THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Jul 11 2022

S.C. SUPREME COURT

Appeal from Dorchester County
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Case No. 2012-CP-18-02583

Court of Appeals Case No. 2019-000644
Unpublished Opinion No. 2022-UP-113 (S.C. Ct. App. filed March 16, 2022)

Supreme Court Case No. 2022-000847

Jennifer McFarland and Carlton Holcombe,

Petitioners,

v.

Thomas Morris and David Hannemann,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

CLEMENT RIVERS, LLP
Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorney for Petitioners

INDEX

CERTIFICATION OF COUNSEL....1

QUESTIONS PRESENTED....1

STATEMENT OF THE CASE....2

ARGUMENT....4

I. In affirming the trial court, the Court of Appeals erred in the following respects: 4

A. The Subject Opinion merely recites propositions of statutory law from §§ 33-31-830(a), -830(d), and -831(a) without identifying any evidentiary basis on which they can reasonably be applied in this case—and indeed there is none. 4

B. (1) Petitioners did not fail to state the issues on appeal in compliance with Rule 208 and (2) even assuming, *arguendo*, there was some sort of technical oversight with respect to Petitioners' issue statement, the Court of Appeals did not address Petitioners' alternative argument that they should be allowed to amend their principal brief to correct the same, as allowing them to do so would be in furtherance of the interests of justice and would not cause any undue prejudice to Respondents. 5

C. The Subject Opinion appears to suggest the abandonment of some issue/argument on the basis that it is conclusory, but the Subject Opinion does not identify any issue/argument to which this applies. 6

D. The Subject Opinion overlooks the fact that the Declaratory Judgment Claim does not only seek injunctive relief but also seeks declaratory relief—as indeed the Court of Appeals' own prior opinion in the first appeal in this case recognizes. 7

E. The Court of Appeals erred in failing to recognize that the trial court erred in making findings of fact and conclusions of law that are materially incomplete, not supported by the evidentiary record, and/or erroneous as a matter of law. 8

Re: Finding of Fact No. 4 8

Re: Finding of Fact No. 5 9

Re: Finding of Fact No. 6 10

Re: Finding of Fact No. 7 11

Re: Finding of Fact No. 8 11

Re: Finding of Fact No. 10 13

Re: Finding of Fact No. 11 13

Re: Findings of Fact Nos. 12 & 13 15

Re: Finding of Fact No. 14 16

Re: Findings of Fact Nos. 15 & 16 17

Re: Findings of Fact No. 17 & 18.....18

Re: Findings of Fact Nos. 19 & 20 19

Re: All Conclusions of Law.....20

CONCLUSION.....25

CERTIFICATION OF COUNSEL

By and through their undersigned counsel, pursuant to Rule 242(d)(1), SCACR, Petitioners[1] certify that the Court of Appeals filed its opinion in this appeal on March 16, 2022 (the "Subject Opinion"); that Petitioners timely petitioned for rehearing; and that the Court of Appeals has finally ruled on that petition, which it denied by order filed May 19, 2022.

QUESTIONS PRESENTED

I. In affirming the trial court's judgment in this nonjury matter, did the Court of Appeals err in the following respects:

A. Does the Subject Opinion merely recite propositions of statutory law from S.C. Code Ann. §§ 33-31-830(a), -830(d), and -831(a) without identifying any evidentiary basis on which they can reasonably be applied in this case? And, indeed, is there any evidentiary basis on which they can reasonably be applied in this case?

B. (1) Did Petitioners fail to state the issues on appeal in compliance with Rule 208, SCACR, and (2) even assuming, *arguendo*, there was some sort of technical oversight with respect to Petitioners' issue statement, did the Court of Appeals fail to address Petitioners' alternative argument that they should be allowed to amend their principal appellate brief to correct the same?

C. The Subject Opinion appears to suggest the abandonment of some issue/argument on the basis that it is conclusory, but does the Subject Opinion actually identify any issue/argument to which this applies?

D. Does the Subject Opinion overlook the fact that the Declaratory Judgment Claim does not only seek injunctive relief but also seeks declaratory relief?

E. Did the Court of Appeals err in failing to recognize that the trial court erred in making findings of fact and conclusions of law that are materially incomplete, not supported by the evidentiary record, and/or erroneous as a matter of law?

[1] "Petitioners" or "Plaintiffs" refers to Plaintiffs/Appellants, Jennifer McFarland ("Mrs. McFarland") and Carlton Holcombe ("Mr. Holcombe"), collectively.

STATEMENT OF THE CASE

Comprising just seven single-family homes, Live Oak Village (the "Subdivision") is a small residential subdivision in Summerville. (*See generally* R. pp. 500–83.) Property ownership in the Subdivision is subject to recorded covenants and restrictions (collectively, the "Covenants"). Every lot owner is a member of the Live Oak Village Homeowners Association, Inc. (the "HOA"),[2] which is a South Carolina nonprofit corporation organized for the purpose of managing the business of the Subdivision's homeowners association. (R. p. 563.) The HOA is empowered to administer and enforce the Covenants. (R. p. 505 § 3.1; *see also* R. p. 536 § 3.1.)

Per its by-laws (the "By-laws"),[3] the HOA is to be governed by a three-member board of directors (collectively, the "Board," with each individual member a "Director"). (R. p. 565.) The Board is charged with the "manage[ment] and direct[ion] [of] the affairs of the [HOA]" and is authorized to "exercise all of the powers of the [HOA] subject only to approval by the Owners [(i.e., the HOA members)] . . . when such is specifically required by the[] By-laws." (R. p. 567.) The By-laws provide for the Board's annual election of the HOA's executive officers, most notably the HOA president, who is the HOA's chief executive officer. (R. p. 569.)

This action was commenced on November 16, 2012, in the Dorchester County Court of Common Pleas. (*See generally* R. pp. 64–72.)[4] The operative complaint is the amended complaint

---

[2] (R. p. 506 § 3.2; *see also* R. p. 537 § 3.2.)

