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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Supreme Court Case No. 2022-001299
Court of Appeals Case No. 2020-000056

Sterling Hills Homeowners' Association, Inc. .....Respondent,

v.

Elliot Hayes .....Petitioner.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in affirming reference of this action to a master-in-equity where Petitioner's legal counterclaims were properly dismissed and Respondent's claims are equitable;

2. Whether the Court of Appeals erred in affirming the circuit court's dismissal of Petitioner's breach of contract claim where Petitioner did not and cannot identify a breach of contract;

3. Whether the Court of Appeals erred in affirming the dismissal of Petitioner's claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (the "Act") where Respondent, a nonprofit corporation homeowners association, is not engaged in trade or commerce or subject to the Act;

4. Whether the Court of Appeals properly found that the question of whether the circuit court erred in failing to grant leave for Petitioner to amend its pleading was not preserved for appellate review where Petitioner 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; and

5. Whether the Court of Appeals erred in affirming the circuit court's grant of summary judgment against Petitioner's counterclaim that Respondent had operated *ultra vires* where Respondent irrefutably did not operate *ultra vires* as demonstrable by South Carolina's Nonprofit Corporation Act and the record before this Court;

6. Whether the present case justifies a writ of certiorari when evaluated under the factors set forth in Rule 242, South Carolina Appellate Court Rules.

COUNTER-STATEMENT OF THE CASE

Respondent is a nonprofit corporation serving as the homeowners' association for the Sterling Hills subdivision. (R. p. 18). Petitioner is the owner of that certain real property designated as Lot 66, located in the Sterling Hills subdivision, bearing the address of 8 High Glen Court, Columbia, South Carolina 29229 ("Subject Property"). (R. pp. 26 - 27). The Subject Property is subject to the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills (the "Declaration"), recorded May 31, 2000 in Deed Book R413 at Page 92 in

Office of the Register of Deeds for Richland County. (R. pp. 67 - 96). By taking ownership of the Subject Property, Petitioner agreed to be bound by the Declaration. (R. pp. 19 – 21; 67-96).

Petitioner's time at Sterling Hills has been marked by unceasing violations of the restrictive covenants and antagonistic behavior with the Association (R. pp. 178, 183-196). Prior actions involving the Association have resulted in what Petitioner's Counsel has described as "heated" arguments with the Master in Equity. (R. pp. 128; 170). Petitioner has continuously and repeatedly violated numerous provisions of the Declaration to include its prohibitions against offensive activities and its provisions that the landscaping and exterior features of Lots be maintained. One significant complaint which has been remedied as of the time of this brief included Petitioner allowing an individual to live on his front porch, changing clothes and urinating in view of the neighboring residents. (R. p. 44). While this violation, upon Respondent's belief, has been remedied, the more persistent and continuous violations include drastically unkempt conditions as to the exterior of Petitioner's dwelling and the yard/landscaping of Petitioner's Lot demonstrated by the photographs of the Subject Property presented to the circuit court and in the record before this Court have persisted despite notifications from the Association and its counsel. (R. pp. 180 – 192, 195 - 199).

Having exhausted all other avenues, Respondent was eventually forced to file suit in the Richland County Court of Common Pleas. In response, Petitioner raised meritless and unsubstantiated allegations of improper dealings and *ultra vires* acts by Respondent rather than simply tend to the Subject Property and comply with the covenants applicable thereto. (R. pp. 26 – 33). Petitioner filed its Answer & Counterclaim on October 10, 2018. Respondent filed its Reply to the Answer & Counterclaim on December 5, 2018. Respondent's Complaint was amended on June 27, 2019. (R. pp. 17 - 48). Respondent's Amended Complaint enumerated causes of action

for "Breach of Covenants," "Enforcement of Restrictive Covenants," "Specific Performance," "Injunctive Relief," and "Declaratory Judgment." Petitioner's Answer & Counterclaim enumerated counterclaims for Breach of Contract, Violation of Unfair Trade Practices Act, Declaratory Judgment, and Failure to Allow Access to Records. (Amended Complaint; R. pp. 40 - 48). Petitioner voluntarily withdrew its counterclaim for Failure to Allow Access to Records at the October 14, 2019 hearing. (R. p. 137 - 172).

