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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Brooks P. Goldsmith, Circuit Court Judge
Case No. 2020-CP-07-00768

Appellate Case No. 2020-001500

Dana Advocaat, both individually and as trustee of the
Advocaat Living Trust dated March 7, 2019…….Respondent,

v.

Community Services Associates, Inc. ……...…Appellant.

BRIEF OF RESPONDENT

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INTRODUCTION

Respondent agrees with Appellant: There is only one question to be answered by this Court—a simple question that was already answered, correctly, by the lower court, pursuant to the authority vested in it by the Legislature. The question is whether a nonprofit corporation can withhold from its member the right to inspect a governing document, despite the Legislature's deliberate provisions imparting the member with inspection rights. As it did before the circuit court, Appellant attempts to confuse the issue with complicated facts about a complicated organization, with a complicated history.

All this Court needs to know is that Respondent Advocaat is a member of Appellant Community Services Associates, Inc. ("CSA"). CSA is a massive nonprofit corporation that, at its core, is a homeowners' association (HOA). CSA's given purpose is to maintain the common areas in the large development that is Sea Pines Plantation, in Hilton Head, South Carolina. Importantly, CSA has two classes of members: residential property owners and commercial interests.[1]

The document that CSA desires to withhold from Advocaat is not (as CSA wrongly describes it) an ordinary contract with third parties. *Instead*, it is an intra-corporate

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[1] The original developer of Sea Pines Plantation designed it to be comprised of residential units, as well as commercial interests. Each owner of a residential unit is a member of CSA, and the owners of commercial interests within Sea Pines are also members of CSA. In other words—putting into a nutshell what is in actuality a rather complicated corporation—CSA is comprised of several classes of members, including residential and commercial, which together control CSA, together are obligated to pay assessments, and which together regulate and maintain the development as a whole. *See* Declaration of Covenants and Agreement of 1988 for the Transfer of Properties, Reserved Rights and Obligations of Hilton Head Liquidation Corp. to Community Services Associates, Inc. (R. p. 173).

agreement between CSA and select commercial **members** of CSA, which purports to dictate the **internal** terms by which a major source of CSA's revenue is to be collected and used. Significantly, CSA allowed its members to inspect past versions of this agreement; it was previously posted on CSA's website. However, in 2018, CSA entered into an amendment to the agreement, and it suddenly wants to conceal the amended agreement from its residential members. So troubled was the 2018 amendment that one CSA board member recused himself, on advice of counsel, writing (among other things):

> This imposition of a potentially unlimited financial burden upon CSA is unprecedented, unnecessary and not in the best interests of CSA.

and

> For [these] reason[s], and on the advice of counsel, I shall recuse myself from board decisions concerning the proposed amendment to the gate fee policy in its current form, and I will not sign it.

(R. p. 171: Robert Gossett letter to CSA board).

In the Nonprofit Corporation Act and the Homeowners' Association Act, the Legislature set forth a member's right to inspect corporate records and governing documents. Advocaat filed this lawsuit pursuant to those statutes and the common law, and the circuit court correctly found that she had the right to inspect the records she sought. This Court should affirm.

COUNTER-STATEMENT OF THE CASE

Sea Pines Plantation ("Sea Pines") is a private, gated, 5,000-acre resort community in Hilton Head, South Carolina. The Sea Pines development includes residential homes, a resort hotel, commercial establishments, and various recreational facilities.

Appellant Community Services Associates, Inc. ("CSA") is a nonprofit corporation, organized pursuant to the South Carolina Nonprofit Corporation Act. CSA's corporate purpose (*inter alia*) is to manage and maintain the expansive common areas within Sea Pines. As the owner of common property, CSA—along with every property owner within Sea Pines—is bound by various declarations of covenants that touch and concern the land.

The common property includes roads, as well as gates for entrance and exit into the development. Outside visitors are charged fees at the gate. Gate fees, amounting to almost $3 million annually, are a significant source of revenue for the community.[2] One of CSA's responsibilities is to run and control the gates into the community, for the benefit of its members. The covenants direct the collection and use of gate fees, expressly requiring that "[a]ll gate fees collected by [CSA] shall be contributed to and used for community services." (1974 Declaration, Art. II, § B(11)) (R. p. 387).

The manner in which CSA runs and controls the gates hinges upon a Gate Pass Agreement (sometimes referred to as a Gate Fee Agreement) ("Gate Agreement"). The Gate Agreement controls the amount of gate fees collected, and it purports to dictate the

[2] *See* Ex. 2, Advocaat Reply to CSA Opposition, filed Aug. 2, 2020) (R. p. 172). CSA's overall annual revenue in 2018 was nearly twelve million dollars ($11,858,000). (Exhibit A, CSA Memorandum in Reply to Plaintiff's Memorandum in Opposition, at p. 8). (R. p. 430).

way those millions of dollars in fees are to be spent. The Gate Agreement is an internal agreement between CSA and two of its commercial members: Sea Pines Resort, LLC (the "Resort"), and Sea Pines Center Associates, LLC (the "Center").[3] The Gate Agreement originally appears in the 1988 Declaration for Sea Pines, and its terms are specifically incorporated into that recorded document, which binds all property in Sea Pines Plantation. (1988 Declaration, Article III) (R. p. 178). Since 1988, the Gate Agreement has been amended several times.