[3] Together, the Covenants and the By-laws are the "Governing Documents."

[4] The original plaintiffs in the action were the HOA and three HOA members: Mrs. McFarland; Mr. Holcombe; and Mr. Holcombe's wife, Ute ("Mrs. Holcombe"). (*See generally* R. pp. 65–72.) The HOA claims, i.e., the claims asserted in the name of the HOA itself, were initiated by Mrs. McFarland's husband, Director and HOA president William McFarland ("Mr. McFarland"). (R. pp. 58–62, p. 123:19–24, p. 131:17–20.) The original defendants were Defendants/Respondents, Thomas Morris ("Mr. Morris") and David Hannemann ("Mr. Hannemann") (collectively, "Respondents" or "Defendants"), who were the two other Directors besides Mr. McFarland, and two other HOA members: Sofia and Michael Mazell. (*See generally* R. pp. 65–72.) As reflected in the above caption, however, the only remaining parties to the action

filed October 31, 2014,[5] and of the four causes of action asserted therein only one—Petitioners' claim for declaratory and injunctive relief against Respondents (the "Declaratory Judgment Claim")—is involved in this appeal. The gravamen of the Declaratory Judgment Claim is that Respondents caused the HOA/Board to become dysfunctional by willfully operating, and continuing to operate, outside the scope of their authority as Directors and in violation of the Governing Documents. (R. p. 100 ¶¶ 5–7.) The Declaratory Judgment Claim seeks (1) a judicial declaration as to Respondents' wrongful acts/omissions in violation of the Governing Documents (and the legal consequences thereof) and (2) an injunction prohibiting (i.e., protecting against) the continuation/recurrence of those violations. (R. pp. 102–03 at Prayer for Relief.)

In March of 2015, the trial court granted summary judgment against Petitioners on the Declaratory Judgment Claim, as well as against the HOA on the claims that Mr. McFarland had initiated on its behalf, prompting an immediate appeal by Petitioners and the HOA. (R. pp. 1–6, pp. 15–24, pp. 824–25.)[6] The appeal resulted in affirmance of summary judgment against the HOA but reversal of summary judgment against Petitioners on the Declaratory Judgment Claim,[7] and the case was remitted to the trial court on January 23, 2018. (*See* R. p. 63.)

By consent order filed March 23, 2018, all remaining claims but for the Declaratory Judgment Claim were dismissed, the case caption was amended to show Petitioners and Respondents as the only remaining parties, and the case was transferred to the nonjury docket for trial of the Declaratory Judgment Claim. (R. pp. 25–35.)

---

are Petitioners (Mrs. McFarland and Mr. Holcombe) on the plaintiffs' side and Respondents (Messrs. Morris and Hannemann) on the defendants'. (R. pp. 25–35.)

[5] (*See generally* R. pp. 99–103.)

[6] The trial court also granted summary judgment against Mrs. Holcombe on all of her claims, but she chose not to appeal.

[7] (R. pp. 58–62.)

The case came on for a nonjury trial on October 30–31, 2018, before the Honorable Maite Murphy. (*See generally* R. pp. 115–499.) At the conclusion of trial, the trial court held the record open for post-trial submissions by the parties. (R. p. 497:14–25.) Following receipt of the parties' post-trial submissions,[8] the court took the matter under advisement until January 14, 2019, when it filed its order setting forth its findings of fact and conclusions of law, ruling in Respondents' favor. (R. pp. 36–53.) Petitioners timely moved for alteration, amendment, and/or reconsideration of the decision or, alternatively, a new trial. (R. pp. 781–823.) On March 14, 2019, the trial court entered an order granting in part and denying in part Petitioners' motion. (R. pp. 54–57.)

This appeal timely followed by notice served and filed April 12, 2019,[9] and in due course, it was fully briefed and made ready for decision. The Court of Appeals heard oral argument on February 9, 2022, and thereafter decided the appeal via an unpublished opinion filed March 16, 2022, i.e., the Subject Opinion, affirming the trial court.

The instant petition timely follows.

ARGUMENT

I. In affirming the trial court, the Court of Appeals erred in the following respects:

A. The Subject Opinion merely recites propositions of statutory law from §§ 33-31-830(a), -830(d), and -831(a) without identifying any evidentiary basis on which they can reasonably be applied in this case—and indeed there is none.

It appears that the Court of Appeals believes Respondents can take refuge under §§ 33-31-830(a) and (d) because they acted in good faith, with the care an ordinarily prudent person in a like position would have exercised under similar circumstances, and in a manner they reasonably believed to be in the best interests of the HOA and, likewise, under § 33-31-831(a) because of the

[8] (*See generally* R. pp. 806–24, pp. 841–57.)

[9] (R. pp. 858–59.)

fairness exception to the prohibition against directors engaging in conflict of interest transactions. But the Subject Opinion is completely silent as to why the court believes this is so. Conceptually, the Court of Appeals only addressed what is *not* in dispute—that these statutory provisions exit—without actually addressing what *is* in dispute—whether there is an evidentiary basis on which they can reasonably be applied in this case—and as shown in Petitioners' challenge to the trial court's findings of fact and conclusions of law, there is none. (*See*, *infra*; *see also* Br. of Appellants pp. 10–45.)

B. (1) Petitioners did not fail to state the issues on appeal in compliance with Rule 208 and (2) even assuming, *arguendo*, there was some sort of technical oversight with respect to Petitioners' issue statement, the Court of Appeals did not address Petitioners' alternative argument that they should be allowed to amend their principal brief to correct the same, as allowing them to do so would be in furtherance of the interests of justice and would not cause any undue prejudice to Respondents.

As an initial matter, Petitioners' counsel would note that, to the best of his recollection, this subject did not come up at all at oral argument. While counsel does not mean to suggest that the silence on this subject at oral argument is of any particular legal effect, as a practical matter, it is surprising to think that if there were any material issue in this regard it would have gone completely unaddressed.

