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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Common Pleas

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No.: 2022-000031

Royal Garden Resort Regime Homeowners Association, Inc. ....Respondent

v.

Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson;
and Phoenix of the Strand, Inc. .... Appellants,

APPELLANTS' REPLY TO RESPONDENT'S INITIAL BRIEF

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ARGUMENT IN REPLY

Appellants, Sea Breeze Property Management & Contract Services, Inc. ("Sea Breeze"), Calvin Donaldson ("Donaldson"), and Phoenix of the Strand, Inc. ("Phoenix"), hereby submit this Reply to Respondent Royal Garden Resort Regime Homeowners Association, Inc.'s[1] Initial Brief. This appeal concerns Respondent HOA's April 28, 2021 Motion to Allow Entry, the Circuit Court's September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry, and the Circuit Court's December 30, 2021 Form 4 Order, which denied Appellants' Motion to Reconsider the Court's September 15, 2021 Order. Although Respondent HOA titled its April 28, 2021 motion as a "Motion to Allow Entry," Respondent HOA's Motion to Allow Entry clearly sought injunctive relief against Appellants in the form of an order requiring Appellant Phoenix to allow Respondent HOA and Horry Telephone Cooperative ("HTC") to enter storage closets belonging to Appellant Phoenix to rip out and install new cable television equipment, and to store such equipment within Appellant Phoenix's property in perpetuity, without payment therefor. (See 04/28/2021 Motion to Allow Entry). In granting Respondent HOA's Motion to Allow Entry, the Circuit Court's September 15, 2021 Order thus granted a mandatory injunction against Appellants. (See 09/15/21 Order Granting Motion to Allow Entry). Therefore, the grounds for this appeal are that neither Respondent HOA, in support of its Motion to Allow Entry, nor the Circuit Court, in granting Respondent HOA's Motion to Allow Entry and denying Appellants' subsequent Motion to Reconsider, complied with South Carolina's legal requirements for a grant of injunctive relief.

In its Initial Brief, Respondent HOA argues, under several theories, the Circuit Court had the authority to issue its September 15, 2021 Order. However, each of the arguments Respondent

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[1] Respondent Royal Garden Resort Regime Homeowners Association, Inc. shall hereinafter be referred to as "Respondent HOA."

HOA sets forth within its Initial Brief fail because Respondent HOA continues to mischaracterize the relief it sought within its April 28, 2021 Motion to Allow Entry as anything other than injunctive relief. Respondent HOA has thus never addressed the crux of the issue in this appeal, which is that no matter how Respondent HOA or the Circuit Court labeled the relief sought and granted in this case, such relief was that of a mandatory injunction against Appellants. As a result, the Circuit Court erred in granting a mandatory injunction against Appellants and denying Appellants' subsequent Motion to Reconsider because: (1) Respondent HOA failed to satisfy the requisite standard for a grant of such injunctive relief, (2) the Circuit Court failed to require Respondent HOA to issue bond; and (3) the Circuit Court failed to include any findings of fact or conclusions of law demonstrating Respondent HOA satisfied all necessary elements for the grant of a mandatory injunction. Further, even in the event the Circuit Court determined there was language in the Master Deed concerning the property at issue that entitled Respondent HOA to access Appellant Phoenix's property, such language does not extend to perpetual use of such property, which is governed contractually by the parties' Storage Facility Agreement. This Court should thus reverse the Circuit Court's September 15, 2021 and December 30, 2021 Orders accordingly. Appellants address each of Respondent HOA's specific arguments in turn herein.

I. Both Standards of Review Set Forth By Respondent HOA In Its Initial Brief Are Inapplicable To This Appeal.

In its Initial Brief, Respondent HOA argues this case concerns a grant of declaratory relief, rather than injunctive relief, and, as such, an "any evidence" standard of review should be applied on appeal. (Resp. HOA's Initial Brief, pp. 4-5). In the alternative, Respondent HOA argues that its April 28, 2021 Motion to Allow Entry could be construed as a Motion for Summary Judgment and reviewed by the Court of Appeals under the standard set forth in Rule 56 of the South Carolina Rules of Civil Procedure. (Id. at pp. 5-6). Notwithstanding the foregoing, both standards of review

suggested by Respondent HOA are inapplicable to this appeal because it is clear the relief sought by Respondent HOA in its April 28, 2021 Motion to Allow Entry and the relief granted by the Circuit Court in its September 15, 2021 Order is **injunctive** relief. As a result, the Court of Appeals should review this matter pursuant to Rule 65, SCRCP, South Carolina common law governing injunctive relief, and either make findings of fact in accordance with its own view of the preponderance of the evidence in this case or follow an abuse of discretion standard. (See Apps' Initial Brief, pp. 7-8).

A. This Appeal Concerns the Circuit Court's Grant of Injunctive Relief and the "Any Evidence" Standard Should Not Be Applied Herein.

