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.

PETITION FOR REHEARING OR REHEARING *EN BANC*

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Appellant, Elliot Hayes (hereinafter "Hayes"), hereby respectfully moves and petitions, pursuant to Rules 219 and 221(a), SCACR, as well as all other applicable law, for an order granting rehearing or rehearing *en banc* in this case and submits the memorandum below in support of the same. Hayes, in an effort to keep this petition succinct, incorporates herein by reference his previously submitted briefs, making by reference those same arguments here. This petition does not restate the briefs, except by incorporation, any more than is needed to address the misapprehensions evident from the opinion issued in this case.

This court's opinion merits a second look – if need be, by this court as a whole, *en banc*. See S.C. Code Ann. §§ 14-8-80 & -90. XXX.

I. Hayes was entitled to a jury trial because the HOA brought a breach of contract claim for damages against him.

The court's opinion in this case cites the case of S.C. Dept. of Natural Resources v. Town of McClellanville, 345 S.C. 617, 550 S.E.2d 299 (2001), for the proposition that, to quote the opinion in this instant case, "an action to enforce restrictive covenants is equitable"; however, what DNR v. Town of McClellanville actually states is that "[a]n action to enforce restrictive covenants *by injunction* is in equity." Id. at 622. In that case, the Department of Natural Resources sued the Town of McClellanville seeking an injunction. Id. at 621.

That is significantly different from this case. The Respondent, Sterling Hills Homeowners' Association, Inc. (hereinafter "the HOA"), sued Hayes for breach of contract, seeking damages. Not only did Hayes plead at-law counterclaims in this action – which would be compulsory even if the HOA's claims sounded only in equity – the HOA's first cause of action asserted against him is an at-law claim that seeks damages for breach of contract. (R. pp. 45, 48, 169 ln. 15-18.) The HOA pled an at-

law claim against Hayes, which it styled as "breach of covenants" and through which it seeks a judgment for "actual and consequential damages[.]" (R. pp. 45, 47.)

Under the South Carolina Constitution, "[t]he right of trial by jury is preserved inviolate." S.C. Const. art. I, § 14. "The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived." Rule 38(a), SCRCP. "This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at the time of the adoption of the Constitution in 1868." Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997).

Under this constitutional guarantee, a claim seeking damages for breach of a contract carries with it the right of either party to trial by jury. Cooper, 326 S.C. at 48. Restrictive covenants are contracts. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987); Kinard v. Richardson, 407 S.C. 247, 754 S.E.2d 888, 893 (Ct. App. 2014); Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 628 S.E.2d 902, 913 (Ct. App. 2006); Houck v. Rivers, 316 S.C. 414, 418, 450 S.E.2d 106, 109 (Ct. App. 1994). A claim that a party has violated a restrictive covenant is a claim that the party has breached the contract embodied in the covenants. See Kinard, 754 S.E.2d at 893; Queen's Grant, 628 S.E.2d at 913.

Under the South Carolina Constitution, the HOA's claim seeking damages for breach of contract is one on which both the HOA and Hayes have the right to a jury trial. This claim, which seeks a money damages judgment for breach of contract (R. pp. 45, 47), 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).

The HOA's damages claim for breach of contract disposes of the need to determine whether Hayes' at-law counterclaims for breach of contract and violation of the Unfair Trade Practices Act are compulsory or permissive. Where the plaintiff pleads an at-law claim, like the HOA did here, the defendant is entitled to a jury trial on that claim and on any legal counterclaims he may assert, even if they are permissive. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014); Johnson v. S.C. Nat. Bank, 292 S.C. 51, 54-56, 354 S.E.2d 895 (1987). Even if the court determines that the main purpose of the HOA's complaint is to seek equitable relief, Hayes still has the right to a jury trial, since an action's "main purpose" does not trump the requirement "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 v. Floyd, 306 S.C. 378, 380, 412 S.E.2d 397, 399 (1991).