The Gate Agreement, and its prior amendments, have previously been disclosed by CSA to all of its members. This makes sense, because the Gate Agreement: (1) pertains to a common property (*i.e.*, the gate), (2) controls common funds (*i.e.*, gate fees), (3) purports to dictate the way that those common funds will be spent by the corporation (*i.e.*, on specific community services, as required by the covenants), and (4) is a part of the covenants.

However, in 2018, CSA entered into an Amendment to the Gate Agreement with certain of its commercial members. The 2018 Amendment pertains to (among other things) the prices of gate entry fees from 2018 through 2021; the residential members, including Advocaat, believe that the Amendment identifies *new* items on which those common funds may be spent, in violation of the covenants. As mentioned above, at least one CSA board member refused to participate in the decision, on advice of counsel,

[3] The Resort is entitled to four seats on CSA's Board of Directors, and the Center is represented on CSA's Board of Directors by the four seats filled by commercial representatives. *See* Exhibit 4 to Plaintiff's Reply to Defendant's Memorandum in Opposition to Application to Inspect Corporate Records (R. p. 367).

including because "This imposition of a potentially unlimited financial burden upon CSA is unprecedented, unnecessary and not in the best interests of CSA." (R. p. 171: Gossett letter).

CSA refuses to allow its members (except for specific commercial members, who are signatories and hold eight seats on CSA's board) to see the 2018 Amendment to the Gate Agreement. However, CSA's board has expended a remarkable amount of corporate energy in describing to its residential members *limited* portions of the 2018 Amendment, and its significant financial ramifications for the community. (*See* Exhibits to Plaintiff's Reply to Defendant's Memorandum in Opposition to Application to Inspect Corporate Records) (R. pp. 402–415).

Respondent Advocaat is a member of CSA by virtue of her ownership of property encumbered by the various declarations of covenants imposed upon the property.[4] She properly asked to see the Gate Agreement, and its amendments. CSA refused to allow her to do so. (Affidavit of Dana Advocaat) (R. p. 489–482). As the circuit court correctly found, Advocaat has the right to inspect corporate documents and records that directly bear on her membership and property interests.

[4] Recorded instruments affecting the property include, but are not limited to the 1974 *Declaration of Covenants and Restrictions by Sea Pines Plantation Company, Inc.*, recorded with the Beaufort County Register of Deeds, in Book 224, Page 1036, as well as the *Declaration of Covenants and Agreement of 1988 for the Transfer of Properties, Reserved Rights and Obligations of Hilton Head Liquidation Corp. to Community Services Associates, Inc.*, recorded with the Beaufort County Register of Deeds in Book 519, Page 1161 (the "1988 Declaration"), as amended from time to time. (R. pp. 53, 173).

STANDARD OF REVIEW

Abuse of Discretion

CSA identifies the wrong standard of review. The circuit court was not interpreting a statute, such that this Court should review its decision de novo. Instead, the circuit court was directing CSA to perform a particular act—*i.e.*, permitting Advocaat to inspect corporate records. The circuit court's authority in this regard was specifically granted to it by the South Carolina Nonprofit Corporation Act. The statutory scheme makes it clear that this authority is discretionary, akin to a writ of mandamus, which is to be reviewed by this Court for abuse of discretion. *See Jolly v. Marion Nat. Bank*, 267 S.C. 681, 231 S.E.2d 206 (1976) (remanding for court to exercise its discretion to determine whether stockholder had a proper motive for his record demand, and noting "the writ of mandamus is not a writ of right, but whether or not the writ be designated as one of right, its allowance or refusal in almost all jurisdictions is invariably held to be a matter of discretion with the Court"); *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C.292, 811 S.E.2d (the decision on whether to issue a writ of mandamus is "within the sound discretion of the trial court, and an appellate court will not overturn that decision unless the trial court abuses its discretion.").

The Nonprofit Corporation Act states that nonprofit corporations have a duty to permit their members to inspect corporate records, provided that the members give to the corporation statutorily sufficient notice of their intent to inspect and, with regard to accounting records, identify a proper purpose for the request.[5] This is a ministerial task:

[5] The fact that Advocaat made a statutorily sufficient demand is the undisputed law of the case. CSA has not appealed the portions of the circuit court's order pertaining to the sufficiency

> a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in Section 33-31-1601(e)[6] if the member gives the corporation written notice or a written demand at least five business days before the date on which the member wishes to inspect and copy.

S.C. Code § 33-31-1602(a).

The Act anticipates that, despite their statutory duty, corporations might not always be forthcoming with the records requested by their members. Thus, the statute contains an express mechanism by which members may apply to the local circuit court to enforce their inspection rights. The Order that underlies this appeal rules on Advocaat's Application to Inspect Corporate Records, pursuant to S.C. Code § 33-31-1604, which states:

> [i]f a corporation does not allow a member who complies with Section 33-31-1602(a) to inspect and copy any records required by that subsection to be available for inspection, **the circuit court in the county where the corporation's principal office in this State, or, if none in this State, its registered office, is located may summarily order inspection and copying of the records demanded** at the corporation's expense upon application of the member.