For purposes of brevity, Appellants adopt and incorporate herein all facts presented within their Initial Brief in this matter. However, it is important to review the following facts. The Royal Gardens Horizontal Property Regime (the "Regime") is comprised of three (3) commercial condominium units and 206 residential units in fifteen (15) floors, as well as general common elements and limited common elements assigned to specific condominium units. (05/04/2019 Jeffcoat Aff., p. 2, para. 6). Amongst other things, Commercial Unit Two (2) of the Regime includes the storage rooms/supply closets on every floor of the building. (Id. at p. 3, para. 7(b)). By Order entered in this matter on November 8, 2019, the Circuit Court held Appellant Phoenix is and has been the record fee simple owner of Commercial Unit Two (2) since 1990. (11/08/2019 Order, pp. 1, 6). The Court's November 8, 2019 Order was not appealed and is the law of this case. See Judy v. Martin, 381 S.C. 455, 458-59, 674 S.E.2d 151, 153 (2009). **Therefore, it is uncontested that Appellant Phoenix is the owner of the storage rooms/supply closets on every floor of the Royal Gardens Resort building.**

In or around 2012, Respondent HOA sought to lease Appellant Phoenix's storage units for the purpose of placing and storing Time Warner Cable switch boxes therein. (See 02/01/2012

Storage Facility Ag., 05/04/2019 Jeffcoat Aff., p. 6, para. 10(f)). On February 1, 2012, Respondent HOA entered into a Storage Facility Agreement with Appellant Phoenix, wherein Appellant Phoenix agreed to lease to Respondent HOA fifteen (15) storage units on each walkway in the building in exchange for Respondent HOA's payment to Appellant Phoenix of $255.00 per month. (See 02/01/2012 Storage Facility Ag.). The Storage Facility Agreement has not been terminated to-date. (See Id.). However, since on or around February 1, 2019, Respondent HOA has refused to pay rent for its continued use of Appellant Phoenix's storage units.[2] (See 02/01/2019 Letter Re: Storage Facility Ag.).

Respondent HOA's Third Amended Complaint in this case contains nine causes of action against Appellants, **none of which allege any declaratory judgment cause of action concerning ownership of, right to access, and/or right to use Appellant Phoenix's storage units**. (See Third Am. Compl.) (emphasis added). None of Respondent HOA's causes of action seek that the Circuit Court construe the Regime's Master Deed with regard to the storage units contemplated by the Storage Facility Agreement. (Id.). Respondent HOA's Third Amended Complaint does not include a cause of action to rescind or otherwise terminate the parties' Storage Facility Agreement. (Id.). Notably, however, Respondent HOA's Third Amended Complaint **does seek** "a **mandatory injunction** enjoining [Appellants] from interrupting any telecommunications, cable television[,] or internet services on the property…"[3] (Id. at p. 3, para. 8) (emphasis added).

Like its cause of action for mandatory injunction within its Third Amended Complaint, Respondent HOA's April 28, 2021 Motion to Allow Entry seeks "an Order of the Court allowing

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[2] The cable television equipment for the Royal Gardens Resort is stored within Appellant Phoenix's storage units and remains undisturbed in such units to-date. However, Appellant Phoenix has not allowed Respondent HOA to access the storage units at issue to rip out the current cable television boxes and permanently install new ones because Respondent HOA has refused to make payment under the parties' Storage Facility Agreement.

[3] Respondent HOA has not claimed there has been any interruption to telecommunications, cable television or internet services on the property. (See Third Am. Compl., 04/28/21 Motion to Allow Entry).

[Respondent HOA] to enter supply closets located on various floors so that television cabling and equipment can be installed" and "barring [Appellant Phoenix] from charging [Respondent HOA] to use the access and/or supply closets for cabling and other telephone equipment necessary to provide cable tv services to the entire Resort." (04/28/2021 Motion to Allow Entry, pp. 1-2). In the same vein, the Circuit Court's September 15, 2021 Order granting Respondent HOA's Motion to Allow Entry orders a mandatory injunction against Appellant Phoenix requiring Appellants to "provide access to the storage closets on each of the floors (1-16) of the Royal Garden Resort" and to "provide keys to each of the storage closets on those floors (1-16) for the purpose of allowing Horry Telephone Cooperative to begin the installation process." (09/15/2021 Order Granting Motion to Allow Entry, p. 2).

Based upon the foregoing, it is disingenuous for Respondent HOA to characterize the relief it seeks within its April 28, 2021 Motion to Allow Entry as "declaratory relief" arising from "an action to construe a master deed." (See Resp. Initial Brief, p. 4). There is not a single cause of action within Respondent HOA's Third Amended Complaint wherein Respondent HOA has sought a declaratory judgment concerning ownership of, right to access, and/or right to use Appellant Phoenix's storage units or regarding the validity of the parties' Storage Facility Agreement. (See Third Am. Compl.). Respondent HOA's Motion to Allow Entry cannot be based upon a cause of action that does not exist and has never been asserted in this case.