In light of Hayes' jury demand, it was reversible, prejudicial error for the circuit court to refer this case to a master-in-equity. See S.C. Const. art. I, § 14; S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017) (reference to master-in-equity never should have been made where jury trial properly demanded on at-law causes of action).

The state constitution, among other law, requires this court to reverse on this point. 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. Hayes identified acts constituting breach of the covenants.

The opinion holds that Hayes' answer and counterclaim fails to identify acts that constitute breaches of the covenants. The record does not support this holding, and the court must have overlooked or misapprehended something – the record or the law – in reaching this conclusion.

Hayes' answer and counterclaim alleges that the HOA has been "refusing to hold elections for directors and operating in flagrant disregard of the covenants the [HOA] claims bind the property subject of this case." (R. p. 54.) The answer and counterclaim also alleges that the HOA "has improperly assessed purported fines and assessments and has improperly taken actions against members or purported members of the [HOA]." (R. p. 56.) It alleges that the HOA "is and for quite some time has been operating in an *ultra vires* state" and that "[n]one of the Plaintiff's actions during this long time period have been lawful or valid." (R. pp. 56-57.)

The covenants at issue are part of the pleadings in this case, having been referenced in the HOA's original and amended complaint and Hayes' answer and counterclaim. Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (proper for court to consider documents referenced in pleading on motion to dismiss). Viewed in the light most favorable to Hayes, as they must be, the allegations of the answer and counterclaim allege that the HOA breached the provisions of the covenants relating to director elections, the charging of fines and assessments, and what actions the HOA can take against members, and it is certainly inferable, in light of the HOA's allegations against Hayes, that the HOA directed against Hayes acts that were unauthorized by the covenants. (R. pp. 54, 56-57.)

These allegations are also consistent with the theory that the HOA has been insisting that Hayes "perform" under the covenants by doing things that are not required under the covenants, with the HOA then taking action against him for this purported lack of performance. (R. pp. 54, 56-57, 193-99.) The chart presented by Hayes at the motion hearing details how the HOA is seeking to enforce nonexistent obligations through its claims in this case. (R. pp. 17-25, 226-36.) For one example, the HOA has demanded that Hayes do things that the recorded covenants and the recorded by-laws of the HOA do not require him to do, such as painting his garage door white or keeping his trash cans out of view of the street. (R. pp. 40-48, 67-116, 226-36.) For another, the HOA seeks to require Hayes to do things that can only be required by an "Architectural Control Committee"; however, the HOA does not have and has not had such a committee. (R. pp. 40-48, 193-99, 67-116, 226-36.)

When one party to a contract demands that another party "perform" by doing things that are not required by the contract, the making of that demand is a breach of the contract. Hunter Bros. Systems, Inc. v. Brantley Const. Co., Inc., 286 S.C. 59, 66, 332 S.E.2d 206, 210 (1985). Hunter Brothers is binding precedent issued by our Supreme Court. Id.; S.C. Const. Art. V, § 9. This court must have misapprehended something in not following that precedent.

The answer and counterclaim also alleges that the HOA "is seeking to enforce by-laws and, to the extent they exist, rules and regulations that have never been recorded as required by S.C. Code Ann. § 27-30-130" and that "[s]uch by-laws and rules and regulations are unenforceable." (R. p. 54.) This Code section provides that "in order to be enforceable, a homeowners association's governing documents must be recorded in the clerk of court's, Register of Mesne Conveyance (RMC), or register of

deeds office in the county where the property is located." S.C. Code Ann. § 27-30-130(A)(1). The recorded covenants and by-laws were put into the record, but there are no provisions in them requiring Hayes (or any other HOA member) to do the things the HOA has demanded that Hayes do. (R. pp. 67-116, 200-25.) Viewed in the light most favorable to Hayes, the HOA is *not* seeking to enforce the terms of the covenants; rather, it seeks to have the court enforce some other set of "rules." (R. pp. 40-48, 193-99, 67-116, 226-36.) Whatever this other set of rules is, it is not recorded with the Richland County Register of Deeds. (R. pp. 200-25, 67-116.)

