THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appellate Case (Ct. App.) No. 2020-000056

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

v.

Elliot Hayes,.....Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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INTRODUCTION

The Petitioner, Elliot Hayes (hereinafter "Hayes"), asks this Court to issue a writ of certiorari to review the Court of Appeals' opinion in Sterling Hills Homeowners Association v. Elliot Hayes, 2022-UP-256 (filed June 8, 2022). In several ways, the Court of Appeals' opinion that affirmed the rulings below in favor of the Respondent, Sterling Hills Homeowners' Association, Inc. (hereinafter "the HOA"), contravenes not just this Court's precedent but also the South Carolina Constitution's guarantee of the right to trial by jury. S.C. Const. art. I, § 14.

CERTIFICATE OF COUNSEL

The Court of Appeals issued its opinion in this case on June 8, 2022. Counsel for the Petitioner certifies that the petition for rehearing was served and filed on June 22, 2022. The petition for rehearing was finally ruled on by the Court of Appeals by an order filed on August 18, 2022. This petition for a writ of certiorari is timely served and filed on September 19, 2022, as September 17, 2022, was a Saturday. Rule 263(a), SCACR.

QUESTIONS PRESENTED

1) Did the Court of Appeals err by affirming the reference of this action to a master-in-equity?

2) Did the Court of Appeals err in affirming the dismissal of Hayes' breach of contract claim?

3) Did the Court of Appeals err in affirming the dismissal of Hayes' claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*?

4) Did the Court of Appeals err in granting summary judgment against Hayes on his claim that the HOA's acts have been *ultra vires*?

STATEMENT OF THE CASE

This case was brought before Court of Appeals as Hayes' appeal of the Honorable Thomas A. Russo's decision to dismiss and grant summary judgment on all his counterclaims and to refer this case to the master-in-equity.

The HOA sued Hayes, alleging that Hayes, a member of the HOA by virtue of his ownership of a house within the subdivision associated with the HOA, had violated and was continuing to violate provisions of the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills (hereinafter "the covenants"). (R. pp. 17-25.) The HOA pled causes of action 1) for breach of contract, seeking damages, 2) seeking enforcement of the covenants in equity "[t]o the extent there is no adequate remedy at law," 3) for specific performance, 4) for injunctive relief, and 5) seeking a declaratory judgment that the HOA has the right under the covenants to perform maintenance on Hayes' property and charge him the cost of that maintenance as an assessment on his lot. (R. pp. 22-24.) The HOA later amended its complaint, pleading the same causes of action but adding allegations to the effect that Hayes was allowing someone to live on his porch and urinate and defecate outside at his house. (R. pp. 14-16, 40-48.) In both its original and amended complaints, the HOA specifically stated in the first item sought in its prayer that it was seeking "actual and consequential damages[.]" (R. pp. 24, 47.)

In response to both the original and amended complaints, Hayes answered and counterclaimed, demanding a jury trial. (R. pp. 26-33, 49-58, 64.) In response to the amended complaint, Hayes denied the HOA's material allegations and asserted

affirmative defenses that the HOA's attempt to enforce unrecorded by-laws and rules was barred by S.C. Code Ann. § 27-30-130, unclean hands, the HOA's own breach of the covenants, and that the HOA's actions were *ultra vires*. (R. pp. 54-55.) Hayes pled counterclaims for breach of contract, for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "the Unfair Trade Practices Act"), for a declaratory judgment that the HOA's acts were *ultra vires*, and for an order directing the HOA to allow Hayes access to its books and records. (R. pp. 55-57.)

Hayes moved for summary judgment on the HOA's claims on the grounds that the covenant and bylaws provisions on which the HOA based its claims were so vague as to be unenforceable, as well as that the HOA was seeking to enforce rules or regulations that were not recorded in the register of deeds' office and were thus unenforceable under S.C. Code Ann. § 27-30-130. (R. pp. 65-116.) The HOA moved to dismiss Hayes' counterclaims and to refer the action to the master-in-equity. (R. pp. 117-18). The HOA later moved for summary judgment on Hayes' counterclaims. (R. pp. 119-26.) Both parties filed affidavits and other factual materials. (R. pp. 173-236).

The Honorable Thomas A. Russo heard all three motions. (R. pp. 137-72.) He denied Hayes' motion for summary judgment[1] and granted the HOA's motions to dismiss with prejudice and for summary judgment. (R. pp. 1-10.) He also referred the case to the master-in-equity. (R. pp. 1-10.)

[1] Hayes was entitled to summary judgment. Since it is settled law, however, that the denial of summary judgment is not appealable under any circumstances, Hayes did not appeal the denial of his summary judgment motion. Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003).

Hayes moved to reconsider. (R. pp. 127-36.) Judge Russo denied that motion without a hearing. (R. pp. 11-13.)

