RECEIVED
Jul 16 2021
SC Court of Appeals

IN 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 RESPONDENT DAVID HANNEMANN

HOOD LAW FIRM, LLC
James B. Hood (SC #70212)
Virginia R. Floyd (SC #101849)
Deborah Harrison Sheffield, *Of Counsel* (SC # 2757)
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com

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

TABLE OF CONTENTS

PAGE

STATEMENT OF AUTHORITIES

CASES PAGE

Statutes and Rules

Other Authorities

STATEMENT OF THE ISSUES ON APPEAL

Respondent Hannemann would restate the issues on appeal as:

I. Did the Trial Court properly grant summary judgment to Hannemann on his claim for a declaratory judgment regarding his status as the duly elected Director and President of the Live Oak Village Homeowners Association?

   A. Does Hannemann have standing to bring this action to determine his status and rights as the duly elected HOA President without seeking approval from the HOA?

   B. Was Hannemann a member in good standing when he was elected as Director and President of the HOA?

II. Did the Trial Court properly grant summary judgment to Hannemann on McFarland's counterclaims?

   A. Can McFarland state a cause of action for conversion or breach of contract in regards to Hannemann's actions, as the duly elected HOA Director/President, opening a new HOA bank account for deposits of HOA assessments after McFarland refused to transfer or relinquish control of the existing HOA bank account?

   B. Can McFarland state a cause of action for attorney fees where he is not a "declarant" or "developer" within the meaning of the HOA governing documents?

III. Did the Trial Court act within its discretion in consideration of arguments and documents submitted by McFarland after the motions hearing?

IV. Are there any grounds to review the Temporary Restraining Order?

   A. Is the appeal from the TRO now moot since a final order has been issued on the merits?

   B. Does McFarland have standing to appeal from the TRO on behalf of HOA members who are not parties to this action?

STATEMENT OF THE CASE

This case involves a dispute over the rightful leadership of a seven-lot horizontal property regime in Summerville, SC. David Hannemann commenced this action with the filing of a complaint on September 9, 2016, alleging that he had been rightfully elected as President of the Live Oak Village Homeowners Association ("HOA") and that William McFarland, the former HOA President, was refusing to cooperate with the orderly transition of HOA governing authority and refusing to transfer HOA records and finances needed for effective operation of HOA business. [ROA 047; Complaint.] Hannemann sought declarations that he is the rightfully-elected HOA President and that, as such, he is entitled to possession of the HOA corporate records, bank information, and checkbook.

McFarland filed an amended answer and counterclaim on February 21, 2017, in which he denies that Hannemann is the rightfully elected HOA President. McFarland bases his position on the argument that Hannemann and another Board member (Morris) were not in good standing, that they were therefore not authorized to call or vote at the 2015 or 2016 HOA annual meetings, and that the results of any elections at the 2015 or 2016 HOA annual meetings were consequently invalid. McFarland also counter-claimed for a declaration that he is the de facto and/or de jure HOA President and the only Board member authorized to conduct HOA business. McFarland further sought a declaration that he and his wife are declarants and/or developers under the covenants and restrictions for the Live Oak Village subdivision, and thus, entitled to attorney's fees as a matter of contract law. McFarland also attempted to state a cause of action against Hannemann for breach of contract/conversion based on allegations that Hannemann had wrongfully established a new HOA bank account in 2016 for the collection of dues/assessments. [ROA 092; Amended Answer and Counterclaim.]

The case was referred to the Master in Equity for Dorchester County by consent order filed August 18, 2017. [ROA 001; Order.]

Motions for Summary Judgment: McFarland moved for summary judgment on August 24, 2018. [ROA 349; Motion.] Hannemann moved for summary judgment on April 19, 2019, and filed a supplemental memorandum in support of his motion for summary judgment on May 14, 2020.[1] [ROA 489, 551; Motions, memoranda.] The cross motions for summary judgment came before the Master for hearing on June 16, 2020. [ROA 123; Transcript.] After the hearing, McFarland filed supplemental memoranda of authority and additional documents on July 13 & 14, 2020. [ROA 563, 618; Memos/Exhibits.] The Trial Court granted summary judgment in favor of Hannemann by order filed, August 13, 2020, ordering:

A. Plaintiff Hannemann had the right to bring this action.

B. Plaintiff Hannemann's Motion for Summary Judgment is granted.

C. Mr. Hannemann is the President of the Live Oak Village Homeowner's Association, Inc.

D. Defendant McFarland waived his right to assert objections before the full body of the Association or its board of directors.

E. Section 8(C)(9) of the Articles of Incorporation is not applicable because the Plaintiff is not seeking a recovery of attorneys' fees from the Association.

F. Even if Section 8(C)(9) of the Articles of Incorporation were applicable, the Plaintiff had the right to pursue the present action under 8(C)(9)(4) as set forth herein above because an emergency existed that created a substantial risk of irreparable injury to the Association.

[1]This supplemental memorandum addressed an issue related to the fact that McFarland and his wife filed a complaint in 2020 with the South Carolina Human Affairs Commission alleging that Hannemann, as HOA President, had engaged in discriminatory practices. In light of this position, Hannemann argued that McFarland's Human Affairs Commission complaint operated as a waiver in the present matter and, effectively, a concession that Hannemann was HOA President. Ultimately, the Human Affairs Commission summarily dismissed the complaint.

G. Defendant McFarland shall turn over all the Association's books and records that are in his possession, custody or control to Plaintiff Hannemann within ten (10) days of this order.

H. If Defendant McFarland is aware of any other books and records that may be in the possession of others, the Defendant McFarland is ordered to specify such books and records and inform Plaintiff Hannemann of the person or entity holding such books and records, and to endeavor to have such books and records returned to himself so that he may turn such books and records over to the Plaintiff Hannemann.

I. Defendant McFarland is directed to provide Plaintiff Hannemann the bank statements of the Association for the preceding 72 months from the date of this order.

J. After procuring the Bank statements, defendant McFarland is directed to close the bank account currently used by him as the Association's bank account.

K. Plaintiff is not entitled to an award of attorneys' fees.

L. Plaintiff Hannemann is entitled to an award taxing costs under SCRCP 54 ....

[ROA 012; Order.] McFarland filed a motion for reconsideration on August 24, 2020, which was denied by order filed August 28, 2020. [ROA 699, 036; Motion, Order.]

Motion for Temporary Restraining Order: During the litigation process, while motions for summary judgment were pending, McFarland – ignoring the intervening HOA elections and continuing to proclaim himself as HOA President – unilaterally noticed an annual HOA member meeting for May 16, 2019. [ROA 541; 5/16/19 TRO Ex. 1.] Hannemann moved for a temporary injunction/restraining order to prevent McFarland from holding an invalid meeting. [ROA 528; TRO Motion, filed 5/16/29.] The Trial Court held a phone conference with counsel for both parties on May 16 during which the Trial Court proposed that the parties agree to hold any further association business in abeyance until the pending summary judgment motions were heard. After consultation with his client, McFarland's counsel advised the Court that "consistent with what we

discussed on today's call, my folks are going to stand down, and the meeting that was scheduled for tonight will not be going forward." [ROA 526; Hines email, Thursday, 5/16/19 3:33 PM.]

