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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-606

Filed: 19 June 2018

Henderson County, No. 11 CVS 784

HOMESTEAD AT MILLS RIVER PROPERTY OWNERS ASSOCIATION, INC., Plaintiff,

v.

BOYD L. HYDER, HOMESTEAD AT MILLS RIVER, LLC, RIVER OAKS JOINT VENTURE, LLC, BILTMORE FARMS HOMES, L LC, DARRIN B. BALL, DANA B. BALL, WILLIAM R. GIBSON, JOAN M. GIBSON, THOMAS G. GIBSON, RITA R. GIBSON, JAMES H. MARTIN, III, KASANDRA R. MARTIN, CARL JERRY BALL, LAUNA B. BALL, JAMES E. ELLIS, SR., MARY J. ELLIS, PALLADIUM BUILDERS, INC., WILLIAM P. EWALD, DEBORAH A. EWALD, WILLIAM R. HUTCHISSON, JR., CO TRUSTEE OF THE WILLIAM R. HUTCHISSON, JR. AND RENE L. HUTCHISSON REVOCABLE TRUST DATED JUNE 9, 2005, RENE L. HUTCHISSON, CO - TRUSTEE OF THE WILLIAM R. HUTCHISSON, JR. AND RENE L. HUTCHISSON - REVOCABLE TRUST DATED JUNE 9, 2005, MARCUS L. HORNE, JR., LAURA L. HORNE, EASYSTREET PROPERTIES, LLC, MOORE & SON SITE CONTRACTORS, INC., WILLIAM F. STANFIELD, SR., PETER DEBLIEUX, KAREN DEBLIEUX, EDWARD H. McELRATH, JAMES R. MOORE, VAUN R. MOORE, JOHN E. CUTTINO, SARAH R. CUTTION, BENJAMIN D. McCOY, NATALIE W. McCOY, BRADFORD D. WELCH, SUSAN M. WELCH, ROBERT H. MEDLEY, LISA M. MEDLEY, SCOTT E. McELRATH, TIMOTHY C. HEFFNER, DEBORAH H. HEFFNER, JOHN L. JOHNSON, JR., LOUISE P. JOHNSON, PENELOPE P. WALLQUIST, TRUSTEE OF THE PENELOPE P. WALLQUIST AMENDED & RESTATED REVOCABLE TRUST U/A/D AUGUST 2 3, 2000, HARRY N. GOUSIS, KRISTIE K. FINCH, DARLENE HARZOG, WILLIAM L. COWARD, PETER NILSEN, TAMARA NILSEN, DAVID A. HARRIS, LESA HINSON McABEE HARRIS, THE MIRIAM N. FORREST LIVING TRUST, DATED MARCH 23, 2005, FLORIAN L. WILSON - MULLIS, CHARLES F. WEST, DEBRA J. WEST, 3 M'S LLC , TIMOTHY A. HIGHLEY, LISA A. TAPP, JULIE A. LAPKOFF, KEITH T. McELRATH, RUSSELL H. NIXON, JOHNSIE B. NIXON, JOHN E. MANSEN, INGRID R. MANSEN, RICHARD L. TATUM, CATHERINE M. TATUM, SERAPHIM M. RINE, CYNTHIA D. RINE, JEFFREY G.J.

CHITTENDEN, REBECCA P.K. CHITENDEN, DAN ROOKER, RENEE ROOKER, MARION DELORENZO, STEVE HEDDEN a/k/a STEPHEN M. HEDDEN, BARBARA HEDDEN, JOHN C. STADLER, CARLOS D. OWEN, KIMBERLY A. OWEN, CYNTHIA G. HIRSCHEY, CHARLES KEVIN WHITE, ASHLEIGH B. WHITE, TERRY L. GAHAGAN, WHISTLESTOP INTERNATIONAL, LLC, DAVID J. ISRAEL, DAVID K. BALLARD, APRIL B. BALLARD, THOMAS W. MOORE, BEULAH S. MOORE, ANNETTE CLOOS, GREGORY CLOOS, FRE DERIC L. WIGHTMAN, DORIS J. KISTLER, DAVID R. CHARLTON, KATHLEEN F. CHARLTON, JOHN A. HORTON, III, LINDA B. HORTON, LINDA F. PIERCE, CO-TRUSTEE OF THE LINDA F. PIERCE REVOCABLE TRUST U/A/D JUNE 14, 2005, ROBERT W. PIERC E, CO - TRUSTEE OF THE LINDA F. PIERCE REVOCABLE TRUST U/A/D JUNE 14, 2005, CAROLINA MOUNTAIN LAND COMPANY, LL C , LYNN P. WILLIAMS, TRUSTEE OF THE LYNN P. WILLIAMS LIVING TRUST U/A/D SEPTEMBER 9, 2008, MIKE ELDER, ANN MARIA ELDER, HOMESTEAD AT MILLS RIVER PROPERTY OWNERS ASSOCIATION, INC., WELLS FARGO BANK, N.A., CAROLINA FIRST BANK, ARTHUR STATE BANK, TD BANK, N.A., SOUTH CAROLINA BANK & TRUST, N.A., BBB FUNDING, LLC, CHARLES SCHWAB BANK, UNITED COMMUNITY BANK, NATIONAL BANK OF SOUTH CAROLINA, ASHEVILLE SAVINGS BANK, HOMETRUST BANK, STEVEN M. ROSENBLOOM ET UX, LAURA S. HOWELL, SUNTRUST MORTGAGE, INC., and MOUNTAIN 1 ST BANK & TRUST, Defendants.

Appeal by Plaintiff from order and judgment entered 13 December 2016; and cross-appeal by Defendant from order entered 8 September 2016 and order entered 13 December 2016 by Judge Mark E. Powell in Superior Court, Henderson County. Heard in the Court of Appeals 8 January 2018.

James W. Lee III, Attorney at Law, by James W. Lee III, for Plaintiff-Appellant and Cross-Appellee.

Fisher Stark, P.A., by Brad A. Stark and W. Perry Fisher, II, for Defendant-Appellee and Cross-Appellant Boyd L. Hyder.

McGEE, Chief Judge.

Homestead at Mills River Property Owners Association, Inc. ("Plaintiff" or "the Association") appeals from the trial court's 13 December 2016 order granting a directed verdict in this matter for Boyd L. Hyder ("Defendant Hyder"). Defendant Hyder appeals the trial court's 8 September 2016 order denying his motion for summary judgment and the trial court's 13 December 2016 order denying his motion for reconsideration. For the reasons discussed below, we dismiss Plaintiff's appeal.

I. Background

Plaintiff is the homeowners' association for The Homestead at Mills River, a planned residential community ("the community" or "the development") located in Henderson County, North Carolina. The community was developed by Homestead at Mills River, LLC, and River Oaks Joint Venture, LLC, (collectively, "Developer-Declarant") beginning in or around 2003. Developer-Declarant recorded a three-slide plat of the development with the Henderson County Register of Deeds. One of the plat slides showed a tract of land near the entrance to the development labeled "Common Area" ("the Common Area"). The Common Area was initially platted as 6.2 acres, but was later re-platted as 5.88 acres. Developer-Declarant used a pre-existing structure in the Common Area as a business office and sales center. The Common Area also included a parking lot.