S.C. Code § 33-31-1604(a) (emphasis added).[7]

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of Advocaat's notice and demand to inspect CSA's records, nor as to her stated purpose for inspection. (*See* Order, pp. 3-4, 6, 8).

[6] "(e) A corporation shall keep a copy of the following records at its principal office: . . . (2) its bylaws or restated bylaws and all amendments to them currently in effect." S.C. Code § 33-31-1601.

[7] As a roadmap for this Court, Advocaat brought her Application to Inspect Corporate Records pursuant to Article 16 of the S.C. Nonprofit Corporation Act, which sets forth the framework for members' inspection rights. S.C. Code § 33-31-1604 has several subsections, in addition to the one quoted, which identify the hoops that a member must jump through in order to inspect particular types of corporate records, as well as the function of the judiciary in enforcing the member's inspection rights. S.C. Code § 33-31-1604(b) contains a similar mandate to the block quote above, with room for a bit more discretion by the court as to the reasonableness of the time taken by the corporation to furnish the records. Here, the circuit court quoted both subsections

The authority that the statute gives to the local circuit court is exactly a writ of mandamus:

> The modern writ of mandamus may be defined as a command issuing from a common-law court of competent jurisdiction, in the name of the State or the sovereign, directed to some corporation, officer, or inferior court, requiring the performance of a specific duty therein specified, which duty results from the official station of the party to whom the writ is directed, or from operation of law.

James L. High, *A Treatise on Extraordinary Legal Remedies* § 2, at 5-6 (1884).

The circuit court's Order granting Advocaat's Application for Inspection of Corporate Records is essentially a writ of mandamus, commanding CSA to perform on its duty to permit its member to inspect its records, pursuant to the Nonprofit Corporation Act. This Court should therefore review the Order for abuse of discretion. "Whether to issue a writ of mandamus lies within the sound discretion of the trial court, and an appellate court will not overturn that decision unless the trial court abuses its discretion. An abuse of discretion arises where the trial court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support." *Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 307, 811 S.E.2d 758, 766 (2018) (internal citations omitted).

CSA correctly states that discovery decisions will not be disturbed on appeal absent abuse of discretion, similarly requiring that this Court find that the circuit court's decision was controlled by error of law. *Evening Post Publ'g Co. v. Berkeley County Sch. Dist.*, 392 S.C. 76, 708 S.E.2d 745 (2011).

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in its Order (Order, pp. 6, 8) (R. pp. 6, 8–9), and it found that Advocaat had properly jumped through the requisite statutory hoops, entitling her to inspect the records she requested.

Because the circuit court did not abuse its discretion in ordering CSA to permit Advocaat to inspect its corporate records, this Court should affirm the Order on appeal.

ARGUMENT

CSA is a nonprofit, mutual benefit corporation, of which Advocaat is a member. She holds a membership interest in CSA, *and* that interest is directly tied to her property. She, and other members of the organization, entrust CSA with their property values. CSA is organized for the purpose of maintaining the common property;[8] the common property benefits each of CSA's members and enhances their property values.

The circuit court gave four legal reasons as to why CSA must permit Advocaat to inspect the records that she properly requested.[9] The first two reasons are that CSA has a statutory duty to permit inspection, pursuant to sections of the South Carolina Nonprofit Corporation Act pertaining to bylaws and accounting records. The third reason is based on common law. The fourth reason stems from the Nonprofit Corporation Act's acknowledgment of a litigant's right to discovery of corporate records.

Each of the circuit court's four reasons is independent grounds for inspection, as well as independent sustaining grounds for the circuit court's decision. This Court should affirm for all—or for any single one—of the grounds discussed below.

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[8] To maintain the common areas, CSA uses assessments collected from members like Advocaat, as well as funds from other sources (such as the gate fees discussed herein). For frame of reference, **CSA has annual expenses of more than $12,297,000**. (Defendant's Reply to Plaintiff's Reply to Defendant's Memorandum in Opposition to Application for Corporate Records, Ex. A, pp. 8-9) (R. pp. 430–431).

[9] In its brief, CSA focuses on only one of the records requested: the 2018 Amendment to the Gate Agreement. In her Complaint and other filings, Advocaat asked the court to permit her to inspect "the full and final" Gate Agreement, and its amendments, and any attachments thereto. (*See* Amended Complaint) (R. p. 26). The circuit court ordered CSA to permit Advocaat to inspect the requested records, including the Gate Agreement and any amendments. (Order) (R. p. 3). This is potentially important due to the timeline of this appeal, which may not be resolved before CSA enters into yet another amendment to the Gate Agreement. However, for ease of reading, this brief refers to the "Gate Agreement" with the intent to incorporate all the records that the circuit court ordered CSA to allow Advocaat to inspect.