What Respondent **has** asserted in this case is a claim for injunctive relief with regard to Respondent HOA's maintenance of cable television services at the Royal Gardens Resort. (Id. at p. 3, para. 8). Notably, during the hearing on Respondent HOA's Motion to Allow Entry, counsel for Appellants asserted the relief Respondent HOA sought in its Motion to Allow Entry was injuction. (See Hearing Transcript, p. 21, lines 1-3). Not only did counsel for Respondent HOA

not deny this assertion, but he compared the relief Respondent HOA sought in its Motion to Allow Entry to a prior Motion for Injunction Respondent HOA filed in May 2019. (Id. at pp. 22-23). It is thus clear Respondent HOA's Motion to Allow Entry arises out of its cause of action for mandatory injunction and, in turn, the Circuit Court's September 15, 2021 Order granting a mandatory injunction. (See 04/28/2021 Motion to Allow Entry, pp. 1-2, Hearing Transcript, pp. 19-23, 09/21/2022 Order Granting Motion to Allow Entry). Therefore, Respondent HOA's argument that an "any evidence" standard of review applies to this appeal is without merit. For these reasons, the Court of Appeals should apply the standard of review applicable to a grant of injunctive relief, as set forth in Appellants' Initial Brief. (See Apps' Initial Brief, pp. 7-8).

B. This Appeal Concerns the Circuit Court's Grant of Injunctive Relief and the Standard of Review for a Grant of Summary Judgment Should Not Be Applied Herein.

As an alternative to its argument that this appeal concerns a grant of declaratory relief, Respondent HOA argues the Court of Appeals could construe its Motion to Allow Entry as a motion for summary judgment and apply a summary judgment standard of review to the Circuit Court's September 15, 2021 Order. (See Resp. Initial Brief, pp. 5-6). Respondent HOA's argument supporting the application of a summary judgment standard of review fails for the same and/or substantially similar reasons as set forth in Section I(A) above.

Based upon the foregoing facts and arguments, it is clear Respondent HOA's Motion to Allow Entry seeks injunctive relief and the Circuit Court's September 15, 2021 Order grants a mandatory injunction against Appellants. (See supra Section I(A), pp. 3-6). Language within the Circuit Court's September 15, 2021 Order and communications between counsel for the parties and the Circuit Court further demonstrate the September 15, 2021 Order was not an order granting summary judgment in favor of Respondent HOA.

First, the Circuit Court's September 15, 2021 Order states "all issues regarding any contract claims by [Appellants] concerning leases of the storage closets are reserved for trial consistent with this Court's Order Denying Summary Judgment on that issue." (09/21/2022 Order Granting Motion to Allow Entry, p. 2). Such language demonstrates the September 15, 2021 Order at issue herein was not a final Order construing the parties' rights concerning Appellant Phoenix's storage units. (Id.). Such language also evidences the fact that there was at least one summary judgment motion pending at or around the same time as Respondent HOA's Motion to Allow Entry, to which the Circuit Court expressly referred in its September 15, 2021 Order. (Id.). The Circuit Court easily could have identified its September 15, 2021 Order as an order granting summary judgment had that been appropriate. The Circuit Court did not do so.

Second, in email correspondence between counsel for the parties and the Circuit Court between August 24, 2021 and August 25, 2021, counsel for Respondent HOA specifically notes that the issues between the parties concerning whether anything is owed for Respondent HOA's continued use of Appellant Phoenix's storage units is an issue of fact to be decided by the jury at trial. (See August 2021 Email Corr.). Therefore, comparable to the language contained in the Circuit Court's September 15, 2021 Order, Respondent HOA's counsel has previously acknowledged the Circuit Court's September 15, 2021 Order was not a grant of summary judgment and there are outstanding issues of fact for trial as it concerns Respondent HOA's use of Appellant Phoenix's storage units. Respondent HOA cannot now argue its Motion to Allow Entry concerned only questions of law and that there were no genuine issues of material fact between the parties. Moreover, because Respondent HOA has not alleged any cause of action concerning the parties' Storage Facility Agreement or Respondent HOA's rights to use or access Appellant Phoenix's

storage units, no cause of action exists upon which the Circuit Court could have rendered summary judgment.

Based on the foregoing, Respondent HOA's argument that a summary judgment standard of review should be applied to this appeal fails. Therefore, the Court of Appeals should apply the standard of review applicable to a grant of injunctive relief, as set forth in Appellants' Initial Brief. (See Apps' Initial Brief, pp. 7-8).

II. The Circuit Court Did Not Have Sufficient Evidence To Grant a Mandatory Injunction Against Appellants.

In Section I of its Initial Brief, Respondent HOA argues the Circuit Court's September 15, 2021 Order granting Respondent HOA's Motion to Allow Entry should be affirmed because the Circuit Court "had ample evidence" to grant such motion. (See Resp.'s Initial Brief, pp. 6-10). However, each of Respondent HOA's arguments fail because they are all based on the improper assertion that Respondent HOA's April 28, 2021 Motion to Allow Entry, the Circuit Court's September 15, 2021 granting Respondent HOA's Motion to Allow Entry, and the Circuit Court's December 30, 2021 Form 4 Order denying Appellants' Motion to Reconsider do not concern injunctive relief, thus an "any evidence" or summary judgment standard of review should be applied herein. (Id. at pp. 4-6, 11).