Scott McElrath ("McElrath"), a developer affiliated with Homestead at Mills River, LLC, testified that Developer-Declarant recorded numerous revised plats over

the course of several years, but each subsequently-recorded plat showed the Common Area as part of the development. Developer-Declarant also recorded restrictive covenants for the development. As early as April 2005, Developer-Declarant began selling lots within the development and granting deeds by reference to the recorded plat and subject to the restrictive covenants. On or about 8 July 2005, Developer-Declarant recorded an amendment to the restrictive covenants that reserved to Developer-Declarant "the right to modify the boundaries of The Homestead at Mills River to remove [] unsold properties from [t]he . . . planned community." The amendment provided, however, that Developer-Declarant's "right to move [sic] properties from the general plan of development . . . does not apply to Common Elements." Developer-Declarant recorded an "Amended and Restated Declaration of Restrictive Covenants Governing The Homestead at Mills River" ("the Declaration") on 8 December 2006. Among other things, the Declaration defined "Common Elements" as "any real estate or other property within [The] Homestead [at Mills River development] owned or leased by the Association, including any improvements thereon, other than a Lot."

Developer-Declarant encountered financial difficulties beginning in 2008. In an effort to mitigate outstanding debt, Developer-Declarant sold the Common Area to Defendant Hyder for $250,000.00 by general warranty deed recorded on 16 July 2009. Developer-Declarant also entered into an agreement with Defendant Hyder to

lease back the Common Area with an option to purchase. McElrath continued doing business in the sales center located in the Common Area.

Plaintiff filed a complaint on 25 April 2011 against Developer-Declarant and Defendant Hyder seeking a declaratory judgment determining "that the 5.88 acre [Common Area] tract is the sole property of [] Plaintiff or that [] Plaintiff and [] Defendant [Hyder] . . . own the [Common Area] tract as tenants in common and said tract may only be used by the lot owners of [the development]." Plaintiff contended Developer-Declarant's "act of recording plats showing common areas [within the development] was a dedication of the common areas for the exclusive use of the purchasers of the various lots[,]" and that every "owner deeded a lot . . . prior to [16 July] 2009[] was assured use of all common areas within the community and agreed to be a member of the homeowners' association and subject to the restrictive covenants of [the development] and therefore had a vested interest in [the Common Area]." Plaintiff further asserted that Defendant Hyder's

> contention that he is the sole owner of the [Common Area] property constitutes a cloud on the property and . . . [the deed conveying the Common Area to Defendant Hyder] does not indicate that the homeowners within the [development] have a vested interest in the [Common Area] property and purports to convey the entire property.

Defendant Hyder filed a motion to dismiss Plaintiff's complaint on 24 June 2011 for failure to state a claim upon which relief could be granted. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2017). The matter was set for hearing, but Defendant

Hyder subsequently withdrew the motion to dismiss, and filed an answer and counterclaim on 20 June 2012. Following a 22 January 2013 hearing on Defendant Hyder's first and second defenses, the trial court entered an order on 11 July 2013 directing Plaintiff to file an amended complaint adding as necessary parties to the action all owners of lots within the development, including lien holders.[1] Plaintiff filed its amended complaint on 7 August 2013.

Defendant Hyder filed a motion for summary judgment on 23 August 2016 "on the grounds that Plaintiff [did] not have a deed to [the Common Area] as a matter of public record, no violation of any [restrictive] covenants [were] alleged against Defendant [Hyder] . . . , and Plaintiff [did] not have standing to make the claims asserted against Defendant [Hyder][.]" Following a hearing, the trial court denied

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[1] In the first defense in his 20 June 2012 response to Plaintiff's complaint, Defendant Hyder asked the trial court

> to dismiss this action for failure to join a necessary party on the ground that all of the individual lot owners in the subdivision are the necessary parties together with each recorded lien holder on any lot in the subdivision. [] Plaintiff property owners['] association is not a proper party, and none of the homeowners or mortgagees have been joined as parties [by] Plaintiff."

No transcript of the 22 January 2013 hearing appears in the record on appeal. In the order entered 11 July 2013, the trial court stated it was

> of the opinion that the owners of the lots in the subdivision known as [T]he Homestead at Mills River together with each recorded lien holder on any and all of the lots in [T]he Homestead at Mills River are necessary parties and a complete determination of the rights of the parties cannot be made without the presence of each of those.

Defendant Hyder's motion for summary judgment on 8 September 2016 based on the court's conclusion that Defendant Hyder was "not entitled to judgment as a matter of law as to whether [] Plaintiff ha[d] standing to make the claims asserted against Defendant Hyder in this action as a matter of law." Defendant Hyder filed a motion for reconsideration of his motion for summary judgment on 29 November 2016, based on this Court's intervening decision in *Willowmere Community Association, Inc. v. City of Charlotte*, ___ N.C. App. ___, 792 S.E.2d 805 (2016), as well as Defendant Hyder's assertion that Plaintiff violated a provision of its corporate bylaws pertaining to suits against Developer-Declarant. The trial court entered an order on 13 December 2016 finding Defendant Hyder's motion for reconsideration was proper with respect to Developer-Declarant but not as to Defendant Hyder. Plaintiff's claims against Developer-Declarant were dismissed with prejudice.

The trial court heard all remaining issues at a trial on 28 November 2016. At the conclusion of Plaintiff's evidence, Defendant Hyder moved for a directed verdict. After hearing arguments of counsel, the trial court indicated it would dismiss Plaintiff's claims. Defendant Hyder dismissed his counterclaims without prejudice. The trial court entered an order on 13 December 2016 directing judgment for Defendant Hyder. Plaintiff appeals. Defendant Hyder cross-appeals from the trial court's 8 September 2016 order denying his motion for summary judgment and the

trial court's 13 December 2016 order denying his motion for reconsideration as to Defendant Hyder only.

II. Defendant's Cross-Appeal

We first address Defendant Hyder's cross-appeal from the order denying his motion for summary judgment, entered 8 September 2016, and the order denying his motion for reconsideration, entered 13 December 2016.

"Once a decision on the merits is reached through a trial, review of the denial of summary judgment is improper." *Reliance Ins. Co. v. Lexington Ins. Co.*, 87 N.C. App. 428, 432, 361 S.E.2d 403, 405-06 (1987) (citing *Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985)). Our Supreme Court explained in *Harris*:

> The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. After there has been a trial, this purpose cannot be served. Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury. The denial of a motion for summary judgment is an interlocutory order and is not appealable. An aggrieved party may, however, petition for review by way of certiorari. To grant a review of the denial of the summary judgment motion after a final judgment on the merits . . . would allow a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence. In order to avoid such an anomalous result, we hold that the denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in a trial on the merits.

314 N.C. at 286, 333 S.E.2d at 256 (citations omitted); *see also Zairy v. VKO, Inc.*, 212 N.C. App. 687, 689, 712 S.E.2d 392, 394 (2011) (noting "[o]rders denying . . . a motion to reconsider are interlocutory[]" and generally not immediately appealable).

In discussing this principle, however, this Court has "distinguish[ed] cases in which the trial court denie[d] motions *based on jurisdictional or similar grounds*, and there [wa]s no right of immediate appeal." *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 682, 340 S.E.2d 755, 758 (1986) (emphasis added). "In those cases the adverse party must, absent a successful petition for certiorari, submit to [a] trial on the merits. Only then will that party have a chance to appeal [the] denial of the original motion." *Id.* (citations omitted).