On appeal, the Court of Appeals issued an opinion that affirmed all of Judge Russo's rulings. The Court of Appeals held that "the circuit court did not err by referring this case to the master-in-equity because Sterling Hills's causes of action and requested remedies were equitable, and therefore, Hayes was not entitled to a jury trial." (Op. p. 2.) The opinion does not discuss that the HOA seeks a judgment for damages for beach of the covenants, nor does it undertake any analysis of whether Hayes had the right to trial by jury on his at-law counterclaims. (Op. pp. 1-4.)

The opinion holds that "the circuit court did not err by granting Sterling Hills's motion to dismiss Hayes's counterclaim for breach of contract because Hayes did not identify in his pleading any contract or the nature of the alleged breach." (Op. p. 2.) The opinion does not discuss the allegations in Hayes' answer and counterclaim that the HOA has refused to hold officer and director elections, that it has operated in disregard of the covenants, has improperly taken action against members, including Hayes, and 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. 54, 56-57.) The opinion does not discuss the theory Hayes advanced below 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 Court of Appeals held that "the circuit court did not err by granting Sterling Hills's motion to dismiss Hayes's counterclaim for violation of the South Carolina

Unfair Trade Practices Act" because "Hayes's pleading failed to allege how Sterling Hills was engaged in 'trade or commerce' constituting a 'large scale use of unfair and deceptive trade practices' carried out 'for sustenance or profit.'" (Op. p. 2.) The opinion did not note that no South Carolina case has ever held that "a 'large scale use of unfair and deceptive trade practices' carried out 'for sustenance or profit'" is a necessary element of an Unfair Trade Practices claim.

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 was barred because it was unpreserved for review, citing Kitchen Planners, LLC v. Friedman, 432 S.C. 267, 279-80, 851 S.E.2d 724, 731 (Ct. App. 2020). (Op. p. 3.) The opinion does not discuss this Court's opinion in Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 826 S.E.2d 585 (2019).

The opinion holds that "the circuit court did not err by granting Sterling Hills's motion for summary judgment on Hayes's counterclaim requesting a declaratory judgment that Sterling Hills had acted ultra vires[,]" stating that "Hayes 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." (Op. p. 3.) The opinion does not mention the existence of an affidavit in the record by a purported director of the HOA, in which she states that she somehow became a director of the HOA some 13 years after the HOA last held director elections. (R. pp. 173-77.)

Hayes petitioned for rehearing or rehearing *en banc*. The Court of Appeals almost immediately asked the HOA to file a return to the petition. The HOA did so,

and Hayes submitted a reply to the petition. The Court of Appeals, however, did not change its decision and denied the petition for rehearing.

This petition for certiorari followed.

ARGUMENT

The Court of Appeals' opinion seems based on a record other than the one in this case. Hayes made the minimum showings needed to keep his claims alive. The Court of Appeals seemed to change the law in order to arrive at a its decision to affirm in all respects. Among other things, this involved a departure from the South Carolina Constitution.

I. On the HOA's at-law breach of contract claim for damages against Hayes and on his at-law counterclaims, Hayes has the right to trial by jury. The Court of Appeals did not undertake the analysis required by this Court's precedent.

The Court of Appeals cited 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 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 "[a]ctual and consequential damages[.]" (R. pp. 45, 47.)

Though the HOA has repeatedly insisted that it sought only equitable relief on only equitable claims against Hayes, let us look at the record exactly as the HOA has made it:

> **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.)

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" – contrary to what the Court of Appeals' opinion implies – cannot 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); accord S.C. Const. art. I, § 14.

The Court of Appeals cited Ins. Fin. Servs., Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978), for the proposition that an action at law may be transformed into one in equity because equitable relief is sought, but, to the extent it is inconsistent with Floyd, that decision has been overruled. 306 S.C. at 380. Maybe more importantly, the primary relief sought by the HOA – at least according to what

its pleading states – is a judgment for "[a]ctual and consequential damages[.]" (R. p. 47.) That is at-law relief, not equitable relief. See Cooper, 326 S.C. at 48.

In light of Hayes' jury demand, it was reversible, prejudicial error for the circuit court to refer this case to a master-in-equity, and it is reversible prejudicial error for the Court of Appeals to affirm the reference. 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, required reversal on this point. S.C. Const. art. I, § 14. By granting a writ of certiorari, this Court can clarify the Court of Appeals' misunderstanding of this state's constitution law. Id. The right to a jury trial is a substantial right, and any contended waiver of the right to trial by jury is strictly construed. Broome v. Watts, 319 S.C. 337, 340, 461 S.E.2d 46 (1995); North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637 (1992); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863 (Ct. App. 2002). Our highest law – constitutional law – does not countenance the Court of Appeals' treatment of Hayes' right to a jury trial.