In its brief, CSA devotes a lot of words to arguing about what the Gate Agreement is and what it is not, urging this Court to view it as a mere contract. And, sure, it is indeed a type of contract (as are covenants, declarations, and other publicly-available documents at Sea Pines and other communities). The Gate Agreement is an *internal* contract between CSA and certain of CSA's members, which governs the behavior of the organization with regards to a limited class of its members (commercial members), while dictating the method by which funds that should benefit all members—and which are required by the governing documents to be used for the common benefit—may be spent: on the interests of a select few.

Because it governs the affairs of CSA, the Gate Agreement is a governing document and a bylaw. Because it purports to dictate the amount and use of gate fees collected, it is a financial record. Because it determines common interests as to common property and the use of common resources, it binds and directly affects the property interests of every owner in Sea Pines. Finally, because it is relevant to the subject matter of the litigation, it must be produced in discovery.

I. The circuit court properly exercised its discretion pursuant to the Nonprofit Corporation Act when it ordered Appellant (a nonprofit corporation) to permit Respondent (its member) to inspect corporate records that regulate and manage the affairs of the corporation.

The South Carolina Nonprofit Corporation Act gives members the right to inspect certain records of the corporation:

> a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in Section 33-31-1601(e)[10] if the member gives the corporation written notice or a written demand at least five business days before the date on which the member wishes to inspect and copy.

S.C. Code § 33-31-1602(a). These records include the governing documents of the corporation, such as bylaws. In its discretion, examining the facts put forth by the parties, the circuit court determined that the Gate Agreement is a record that Advocaat has the right to inspect.

CSA complains that "The circuit court's expansive interpretation of what constitutes a bylaw is incompatible with the statute and common sense." (App. Br. p. 8). But the term "Bylaws" is a defined term within the South Carolina Nonprofit Corporation Act, and it is the Act itself—and not the circuit court—that gives the term a broad meaning. The statute's definition of "Bylaws" is designed to encompass any document used by the corporation for the management of corporate affairs. The statute states:

> "Bylaws" means the code or codes of rules, other than the articles, adopted pursuant to this chapter **for the regulation or management of the affairs**

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10 "(e) A corporation shall keep a copy of the following records at its principal office: . . . (2) its bylaws or restated bylaws and all amendments to them currently in effect." S.C. Code § 33-31-1601.

> **of the corporation irrespective of the name or names by which the rules are designated**.

S.C. Code § 33-31-140(b)(4) ("Definitions") (emphasis added).

What the Legislature's definition means is that what matters is the *function* of the document, rather than the *name* of the document. If the purpose of the document is "the regulation and management of the affairs[11] of the corporation," then the statute says that it is a "Bylaw," irrespective of whether the corporation chooses to call it a "Rule" or a "Commandment" or an "Agreement" or a "Royal Decree." If CSA perceives this to be too broad of a definition, then its complaint is with the Legislature and not with the circuit court.

In its *Appellant's Brief*, CSA has two arguments that the Gate Agreement is not a corporate "Bylaw." The first is that the Gate Agreement is "only" a contract. The second is the parade of horribles rhetorical device. The circuit court properly rejected both arguments.

A. CSA cannot transform the Gate Agreement into something it can hide from its members, just by cleverly naming it a "contract."

CSA argues that if "the General Assembly intended for every contract to be subject to inspection, it would have said so by adding 'contracts with third parties' to the list of [records subject to inspection by members.]" (App. Br. p. 9). But the statutory definition

[11] The word "affairs" is itself a broad, general word, referring to "commercial, professional, public, or personal business." *Merriam-Webster Dictionary*, Affairs, https://www.merriam-webster.com/dictionary/affairs (last accessed April 5, 2021). Some synonyms for "affairs" include: businesses, matters, dealings, activities, concerns, and undertakings. *Merriam-Webster Thesaurus*, Affairs, https://www.merriam-webster.com/thesaurus/affairs (last accessed April 5, 2021).

of "Bylaws" is unquestionably written so that the definition includes certain contracts, like the Gate Agreement. The definition spells out that it applies to any code or rules that regulate or manage the affairs of the corporation: "irrespective of the name or names by which the rules are designated." S.C. Code § 33-31-1604(a) (emphasis added). Put simply: the statute's definition does not encompass "every contract," as CSA asserts, but it absolutely includes internal agreements with members of the corporation that dictate the terms by which the corporation fulfills its corporate functions.