> The question of subject matter jurisdiction may be raised at any time, and while the denial of a motion to dismiss pursuant to [N.C. Gen. Stat. § 1A-1,] Rule 12(b)(1) [for lack of subject matter jurisdiction] is interlocutory, an appeal of the denial is no longer interlocutory once there has been a final judgment on the merits of the case.

In re Will of McFayden, 179 N.C. App. 595, 599-600, 635 S.E.2d 65, 68 (2006).

In the present case, Defendant Hyder moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56, rather than seeking dismissal for lack of subject matter jurisdiction under Rule 12(b)(1). *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001) ("Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss." (citations omitted)). However, among other arguments, Defendant Hyder asserted in

his motion for summary judgment that "Plaintiff [did] not have standing to make the claims asserted against Defendant Hyder in this action as a matter of law."[2]

"Standing is treated differently than most other issues because it is an aspect of subject matter jurisdiction." *Transcontinental Gas Pipe Line Corp. v. Calco Enter.*, 132 N.C. App. 237, 241, 511 S.E.2d 671, 675 (1999) (citation omitted). "Without standing, the courts of this State lack subject matter jurisdiction to hear a party's claims." *Am. Oil Co., Inc. v. AAN Real Estate, LLC*, 232 N.C. App. 524, 526, 754 S.E.2d 844, 846 (2014) (citation omitted); *see also Peacock v. Shinn*, 139 N.C. App. 487, 491, 533 S.E.2d 842, 845 (2000) ("[S]ubject matter jurisdiction exists only if a plaintiff has standing."). "[I]t is well-established that an issue of subject matter jurisdiction may be raised at any stage of a case and may be raised by a court on its own motion." *Sanford v. Williams*, 221 N.C. App. 107, 116, 727 S.E.2d 362, 368 (2012) (citation and quotation marks omitted). In *Sanford*, although the defendants did not file a motion to dismiss for lack of subject matter jurisdiction prior to the hearing on their motion for summary judgment, this Court addressed the issue of subject matter jurisdiction as a threshold question. *See id.*

In the present case, the *sole* reason cited by the trial court in its order denying Defendant Hyder's motion for summary judgment was the court's determination that

[2] In a memorandum filed in support of his motion for summary judgment, Defendant Hyder argued more specifically on the issue of standing that Plaintiff "ha[d] no authority under [its] restrictive covenants to bring this action where no violation [of the restrictive covenants] [was] alleged and none [had] occurred."

"Defendant [Hyder] [was] not entitled to judgment as a matter of law *as to whether [] Plaintiff ha[d] standing to make the claims asserted against Defendant Hyder* in this action[.]" (emphasis added). Defendant Hyder's motion for reconsideration was based exclusively on his assertion that "subsequent authority and the uncontroverted testimony of Plaintiff establish[ed] Plaintiff's lack of standing." In its order denying Defendant Hyder's motion for reconsideration, the trial court did not explicitly refer to standing, but stated it "[was] of the opinion that the [m]otion for [r]econsideration [was] . . . not [just and proper] as to Defendant [] Hyder." Because Defendant Hyder's only argument in support of his motion for reconsideration concerned Plaintiff's standing, we can reasonably infer that the trial court denied that motion on jurisdictional grounds. As discussed above, Defendant Hyder's appeal from the interlocutory orders denying his motion for summary judgment and motion for reconsideration would ordinarily be mooted by a final judgment on the merits. However, the record makes clear that the trial court denied both motions on jurisdictional grounds, and our precedent suggests Defendant Hyder's appeal is therefore not improper. Moreover, "issues pertaining to standing may be raised for the first time on appeal, including *sua sponte* by [this] Court." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 879 (2002) (citation omitted). We therefore address Plaintiff's standing to maintain this action.

III. Standing

A. *Standard of Review*

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011) (citations and quotation marks omitted).

> Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal. Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. Subject-matter jurisdiction derives from the law that organizes a court and cannot be conferred on a court by action of the parties or assumed by a court except as provided by that law. When a court decides a matter without the court's having jurisdiction, then the whole proceeding is null and void, *i.e.*, as if it had never happened.

Rodriguez v. Rodriguez, 211 N.C. App. 267, 270, 710 S.E.2d 235, 238 (2011) (citation and quotation marks omitted) (first emphasis added). "A *de novo* standard of review requires the appellate court to examine the case anew as if there had never been a trial court ruling." *Watson v. Brinkley*, 211 N.C. App. 190, 192, 712 S.E.2d 186, 188 (2011) (citation omitted).

B. *Analysis*

"Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *Street v. Smart Corp.*, 157 N.C. App. 303, 305, 578 S.E.2d 695, 698 (2003)

(citation and quotation marks omitted). Plaintiff bears the burden of demonstrating that standing exists. *See Myers v. Baldwin*, 205 N.C. App. 696, 698, 698 S.E.2d 108, 109 (2010).

Defendant Hyder has asserted throughout this litigation that Plaintiff lacked standing to initiate this action against him. Plaintiff contends it has standing to sue Defendant Hyder in a representative capacity on behalf of its individual members. According to Plaintiff, it satisfies the three prerequisites for association standing articulated by the United States Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 53 L. Ed. 2d 383 (1977), and restated by this Court in *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 552 S.E.2d 220 (2001):

> [A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.

Creek Pointe, 146 N.C. App. at 165, 552 S.E.2d at 225 (quoting *Hunt*, 432 U.S. at 343, 53 L. Ed. 2d at 394) (alteration in original). Plaintiff argues it meets all three prongs of the *Hunt* test because (1) each member of the Association "has an interest in and cognizable claim to the 5.88 acre [C]ommon [A]rea and [thus] has standing to sue in the member's individual capacity[;]" (2) the interests Plaintiff seeks to protect – "[t]he

defense of title to and maintenance of [the] [C]ommon [A]rea" – are "germane to the purpose of a subdivision homeowners' association[;]" and (3) Plaintiff's suit does not require the participation of its individual members, as it seeks only "declaratory relief on behalf of all its members[,]" and "[n]o monetary relief is sought and the relief which is sought is common to all members of the [A]ssociation." Plaintiff also contends it was authorized to bring this action pursuant to N.C. Gen. Stat. § 47F-3-102(4) (2017), which provides that "[u]nless the articles of incorporation or the declaration [of an owners' association] expressly provides to the contrary, the association may . . . [i]nstitute, defend, or intervene in litigation . . . on matters affecting the planned community[.]"

Defendant Hyder argues Plaintiff lacked standing to bring this action against him because (1) Plaintiff's Board of Directors ("the Board") violated a provision in the Association's bylaws ("the bylaws") "requir[ing] an affirmative vote of two-thirds [] of all qualified voting members as a pre-condition to any lawsuit being filed by Plaintiff 'on account of an act or omission of [Developer-]Declarant[;]'" and (2) Plaintiff did not suffer any injury in fact. Defendant Hyder submits this case "is similar to many cases in which [this Court found] a non-profit association . . . to lack standing because it failed to follow a governance provision in its own bylaws."