As outlined at length above, it would be improper for this court to apply an "any evidence" or summary judgment standard of review in this case because Respondent HOA's April 28, 2021 Motion to Allow Entry and the Circuit Court's September 15, 2021 and December 30, 2021 Orders concerning such Motion clearly and unequivocally concern Respondent HOA's request for and the Circuit Court's grant of **injunctive relief** against Appellants. (See supra Section I, pp. 2-8) (emphasis added). As a result, the evidence before the Circuit Court concerning Respondent

HOA's April 28, 2021 Motion to Allow Entry must be analyzed pursuant to South Carolina law governing injunctive relief.

South Carolina law makes clear that a plaintiff's complaint must allege facts sufficient to constitute a cause of action for injunction and demonstrate it is reasonably necessary to protect the legal rights of the plaintiff pending in the action. AJG Holdings, LLC v. Dunn, 382 S.C. 43, 50-51, 674 S.E.2d 505, 508 (Ct. App. 2009) (internal citations omitted). In order for an injunction to be granted, the plaintiff must demonstrate: (1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. Dunn, 382 S.C. at 51, 674 S.E.2d at 508 (internal citations omitted), Peek v. Spartenburg Reg'l Healthcare Sys., 367 S.C 450, 454, 626 S.E.2d 34, 36 (Ct. App. 2005) (internal citations omitted). Appellants have already argued within their Initial Brief how Respondent HOA failed to demonstrate the requisite elements entitling it to injunctive relief in the lower court. (See Apps' Initial Brief, pp. 8-16). Appellants thus adopt and incorporate all such arguments herein. It is further important to note Respondent HOA has not even attempted to demonstrate its compliance with the requisite elements of a grant of injunctive relief. Respondent HOA has carefully avoided any discussion of injunctive relief – arguably because it knows it cannot demonstrate its entitlement to a grant thereof.

In its Initial Brief, Respondent HOA states it offered the following documents to the Circuit Court in support of its April 28, 2021 Motion to Allow Entry: (A) the Regime's Master Deed;[4] (B) a prior cable communications easement; (C) a July 30, 2021 Supplemental Affidavit of Daniel W.

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[4] Respondent HOA did not enter into the record or present the Circuit Court with a complete copy of the Regime's Master Deed. (See 04/28/21 Motion to Allow Entry). Rather, Respondent HOA attached a one page excerpt from the Regime's Master Deed, which includes Article IX, Section 2 of the Regime's Master Deed, as the sole Exhibit to Respondent HOA's Motion to Allow Entry. (See Id.). Therefore, any and all references to the "Master Deed" herein shall encompass only Article IX, Section 2 of the Regime's Master Deed.

Stacey, Jr.; (D) an August 2, 2021 Affidavit of Stephen Hunt, Jr.; (E) a September 28, 2021 Affidavit of Stephen Hunt, Jr.; and (F) an August 2, 2021 Affidavit of Harold Outz. (Resps' Initial Brief, pp. 6-10). Analyzing Respondent HOA's arguments under the standard for a grant of injunctive relief, Respondent HOA cannot demonstrate it satisfied such standard.

First, four of the six documents Respondent HOA asserts it offered to the Circuit Court in support of its Motion to Allow Entry - the Master Deed, the July 30, 2021 Supplemental Affidavit of Daniel W. Stacey, Jr., the August 2, 2021 Affidavit of Stephen Hunt, Jr., and the August 2, 2021 Affidavit of Harold Outz - only concern Respondent HOA's alleged entitlement to use and/or access Appellant Phoenix's storage units. (See Master Deed, 07/30/21 Supp. Aff. of Dan Stacy, Jr., 08/02/21 Aff. of Stephen Hunt, Jr., 08/02/21 Aff. of Harold Outz). As a result, these documents do not support the injunctive relief elements of irreparable harm or inadequate remedy at law. At most, these documents could only potentially be considered as evidence of the injunctive relief element of "likelihood of success" at trial – i.e., evidence that Respondent HOA may have some right to use and/or access Appellant Phoenix's storage closets in support of a claim for such rights. However, the immediate issue that arises is **Respondent HOA has never asserted an underlying cause of action concerning ownership of or right to use and/or access Appellant Phoenix's storage closets.** (See Third Am. Compl.). Therefore, there is no underlying claim upon which Respondent HOA can or may succeed that justifies a need for the mandatory injunction granted by the Circuit Court in its September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry.