After the May 16, 2019 HOA member meeting was cancelled, McFarland's wife and another member attempted to schedule a special HOA member meeting for May 30, 2019, purportedly to elect a HOA president and other business. That attempt came to the Trial Court's attention at a status conference held on May 30, 2019. [ROA 006; 6/10/19 Order, p. 4.] To preserve the status quo the Trial Court issued an Order (Pendente lite), on June 10, 2019, prohibiting the parties from calling any HOA meetings without a court order while the Court was considering the summary judgment motions. [ROA 003; Order.] McFarland filed a motion to reconsider on June 21, 2019. [ROA 545; Motion.] The Trial Court denied the motion to reconsider by order filed June 16, 2020. [ROA 009; Order.] The Trial Court dissolved the TRO in its final order of August 13, 2020.[2]

[2] Although the Trial Court hoped that "a working 'order of Business' of the HOA pending conclusion of the suit should be crafted," that has not happened. [ROA 014;Order, p. 3.] Instead, McFarland has continued to hold the HOA records and conduct HOA business. Even after the final order was entered declaring Hannemann was the duly elected President and directing McFarland to turn over the HOA records, McFarland still refused to surrender the HOA records. [ROA 723; Hannemann Affidavit, 10/10/20.]

Attempting to address this recalcitrance, Hannemann filed a Motion for Rule to Show Cause. [ROA 718; Motion, filed 10/14/20.] Rather than complying with the Trial Court's order, McFarland filed a petition in the Court of Appeals, arguing that the final order was automatically stayed under Rule 241(a), SCACR. [ROA 764; Petition, filed 12/14/20.] The Court of Appeals stayed the rule conditioned on McFarland delivering the documents by December 22, 2020. [ROA 044; Order, filed 12/21/20.] McFarland finally produced copies of bank statements for the HOA, but he retains control of the original HOA bank account and all records.

Meanwhile, once the TRO was dissolved, several HOA members requested that a HOA member meeting be held. [ROA 725; Motion for Rule Ex. D.] Hannemann expressed his willingness to call such a meeting once he had the HOA financial records from McFarland. [ROA 738; Motion for Rule Ex. I.] While McFarland continued to withhold the records, Mrs. McFarland and other HOA members moved forward and claim to have held a HOA members meeting on October 30, 2020, at which they purported to have elected McFarland to the Board (along with two other Directors). [ROA 752, 745; Declaration of Mrs. Jennifer McFarland, Declaration of Carlton Holcombe, filed 11/30/20.]

Appeals: McFarland served a notice of appeal from the TRO orders on July 16, 2020. [ROA 811; Notice of Appeal.] McFarland served a notice of "second" appeal from the summary judgment orders on September 14, 2020. [ROA 815; Notice of Appeal.] These appeals have been consolidated.

STATEMENT OF THE FACTS

The two key legal issues in this case are whether Hannemann has standing to bring this action and whether Hannemann was duly elected as Director and President of the HOA Board in 2015 and 2016. The controlling provisions of the HOA By-Laws are clear and unambiguous, and the material facts regarding the election of the Board members and officers are documented in this record beyond any genuine dispute.

The HOA Organization and Governance - Generally

Live Oak Village is a seven-lot neighborhood located in Summerville, South Carolina. The neighborhood association for this development, the Live Oak Village Homeowner's Association, Inc. ("HOA") was incorporated as a non-profit in 2002. The governing documents include the Articles of Incorporation ("Articles") and By-Laws of the HOA and the Protective Covenants recorded with the master deed (as amended).

Live Oak Village property owners with title of record are deemed members of the HOA, but there shall be only one vote per lot. [ROA 059, 066; Articles § 9; By-Laws § 2.] For the purposes of HOA meetings, a quorum shall consist of members present (or by proxy) for 4 of the 7 lots/votes. [ROA 066; By-Laws § 2(B).]

The By-Laws provide for annual meetings of the HOA to held on the first Wednesday in March of each year or such other time as set by the Board. [ROA 066; By-Laws § 3(A).] Pursuant

to By-Laws §3(B), special HOA meetings may be called by President or Vice President or a majority of the Board, and this provision also requires the officers to call a special meeting upon written request by owners of three voting lots. [ROA 066; By-Laws § 3(B).]

Section 10 of the Articles together with Section 4(B) of the By-Laws provide that the affairs of the HOA shall be governed by a Board of Directors. [ROA 060, 067.] The Board is comprised of three members elected to staggered three-year terms which provides for the election of one director each year. [ROA 067, By-Laws § 4(B).] The executive officers consist of the President and Secretary, a Vice President, and a Treasurer who are to be elected annually by the HOA Board. [ROA 071; By-Laws § 7(A).] The By-Laws specify that the Board is supposed to hold regular meetings to conduct HOA business; that attendance of two Directors constitutes a quorum for Board meetings; and that a majority of two Directors is necessary to take action. [ROA 068; By-Laws § 5.]

Dysfunction in the Governance and Operation of the HOA Board since 2012

The governance of the HOA has been in dispute since 2012. As of August 2011, the Board members were McFarland, Hannemann and Thomas Morris.[3] From August 2011 until October 4, 2012, McFarland served as President and Treasurer, and Hannemann served as the Secretary. On September 2, 2012, Hannemann and Morris requested a special Board meeting for the purpose of electing new officers, and this meeting was ultimately held on October 4, 2012. [ROA 470; Defendant SJM Ex. # 11.] McFarland did not appear at the October 2012 meeting, and Hannemann and Morris (constituting a quorum), elected Hannemann as President, and Morris as Secretary. In response, on November 16, 2012, McFarland caused a lawsuit to be filed in the name of the HOA

[3]McFarland was serving a three-year term for 2009-2012; Hannemann's term was for 2010-2013; and Morris' term was for 2011-2014.

against Hannemann and Morris alleging that they had violated the Covenants and seeking a declaration that they were acting outside the scope of authority of the Board.[4] [ROA 445; Defendant SJM Ex. #8.]

During the next several years, the regular and orderly operations of the HOA became dysfunctional as McFarland refused to acknowledge the 2012 HOA Board or officer elections, intractably continued to hold himself out as President, and retained control of the operations and finances of the HOA.

After three years of dysfunction, an annual HOA meeting finally was held on May 17, 2015. At that meeting, a quorum was present and unanimously voted for the election of Hannemann, Morris, and another homeowner (Donna Knight) to the HOA Board. McFarland did not appear for the May 17, 2015 meeting. Since the three-year terms of each of the three Board members had already expired, the election re-established the staggered terms for the HOA Board by electing Donna Knight to serve a one (1) year term, Morris was elected to serve a two (2) year term, and Hannemann was elected to a three (3) year term. [See ROA 083, 084; Affidavit/Letter of Capers Barr, Complt. Ex. C & D.] Thereafter, on May 29, 2015, the Board elected officers: Hannemann was elected as President, Knight was elected as Secretary, and Morris was elected as Treasurer. [See ROA 523; Plaintiff SJM Ex. # 4.]

[4] This earlier litigation is referred to as the "2012 Lawsuit". The 2012 Lawsuit has been the subject of two appeals. Live Oak Village Homeowners Association, Inc., et al v. Thomas Morris, et al, 2015-000599, Ct. App. No. 2016-UP-519; Jennifer McFarland, et al. v. Thomas Morris, et al., 2019-000644 (pending). "A court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records." Freeman v. McBee, 280 S.C. 490, 494, 313 S.E.2d 325, 327 (Ct. App. 1984), *cited in* S.C. Dep't of Soc. Servs. V. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009).

The following year, an annual HOA meeting was held on April 25, 2016; a quorum was present and unanimously voted for Donna Knight to serve a new three-year term. [See ROA 084; Letter of Capers Barr, Complt. Ex. D.] McFarland again did not appear for the April 25, 2016 meeting. Thereafter, the Board elected officers: Hannemann was elected as President, Morris was elected as Treasurer, and Donna Knight was elected as Secretary. [ROA 525; Plaintiff SJM Ex. #5.]