In support of this argument, Defendant cites this Court's holdings in *Willowmere Community Association, Inc. v. City of Charlotte*, ___ N.C. App. ___, 792

S.E.2d 805 (2016), and *Peninsula Prop. Owners Ass'n v. Crescent Res., LLC*, 171 N.C. App. 89, 614 S.E.2d 351 (2005). In both *Willowmere* and *Peninsula*, this Court held the plaintiff-associations lacked standing to sue, because the associations' directorship failed to comply with explicit bylaw provisions governing the directors' ability to act on behalf of the associations. In *Peninsula*, the plaintiff's bylaws and declaration of restrictive covenants contained a provision that required an affirmative vote of two-thirds of its members to "(1) file a complaint, on account of an act or omission of [the d]eclarant, . . . or (2) assert a claim against or sue [the d]eclarant." *Peninsula*, 171 N.C. App. at 90, 614 S.E.2d at 352. The plaintiff-association filed suit against the developer-declarant without obtaining the required two-thirds vote, and asserted the claims in its complaint "on behalf of the [association] itself, rather than individual homeowners." *Id.* at 91, 614 S.E.2d at 353. This Court concluded the *Peninsula* plaintiff's complaint was properly dismissed for lack of subject matter jurisdiction. We noted the two-thirds provision at issue in that case was "limited to situations where the [association] desire[d] to commence legal action against [the developer-declarant] directly or complain to a governmental agency about [the developer-declarant's] acts or omissions." *Id.* at 94, 614 S.E.2d at 354.

In *Willowmere*, the plaintiffs, two homeowners' associations, had bylaws that "permit[ted] their directors to sue regarding matters affecting their [respective] planned communities, [but provided that] the directors [could] only act through a

meeting or a consent action without a meeting." *Willowmere*, ___ N.C. App. at ___, 792 S.E.2d at 808. This Court concluded the associations lacked standing because their directors "failed to hold a meeting or take other action in accordance with their bylaws to authorize the filing of [the] lawsuit[,]" and further, the associations "presented [no] evidence that the boards took action in accord with their bylaws to ratify the filing of the lawsuit after the issue of standing was raised." *Id.* at ___, 792 S.E.2d at 812-13. Notably, unlike in *Peninsula*, the *Willowmere* defendants were neither members nor developers of the planned communities represented by the plaintiffs.

While the present appeal was pending before this Court, our Supreme Court reversed this Court's holding in *Willowmere*. *See Willowmere Community Association, Inc. v. City of Charlotte*, ___ N.C. ___, 809 S.E.2d 558 (2018). The Court held that "despite [the *Willowmere*] plaintiffs' failure to strictly comply with their respective bylaws and internal governance procedures in their decision to initiate [the] suit, they nonetheless possess[ed] a sufficient stake in an otherwise justiciable controversy to confer jurisdiction on the trial court to adjudicate [the] legal dispute." ___ N.C. at ___, 809 S.E.2d at 565 (citation and internal quotation marks omitted). The Court distinguished precedent of this Court "deal[ing] entirely with the plaintiff associations' capacity to enforce restrictive covenants against the defendant property owners," *id.* at ___, 809 S.E.2d at 562, and noted that, prior to this Court's decision in

Willowmere, our appellate courts had "[never] held . . . that a defendant who is *a stranger to the plaintiff association* may assert that the plaintiff's failure to abide by its own bylaws necessitates dismissal of the plaintiff's complaint for lack of standing[.]" ___ N.C. at ___, 809 S.E.2d at 563 (emphasis in original). The Court further noted that, "in *Peninsula*, the failure of the plaintiff[-association] to comply with [its] bylaws was raised by [the defendant-developer], *which was a member of the plaintiff association*." *Id.* (emphasis added). The Court observed that

> [o]ne of the underlying issues . . . in *Peninsula* was the very fact that [the defendant-developer] . . . had drafted the association's bylaws and explicitly included the two-thirds approval provision, which, in the plaintiff's view, contravened [the defendant-developer's] fiduciary duties as the controlling member of the association when the bylaws were created. *As a member of the plaintiff association and as the party that was clearly intended to benefit from the two-thirds approval requirement in the bylaws, [the defendant-developer] was entitled to raise the association's failure to comply with this provision of its bylaws as a bar to the plaintiff's suit*.

Id. (internal citation omitted) (emphasis added). After observing "[t]here [was] no evidence . . . suggesting that any member of the [*Willowmere* plaintiffs'] communities . . . opposed [the] plaintiffs' prosecution of [the] suit[,]" the Court "decline[d] to permit a defendant *who is a stranger to an association* to invoke the association's own internal governance procedures as an absolute defense to subject matter jurisdiction in a suit filed by the association against that defendant." *Id.* at ___, 809 S.E.2d at 564 (emphasis added). Although our Supreme Court stated that "[n]othing in our

jurisprudence on standing requires a corporate litigant to affirmatively plead or prove its compliance with corporation bylaws and internal rules relating to its decision to bring suit[,]" *see id.* at ___, 809 S.E.2d at 563, the Court repeatedly emphasized the third-party, non-member status of the party asserting a lack of standing in that case.

We find the present case factually distinguishable from *Willowmere* in several important respects. Here, although Defendant Hyder was not Plaintiff's Developer-Declarant, he was also not a "stranger" to the Association. Article XXVI of Plaintiff's Declaration provides that "[e]very person (or entity) who/which is a record owner of a fee or undivided fee interest in any lot that is subject to this Declaration shall be deemed to have a membership in The Homestead at Mills River Property Owners Association, Inc." Defendant Hyder thus became a member of the Association when he purchased the Common Area property in 2009. Article XXVI further provides that each lot owner "shall, by the acceptance of a deed or other conveyance for such lot, be deemed obligated to pay to the Association an annual assessment or charge . . . established by the Association[.]" Article XXXII of the Declaration provides in part that

> [e]ach grantee or purchase[r] of any lot or parcel shall, by acceptance of a deed conveying title thereto, . . . accept such deed or contract upon and subject to each and all of the provisions of this Declaration and all amendments thereto, and to *the jurisdiction, rights, powers, privileges and immunities* of Developer *and the Association* herein provided for.

(emphases added). Under the Declaration, the "rights" and "powers" of the Association include "the right to collect the amount [of past-due assessments] by an action at law against the [property] owner as for a debt, and [the Association] may bring and maintain such other suits and proceedings at law or at equity as may be available." Thus, when Plaintiff filed this action in 2011, Defendant Hyder was (1) a member of the Association, with attendant voting rights; (2) obligated to pay annual membership fees to the Association; and (3) subject to legal action by the Association for unpaid or past-due annual fees. Plaintiff's Declaration and bylaws permit the Association to use the funds collected from the annual assessments for a number of specific purposes, including "legal . . . fees" and "doing any other things necessary or desirable in the opinion of the Association to maintain the [d]evelopment." Jeffrey Buchanan ("Buchanan"), who was president of the Board at the time of trial, testified that lot owners paid annual dues of $700.00 each, and that, to Buchanan's knowledge, Defendant Hyder had paid annual dues to the Association since purchasing the Common Area property in 2009. Buchanan acknowledged the Association "accepted and cashed [Defendant Hyder's] check[s]." Buchanan agreed at trial that Defendant Hyder's membership dues had helped fund the Association's annual budget.

Defendant Hyder was a party to Plaintiff's governing articles. *See* N.C. Gen. Stat. § 55A-6-20 (2017) (providing in part that "[i]f a corporation has members, the designations, qualifications, rights, and obligations of members shall be set forth in

or authorized by the articles of incorporation or bylaws[.]"). Article XXXII of the Declaration provides in part that

> [e]ach grantee or purchaser of any lot or parcel shall, by acceptance of a deed conveying title thereto, or the execution of a contract for the purchase thereof, . . . consent and agree . . . to keep, observe, comply with[,] and perform the covenants, conditions[,] and restrictions contained in this Declaration, and all amendments and supplemental declarations thereto.

