have granted Mr. McFarland's motion and denied Mr. Hannemann's motion, or at least denied Mr. Hannemann's motion (if not in whole, in part) because he is not entitled to judgment as a matter of law under the governing legal standard?[5]

II. Did the master have jurisdiction to prohibit other HOA[6] members, i.e., not Messrs. Hannemann and McFarland but other HOA members who

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[1] "Mr. Hannemann" is Plaintiff/Respondent, David Hannemann.

[2] "Mr. McFarland" is Defendant/Appellant, William McFarland.

[3] To be clear, by presenting this sub-issue (and the argument thereon) first, Mr. McFarland does not mean to suggest that it is dispositive of Issue/Argument I.

[4] As further explained, *infra*, "Mr. McFarland's Supplemental Submission," or simply the "Supplement," refers to the supplemental briefing and exhibits he submitted in further support of his motion for summary judgment and opposition to Mr. Hannemann's.

[5] As expressly identified in the argument thereon, this sub-issue comprises numerous errors directed toward the same end, i.e., the erroneous determination of the parties' summary judgment motions, to include the incorrect application of the summary judgment standard and other principles of law, the misapprehension of evidence and issues/arguments, and the failure to rule on issues/arguments duly presented.

[6] The "HOA" is Live Oak Village Homeowners Association, Inc.

are not parties to this action, from exercising their rights in respect of requesting/calling special HOA meetings?

STATEMENT OF THE CASE

A. Background: the Subdivision, the HOA, and the Parties

Live Oak Village (the "Subdivision") is a small residential subdivision in Summerville comprising seven single-family homes and some common areas. (*See* R. pp. 65, 381, 412, 444, 594.)

The HOA is a South Carolina nonprofit corporation that manages the business of the Subdivision's homeowners association. (*See* R. p. 57 § 7; R. p. 65 § 1.) In short, it administers and enforces the Subdivision's "Governing Documents," namely, the Subdivision's declaration of covenants and restrictions (the "Covenants"[7]) and the HOA's articles of incorporation (the "Articles") and bylaws (the "Bylaws"). (*See* R. pp. 57–59 §§ 7–8; R. pp. 69–71, § 6.)

Like all homeowners in the Subdivision (technically, in the language of the Governing Documents, like all "Lot" "Owners" in the Subdivision), Messrs. Hannemann and McFarland, and their respective spouses (co-owners), are members of the HOA. (*Compare* R. p. 98 ¶¶ 6–7 *with* R. p. 113 ¶¶ 6–7; *see also* R. p. 66, § 2(A) (providing that all persons defined as "Owners" in the Covenants are members of the HOA); R. p. 415 § 1.18 (defining "Owner" to mean every owner of fee simple

[7] As further explained, *infra*, the Subdivision's operative Covenants are not set forth in its "Original Declaration" but rather in an "Amended Declaration."

title to a "Lot" within the Subdivision); R. p. 415 § 1.14 (defining "Lot" to mean any parcel of real property within the Subdivision intended for single-family use).)

The HOA's affairs are governed by a three-member board of directors (collectively, the "Board," with each individual member a "Director"). (*See* R. p. 67 § 4(A).) Directors are elected by the HOA membership. (*See* R. pp. 67–68 § 4(B).) HOA business is carried out by corporate officers (e.g., president, secretary, treasurer) who are elected by the Board. (*See* R. p. 71 § 7.) The HOA president is the HOA's chief executive officer. (R. p. 71 § 7(B).)

B. Mr. Hannemann's claims against Mr. McFarland

Claiming himself, not Mr. McFarland, to be the rightfully elected HOA president, and that Mr. McFarland was wrongfully denying him the office and the corporate records, bank information, and checkbook attendant thereto, Mr. Hannemann brought this action on September 9, 2016, in the Court of Common Pleas, Dorchester County,[8] seeking, in pertinent part, an order declaring him HOA president and requiring Mr. McFarland to deliver/relinquish to him the corporate records and control of the HOA's finances. (*See* R. pp. 47–55; *see also* R. p. 376 at Resp. No. 30.)[9]

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[8] (*See* R. pp. 46–55.)

[9] By consent order filed August 18, 2017, the case was referred to the Dorchester County Master-in-Equity, the Honorable James E. Chellis. (R. pp. 1–2.)

Mr. Hannemann traces his claim to the HOA presidency to an alleged annual meeting of the HOA membership on May 17, 2015, and a subsequent Board meeting on May 29, 2015. According to Mr. Hannemann, he, along with two other homeowners, Thomas Morris ("Mr. Morris") and Donna Knight ("Ms. Knight"), was duly elected to the Board at the annual HOA meeting on May 17, 2015, and then duly elected HOA president at the Board meeting on May 29, 2015. (*See* R. p. 51 ¶¶ 20–21; R. p. 83; R. pp. 84–85.) He further claims that he was duly re-elected HOA president the following year at an alleged Board meeting on or about May 20, 2016. (*See* R. p. 41 ¶¶ 23–24; R. pp. 84–85.)

C. Mr. McFarland's claims against Mr. Hannemann

Mr. McFarland duly answered Mr. Hannemann's complaint, denying its material allegations and raising a number of affirmative defenses. (*See* R. pp. 86–91.) Additionally, based on the allegations explained below[10]—which he supported via the evidence cited herein—Mr. McFarland counterclaimed for the following:

1. A judicial declaration that, as a declarant who subjected real property to the Covenants, he (and, for that matter, Mrs. McFarland) has the rights and protections associated with the terms "Developer" and "Declarant" under the Governing Documents

The HOA was formed September 27, 2002, by incorporator John R. Payne ("Mr. Payne"), principal of both Oak Village Development, LLC ("OVD"), and

[10] (*See* R. pp. 97-109.)

LowCountry Signature Homes, Inc. ("LCSH"), and one of the two initial HOA officers and Directors. (*See* R. pp. 56–62, 410, 441.)

The Original Declaration was recorded in the Dorchester County land office on October 8, 2002, and in it, OVD purported to own all the real property in the Subdivision, i.e., every one of the seven single-family lots therein (specifically, the lots identified as "Lots 1, 2, 3, 4, 5, 6, and 7" in the property description that the Original Declaration refers to as "Exhibit 'A'") and all of the common areas, and purported to declare all this real property subject to the Covenants. (*See* R. p. 384 §§ 1.20, 1.22, 1.23; R. p. 594; *see also* R. p. 444.)