Second, Respondent HOA's assertion that it "offered" a prior cable communications easement to the Circuit Court in support of its Motion to Allow Entry is simply untrue. (Resp's Initial Brief, pp. 6, 7). Respondent HOA has never entered a February 7, 2006 Time Warner Cable

Communications Easement into the record in this case and such easement was never offered, presented, or considered by the Circuit Court in this matter. It is thus wholly inappropriate and improper for Respondent HOA to attempt to include any such easement in the Record on Appeal. It is further improper for Respondent HOA to assert, in its Initial Brief, that the Circuit Court relied upon an easement document it never had as a basis for granting Respondent HOA's Motion to Allow Entry. Nonetheless, even if the easement had been presented to the Circuit Court and entered into the record in the underlying case, such easement, like the documents discussed in the preceding paragraph, could only potentially be considered as evidence that is encompassed under the likelihood of success element required for a grant of injunctive relief.

Third, the only other remaining document referenced by Respondent HOA as evidence presented to the Circuit Court in support of its Motion to Allow Entry is a September 28, 2021 Affidavit of Stephen Hunt, Jr. (Id. at p. 9). However, Respondent HOA admittedly did not file such Affidavit until **after** the Circuit Court entered its September 15, 2021 Order granting Respondent HOA's Motion to Allow Entry. (Id.). As a result, such Affidavit could not have been considered by the Circuit Court in granting Respondent HOA's Motion to Allow Entry. Moreover, if the Circuit Court declined to grant Appellants' Motion to Reconsider based upon information within the September 28, 2021 Affidavit of Stephen Hunt, Jr., the Circuit Court's reliance upon such Affidavit in doing so would be inappropriate and another basis for reversal of the Court's December 30, 2021 Form 4 Order denying Appellant's Motion for Reconsideration. See Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004) (holding that courts should not consider any points not presented previously and considered by the court when evaluating a motion for reconsideration under Rule 59(e), SCRCP) (internal citations omitted).

In sum, Respondent HOA failed to satisfy South Carolina's requirements for a grant of injunctive relief, as there was no evidence of irreparable harm or inadequate remedy at law in the record at the time the Circuit Court entered its September 15, 2021 Order granting a mandatory injunction against Appellants. At most, Respondent HOA could argue that the documents it has identified within Section I of its Initial Brief demonstrate a likelihood of success on the merits. However, even that argument is without merit in light of the fact that Respondent HOA has not asserted a cause of action concerning rights to use or access Appellant Phoenix's storage units, or to construe the validity of the parties' Storage Facility Agreement. As a result, there is no underlying cause of action upon which Respondent HOA could potentially succeed that concerns Respondent HOA's use of and/or access to Appellant Phoenix's storage closets.

For these reasons, the Court of Appeals should reverse the Circuit Court's September 15, 2021 and December 30, 2021 Orders.

III. The Regime's Master Deed Does Not Give Appellant Phoenix the Right to Enter Appellant Phoenix's Storage Closets.

In Sections II and III of its Initial Brief, Respondent HOA argues the Court of Appeals should affirm the Circuit Court's September 15, 2021 and December 30, 2021 Orders requiring Appellants to allow Respondent HOA and/or HTC to access Appellant Phoenix's storage closets because Respondent HOA has a right to enter such storage closets under the language of the Master Deed. (See Resp's Initial Brief, pp. 10-13). Respondent HOA's argument is without merit because the relief granted by the Circuit Court encompasses not only short-term access but Respondent HOA's perpetual use of Appellant Phoenix's property, which is improper.

As discussed within Appellants' Initial Brief, the rights of an easement owner are limited. See Snow v. Smith ex rel. Stoudenmire, 416 S.C. 72, 86, 784 S.E.2d 242, 249 (Ct. App. 2015). Moreover, restrictions on the use of property, such as the easement within the Master Deed

Respondent HOA relies upon, are to be strictly construed in favor of the property owner, with all doubts resolved in favor of the property owner's free use of the property. See Hardy v. Aiken, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006) (holding courts are to construe any ambiguity in a restrictive covenant in favor of limited duration and against restricting property, with all doubts resolved in favor of the free use of the property). Here, the relief granted by the Circuit Court allows Respondent HOA to have new cable television equipment installed and stored, in perpetuity, within property owned by Appellant Phoenix, which is governed by the parties' Storage Facility Agreement. (See 09/15/21 Order Granting Motion to Allow Entry, Storage Facility Ag.). Therefore, the Circuit Court's September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry effectively allows Respondent HOA to avoid its contractual requirement to pay Appellant Phoenix rent for its use of Appellant Phoenix's storage closets. (Id.). Even if the Master Deed granted an easement giving Respondent HOA the right to briefly access the storage units at issue for a limited purpose, compliance with the Storage Facility Agreement is required to provide Respondent HOA with any right to long-term use of the storage units. (Id.).