The circuit court, in its discretion, found that—irrespective of its name—the Gate Agreement regulates and manages the affairs of the corporation, and it is therefore a corporate "bylaw," as defined by the Nonprofit Corporation Act. CSA's corporate affairs include managing and maintaining the common areas; CSA's Gate Agreement regulates and manages the gates to the community (a common area), and it regulates the corporation's use of fees associated therewith (used to maintain the common areas). Further, the Gate Agreement regulates the behavior of the corporation with regards to certain of its commercial members.[12]

CSA summarizes its corporate affairs as to: "protect, maintain and enhance the resources of Sea Pines for the benefit of the Sea Pines Community." *Opposition*, p. 2. CSA admits that the purpose of the Gate Agreement is to regulate and manage the gate and

[12] CSA insists that the Gate Agreement is "simply" a contract with "two third parties." (App. Br. p. 10). It neglects to mention that the "two third parties" are not strangers to the corporation—instead, they are commercial ***members*** of the corporation. In other words, the Gate Agreement is an intra-corporate arrangement that governs CSA's relationship with one class of CSA's members (commercial), which CSA would like to keep secret from its other class of members (residential members, like Advocaat), despite the fact that the Gate Agreement decides which common property (owned by all members, together) receive the corporation's funds (in which all members have an interest).

its associated fees. Here are some excerpts, in CSA's own words, as to the function of the Gate Agreement's 2018 Amendment:

> The 2018 Amendment pertains to the prices of gate entry fees from 2018 through 2021. Further, **under the 2018 Amendment, CSA is required to contribute certain sums from gate entry fees for the maintenance and improvement of Sea Pines common areas**, and for certain services important to the preservation of Sea Pines as a visitor-friendly, attractive community.

Opposition p. 3 (emphasis added) (R. p. 45). The 2018 Amendment pertains to a major resource of the corporation (*i.e.*, the gate fees), and it purports to dictate its use for common areas and "certain services." An internal agreement for the use of corporate resources is plainly a rule for the management of its affairs, and thus is a bylaw under the Nonprofit Corporation Act. Thus, by CSA's own description, the 2018 Amendment unquestionably sets forth "rules . . . for the regulation or management of the affairs of the corporation."

The thrust of CSA's argument is that members of nonprofit corporations should not be allowed to inspect governing documents that the corporation cleverly chooses to label "contracts." The Legislature clearly anticipated this evasive maneuver, which is why it included within its definition of "Bylaws" the modifying phrase "irrespective of the name or names by which the rules are designated." The circuit court, in its discretion and in accordance with the Legislature's definition, looked to the *function* of the Gate Agreement, rather than simply its name. Examining the facts before it, and applying them to the definition given by the Legislature, the circuit court determined that the Gate Agreement is a "Bylaw" of CSA. This was not an abuse of discretion, controlled by error of law. Instead, it was a proper exercise of the authority given to the circuit court by the

statute. S.C. Code § 33-31-1602(a) ("the circuit court . . . may summarily order inspection and copying of the records demanded . . . "). This Court should therefore affirm, under the applicable standard of review.

B. The parade of horribles lacks the requisite horror.

CSA next argues, as if it were a bad thing, that: "Taking the circuit court's reasoning even further to its logical conclusion, every provision of the United States Code, every section of the South Carolina Code, and every local ordinance would also constitute a bylaw of the corporation." (App. Br. p. 10). But, of course there is no question that all of those acts of the legislature **do** regulate the affairs of the corporation and its members. And there is also no question that folks like Advocaat have the right to inspect those legislative schemes, in order to understand how they might impact something like membership in a nonprofit corporation. Governing provisions should be accessible, here in America, and CSA's parade of horribles argument is downright unpatriotic.

In any event, CSA has not attempted to keep the South Carolina Code hidden from its members, so as to prevent them from fully understanding what makes their nonprofit corporation tick. But it **has** attempted to keep the Gate Agreement hidden, so that its members are prevented from fully understanding how CSA will spend the corporation's money, and how CSA will interact with an exclusive few of its commercial members (The Resort and The Center), and whether CSA will allow some of its members to control common resources (the gate fees).[13] The circuit court correctly found that CSA's governance should not be a game of "hide the ball."

[13] A member of the Board of Directors of CSA, recusing himself from acting on the amendment to the Gate Agreement, noted: "Under the current proposal, both Sea Pines Center

The bottom line is that the Nonprofit Corporation Act obviously intends for members of nonprofit corporations to have access to the corporation's records—and particularly those that lay the groundwork for the management and regulation of the affairs of the entity and its members. Nonprofit corporations are required by statute to allow their members to view those governing documents, and the courts are specifically given the power (and the discretion) to enforce the statute by ordering inspection. S.C. Code § 33-31-1604(a). So strongly does the Legislature feel about the importance of a corporation's forthcoming disclosure of its records to its members, that it mandates ("shall") the court to award attorney's fees and costs to the member who must go to the court to get her corporation's records. S.C. Code § 33-31-1604(c). This is not a parade of horribles; it is democracy and transparency at its best.

This Court should affirm the circuit court, which did not abuse its discretion when it ordered CSA to permit Advocaat to inspect Gate Agreement, which governs CSA's affairs and thus constitutes a bylaw under a plain reading of the Nonprofit Corporation Act's broad definition of the term.

II. The circuit court properly exercised its discretion pursuant to the Nonprofit Corporation Act when it found that the Gate Agreement is an accounting record that CSA must permit Advocaat to inspect.

The circuit court's second basis for ordering CSA to permit inspection was that the Gate Agreement also constitutes an "accounting record," under a different statutory

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and Sea Pines Resort would be granted control over spending significant portions of the gate fee revenues of CSA." (Ex. 1 to Advocaat Reply Memorandum) (R. p. 171).

provision. As discussed below, the circuit court's decision in this regard was correct, and it is an independent sustaining ground for the order on appeal.

