

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Judge

Appellate Case No. 2020-000056

Sterling Hills Homeowners Association,.....Respondent,

v.

Elliot Hayes,.....Appellant.

REPLY TO RETURN TO PETITION
FOR REHEARING OR REHEARING *EN BANC*

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Jul 12 2022

SC Court of Appeals

Appellant, Elliot Hayes (hereinafter “Hayes”), hereby respectfully submits this reply to the return submitted by the Respondent, Sterling Hills Homeowners’ Association, Inc. (hereinafter “the HOA”) to Hayes’ petition for rehearing or rehearing *en banc* in this case. Hayes sees no need to repeat, any more than is needed to reply and address the points below, what is already stated in his petition for rehearing.

Just as the lower court did, the HOA in its return ignores what is actually in – and not in – the record.

I. The HOA sued Hayes on an at-law breach of contract claim for damages – just as its amended complaint sets forth.

Covering its eyes to avoid reading its own pleading, the HOA continues to insist that it sought only equitable relief on only equitable claims against Hayes. Poppycock. Let us literally look at the record:

FOR A FIRST CAUSE OF ACTION
(Breach of Covenants)

25. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

26. Restrictive Covenants are considered voluntary contracts between the Parties.

27. Pursuant to the terms of the Declaration, Defendant has breached the Covenants by allowing an individual to reside and/or sleep on a porch attached to his Dwelling.

28. Defendant’s conduct constitutes an annoyance and a nuisance for other owners within the Sterling Hills Community.

29. Defendant has further breached the Covenants in allowing his Lot to fall into such an extreme state of disrepair.

30. Defendant’s breach affects the appearance and aesthetics of the Community and diminishes the overall value of the homes in the Community.

31. Defendant’s breach of covenants has caused Plaintiff to incur damages, including: diminished aesthetics, diminished property value, attorneys’ fees, and a lack of harmony with the rest of the Community.

(R. p. 45.)

WHEREFORE, Plaintiff prays this Honorable Court enter judgment against Defendant as follows:

a. Actual and consequential damages;

(R. p. 47.)

This is what is pled in the HOA's amended complaint. (R. pp. 45, 47.) These are the HOA's words, not Hayes'. (R. pp. 45, 47.) What the HOA lists in its prayer as the primary things it seeks are "[a]ctual and consequential damages[.]" (R. p. 47.)

If this is not an at-law breach of contract claim, one wonders what would be. A claim that prays for a damages judgment for breach of contract is an action at law. E.g., Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010) (action for breach of contract is at law); First Citizens Bank & Trust Co. of S.C. v. Hucks, 305 S.C. 296, 408 S.E.2d 222, 223 (1991) (same); Branche Builders, Inc. v. Coggins, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009) (action seeking damages for breach of contract is action at law).

Even if this court were to see the main purpose of the HOA's amended complaint as seeking equitable relief – which would be at odds with what the amended complaint actually states – Hayes would still have the constitutionally guaranteed right to a jury trial in this case. S.C. Const. art. I, § 14; Floyd v. Floyd, 306 S.C. 378, 380, 412 S.E.2d 397, 399 (1991). An action's "main purpose" cannot override the constitutional mandate "that in instances where legal and equitable issues or rights are asserted in the same complaint, the legal issues are for determination by a jury and the equitable issues are to be decided by the court." Floyd, 306 S.C. at 380; accord S.C. Const. art. I, § 14.

The state constitution requires this court to reverse and remand for a jury trial. S.C. Const. art. I, § 14. The court must have overlooked or misapprehended the law in reaching its conclusion in this case, and rehearing should be granted.

II. Skydive clarified what the standard is on a motion to dismiss.

In 2019, our Supreme Court clarified that the standard for deciding a motion to dismiss under Rule 12(b)(6), SCRCP, requires that “the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted.” Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). That is part of the standard; it does not require a motion or special request by Hayes or someone in his position to invoke it. Id. The circuit court did not perform this analysis. (R. pp. 1-10.) Had it done so, Hayes’ counterclaims would not have been dismissed.

In applying the standard of review that pertains to the grant of a motion to dismiss, if this court deems what Hayes pled insufficient, it is required to allow him the opportunity to amend, unless amendment is shown to be futile. Skydive, 426 S.C. at 181. The opinion misapprehends the law to hold otherwise.

III. The HOA does not argue from the record; rather, it argues from inferences it wants drawn in its favor, including ones not based in the record. The HOA argues that purported, outside-the-record facts make the existing opinion correct.

The HOA contends the court was right to affirm the grant of summary judgment based on “minutes produced in discovery” that are not part of the record that was before the court below. (Return to petition for rehearing p. 12.) The HOA has now acknowledged that Ella Calvert is not, as it previously maintained, a holdover director. Now, the HOA contends that these ostensible minutes show that Ella Calvert, who

became a director of the HOA *in 2015*, some 13 years after the HOA last held director elections (R. pp. 173-77), came to hold that position through a purported series of lawful events – facts about none of which are in the record. (Return to petition for rehearing pp. 12-13.)

To decide the HOA is correct about this would be manifestly improper, as this argument depends upon “matter which was not presented to the lower court or tribunal.” Rule 210(c), SCACR; accord Rule 208(b)(4), SCACR (references to facts must cite to “materials which may be properly included in the Record on Appeal”). The purpose of an appeal is for the appellate court “to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court.” Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984); accord State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007); Cobb v. Benjamin, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997). This court has already granted a motion to strike material from inclusion in the record on appeal because the HOA improperly designated it. (Order filed Aug. 20, 2021.) The HOA consented to the motion, conceding that the stricken material could not properly be included in the record on appeal. (Order filed Aug. 20, 2021; Return to motion to strike from designation.) Yet, now, the HOA argues from matter not in the record in an attempt to save its position.