OVD, however, did not actually own all the real property it purported to declare subject to the Covenants. By deed dated October 4, 2002, the McFarlands had taken title to their lot (Lot 3) four days before the Original Declaration was recorded,[11] and they were not parties to the Original Declaration. (*See* R. pp. 381–411.) It was not until November 26, 2002, when the McFarlands joined in recording the Amended Declaration, that their lot was properly declared subject to the Covenants. (*See* R. pp. 412–43.)

Although both the Original Declaration and the Amended Declaration designate OVD as the "Developer," Mr. McFarland contends that this derives from the premise that the "Developer is the owner" of the real property declared subject to

[11] (*See* R. pp. 595–97; *see also* R. p. 444, 594.)

the Covenants, i.e., the real property on which the then-proposed Subdivision was to be created,[12] and that the designation "Developer" covers and entitles him (and, for that matter, Mrs. McFarland) to the rights and protections thereunto appertaining, because, again, in context, "Developer" is tied to the ownership of the real property declared subject to the Covenants, and the McFarlands are in fact such owners and declarants, and indeed their participation in the Amended Declaration was essential to the Subdivision's creation. Likewise, notwithstanding the identification of OVD as the "Declarant" in the Bylaws,[13] Mr. McFarland contends that he and Mrs. McFarland are covered by the term "Declarant."

In further support of this claim, Mr. McFarland contends that he and Mrs. McFarland were essential to the completion of the plan of development for the Subdivision set forth in the Covenants. According to Mr. McFarland, with OVD either unable or unwilling to complete the plan, Mr. Payne appointed Mrs. McFarland the HOA's registered agent in 2008,[14] placed the McFarlands in charge of the HOA's finances, and left it up to them to see that the remaining items in the plan of development were accomplished, which they were.[15]

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[12] (*See* R. pp. 381–82, 412–13.)

[13] (R. p. 65.)

[14] (R. pp. 63–64.)

[15] Among other things in this regard, the McFarlands discovered, and remedied, the fact that no tax returns had been filed on behalf of the HOA. (R. p. 598.)

2. A judicial declaration in favor of his HOA presidency

Without question, Mr. McFarland was duly elected to the Board and to the HOA presidency in 2009 and, as of on or about October 3, 2012, he remained the duly elected HOA president and, along with Messrs. Hannemann and Mr. Morris, a duly elected Director. (R. p. 50 ¶ 13.) On October 4, 2012, however, Messrs. Hannemann and Morris purported to hold a special Board meeting wherein they voted to remove Mr. McFarland as HOA president and elected themselves president and secretary, respectively. (R. p. 50 ¶ 13.) This prompted an earlier lawsuit (the "Original HOA Litigation"),[16] which is in fact still pending on appeal to this Court. *See* Appellate Case No. 2019-000644.

Among other claims, the plaintiffs in the Original HOA Litigation seek declaratory and injunctive relief against Messrs. Hannemann and Morris, alleging that they caused the HOA to become dysfunctional. (*See* R. pp. 454–58.)

There were no HOA meetings in 2013 or 2014.

Mr. McFarland contends that, at the time that the HOA became dysfunctional, he was the duly elected HOA president, and since it was the other two Directors (Messrs. Hannemann and Morris) who caused the dysfunction, he (Mr. McFarland) was the only Director authorized to conduct HOA business. Mr. McFarland further contends that, at all relevant times, he has properly and diligently continued to

[16] (R. pp. 445–49.)

conduct the general and ordinary business of the HOA, including collecting annual assessments, maintaining the HOA's account at Bank of America, and securing/paying for various essential services for the HOA (e.g., common area maintenance),[17] and that, excepting only Messrs. Hannemann and Morris, all other HOA members have acted in conformity therewith by timely paying their annual HOA assessments to Mr. McFarland for deposit into the HOA's bank account at Bank of America. (*See* R. pp. 646, 658, 669, 670.)[18]

Mr. McFarland contends that in both 2013 and 2014 Messrs. Hannemann and Morris failed to timely pay their annual HOA assessments, i.e., in both of these years, neither Mr. Hannemann nor Mr. Morris timely paid their HOA assessments to Mr. McFarland for deposit into the HOA's bank account at Bank of America; nor, for that matter, did they follow the procedure they would later follow with respect to the annual assessments Mr. McFarland sent out for 2015 and deposit payment directly into the HOA's account at Bank of America. (*See* R. pp. 475–76.) Instead, they "place[d] [their] annual assessment [payments] in escrow with [their] attorney." (R. p. 470; *see also* R. p. 370 at Resps. No. 11–12; R. p. 372 at Resp. No. 18; R. p.

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[17] (*See* R. pp. 635–79; *see also* R. pp. 519–22.)

[18] Without question, the HOA's account at Bank of America is its proper bank account. Though, to be clear, Mr. McFarland denies any impropriety, by alleging, as Mr. Hannemann does, that Mr. McFarland has improperly retained control of "*the* bank account of the [HOA]" (R. p. 52 ¶ 28 (emphasis added)), Mr. Hannemann necessarily concedes that the Bank of America account is the proper HOA bank account.

471.) Messrs. Hannemann and Morris did not make any payment to the HOA for their 2013 and 2014 annual HOA assessments until the spring of 2015, and even then, they paid only the $1,000 principal amount for each year and did not pay the HOA the interest that Mr. McFarland contends had, pursuant to the Governing Documents, automatically accrued thereon for late payment. (*See* R. pp. 472–74; *see also* R. p. 371 at Resp. No. 15.)

3. A money judgment against Mr. Hannemann for breach of contract and/or conversion relating to his wrongful creation and use of a bank account in the name of the HOA

Since 2015, and unlike every other member of the HOA, Messrs. Hannemann and Morris have not paid the HOA any of the annual assessments Mr. McFarland has sent out (neither making payment to the HOA via Mr. McFarland nor via direct deposit into the HOA's account at Bank of America) but have instead purported to make their own assessments, which they alone have paid into another account Mr. Hannemann opened at Wells Fargo. (*See* R. pp. 373–74 at Resp. No. 23; R. pp. 477–79 at Resps. No. 37, 40–41.)[19]

D. The Pendente Lite Order and the Summary Judgment Orders

On August 24, 2018, Mr. McFarland moved for summary judgment as to all of Mr. Hannemann's claims against him. (R. pp. 349–62.) On April 19, 2019, Mr. Hannemann moved for summary judgment as to all claims in the action, both his

[19] Mr. McFarland's counterclaims also seek an award of attorney fees and costs and any such other and further relief the court deems proper. (*See* R. p. 110.)

against Mr. McFarland and Mr. McFarland's against him, and thereafter, on May 14, 2020, supplemented his motion with additional grounds. (R. pp. 489–513; R. pp. 551–56.)

