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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Appellate Case No. 2020-000056

Sterling Hills Homeowners' Association, Inc. — Respondent,

v.

Elliot Hayes, — Appellant.

RETURN TO APPELLANT'S PETITION FOR REHEARING OR REHEARING *EN BANC*

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TABLE OF CONTENTS

Standard of Review 2

Arguments

I. This Court's ruling affirming the circuit court's referral to the Master-in-Equity is based on well-settled case law, where Respondent's claims are equitable, and Appellant's legal counterclaims have been properly dismissed 2

II. This Court correctly affirmed the circuit court's dismissal of Appellant's counterclaim for Breach of Contract where Appellant has not and cannot identify a breach of contract, and this Court did not overlook or misapprehend Appellant's argument 5

III. This Court correctly affirmed the circuit court's dismissal of Appellant's counterclaim for violation of the Unfair Trade Practices Act, and this Court certainly did not overlook or misapprehend Appellant's argument, as the text of the Unfair Trade Practices Act and existing precedent demonstrates it is not applicable to Respondent 6

IV. This Court properly found that whether the circuit court erred by failing to grant Appellant leave to amend its pleadings was not preserved for review because Appellant never requested leave to amend and instead raised the argument for the first time on appeal, and regardless, such an amendment would have been futile 9

V. This Court correctly affirmed the circuit court's grant of summary judgment as to Appellant's declaratory judgment counterclaim where Respondent irrefutably did *not* operate *ultra vires*, and nothing presented by Appellant indicates this Court overlooked or misapprehended its argument 11

VI. Rehearing *en banc* is neither necessary nor appropriate in this case because consideration by the court *en banc* is not necessary to secure or maintain uniformity of its decisions, and the proceeding does not involve any unsettled question of exceptional importance 14

A. Consideration by the full court is not necessary to secure or maintain uniformity of its decisions 15

B. There is no disputable question of exceptional importance in this case 16

Conclusion 17

STANDARD OF REVIEW

"A petition for rehearing … shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), SCACR. "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended their argument." *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Rule 221(a), SCACR). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 643 (2011) (citing *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322).

ARGUMENT

I. This Court's ruling affirming the circuit court's referral to the Master-in-Equity is based on well-settled case law, where Respondent's claims are equitable, and Appellant's legal counterclaims have been properly dismissed.

This Court correctly affirmed the circuit court's referral of this case to the Master-In-Equity. This Court's opinion reflects that the Court did not overlook or misapprehend Appellant's argument, but rather based its ruling on well-settled case law. While Appellant's Counsel has indicated that Appellant's prior appearances before the Master-in-Equity "got heated," the fact remains that referral was proper as demonstrated by the case law cited in this Court's Opinion.

As shown by the decisions cited in this Court's Opinion, it is well settled in South Carolina that there is no right to trial by jury for equitable actions. *Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997). In Appellant's Petition for Rehearing, Appellant again argues that the circuit court erred in referring this case based on incorrect assertions that

Respondent has raised a "breach of contract" claim. As Counsel for Respondent explained at the motions hearing on October 14, 2019, the present case is merely an equitable action involving claims raised by the homeowners' association for the purpose of enforcing the restrictive covenants applicable to the Subject Property. (R. pp. 167-168, 237 - 247). Respondent's Amended Complaint enumerated causes of action for "Breach of Covenants," "Enforcement of Restrictive Covenants," "Specific Performance," "Injunctive Relief," and "Declaratory Judgment." (R. p. 40 - 48). Whether an action is legal or equitable is primarily determined by the allegations in the Complaint. *Bateman*, 358 S.C. at 673; 596 S.E.2d at 389. Each and every claim raised in the Amended Complaint merely requests the court to apply and enforce the restrictive covenants of Sterling Hills.