Respondent HOA's argument regarding the language in the Master Deed defies logic. According to Respondent HOA, the Master Deed gives Respondent HOA the unilateral right to permanently store cable television boxes anywhere within the Royal Gardens Resort development. (Apps' Initial Brief, pp. 10-13). If such argument is true, why has Respondent HOA not stored cable television boxes on its own property or in one or more of the residential units of the building? The most likely answer to the foregoing is Respondent HOA knows how illogical its argument is. If Respondent HOA took the position it could permanently place its cable television boxes in residential units of the Royal Gardens Resort building, it would be laughed out of the Circuit Court. Appellant Phoenix's property in this matter is no different.

In 2012, the parties agreed that in order to permanently store cable boxes on Appellant Phoenix's property, Respondent HOA would pay Appellants $255.00 per month. (See Storage Facility Ag.). Respondent HOA abided by the parties' Storage Facility Agreement for nearly (7) years until a rogue Board of Respondent HOA's members took over in October 2018 and simply decided it did not want to honor its contractual obligations any further. (See 02/01/2019 Letter Re: Storage Facility Ag.). However, as previously noted, Respondent HOA has not alleged any cause of action to set aside any of its prior contracts,[5] and Respondent HOA is bound to honor such contracts by the business judgment rule. See Fisher v. Shipyard Village Council of Co-Owners, Inc., 415 S.C. 256, 270-71, 781 S.E. 2d 903, 910-11 (2016) (internal citations omitted) (holding that absent a showing of a lack of good faith, fraud, self-dealing, or unconscionable conduct by a corporate governing board in making a decision, prior decisions made by such board should be upheld). Allowing Respondent HOA to escape its contractual obligations without application of the business judgment rule sets a dangerous precedent, which could wreak havoc on every corporation in South Carolina and ever person or entity they do business with, whenever a new corporate governing board is elected.

For these same reasons, the Circuit Court erred in granting Respondent HOA's Motion to Allow Entry. The parties entered into a valid and binding Storage Facility Agreement in 2012, which Respondent HOA abided by for nearly seven (7) years. (See Storage Facility Ag., 02/01/2019 Letter Re: Storage Facility Ag.). Although Respondent HOA has not alleged any cause of action in this case that seeks a declaration of the Storage Facility Agreement's validity or any cause of action to declare such contract void, even if Respondent HOA had sought a declaratory judgment as to the validity of the contract, the Circuit Court would not have the

[5] (See Third Am. Compl.).

authority to review Respondent HOA's decision to enter into the Storage Facility Agreement, as such decision is subject to the business judgment rule. See Fisher, 415 S.C. at 270, 781 S.E. 2d at 910 (2016) (internal citations omitted) (holding a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith).

In addition to the foregoing, Respondent HOA's arguments within Sections II and III of its Initial Brief continue to mischaracterize Respondent HOA's Motion to Allow Entry as a motion for declaratory relief, even though, as argued at length above, Respondent HOA has never asserted a cause of action in this case to construe the Master Deed as it concerns Appellant Phoenix's storage closets or to assess the validity of the parties' Storage Facility Agreement. Therefore, the Court of Appeal should not review these issues under any standard other than that of injunctive relief. Accordingly, regardless of what the Circuit Court determined with regard to the language of the Master Deed, the standard for a grant of injunctive relief must be met and a bond must be issued in this case. See AJG Holdings, LLC v. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009). Respondent HOA failed to satisfy South Carolina's legal standard for a grant of injunctive relief, the Circuit Court failed to require Respondent HOA to meet such standard, and the Circuit Court further failed to require a bond in this case. Therefore, regardless of what determinations, if any, the Circuit Court made regarding the Master Deed, it erred in granting a mandatory injunction against Appellants. The Circuit Court's September 15, 2021 and December 30, 2021 Orders should thus be reversed.

IV. Appellants Have Been Harmed By the Circuit Court's Grant of a Mandatory Injunction Against Appellants.

In Section IV of its Initial Brief, Respondent HOA argues that no harm will result from Respondent HOA being allowed to access and use Appellant Phoenix's storage closets. (Resp's

Initial Brief, p. 13). Respondent HOA further states "the denial by Appellants to allow the HOA and its homeowners access to a utility created irreparable harm." (Id.). Respondent HOA's arguments with regard to harm are conclusory and unsupported by any evidence in this case. First, Respondent HOA did not present any evidence of irreparable harm in support of its Motion to Allow Entry. (See Hearing Transcript, pp. 19-23). At most, counsel for Respondent HOA argued Respondent HOA **wants** to enter Appellant Phoenix's property and/or to allow third parties to do so simply because the HOA **wants** to change its television provider from Spectrum to HTC. (August 4, 2021 Hearing Transcript, pp. 19-20)[6] (emphasis added). Respondent HOA has never demonstrated a **need** to change cable providers. **In fact, Respondent HOA has never alleged a loss of service or set forth any other allegation of actual harm.** Therefore, it is clear there has been no harm to Respondent HOA in the matter, much less irreparable harm. Second, contrary to Respondent HOA's argument, Appellant Phoenix is being harmed every day Respondent HOA is allowed to use Appellant Phoenix's property for free in violation of the parties' Storage Facility Agreement. (See Storage Facility Ag.). Based on the foregoing, Respondent HOA's argument with regard to harm is unfounded and should not be given any merit by the Court of Appeals.