Since 2012, McFarland had refused to recognize the election of new Directors and Officers and continued to control the finances and direct the business of the HOA unilaterally. In the face of the impasse with McFarland, Hannemann brought this action in September 2016 seeking a court order declaring that he is the duly elected Director/President of the HOA Board and directing McFarland to turn over the HOA business and bank records and control of the HOA funds.

Dysfunction in HOA Assessments and Payments Flowing from Disputes in HOA Governance

Despite being removed as President in 2012, McFarland retained control over the existing HOA bank account and continued to issue assessments in the HOA's name in 2013 and 2014 without seeking approval of a budget or the amount of the assessment. [ROA 471; 519. Defendant SJM Ex. # 12, and Plaintiff SJM Ex. # 3.] Hannemann and Morris, continuing to harbor concern over McFarland's use of HOA funds and manner of calculating assessments (an issue involved in the 2012 Lawsuit), refused to pay assessments directly to McFarland and instead provided checks for their assessments to their attorneys in both 2013 and 2014. [ROA 470-471; Defendant SJM Ex. #11, 12.] In 2015, after McFarland provided some level of financial disclosure regarding the HOA account he continued to control, Hannemann and Morris provided the 2013 and 2014 assessments to McFarland's counsel. [ROA 472; Defendant SJM Ex. # 13.]

In 2015, McFarland again peremptorily issued assessments in the HOA's name without Board approval of a budget or the assessment amount. [ROA 475; Defendant SJM Ex. 14.]

In 2016, following his re-election as President of the HOA and in light of McFarland's ongoing refusal to cede control over the existing HOA bank account, Hannemann opened a new account in the HOA's name. [ROA 477; Defendant SJM Ex. #15.] The HOA Board (Hannemann, Morris and Knight) approved a budget and an annual assessment for 2016 and provided information for both to the HOA membership. [ROA 084; Plaintiff SJM Ex. D.] Despite this, McFarland issued his own unapproved assessment invoice to HOA members in 2016. Hannemann and Morris deposited their annual assessments into the newly-opened HOA account. [ROA 475; Defendant SJM Ex. 14.]

Since 2016, McFarland has continued to issue assessments in the name of the HOA without the requisite Board approvals. [ROA 519; Plaintiff SJM Ex. # 3.] Also, since 2016, Hannemann and Morris have continued to deposit their annual HOA assessments into the newly-opened HOA account. [See ROA 373-374; Defendant SJM Ex. #2.]

STANDARD OF REVIEW

On appeal from the grant of summary judgment, the appellate court applies the same standard of review as applied by the trial court pursuant to Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002). Rule 56(c) provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming, *id*. (citations omitted).

As a general matter, the trial court should not consider the merits of competing testimony or make determination on genuine disputes of material facts on a motion for summary judgment. However, cross motions for summary judgment present issues to the trial court in a different posture. In such case, the parties are implicitly representing that there is no need for presentation of any further evidence. Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012). "Where cross motions for summary judgment are filed, the parties concede the issue before us should be decided as a matter of law." Wiegand v. U.S. Auto. Ass'n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011), *cited in* Mead v. Beaufort Cty. Assessor, 419 S.C. 125, 131, 796 S.E.2d 165, 168 (Ct. App. 2016).

Questions of law are subject to de novo review. Appellate review of a trial court's factual findings depends on the whether the underlying action is an action at law or an action in equity. Townes Assocs. Ltd. v. City of Greenville, 266 S.C. 81, 85–86, 221 S.E.2d 773, 775–76 (1976) (setting forth standards of review to apply in actions at law and actions in equity). "Declaratory judgments are neither legal nor equitable. The standard of review for a declaratory judgment action is, therefore, determined by the nature of the underlying issue." Bundy v. Shirley, 412 S.C. 292, 301–02, 772 S.E.2d 163, 168 (2015) (citations omitted). "The character of an action as legal or equitable depends on the relief sought." Cedar Cove Homeowners Ass'n, Inc. v. DiPietro, 368 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006). Claims for declaratory relief to enforce unambiguous provisions of the By-Laws of a homeowners' association lie in equity. *Id*.

On review of a master's rulings in an equitable action, the appellate court can find facts in accordance with its own view of the preponderance of the evidence. Townes, 221 S.E.2d at 775. However, the appellant bears the burden of convincing the appellate court that the trial judge erred. Pinckney v. Warren, 344 S.C. 382, 387–88, 544 S.E.2d 620, 623 (2001).

Rule 56(c), SCRCP, provides that on a motion for summary judgment: "The adverse party may serve opposing affidavits not later than two days before the hearing." A trial court's decision to admit or exclude evidence and arguments presented after a motion for summary judgment has been heard is reviewed on appeal for abuse of discretion. Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997).

The grant or denial of an injunction by the trial court will not be reversed absent an abuse of discretion. Gilley v. Gilley, 327 S.C. 8, 11–12, 488 S.E.2d 310, 312 (1997). An abuse of discretion occurs when the decision of the trial court is unsupported by the evidence or controlled by an error of law. Ledford v. Pa. Life Ins. Co., 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976).

SUMMARY OF ARGUMENT

As demonstrated by the record and as observed by the Trial Court, there is a long history of discord and litigation between these parties on a variety of disputes about the management of the HOA. The current dispute before the Trial Court centers on whether Hannemann was duly elected as Director and President of the HOA in 2015. The Trial Court's 23-page order carefully identifies the issues and arguments presented by both parties, properly reviews the applicable provisions of the HOA governing documents and the relevant evidence, and fully discusses the applicable legal principles in issuing its order granting summary judgment to Hannemann.

On the threshold matter of standing, the Trial Court correctly held that Hannemann has standing to pursue his claims. Neither the plain language of the HOA Articles nor the doctrine of judicial estoppel supports McFarland's contentions that Hannemann needed the approval of the HOA members or the HOA Board to pursue his individual claims. HOA approval was not required under Section 8.C.9 of the Articles because this action is brought by Hannemann, not the HOA, and Hannemann is not seeking to have his attorney's fees paid by the HOA. Judicial estoppel does

not apply because Hannemann had not taken the position that McFarland, or the HOA, lacked standing in the 2012 Lawsuit based on the provision of Section 8.C.9; rather, the HOA's claims were dismissed on Hannemann's argument that the HOA Board had never authorized McFarland to commence any such legal action against Hannemann on behalf of the HOA.

McFarland's secondary argument that Hannemann had no standing because he had not timely paid his assessments since 2012 overlaps with the key dispute as to the validity of Hannemann's election as Director and President. In holding that Hannemann is the duly elected president of the HOA, the Trial Court correctly found that Hannemann was a member in good standing when he was elected to the HOA Board of Directors and then to the office of President. Regardless of the timing and circumstances of Hannemann's payment of assessments made by McFarland after 2012, McFarland did not have the authority to unilaterally declare that Hannemann was not in good standing and ineligible to hold an HOA office. The enforcement procedures set forth in Section 15(B) of the HOA By-Laws requires affirmative action by the Board to impose a late payment fee or to suspend Hannemann's voting rights. Ultimately, the HOA annual meetings held in May 2015 and April 2016 met the requirements of the HOA By-Laws, and McFarland waived his objections to those meetings by failing to appear at the meetings to put his objections about Hannemann's member status before the HOA members.

The Trial Court also correctly held that McFarland's counterclaim for breach of contract and/or conversion fails as a matter of law based on the determination that Hannemann had been duly elected as a Director and President of the HOA. As Director and President, Hannemann acted within his authority, and with Board approval, in opening a new HOA bank account when McFarland obstinately refused to relinquish control of the established HOA account for three years.