The Declaration authorizes both Plaintiff and Defendant Hyder to "proceed at law or in equity against any person or other legal entity *violating or attempting to violate any provisions of [the Declaration]*, either to restrain violation, to recover damages, or both." (emphasis added). Thus, when Defendant purchased the Common Area, he became both subject to the Declaration and authorized to enforce its terms.

In other contexts, our appellate courts have recognized that members of a corporation have the right to challenge the corporation's alleged failure to comply with corporate bylaws. *See*, *e.g.*, *Roberts v. Madison County Realtors Assn.*, 344 N.C. 394, 402-03, 474 S.E.2d 783, 789 (1996) (holding summary judgment was improper where plaintiff "presented to the trial court genuine issues of material fact about whether [defendant association] violated [plaintiff's] rights as a member of . . . defendant [a]ssociation by following merger procedures that violated . . . the [association's] articles of incorporation, and the bylaws[.]"); *Davis v. New Zion Baptist Church*, ___ N.C. App. ___, ___, 811 S.E.2d 725, 728 (2018) (holding that plaintiffs

who were "voting members of [a c]hurch in good standing at the time of the alleged violations of the [c]hurch bylaws, and at the time [plaintiffs] filed [their] lawsuit[,]" had standing to challenge church's alleged failure to comply with provisions of its bylaws). This Court has also held that corporate bylaws, like restrictive covenants, are contractual in nature. *See Cape Hatteras Electric v. Stevenson*, ___ N.C. App. ___, ___, 790 S.E.2d 675, 676 (2016); *Property Owners Assoc. v. Curran*, 55 N.C. App. 199, 205, 284 S.E.2d 752, 756 (1981); *see also Virmani v. Presbyterian Health Services Corp.*, 127 N.C. App. 71, 77, 488 S.E.2d 284, 288, *disc. review denied*, 347 N.C. 141, 492 S.E.2d 38 (1997) (concluding employer's corporate bylaws were "an integral part" of employment contract, and employee had a contractual right to enforce the bylaws against employer). "Judicial enforcement of a covenant will occur as it would in an action for enforcement of any other valid contractual relationship." *Page v. Bald Head Ass'n*, 170 N.C. App. 151, 155, 611 S.E.2d 463, 466 (2005) (citation and internal quotation marks omitted).

Applying the foregoing principles to the present case, we conclude Defendant Hyder had the right to allege Plaintiff failed to comply with its bylaws in filing this action against Defendant Hyder. Defendant Hyder was required by the Declaration to join and pay annual fees to the Association. As a member of the Association, Defendant Hyder had certain voting rights. Fees paid by Defendant Hyder were used to finance the Association's budget – including, presumably, costs associated with this

litigation. Defendant Hyder was also authorized by the Declaration to enforce its provisions. We do not find our Supreme Court's holding in *Willowmere* inconsistent with the conclusion that a member of an association being sued by that association may assert a lack of standing based on the association's alleged violation of provisions in its own articles of incorporation specifically governing the association's ability to sue. In a footnote, the *Willowmere* Court found it "sufficient to say that, *while a member of either plaintiff association could permissibly challenge the association's failure to comply with its bylaws in instituting this suit*[,] . . . [the non-member] defendants [in *Willowmere*] [could] not." *See* ___ N.C. at ___ n.7, 809 S.E.2d at 564 n.7 (emphasis added).

We also observe that, in *Willowmere*, our Supreme Court emphasized there was "no evidence . . . suggesting that any member of the [plaintiff-associations] opposed [the] plaintiffs' prosecution of [the] suit." *Id.* at ___, 809 S.E.2d at 564. By contrast, in the present case, there was ample evidence indicating a number of Plaintiff's members opposed this lawsuit. At trial, Defendant Hyder introduced twenty-one letters from owners of property within the development, dated 14 October 2013 and filed with the Henderson County clerk of superior court on various dates in October and November 2013, stating the owners "object[ed] to [his or her] Property Owners Association dues being used to pursue this lawsuit over [the Common Area][,]" and "ask[ing] that the [trial] court dismiss this lawsuit." Buchanan testified

the Board had received the letters in evidence as well as "other letters along the way." Buchanan stated the Board received a letter about a month before trial "from someone who owned a property and just said 'this has gone on long enough,' you know. . . . [The property owner] asked how much money had been spent on the suit and then said that [the Board] should drop it." McElrath also testified that numerous members of the Association opposed the lawsuit, and that there was an effort at some point to remove the directors of the Board as a result. McElrath testified:

> [I]n speaking with these [owners] who were very upset and continued to be upset, they wanted to know how we might end this [litigation]. And the only way I [knew] to do it was to overthrow the [B]oard and drop the suit. And to do that you have to announce a special meeting, call a special meeting and [specify] what the meeting is going to be about and then get [sixty-seven] percent of the [members] to show up and take the action. And I had about [sixty-four] percent of those people, which represented [eighty-four] property owners, to sign such a letter requesting a special meeting to overthrow the [B]oard and drop the suit. And some of the folks that participated in bringing the suit . . . basically lobbied against that, and I couldn't achieve [the sixty-seven percent vote]. But most of the [owners] . . . [live] all over the country. And . . . it's difficult to understand . . . what's going on. And [the owners] just want [the litigation] to [] end. And they are very happy with their community and what we have there. . . . But that was why they wanted me to put forth that effort [to remove the directors] because they are tired of this continuing saga.

The uncontroverted evidence shows that Defendant was a dues-paying member of the Association when Plaintiff filed this lawsuit in 2011, and other

members of the Association thereafter opposed the litigation. Under these circumstances, we find it consistent with the reasoning of our Supreme Court in *Willowmere* to conclude Defendant Hyder was entitled to challenge Plaintiff's standing to sue based on an alleged "fail[ure] to comply with explicit prerequisites to filing suit imposed by [the Association's] bylaws[.]" *See* ___ N.C. at ___, 809 S.E.2d at 562.

Our Supreme Court stated in *Willowmere* that if "a member of [a] plaintiff association disagrees with the [association's] decision to file suit, the proper vehicle to challenge the association's failure to comply with its respective bylaws in making that decision is a suit against the nonprofit corporation brought by the aggrieved member or members of the association[.]" ___ N.C. at ___, 809 S.E.2d at 564. In the present case, where Defendant Hyder was both a member of the Association *and* a named defendant in Plaintiff's suit, it would frustrate principles of judicial economy to require Defendant Hyder to file a separate action challenging Plaintiff's failure to comply with its bylaws rather than permitting him to raise that argument as a defense to Plaintiff's suit. *See, e.g.*, *Baldelli v. Baldelli*, ___ N.C. App. ___, ___, 791 S.E.2d 687, 690 (2016) (holding that where "there is a clear interrelationship between the issues [and parties] in [two separate] actions, we do not believe it is in the interest of judicial economy or clarity for both of these actions to proceed simultaneously.").