On June 11, 2019, while the parties' respective motions for summary judgment were pending, the master entered a *pendente lite* order (the "Pendente Lite Order"), providing that § 3(B) of the Bylaws (regarding special HOA meetings) was suspended and, effectively, that no meeting special HOA meeting could be held without an order from the master. (*See* R. pp. 3–8.) The Pendente Lite Order was issued in response to a motion by Mr. Hannemann for an injunction or, alternatively, a temporary restraining order, to prevent a special HOA meeting from being held that "could result in Mr. McFarland purportedly being elected as an officer of the [HOA], as well as its president" and moot Mr. Hannemann's claims. (R. p. 531.) On June 21, 2019, Mr. McFarland timely moved for reconsideration of the Pendente Lite Order. (R. pp. 545–47.) The master denied the motion by order filed June 16, 2020. (R. pp. 9–10.) Mr. McFarland then timely appealed the Pendente Lite Order (and the master's denial of his motion to reconsider the same) by notice served July 16, 2020. (R. pp. 811–14.)

The master heard the parties' motions for summary judgment on June 16, 2020. (R. pp. 123–348.) Following the hearing, believing that the master had authorized the same (and that it was otherwise permissible, as the master had not

entered an order ruling on the parties' motions for summary judgment), Mr. McFarland submitted the Supplement, to which Mr. Hannemann objected. (R. pp. 563–71; R. pp. 618–29; R. pp. 680–90.)

On August 13, 2020, the master filed an order granting Mr. Hannemann's motion for summary judgment and denying Mr. McFarland's. (R. pp. 12–35.) In the order, the master found the Supplement "to lack a requisite basis." (R. p. 14 n.3.) Mr. McFarland timely moved for reconsideration on August 24, 2020. (R. pp. 699–717.) The master denied the motion by order filed August 28, 2020. (R. pp. 36–40.) Mr. McFarland then timely appealed the master's summary judgment orders, i.e., the principal order filed August 13, 2020, and the order denying reconsideration thereof, filed August 28, 2020, by notice served September 14, 2020. (R. pp. 815–19.)

By letter dated September 23, 2020, this Court advised that Mr. McFarland's appeals of the Pendente Lite Order and the summary judgment orders were consolidated.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must

be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "[I]n cases," like the instant case, "applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). Where questions of law are involved, "[t]his Court reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009).

ARGUMENT

I. With respect to the parties' cross-motions for summary judgment, the master erred in granting Mr. Hannemann's motion and denying Mr. McFarland's motion.

A. As an initial matter, the master erred in disallowing the Supplement.

The master's principal summary judgment order states, "The Defendant filed a post hearing supplemental memorandum with additional evidentiary matters. For two reasons, I find these additional matters supplementing the record to lack a requisite basis. First, the records Defendant files come too late. Secondly, were these records timely, they are not relevant to the issues before me. Plaintiff's opposition memorandum included a copy of the record of the hearing." (R. pp. 14–15 n.3.)

The Supplement should not have been deemed too late. Due to the ongoing COVID-19 emergency, the June 16, 2020, summary judgment hearing was held remotely. Consequently, handing up additional material during the hearing was, if not impossible, certainly impractical.[20] This was especially problematic in regard to points the master raised *sua sponte*, such as Mr. McFarland's supposed waiver of his objection to the disputed HOA and Board meetings (on which Mr. Hannemann stakes his claim to the HOA presidency) by non-attendance and the supposed applicability of the "emergency" exception in subsection (d) of § 8(C)(9) of the Articles to excuse Mr. Hannemann's failure to get the HOA membership's approval to bring this suit.

Indeed, during the hearing, the master indicated that Mr. McFarland's counsel was allowed to supplement the record. (*See* R. pp. 125:1–126:13; *see also* R. p. 290:6–17 ("The Appellate Courts always mentions this preservation issue as a very difficult and complex one, and it is - - it does creep up on you. And when you think you have everything covered and all of a sudden, there's a lack of preservation, and your client is going to say to you, what happened? But I will make sure, to the extent I can, Mr. Hines, that you'll be able to preserve all of your issue for appeal that you need to appeal, if you want to appeal.").) Moreover, when the matter of Mr.

[20] While perhaps technically possible to do so, stopping and starting the proceedings to circulate material via email would have been unduly cumbersome and inefficient.

McFarland supplementing the record was discussed after the hearing, at the time of Mr. Hannemann's submission of his proposed order to the master, the master indicated that he would allow Mr. McFarland to supplement the record. (*See* R. pp. 695–98.)

"An order is not final until it is written and entered by the clerk of court," and "[u]ntil an order is written and entered by the clerk of court, the judge retains discretion to change his mind and amend his ruling accordingly." *Bowman v. Richland Memorial Hospital.*, 335 S.C. 88, 91, 515 S.E.259, 261 (Ct. App. 1999). The master was certainly empowered to consider the Supplement, and his doing so posed no threat of undue prejudice to Mr. Hannemann, who had a full and fair opportunity to respond. (*See* R. pp. 680–90.) It was only Mr. McFarland who stood to suffer undue prejudice if the master did not consider the Supplement, and in the interest of justice, the master should have considered it. *Cf.* Rule 1, SCRCP ("These rules . . . shall be construed to secure the just, speedy, and inexpensive determination of every action.").

The Supplement was, and is, relevant to the issues *sub judice*. For instance, it included Mr. McFarland's Exhibits 18–23, so numbered to pick up where his other exhibits left off. Exhibit 18 is relevant to Mr. McFarland's arguments that, in addition to violating the Articles by not obtaining the requisite approval of the HOA membership to bring this suit, Mr. Hannemann violated the Bylaws by not obtaining

the requisite Director approval and, indeed, he should be judicially estopped from arguing otherwise (*see* R. pp. 572–79, 619–20), both relevant points, as evidenced, in the case of Mr. McFarland's judicial estoppel argument, by the fact that the master addressed it. (*See* R. pp. 26–28.)

