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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

Appellate Case No. 2022-001299

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

v.

Elliot Hayes,.....Appellant.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

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ARGUMENT IN REPLY

The Petitioner, Elliot Hayes (hereinafter "Hayes"), submits this reply to the return of the Respondent, Sterling Hills Homeowners' Association, Inc. (hereinafter "the HOA"), to Hayes' petition for 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).

The HOA's multiple and irrelevant attacks on Hayes are not supported by the record; moreover, though, they illustrate that the HOA does not believe its own position is strong. "*Ad hominem* arguments, of course, constitute one of the most common errors in logic: Trying to win an argument by calling your opponent names ('Jane you ignorant etcetera . . .') only shows the paucity of your own reasoning." Huntington Beach City Council v. Superior Ct., 115 Cal. Rptr. 2d 439, 448, 94 Cal. App. 4th 1417, 1430 (Cal. App. 4th 2002).

On the merits of arguments, a great deal of the HOA's return is already addressed fully in Hayes' petition for certiorari, and respect for the Court's time cautions against Hayes repeating them here. The HOA's return does, however, merit some comment in reply, since much of the HOA's return shows why certiorari ought to be granted.

I. If it is unclear that there is the right to a jury trial on a damages claim for breach of real property covenants, this Court should speak to that.

As discussed in Hayes' petition, South Carolina law is straightforward in stating that either party has the right to a jury trial in a case that seeks money damages for breach of a contract. S.C. Const. art. I, § 14; Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010); Cooper v. Poston, 326 S.C. 46, 48, 483

S.E.2d 750 (1997); First Citizens Bank & Trust Co. of S.C. v. Hucks, 305 S.C. 296, 408 S.E.2d 222, 223 (1991). The restrictive covenants on which the HOA sues in this case are a contract. 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). No matter how vociferously the HOA argues otherwise, its pleadings do not lie about what it seeks in this case, and that includes a judgment for "[a]ctual and consequential damages" for "breach of covenants[.]" (R. pp. 45, 47.)

The Court of Appeals, though, seemed to operate from the position that, since the HOA sued for breach of real property covenants, that made its contractual damages claim sound in equity. The HOA shares that position. If there is any lack of clarity in the law about whether a damages claim for breach of real property covenants sounds at law or in equity, that is confusion among the lower courts' judges and practitioners of the sort that certiorari exists to remedy. It is, too, a question of constitutional imperative, a question about the scope of a bedrock right that underlies this state's judicial system. S.C. Const. art. I, § 14.

The HOA's return illustrates why certiorari is proper in this case.

II. The distinction between compulsory and permissive counterclaims would benefit from further clarification.

The HOA pleads an at-law damages claim. Accordingly, Hayes has the right to a jury trial on his at-law counterclaims regardless of whether they are permissive or compulsory. 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).

Determining whether a counterclaim is compulsory or permissive is often more difficult than it seems in the abstract. In N.C. Fed. Sav. & Loan Ass'n v. DAV Corp., 298 S.C. 514, 518, 381 S.E.2d 903, 905 (1989), this Court adopted the "logical relationship" test for determining whether a counterclaim is compulsory. In the years that have followed, our courts have struggled to gain a working understanding of what constitutes such a "logical relationship[.]" Id. Should questions of whether the counterclaims involved here are compulsory or permissive become important to deciding this case, the bench and bar would benefit from this Court's analysis of those issues.

III. If existing precedent does not make plain that a breach of contract occurs when a party demands that the other party to a contract "perform" by doing things that are not required by the contract, that is an important question this Court should address.

As noted in Hayes' petition, this Court has previously observed that, when one party to a contract demands that another party "perform" by doing things that are not required by the contract, the making of that demand is a breach of the contract. Hunter Bros. Systems, Inc. v. Brantley Const. Co., Inc., 286 S.C. 59, 66, 332 S.E.2d 206, 210 (1985). The Court of Appeals and the HOA evidently disagree, and it is not as though there is a host of cases that stand for this proposition.

What Hunter Bros. stands for in this regard is an important question, and one that it would be beneficial for this Court to answer. That is a reason to grant certiorari.

IV. The Court should address whether a homeowners' association can violate the Unfair Trade Practices Act.

The HOA contends that the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "the Unfair Trade Practices Act") simply does not apply to homeowners' associations, though, if it does, the HOA says that its actions

at issue here were not within trade or commerce. This makes no sense: the HOA, like all other homeowners' associations, is a business entity. It does not socialize. It does not spend time with family or friends. It does not do things for enjoyment or education. Every one of its activities is a commercial, business activity, an activity in "trade or commerce." S.C. Code Ann. § 39-5-10(b).