The Supreme Court in *Willowmere* also cited N.C. Gen. Stat. § 55A-3-04(b) (2017), a statutory provision that applies to *ultra vires* action by a corporation and provides in part that "[a] corporation's *power to act* may be challenged . . . [i]n a proceeding by a member or a director against the corporation to enjoin the act[.]" (emphasis added). "An act by a . . . corporation is *ultra vires* if it is *beyond the purposes or powers expressly or impliedly conferred upon the corporation* by its charter and relevant statutes and ordinances." *Miesch v. Ocean Dunes Homeowners Assn.*, 120 N.C. App. 559, 563, 464 S.E.2d 64, 67 (1995) (citation and quotation marks omitted) (second emphasis added). Our Supreme Court has held that

> [i]f a corporation has *authority* under statute and charter to enter into a particular kind of contract, the fact that an agent of the corporation purports to bind the corporation without permission of the corporation does not make this act *ultra vires*. It merely makes this particular act one that the corporation *has not authorized*, even though other such acts by proper corporate agents would be binding on the corporation.

Rowe v. Franklin County, 318 N.C. 344, 349, 349 S.E.2d 65, 69 (1986) (emphases added). We find this distinction instructive in the present case. Assuming Plaintiff had *authority* to sue Defendant Hyder, as conferred by statute and/or its governing articles, the filing of this lawsuit did not constitute an *ultra vires* act. Instead, the issue before us is whether Plaintiff's suit was *properly authorized* by the Association. We conclude Defendant Hyder was entitled to assert, as a defense to further prosecution of this action, that Plaintiff lacked *proper authorization* to sue him.

We next address Defendant Hyder's argument that Plaintiff violated a provision of its bylaws governing Plaintiff's ability to sue. Specifically, Defendant Hyder cites the following provision in Plaintiff's bylaws:

> 3.14 Pre-condition to Suits Against Declarant. The affirmative vote of no less than two-thirds (2/3) of all votes by Qualified Voting Members entitled to be cast by the Association shall be required in order for the Association to (1) file a complaint, on account of an act or omission of Declarant, with any governmental agency which has regulatory or judicial authority over the Homestead at Mills River development or any part thereof; or (2) assert a claim against or sue Declarant.

According to Defendant Hyder, "[i]t is undisputed and all evidence presented at trial confirmed [that] this action was both originally against [] Developer[-]Declarant and the basis for the lawsuit against Defendant Hyder was 'on account of an act or omission of [Developer-]Declarant.'" Thus, Defendant Hyder argues, bylaw provision 3.14 applied, and "Plaintiff's Board of Directors acted in contravention of its [b]ylaws [when it] did not obtain the appropriate member voted approval to file this action, [and] the Board . . . never obtained authority to act on Plaintiff's behalf."

As Defendant Hyder notes, bylaw provision 3.14 requires an affirmative vote by two-thirds of Plaintiff's members "in order for the Association to [] file a complaint, on account of an act or omission of Declarant[.]" Defendant Hyder does not dispute that bylaw provision 3.14 explicitly applies to "Suits Against Declarant," or that he is

not the "Declarant"[3] referenced throughout Plaintiff's bylaws, but argues bylaw provision 3.14 nevertheless applied to him because "this action was [] originally against [] Developer[-]Declarant and the basis for the lawsuit against Defendant Hyder was 'on account of an act or omission of [Developer-]Declarant.'" We find this argument unpersuasive. Reading bylaw provision 3.14 as a whole – including its title, "Pre-condition to Suits *Against Declarant*" – we conclude this provision governs Plaintiff's ability to "file a complaint [*against Declarant*], on account of an act or omission of Declarant[.]" *See*, *e.g.*, *Biggers v. Evangelist*, 71 N.C. App. 35, 41, 321 S.E.2d 524, 528 (1984) (noting that, in construing a contract provision, "[t]he intention of the parties is to be collected from the entire instrument and not from detached portions." (citation and quotation marks omitted)). Moreover, Plaintiff asserted a distinct cause of action against Defendant Hyder based on Defendant Hyder's "contention that he is the sole owner of the [Common Area] property[,]" which Plaintiff alleged "constitutes a cloud on the property[.]" Plaintiff asked the trial court to "determine that the 5.88 acre [Common Area] tract is the sole property of [] Plaintiff or that [] Plaintiff and [] Defendant [] Hyder[] own the said tract as tenants in common and said tract may only be used by the lot owners of The Homestead at Mills River, LLC." At trial, when asked to clarify Plaintiff's request for relief,

[3] The bylaws identify "Declarant" as "[the] developer, The Homestead at Mills River, LLC[.]" In ruling on Defendant's motion for reconsideration, the trial court concluded dismissal was proper with respect to The Homestead at Mills River, LLC, as well as its co-developer, River Oaks Joint Venture, LLC, which was also named as a defendant in this action.

Plaintiff's counsel "move[d] to amend [its] complaint to conform to the evidence presented[,]" and told the trial court:

> Specifically, . . . in our prayer for relief, [Plaintiff was] asking as tenants in common, I don't think that's what [Plaintiff is] asking for exactly. [Plaintiff is] asking for *the right to use the property* which is in the complaint already. But I don't think that necessarily means tenants in common. . . . Just to make sure that we're clear that [Plaintiff is] not only asking [for the homeowners] to be named tenants in common [with Defendant Hyder] but *[to declare] that [they] have an interest . . . in the property*. That is [Plaintiff's] prayer for relief. If that is to quiet title, that would be fine. . . . I don't know that it would be tenants in common though. But otherwise, [Plaintiff is] still asking that judgment be entered that . . . the homeowners have an interest in the Common Area.

(emphases added). Because bylaw provision 3.14 applies only to suits against the "Declarant" specifically identified in the bylaws, and Defendant Hyder is not the Declarant, bylaw provision 3.14 did not apply to Defendant Hyder. Nevertheless, as discussed below, we conclude Plaintiff's lawsuit was not properly authorized under other provisions of the bylaws.

The North Carolina Planned Community Act ("PCA") provides in part that

> [t]o the extent not inconsistent with the provisions of this Chapter, the declaration, bylaws, and articles of incorporation *form the basis for the legal authority for [a] planned community to act as provided in the declaration, bylaws, and articles of incorporation*, and the declaration, bylaws, and articles of incorporation are enforceable by their terms.

N.C. Gen. Stat. § 47F-2-103(a) (2017) (emphasis added). The PCA also confers certain statutory powers upon a property owners' association, including the authority to "[i]nstitute, defend, or intervene in litigation or administrative proceedings on matters affecting the planned community[,]" "[u]nless the [association's] articles of incorporation or the declaration expressly provides to the contrary[.]" *See* N.C.G.S. § 47F-3-102(4). Under an earlier version of the statute, an association's ability to exercise the statutory powers enumerated therein was made "*[s]ubject to* the provisions of the [association's] articles of incorporation or the declaration[.]" *See Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 402, 584 S.E.2d 731, 736 (2003) (emphasis added). In *Wise*, the organizational documents of the defendant-association "[did] not expressly empower [the association]" to impose the fines at issue in that case, although such fines were authorized under N.C.G.S. § 47F-3-102. *Id.* at 407, 584 S.E.2d at 739. Our Supreme Court held that, in using the phrase "subject to," our General Assembly "explicitly acknowledged that the powers described in N.C.G.S. § 47F-3-102 were contingent on, subordinate to, and governed by the legal instruments creating a homeowners['] association." *Id.* at 403, 584 S.E.2d at 737. The Court concluded the powers enumerated in the statute could not be "create[d] . . . by implication" with respect to associations formed prior to the enactment of the PCA. *Id.* at 407, 584 S.E.2d at 740.

After *Wise*, the General Assembly amended N.C.G.S. § 47F-3-102 by

> remov[ing] the permissive words "subject to" and replac[ing] them with explicit language stating that a homeowners' association may exercise the listed powers unless its articles of incorporation or declaration expressly provides to the contrary. It appears that the [L]egislature's intent was to . . . clarify that homeowners' associations have the enumerated powers unless their documents expressly provide to the contrary.