On July 24, 2019, Petitioner filed a Motion for Summary Judgment as to Respondent's claims. On August 12, 2019, Respondent filed its Motion to Dismiss Defendant's Counterclaims and for Order of Reference to Master in Equity. On October 4, 2019, Respondent filed its Motion for Summary Judgment as to Defendant's Counterclaims. (R. pp. 65 - 116). On October 14, 2019, a hearing was held before the Honorable Thomas A. Russo at the Richland County Courthouse. On November 22, 2019, the circuit court issued its Order Dismissing Defendant's Motion for Summary Judgment, Granting Plaintiff's Motion to Dismiss and for Summary Judgment, and Order of Reference to Master-In-Equity. (R. pp. 1 - 10). Petitioner subsequently filed a Motion to Reconsider on December 2, 2019, in which Petitioner submitted that it would "be amazed to discover the judge who did that signing and filing actually read the order before doing so." (R. pp. 11 - 13). Respondent filed a Memorandum in Opposition to the Motion to Reconsider on December 6, 2019. The court denied Petitioner's Motion to Reconsider on December 19, 2019. (R. pp. 11 - 13). Petitioner's appeal followed.

The Court of Appeals affirmed the ruling of the circuit court on June 8, 2022. *Hayes v. Sterling Hills Homeowners' Association, Inc.* Op. No. 2022-UP-256. On June 22, 2022, Petitioner filed petitioned for a rehearing or rehearing *en banc*. Respondent filed its Return on July 8, 2022, and Petitioner filed its Reply on July 12, 2022. The Court of Appeals denied the Petition for

Rehearing by Order dated August 18, 2022. Petitioner then filed its Petition for Writ of Certiorari on September 19, 2022. This Return follows.

ARGUMENT

I. The Court of Appeals properly affirmed reference of this action to a master-in-equity where Petitioner's legal counterclaims were properly dismissed and Respondent's claims are equitable.

The Court of Appeals properly affirmed the circuit court's referral of this case to the Master in Equity. In light of the proper dismissal of Petitioner's frivolous legal counterclaims by the circuit court, the only remaining causes of action in this matter are equitable. (R. pp. 1 - 10). 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). Whether an action is legal or equitable is primarily determined by the allegations in the Complaint. *Bateman v. Rouse*, 358 S.C. 667, 673, 596 S.E.2d 386, 389 (Ct. App. 2004). In the present case, as counsel for Respondent made clear at the motions hearing and in memoranda submitted to the circuit court, together with Respondent's pleadings, Respondent has merely brought equitable claims to enforce restrictive covenants against the Subject Property. (R. pp. 167-168, 237 - 247).

Petitioner's assertion that Respondent has brought a legal claim for "Breach of Contract" is demonstrably false and not supported in the pleadings and/or record. Regardless, each and every claim raised in the Amended Complaint merely requests the court to apply and enforce the restrictive covenants of Sterling Hills. An action to enforce restrictive covenants by injunction is in equity. *Gibbs v. Kimbrell*, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993) (citing *Holling v. Margiotta*, 231 S.C. 676, 679, 100 S.E.2d 397, 398 (1957)). "Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *Ingram v. Kasey's Associates*, 340 S.C. 98, 105, 531

S.E.2d 287, 291 (2000) (citing *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984)).

Clearly, as the circuit court properly found, Respondent's claims were equitable, not legal. 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 Petitioner'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).

As the Court of Appeals noted, "[A]n 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. The Court of Appeals' 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 because most of the relief sought was equitable. In the present case, Respondent *did not even raise legal claims*, despite Petitioner'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 Petitioner.

Petitioner's reliance on *Cooper v. Poston*, 326 S.C. 46, 483 S.E.2d 750 (1997) is misplaced. In *Cooper*, this Court evaluated the right to a jury trial arising from money damages arising from money damages from a motor vehicle accident, an indisputably legal claim, unlike Respondent's equitable claims seeking enforcement of restrictive covenants. Nothing in Petitioner's petition calls for the reversal of settled South Carolina law that an action to enforce restrictive covenants by injunction is in equity. *See South Carolina Dept. of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (2001); *see also Taylor v. Lindsey*, 332 S.C. 1, 498 S.E.2d 862 (1998); *see also Holling v. Margiotta*, 231 S.C. 676, 100 S.E.2d 397 (1957). Therefore, the Court of Appeals properly affirmed the circuit court's referral to the Master-In-Equity appropriately in light of the ample South Carolina case law.