The sentence in Respondent's Amended Complaint in its prayer for relief which requests "actual and consequential damages" does not itself convert the action to a legal action. "A request for monetary relief should not be viewed in isolation to convert what is otherwise an equitable claim to a legal claim." *Thomerson v. DeVito*, 430 S.C. 246, 259, 844 S.E.2d 378, 385 (2020) (citing *Watson v. Pub. Serv. Co. of Colo.*, 207 P.3d 860, 865-66 (Colo. App. 2008) ("Even though a plaintiff seeks to recover money damages, the plaintiff is not entitled to a jury trial if the essence of the action is equitable in nature.")). The clear essence of this case is equitable, simply put, the application and enforcement of restrictive covenants as to Appellant's Subject Property. Respondent has made it clear it merely seeks the equitable relief of enforcement of the covenants. (R. pp. 47, 167-168, 237 - 247).

Appellant has not, and cannot, carry its burden of demonstrating that the Court overlooked or misapprehended its argument. Rather, Appellant has effectively restated its arguments which are conclusively refuted by an abundance of South Carolina case law. Again,

Appellant's assertion that Respondent has brought a claim for Breach of Contract is demonstrably incorrect. Regardless, as the Opinion of this Court noted, "action sounding in law may be transformed to one in equity because equitable relief is sought." *Ins. Fin. Servs., Inc. v. S.C. Ins. Co.*, 271 S.C. 289, 293, 247, S.E.2d 315, 318 (1978). In *Ins. Fin. Serv., Inc.*, the Court ruled that, in a case in which an appellant had claimed money damages in addition to equitable relief, the characterization of the action as equitable or legal depended on the "main purpose" in bringing the action. 271 S.C. at 293, 247 S.E.2d at 318. This Court's Opinion also cited *Crewe v. Blackmon*, 289 S.C. 229, 345, S.E.2d 754 (Ct. App. 1986), in which the Court of Appeals concluded that an action raising claims of specific performance, fraud, and misrepresentation was equitable based on the reasoning observed in this Court's Opinion. In the present case, Respondent *did not even raise legal claims*, despite Appellant's repeated incorrect assertions that Respondent has pled a "Breach of Contract" claim. Any reasonable review of Respondent's Amended Complaint and the record before this Court reveals that the purpose of the lawsuit is the enforcement of restrictive covenants by injunction against Appellant. Therefore, this Court has affirmed the circuit court's referral to the Master-In-Equity appropriately in light of the ample case law cited in this Court's Opinion. Accordingly, this Court has not overlooked or misapprehend Appellant's argument, and Appellant's Petition should be denied.

Respondent also incorporates its arguments set forth in its Brief of Respondent that, even if Appellant's legal counterclaims had not been dismissed, Appellant would still not be entitled to a jury trial because Appellant's counterclaims were not compulsory. *North Carolina Federal Sav. And Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989) ("A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and compulsory in nature"). For all the reasons set forth above, Appellant's

Petition should be denied.

II. This Court correctly affirmed the circuit court's dismissal of Appellant's counterclaim for Breach of Contract where Appellant has not and cannot identify a breach of contract, and this Court did not overlook or misapprehend Appellant's argument.

As has now been determined by the circuit court and this Court, Appellant has not and cannot identify a breach, which is an indispensable element of a Breach of Contract claim. Accordingly, this Court's ruling affirming the circuit court's dismissal was proper, and there is nothing to suggest this Court overlooked or misapprehended Appellant's argument.

Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. *Doe v. Marion*, 361 S.C. 463, 469, 605 S.E.2d 556, 559 (Ct. App. 2004) (citing *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995)). Accordingly, the circuit court acted properly in dismissing the counterclaims for Breach of Contract and violation of the Unfair Trade Practices Act under Rule 12(b)(6), SCRCP. As the circuit court correctly held, Appellant failed to allege any facts sufficient to identify a breach of a contract. (Order; R. p. 2 - 3). Appellant's counterclaim pleading effectively recites the elements of a breach of contract cause of action while alleging with no specificity as to what constituted a breach of the contract. Appellant argues that the obligation enumerated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-1965 (2007), to provide more than mere labels and conclusions rather than a formulaic recitation of the elements of a cause of action, is inapplicable in South Carolina. To the contrary, Respondent submits that *Twombly's* provision is applicable and instructive to the present case and cited in South Carolina opinions, but regardless, it is well settled that a motion to dismiss must be based solely upon the allegations set forth on the face of the pleading. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602