In any event, "appellate rules should not be written or interpreted to create a trap for the unwary lawyer or party." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 25, 602 S.E.2d 772, 780 (2004). The trial court decided this nonjury matter in a 17-page order that enumerates 20 separate findings of fact and 7 conclusions of law,[10] and Petitioners take issue with nearly all of them. (*See generally* Br. of Appellants.) Petitioners' issue statement reads as follows: "In deciding this case in favor of Respondents (following a nonjury trial), did the trial court err in making findings of

[10] (*See generally* R. pp. 36–53.)

fact and conclusions of law that are materially incomplete, not supported by the evidentiary record, and/or erroneous as a matter of law?" (Br. of Appellants p. 1.) It is a meaningful and reasonably tailored expression of the substance of each argument Petitioners presented for review with respect to each of the various specific findings and conclusions in issue—each of which was addressed with specificity, under specific sub-headings, in the Argument section of Petitioners' principal appellate brief. *Cf. Johnson v. Roberts*, 422 S.C. 406, 411, 812 S.E.2d 207, 210 (Ct. App. 2018) ("The factual theory Appellant presented to the circuit court is not identical to the factual theory she argues here. *But Appellant's statement of issues on appeal is broad enough to encompass the argument she presents to this court . . . .*") (emphasis added).

But, out of an abundance of caution, even to the extent that fault might reasonably be found with respect to Petitioners' issue statement, Petitioners expressly argued in their reply brief that they ought to be allowed to amend their brief and correct the same. (Reply Br. of Appellants pp. 5–7.) The Court of Appeals failed to address this. Given the interests of justice (favoring judgment on the merits) and the lack of any undue prejudice to Respondents, to the extent fault might reasonably be found with respect to Petitioners' issue statement, Petitioners should have been allowed to amend their appellate brief to correct any such problem, a task which would appear to require no more than copying and pasting their argument headings (slightly revised so as to be phrased as questions) into their issue statement. *See, e.g., Henning v. Kaye*, 307 S.C. 436, 415 S.E.2d 794 (1992).

C. The Subject Opinion appears to suggest the abandonment of some issue/argument on the basis that it is conclusory, but the Subject Opinion does not identify any issue/argument to which this applies.

Here again, this subject did not come up at oral argument. But in any event, the Subject Opinion simply does not say what issue/argument Petitioners are supposed to have abandoned as

conclusory. Petitioners dispute any such abandonment and contend that their issues/arguments are duly presented and supported, but at a minimum, the Court of Appeals should have made clear the issue/argument to which it is referring in this regard and Petitioners should have been allowed the opportunity to be heard in challenge to the same and/or, assuming, *arguendo*, there is indeed some technical deficiency, Petitioners should have been allowed to correct the same, as allowing them to do so would be in furtherance of the interests of justice and would not cause any undue prejudice to Respondents. *See, e.g., Henning*, 307 S.C. 436, 415 S.E.2d 794.

D. The Subject Opinion overlooks the fact that the Declaratory Judgment Claim does not only seek injunctive relief but also seeks declaratory relief—as indeed the Court of Appeals' own prior opinion in the first appeal in this case recognizes.

In pertinent part, the Court of Appeals' prior opinion (i.e., its opinion reversing the trial court's summary judgment against Petitioners on the Declaratory Judgment Claim) reads as follows:

> Appellants McFarland and Holcombe argue the circuit court erred by granting summary judgment on their declaratory judgment cause of action because they showed a justiciable controversy. We agree. McFarland and Holcombe properly stated a cause of action under the Declaratory Judgments Act (DJA) because a justiciable controversy existed. . . . .
>
> McFarland and Holcombe's allegations amount to claims that Respondents Morris and Hannemann were violating the covenants and restrictions (C&R), which was an agreement contractual in nature, in their capacities as directors. They claimed Morris and Hannemann had already violated the C&R, rather than alleging some hypothetical, future event would violate the C&R. We believe such allegations amount to a claim of an existing controversy regarding the rights and status of a writing or contract. Such allegations reasonably come within section 15-53-30 and satisfy the requirement for a justiciable controversy.
>
> Additionally, we find the circuit court erred by requiring McFarland and Holcombe to establish constitutional standing, which includes showing an injury in fact. The circuit court explained they lacked

> standing to bring a declaratory judgment action because they failed to satisfy our supreme court's test for constitutional standing. However, we find McFarland and Holcombe acquired standing to bring this cause of action by statute, specifically the DJA. *See ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (explaining there are three ways a party may acquire standing, including "by statute"). Therefore, they were not required to possess constitutional standing.

(R. pp. 58–62.)

As the Court of Appeals itself has recognized in this very case, Petitioners "allegations amount to a claim of an existing controversy regarding the rights and status of a writing or contract [i.e., the Governing Documents]. Such allegations reasonably come within section 15-53-30 and satisfy the requirement for a justiciable controversy" in an action for declaratory judgment. The Subject Opinion erroneously fails to recognize that Petitioners are entitled to declaratory relief independent from injunctive relief.

E. The Court of Appeals erred in failing to recognize that the trial court erred in making findings of fact and conclusions of law that are materially incomplete, not supported by the evidentiary record, and/or erroneous as a matter of law.