While the master did not address Mr. McFarland's argument that Mr. Hannemann brought this lawsuit without obtaining the Director approval required by the Bylaws, this argument was duly presented to the master (*see* R. pp. 360–61 (arguing not only did Mr. Hannemann fail to obtain the approval of the HOA membership, as required by the Articles, he also failed to obtain the approval of the Directors, as required by the By-laws)), and it was error for the master not to rule on it.

Exhibit 19 is relevant to Mr. McFarland's argument that Mr. Hannemann cannot be HOA president because he is not a member of the HOA in good standing (due to nonpayment of assessments) and Mr. McFarland's contention that he did not waive any objections or rights in opposition to Mr. Hannemann's claim to the HOA presidency or the purported meetings/elections on which his claim relies (*see* R. pp. 580–93, 620–21), both relevant points, as evidenced by the fact that the master addressed them. (*See* R. pp. 20–22 (rejecting Mr. McFarland's argument about the lack of good standing); R. pp. 22–23 (finding Mr. McFarland waived his objections to the disputed 2015 and 2016 meetings/elections (HOA and Board

meetings/elections) on which Mr. Hannemann stakes his claim to the HOA presidency).)

Exhibit 20 is relevant to Mr. McFarland's claim for a declaratory judgment that he (like Mrs. McFarland) has the rights and protections associated with the terms "Developer" and "Declarant" under the Governing Documents (*see* R. pp. 621–24), a relevant point, as evidenced by the fact that the master addressed it. (*See* R. pp. 28–29 (ruling that the McFarlands are not "declarants" or "developers" within the meaning of the Governing Documents).)

Exhibit 21 provides evidence that Messrs. Hannemann and Morris aligned themselves against Mr. McFarland. (*See* R. pp. 599–603, 625.) This is relevant to Mr. McFarland's rebuttal to the charge of waiver against him and to Mr. McFarland's argument about Messrs. Hannemann and Morris's lack of good standing with the HOA, both points the master addressed. (*See* R. pp. 20–22 (rejecting Mr. McFarland's argument about the lack of good standing); R. pp. 22–23 (finding Mr. McFarland waived his objections to the disputed 2015 and 2016 meetings/elections (HOA and Board meetings/elections) on which Mr. Hannemann stakes his claim to the HOA presidency); *see also* R. p. 17 (addressing Mr. Hannemann's waiver argument based on the McFarland's HUD complaint).)

Also, part of the master's rejection of Mr. McFarland's lack-of-good-standing argument was based on the master's view that the Board had to affirmatively act to

suspend voting rights. (*See* R. p. 20.) Subject to and without waiving Mr. McFarland's contention that this view is incorrect in any event (i.e., that Mr. Hannemann's loss of voting rights was automatic upon his nonpayment and/or duly effected by Mr. McFarland alone, as the only Director in good standing), the evidence of Messrs. Hannemann and Morris's alignment against Mr. McFarland goes to the point that Messrs. Hannemann and Morris should not be able to point to the supposed lack of affirmative Board action to suspend their voting rights when they themselves had, as the other two Directors besides Mr. McFarland, prevented such action.

Moreover, the master's waiver ruling is based on Mr. McFarland not appearing at certain disputed meetings to voice his objection to the same to Messrs. Hannemann and Morris in person, even though Mr. McFarland had already clearly voiced his objection in advance in writing. The antagonistic position in which Messrs. Hannemann and Morris placed themselves in relation to Mr. McFarland is relevant to undermine the master's reasoning in this regard.

Exhibit 22 provides evidence that Mr. Hannemann did not refer to any emergency or seek HOA member approval for the instant lawsuit during the time he has claimed to be HOA president (*see* R. pp. 604–10, 625), a relevant point, as evidenced by the fact that the master ruled addressed it. (*See* R. pp. 24–26 (finding that, even if § 8(C)(9) of the Articles of Incorporation applies, an emergency existed

and continues to exist, such that Mr. Hannemann properly brought this lawsuit under the emergency exception to § 8(C)(9) in subsection (d)).)

Exhibit 23 shows that Messrs. Hannemann and Morris's prior claims against Mr. McFarland (for, among other things, alleged conversion of HOA funds) were adjudicated to be without merit, and goes to show not only their bad faith alliance against Mr. McFarland but also the lack of any emergency; to show Mr. McFarland's diligent handling of the HOA's general and ordinary business; and to show that all other HOA members, except for Messrs. Hannemann and Morris, have been paying their annual assessments to Mr. McFarland for deposit into the HOA's account at Bank of America and that Mr. McFarland has duly accounted for the same (*see* R. pp. 625, 635–79), which is relevant to the applicability of the emergency exception to § 8(C)(9) of the Articles (subsection (d).

B. The master should have granted Mr. McFarland's motion and denied Mr. Hannemann's motion, or at least denied Mr. Hannemann's motion (if not in whole, in part) because he is not entitled to judgment as a matter of law under the governing legal standard.

1. The master erred in not recognizing that Mr. Hannemann's claims against Mr. McFarland must fail because Mr. Hannemann did not obtain the requisite approval from the HOA membership to bring this suit.[21]

Section 8(C)(9) of the Articles provides as follows:

> Notwithstanding anything contained herein to the contrary, the Association shall be required to obtain the approval of three-fourths (3/4) of all Members (at a duly called meeting of the Members at which a quorum is present) prior to the payment of lega1 or other fees to persons or entitles engaged by the Association for purpose or suing, or making, preparing or investigating any lawsuit, *or commencing <u>any lawsuit</u> other than for the following purposes*:
>
> (a) the collection of assessments;
>
> (b) the collection of other charges which owners are obligated to pay pursuant to the Association Documents;
>
> (c) the enforcement of any applicable use and occupancy restriction contained in the Association Documents;

[21] The master's ruling against Mr. McFarland on his claim for breach of contract/conversion is premised on his ruling in favor of Mr. Hannemann on his claim to the HOA presidency. Accordingly, for this (Argument I.B.1) and the other reasons (*see* Arguments I.B.2 and I.B.3, *infra*) why Mr. Hannemann's claims against Mr. McFarland must fail, the master's summary judgment for Mr. Hannemann on Mr. McFarland's breach of contract/conversion claim should also be reversed.