(1995) (citing *State Board of Medical Examiners v. Fenwick Hall, Inc.*, 300 S.C. 274, 387 S.E.2d 458 (1990)); *see also Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 180, 826 S.E.2d 585, 587 (2019) (citing *Twombly*). The fact remains that Appellant's Answer & Counterclaim and Amended Answer & Counterclaim fail to identify or allege any specific breach of a contract, an indispensable element of a Breach of Contract action, leaving Respondent to only speculate as to what Appellant contends constituted a breach. Appellant's Brief, and later its Petition for Rehearing, allege, amongst other things, that Petitioner has required from Appellant more than what is required from the covenants. Not only is this not contained in the pleadings at issue, but it is indisputable that Appellant's pleadings failed to allege that any of these alleged acts or omissions constituted a breach of a contract with Respondent or how any such acts required over and above any provisions. Even if Appellant had identified a specifically alleged breach in its pleading, which it did not, then it certainly did not identify how any acts constituted a breach.

For all these reasons and the authorities properly cited in this Court's Opinion, Appellant's Petition should be denied.

III. This Court correctly affirmed the circuit court's dismissal of Appellant's counterclaim for violation of the Unfair Trade Practices Act, and this Court certainly did not overlook or misapprehend Appellant's argument, as the text of the Unfair Trade Practices Act and existing precedent demonstrates it is not applicable to Respondent.

This Court correctly found that Appellant has not shown how Respondent, a nonprofit corporation homeowners association, was engaged in "trade or commerce' constituting a "large scale use of unfair and deceptive practices" carried out "for sustenance or profit." Pursuant to the plain text of the Unfair Trade Practices Act, "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade or commerce*" are unlawful. S.C. Code § 39-5-20 (emphasis added). The Act defines "trade or commerce" as "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 § 39-5-10. As the circuit court correctly observed, Respondent, a nonprofit corporation, is a homeowners' association and not an entity engaged in trade or commerce as defined by the Unfair Trade Practices Act. (R. p. 3 - 4). Respondent's actions enumerated in Appellant's pleadings are merely actions in furtherance of enforcing the restrictive covenants; simply put, enforcement of restrictive covenants is not "trade or commerce."

This Court has already heard Appellant's misplaced reliance on *Baker v. Chavis*, 306 S.C. 203, 410 S.E.2d 600 (Ct. App. 1991) in its argument that the Unfair Trade Practices Act should apply to homeowners' associations. This Court in *Baker* did note that the language of the Act suggests the legislature did not intend to limit "trade" and "commerce" to only the listed transactions. *Id.* at 208-209. However, *Baker* was readily distinguishable from the present case, and addressed conduct drastically different from that of a homeowners' association. In *Baker*, this Court was analyzing the Act within the context of a for-profit time-share, and merely held that the term "trade" was broad enough to encompass the buying and selling of leases in a time-share. Applying "trade or commerce" even more broadly than *Baker*, the enforcement of restrictive covenants by a nonprofit corporation homeowners' association would still not constitute trade or commerce. Covenant enforcement and/or the maintaining of common area is not carried on "for sustenance or profit," but rather carried on in furtherance of the association's duties to uphold the restrictions on the applicable property.

Moreover, while Respondent is a nonprofit homeowners association not involved in conduct of any trade or commerce, even assuming *arguendo* that some functions of Respondent

such as maintaining common elements constitute "trade or commerce," this would be irrelevant because the Act only applies if the specifically alleged unfair or deceptive acts were in the conduct of the actual "trade or commerce." In *Foggie v. CSX Transp., Inc.*, 313 S.C. 98, 104, 431 S.E.2d 587, 591 (1993), the South Carolina Supreme Court held that a railroad company's removal and subsequent refusal to reinstall a railroad crossing was not the conduct of trade or commerce. Of course, a railroad company would certainly be engaged in "trade or commerce" in some of its other actions, but not in the conduct at issue. Likewise, even if Respondent theoretically engaged in "trade or commerce" at some point, the fact remains that Appellant has not enumerated any party or act in this action which is under the purview of the Unfair Trade Practices Act.