A. The Legislature delegated to the circuit court the task of determining what is an "accounting record" in a particular circumstance.

The Nonprofit Corporation Act requires a nonprofit corporation to "maintain appropriate accounting records," and it gives the corporation's members the right to inspect those records.[14] S.C. Code §§ 33-31-1601, 1602(b)(2) *et seq.* Importantly, the Legislature delegated **to local circuit courts** the question of which accounting records a member is entitled to inspect under particular circumstances. The statute imparts to those courts broad discretion in making that determination:

> If a corporation does not within a reasonable time allow a member to inspect and copy **any other record**, the member who complies with Section 33-31-1602(b) and (c) may apply to the circuit court in the county where the corporation's principal office in this State, or if none in this State, its registered office, is located for an order to permit inspection and copying of the records demanded. The court shall dispose of an application under this subsection on an expedited basis.

S.C. Code § 33-31-1604(b) (emphasis added). In this instance, the circuit court examined the facts before it and concluded that, under these circumstances, the Gate Agreement constitutes an accounting record of the corporation. Because the circuit court did not abuse its discretion when it ordered CSA to permit Advocaat to inspect the Gate Agreement, this Court should affirm. *See Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C.292, 307, 811 S.E.2d 758, 766 (2018) (internal citations omitted) ("An abuse of

[14] The statutory right to inspect accounting records is separate and apart from the statutory right to inspect bylaws.

discretion arises where the trial court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support.").

In its brief, CSA complains that the Legislature did not define "accounting record." CSA then cherry-picks some definitions that it happens to like, from various dictionaries,[15] and proceeds to argue that the Gate Agreement does not fit within the particular definitions that CSA has curated. But it bears repeating that the circuit court was not interpreting a statute when it ordered CSA to produce the Gate Agreement. Instead, it was exercising the discretion given by the Legislature to local circuit courts ("the member . . . may apply to the circuit court in the county where the corporation's

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[15] Other definitions include:

- "A course of business dealings or other relations for which records must be kept," *Black's Law Dictionary* p. 21, Account / Accounting (11th ed. 2019).
- "[T]he system of recording and summarizing business and financial transactions and analyzing, verifying, and reporting the results" Synonyms: account, argument, case, explanation, rationale, reason. *Merriam-Webster Dictionary*, Accounting, https://www.merriam-webster.com/dictionary/accounting (accessed March 18, 2021).
- "Accounting records are key sources of information and evidence used to prepare, verify and/or audit the financial statements. They also include documentation to prove asset ownership for creation of liabilities and proof of monetary and non monetary transactions. **Accounting records can take on many forms and include (among other camps):**
    - Ledgers
    - Journals
    - Bank statements
    - **Contracts and agreements**
    - Verification statements
    - Transportation receipts
    - Invoices
    - Vouchers"

  https://en.wikipedia.org/wiki/Accounting_records (accessed March 18, 2021) (emphasis added).

principal office . . . is located . . . for an order to permit inspection . . . on an expedited basis") and deciding whether, under these particular circumstances, the Gate Agreement was the sort of record that CSA's members should have access to. Because "accounting records" can take various forms, depending on the particular circumstances—ledgers, journals, bank statements, contracts, agreements, verification statements, transportation receipts, invoices, vouchers (*see* fn. 15, *supra*)—the Legislature delegated to the circuit court the discretion of whether a document is an "accounting record" in a specific instance.

This makes sense—it is unlikely that the Legislature intended for this Court of Appeals to have to weigh in for a *de novo* review every time a homeowners association has a disagreement on what is an "accounting record" in a particular instance. (If so, this Court would not have time to do much else.)[16]

[16] As further example, the Act's Official Comment deliberately leaves open the question of which accounting records a corporation must permit its members to inspect, permitting courts to decide, on a case-by-case basis: "The question of what accounting records are 'appropriate' depends on the nature, size and other characteristics of the corporation." Off. Cmt. 2, § 33-31-1601.

B. The Circuit Court properly determined that the Gate Agreement is included under accounting records in this circumstance.

Here, the circuit court, as empowered by the Legislature, properly examined the particular circumstances of Advocaat's record request in light of CSA's size, nature, and the factual circumstances surrounding the particular document sought. The circuit court properly based its determination on the facts before it, which indicated that CSA is a large, sophisticated corporation, with a $13 million annual budget and complex accounting records, charged with managing the finances and property interests of thousands of members. (Order) (R. p. 1).

In determining whether CSA's Gate Agreement is an accounting record, the circuit court looked to, *inter alia*, (i) the terms in a previous version of the Gate Agreement and a "final" draft of the 2018 Gate Agreement, and (ii) CSA's own statements, made to its members, about the nature of the document.

(i) Past version of Gate Agreement and the "final" draft of the 2018 Gate Agreement.