V. South Carolina Law Requires the Issuance of a Bond In Order to Grant Injunctive Relief.

In Section V of Respondent HOA's Initial Brief, Respondent HOA argues the Circuit Court did not err in failing to require Respondent HOA to pay bond in conjunction with its September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry. (Resp's Initial Brief, p. 14). Respondent HOA's argument is in direct contravention of South Carolina law and should be disregarded by the Court of Appeals.

[6] "We wrote [Appellants] a letter and said we want to change television service from Spectrum to Horry Telephone."

Rule 65(c), SCRCP, provides, in pertinent part, as follows:

> Except in divorce, child custody and non-support actions where the giving of security is discretionary, **no restraining order or temporary injunction shall issue except upon the giving of security by the applicant**, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

(emphasis added). The South Carolina Supreme Court has further held that even a nominal bond does not satisfy Rule 65(c), SCRCP. Dunn, 382 S.C. at 49, 674 S.E.2d at 508 (citing Atwood Agency v Black, 374 S.C. 68, 73, 646 S.E.2d 882, 884 (2007)). In Atwood, the South Carolina Supreme Court found that a nominal bond was improper "because it erroneously assume[d] the injunction [was] proper instead of providing an amount sufficient to protect appellants in the event the injunction [was] ultimately deemed improper." Atwood, 374 S.C. at 73, 646 S.E.2d at 884

Respondent HOA argues the Atwood case is inapplicable to this matter because it concerned an employment issue, rather than an easement. (Resp's Initial Brief, p. 14). Respondent HOA's argument has no merit. First, Rule 65(c), SCRCP, expressly states that "**no restraining order or temporary injunction shall issue except upon the giving of security by the applicant**." (emphasis added). Rule 65(c), SCRCP, also includes a list of specific exceptions to the bond requirement. However, nowhere within that list does Rule 65(c), SCRCP, identify property disputes as a particular subject matter where bond should not be issued as a requirement for a grant of injunctive relief. See Rule 65(c), SCRCP. Therefore, the plain language of Rule 65, SCRCP, contains a bond requirement applicable to this matter. If the South Carolina legislature had wanted to create an exception to the bond requirement for injunctions concerning property disputes such as the one at issue in this case, it had every opportunity to do so within Rule 65, SCRCP, and did not.

Second, in the Atwood case, the South Carolina Supreme Court did not limit its holding of a bond requirement to only a particular type of injunction case. Atwood, 374 S.C. at 73, 646 S.E.2d at 884. In the Dunn case, a matter involving covenants and restrictions concerning property, the Court of Appeals restates the holding in Atwood and reversed the trial court's decision to not require a bond with an injunction. Dunn, 382 S.C. 43, 674 S.E.2d 505 (Ct. App. 2009). In Dunn, the Court of Appeals also clearly delineates that failing to issue a bond and/or issuing only a nominal bond with an injunction is equivalent to the court assuming the injunction is proper, and to do so is erroneous. See Id., 382 S.C. at 49, 674 S.E.2d at 508. All of the foregoing makes clear that the Circuit Court erred in failing to require Respondent HOA to pay a bond as security for the mandatory injunction issued against Appellants. It is erroneous for either Respondent HOA or the Circuit Court to assume the relief granted is proper and to bypass South Carolina's legal requirements for issuing bond. Id.

Additionally, Respondent HOA has argued there is no damage to Appellants if bond is not required in this matter. (Resp's Initial Brief, p. 14). This is false for the same reasons argued above in Section IV of Appellants' Reply. Appellant Phoenix is harmed every single day that Respondent HOA avoids its obligations to pay for its use of Appellant Phoenix's storage closets, and is allowed to enter onto Appellant Phoenix's property, tear out equipment, and replace with new equipment.

Based upon the foregoing, the Circuit Court has erred in failing to require a bond in its September 15, 2021 Order Granting Respondent HOA's Motion to Allow Entry. The Circuit Court's September 15, 2021 and December 30, 2021 Orders should thus be reversed accordingly.

VI. <u>Respondent HOA's Initial Brief Is Not Properly Supported By the Record.</u>

Commensurate with the filing of this Reply, Appellants intend to file a separate Motion to Strike with regard to the factual statements set forth within Respondent HOA's Initial Brief. Appellants do not intend to duplicate their arguments from such Motion to Strike herein; however, it is important to note that Respondent HOA's Initial Brief does not contain any proper citations to the documents upon which Respondent HOA relies and/or asserts should be included in the Record on Appeal. Moreover, Respondent HOA has attempted to designate at least one document to be included in the Record on Appeal that was not in the record before the Circuit Court. Therefore, in addition to the other arguments Appellants have set forth in this Reply and in their Initial Brief, Appellants respectfully request they be permitted to re-file an amended Reply in the event the Court of Appeals grants Appellants' Motion to Strike and requires Respondent HOA to file an Amended Initial Brief with proper citations.