Re: Finding of Fact No. 4[11]

The October 4, 2012, special Board meeting at which Defendants purported to vote Mr. McFarland out as HOA president and Mr. Hannemann in in his place could not possibly have been valid. Notice of the meeting was only placed in the mail to Mr. McFarland on October 1, 2012. (*See* R. pp. 657–658.) Mr. McFarland could not have actually gotten it until after that date, and the meeting notice could not possibly have been given in compliance with the By-laws. (*See* R. p. 566 (providing that special Board meetings require "not less than three (3) days notice to each director mailed or presented personally to such director with such time.") Indeed, three *full days*

[11] (*See* R. p. 43; R. pp. 54–55.)

after October 1st could not have possibly *passed* until October 5th. *See Town of Summerville v. City of North Charleston*, 378 S.C. 107, 112, 662 S.E.2d 40, 42–43 (2008) ("[W]here the time prescription mentions only the passage of a number of days, a 'day' means a calendar day, beginning and ending at midnight."). Moreover, with only Defendants involved in the process of moving, seconding the motion, and voting to remove Mr. McFarland as HOA president and of nominating, seconding the nomination, and voting to elect Mr. Hannemann to take Mr. McFarland's place as HOA president, the proceedings were out of proper order and tainted by conflict of interest and self-dealing. Even Defendants' own witness Ms. Greene still recognized Mr. McFarland to be HOA president after October 4, 2012, and she also attested to Defendants having aligned themselves against Mr. McFarland, rending the Board dysfunctional. (*See* R. pp. 670–673; R. p. 465, lines 3–21.)

Re: Finding of Fact No. 5[12]

In a footnote, the trial court states: "[Mrs.] McFarland was a member of the HOA's Board of Directors during the period of 'well over a year' that the tenant was purportedly living in the Mazell's residence. The record is devoid of any evidence that [Mrs.] McFarland took any action regarding this issue while she was a member of the Board of Directors." This criticism of Mrs. McFarland is not supported by the evidentiary record. Although Mrs. McFarland had frequently seen the tenant (more precisely, the person she would later learn to be the tenant) for quite a while before her September 7, 2011, letter to the Board, it was not until August of 2011, when her teenage daughter, upon returning home after a morning run, told her there was "a man standing over on [the] Mazzels's property looking at me and it's kind of creepy," that Mrs. McFarland had reason

[12] (*See* R. p. 43.)

to focus her attention on the nature of the tenant's presence in the neighborhood. (*See* R. p. 129, line 24 – p. 130, line 13.)

Re: Finding of Fact No. 6[13]

While the trial court correctly notes that "[i]n response to [Mrs.] McFarland's letter, an impromptu discussion was held among the members of the Board of Directors regarding the possibility of hiring a property manager to remedy the Mazell tenant issue," the court does not address the contradiction between this finding and Mr. Hannemann's testimony that he thought the property manager was only going to "[h]andle the bills" and would not be involved in addressing violations of the Governing Documents. (R. p. 232, line 23 – p. 233, line 1.) Mr. Hannemann's testimony was irreconcilable with, among other things, the plain language of his own April 19, 2012, email to Mr. McFarland acknowledging that, "sometime in September 2011," there had been "[a]n unscheduled impromptu discussion of the B[oard] . . . *to review options of hiring a Property Manager to deal with a possible violation of the [Governing Documents]*." (R. p. 604; *see also* R. p. 243, line 20 – p. 244, line 7.)

While it is technically correct that "[a]t no time was a Board of Directors meeting noticed or held pursuant to the Bylaws wherein a majority of the Board of Directors members constituting a quorum voted to approve the hiring of a property manager, nor was there unanimous written consent of all Board of Directors members approving the hiring of a property manager," the trial court does not address the overwhelming evidence that—notwithstanding the position they have taken in this litigation—neither Mr. Morris nor Mr. Hannemann questioned Ms. Greene's legitimacy as HOA property manager at the time,[14] but rather, as explained above, they both (as

---

[13] (*See* R. p. 43.)

[14] (*See, e.g.,* R. p. 231, lines 4–12.)

did Mrs. Morris, for that matter) acted as if Ms. Greene was indeed HOA property manager, not only in their direct communications with Ms. Greene but also in their inclusion of Ms. Greene on HOA-related communications and documents. (*See* R. pp. 599, 607–611, 627–628, 630–633, 637, 640–644, 654–655, 659–663, 665, 670–673, 675–682.)

Re: Finding of Fact No. 7[15]

While the trial court states, "it is evident from the testimony and evidence that the Board of Directors never voted upon Greene's levying of fines against homeowners,"[16] the court overlooked the fact that the Board was rendered dysfunctional by Defendants, who had, again, as Ms. Greene documented, aligned themselves together against Mr. McFarland. (*See* R. p. 670–673; R. p. 465, lines 3–21.) In other words, the court overlooked the fact that it would not have been possible to have a vote of the Board wherein Mr. Hannemann and Mr. Morris himself voted to fine Mr. Morris.[17]

Re: Finding of Fact No. 8[18]

The trial court's finding about Mr. Morris's reasonable belief as to the process to be followed for his landscaping project is not supported by the evidentiary record. To begin, this finding does not take into account, and is irreconcilable with, the Governing Documents. The Covenants expressly provide: "The failure to enforce any rights, reservation, restriction or

---

15 (*See* R. pp. 43–44; R. p. 55.)

16 (R. p. 44.)

17 And even so, contrary to Defendants' litigation position that Ms. Greene's acts were illegitimate, Mr. and Mrs. Morris did, in fact, pay (to Ms. Greene) the $1,000 fine assessed for their improper landscaping. (R. p. 628.) While Defendants' claim the Morrises' payment of this fine was somehow related to "*continued* . . . complaints [received] from Plaintiffs" "*[s]ubsequent* to the May 31, 2012" special HOA meeting (R. pp. 852–853 ¶ 14 (emphasis added)), given that the Morrises paid the $1,000 fine to Ms. Greene on June 1, 2012 (*see* R. p. 628), the very next day after the referenced May 31st meeting, Defendants' claim cannot possibly be true.

18 (*See* R. pp. 44–45.)

condition contains in this Declaration, however long continued, shall not be deemed a waiver of the right to do so hereafter as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or affects its enforcement." (R. p. 528; R. p. 559.) Mr. Morris himself expressly admitted that the above-quoted language from the Covenants directly contradicted the idea that any leniency previously shown him for his own prior unapproved construction and landscaping absolved him of the need to follow the rules for future projects. (R. p. 418, line 3 – p. 419, line 5; *see also* R. p. 580 ("Each Owner shall comply strictly with the By-laws . . . . No delay, failure or omission on the part of the Declarant, the [HOA] or any aggrieved Owner in exercising any right, power or remedy herein provided shall be construed as an acquiescence thereto as to the same violation or breach, or as to the enforcement.")