Although CSA's brief refuses to tell what is in the 2018 Gate Agreement (other than representing what it is *not*), the circuit court had guidance from a previous version of that Agreement, and from a "final" draft of the 2018 Gate Agreement. The previous version (R. p. 460) specifies, among other things, numerous accounting functions and accounting-related requirements, including:

- The amounts, dates, and methods of determining the increased gate fees and weekly passes (*id.* ¶ 2);
- The method for allocating excess funds from the increased gate fees (*id.* ¶ 3);

- Adjusted gross resort revenue increases in allocations from Business Landowners (*id.* ¶ 4);

- Crediting of additional adjusted gross resort revenues regarding Business Landowners (*id.* ¶ 4);

- Redetermination of the minimum annual amount payable from the Business Landowners (*id.* ¶ 5);

- Refunding of certain payments made by CSA (*id.* ¶ 5);

- Capital project allocations for certain internal entities at Sea Pines (*id.* ¶ 7);

- Reduction in daily access fees in certain instances, and crediting of CSA for the difference in amount (*id.* ¶ 8);

- Governance requirements for (*inter alia*) development and prioritization of expenditures (*id.* ¶ 9).

Similarly, the draft version[17] of the 2018 Gate Agreement (labeled as "Final 7-2-18 4:00 p.m." (R. p. 460)) specifies accounting functions and requirements:

- Graduated fees of various sorts for each 2018, 2019, 2020, 2021, and 2022 (R. pp. 463–465);

- Detailed, specific accounting metrics for mandatory increases or decreases in CSA contributions to internal funds based on changes in revenue from the gate fees (R. pp. 463–465);

- Budgeting requirements (R. p. 465);

- Incremental funding requirements (R. p. 465).

Based on the previous version, and on the "final" draft, any reasonable audit or financial review[18] of CSA's finances would necessarily include the 2018 Gate Agreement, as an

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[17] As argued by Advocaat at the hearing (R. pp. 512–513, 535), the fact that the "final" draft of the 2018 Gate Agreement is available waives any confidentiality or privilege that CSA claims over the document. This is an additional sustaining grounds for the circuit court's ruling.

[18] A common definition of "accounting records" includes documents necessary to support an audit or financial reviews of a corporation's finances: "Accounting records are all of the

underlying accounting record. Indeed, a financial review or accounting audit would not make sense without viewing the 2018 Gate Agreement.

In sum, there is no serious question that the Gate Agreement documents deal directly with accounting issues and are included under the rubric of accounting records. From this evidence, the circuit court reasonably concluded that the revised, hidden document also falls under the statute's rubric of accounting documents, in this circumstance.

(ii) CSA's statements to members about the content and effect of the 2018 Gate Agreement.

In addition, the circuit court evaluated CSA's own statements describing the content and effect of the Gate Agreement. Impressively, CSA expended a huge amount of corporate energy explaining certain financial ramifications of the Gate Agreement to its members, while nonetheless withholding the actual document from those very members. (R. pp. 402–415). That additional evidence in the Record supports the circuit court's conclusion that the Gate Agreement underlies the finances of CSA and is a material used to prepare CSA's financial and accounting statements. For example:

documentation and books involved in the preparation of financial statements or records relevant to audits and financial reviews." https://www.investopedia.com/terms/a/accounting-records.asp (accessed March 18, 2021).

A pathway to $10 for the daily visitor gate fee:

This agreement provides a path to future daily visitor gate fee increases to $9.00 and $10.00. This path requires the volume of daily visitor passes to be maintained at or close to established levels.

Potential for additional income with $1 from $8.00 to $9.00 daily gate fee:

Source: $278,025 +/- based on current volume.

Use: $75,000 = Marketing Fund Contribution

At $9.00 this creates an estimated total annual funding source of approximately $203,025 in revenues to the infrastructure and operating funds of CSA.

Potential for additional income with $1 increase from $9.00 to $10.00 daily gate fee:

Source: $278,025 +/- based on current volume.

Use: $75,000 = Marketing Fund Contribution

At $10.00 this creates an estimated total annual funding source of approximately $203,025 in revenues to the infrastructure and operating funds of CSA.

R. p. 412. CSA also has emphasized how critical gate fees are to Sea Pines' finances:

> Many of you may already be aware that on July 5th, 2018 the Sea Pines Community Services Associates (CSA) Board of Directors passed a resolution to enter into an agreement to increase the Sea Pines "daily visitor gate fee" from $6 to $8 . . . **Today, gate fees now far outpace the growth of any other major revenue sources to CSA**. These gate fee increases and the new agreement, updates and confirms all prior gate fee agreements and current policies, and **comprise the largest ongoing revenue increase to any CSA revenue source ever made!** The agreement also provides for the first time, a specified opportunity for additional defined future gate fee increases. These daily gate fee increases will help us **address critical projects for the Sea Pines community**, including funding improvements to increase efficiencies and flow at our gate entrances, repairing and improving our roadways and help to provide for other vital community needs. . .
>
> This additional revenue will help CSA fill the gap of what we believe is needed in Sea Pines . . .