> (d) in an emergency where waiting to obtain the approval of the Members creates a substantial risk of irreparable injury to the Association Property or to Member(s) (the Imminent expiration of a statute of limitations shall not be deemed an emergency obviating the need for the requisite vote of three-fourths (3/4) of the Members[.]

(R. pp. 58–59 § 8(C)9 (emphasis added).) Without question, Mr. Hannemann brought this suit in his (purported) official capacity "as President of the Live Oak Village Homeowner's Association, Inc.," without obtaining the requisite three-fourths vote of the membership. (R. pp. 374–76 at Resps. No. 24–29.)

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. *See Litchfield Co. of S.C., Inc. v. Kiriakides*, 290 S.C. 220, 223, 349 S.E.2d 344, 346 (Ct. App. 1986); *see also Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (instructing that the cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language). "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." *Koon v. Fares*, 379 S.C. 150, 155, 666 S.E.2d 230, 233 (2008).

The master's analysis of § 8(C)(9) of the Articles is erroneous. The master reads this section as only applying where attorney fees are being sought from the

HOA itself. But by its plain language, this is not so. This section governs the commencement of any lawsuit other than for the four expressly stated purposes. The master's view that it does not apply to this case because Mr. Hannemann is not seeking to recover attorney fees from the HOA is incorrect.[22]

Likewise erroneous is the master's view that, even if this section does apply, Mr. Hannemann's suit was permitted under emergency exception in subsection (d). Again, the language of this exception is as follows: "in an emergency where waiting to obtain the approval of the Members creates a substantial risk of irreparable injury to the Association Property or to Member(s) (the imminent expiration of a statute of limitations shall not be deemed an emergency obviating the need for the requisite vote of three-fourths (3/4) of the Members)." (R. pp. 58–59.) As evidenced by the express clarification that even the imminent expiration of the statute of limitations is not a risk that obviates the need to obtain the requisite member approval, the emergency exception is intended to be construed strictly. In no reasonable way can it be said that the time it would have taken to obtain the approval of the HOA members would have created the risk of "irreparable injury" to "Association Property" or any "Member" necessary to trigger the exception.

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[22] Also, out of an abundance of caution, to the extent that it might be claimed to have any significance with respect to this (or, for that matter, any other) issue, the master's statement that Mr. McFarland "has offered no evidence that the [HOA] has authorized the use of its funds to pay for his attorney's fees incurred in the defense of this action" (R. p. 29) is misplaced and of no moment. Mr. McFarland does not seek attorney fees from the HOA, only from Mr. Hannemann.

Moreover, the very fact that Mr. Hannemann did not bring this suit until September 2016—more than a year after he claims to have become HOA president in May of 2015—is irreconcilable with any emergency. Indeed, the first time Mr. Hannemann suggested the existence of any emergency was during the June 16, 2020, motion hearing. And if anything, by maintaining the *status quo*, the Pendente Lite Order itself shows the absence of any emergency circumstance under the long existing state of affairs.

Lastly, at no time since commencing this lawsuit has Mr. Hannemann tried to obtain the requisite HOA member approval. Viewed in its proper context and with due consideration of its purpose, the emergency exception should be taken to mean that, even where emergency circumstances justify *commencing* a suit without HOA member approval, they do not automatically justify *maintaining* the suit without HOA member approval, i.e., after the protective purpose of the exception is served by filing suit without obtaining HOA member approval, the protective purpose of the general rule itself must still be served by requiring HOA member approval to continue the suit. *See Kiriakides*, 290 S.C. at 223, 349 S.E.2d at 346; *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134; *Koon*, 379 S.C. at 155, 666 S.E.2d at 233.

2. The master erred in not to recognizing that Mr. Hannemann's claims against Mr. McFarland must fail because Mr. Hannemann did not obtain the requisite approval from the Board to bring this suit, and indeed that Mr. Hannemann should be judicially estopped to argue otherwise.

Besides the HOA member approval required by the Articles (discussed above), the Bylaws require approval by the Board "[t]o enforce by legal means the provisions of" the Articles, the Bylaws, or the Covenants. (R. pp. 69–70.) There is no question that Mr. Hannemann violated the Bylaws by bringing this lawsuit without obtaining approval from even his supposed fellow Directors, Mr. Morris and Ms. Knight. (R. pp. 374–76 at Resps. No. 24–29.)

Moreover, Mr. Hannemann should be judicially estopped[23] to argue that he, as HOA president, can bring suit in the absence of the Board approval required by the Bylaws, Mr. Hannemann having already successfully defeated the claims Mr. McFarland brought in the name of the HOA in the Original HOA Litigation by arguing they suffered from the same infirmity. (*See* R. pp. 484–88.)

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[23] *See Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding."); *id.* at 357 S.C. at 215–16, 592 S.E.2d at 632 ("We now adopt the following elements necessary for the doctrine to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.").

The master's rejection of Mr. McFarland's judicial estoppel argument relies on too narrow a view of the parties. Judicial estoppel applies not only to inconsistent positions taken by the same party but also to inconsistent positions taken by parties in privity with one another. *Cothran*, 357 S.C. at 216, 592 S.E.2d at 632. Even if the parties plaintiff and defendant here are not exactly the same as they were in the Original HOA Litigation, the parties in the respective suits are in privity with one another.

Also, the master is mistaken about Mr. Hannemann having successfully relied on § 8(C)(9) of the Articles in the Original HOA Litigation. He did not. What Mr. Hannemann successfully argued before was the lack of the Board approval required by the Bylaws. (*See* R. pp. 484–88, 572–79.) Having prevailed on this argument against Mr. McFarland previously, Mr. Hannemann should not be able to avoid the same fate here.

Lastly, in regard to the element that the inconsistency must be part of an intentional effort to mislead the court, such a finding is required by the concurrence of all the other elements of the test and Mr. Hannemann's knowing and voluntary continuation of this action in the face thereof.

3. The master erred in not recognizing that Mr. Hannemann cannot be the rightfully elected president of the HOA (or, for that matter, a Director) because, without question, he is not in good standing with the HOA, given that (A) Mr. Hannemann never fully paid the HOA his annual assessments for 2013 and 2014 because the untimely payment he did eventually make (in 2015) did not account for the mandatory interest that had accrued (and indeed continues to accrue) thereon and (B) Mr. Hannemann has not paid the HOA his annual assessments for 2016 to present.