The trial court's finding here also overlooks the vast difference in the nature and scope of Mr. Morris's prior projects (replacing a stair case and removing a tree) and the April 2012 landscaping project that required heavy equipment and reduced his yard to what he self-described as a "barren landscape" for the better part of two months—and all of this after the April 1, 2012,[19] letter he sent asking for Board approval he did not wait to receive had grossly mischaracterized the nature of his plan as being the removal of "some" landscaping. In addition to disregarding the plain language of the Governing Documents, the court's finding here rewards Mr. Morris's repeated misconduct while punishing the neighborly way in which he was afforded some leniency

[19] The trial court states Morris's letter was dated April 10, 2012. In fact, it was April 1, 2012, and, in full, it reads as follows: "I would like to *ask for approval* from the HOA Board of Directors to remove and replace some of our existing landscaping and lighting in accordance with the HOA covenants." (*See* R. p. 601 (emphasis added).) The very fact that he wrote a letter expressly asking for Board approval of his project "in accordance with the HOA covenants," contradicts the idea that he did not really need to obtain approval. But, of course, despite having expressly requested approval, as Mr. Morris himself admits, he never waited for an answer. (R. p. 356, lines 6–13.)

for his prior violations. For Mr. Morris, the trial court's ruling is to the effect that three wrongs make a right and that, having been given an inch, it was only right for him to take a mile; but for Petitioners it seems the sad lesson is this: all good deeds will be punished. This is error.

Re: Finding of Fact No. 10[20]

The trial court's citation to Section 15(c) of the By-laws overlooks the fact that the Board was rendered dysfunctional by Defendants, who had, again, as Ms. Greene documented, aligned themselves together against Mr. McFarland. (*See* R. pp. 670–673; R. p. 465, lines 3–21.) It would not have been possible to follow the referenced procedure, which would have required Mr. Hannemann and Mr. Morris himself to take action against Mr. Morris. Moreover, the court overlooks that the referenced procedures, which begin with "[a] written demand to cease and desist from an alleged violation," could not possibly be followed where Mr. Morris's violation was already full and complete—cease and desist makes no sense when, because of the violation, Mr. Morris's yard was already a "barren landscape."

Re: Finding of Fact No. 11[21]

The trial court states, "In response to these complaints from Plaintiffs, the work at Morris' residence ceased, leaving the yard to look like a 'barren landscape.'" This finding is not supported by the evidentiary record. It was on April 17, 2012, that Mr. Shelbourne first wrote the Board on behalf of Mrs. McFarland, voicing her concerns about the Morris landscaping project. (*See* R. pp. 602–603.) As the trial court noted in Finding of Fact No. 9, on "April 19, 2012, [Mr.] Holcombe sent an email to [Ms.] Greene memorializing their conversation that occurred the day before, in which [Mr.] Holcombe echoed [Mrs.] McFarland's complaints." (R. p. 55.) In Mr. Holcombe's

[20] (*See* R. pp. 45–46.)
[21] (*See* R. p. 46.)

April 19, 2012, email he stated, "they have cleaned out all of the landscaping. . . . The backhoe has been sitting in the front yard for over a week and no one knows when it will be removed." (R. p. 606.) In an email to Ms. Greene on April 22, 2012, Mr. Morris himself apologized for the "barren landscape in front of our home," explaining, "[u]fortunately the commencement of our landscaping project was delayed due to a death in our family. Thus, our project had to be postponed. We will work diligently to complete the landscaping as soon as possible." (R. p. 609.) Indeed, when questioned by his own counsel about delay in the middle of the project, Mr. Morris expressly attributed the same to a death in the family. (R. p. 392, lines 9–16.) And when directly asked about it at trial by Plaintiffs' counsel, Mr. Morris testified that he did not recall any delay in his landscaping project being caused by Mr. Shelbourne's letter. (R. p. 414, lines 4–20.)

Moreover, the trial court states that Defendants held a special Board meeting "[t]o specifically address Plaintiffs' concerns and in an attempt to follow the *requested* process." (R. p. 46 (emphasis added).) The idea that the process was merely "requested," as opposed to *required* by the Governing Documents is wrong. And it is required in furtherance of the very objectives the court itself expressly cites. (R. p. 37 ("To prevent any Owner or any other persons from building or carrying on any other activity in the Subdivision to the detriment of any owner in the Subdivision" etc.).)

Further still, Mr. McFarland was not given proper notice of the referenced special Board meeting—the sworn certification of service for the notice itself attests that the notice was sent to 102 Oak Village Lane, which is not the McFarland's address. (*See* R. p. 273, line 3 – p. 274, line 6; R. p. 616.) Even further, with only Defendants involved in the process of moving, seconding the motion, and voting to approve Mr. Morris's own project, the proceedings were out of proper order and tainted by conflict of interest and self-dealing. The court's finding that Defendants

"believ[ed]" they were acting in the best interests of the HOA and following proper procedure is (1) not supported by the evidentiary record and (2) ultimately not relevant, especially as to the procedure. Regardless of their belief, the record leaves no doubt the Defendants did not follow proper procedure. As noted above, even Defendants' own retained expert, attorney Capers Barr, acknowledged that Mr. Morris had a conflict of interest under § 33-31-831 in voting to approve his own landscaping project. (*See* R. p. 489, lines 8–19.)