RiverPointe Homeowners Ass'n v. Mallory, 188 N.C. App. 837, 841, 656 S.E.2d 659, 661 (2008). This Court has subsequently interpreted N.C.G.S. § 47F-3-102 "to provide powers to an [owners'] association *in addition* to those already provided to [the association] by its declaration, provided that the declaration is silent regarding said powers." *Conleys Creek Limited Partnership v. Smoky Mountain Country Club Property Owners Association, Inc.*, ___ N.C. App. ___, ___, 805 S.E.2d 147, 154 (2017) (emphasis in original).

In the present case, Plaintiff's governing articles expressly empower the Association to take legal action for certain purposes. As noted above, the Declaration gives the Association the authority to collect from its members, *i.e.*, "[e]very person (or entity) who/which is a record owner of a fee or undivided fee interest in any lot that is subject to [the] Declaration[,]" "an annual assessment or charge for the purposes stated within this article to be fixed, established by the Association and pursuant to reasonable advance notice given in writing to all lot owners." Under Article XXVI, the Association has "the right to collect the amount of [past-due assessments or charges] by an action at law against [an] owner as for a debt, and may

bring and maintain such other suits and proceedings at law or [in] equity as may be available [to collect assessments due]." Article XXXIV of the Declaration, entitled "Enforcement," also provides that

> each person to whose benefit these restrictions inure, *including The Homestead at Mills River Property Owners Association, Inc.*, and other lot owners in the [d]evelopment, may proceed at law or in equity against any person or other legal entity violating or attempting to violate any provisions of these restrictions, either to restrain violation, to recover damages, or both.

(emphasis added). Thus, under the Declaration, Plaintiff is explicitly authorized to take legal action in order to (1) enforce annual assessments against property owners within the development; and (2) enforce the restrictive covenants.

Plaintiff's bylaws provide that "*[a]ll of the powers and duties of the Association* shall be exercised by the Board [of Directors], including those existing under the common law, applicable statutes, the [North Carolina] Corporation Act, the Declaration, the Articles, and these [b]ylaws[.]" *See also* N.C. Gen. Stat. § 55A-8-01(b) (2017). Under provision 4.13 of the bylaws, the Board's "powers and duties" include the ability to (1) enforce the bylaws and the Declaration "by all legal means, including injunction and recovery of monetary penalties[,]" and (2) "institute, defend, intervene in, or settle any litigation . . . in its own name on behalf of itself on matters affecting the Common Elements or enforcement of the Declaration, the [b]ylaws[,] or the rules and regulations of the Association."

We observe that while N.C.G.S. § 47F-3-102(4) permits an owners' association to institute litigation "on matters affecting the planned community," Plaintiff's bylaws give the Association, by and through the Board, express authority to "institute . . . litigation . . . on *matters affecting the Common Elements*[.]" (emphasis added). The bylaws provide that "terms specifically defined either in the . . . Declaration . . . or the North Carolina Nonprofit Corporation Act . . . shall have the same meaning [in the bylaws]." The Declaration explicitly defines the term "Common Elements" as "any real estate or other property within [the development] *owned or leased by the Association*, including any improvements thereon, other than a [l]ot." It is undisputed in this case that the Common Area property was never "owned or leased by the Association." Thus, the provision of the bylaws permitting the Association to sue regarding "matters affecting the Common Elements" did not apply here. However, bylaw provision 4.13 also states that the "powers and duties" of the Board "shall include, *but not be limited to*," the powers and duties enumerated in the bylaws. Additionally, the Declaration and bylaws do not expressly provide that the Association *may not* initiate litigation "on matters affecting the planned community[,]" which it is otherwise authorized to do under N.C.G.S. § 47F-3-102(4). *See RiverPointe*, 188 N.C. App. at 841, 656 S.E.2d at 661.

Assuming *arguendo* this lawsuit concerns a "matter[] affecting [Plaintiff's] planned community," the PCA "reiterat[es] the common law rule that, *when otherwise*

proper, a homeowners' association may participate in a lawsuit." *Creek Pointe*, 146 N.C. App. at 164, 552 S.E.2d at 224 (emphasis added). This Court held in *Creek Pointe* that the statute "does not *automatically* confer standing upon homeowners' associations in every case, and [] questions of standing should be resolved by our courts in the context of the specific factual circumstances presented[.]" *Id.* (emphasis in original). We concluded that

> although the [PCA] clearly authorizes homeowners' associations as a general class to institute, defend, or intervene in litigation, this statute does not diminish our judicial responsibility to evaluate whether the association has standing to bring [the] suit under the specific fact situation presented.

Id.

As this Court observed in *Peninsula*, "*contractual provisions agreed to by members of [a property owners' association] may provide procedural prerequisites or contractually limit the time, place, or manner for asserting claims*." *Peninsula*, 171 N.C. App. at 96, 614 S.E.2d at 355 (emphasis added). In the present case, we conclude the Board failed to comply with certain "procedural prerequisites" set forth in the bylaws that apply to action taken by the Association. As a result, Plaintiff was not properly authorized to file this lawsuit according to the terms of its own governing articles, and it cannot establish standing. *See, e.g.*, *Anderson v. SeaScape at Holden Plantation, LLC*, 241 N.C. App. 191, 203, 773 S.E.2d 78, 87 (2015) ("*Having determined that the [plaintiff-property owners' association] was properly authorized*

by a quorum of disinterested directors to file the intervenor complaint, we must now turn to the issue of standing." (emphasis added)).

Plaintiff's bylaws provide that "*[a]ll of the powers and duties of the Association* shall be exercised by the Board[.]" In turn, the bylaws impose specific procedural requirements on the Board's ability to act on behalf of the Association. Bylaw provision 4.9 requires the presence of a majority of the directors "for the transaction of business at any meeting of the Board. If a [majority] is not present, the meeting shall be adjourned from time to time until a [majority] is present." Bylaw provision 4.10 prescribes the Board's "Manner of Acting": "Each Director shall be entitled to one (1) vote. The act of a majority of the Directors *present at a meeting* shall constitute the act of the Board unless the act of a greater number is required by the provisions of applicable law, the Declaration[,] or these [b]ylaws." (emphasis added). The bylaws plainly contemplate that most action taken by the Board, which has the sole authority to act in Plaintiff's name, will occur by majority vote of the directors, at regular or special meetings, which are subject to notice requirements stipulated elsewhere in the bylaws.[4] Provision 4.11 of the bylaws provides the singular exception: "Any action that may be taken at a meeting of the Board may be taken without a meeting *if such action is authorized in writing, setting forth the action taken, signed by all Directors*." (emphasis added). Thus, under Plaintiff's bylaws, all powers of the

[4] The bylaws permit meetings of the directors to occur "by means of a conference telephone or similar communication device . . . *as long as the required notice is given*." (emphasis added).

Association are exercised by the Board, and the Board may exercise those powers either (1) by a majority vote of directors present at a meeting, or (2) without a meeting, "if such action is authorized in writing, setting forth the action taken, signed by all Directors."