McFarland sought attorney's fees under a provision of the Amended Declaration of Covenants and Restrictions based on an argument that he (and his wife) are "Declarants" or "Developers," but the Trial Court properly denied McFarland's claim because he is not a Declarant and the HOA never authorized the use of its funds to pay for his attorney's fees incurred in the defense of this action.[5]

McFarland also appeals from the 2019 temporary restraining order halting efforts to hold a new election of Directors/Officers to preserve the status quo while the Trial Court was considering the pending summary judgment motions. McFarland's attempt to challenge that TRO was mooted when the Trial Court dissolved the TRO in the final order on the merits. In any event, McFarland has no standing to complain that the TRO affected the rights of HOA members who are not parties to this action.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO HANNEMANN ON HIS CLAIM FOR A DECLARATORY JUDGMENT ACTION REGARDING HIS STATUS AND RIGHTS AS THE DULY ELECTED DIRECTOR AND PRESIDENT OF THE LIVE OAK VILLAGE HOMEOWNER'S ASSOCIATION.

A. Standing: Hannemann did not need to seek approval of the HOA membership or the HOA Board in order to bring this action to determine his individual/personal position as President of the HOA.

McFarland moved for summary judgment on a threshold issue of lack of standing/authority, arguing that Hannemann was required to obtain approval from the HOA Board and/or HOA membership before initiating this legal action. In support of his argument McFarland cites to Section 8.C.9 of the HOA Articles of Incorporation and Section 6(A)(6) of the HOA By-

[5] The Trial Court also wisely acted within its discretion by declining to grant McFarland's request for attorney's fees under Section 15-53-100 of the South Carolina Declaratory Judgment, finding that an award of costs would be neither equitable nor just. McFarland does not challenge this ruling on appeal.

Laws, and further contends that Hannemann is judicially estopped from denying the effect of these provisions based on separate litigation that McFarland initiated in 2012 in the name of the HOA. As discussed below, neither provision of the HOA documents require Hannemann to seek preapproval of this declaratory judgment action, and the doctrine of judicial estoppel is inapplicable.

McFarland also raised a standing argument based on his contention that Hannemann has not paid his HOA assessments since 2012. To the extent that the circumstances of Hannemann's payment of his assessments overlaps with the issue of whether Hannemann is a member in good standing, the record shows that Hannemann did make his payments, albeit not to McFarland, and Hannemann's voting rights have never been suspended by the HOA Board, as discussed separately below.

1. The HOA governing documents do not require that Hannemann obtain approval of the HOA Board or the HOA members.

"[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto..." Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987). Those documents are to be strictly construed when determining the powers of a homeowner's association. Lovering v. Seabrook Island Prop. Owners Ass'n, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986), *aff'd as modified*, 291 S.C. 201, 352 S.E.2d 707 (1987).[6]

Section 8.C of the Articles of Incorporation generally defines the corporate powers of this HOA and provides, in pertinent part:

> 9. 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

[6] Superseded on other grounds by S.C. Code Ann. § 33–31–302.

> called meeting of the Members at which a quorum is present) prior to the payment of legal or other fees to person or entities engaged by the Association for the purpose of suing, or making, preparing or investigating any lawsuit or commencing any lawsuit 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 restrictions contained in the Association Documents;
>
> (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. [ROA 058; Complt. Ex. A.]

As the Trial Court held, Section 8.C.9 deals with circumstances allowing for payment of legal fees by the HOA. This section provides generally that the HOA funds cannot be used to pay litigation legal fees without approval of three-fourths of the members except for four enumerated exceptions. By its clear, express terms, Section 8.C.9 does not apply here because Hannemann did not bring this action in the name of the HOA, and there is no evidence in this record that Hannemann is using HOA Funds to finance the litigation or that he is seeking to recover his attorneys' fees from the HOA.

Additionally, in the alternative, even if Section 8.C.9 did apply to Hannemann's action, then the situation presents an emergency sufficient to invoke the application of exception (d). As the Trial Court noted, the HOA has had two individuals claiming to be its president, and each challenges the legality of the other's position as HOA president. In finding that the dispute over the HOA leadership gives rise to an emergency, the Trial Court was rightfully concerned that McFarland's intransigent and obstreperous conduct posed a detriment to the homeowners.

By-Laws §6(A)(6) empowers the Board: "To enforce by legal means the provisions so the Certificate of Incorporation and By-Laws of the Association, the Declaration and the regulations hereinafter promulgated governing use of the property of the Subdivision." [ROA 069; Complt. Ex. B.] By its terms, this provision does not apply to restrict Hannemann's capacity to bring an action to seek a court's declaration of his status and rights as the duly elected HOA President. Hannemann did not initiate this action on behalf of the HOA to enforce any HOA provisions "governing use of the property in the Subdivision."[7]

2. The doctrine of judicial estoppel does not apply to preclude Hannemann from maintaining his legal standing in this action.

McFarland's judicial estoppel argument is grounded on the 2012 Lawsuit that McFarland[8] caused to be commenced in the name of the HOA against Hannemann (and Morris) alleging that they had acted outside the scope of their powers as HOA Directors. [ROA 445; Complaint, C/A No. 2012-CP-18-2583, filed 11/16/12; Ex. 8 to Defendant's Motion for Summary Judgment.] In that case, Hannemann prevailed on an argument the HOA lacked standing because McFarland had failed to obtain Board authorization to commence the action on behalf of the HOA. Contrary to McFarland's contention, neither Hannemann's argument nor the court's ruling in the 2012 Lawsuit supports the application of judicial estoppel to the issue of Hannemann's standing in this case.

As an equitable doctrine, judicial estoppel prevents a litigant from asserting inconsistent or conflicting positions on matters of fact in separate proceedings. Cothran v. Brown, 357 S.C. 210,

[7] Although the Trial Court did not address this specific argument regarding By-Laws §6(A)(6), the record supports his ultimate holding that Hannemann does have standing. Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." *See also* Equivest Fin., LLC v. Ravenel, 422 S.C. 499, 507–08, 812 S.E.2d 438, 442 (Ct. App. 2018) (A respondent may raise additional grounds for sustaining the lower court's ruling so long as the basis appears in the record.).

[8] See ROA 450; Verification.

215, 592 S.E.2d 629, 631 (2004) (citations omitted). The Supreme Court formally adopted the doctrine of judicial estoppel as it relates to matters of fact in Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997). In Cothran v. Brown, the Supreme Court adopted, and articulated, five 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.

592 S.E.2d at 632, *cited in* Auto-Owners Ins. Co. v. Rhodes, 405 S.C. 584, 598, 748 S.E.2d 781, 788 (2013).

Judicial estoppel does not apply to the issue of Hannemann's standing in this case because the facts do not meet several of these five elements. As to point one, the parties were not the same because the HOA was the named plaintiff in the 2012 Lawsuit, but the HOA is not a party to the present lawsuit. As to point two, Hannemann argued that McFarland did not obtain the 2/3 vote of the Board to bring the 2012 Lawsuit in the name of the Board as required by the By-Laws, but Hannemann did not rely upon Section 8.C.9 as a basis for his argument that the HOA lacked standing. [ROA 152-153; Tr. 30/18 – 31/16.] On point three, Hannemann was successful in the 2012 Lawsuit on his argument that the HOA did not have standing, but the issue of the HOA's standing was decided at the Court of Appeals on the fact that McFarland unilaterally proceeded without seeking a vote of the HOA Board and the express provision of the Nonprofit Corporation Act [S.C. Code. §33-31-831(e)] prohibits such action by a single director. [ROA 484; Live Oak Village Homeowners Association, Inc., et al v. Thomas Morris, et al, Ct. App. No. 2016-UP-519,

Def. Ex. 17.] Neither the trial court[9] nor the Court of Appeals, in affirming, relied upon Section 8.C.9 of the Articles. Accordingly, judicial estoppel does not apply to Hannemann's standing in this action.