CONCLUSION

In sum, this case involves the Circuit Court's errors in granting a mandatory injunction against Appellants and should thus be reviewed under South Carolina's legal standard for injunctive relief. The Circuit Court erred in granting a mandatory injunction against Appellants, and by affirming such decision, because Respondent HOA failed to satisfy South Carolina's legal standard for a grant of injunctive relief. The Circuit Court further erred in failing to require Respondent HOA to pay a bond as security for the mandatory injunction. Moreover, there is a contract that governs the property dispute issues in this case, which the Circuit Court failed to take into account when granting the mandatory injunction at issue herein. Respondent HOA has failed to set forth any meritorious arguments in support of affirming the Circuit Court's September 15, 2021 and December 30, 2021 Orders within its Initial Brief. Based upon the foregoing, and the

arguments set forth within Appellant's Initial Brief, Appellants respectfully request the Court of Appeals reverse the Circuit Court's September 15, 2021 and December 30, 2021 Orders.

Respectfully submitted,

s/Douglas M. Zayicek
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Myrtle Beach, South Carolina

June 6, 2022

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Appellate Case No. 2022-000031

Royal Garden Resort Regime Homeowners Association, Inc..............................Respondent

vs.

Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc..Appellants

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PROOF OF SERVICE

The undersigned certifies that she is employed by the law firm of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A., attorneys for the Appellants, Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc., that she has mailed and emailed a copy of the Appellants' Reply to Respondent's Initial Brief, Appellants' Amended Designation of Matter, Appellants' Motion to Strike, and Proof of Service to counsel listed below this 6th day of June, 2022, with proper postage attached thereto.

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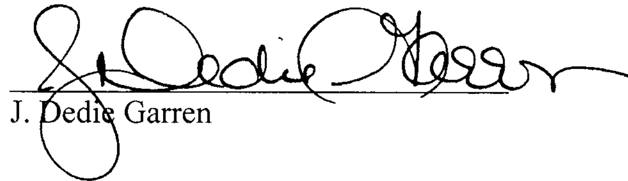

J. Dedie Garren

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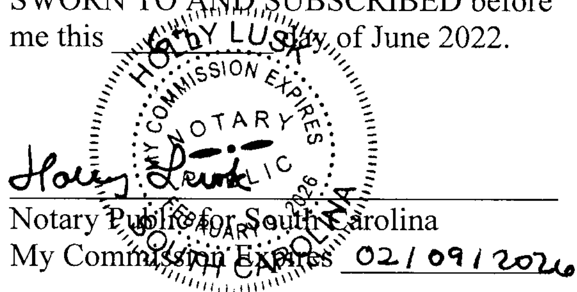
me this ____ day of June 2022.



Notary Public for South Carolina
My Commission Expires 02/09/2026

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June 6, 2022

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<u>VIA ELECTRONIC MAIL (AND U.S. MAIL, AS NOTED)</u>
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The South Carolina Court of Appeals
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ctappfilings@sccourts.org

Re: Royal Garden Resort Regime Homeowners Association, Inc. v. Sea Breeze Property Management & Contract Services, Inc.; Calvin Donaldson; and Phoenix of the Strand, Inc.
Case No. 2018-CP-26-06033
Appellate Case No. 2022-000031

Dear Ms. Kitchings:

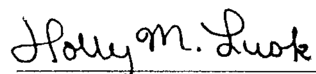
Enclosed for filing are the following:

1. Appellants' Reply to Respondent's Initial Brief (via email only);
2. Appellants' Amended Designation of Matter (via email only);
3. Appellants' Motion to Strike (via email only);
4. A check in the amount of $50.00 for the Court of Appeals' Motion filing fee (via email and U.S. Mail); and
5. Proof of Service of items 1-4 identified above (via email only).

By copy of this letter, and pursuant to the enclosed Proof of Service, I hereby serve the Respondent, through its attorneys of record, with the foregoing documents. At your convenience, please return clocked copies to us of the foregoing documents, via electronic mail.

If the Court needs anything additional, please do not hesitate to let us know.

Sincerely,



Douglas M. Zayicek
Holly M. Lusk

Enclosures

cc: Gene M. Connell, Esq.
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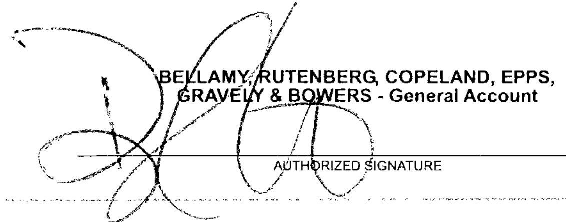

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MEMO: ROYAL GARDEN V. SEA BREEZE ET AL AP

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