Re: Findings of Fact Nos. 12 & 13[22]

Despite the referenced May 31, 2012, special HOA meeting being noticed with the object of "harmony," the record shows it was not harmonious. (*See* R. p. 222, line 14 – p. 223, line 22; R. p. 823.) As Ms. Greene attested, Defendants had aligned themselves against Mr. McFarland, rendering the Board dysfunctional. (*See* R. pp. 670–673; R. p. 465, lines 3–21.) In their capacities as Board Members, Defendants were yelling, insulting, and bullying in an effort to reduce Mr. Morris's fine. (*See* R. p. 823.) Indeed, Ms. Greene documents anything but Defendants' engagement in an amicable, neighborly dialogue, with Mr. Morris even abruptly "interrupt[ing]" remarks his wife was making about the Holcombe's garden to interject his concern "about Mexican's working in [the neighborhood] and did they have green cards . . . ." (*See* R. p. 823.)

The trial court also overlooks that the stated object of the meeting did not include addressing Mr. Morris's fine to begin with—a fact made all the more important because a quorum for the meeting was achieved via proxies from homeowners who could not have known the matter was to be discussed and, as the court itself notes, Mr. Morris voted to reduce his own fine. (*See* R. p. 627.)[23] The court likewise overlooks that Defendants improperly attempted to conduct the

---

[22] (*See* R. pp. 46–47.)

[23] The trial court states Mr. Morris voted to reduce his own fine "in his capacity as a homeowner." (R. p. 47.) The court overlooks that Mr. Morris, like Mr. Hannemann, noticed the

special HOA meeting as *annual* HOA meeting. And, of course, the only conceivable reason why they would do this would be, in furtherance of their alliance against Mr. McFarland, to try and get him off the Board. The court further overlooks the only conceivable inference that can be drawn from Mr. Hannemann's improper refusal to provide Mr. Holcombe with copies of the meeting minutes and proxies: Defendants' had aligned themselves against Mr. Holcombe, too. (*See* R. pp. 629, 645–648.)

Defendants' ill will and intentions in this regard are only underscored by the by the patently incredible testimony that Mr. Hannemann gave at trial claiming that the reason he refused to provide Mr. Holcombe with copies of the minutes and proxies was because the minutes were in draft form. As explained above, that is not the reason that Mr. Hannemann himself provided at the time. (*See* R. p. 629.) Moreover, the record includes evidence of Mr. Hannemann, and for that matter Mr. Morris, actually circulating draft minutes on other occasions. (*See* R. pp. 663, 678–682.)

Re: Finding of Fact No. 14[24]

The trial court states, "Subsequent to the May 31, 2012 meeting in which the homeowners voted to reduce Morris' fine from $1,000.00 to $100.00, [Mr.] Morris continued to receive complaints from Plaintiffs" and was thus prompted to pay the $1,000 fine. This is false. Mr. Morris's letter to Ms. Greene with the $1,000 payment was sent on June 1, 2012 (*see* R. p. 628), the very next day after the referenced May 31st meeting. The finding that his payment was prompted by "continued . . . complaints from Plaintiffs" is not supported by the evidentiary record.

---

meeting expressly in his capacity as a "Board of Director." (*See* R, p. 620.) Additionally, the very fact that the trial court would observe a distinction between Defendants' actions as homeowners versus as Board Members implicitly recognizes that, if Defendants' actions were taken as Board Members, which they were, they were taken outside their authority.

[24] (*See* R. pp. 47–48.)

Re: Findings of Fact Nos. 15 & 16[25]

The trial court overlooks the fact that the Mazell's payment was already overdue after May 31, 2012 (*see* R. pp. 634–636); thus, when ("[i]n June 2012," as the court states) Mrs. Mazell gave Mr. Hannemann a check for a bill that was already past due, Mr. Hannemann's actions thereafter are all the more conspicuous. The court incorrectly states that the certified mailing Mr. Hannemann sent Mr. McFarland with the Mazell check was "refused." (*See* R. p. 328, lines 11–15.) Rather, it was never received—nor could it have been—because Mr. Hannemann sent the check via certified mail to a mailbox where certified mail could not be received. (*See* R. pp. 634–636, 638–639.)

Mr. Hannemann effectively prevented Mr. McFarland's receipt of the check for some fifty (50) days, and then, despite Mr. Hannemann's direct responsibility for the delay and confusion in the transmittal of the Mazells' check, he, along with Mr. Morris, wrote a joint letter to the entire HOA accusing both Mr. and Mrs. McFarland of some vague but sinister impropriety with the Mazells' check that could expose the HOA to "legal jeopardy" and demanding Mr. McFarland's immediate resignation from the Board and as HOA president. (*See* R. pp. 634–636, 638–639, 654–655.) The only reasonable inference that can be drawn from these events (especially when considered along with the other evidence of Defendants' alignment against Mr. McFarland) is that Defendants were attempting to arouse negative sentiment against Mr. McFarland in the neighborhood to get him out of office/off the Board.

This is only further supported by Mr. Morris obtaining a cashier's check (drawn on his own account) on October 4, 2012, and bringing it with him (to have "if needed") to the special Board meeting he and Mr. Hannemann had set for that date—which meeting Mr. Mazell attended even

---

[25] (*See* R. p. 48.)

though he, a non-Board member, could not actually participate in it—at which they purported to vote Mr. McFarland out as HOA president and voted Mr. Hannemann in. (*See* R. pp. 656–658.) By October 4, 2012, the Mazell dues payment was already over four months late. The trial court's statement that Mr. Morris obtained the cashier's check "[i]n the event the Mazell dues check was not received by [Mr.] McFarland" does not make sense in this context.

And, indeed, the trial court's ruling is inconsistent with Mr. Morris's own testimony in this regard. (R. p. 370, lines 11-25 ("[Q.] And the date of that certified check is the same date, is it not? [A.] I don't know, whatever it says on there. [Q.] October 4, 2012? [A.] Says October 4th. That's when it was. That's when I got it. They don't post date certified checks. [Q.] Is there any particular reason that's the same day as the meeting? [A.] I don't have a clue. That's when I got it. [Q.] You said you were going -- you got it just in case it was necessary? [A.] Exactly. [Q.] Why would it have been necessary on October 4th? [A.] I don't have a clue why it would have been necessary October 4th.").)