Appellant's reliance on *Beneficial Financial I, Inc. v. Windham*, 431 S.C. 256, 847 S.E.2d 793 (Ct. App. 2020) is also misplaced. The first obvious distinction is that *Beneficial* concerned a mortgage company clearly engaging in trade or commerce. Furthermore, the claimant in *Beneficial* actually identified an unfair practice capable of repetition adversely affecting the public interest; Specifically, the "unfair practice of force-placing hazard insurance in violation of a mortgage contract." *Id.* at 270. Appellant, in this case, has failed to specifically plead and/or identify not only any "unfair" practice, but any practice adversely affecting public interest. The actions subject to the present case involve the Respondent's proper enforcement of covenants applicable to Appellant's property, not actions affecting public interest.

In *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013), which was cited in this Court's Opinion, the Supreme Court observed that the Board of Dentistry's promulgation of a regulation could not satisfy the requirement that an alleged unfair act occurred "in the conduct of any trade or commerce"

because the promulgation did not involve "advertisement, sale, or distribution of services or property *within a business context*." *Beneficial*, 403 S.C. at 638 (emphasis added). In the present case, Respondent's enforcement of covenants as a homeowners association involved none of the above, and certainly was not undertaken "within a business context."

Clearly, the circuit court had ample basis in statute and case law to properly dismiss Appellant's counterclaim under the Unfair Trade Practice Act without reliance on the unpublished opinion from a case in which Appellant's Counsel had previously unsuccessfully raised the same argument. (R. pp. 3 – 4). This argument has been heard and rightfully dismissed without any indication that this Court has overlooked or misapprehended Appellant's argument in the matter. For all these reasons, this Court should deny Appellant's petition.

IV. This Court properly found that whether the circuit court erred by failing to grant Appellant leave to amend its pleadings was not preserved for review because Appellant never requested leave to amend and instead raised the argument for the first time on appeal, and regardless, such an amendment would have been futile.

The Court of Appeals ruled on the side of South Carolina case law and longstanding principles of issue preservation in finding that Appellant's argument regarding amending its complaint was not preserved for review. In *Kitchen Planners, LLC v. Friedman*, 432 S.C. 267, 279-80, 851 S.E.2d 724, 731 (Ct. App. 2020), this Court found that the issue of whether Kitchen Planners was entitled to amend its complaint was not preserved for this Court's review because Kitchen Planners never requested leave of the circuit court to amend its pleadings and rather raised the argument for the first time on appeal. Likewise, Appellant in the present action never requested leave to amend, but only seeks to amend on appeal. This Court did not overlook or misapprehend Appellant's argument, but rather ruled in accordance with principles of issue preservation that are axiomatic in South Carolina. *See Herron*, 395 S.C. at 465 ("It is 'axiomatic

that an issue cannot be raised for the first time on appeal.'") (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)).

In its Petition, Appellant reasserts its reliance on *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019). The Opinion issued by this Court in this case does not conflict with any precedent of *Skydive*. As Respondent explained in its Brief, Appellant's reliance on *Skydive* is misplaced. First, as a procedural matter, *Skydive,* along with the South Carolina cases which were cited in *Skydive* to support granting the *Skydive* party leave to amend, were analyzing cases in which the party *had* moved to amend their pleading but been denied.[1] In fact, the Court noted in *Skydive*, "Each time [the parties submitted proposed orders to the court], Skydive requested in writing it be allowed to amend its complaint to cure any pleading defects…" 426 S.C. at 179. Appellant, in stark contrast, never moved to amend its pleading and only now raises the proposition. To *now* allow Appellant leave to amend its pleading would be inappropriate, and not the result required or called for under *Skydive*, which addressed the matter of preservation when parties had actually requested leave to amend.

Notwithstanding the procedural consideration, the Court in *Skydive* also noted that leave to amend may be denied when amendment would be clearly futile. 426 S.C. at 175 (citing *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) ("Although leave to amend should generally be 'freely given,' … it may be denied where the proposed amendment would be futile.")) As the circuit court correctly noted in its Order, while the counterclaims under Unfair Trade Practices Act and Breach of Contract were dismissed under Rule 12(b)(6),

[1] Again, *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019); *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227 (1962); *Dockside Ass'n, Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct. App. 1988); *Patton v. Miller*, 420 S.C. 471, 804 S.E.2d 252 (2017); and *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005) all analyzed cases where leave to amend had been sought and denied before the appellate level, distinguishable from the present case where Appellant now requests leave to amend in the Court of Appeals.