As explained above, Mr. Hannemann traces his claim to the HOA presidency on alleged HOA and Board meetings in 2015 and 2016. But these meetings are not valid because Mr. Hannemann (and, for that matter, Mr. Morris) was not then, and is not now, a member of the HOA in good standing with the right to vote on HOA matters. Thus, Mr. Hannemann could not possibly be the rightfully elected HOA president (or, for that matter, a Director), as the master should have recognized, or at least recognized that the existence of a genuine issue of material fact precluded the grant of judgment to Mr. Hannemann as a matter of law in this regard.

The owners of each lot in the Subdivision are required to timely pay their HOA annual assessments. (*See* R. p. 77.) Regarding the non-payment of assessments, the Covenants provide as follows:

> **Section 6.3. Effect of Nonpayment of Assessments: Remedies of the Association.**
> Any assessment not paid within thirty (30) days after the due date *shall* bear interest from the due date at a rate equal to the lesser of (i) eighteen (18%) percent per annum or (ii) the maximum rate provided by applicable law.

(R. p. 426 (emphasis added); *see also* R. pp. 79–80.)

With regard to assessments more than 30 days past due, it is clear from the above-quoted language that the amount due from the lot owner includes not only the principal amount of the assessment but also the interest accrued thereon, the accrual of such interest being *mandatory* and *automati*c upon the passage of 30 days' time from the assessment due date without payment. The master's view in this regard (that the accrual of interest on untimely paid assessments is not automatic) is erroneous. *See Kiriakides*, 290 S.C. at 223, 349 S.E.2d at 346; *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134; *Koon*, 379 S.C. at 155, 666 S.E.2d at 233.

The master incorrectly states, "Exhibits 12–14 to Defendant McFarland's own motion illustrates that Plaintiff Hannemann paid all assessments as was practicable given the realities of the already-pending litigation. Plaintiff Hannemann placed checks associated with his 2013 and 2014 assessments in the hands of his then-attorney. These checks were re-issued in 2015 and provided to Defendant McFarland through counsel. Defendant McFarland conceded this during the hearing." To be clear, Mr. McFarland did *not* concede the propriety of Messrs. Hannemann and Morris's actions at the hearing. The impropriety of their actions was expressly briefed (*see* R. pp. 355–59) and maintained at all times during the hearing.

Mr. Hannemann's alleged payment of his 2013 and 2014 HOA assessments in escrow to his attorney is irrelevant—and, for that matter, untrue. It is irrelevant because, quite simply, the Governing Documents make no provision whatsoever for paying assessments in escrow to a third-party[24]—indeed, as a practical matter, logic instructs that the existence of such a provision would be absurd as, from the HOA's perspective, it has no more received payment from an owner who makes payment to a third-party escrow agent than it has from an owner who makes no payment at all. And it is untrue because, in point of fact, Mr. Hannemann did not actually make any payment at all in regard to either his 2013 or 2014 annual assessments until the spring of 2015.

The transmittal letter enclosing Mr. Hannemann's payment of the principal amounts (again, $1,000 each) of the annual assessments for 2013 and 2014 is dated April 27, 2015[25]—by which point, of course, payment for both assessments was well over 30 days past due. Mr. Hannemann paid these funds via a single check in the amount of $2,000. (R. pp. 472–74.) The check was dated March 18, 2015, and in the "For" line read "Stale Checks Replacement," thus confirming that Mr. Hannemann had never actually placed any funds in escrow to begin with. (R. pp. 472–74.) At most, he had, at some time(s) in the past, given his attorney check(s) made payable to the HOA for the $1,000 principal amount of the 2013 and 2014

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[24] (*See generally* R. pp. 56-82, 412–43.)

[25] (R. pp. 472–74.)

annual assessments, but those checks were never actually deposited; rather, they sat and became stale with no funds ever actually leaving Mr. Hannemann's account.

It is therefore indisputable that Mr. Hannemann did not make any payment of his 2013 and 2014 annual HOA assessments until both were more than 30 days past due and that the only payment he has ever made to the HOA in regard to these assessments was for their respective principal amounts (i.e., $1,000 each), making no payment for any interest.

With regard to the enforcement of the Governing Documents and the procedure therefor, the Bylaws make clear the paramount importance of an owner's fulfillment of his/her obligation to pay assessments. (*See* R. pp. 81–82.) For *every other* violation of the Subdivision's Governing Documents *but* "the failure to pay assessments," there is a procedure that is required to be followed before the imposition of a fine or the suspension of voting or other rights. (R. p. 81 ("Except with respect to the failure to pay assessments . . . .".) By expressly excluding "the failure to pay assessments" from this procedure, the By-laws make at least one consequence of that failure *automatic*: the suspension of voting rights. While some affirmative Board action may be necessary for the imposition of a fine or some other suspension of rights (if only for the purpose of determining the amount of the fine or identifying what right(s) besides voting is/are to be suspended), nothing beyond the fact of nonpayment is needed for the suspension of voting rights. *See Kiriakides*, 290

S.C. at 223, 349 S.E.2d at 346; *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134; *Koon*, 379 S.C. at 155, 666 S.E.2d at 233.

It would be absurd for an HOA member who has shirked the foremost obligation of his/her membership to enjoy the same voting rights as other members who have not. Likewise, as illustrated by the situation at hand, if the failure to pay assessments did not automatically render an HOA member not in good standing and suspend his/her voting rights, but instead some affirmative Board action was required to do so, it would allow for the absurdity that two Directors acting in concert could fail to pay their assessments with impunity.