II. Hayes has pled a breach of contract claim and has identified acts constituting breach of the covenants.

The Court of Appeals' opinion holds that Hayes' answer and counterclaim fails to identify acts that constitute breaches of the covenants. This holding is contradicted by the record.

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 Hayes' theory that the HOA has been insisting that Hayes "perform" under the covenants by doing things that the covenants do not require, with the HOA then taking action against him for this purported lack of performance. (R. pp. 54, 56-57, 193-99.) This Court has observed that, then 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). A chart presented by Hayes at the motion hearing before the circuit court details how the HOA is seeking to enforce nonexistent obligations through its claims in this case.

(R. pp. 17-25, 226-36.) 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.) 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.)

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.) It is not enforceable. S.C. Code Ann. § 27-30-130(A)(1).

The HOA's insistence that Hayes comply with its demands that exceed the requirements of the parties' contract *is* a breach of that contract. Hunter Bros., 286 S.C. at 66. Additionally, "[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 the Court of Appeals should have reversed it. This court can grant certiorari and reverse the Court of Appeals, allowing the HOA to be held accountable for its actions.

III. To arrive at the decision to affirm, the opinion creates a new requirement under the Unfair Trade Practices Act, contrary to the law.

Citing Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013), the Court of Appeals held that "the circuit court did not err by granting Sterling Hills's motion to dismiss Hayes's counterclaim for violation of the South Carolina Unfair Trade Practices Act" because "Hayes's pleading failed to allege how Sterling Hills was engaged in 'trade or commerce' constituting a 'large scale use of unfair and deceptive trade practices' carried out 'for sustenance or profit.'" (Op. p. 2.) This is a misstatement of the elements of an Unfair Trade Practices Act claim, and it evinces the Court of Appeals' misunderstanding of the law on this point.

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). "The 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, as well as the collection of assessments from the HOA's 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, consistently with how the HOA has described itself in its briefs and what it has stated it is doing in this case. This is 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 of Appeals was 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 – like what it is doing to Hayes. (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 decision in Health Promotion Specialists, cited in the Court of Appeals' opinion, does not support the Court of Appeals' conclusion but is quite consistent with the HOA's actions being within the definition of trade and commerce under the Unfair Trade Practices Act. 403 S.C. 623. 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.

To conclude, as the circuit court did, that the Unfair Trade Practices Act does not apply to HOAs is not just unsupported by the law. It is also 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.

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 importance worthy of this Court's attention.

IV. The dismissal analysis used by the Court of Appeals contravenes the dismissal analysis this Court set forth in Skydive Myrtle Beach, Inc. v. Horry County.

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. To the extent that the Court of Appeals' decision in Kitchen Planners, 432 S.C. at 279-80, supports the result the Court of Appeals reached here, it is against precedent authored by this Court and cannot be followed. S.C. Const. Art. V, § 9.

This Court has held 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). If what Hayes pled is somehow insufficient, the circuit court and the Court of Appeals were required to allow him the opportunity to amend, unless amendment would be futile. Id. The Court of Appeals misapprehended the law to hold otherwise.

V. The Court of Appeals' opinion disregards a genuine issue of material fact about whether the HOA's acts have been *ultra vires*.

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.)

Ella Calvert's affidavit, which the HOA submitted to the circuit court, 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 has now acknowledged in its return to Hayes' petition for rehearing, 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 circuit 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 circuit 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. This 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 this 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 (such as Ella Calvert, who is definitely not a holdover director, as the HOA now admits), 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.

This Court can peel away the whitewash used by the circuit court and, then, the Court of Appeals to do away with this cause of action. That will simply – and properly – allow it to be tried on its facts, as it should be, so that the HOA may be held accountable in accordance with a factfinder's determinations.

CONCLUSION

What the constitution has granted, the Court of Appeals cannot take away. This Court's decisions bind the Court of Appeals as precedents. S.C. Const. Art. V, § 9. The Court of Appeals' opinion here is wayward when it comes to the constitution and wayward when it comes to adherence to precedent. This Court can and should correct this flawed analysis and let Hayes have his day in court on his claims and the HOA's claims against him – before a jury, as is his right under the constitution of this state. S.C. Const. art. I, § 14.

WHEREFORE, Hayes prays for this Court to issue a writ of certiorari to review the Court of Appeals' opinion and decision in this case.

Respectfully submitted,

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September 19, 2022

THE STATE OF SOUTH CAROLINA
In the Supreme Court

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appellate Case (Ct. App.) No. 2020-000056

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

v.

Elliot Hayes,.....Appellant.

PROOF OF SERVICE

I certify that I served the petition for writ of certiorari 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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