But the HOA and the Court of Appeals certainly disagree. Given the ubiquity of homeowners' associations in contemporary life, this question is bound to come up again – and again, and again – as the business activities of homeowners' associations affect more and more South Carolina citizens. This case presents the question of whether a homeowners' association's activities are excluded from the definition of *trade* or *commerce* under S.C. Code Ann. § 39-5-10(b). That is a question of importance worthy of this Court's attention.

The HOA's return shows why this Court should grant certiorari.

V. This case presents an opportunity to clarify the meaning of Skydive.

The HOA contends in its return that Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 181, 826 S.E.2d 585, 588 (2019), requires a specific request to amend be made to the trial court, as the HOA contended to the Court of Appeals. The Court of Appeals agreed, citing its own decision in Kitchen Planners, LLC v. Friedman, 432 S.C. 267, 279-80, 851 S.E.2d 724, 731 (Ct. App. 2020). Skydive set forth that the opportunity to amend the challenged pleading is part of the process and standard under Rule 12(b)(6), SCRCP. Skydive, 426 S.C. at 181. Hayes' reading is supported by the text of the Skydive opinion, but, regardless, the question is one of importance, dealing with a three-year-old decision of this Court that changed the way many trial courts are

analyzing motions to dismiss. Certiorari is warranted, as the interpretive dispute revealed by the HOA's return needs to be resolved.

VI. To what extent a corporation's acts are *ultra vires* when people act as directors who are not actually directors is a good question.

The first time that the HOA ever brought up its contention that Ella Calvert was lawfully made a director by board appointment in 2015 was in its return to Hayes' petition for rehearing. The HOA contention in this regard is premised "minutes produced in discovery" that are not part of the record that was before the court below. (Return to petition for rehearing p. 12.) The HOA has now acknowledged that Ella Calvert is not, as it previously maintained, a holdover director. Now, the HOA contends that these ostensible minutes show that Ella Calvert, who became a director of the HOA *in 2015*, some 13 years after the HOA last held director elections (R. pp. 173-77), came to hold that position through a purported series of events – facts about none of which are in the record. (Return to petition for rehearing pp. 12-13.)

To decide the HOA is correct about this would be manifestly improper, as this argument depends upon "matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR; accord Rule 208(b)(4), SCACR (references to facts must cite to "materials which may be properly included in the Record on Appeal"). The purpose of an appeal is for the appellate court "to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court." Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984); accord State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007); Cobb v. Benjamin, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997).

As far as this record is concerned, nothing shows that Ms. Calvert became a director in 2015 in accordance with "S.C. Code § 33-31-811(a)(2) and Article IX,

Section 6 of the Bylaws" (Return to petition for certiorari p. 15) – though the HOA has now conceded that the factual premise of the lower court's decision and the Court of Appeals' decision on this issue was wrong.

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

The HOA's position had been that all its purported directors were lawful holdover directors, until it became forced to acknowledge that was false. The lower court's decision was based on ignoring the evidence to the contrary and deciding that holdover directors were indeed who compose the HOA's ostensible board. (R. p. 6.) The lower court concluded that, because they were holdover directors under S.C. Code § 33-31-805(d), their acts on behalf of the HOA were not *ultra vires*. The Court of Appeals decided the same thing.

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 the Supreme Court observed in Fisher, "[a] corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto." Id. at 271. "A corporation's actions taken within the scope of the powers granted it are considered *intra vires* acts; acts beyond the scope of its powers, however, are *ultra vires* acts." Id. An act of a corporation that exceeds the powers granted to it under its governing documents is an *ultra vires* act. Id.

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

The HOA now argues in its return that, "[e]ven if the Board somehow acted *ultra vires* . . . 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." (Return to petition for certiorari p. 16.) Now, that does bring up an interesting question, an important question, and one that it seems is not answered by existing case law (or Hayes

or the HOA would have answered it in some filing in this case). If those who acted as the board of directors were not actually all directors, where does that put the validity or invalidity of the HOA's actions through that improperly acting board?

The HOA's return again illustrates that this case is a good candidate for writ of certiorari.

CONCLUSION

Hayes' petition sets out why the Court of Appeals' decision is wrong and why this Court should grant certiorari. The HOA's return simply illustrates further why granting certiorari here would be helpful for the bench and bar and provide an opportunity for this Court to address important questions, including ones arising under the South Carolina Constitution.

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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