The HOA's insistence that Hayes comply with its demands that exceed the requirements of the parties' contract *is* a breach of that contract, as discussed above. Hunter Bros., 286 S.C. at 66. Further, "[w]hen a contract is made it is presumed to be made with reference to the existing law applicable to its terms[.]" Witte Brothers v. Clarke, 17 S.C. 313, 316 (1882). It is a part of the parties' contract that the HOA's unrecorded (and seemingly unwritten) rules cannot be enforced. See id.; S.C. Code Ann. § 27-30-130(A)(1). The HOA's attempts to enforce them breach the contract.

Hayes can achieve relief under breach of contract theories within what is pled in his answer and counterclaim; thus, the circuit court's dismissal was improper, reversible error, and this court should have reversed it. This court must have overlooked something to conclude that Hayes did not plead anything that would constitute a breach of the covenants.

III. The opinion has announced a new requirement under the Unfair Trade Practices Act that is not the law – but this HOA would still meet that requirement if it were the law.

The opinion has misapprehended the law about the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, and that misapprehension is the basis for the holding that Hayes did not plead facts that could be seen as a violation of the Unfair Trade Practices Act.

A claimant under the Unfair Trade Practices Act must show: (1) the other party violated S.C. Code Ann. § 39-5-20 by engaging in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the claimant suffered damages as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). Hayes' answer and counterclaim pled all these things.

The Unfair Trade Practices Act specifically defines by statute that, under the Act, "'[t]rade' and 'commerce' shall include the . . . distribution of *any services* and any property, tangible or intangible, . . . and *any* other article, commodity or *thing of value* wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b) (emphasis added). This court has held that "[t]he statute's use of the words 'shall include' clearly suggests the legislature did not intend to limit 'trade' and 'commerce' to only the listed transactions." Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (Ct. App. 1991). "[T]he UTPA 'should be given a liberal construction.'" McTeer v. Provident Life and Accident Ins., 712 F. Supp. 512, 515 (D.S.C. 1989) (quoting Connolly v. People's Life Ins. Co., 294 S.C. 355, 359, 364 S.E.2d 475, 477 (Ct. App. 1988)).

An HOA distributes HOA services, such as covenant compliance enforcement and maintenance of HOA common areas for the benefit of the HOA's members, and

collection of money assessed to its members. The very nature of an HOA is commercial: it collects money from its members and uses that money to provide services to its members. One of the HOA's primary functions is to distribute covenant enforcement services, consonantly with how the HOA describes itself in its brief and what it states it is doing in this case. That brings it and its actions at issue within the ambit of the Unfair Trade Practices Act's definition of trade or commerce. S.C. Code Ann. § 39-5-10. Indeed, if an HOA does *not* provide services to its members, it has no reason to exist; providing services to its members – including, often, covenant enforcement – is what its purpose is.

The court is required to examine Hayes' answer and counterclaim in the light most favorable to him. In that light, Hayes has pled a cause of action for violation of the Unfair Trade Practices Act. The HOA seeks to enforce unwritten and unenforceable rules. (R. pp. 40-48, 54.) The HOA "refus[es] to hold elections for directors and operat[es] in flagrant disregard of the covenants[,]" such that it perpetuates *ultra vires* acts whenever it acts, including when it takes action against a member, such as it has against Hayes. (R. pp. 54-56.) That means that *all* of the HOA's actions, on as wide a scale and with as much potential for repetition as possible, exceed its lawful powers, including its actions concerning those with whom it most regularly engages in commerce, its members. The HOA has engaged in actions, including those subject of its amended complaint in this case, that "constitute violations of the South Carolina Unfair Trade Practices Act" and "offended public policy[.]" (R. p. 56.) The HOA "has improperly assessed purported fines and assessments and has improperly taken actions against members or purported members of the [HOA,]" which include fines, assessments, and other actions taken against HOA members for purported