B. The Trial Court properly held that Hannemann was duly elected as President of the HOA in compliance with the HOA By-Laws.

The core of McFarland's challenge to Hannemann's election as HOA President is his contention that that Hannemann is not a member in good standing because he has not paid interest owing on allegedly late payments of his 2013 and 2014 assessments/dues. As noted above, McFarland's argument about Hannemann's membership status also overlaps with his objection to Hannemann's standing to bring this action.

As the Trial Court correctly found, Hannemann was a member in good standing at the time of his election to the Board as Director and to the office of President in 2015 and 2016 because McFarland had never taken the proper steps to obtain Board approval to impose any late payment fine nor to suspend Hannemann's voting rights as required by the HOA By-Laws. The Trial Court properly refused to countenance McFarland's disregard for the democratic processes as provided in the HOA governing documents and correctly rejected McFarland's claim of what amounts to dictatorial powers over the HOA. Ultimately, nothing in the HOA governing documents or fundamental concepts of due process justifies McFarland's autocratic suspension of Hannemann's voting rights for alleged nonpayment of assessments and interest.

Notably, the 2013 and 2014 payments with which McFarland takes issue are associated with assessments McFarland unilaterally made in the name of the HOA after he was removed from his position as President. Though he disputed McFarland's authority to issue these assessments,

[9]See also ROA 572; Judge Goodstein's 3/13/15 Order, p. 4-5, Def. Supp. Memo Ex. 18.

Hannemann provided checks in the amounts of both 2013 and 2014's assessments to his attorney, and there they remained until McFarland provided a financial disclosure for the HOA account he controlled in 2015.

1. Election of HOA Directors and Officers

The HOA By-Laws provide for election of Directors to the HOA Board by vote of the members at a HOA owners meeting attended by a quorum of members representing at least four of the seven voting lots, and then the executive officers are elected annually by the HOA Board. [ROA 066-067; By-Laws §2(B), §4(B), §7.] As of August 2011, the Board members and officers were McFarland (President/Treasurer), Hannemann (Secretary), and Thomas Morris. At the October 4, 2012 Board meeting (which McFarland boycotted), Hannemann was elected as President, and Morris was elected as Secretary. Despite several attempts, no annual HOA meeting was held until May 17, 2015, at which time a quorum of four voting owner/members were present and unanimously voted for the election of Hannemann as a Director for a three (3) year term. Hannemann was reelected as President by the Board in 2015 and again in 2016.

Neither McFarland nor his wife (as a co-owner) attended either the May 2015 or the April 2016 HOA member meetings. McFarland has not identified a scintilla of evidence to contradict the reports of the attorney present at the both the May 17, 2015 and the April 25, 2016 HOA member meetings, which confirmed that a quorum was present for each meeting and that new Directors were elected. Instead, McFarland's objections to Hannemann's election as Board Director in 2015, and his election to the office of HOA President in 2015 and 2016, rest on his assertion that Hannemann had not timely paid his 2013 and 2014 assessments, and thus he was not a member "in good standing" and not eligible to vote or hold an HOA office. However, neither

the evidence nor the HOA governing documents support/justify McFarland's objection to Hannemann's status as a member in good standing.

2. Hannemann's Status as a Member in Good Standing and Eligible to Vote

Pursuant to Section 8.C.3 of the Articles, the HOA has the power to set a budget and to make, levy, and collect assessments, and that power is assigned to the HOA Board of Directors under By-Laws § 6(A)(1). [ROA 058, 069.] By-Laws § 6(B)(4) imposes a duty on the HOA Board to fix the amount of the annual assessments, and By-Laws § 15(B) gives the Board power to impose reasonable monetary fines for late assessment payments. [ROA 070, 081.] By-Laws § 6(A)(12), together with By-Laws § 15(B) empowers the Board to suspend the voting rights of a member in default in the payment of any assessment levied by the HOA. [ROA 069, 081.] However, nonpayment of an assessment does not automatically suspend the member's voting rights. The By-Laws clearly require affirmative Board action, but the undisputed facts show that no affirmative action has ever been taken by the Board to impose a late payment fee on Hannemann or to suspend his right to vote.

Prior to 2015, the last budget set and approved by the HOA Board was for the fiscal year June 1, 2011 – May 30, 2012. No budgets were set or approved by the Board for 2013 or 2014 because, after McFarland was removed from office at the October 4, 2012 Board meeting[10], McFarland refused to acknowledge Hannemann and Morris' proper election as Directors/Officers

[10] Of note, McFarland has made no contention that Hannemann was not "in good standing" in 2012. If, only for the sake of argument, the 2015 and 2016 member meetings were invalid – Hannemann remained and still remains a Director because once elected he becomes a "holdover" under S.C. Code Ann. § 33-8-105(e) until replaced, and he could not be removed as a Director except under the provisions of Section 4(C) of the By-Laws which allows a majority of the HOA members to remove a Director from the Board. No provision of the HOA governing documents allows McFarland to unilaterally strip Hannemann of his seat on the Board or suspend his voting rights.

and refused to turn over HOA records. Instead, McFarland maintained a stronghold on the HOA business operations and finances and unilaterally issued invoices to the members for assessments in 2013 and in 2014 without seeking approval of a budget or the amount of the annual assessment. Hannemann did not pay his 2013 or 2014 assessment to McFarland because he was concerned about how HOA funds were being used by McFarland, so he gave checks to his attorney to hold.

McFarland had peremptorily sent out invoices for 2015 assessments ($1000), again without Board approval of a budget or the assessment amount. The newly elected HOA Board was unable to make a budget or set an assessment amount in 2015 because McFarland continued to withhold the information needed to create a budget or identify an appropriate assessment. Lacking this information, all Board members paid the 2015 assessment identified by McFarland. Eventually, in 2016 Hannemann opened a new bank account in the HOA's name and paid his assessment into the new HOA account. [ROA 475; Def. SJM Ex. 14.] Mr. Morris another Board member, also deposited his payment into the new HOA account. The HOA Board approved a budget and set the annual assessment at $600 in 2016, but McFarland sent his own (unapproved) assessment invoice to the HOA members for $1000.[11]

McFarland has tacitly acknowledged that Hannemann has paid annual assessments since 2012,[12] yet he still argues that Hannemann's payments into the new HOA account were not proper and timely because they were not paid to him for deposit in the HOA bank account over which he refused to surrender control. He also argues that Hannemann has not paid interest that allegedly automatically accrued, under Section 6.3 of the HOA Covenants, while his checks for the 2013

[11] McFarland also sent assessment invoices for $1000 for 2017 and $1000 for 2018.

[12] ROA 187; Tr. 65/6-7.

and 2014 assessments were being held by the attorneys. McFarland argues that, as a consequence of such nonpayment of assessments and/or interest, Hannemann was not "in good standing," and thereby, he was ineligible to vote or hold office in the HOA.

Covenants and By-Laws requiring the payment of homeowner assessments are contractual in nature and bind the parties to the covenants in the same manner as other contracts, and where the language imposing such covenants is unambiguous, the covenants will be enforced according to their obvious meaning. *See* Seabrook Island Property Owners Ass'n v. Pelzer, 292 S.C. 343, 356 S.E.2d 411, 414 (Ct.App.1987); Shipyard Property Owners Ass'n v. Mangiaracina, 307 S.C. 299, 414 S.E.2d 795, 801 (Ct.App.1992); First Fed. Sav. & Loan Ass'n of Charleston v. Bailey, 316 S.C. 350, 354, 450 S.E.2d 77, 79–80 (Ct. App. 1994). The HOA governing documents do not support McFarland's contentions about Hannemann's membership status or his ultimate position that Hannemann was not duly elected in 2015 and in 2016.