SCRCP, no evidence was produced to provide any evidentiary support for the two dismissed counterclaims regardless. (R. p. 4.) To allow leave to amend would not alter this fact, and there would be no issue of material fact as to the two counterclaims. Moreover, amending the Counterclaim would not somehow expand the purview of the Unfair Trade Practices Act to apply to Respondent or its conduct. Furthermore, Appellant cannot conceivably identify a breach of a contract on the part of the Respondent, nor has Appellant been able to produce any evidence of the same. The circuit court properly found that there was no issue of material fact to support allegations of any *ultra vires* acts of Respondent. Accordingly, not only would it would be inappropriate, but also futile to allow Appellant to amend.

This Court has already properly examined and rejected Appellant's argument with its misplaced reliance on *Skydive*. This Court did not misapprehend or overlook the argument, but properly held the issue was not preserved for review in accordance with well-established case law. Therefore, Appellant's petition should be denied.

V. This Court correctly affirmed the circuit court's grant of summary judgment as to Appellant's declaratory judgment counterclaim where Respondent irrefutably did *not* operate *ultra vires*, and nothing presented by Appellant indicates this Court overlooked or misapprehended its argument.

There is likewise no indication that this Court overlooked or misapprehended Appellant's argument alleging that Respondent operated *ultra vires*. This Court, after review comprehensive briefs from each party, properly observed that Appellant failed to present any evidence from which a factfinder could reasonably find that Sterling hills failed to hold elections for its board of directors despite the existence of a quorum at an annual meeting, or that any of the existing directors were improperly appointed.

As this Court has heard, Respondent is a nonprofit corporation and therefore subject to

the provisions of South Carolina's Nonprofit Corporation Act, S.C. Code § 33-31-101 et seq. Pursuant to the Act at S.C. Code § 33-31-803(a), a board of directors must consist of no less than three directors. Under S.C. Code § 33-31-805(d), despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated or appointed, and qualifies, or until there is a decrease in the number of directors. Therefore, being that a required quorum of Members to elect new directors has not attained throughout the relevant time period, as indicated by the affidavits of Director Ella Calvert's and property manager Kayla Stokes in addition to Appellant's own discovery responses, then the board of directors is merely complying with the Nonprofit Corporation Act in maintaining the current directors. (R. pp. 176, 178). Therefore, Respondent has not been operating *ultra vires* and likewise Appellant's allegation that Respondent's actions have therefore been illegal is meritless as a matter of law.

Nothing before this Court, despite Appellant's baseless allegations, refutes the fact that Ms. Calvert has permissibly remained on the Board since her time in 2015 due to the fact that a quorum has not been established. The discovery responses indeed show that Ms. Calvert was a director and officer of the association, specifically the treasurer, prior to 2015. Pursuant to Article VIII, Section 1(e) of the By-Laws of the Sterling Hills Homeowners' Association, Inc. (the "Bylaws"), the Board of Directors has the power to employ a Treasurer of the Association or such other employees as they may deem necessary. (R. p. 176). Pursuant to Article IX, Section 1 of the Bylaws, "the offices of this Association shall be a President and Vice President, who shall at all times be Members of the Board of Directors, a Secretary and a Treasurer, and such other officers as the Board of Directors from time to time by resolution create." (R. p. 217). Furthermore, Article IX, Section 2 of the Bylaws provides that all officers shall be appointed by the Board of Directors. (R. p. 217). Then, in 2013, as the minutes produced in discovery reveal,

Ms. Calvert did step down from Treasurer and the Board because she had been unable to attend meetings. This was in accordance with Article IX, Section 5 of the Bylaws concerning removal and resignation of Directors. (R. p. 218). As a natural consequence of Ms. Calvert's resignation, a vacancy was of course created on the Board of Directors. After no other would-be directors materialized, the remaining Directors eventually filled the vacancy by Ms. Calvert herself in 2015 in accordance with S.C. Code § 33-31-811(a)(2) and Article IX, Section 6 of the Bylaws, which both allow for the directors to appoint another director to fill a vacancy. It, of course, stands to reason that said appointment would be necessary in light of failure to reach a quorum for the Members to fill the vacancy.