Re: Findings of Fact No. 17 & 18[26]

As explained above, the trial court's citation to Section 15(c) of the By-laws here overlooks the fact that the Board was rendered dysfunctional by Defendants, who had, again, as Ms. Greene documented, aligned themselves together against Mr. McFarland. (*See* R. pp. 670–673; R. p. 465, lines 3–21; R. p. 823.) Defendants disregarded credible evidence of the violation presented to them by Ms. Greene and refused to take even so modest an investigatory step as to ask the tenant—the very same person who had improperly resided at the Mazells' before—to provide a copy of a utility bill that could prove he did indeed reside elsewhere. (*See* R. pp. 659–662, 664–665, 670–673.)

[26] (*See* R. pp. 48–49.)

Re: Findings of Fact Nos. 19 & 20[27]

Again, the October 4, 2012, special Board meeting at which Messrs. Hannemann and Morris purported to vote Mr. McFarland out as HOA president and Mr. Hannemann in in his place could not possibly have been valid. Notice of the meeting was only placed in the mail to Mr. McFarland on October 1, 2012. (*See* R. pp. 657–658.) Mr. McFarland could not have actually gotten it until after that date, and the meeting notice could not possibly have been given in compliance with the By-laws. (*See* R. p. 566 (providing that special Board meetings require "not less than three (3) days notice to each director mailed or presented personally to such director with such time.") Indeed, three full days after October 1st could not have possibly passed until October 5th. *See Town of Summerville*, 378 S.C. at 112, 662 S.E.2d at 42–43.

Moreover, with only Messrs. Hannemann and Morris involved in the process of moving, seconding the motion, and voting to remove Mr. McFarland as HOA president and of nominating, seconding the nomination, and voting to elect Mr. Hannemann to take Mr. McFarland's place as HOA president, the proceedings were out of proper order and tainted by conflict of interest and self-dealing. Again, Defendants' own witness Ms. Greene still recognized Mr. McFarland to be HOA president after October 4, 2012, and she also attested to Defendants having aligned themselves against Mr. McFarland, rendering the Board dysfunctional. (*See* R. pp. 670–673; R. p. 465, lines 3–21.) And even Defendants themselves identified Mr. McFarland as a Board Member *after* October 4, 2012. (*See, e.g.,* R. p. 684 (notice dated *June 12, 2013*, by Messrs. Hannemann and Morris to "Mr. Bill McFarland [/] Member of the Board of Directors [/] Live Oak Village Homeowners Association," purporting to give Mr. McFarland notice of a special Board meeting they had called for *June 17, 2013*).)

---

[27] (*See* R. pp. 49–50; R. p. 56.)

Re: All Conclusions of Law[28]

None of the trial court's Conclusions of Law is supported by the record or the applicable law.

Directors of a nonprofit corporation owe the corporation duties of care and loyalty. *See* § 33-31-830 (setting forth general standards for directors); § 33-31-831 (subject to certain exceptions inapplicable here, prohibiting directors acting on corporate matters in which they have a conflict of interest). While it is true that, "[i]n a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule[,]'" this simply means that the judgment of the directors will not be set aside "*absent* a showing of bad faith, dishonesty, or incompetence . . . ." *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (emphasis added); *see also Dockside Ass'n v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) ("[T]he business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self-dealing [,] or unconscionable conduct."). Moreover, "a corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires*." *Seabrook Island Prop. Owners Ass'n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987). "The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones[,]" and "[a] homeowners association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative." *Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 409 S.C. 164, 180, 760 S.E.2d 121, 130 (Ct. App. 2014).

---

[28] (*See* R. pp. 50–52.)

As addressed above, the record contradicts every one of Conclusions of Law Nos. 1–6. The record is replete with evidence of Defendants' dereliction of their duties of care and loyalty in favor of bad faith, self-dealing, incompetence, and dishonesty—that latter further displayed by their dubious trial testimony regarding such matters as their view of Ms. Greene's "legitimacy" as HOA property manager (which is strikingly different than that revealed by the contemporaneous records), including the incredible notion expressed at trial that the idea had been for Ms. Greene to "[h]andle the [HOA's] bills," and the explanation for why Mr. Holcombe's request for copies of the minutes and proxies from the May 31, 2012, special HOA meeting was refused. The way Defendants disregarded the credible evidence that the very same tenant who had been improperly residing the Mazells before had returned to the Mazell's house plainly violates § 33-31-830(c) ("A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted."). Moreover, with respect to following the Governing Documents, the applicable legal standard mandates that they in fact be followed—there is no such thing as a "reasonable alternative." Without question, Mr. Morris violated the Governing Documents with his April 2012 landscaping project. The very fact that the trial court excused his violation on account of its supposed reasonableness is itself proof positive of Mr. Morris's breach of the legal standard that actually applies. And the breach of this standard—accompanied by bad faith, self-dealing, incompetence, and dishonesty—is evidenced repeatedly throughout the course of Defendants' efforts thereafter to use their positions on the Board, not to promote the HOA's interest in ridding the community of violations of the Governing Documents,[29]

[29] Indeed, far from protecting the community via protecting the sanctity of the Governing Documents, Mr. Morris took the position that the "covenant" he violated was "null and void." (*See* R. p. 609.)

but to rid themselves of the nuisance of following the Governing Documents whenever it did not suit them.