Even if the Petitioner's counterclaims had not been dismissed, the counterclaims would not have precluded a referral to the Master in Equity as Petitioner's counterclaims were not compulsory. "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." *North Carolina Federal Sav. And Loan Ass'n v. DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989) (emphasis added) (citing *Johnson v. South Carolina National Bank,* 292 S.C. 51, 354 S.E.2d 895 (1987)). By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim. *Id.* at 517 (citing Rule 13(a), SCRCP). Petitioner's at-law counterclaims, for Breach of Contract and violate on of the Unfair Trade Practices Act, which were properly dismissed, in no way originated from the same transactions or occurrences as Respondent's claims. Therefore, Petitioner's counterclaims would merely be permissive. Respondent brought claims to

enforce the covenants of Sterling Hills concerning the lack of upkeep and maintenance by Petitioner of his Lot, which has remained in an unkempt and unsightly condition. Petitioner's allegations under the Unfair Trade Practices Act pertain to alleged improprieties regarding fines, assessments, and actions "against members or purported members of Plaintiff." It is abundantly clear on the face of the pleading that this counterclaim did not arise from the same transaction or occurrence which led Respondent to bring suit to compel the upkeep of Petitioner's unkempt property. Moreover, while it is unclear how Petitioner alleges Respondent breached a contract, which is why the counterclaim was dismissed pursuant to Rule 12(b)(6), but it is not conceivable that such a Breach of Contract claim arises from the equitable claims brought by Respondent to enforce the restrictive covenants of Sterling Hills. Again, Petitioner's counterclaims were properly dismissed regardless, but it is clear they would not have precluded the referral to the Master in Equity had they survived.

While Counsel for Petitioner indicated to the circuit court that Petitioner's prior appearances before the Master-in-Equity "got heated," the fact remains that referral was proper under South Carolina case law, regardless of Petitioner's feelings toward the Master-In-Equity. (R. pp. 128; 170). In light of the circuit court's proper dismissal of Petitioner's non-compulsory legal counterclaims, there remains only the equitable action brought by Respondent in which Petitioner has no right to a jury trial. Accordingly, the Court of Appeals did not err in affirming the circuit court's referral of this this equitable matter to the Master in Equity. Accordingly, this Court should deny Petitioner's petition for writ of certiorari.

II. The Court of Appeals properly affirmed the circuit court's dismissal of Petitioner's breach of contract claim where Petitioner did not and cannot identify a breach of contract.

As has now been determined by the circuit court and the Court of Appeals, Petitioner has

not and cannot identify a breach, an indispensable element of a Breach of Contract claim. The elements of a cause of action for Breach of Contract are (1) the existence of the contract, (2) its breach, and (3) damages caused by such breach. *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 S.C. 483, 491-492, 732 S.E.2d 205, 209 (Ct. App. 2012) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). As the Court of Appeals properly noted, the circuit court did not err by granting Respondent's motion to dismiss the breach of contract counterclaim because Petitioner did not identify any contract or the nature of the alleged breach.

Petitioner'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. A claimant is obligated to provide more than "a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-1965 (2007). 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*). Petitioner's Answer & Counterclaim and Amended Answer & Counterclaim fail to identify or allege any specific breach of a contract, leaving Respondent to only speculate as to what Petitioner contends constituted a breach. Petitioner now submits, amongst other things, that Respondent has required from Petitioner more than what is required from the covenants. Not only is this not contained in the pleadings at issue, but it is indisputable that Petitioner'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 Petitioner 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.

Therefore, the Court of Appeals properly affirmed the circuit court's dismissal, and this Court should deny Petitioner's petition for writ of certiorari.