violation of nonexistent rules. (R. pp. 54, 56.) This is unfair and deceptive practice on a large scale. "These acts were immoral, oppressive, unscrupulous, and substantially injured Hayes." (R. p. 56.) The HOA "knew or should have known that these actions were violations of the Unfair Trade Practices Act and constituted unfair and deceptive acts in trade or commerce." (R. p. 56.) The HOA's "actions have an impact upon the public interest and are capable of repetition" – and, since they have been repeated, as alleged, of course they do. (R. p. 56.) "Hayes has suffered damages as a direct, consequent, and proximate result of these actions of the [HOA]." (R. p. 56.)

The allegations touch on every element of an Unfair Trade Practices claim. Wright, 372 S.C. at 23.

Those things fall within the Unfair Trade Practices Act's broad definition of *trade* and *commerce*. See Baker, 306 S.C. at 208-09; Connolly, 294 S.C. at 359; McTeer, 712 F. Supp. at 515. Viewing the answer and counterclaim in the light most favorable to Hayes, there is at least a fact question about whether the HOA's acts subject of the Unfair Trade Practices Act claim fall within the broadly construed meaning of *trade* or *commerce* under the Act.

This court's recent decision of Beneficial Financial I, Inc. v. Windham, 431 S.C. 256, 847 S.E.2d 793 (Ct. App. 2020), summarized the law of an Unfair Trade Practices cause of action. There, the court stated as follows:

> The SCUTPA establishes: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006) (quoting Wogan v. Kunze, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005)). "In order to be actionable under SCUTPA,

> the unfair or deceptive act or practice must have an impact on the public interest. [. . .]" Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 453, 814 S.E.2d 643, 655 (Ct. App. 2018) (quoting Noack Enters., Inc. v. Country Corner Interiors, Inc., 290 S.C. 475, 479, 351 S.E.2d 347, 349-50 (Ct. App. 1986)), *cert. denied*, S.C. Sup. Ct. Order dated Nov. 9, 2018.
>
> "After alleging and proving facts demonstrating the potential for repetition of the defendant's actions, the plaintiff has proven an adverse effect on the public interest . . . the plaintiff need not allege or prove anything further in relation to the public interest requirement." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998).
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> > An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.
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> Id. at 453-54, 814 S.E.2d at 655 (quoting Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004)). However, these are not the only two ways impact on the public interest may be shown, rather "each case must be evaluated on its own merits." Crary, 329 S.C. at 388, 496 S.E.2d at 23.

Beneficial, 431 S.C. at 268-69.

Hayes pled all that.

Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013), cited in this court's opinion, is quite consistent with the HOA's actions being within the definition of trade and commerce under the Unfair Trade Practices Act. Health Promotion Specialists reads, in pertinent part, as follows:

> As defined by the SCUTPA, "trade or commerce" includes "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article,

> commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39–5–10(b) (1985). *By these plain terms, it is clear the General Assembly intended for the SCUTPA to apply to business or consumer transactions*.
>
> Furthermore, *by its very definition, "trade or commerce" involves "[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic."* Black's Law Dictionary (9th ed.2009); see Bretton v. State Lottery Comm'n, 41 Mass. App. Ct. 736, 673 N.E.2d 76, 78–79 (1996) (recognizing that "the proscription in § 2 of 'unfair or deceptive acts or practices in the conduct of any trade or commerce' must be read to apply to those acts or practices which are perpetrated in a business context" (citations omitted)).
>
> In the instant case, the Board's sole action was the promulgation of a regulation. We find this act, which is alleged to have been unfair, does not fall within the definition of "trade or commerce" as it did not involve advertisement, sale, or *distribution of services* or property within a business context.