As for Conclusion of Law No. 7, i.e., the trial court's ruling that Plaintiffs are not entitled to an injunction in any event because they have unclean hands, it too is not supported in law or fact. Regarding Mrs. McFarland, the trial court states she "has unclean hands by acting as an officer and/or director in directing the property manager without approval from the Board of Directors." (R. p. 52.) Neither of the two written contracts Ms. Greene entered into with the HOA was signed by Mrs. McFarland; both were signed by Mr. McFarland, for and on behalf of the HOA, as its president, just as were her checks. (*See* R. pp. 589–590, 597–598; *see also* R. p. 433, lines 2–5.) Mrs. McFarland did not wrongly represent herself to Ms. Greene as a Board Member or HOA officer—again, this has never even been suggested. Ms. Greene always knew Mrs. McFarland was not a Board Member or HOA officer but rather the spouse of Board Member/President Mr. McFarland,[30] and Ms. Greene considered Mrs. McFarland's involvement to be within the bounds of the normal spousal teamwork. (*See* R. p. 458, line 20 – p. 459, line 12.) Ms. Greene simply did not testify that Mrs. McFarland acted "unilaterally" or that she (Ms. Greene) "reported to and took directives solely from [Mrs. McFarland]." Rather, according to Ms. Greene, Mr. McFarland was involved and Mrs. McFarland did not act alone. (R. p. 435, line 23 – p. 436, line 3.) Indeed, Ms. Greene explained, "as far as dealing with Ms. McFarland and Mr. McFarland, it was always via e-mail[,]"[31] and as is well documented in the record, Mr. and Mrs. McFarland share the same email address.

[30] (*See* R. p. 432, lines 1–14.)

[31] (R. p. 435, lines 24–25.)

Regarding Mr. Holcombe, the trial court states he has "unclean hands in loaning the HOA money for attorney's fees and, in the event Holcombe is not awarded attorney's fees, in planning to issue a special assessment to all homeowners for reimbursement—all without a vote of the Board of Directors and/or homeowners." (R. p. 52.) First off, this was not actually Mr. Holcombe's testimony. The most that can be said of his testimony is that he agreed with Defendants' counsel "that if you are unsuccessful in collecting attorney's fees and costs, then you would anticipate a special assessment to all of the owners for the attorney's fees and costs." (R. p. 123, lines 3–7.) Mr. Holcombe's anticipation in this regard is simply not the same thing as him "planning to issue to issue a special assessment to all homeowners for reimbursement . . . without a vote of the Board of Directors and/or homeowners." At most, what Mr. Holcombe actually testified to was his anticipation of a special assessment, not that he himself would somehow be "issuing" such an assessment "without a vote of the Board of Directors and/or homeowners." There is absolutely no suggestion anywhere in this testimony (or elsewhere in the record) that any special assessment he might have anticipated would—or even could—ever come to pass unless and until it was properly approved and issued in accordance with the Governing Documents. And his mere act of fronting money to pursue litigation in good faith[32] in furtherance of the interests of the HOA—for no potential personal gain other than that in which he would share with fellow homeowners by remedying the dysfunction in the community's governance—cannot possibly amount to inequitable conduct or otherwise render his hand unclean.

[32] Nowhere has it been suggested (nor could it reasonably be) that Mr. Holcombe's pursuit of this litigation has been in bad faith. The trial court itself, even in finding Mr. Holcombe to have unclean hands, does not find any such bad faith on his part—nor, for that matter, on the part of Mrs. McFarland.

Moreover, in the evaluating the instant situation the trial court's view of the equities is out of balance. The court states that even if it did find Defendants were acting outside the scope of their authority as Board Members, it nonetheless would not enjoin them from doing so. Besides the fact that the court's finding about Petitioners' supposedly unclean hands is not supported by the evidentiary record, and besides the fact that, in any event, the conduct attributed to Petitioners on which this finding is based does not, as a matter of law, amount to a proper basis to invoke the doctrine of unclean hands,[33] it is patently inequitable to allow Defendants to continue to act/fail to act in a way that is detrimental to the entire community on the basis of what, even as erroneously attributed to them by the trial court, is less significant conduct on the part of just *two* members of the community. Moreover, Petitioners' request for the court to stop Defendants' violation of the Governing Documents is in accordance with § 33-31-810, which expressly authorized it to "(a) . . . remove any director of the corporation from office . . . if [it] finds that: (1) the director engaged in fraudulent or dishonest conduct, or gross abuse of authority or discretion, with respect to the corporation, . . . ; and (2) removal is in the *best interest of the corporation*." (emphasis added). Moreover, in subsection (b), § 33-31-810 provides that "[t]he court that removes a director may bar the director from serving on the board for a period prescribed by the court."

[33] The trial court itself states, "'The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly [1] *in a matter that is the subject of the litigation* [2] *to the prejudice of the defendant*.'" (R. p. 42 (quoting *First Union Nat'l Bank of S.C. v. Soden*, 511 S.E.2d 372, 379 (S.C. Ct. App. 1998) (emphasis added).) The supposed conduct on which the court based its finding of unclean hands against Petitioners was not, in fact, "the subject of the litigation" and, besides that, the court never identified any prejudice to Defendants thereby, nor does the evidentiary record allow for such a finding. The court merely states, in conclusory fashion, "Plaintiffs' actions violate the same Covenants and Bylaws of which they complain the Defendants are violating and, therefore, Plaintiffs' unclean hands bar the equitable remedy of injunction[,]" without ever actually identifying any provision of the Governing Documents supposedly violated by Mrs. McFarland or Mr. Holcombe. (*See* R. p. 52.)

CONCLUSION

For the foregoing reasons, Petitioners contend that the Court of Appeals erred in affirming the trial court and ask this Honorable Court to grant the instant petition, reverse the Subject Opinion, and file its own opinion reversing the trial court and providing for judgment in favor of Petitioners or, alternatively, if more appropriate to effectuate relief from the errors Petitioners challenge herein (or any of them), to grant the instant petition, reverse the Subject Opinion, and remand this matter to the Court of Appeals or the trial court for such further proceedings as may be necessary.

Respectfully submitted,

CLEMENT RIVERS, LLP

By: s/Russell G. Hines

Russell G. Hines (SC Bar No. 72100)
25 Calhoun Street, Suite 400
Charleston, South Carolina 29401
P.O. Box 993 (29402)
(843) 720-5488

Attorney for Petitioners

Charleston, South Carolina

July 11, 2022