Further, on review of a grant of summary judgment, for this court to do what the HOA asks would violate the standard of review. The HOA asks this court to draw inferences in *the HOA’s* favor about what happened, though what is before this court for review is whether a summary judgment motion *the HOA made* ought to have been granted. (R. pp. 1-10, 65-116.) On review of the grant of summary judgment, “[a]ll

ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly *against the moving party*.” Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004) (emphasis added). This standard does not permit this court to assume that events outside the record must have happened because they would support the HOA’s position – the *moving party*’s position. Id.

All Hayes needed to avoid summary judgment about the *ultra vires* issue was a scintilla of evidence. Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-03 (2009). He had it. The interrogatory responses that were on file with the circuit court at the time of the motions hearing state “that the Plaintiff is operated unlawfully by persons claiming to be its directors, even though a the required quorum of Plaintiffs’ members to elect directors has not participated in a director’s election since at least 2002; [and] that the supposed ‘board of directors’ of the Plaintiff simply purports to appoint themselves as the Plaintiff’s putative directors.” (R. p. 173.) Ms. Calvert’s affidavit states that she became a director of the HOA *in 2015*, some 13 years after the HOA last held director elections. (R. pp. 173-77.) As the HOA now acknowledges, she could not be a holdover director from before 2002 *and* have become a director in 2015; thus, the purported board of directors through which the HOA acts is not made up of directors who continue to hold their positions per S.C. Code § 33-31-805(d).

The HOA’s position had been that all its purported directors were lawful holdover directors, until it became forced to acknowledge that was false. The lower court’s decision was based on ignoring the evidence to the contrary and deciding that holdover directors were indeed who compose the HOA’s ostensible board. (R. p. 6.)

The lower court concluded that, because they were holdover directors under S.C. Code § 33-31-805(d), their acts on behalf of the HOA were not *ultra vires*.

When viewed in the light most favorable to Hayes, this case's record presents a genuine issue of material fact about whether the HOA has been acting through a group of people who actually, under law, comprise its board of directors. Id. The Supreme Court has spoken to the difference between *ultra vires* versus *intra vires* acts of a corporation in Fisher v. Shipyard Village Council of Co-Owners, Inc., 415 S.C. 256, 781 S.E.2d 903 (2016). As the Supreme Court observed in Fisher, “[a] corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto.” Id. at 271. “A corporation’s actions taken within the scope of the powers granted it are considered *intra vires* acts; acts beyond the scope of its powers, however, are *ultra vires* acts.” Id. An act of a corporation that exceeds the powers granted to it under its governing documents is an *ultra vires* act. Id.

The HOA can act only if it has a lawfully empowered board of directors, as “all corporate powers must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board” of directors, S.C. Code Ann. § 33-31-801(b), and the HOA’s covenants and by-laws do not provide otherwise. (R. pp. 67-116.) If it is acting through a different group of people, some or all of whom do not lawfully hold director positions, its acts are *ultra vires*. Fisher, 415 S.C. at 271. There is a genuine issue of material fact about that. (R. pp. 173-77.) That genuine issue of material fact precluded summary judgment. Rule 56(c), SCRCP.

IV. Whether the Unfair Trade Practices Act can apply to the activities of a homeowners' association is an important question worthy of rehearing *en banc*.

Whether a nonprofit homeowners' association's activities are excluded from the definition of *trade* or *commerce* under S.C. Code Ann. § 39-5-10(b) – despite the fact that they engage in repeated, systemic consumer transactions by providing subdivision-wide services to homeowners and that the fact that they engage in repeated, systemic consumer transactions by collecting money from those homeowners to fund those activities – is a question of exceptional importance that calls for rehearing by this court *en banc*. Rule 219(a), SCACR.

V. The HOA employs vitriol because it lacks strong argument.

The HOA takes every opportunity to use words like “baseless” and “frivolous” to describe Hayes’ position. A return to a petition for rehearing does not require such venom. “*Ad hominem* arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names (‘Jane you ignorant etcetera . . .’) only shows the paucity of your own reasoning.” Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal. App. 4th 1417, 1430 (Cal. App. 4th 2002). As the undersigned once read in a brief, there is a saying in our line of work: “If you have the facts and not the law, argue the facts. If you have the law and not the facts, argue the law. If you don’t have either the facts or the law, pound the table.”

The HOA pounds the table. That is telling. Id.

WHEREFORE, Appellant prays that his petition for an order granting rehearing or rehearing *en banc* in this case be granted.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I served the reply to return to petition for rehearing in this case by
providing a copy of it by email to opposing counsel at the email address shown below
and on the date shown below:

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Respectfully submitted,

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July 12, 2022

Drew Radeker

From: Drew Radeker
Sent: Tuesday, July 12, 2022 4:51 PM
To: 'Christian Saville'
Cc: Ian Thomson; Rhonda Schaub
Subject: RE: Sterling Hills v. Hayes - Reply to Return to Petition for Rehearing
Attachments: Reply to return to Pet rhg.pdf

Christian:

Good afternoon. Attached and served upon you is the appellant's reply to the respondent's return to the petition for rehearing or rehearing *en banc*.

Thank you.

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From: Christian Saville <Christian.Saville@mccabetrotter.com>
Sent: Friday, July 8, 2022 3:56 PM
To: Drew Radeker <Drew@harrisonfirm.com>
Cc: Ian Thomson <Ian.Thomson@mccabetrotter.com>; Rhonda Schaub <Rhonda@harrisonfirm.com>
Subject: Sterling Hills v. Hayes - Return to Petition for Rehearing

Good afternoon Drew,

Please find attached the Return to Petition for Rehearing we are filing today in the Sterling Hills v. Hayes appeal. Please don't hesitate to let me know if I can provide anything further.

Thank you,

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