While McFarland insists that interest automatically accrued, in accordance with Section 6.3 of the Covenants, on the "late" payments in 2013 and 2014, Section 15(B) of the By-Laws sets forth an enforcement procedure that requires Board action to impose a late payment fee.[13] Similarly, while Section 6(A)(12) of the By-Laws do provide that a homeowner's voting right may be suspended for nonpayment of any assessment levied by the Association[14], that provision is not

[13] Likewise, the By-Laws provides that an equitable lien attaches for delinquent payments under §14(G), but § 14(H) requires Board action to institute legal action to collect and foreclose the lien. [ROA 079.] Yet, McFarland has unilaterally filed liens on Hannemann's home without any Board approval. The invalidity of those unauthorized liens undoubtedly will be the subject of some future litigation.

[14] One could entertain the question of whether such enforcement action could be taken for nonpayment of assessments, where such assessments were never actually authorized by the Board. However, Hannemann never sought to avoid his obligation to pay HOA assessments; rather, he merely believed that McFarland should be accountable and transparent in how the assessments were being made and spent.

self-activating. The enforcement procedure set forth in Section 15(B) requires affirmative action by the Board to suspend a member's voting rights.

It is undisputed that the HOA Board has never taken any action to charge Hannemann a late fee on any of his assessment payments or to suspend his voting rights as required by the By-Laws. Instead, McFarland attempts to gloss over the absence of such actions and justify his unilateral actions with an argument that any attempt to elicit such Board action would have been futile because Hannemann and Morris were the other two Directors and they would not have voted to suspend their own voting rights.

The Court of Appeals rejected essentially the same argument in the appeal of the 2012 Lawsuit when Hannemann raised the point that the HOA lacked standing based on the facts that the Board had not authorized the commencement of the legal action. There, the HOA, under the direction of McFarland, argued that McFarland's vote alone was sufficient to authorize the action because the other two Directors (Hannemann and Morris) had an alleged conflict of interest. As discussed above, the Court of Appeals held that, even if McFarland was the only director eligible to vote, § 33-31-831(e) prohibits such action by a single director. [ROA 484; Def. SJM Ex. 17.]

McFarland's attempt to excuse the lack of Board action cannot prevail in the face of the facts that McFarland never attempted to work within the processes provided in the HOA governing documents. McFarland has not attended a properly-noticed Board meeting since before 2012. To the extent that McFarland insists that he has remained the HOA President since 2012, he has never utilized his self-proclaimed authority as a holdover Director/President to call a HOA member meeting to seek HOA member input or action on the question of Hannemann's membership/voting status. Instead, McFarland has repeatedly attempted to block Hannemann from calling any HOA member meetings and he boycotted the member meetings that were held in 2015 and 2016.

In 2015, all three Director slots were open, and Hannemann and Morris owned only two of the seven lots. McFarland had ample opportunity to line-up support among three other members to constitute a majority to elect different directors, and then petition a new Board to suspend Hannemann's and Morris' voting rights. By refusing to even attempt to work within the governing process proscribed by the HOA's governing documents, McFarland may not rely on "futility" as an excuse for his choice to boycott the HOA meetings and continue his stranglehold on control of the HOA (by refusing to cooperate in the orderly transfer of the records and funds necessary to continue effective operations of the HOA business).

From another perspective, as considered by the Trial Court, McFarland waived his objections to Hannemann's membership voting status by failing to appear at the 2015 and 2016 meetings. "A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387–88 (1992), *cited in* Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 428, 673 S.E.2d 448, 453–54 (2009). The record does contain an email that McFarland sent to Hannemann (and Morris) on May 1, 2015, objecting to them calling a member meeting based on his opinion that they did not have authority because they were not members in good standing insomuch as they had not timely paid their 2013 and 2014 assessments. [ROA 482; Def. SJ Motion Ex. 16.] However, McFarland's unilateral pronouncement that Hannemann (and Morris) were not in good standing did not make it so. Under the By-Laws, Hannemann and Morris retained their voting rights until an affirmative action was taken by the HOA, whether by the Board or the members. When McFarland let the 2015 and 2016 meetings proceed without seeking the

suspension of their voting rights, he waived any objection to the validity of the actions taken at those meetings.

****

Nothing in the HOA governing documents or the law generally applicable to property owners associations makes it acceptable for McFarland to proclaim himself as the sole authority to operate the HOA. McFarland has no legal justification to unilaterally set assessments and impose late fees, then peremptorily declare that Hannemann was not in good standing, all while boycotting meetings and denying access to HOA records and finances. In the final analysis, irrespective of all the arguments, the defining points of law and fact are clear and undisputed. A member's voting rights cannot be suspended without affirmative Board action, and the Board has never taken any action to suspend Hannemann's voting rights. Accordingly, Hannemann is entitled to a declaration that he was duly elected as to the Board as a Director and to the office of President of the HOA, and that he is entitled to injunctive relief to compel McFarland to turn over/surrender the HOA records and finances.

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO HANNEMANN ON MCFARLAND'S COUNTERCLAIMS.

A. McFarland cannot state a cause of action conversion or breach of contract in regards to Hannemann's actions, as the duly elected HOA Director/President, in opening a new HOA bank account for deposits of HOA assessments after McFarland refused to transfer or relinquish control of the existing HOA bank account.

In his Amended Answer and Counterclaims, McFarland attempted to assert a cause of action for conversion or breach of contract based on Hannemann's establishment of a new HOA bank account into which he deposited HOA assessments paid by Hannemann and Morris. In light of the Trial Court's determination that Hannemann was the duly elected HOA President, the Trial Court correctly granted summary judgment to Hannemann on these counterclaims.

"'Conversion' is defined as the unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another, to the alteration of their condition or to the exclusion of the rights of the owner." Mullis v. Trident Emergency Physicians, 351 S.C. 503, 506–07, 570 S.E.2d 549, 550 (Ct. App. 2002). "In general, a breach of contract is defined as a failure without legal excuse to perform any promise which forms a whole or a part of a contract. A breach of contract may also include the refusal of a party to recognize the existence of the contract, or the doing of something inconsistent with its existence." 30 S.C. Jur. *Contracts* § 65 (citations omitted).

In attempting to state a cause of action for conversion/breach of contract, McFarland alleges that the bank account over which he has retained control, as the self-proclaimed de facto/de jure HOA President, is the only "one true bank account," and that Hannemann acted without authority when he opened a new HOA bank account and deposited assessments into that new account. [ROA 108; Amd. Answer ¶¶50-51.]

The key element to McFarland's counterclaim(s) is an unauthorized action. To establish a claim for conversion, McFarland would have to establish title or right to the property, i.e., the HOA assessments. Crane v. Citicorp Nat'l Servs., Inc., 313 S.C. 70, 72, 437 S.E.2d 50, 52 (1993).[15] Since the Trial Court has ruled and declared that Hannemann was the duly elected President of the HOA, the claim for breach of contract/conversion fails as a matter of law. As recounted above, McFarland had no right of ownership or possession over the HOA assessments. Under the circumstances, the actions Hannemann and Morris took in opening the new account and depositing their assessments demonstrate that their actions were a reasonable and prudent (and in

[15] Superseded on other grounds by S.C. Code § 36–9–628 (Supp.2001).

all likelihood, necessary) response to McFarland's wrongful refusal to relinquish control over the existing HOA bank account.