Respondent again submits that, even assuming *arguendo* there was a procedural deficiency in Ella Calvert's appointment to the Board or current position on the Board, this would not render any action at issue in this case *ultra vires*. Appellant has identified no act which, even if Ella Calvert's appointment was procedurally imperfect, would be outside of the powers of the Association. Notwithstanding the fact that Ms. Calvert is a procedurally proper director, the Board would still maintain the authority under Article VIII, Section 1 to exercise the powers vested in it by the Declaration and Bylaws, including but not limited to the enforcement of covenants and the levying of assessments, to include the levying of noncompliance assessments for breaches of the covenants. (R. pp. 214 - 216). Even if the Board somehow acted *ultra vires* despite support from the Nonprofit Corporation Act and Bylaws to appoint Ms. Calvert to serve as a director, the mere act of appointing her would be *ultra vires*, not every act ever taken by the association. Nevertheless, as Appellant's brief notes, "[a] corporation may exercise only those powers granted to it by law, its charter or articles of incorporation and any bylaws made pursuant thereto," and Respondent here acted pursuant to powers granted to it both

by law and its Bylaws. *See Fisher v. Shipyard Village Council of Co-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). Appellant has failed to identify or substantiate with evidence any specific procedural flaw in the makeup of the Board of Directors, but to the extent that any technicality exists which has yet to be identified, it is axiomatic that equity looks to "substance rather than form," which evolved out of judicial regard for that which out to be done. *See Regions Bank v. Wingard Prop., Inc.*, 394 S.C. 241, 253, 715 S.E.2d 348, 354 (Ct. App. 2011) (citing *Wilkie v. Phila. Life Ins. Co.*, 187 S.C. 382, 393-94, 197 S.E. 375, 380 (1938)). It would be an absurd result for a technicality which has not been described in any specificity by Appellant to render the acts of a nonprofit corporation with multiple board members who acted pursuant to their Bylaws *ultra vires*.

As this Court noted in its Opinion, "[W]here a verdict is not reasonably possible under the facts presented, summary judgment is proper." *Bloom v. Ravoira*, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000). This Court has already heard and considered Appellant's argument that Respondent's Board of Directors has been operating *ultra vires*, and the argument remains completely devoid of substantiation. There is nothing to suggest this Court overlooked or misapprehended Appellant's argument, and Appellant's petition should be denied accordingly.

VI. Rehearing *en banc* is neither necessary nor appropriate in this case because consideration by the court *en banc* is not necessary to secure or maintain uniformity of its decisions, and the proceeding does not involve any unsettled question of exceptional importance.

Without specific explanation, Appellant asserts in its Petition, "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." Pursuant to Rule 219(a), SCACR, a 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. Neither is the case here, and Appellant has provided no specific justification to the contrary other than a reworded recitation of the elements.

A. Consideration by the full court is not necessary to secure or maintain uniformity of its decisions.

First, rehearing *en banc* is uncalled for in this matter because consideration by the full court is not necessary to secure or maintain uniformity of its decisions. Each ground affirmed by this Court was based on settled case law and supported by the record before this Court.

The principles of referral of equitable cases to masters-in-equity are well-settled. *See Lester v. Dawson*, 327 S.C. 263, 267, 491 S.E.2d 240, 242 (1997) ("[T]here is no right to trial by jury for equitable actions."); *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 622, 550 S.E.2d 229, 302 (2001) (stating an action to enforce restrictive covenants is equitable). Moreover, there is no conceivable risk to "uniformity of [this Court's] decisions" as to Appellant's failure to specify a breach of a contract resulting in dismissal under Rule 12(b)(6). Likewise, this Court's ruling that the circuit court properly disposed of Appellant's counterclaim alleging *ultra vires* acts simply poses no threat to uniformity of decisions where nothing has been presented to evidence any *ultra vires* act at issue beyond baseless accusation.

Furthermore, this Court correctly found that whether Appellant should have been granted leave to amend its pleading was not preserved for appellate review because Appellant never requested such leave until its appeal. Appellant's argument at odds with South Carolina case law raises no matter which would require *en banc* review to ensure uniformity of decisions as it is already "axiomatic that an issue cannot be raised for the first time on appeal." *Herron*, 395 S.C.

at 465 (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)), and this Court's ruling in no way conflicts with *Skydive* as explained above.