There is no evidence tending to show the present action was ever authorized either (1) by a majority vote of Plaintiff's directors present at a meeting, or (2) in a writing signed by all directors. The record discloses little detail about the Board's decision-making process prior to filing the complaint in this case. At trial, Robert Pierce ("Pierce"), a former member of the Board, testified:

> I was on the [B]oard when we were in the process of filing the lawsuit. I am not sure if we had actually filed it or not when I rolled off [the Board]. I do know we had a meeting at . . . [an] attorney's office, at which time [Defendant] Hyder and [] McElrath and their attorneys and another board member and I were there. I just am not sure if we [had already] filed [the lawsuit] or if we had seen the purchase [of the Common Area by Defendant Hyder] had been done, . . . or whether the purchase had been made and we were trying to figure out what to do going forward. So I am not real certain.

When Buchanan testified that "the homeowners in total did not agree to approve the lawsuit[,]" counsel for Defendant asked: "But the lawsuit was filed because the directors decided on their own to file a lawsuit; right?" Buchanan replied: "*I assume there was a vote taken* where that group – yes, that group decided to bring the lawsuit."

Dennis Mankin ("Mankin"), who did not testify at trial, was president of the Board when this action was filed and the only signatory of Plaintiff's complaint. The record includes an undated "Letter from the President," on letterhead of the Homestead at Mills River Property Owners Association, addressed to property owners and signed by Mankin. Although the letter is undated, its contents indicate it was written "seven months" after Developer-Declarant transferred control of the Association to the property owners. It is unclear exactly when that transfer of control occurred, but the record suggests it happened sometime in 2009 or 2010.[5] McElrath testified he received the undated letter from Mankin in February 2011. The letter introduced the "new Board of Directors[,]" comprising a president, vice president, treasurer, secretary, and one member-at-large. It informed property owners that the Board had been "working on a variety of projects and issues on [their] behalf including . . . overseeing deed restrictions to protect the value of the community assets[.]" It also indicated the Board had "taken a number of steps to ensure all common properties that were in the hands of the developers have now been transferred over

[5] Buchanan testified Developer-Declarant transferred control of the Association to the property owners "sometime in [the] 2010 timeframe, . . . 2009-2010." Pierce, who was vice president of the original Board, testified the Board was "formed after the declarant turned it over to the people of the property . . . [in] [20]09 perhaps." Another property owner testified it was "hard to say" when Developer-Declarant handed over control of the Association to the property owners, but testified it was in "[20]09, maybe, at some point in time. . . . [20]08, [20]09, somewhere in there."

to the [Association][.]"[6] The letter did not reference the Common Area property, which was never "transferred over to the [Association][,]" nor did it indicate the Board was considering legal action related to the sale of the Common Area to Defendant Hyder.

The record also includes a notice of annual meeting and meeting agenda allegedly mailed to Plaintiff's members prior to Plaintiff's 2011 annual meeting. That annual meeting was held on or about 31 March 2011, less than a month before Plaintiff filed this lawsuit; however, the notice of annual meeting and the meeting agenda do not indicate whether there was any discussion, by the directors and/or the members, about potential legal action related to the sale of the Common Area.[7] No minutes from the 2011 annual meeting – or any other meeting of the Board – appear in the record on appeal.[8] Additionally, although the bylaws require the Board to "prepare and provide to members annually, a budget summary report . . . containing . . . [a] statement of the status of any pending suits or judgments in which the

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[6] The only deed that appears in the record showing a transfer of property from Developer-Declarant to the Association involved a 10.62 acre tract known as the River Reserve property. That deed was recorded on or about 8 November 2010.

[7] Plaintiff's bylaws provide that "[t]he Association may vote or transact business on any matter at an annual meeting whether or not specific notice of said item had been given in the notice of the annual meeting." By contrast, "for special meetings, only items which were included in the meeting's notice to members can be voted on." The record in this case does not disclose evidence of any special meetings.

[8] Provision 5.6(c) of the bylaws provides in part that the secretary of the Board "shall keep the minutes of *all meetings and actions of the Board* and of the members[.]" (emphasis added).

Association is a party[,]" there are no budget summary reports in the record before us.

The above evidence is insufficient to show the Board complied, or attempted to comply, with the explicit procedural prerequisites set forth in Plaintiff's bylaws that prescribe the Association's "manner of acting." *See Bilodeau v. Hickory Bluffs Cmty. Servs. Ass'n. Inc.*, 244 N.C. App. 1, 9-10, 780 S.E.2d 205, 211-12 (2015). Even assuming Plaintiff had statutory authority to file this lawsuit, Plaintiff's governing articles impose procedural constraints on action by the Board, which has exclusive authority to act on Plaintiff's behalf. *See, e.g.*, *Laurel Park Villas Homeowners Assoc. v. Hodges*, 82 N.C. App. 141, 143-44, 345 S.E.2d 464, 466 (1986) (finding that, while plaintiff's corporate bylaws contained a provision giving corporation the power to bring the action, "*a [different] provision of the bylaws* indicate[d] that all powers of the corporation [must] be exercised by the board of directors, and . . . nothing in the record suggest[ed] that any of [the persons explicitly empowered to take action on behalf of the corporation] authorized [the] action." (emphasis added)). While Plaintiff's bylaws may not require a vote by the Association's members before Plaintiff may sue someone other than the Declarant identified in the bylaws, they do require that any action of the Association be authorized by a majority vote of directors at a meeting or in a writing signed by all directors.

In *Willowmere*, our Supreme Court held "that a showing of *strict* compliance [with an association's bylaws and internal governance procedures] is not necessary to satisfy the requirements of our standing jurisprudence." ___ N.C. at ___, 809 S.E.2d at 565 (emphasis added). In that case, in addition to the third-party status of the defendants, there was evidence suggesting the plaintiff-associations' directors had taken some informal steps to authorize the lawsuit. One of the association's directors discussed initiating the lawsuit by phone, and the other association contended its board of directors unanimously authorized the litigation through a chain of emails. By contrast, in this case, there is no record of internal discussions among Plaintiff's directors about the lawsuit, other than Pierce's testimony that he and one other unidentified Board member attended a meeting with Defendant Hyder and some attorneys that, by Pierce's own account, may have occurred before or after the lawsuit was filed. Only one Board member, Mankin, signed Plaintiff's complaint. There are no minutes of any Board meeting in the record. Because the evidence does not show Plaintiff's Board approved this action, either by a majority vote of directors at a meeting or in a writing signed by all directors, we conclude the action was not properly authorized as required by Plaintiff's bylaws, and Plaintiff therefore lacked standing to prosecute the action. *See Beech Mountain Property Owners' Assoc. v. Current*, 35 N.C. App. 135, 136, 240 S.E.2d 503, 505 (1978) (noting that "substantive issues cannot be considered unless the party raising them has the capacity to do so.").

Since "our holding that the [trial] court lacked subject matter jurisdiction is dispositive," it is unnecessary to address Plaintiff's arguments challenging the trial court's entry of a directed verdict for Defendant. *See Reynolds v. Motley*, 96 N.C. App. 299, 306 n.2, 385 S.E.2d 548, 552 n.2 (1989).

IV. Conclusion

The record does not indicate this action was properly authorized under the plain language of Plaintiff's bylaws. Consequently, Plaintiff has failed to demonstrate standing to maintain its suit against Defendant Hyder. The trial court therefore improperly denied Defendant Hyder's motion for summary judgment. We dismiss Plaintiff's appeal.

DISMISSED.

Judge DAVIS concurs.

Judge TYSON concurs in the result to dismiss for lack of jurisdiction.

Report per Rule 30(e).