B. McFarland cannot state a cause of action for fees because he is not a "Declarant" or "Developer" within the meaning of the Declaration of Covenants and Restrictions.

Under the American Rule followed in South Carolina, the parties to a lawsuit generally bear the responsibility of paying their own attorneys' fees, and the prevailing party generally, cannot recover attorneys' fees and costs unless authorized by contract or statute. Maybank v. BB&T Corp., 416 S.C. 541, 580, 787 S.E.2d 498, 518 (2016); 2 S.C. Jur. *Attorney Fees* § 2; Trial Handbook for South Carolina Lawyers § 36:14 (4th ed.). McFarland requested attorney's fees and costs under two provisions in the HOA governing documents. Section 8.7 of the Covenants, provides for "Remedies for Violation of Restrictions," and states: "Should the Developer or Association employ counsel to enforce any of the foregoing covenants, conditions, reservations or restrictions, because of a breach of the same, all costs incurred in such enforcement, including a reasonable fee for the Developer's or Association's counsel, shall be paid by the Owner of such Lot(s) in breach thereof." [ROA 408-409.] Section 15(D) of the By-Laws contains a corollary provision, which states: "Should the Declarant or the Association employ legal counsel to enforce any of the [subdivision's governing documents], all costs incurred in such enforcement, including court costs and reasonable attorney's fees, shall be paid by the violating Owner." [ROA 082.]

McFarland does not have standing/authority to assert his counterclaim on behalf of the HOA because he did not have approval from the Board or the HOA members. Nor is the HOA a party seeking attorney's fees in this action. In the alternative, McFarland argues that he was a Developer and/or Declarant and is entitled to attorney's fees for asserting his counterclaim. Beyond the fact that McFarland did not prove that Hannemann breached or violated any HOA

covenants or restrictions, the Trial Court correctly rejected McFarland's argument because he is not a "Developer" or a "Declarant" under the terms of the HOA documents.

In the original Declaration of Covenants and Restrictions, recorded on October 8, 2002, the "owners" were identified as John R. Payne, Scott S. Drummond, LowCountry Signature Homes, Payne Homes, and The Village Development Corporation. [ROA 381; Defendant SJM Ex. #3.] An Amendment to the Declaration was recorded on November 26, 2002, and in the interim from the filing of the original Declaration, McFarland and his wife had purchased the first lot, and thus, they were identified as "owners." [ROA 412; Defendant SJM Ex. #4.] However, McFarland was never identified as a "Developer" or a "Declarant."

The HOA documents establish, beyond contravention, that Oak Village Development was designated as the "Developer" in both the original and amended Declaration of Covenants. [Id.] Oak Village Development also is identified as the "Declarant" in the HOA Articles. [ROA 056.] Likewise, the HOA By-Laws clearly states: "The developer of this Subdivision is the Declarant, Oak Village Development, LLC, referred to as 'Declarant.'" [ROA 065.]

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ITS CONSIDERATION OF ARGUMENTS AND DOCUMENTS SUBMITTED BY MCFARLAND AFTER THE MOTION HEARING.

As noted above, McFarland moved for summary judgment in August 2018, and Hannemann moved for summary judgment in April 2019. More than a year passed by the time those motions came before the Trial Court for hearing on June 16, 2020. Both parties had fully briefed their issues and submitted documents in support of their arguments. The Trial Court heard extensive argument on the motions, and the Trial Court ruled at the conclusion of the hearing with directions to Hannemann's counsel to submit a proposed order by July 13, 2020 after allowing McFarland's counsel to review it. [ROA 277-278, 304-305; Tr. 155-56, 182-83.] After providing

an advance draft to McFarland's counsel as instructed, Hannemann's counsel submitted the proposed order electronically at 10:41am on July 13, 2020. [ROA 807; See Docket sheet.] Less than two hours later, at 12:02pm on July 13, 2020, McFarland filed a supplemental memorandum with additional documents. [ROA 563.] McFarland then submitted a revised supplemental filing the next day. [ROA 618.]

In the order, as signed and filed on August 13, 2020, the Trial Court addressed this supplemental filing: "The Defendant [McFarland] 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." [ROA 014; 8/13/20 Order p. 3 n. 3.]

A trial court's decision to admit or exclude evidence and arguments presented after a motion for summary judgment has been heard is reviewed on appeal for abuse of discretion. Black v. Lexington Sch. Dist. No. 2, 327 S.C. 55, 60, 488 S.E.2d 327, 329 (1997). On review of a trial court's exclusion of evidence, the appellant must show both the error of the ruling and resulting prejudice. Recco Tape & Label Co. v. Barfield, 312 S.C. 214, 216, 439 S.E.2d 838, 840 (1994). The apppellant must show that the proffered evidence was relevant and even if relevant, exclusion is harmless if evidence it is merely cumulative to other admitted evidence. *Id.*

McFarland argues on appeal that the supplemental filings were not late because the Trial Court gave permission for post-hearing submissions. Whatever perception the Defendant's counsel might have had about having been granted permission to submit additional argument and evidence after the hearing, McFarland cannot point to any specific grant of a specific time for such submissions. Under the circumstances, the Trial Court was reasonable in finding that the

submission was not timely when it was made almost four weeks after the hearing and after the submission of a proposed order by Hannemann. Such finding of untimeliness was reasonable particularly where each and all of the documents were already in existence at the time of the hearing and no rational explanation was offered for the delay. In any event, even if the supplemental arguments and evidence arguably were timely, the Trial Court did, in fact, consider the evidence and found that those documents were not relevant. As discussed below, a review of the supplemental materials demonstrates that the documents were irrelevant or cumulative. Accordingly, any error in excluding the supplemental materials was not prejudicial to warrant reversing the Trial Court's rulings.

Supplemental Exhibit 18 is Judge Goodstein's order of March 15, 2015, in the 2012 Lawsuit, granting summary judgment to Hannemann and Morris on the HOA claims. [ROA 572.] Supplemental Exhibit 23 includes Judge Goodstein's order of the same date in that 2012 Lawsuit litigation granting summary judgment to the HOA on Hannemann/Morris' counterclaims for an accounting and conversion. [ROA 611.] The Court of Appeals' decision affirming the summary judgment granted to Hannemann and Morris had already been submitted by McFarland with his motion for summary judgment. [ROA 484; Def. SJM Ex. 17.] As discussed above, in the 2012 Lawsuit, the Court of Appeals held that the HOA lacked standing based on lack of HOA Board approval because McFarland was statutorily prohibited from acting for the Board as a single director. Accordingly, this supplemental "evidence" of Judge Goodstein's trial court order was superfluous and irrelevant. Likewise, Judge Goodstein's separate order granting summary judgment against Hannemann (and Morris) in the 2012 Lawsuit is irrelevant to the issues raised in this action as to Hannemann's status as HOA President.

Supplemental Exhibit 19 is a collection of correspondence and other documents about McFarland's objections to Hannemann/Morris' lack of good standing to call HOA meetings and/or serve as a directors/officers. [ROA 580-593.] Again, these documents are irrelevant or cumulative to the undisputed facts upon which the Trial Court relied to find that McFarland's objections to the 2015 meeting were meaningless where the Board never voted to suspend Hannemann/Morris' voting rights, and McFarland never appeared at any of the HOA member meeting to interpose his accusations that they were not in good standing.

Supplemental Exhibit 20 includes a copy of the deed evidencing McFarland's purchase of his lot and a letter from Mrs. McFarland to the IRS about HOA tax returns for 2005-2007. [ROA 594.] These documents are wholly irrelevant to his claim that he is a "declarant" or a "developer" entitled to attorneys fees under the HOA governing documents.