Health Promotion Specialists, 403 S.C. at 638-39 (emphasis added).

Health Promotion Specialists by no means *limits* the scope of "trade or commerce" to for-profit activities; rather, it notes that for-profit activities are *included* within "trade or commerce" under the Act. Id. The acts subject of Hayes' Unfair Trade Practices Act claim involve consumer transactions (between homeowners and the HOA) that occurred within the HOA's distribution of services to its members. That is "trade or commerce" under the Act. Id.

Had the legislature wanted to carve HOAs out of applicability of the Unfair Trade Practices Act, they would have enacted a statute to do so. They did not.

It is not only unsupported by the law to conclude, as the circuit court did, that the Unfair Trade Practices Act does not apply to HOAs, it is unjust. There is no reason

that entities that provide subdivision-wide services to homeowners and collect their money to do so should not be subject to the application of the Unfair Trade Practices Act if they engage in unfair trade practices.

IV. The opinion is wrong to deny Hayes' amendment argued as unpreserved.

The opinion concludes that Hayes' argument that the circuit court erred in dismissing his claims with prejudice and failing to allow him an opportunity to amend is barred because it was unpreserved for review. The opinion is wrong to do so. There is Supreme Court precedent that supports Hayes being able to argue this on appeal. To the extent that Kitchen Planners, LLC v. Friedman, 432 S.C. 267, 279-80, 851 S.E.2d 724, 731 (Ct. App. 2020), holds otherwise, it is against Supreme Court precedent and cannot be followed.

Our Supreme Court dealt with a similar issue preservation argument and rejected it, holding that, "[o]rdinarily, . . . the time for requesting leave to amend to correct a Rule 12(b)(6) pleading defect is after the trial court has determined the original pleading was deficient." Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 181, 826 S.E.2d 585, 588 (2019). The Supreme Court's decisions bind the Court of Appeals as precedents, S.C. Const. Art. V, § 9. If this court deems what Hayes pled insufficient, it is required to allow him the opportunity to amend, period, unless amendment would be futile. Skydive, 426 S.C. at 181. The opinion misapprehends the law to hold otherwise.

V. Hayes did present evidence of improper appointment of directors.

The opinion holds that Hayes did not present evidence of improper appointment of directors, but he did. The opinion misapprehends the record in this regard.

Hayes interrogatory responses that were on file with the circuit court at the time of the motions hearing contain the following statements: "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.) The court is required to examine "the pleadings, depositions, answers to interrogatories, and admissions on file" in assessing whether summary judgment is proper. Rule 56(c), SCRCP. The circuit court and this court evidently did not do so.

The HOA is a nonprofit corporation. (R. p. 40.) Examining the affidavit of purported board member Ella Calvert and comparing it to the statements from the interrogatory responses above, it is evident that the HOA's so-called board of directors is *not* composed of allowable holdover directors. (R. pp. 173-77.) 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.) Ms. Calvert could not be a holdover director from before 2002 *and* have become a director in 2015. She is not a holdover director, and the purported board of directors through which the HOA acts is not composed of directors continuing to hold their positions as allowed under S.C. Code § 33-31-805(d). More to the point for purposes of this appeal, when the record is viewed in the light most favorable to Hayes, as it must be, there is 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. A reasonable inference may be drawn that Ms. Calvert did not obtain her position on the board through any means authorized by law.

Hayes presented evidence of improper appointment of directors. He only needed a scintilla to avoid summary judgment, and he had it.

VI. Rehearing *en banc* would be proper.

"A hearing or rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Rule 219(a), SCACR.

Consideration by the full court appears necessary to secure or maintain the uniformity of this court's decisions, as well as to ensure adherence not just to Supreme Court precedent but also to the constitution of this state. This court should rehear this case *en banc*.

WHEREFORE, Appellant prays for an order granting rehearing or rehearing *en banc* in this case.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I served the 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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