But even assuming, *arguendo*, some affirmative Board action was necessary to effect the suspension of Mr. Hannemann's voting rights, the master is incorrect in stating Mr. McFarland presented no evidence of the same. Mr. McFarland presented evidence that he (the only Director in good standing), wrote Messrs. Hannemann and Morris on May 1, 2015, expressly advising, "I do not agree that you have the authority to call a Board meeting, nor do you have the authority to participate in one as you are both members not in good standing. You both have failed to timely pay your 2013 and 2014 annual assessments . . . ." (R. pp. 482–83.); *see also* R. pp. 580–93.) Given that Messrs. Hannemann and Morris were themselves the only other Directors, and indeed that they could not act on the matter because their own conduct was at issue, *see* S.C. Code Ann. § 33-31-831 (regarding director conflict of

interest), it would be absurd to construe the Governing Documents as requiring them to vote to sanction themselves in order for their standing with respect to/voting rights in the HOA to be affected. *See Kiriakides*, 290 S.C. at 223, 349 S.E.2d at 346; *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134; *Koon*, 379 S.C. at 155, 666 S.E.2d at 233.

Lastly, as explained above, there is no question that the HOA's account at Bank of America is its proper bank account, not new the account Mr. Hannemann opened at Wells Fargo. Consequently, following the same reasoning as already set forth above, Mr. Hannemann could not possibly be the rightfully elected president (or, for that matter, a Director) of the HOA because he is not in good standing with the HOA for the additional reason of his nonpayment to the HOA of annual assessments from 2016 to present.

4. The master incorrectly applied the summary judgment standard.

Although the master's order states its analysis "give[s] every inference in favor of the Defendant,"[26] this is not so.

The master refers to Mr. McFarland's "utter disregard for" the fundamental purpose of the Covenants and to his "obstreperous" conduct. (R. p. 25.) While Mr. McFarland asserts there is no cause to view his actions and motives in this way in any event, they certainly cannot be viewed in this way under the legally required

[26] (R. p. 15.)

standard, which mandates viewing the evidence and all reasonable inferences capable of being drawn therefrom in the light most favorable to him.

To the extent the master found waiver on the basis of the McFarlands' HUD complaint against Messrs. Hannemann and Morris, "[w]aiver is a voluntary and intentional abandonment or relinquishment of a known right,"[27] and given Mr. McFarland's explanation and denial of any intent to waive or otherwise relinquish his rights/position in this litigation (*see* R. pp. 560–62), the master could not possibly make a finding of waiver against Mr. McFarland on this basis while still viewing the facts in the light most favorable to Mr. McFarland.

The master's finding that "an award of costs, including attorneys' fees, to Defendant McFarland in this matter is neither equitable nor just"[28] is likewise colored by a failure to view the evidence/inferences therefrom in the required light most favorable to Mr. McFarland.

The master's commentary about Mr. Hannemann's service to the HOA and principled pursuit of litigation[29] fails to view Mr. Hannemann's baseless conversion claim against Mr. McFarland in the Original HOA Litigation (*see* R. pp. 572–79) and the evidence of Mr. Hannemann's bad faith alliance with Mr. Morris against Mr.

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27 *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994).

28 (R. p. 29.)

29 (*See* R. p. 31.)

McFarland and the resulting HOA dysfunction (*see* R. pp. 599–603) in the light most favorable to Mr. McFarland.

Conversely, the master's negative view of Mr. McFarland's actions and motivations fails to afford Mr. McFarland the requisite favorable view of the evidence, such as that showing his dutiful handling of the HOA affairs (*see* R. pp. 519–22, 635–79), all of which he did without compensation, as a volunteer for the benefit of himself and his neighbors, and has continued to do by maintaining his principled position in this litigation.

5. The master improperly took and relied upon judicial notice.

Without notice,[30] the master improperly took "judicial notice that individuals in a group setting may make a different decision than when the same choice is given to them on an individual basis." (R. p. 15 n.4.) "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b). "[T]hat individuals in a group setting may make a different decision than when the same choice is given to them on an individual

[30] *See* Rule 201(e), SCRE ("A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.").

basis" is neither of these things, as indeed proved by the source material that the master cited for the proposition.

The master cited a web address that leads to an academic research paper about a phenomenon apparently known to the field of social psychology as the "discontinuity effect" or "group shift," which has to do with decisions made by groups of individuals and by individuals making decisions in isolation. Clearly, this is not a matter of general public knowledge or a fact capable of ready and accurate determination by resort to sources whose accuracy cannot reasonably be questioned. At most, it is a theory/view endorsed by a single paper (now more than 10 years old) on a matter for discussion among a particular community of scholars, and, without more, obviously beyond the ability of lay people to understand and meaningfully apply to this case. *See* Rule 701, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."); Rule 702, SCRE ("If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the

determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."); *Watson v. Ford Motor Co.*, 389 S.C. 434, 445–46, 699 S.E.2d 169, 175 (2010) ("Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience, or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge. . . . [E]xpert evidence is required where a factual issue must be resolved with scientific, technical, or any other specialized knowledge. . . . For these reasons, expert testimony receives additional scrutiny relative to other evidentiary decisions. . . . Expert testimony is not admissible unless it satisfies all three requirements with respect to subject matter, expert qualifications, and reliability. Thus, only after the trial court has found that expert testimony is necessary to assist the jury in resolving factual questions, the expert is qualified in the particular area, and the testimony is reliable, may the trial court admit the evidence and permit the jury to assign it such weight as it deems appropriate."). And, of course, all this assumes the genuineness of the cited article, which itself is, in effect, unauthenticated, inadmissible evidence. *See* Rule 901, SCRE (regarding authentication or identification); Rule 902, SCRE (not including papers like the one cited by the Court among the types of documents that are self-authenticating); *see also* Rules 801–805, SCRE (regarding hearsay).)

Moreover, the master relies on this idea ("that individuals in a group setting may make a different decision than when the same choice is given to them on an individual basis") to support its waiver ruling against Mr. McFarland. (*See* R. p. 15 ("Defendant McFarland objected to the meeting in an email sent May 1, 2015. In the email, Defendant McFarland asserts that Plaintiff Hannemann and board member Tom Morris were not members in good standing. But Defendant McFarland failed to attend the meeting on May 17, 2015. Hence, he failed to assert his objections in the corporate (group) setting.") (internal citation omitted).) Again, "[w]aiver is a voluntary and intentional abandonment or relinquishment of a known right." *Parker*, 313 S.C. at 487, 443 S.E.2d at 391. If anything, the paper the master cited cuts against any finding of waiver, as it discusses a psychological phenomenon in decision-making that the decision makers themselves are not conscious of—in other words, if anything, the paper supports a lack of any voluntary and knowing relinquishment of rights by Mr. McFarland. Moreover, and in any event, given that waiver hinges on the factual question of whether there was knowing and voluntary intent, the master could not possibly find against Mr. McFarland and still view the evidence/inferences therefrom in the required light most favorable to Mr. McFarland.