III. The Court of Appeals properly affirmed the dismissal of Petitioner's claim for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (the "Act") where Respondent, a nonprofit corporation homeowners association, is not engaged in trade or commerce or subject to the Act.

The Court of Appeals correctly affirmed the circuit court's dismissal of Petitioner's counterclaim under South Carolina's Unfair Trade Practices Act when Petitioner has not shown how Respondent, a nonprofit corporation homeowners association, was engaged in "trade or commerce." 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 this Court observed in *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 639, 743 S.E.2d 808, 816 (2013) (citing *Black's Law Dictionary* (9th ed. 2009)), "by the plain terms of the Act, 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." While Petitioner contends that the Court of Appeals has somehow imposed new requirements to trigger the Act, the Court of Appeals merely applied the text of the Act itself together with this Supreme Court's interpretations of the same.

As the circuit court correctly observed and the Court of Appeals correctly affirmed, 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 Petitioner's pleadings are merely actions in furtherance of enforcing the restrictive covenants; simply put, enforcement of restrictive covenants is not "trade or commerce."

Petitioner's 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 is misplaced. 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*, the Court of Appeals 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 to the present case 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 Petitioner has not enumerated any party or act in this action which is under the purview of the Unfair Trade Practices Act.

In *Health Promotion Specialists,* this 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*." 403 S.C. at 638 (emphasis added). In the present case, Respondent's enforcement of covenants as a homeowners association did not involve trade or commerce, and certainly was not undertaken "within a business context," where any party subject to the applicable restrictive covenants, even private lot owners, can take pursue enforcement of the same.

Notwithstanding the absence of "trade or commerce" in the present case, Respondent's enforcement of restrictive covenants against Petitioner pursuant to its duty under those covenants is not a commercial practice capable of repetition adversely affecting the public interest. *See Beneficial Financial I*, 431 S.C 256, 268, 847 S.E.2d 793, 800 (Ct. App. 2000) ("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)). While Respondent's

enforcement of restrictive covenants in efforts to compel Petitioner to maintain its property has no impact upon public interest, aside from the beneficial impact should the lot be maintained, Petitioner has not identified how any such action, even assumed to be "trade or commerce," concerns those beyond the parties to the covenants.

Therefore, as this case merely involves Respondent's authorized and proper enforcement of restrictive covenants applicable to Petitioner's property, with no actions being carried on for subsistence or profit, and with no implication of public interest, this Court should leave the Court of Appeals' decisions undisturbed and deny Petitioner's petition for writ of certiorari.

IV. The Court of Appeals properly found that whether the circuit court erred by failing to grant Petitioner leave to amend its pleadings was not preserved for appellate review because Petitioner 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.

Petitioner argues that the Court of Appeals relied on analysis contrary to this Court's precedent in finding that Petitioner's "leave to amend" issue was unpreserved for appellate review. To the contrary, the Court of Appeals ruled on the side of South Carolina case law and longstanding principles of issue preservation in finding that Petitioner'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), the Court of Appeals 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, Petitioner in the present action never requested leave to amend, but only seeks to amend on appeal. "It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" *Herron v. Century BMW*, 395 S.C. 461, 465, 719

S.E.2d 640, 642 (2011) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)).

In its Petition, Petitioner reasserts its misplaced reliance on *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019). 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. Petitioner, in stark contrast, never moved to amend its pleading and only raised the proposition before the Court of Appeals. To *now* allow Petitioner leave to amend its pleading would be inappropriate, and not the result required or called for under this Court's opinion in *Skydive*, which addressed the matter of preservation when parties had actually requested leave to amend.

Notwithstanding the procedural consideration, this 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), SCRCP, no evidence was produced to provide any evidentiary support for the two dismissed counterclaims

[1] *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 Petitioner now requests leave to amend at the appellate level.

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, Petitioner cannot conceivably identify a breach of a contract on the part of the Respondent, nor has Petitioner 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 be procedurally inappropriate, but also futile to allow Petitioner to amend. Notwithstanding, this matter is not preserved for appellate review, and this Court should deny Petitioner's petition for writ of certiorari accordingly.