Supplemental Exhibit 21 contains emails with the property manager that Mrs. McFarland hired and correspondence from Hannemann and Morris to McFarland giving notice of a HOA Board meeting for June 17, 2013. [ROA 599.] To the extent that McFarland argues that these show some antaganism on the part of Hannemann and Morris, they are not relevant in the face of the irrefutabale fact that McFarland never pursued any process afforded under the HOA governing documents to prove his accusations and have them removed from the Board or to suspend their voting rights.

Supplemental Exhibit 22 is comprised of miscellaneous letters to HOA members from Hannemann (and/or the other Board members) spanning a time from April 2015 to February 2019. [ROA 604.] Those documents generally evidence the efforts to move forward with HOA business, and they are either irrelevant or cumulative to the other materials submitted by the parties. They

do not provide any basis for sustaining McFarland's contentions that Hannemann was not eligible to hold a position of leadership in the HOA.

Supplemental Exhibit 23 contains a series of correspondence from McFarland – purportedly in his capacity as the HOA President -- to the HOA members regarding assessments, budgets and financial issues for years 2017/2018, 2018/2019, 2019/2020, and 2020/2021. [ROA 611.] These materials are cumulative and redundant to the undisputed general fact that McFarland continued to unilaterally issue assessments and collect payments from other HOA members without authority after he had been removed as HOA President in 2012 (and after new directors and officers were elected in 2015 and 2016). Nothing in these documents can rebut the fact that Hannemann's voting rights have never been suspended in accordance with any legitimate process provided in the HOA governing documents.

IV. THERE ARE NO GROUNDS TO REVIEW THE TEMPORARY RESTRAINING ORDER.

As noted above in the Statement of the Case, the Trial Court granted a temporary restraining order to preserve the status quo while the Court was considering the summary judgment motions. [ROA 003; Order, filed 6/11/19.] The Trial Court's order suspended By-Laws §3(b) and prohibited the parties from noticing special HOA meetings during the pendency of the litigation. McFarland has appealed from the TRO and argues that the Trial Court did not have personal jurisdiction over the other five HOA members to prohibit them from exercising their rights to call a special HOA member meeting under By-Laws § 3(b).

A. The appeal from the TRO is now moot since a final order has been issued on the merits.

A temporary injunction expires upon entry of a final order on the merits and any challenges to a temporary injunction are moot:

> The trial judge's [final] Order renders this case nonjusticiable because any decision by this Court will not have a practical legal effect on the temporary injunction. The sole object of a temporary injunction is to preserve the subject of the controversy in its condition at the time of the order until opportunity is offered for full and deliberate trial investigation. Temporary injunctions are interlocutory, tentative, and impermanent and are superseded by the final judgment rendered on the merits. Thus, temporary injunctions 'remain in force only until, and expire upon, the entry of the final judgment and are not enforceable after the final judgment has been entered.'

Curtis v. State, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001) (citations omitted). In this case, the Trial Court affirmatively dissolved the TRO in his final order. Accordingly, there is no justiciable issue before the Court regarding the TRO.

B. McFarland does not have standing to appeal from the TRO on behalf of HOA members who are not parties to this action.

The HOA is not a party to this action and McFarland does not have the authority to appeal and raise the personal/individual rights of HOA members who have not intervened to protect their own rights. *See* Carolina All. for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 487, 523 S.E.2d 795, 800 (Ct. App. 1999) ("An organization has standing only if it alleges that it or its members will suffer an individualized injury; a mere interest in a problem is not enough."); Beaufort Realty Co. v. Beaufort Cty., 346 S.C. 298, 301, 551 S.E.2d 588, 589-90 (Ct. App. 2001) ("A party cannot appeal from a decision which does not affect his or her interest, however erroneous and prejudicial it may be to some other person's rights and interests."); Rule 201, SCACR ("Only a party aggrieved by an order, judgment, or sentence may appeal.")

Personal jurisdiction is an individual right. Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982); Golden State Indus., Inc. v. Cueto, 883 So. 2d 817, 820 (Fla. Dist. Ct. App. 2004) (The defense of lack of personal jurisdiction is a personal right.); Wiggins v. Physiologic Assessment Servs., LLC, 138 A.3d 1160, 1169 (Del. Super. Ct. 2016) (The

defense of lack of personal jurisdiction is a personal right.); Gen. Contracting & Trading Co., LLC v. Interpole, Inc., 940 F.2d 20, 22 (1st Cir. 1991) (The defense of lack of personal jurisdiction is a personal right.).

A party does not have the right to assert the personal rights of anyone else. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 804 (1985) ("a litigant must normally assert his own legal interests rather than those of third parties."); *see also* Vance Trucking Co. v. Canal Ins. Co., 338 F.2d 943, 944 (4th Cir. 1964) (personal defense could not be raised by anyone else). Accordingly, McFarland's appeal from the TRO should be dismissed.

CONCLUSION

As to the threshold standing issue, the record shows that Hannemann has standing to bring this declaratory judgment action to determine his status and rights as the duly elected HOA President. Contrary to McFarland's contentions, the HOA governing documents do not require that Hannemann obtain approval of the HOA Board or the HOA members prior to pursuing his action to determine his individual/personal position as a director and officer of the HOA. Moreover, the doctrine of judicial estoppel does not apply to any of the arguments or the holdings in the 2012 Lawsuit so as to preclude Hannemann from maintaining his legal standing in this action.

On the merits of Hannemann's status, the Trial Court properly granted summary judgment to Hannemann and declared that he was duly elected as HOA Director and President in compliance with the HOA governing documents. The HOA governing documents together with the relevant undisputed facts, as proven by all the evidence presented by both parties, establish, as a matter of law, that Hannemann was a member in good standing when he was elected as Director in 2015, reelected as President in 2015 and 2016. Beyond any argument about whether McFarland had the

authority to issue and collect the HOA assessments after 2012, or whether Hannemann owed any interest as late fees for his payment of his HOA assessments for 2013 and 2014, the fact remains that McFarland did not have any self-proclaimed, unilateral authority to strip Hannemann of his HOA voting rights and eligibility to serve as a director or officer of the HOA.

The Trial Court also properly granted summary judgment to Hannemann on McFarland's counterclaims for conversion or breach of contract and for attorney's fees. As of the 2015 HOA elections, Hannemann was duly elected as HOA Director and President, and McFarland had no right of ownership or possession over the HOA assessments. Thus, the claim for conversion/breach of contract fails as a matter of law because Hannemann had authority to establish the new HOA bank account when McFarland refused to surrender control of the existing HOA bank account. McFarland's counterclaim for attorney's fees also fails as a matter of law because he is not a "Declarant" or "Developer" within the meaning of the HOA governing documents.

Finally, McFarland's appeal from the temporary restraining order should be dismissed because appeal from the TRO was mooted by the final order, and McFarland does not have standing to appeal from the TRO on behalf of HOA members who are not parties to this action.

WHEREFORE, based on the foregoing, the judgment in favor of Respondent David Hannemann should be affirmed.

HOOD LAW FIRM, LLC

James B. Hood (SC #70212)
Virginia R. Floyd (SC #101849)
Deborah Harrison Sheffield, *Of Counsel* (SC # 2757)
172 Meeting Street
Post Office Box 1508
Charleston, SC 29402
Phone: (843) 577-4435
Facsimile: (843) 722-1630
Email: Info@hoodlaw.com

/s/James B. Hood
james.hood@hoodlaw.com

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

July 16, 2021

Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

/s/ James B. Hood
James B. Hood

July 16, 2021