In support of his finding regarding the applicability of the emergency exception (subsection (d)) to § 8(C)(9) of the Articles, and again without notice,[31] the master also improperly took "judicial notice that the most recently sold home in the . . . [S]ubdivision shows a purchase price of $695,000.00." (R. p. 26 n.6.). But even assuming this to be a proper judicially noticed fact, it does not actually support the applicability of subsection (d) of § 8(C)(9) of the Articles. Again, the type of emergency to which subsection (d) applies is specifically stated to be the risk of imminent harm to "Association Property or to Member(s)." It is does not say the *property* of members, only to the members themselves. Moreover, it makes no sense to view the type of emergency to which subsection (d) applies as one involving the attenuated and collateral consequences of a dispute over HOA governance. The very act that Section 8(C)(9) requires—taking the matter to the HOA membership for a vote—stands to go further toward resolving such a dispute than does skipping straight to litigation. *See Kiriakides*, 290 S.C. at 223, 349 S.E.2d at 346; *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134; *Koon*, 379 S.C. at 155, 666 S.E.2d at 233.

Lastly, and in any event, Mr. McFarland should have been given a full and fair opportunity to be heard in opposition to the matters as to which the master took judicial notice. *See* Rule 201(e).

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[31] *See* Rule 201(e).

6. In granting Mr. Hannemann summary judgment as to Mr. McFarland's claim for a judicial declaration that he (and, for that matter, Mrs. McFarland) has the rights and protections associated with the terms "Developer" and "Declarant" under the Governing Documents, the master did not fully address Mr. McFarland's argument on this claim, and in any event, given the favorable view of the evidence/inferences therefrom that must be afforded Mr. McFarland, the master should not have granted Mr. Hannemann judgment as a matter of law in this regard.

While it is true that the construction of a clear an unambiguous contract is a question of law for the court, if the court determines that the language is ambiguous, however, the determination of the parties' intent becomes a question of fact for the fact-finder, and evidence may be admitted to show the intent of the parties. *Williams v. Gov't Employees Ins. Co.*, 409 S.C. 586, 594, 762 S.E.2d 705, 709–10 (2014). A contract is ambiguous when, read as a whole, it is capable of more than one reasonable interpretation. *See Rodarte v. Univ. of S.C.*, 419 S.C. 592, 604, 799 S.E.2d 912, 918 (2017); *Schulmeyer*, 353 S.C. at 495, 579 S.E.2d at 134.

Mr. McFarland duly argued to the master that the Governing Documents are ambiguous because of the false premise on which OVD is identified in the Covenants as the "Developer" and, in turn, in the Bylaws as the "Declarant," i.e., the false premise, explained above, that OVD is the owner of all the real property declared subject to the Covenants, and that the intent of the Amended Declaration, which he (and Mrs. McFarland) were required to sign because of their ownership of their lot before the recording of the Original Declaration, was to confer upon himself

(and Mrs. McFarland) rights and protections consistent with the "Developer" and "Declarant" under the Governing Documents, and further, that they acted consistent therewith in helping to carry out the plan of development for the Subdivision. (*See* R. pp. 566–69.)

The master did not fully address Mr. McFarland's argument on this claim,[32] and in any event, given the favorable view of the evidence/inferences therefrom that must be afforded Mr. McFarland, the master should not have granted Mr. Hannemann judgment as a matter of law in this regard.

II. The master did not have jurisdiction to prohibit other HOA members, i.e., not Messrs. Hannemann and McFarland but other HOA members who are not parties to this action, from exercising their rights in respect of requesting/calling special HOA meetings.

As explained above, the Pendente Lite Order was issued in response to a motion by Mr. Hannemann for an injunction or, alternatively, a temporary restraining order, to prevent the holding of a special HOA meeting that "could result in Mr. McFarland purportedly being elected as an officer of the [HOA], as well as its president" and moot Mr. Hannemann's claims. (R. p. 531.) The Pendente Lite Order itself recognized that other HOA members besides Messrs. Hannemann and McFarland had requested a special HOA meeting to address the HOA presidency. (*See* R. p. 6 ("At the hearing Plaintiff's counsel advised the Court a letter signed by Defendant's wife and another individual, purportedly pursuant to Section 3(B) of the

[32] (*See* R. pp. 28–29.)

Association's By-laws, had requested the Plaintiff and Defendant to schedule a special meeting of the Association. The purpose of the meeting was purportedly to elect a president of the homeowner's association and other business. The meeting was to be held May 30, 2019.").) These other HOA members are not parties to this lawsuit and were not before the master. *See BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006) ("A court generally obtains personal jurisdiction by the service of a summons."); *Thomas & Howard Co. v. T.W. Graham & Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995) ("A judgment is void if a court acts without personal jurisdiction."). Both the Bylaws (in § 3(B)) and the statutory law, *see* S.C. Code § 33-31-702, confer upon all members of the HOA rights in respect to requesting/calling special HOA meetings, and it was error for the Pendente Lite Order to purport to prohibit HOA members over whom the master did not have personal jurisdiction (and who, for that matter, did not have notice and an opportunity to be heard) from exercising these rights.

CONCLUSION

For the foregoing reasons, Mr. McFarland asks the Court to reverse the master and enter, or direct that the master enter, judgment in his favor as to all Mr. Hannemann's claims against him, or at least to reverse the master's grant of Mr. Hannemann's motion for summary judgment (if not in whole, in part), and to

remand this matter to the master for such further proceedings as are necessary, to include, without limitation, trial.

Respectfully submitted,

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July 19, 2021

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dorchester County
Court of Common Pleas

James E. Chellis, Master-in-Equity

Case No. 2016-CP-18-01812
Appellate Case No. 2020-001029

David Hannemann,
as President of the Live
Oak Village Homeowner's
Association, Inc., Respondent,

v.

William McFarland, Appellant.

APPELLANT'S CERTIFICATION FOR FINAL BRIEF

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I, Russell G. Hines, do hereby certify that the Final Brief of Appellant complies with Rule 211(b), SCACR. Additionally, the undersigned hereby certifies that this filing complies with the Supreme Court order of April 15, 2014.

Respectfully submitted,

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