As to the dismissal of Appellant's claim under the Unfair Trade Practices Act, it is inconceivable that uniformity of this Court's decisions is at risk, as the case law is clear that the nonprofit corporation homeowners association's enforcement of covenants is not "trade or commerce." In fact, in *Brown v. Spring Valley Homeowners Association, Inc.*, App. Case No. 2014-002587, Unpublished Opinion No. 2016-UP-343 (Ct. App. 2016), this Court already found that a homeowners association was not subject to the Unfair Trade Practices Act, citing the definitions of "trade" and "commerce." Of the judges who signed the opinion in *Brown*, only one of them took part in the opinion in the present case. Therefore, it stands to reason that uniformity of decision is not at stake now that five different judges with the Court of Appeals (one retired) have come to the same logical conclusion that a homeowners association is not engaging in "trade" and "commerce" under the purview of the Unfair Trade Practices Act.

B. There is no disputable question of exceptional importance in this case.

In addition to the fact that a rehearing *en banc* is not necessary to ensure uniformity of decisions, the present case also does not involve any unsettled and/or disputable question of exceptional importance. As set forth above herein, this Court's Opinion was supported by well-settled case law. Certainly, Appellant's failure to plead and identify with any specificity a breach of a contract is not a question of exceptional importance, nor is Appellant's frivolous and refuted argument that Respondent homeowners association has been operating *ultra vires* despite acting pursuant to its Bylaws and South Carolina's Nonprofit Corporation Act. Moreover, Appellant's argument that Respondent is subject to the purview of the Unfair Trade Practices Act is not a question of exceptional importance as it is plainly evident from the very text of the Act it does

not apply to Respondent as Respondent is not conducting "trade" and commerce." Also, as this Court's Opinion noted, "'[T]rade or commerce' involves '[e]very business occupation carried on for subsistence or profit…" *Health Promotion Specialists*, 403 S.C. at 639 (quoting *Black's Law Dictionary* (9th ed. 2009)). Moreover, regardless of the absence of trade and commerce, Respondent's enforcement of covenants against Appellant pursuant to its duty under the same is not a commercial practice capable of repetition adversely affecting the public interest. *See Beneficial Financial I*, 431 S.C. at 268 ("In order to be actionable under SCUTPA, the unfair or deceptive act or practice must have an impact on the public interest … 'An unfair or deceptive act or practice that affects only the parties to a trade or a commercial transaction is beyond the act's embrace." (quoting *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 453, 814 S.E.2d 643, 655 (Ct. App. 2018)).

Again, the present case merely involves the Respondent's proper enforcement of covenants applicable to Appellant's property, and the actions are patently not carried on for subsistence or profit, nor do they implicate exceptional importance to public interest. Therefore, consideration by the court *en banc* is not necessary to secure or maintain uniformity of its decisions, and the proceeding does not involve any unsettled question of exceptional importance. Accordingly, this Court should deny Appellant's petition for a rehearing *en banc*.

CONCLUSION

For the reasons stated herein, this Court should deny Appellant's Petition.

{*Signature page to follow*}

Respectfully Submitted,

/s/Christian Saville

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July 8, 2022
Columbia, South Carolina

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SC Court of Appeals

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, Inc., ... Respondent,

v.

Elliot Hayes, ... Appellant.

PROOF OF SERVICE

I certify that I have served the Return to Appellant's Petition for Rehearing or Rehearing E*n Banc* in this case by my office's providing a copy of it by email to opposing counsel at the email address shown below, and on the date shown below:

Andrew S. Radeker, Esq.
drew@harrisonfirm.com

Respectfully submitted,

s/ Christian Saville
Christian Saville (SC Bar No. 103272)
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July 8, 2022
Columbia, South Carolina

Christian Saville

From: Christian Saville
Sent: Friday, July 8, 2022 3:56 PM
To: 'Drew Radeker'
Cc: Ian Thomson; Rhonda Schaub
Subject: Sterling Hills v. Hayes - Return to Petition for Rehearing
Attachments: 338178.pdf

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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