V. The Court of Appeals properly affirmed the circuit court's grant of summary judgment as to Petitioner's declaratory judgment counterclaim where Respondent irrefutably did not operate *ultra vires* as demonstrable by South Carolina's Nonprofit Corporation Act and the record before this Court.

The Court of Appeals properly affirmed the circuit court's grant of summary judgment as to Petitioner's declaratory judgment claim where Petitioner failed to present any evidence from which a factfinder could reasonably find that the Association failed to hold elections for its board of directors despite the existence of a quorum at an annual meeting, that any of the existing directors were improperly appointed, or that the Association otherwise operated *ultra vires*.

Respondent is, again, 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 Petitioner'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). Petitioner presented nothing to the court that contradicted 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.

Notwithstanding, 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*. Petitioner has identified no act which, even if Ella Calvert's appointment was procedurally imperfect, would be outside of the powers of the Association. The Board would still maintain the authority under Article VIII, Section 1 of the Bylaws 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. As Petitioner's Petition 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). Petitioner 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 substantiated, 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 or substantiated by Petitioner, to render the acts of a nonprofit corporation with multiple board members who acted pursuant to their Bylaws *ultra vires*.

As the Court of Appeals 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). For the reasons set forth herein, this Court should deny Petitioner's for petition for writ of certiorari accordingly.

VI. The present case does not justify a writ of certiorari when evaluated under the factors set forth in Rule 242, SCACR.

Notwithstanding the foregoing reasons that the Court of Appeals' affirmation should be left undisturbed, the present case does not justify a writ of certiorari when evaluated under the factors set forth in the South Carolina Appellate Court Rules. Pursuant to Rule 242(b), SCACR, "A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons." Rule 242(b), SCACR also sets forth the following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, which indicate the character of reasons which will be considered:

> (1) Where there are novel questions of law;
> (2) Where there is a dissent in the decision of the Court of Appeals;
> (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;
> (4) Where substantial constitutional issues are directly involved; and
> (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

First, this matter involves no novel questions of law. The principles of referral of equitable cases, to include enforcement of restrictive covenants, 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."); *See also 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). Likewise, Petitioner's failure to specify a contract and breach of contract resulting in dismissal under Rule 12(b)(6) raises no novel question of law, nor does the summary judgment against Petitioner's

declaratory judgment claim that the Association has operated *ultra vires*, when the award of summary judgment was simply based on the record before the court. Furthermore, the Court of Appeals' determination that the question of whether Petitioner should have been granted leave to amend its pleading was not preserved for appellate review because Petitioner never requested leave until its appeal was based on axiomatic principles of issues preservation, not a novel question of law. "It is 'axiomatic that an issue cannot be raised for the first time on appeal.'" *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (citing *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)). As to the dismissal of Petitioner's claim under the Unfair Trade Practices Act, this Court has already evaluated claims under the Unfair Trade Practices Act outside of the business context and upheld dismissals accordingly. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 639, 743, S.E.2d 808, 816 (2013) ("'[T]rade or commerice' involves '[e]very business occupation carried on for subsistence or profit'") (finding promulgation or a regulation does not fall within the definition of "trade or commerce").

As to the second factor set forth in Rule 242(b), SCACR, there is no record of dissent in the Court of Appeals. The Court of Appeals issued Op. No. 2022-UP-256 with no dissent. Subsequently, Petitioner petitioned for a rehearing, and the Court of Appeals denied the petition.

As to the third factor, nothing decided or cited by the Court of Appeals in this matter is in conflict with a prior decision of this Court. Instead, Op. No. 2022-UP-256 shows that the Court of Appeals relied on ample case law provided by this Court.

As to the fourth factor, there are no substantial constitutional issues directly involved in this matter. Again, it is well-settled that there is no right to a trial by jury for equitable actions. *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.").

Lastly, there is no federal question included in this action, nor is there any conflict between the Court of Appeals' decision and a decision of the United States Supreme Court. Therefore, Petitioner's petition, while substantively meritless, is not of the nature that it is appropriate for this Court's discretionary review. There are no special, important, or compelling reasons for granting such review in this matter. Petitioner's petition for writ of certiorari should be denied accordingly.

CONCLUSION

For all of the reasons stated herein, Respondent requests that Petitioner's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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