(Plaintiff's Reply to Defendant' Memorandum in Opposition, Ex. 6) (emphasis added) (R. pp. 402–403).

Looking at all of the evidence, the circuit court decided, in its discretion, that "is clear from CSA's own communications to its members that the documents Plaintiff seeks to inspect are very much accounting records of the corporation, profoundly affecting its finances." (R. p. 7). Based on the voluminous evidence before it, the circuit court properly ruled that the requested document fell under the category of accounting records in this instance. This Court should affirm.

III. The circuit court correctly exercised its discretion by ordering CSA to permit Advocaat to inspect the records, pursuant to the common law.

Apart from the previous two reasons, the circuit court had a third basis for ordering inspection, which is another independent sustaining ground for its decision. The court correctly found that Advocaat has a right to inspect the Gate Agreement because it is an instrument that binds her property and affects her vested interests. In addition to the statutory rights that it delineates, the Nonprofit Corporation Act expressly references a member's common law right to inspect corporate records. S.C. Code § 33-31-1602(d)(2).

Significantly, CSA is a homeowners' association. Advocaat's membership in CSA is tied to her property, which is bound by various declarations of covenants and restrictions that run with the land. The covenants are a legal thread that links Advocaat's interests with those of every other property owner within Sea Pines Plantation, including CSA (the owner of common property). When she purchased property within Sea Pines Plantations, Advocaat acquired a vested interest in the common areas of the development, as well as the obligation to pay assessments to maintain them. CSA is the

entity charged with managing the assessments paid by its members and maintaining the common areas.

The circuit court examined the facts before it, including the myriad descriptions by CSA of the Gate Agreement, and it found that the Gate Agreement materially affects and binds Advocaat's property interest. Significantly, the original version of the Gate Agreement was incorporated into the covenants subject to which Advocaat took title to her property. (*See* 1988 Declaration, p. 6) (R. p. 178). The Gate Agreement is therefore a part of Advocaat's real property "bundle of rights."

Examining these facts, the circuit court found that this link between the Gate Agreement and Advocaat's property interests was a proper purpose for her inspection of the Gate Agreement, pursuant to the common law. The common law recognizes the court's power to enforce Advocaat's right as a member to view corporate records, so long she has a justifiable basis for doing so:

> there can be no question that the decisive weight of American authority recognizes the common law right of the shareholder, for proper purposes . . ., to inspect the books of the corporation of which he is a member; and, at common law, mandamus is proper to enforce such right of inspection where the writ is sought for a proper and legitimate purpose.

Jolly at 685, 231 S.E.2d at 207, *citing Guthrie v. Harkness*, 199 U.S. 148, 26 S.Ct. 4, 50 L.Ed. 130, 55 C.J.S. Mandamus § 223b.

Advocaat argued to the circuit court that property owners subject to the Gate Agreement should have a right to inspect it. Moreover, she wanted to inspect the agreement for the purpose of better understanding CSA's use of common funds and common property. The circuit court had the discretion to determine whether Advocaat's

purpose for inspection was proper, and it did not abuse its discretion in doing so—particularly given the link between the Agreement and Advocaat's homeownership. This Court should affirm.

IV. The circuit court properly relied on the South Carolina Rules of Civil Procedure.

CSA argues that the circuit court erred when it also based its ruling on the South Carolina Rules of Civil Procedure, as yet another independent ground for ordering inspection. Tellingly, CSA cites no on-point law for this novel argument. There is no question that Rules 26 and 34 provide the circuit court with broad discretion in a civil action:

> Parties may obtain discovery regarding **any matter, not privileged, which is relevant to the subject matter involved in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

S.C. R. Civ. P. 26(b)(1) (emphasis added).

Here, Advocaat requested the 2018 Gate Agreement in discovery, and CSA refused to provide it because of "executive privilege." (R. p. 504 (CSA privilege log)). Unless a party is the governor, or the president, "executive privilege"[19] is not a thing in civil

[19] *Black's Law Dictionary* defines "executive privilege" as "A privilege, based on the constitutional doctrine of separation of powers, that exempts the executive branch of the federal government from usual disclosure requirements when the matter to be disclosed involves national security or foreign policy; specif., the right of a president or other head of state to keep

litigation. CSA appears to have just made the objection up. Meaning, the document was improperly withheld, and CSA waived any other privileges (because they were not asserted). Given CSA's specious objection, and CSA's waiver of any other objections, the circuit court properly ordered the document to be produced, including under the authority of Rules 26 and 34.

CSA is incorrect when it baldly states that the *only* way to get a document under Rules 26 and 34 is to file a motion to compel. Certainly a motion to compel is *one* way;[20] another way is for the court to so order under the authority vested in the court, including under the South Carolina Rules of Civil Procedure. *Cf. Samples v. Mitchell*, 329 S.C. 105, 109, 495 S.E.2d 213, 215 (S.C. App. 1997) ("In South Carolina the scope of discovery is very broad and "an objection on relevance grounds is likely to limit only the most excessive discovery request.". . .") (internal quotations and citations omitted). The discovery issues of improper withholding, waiver, and "executive privilege" were argued at the hearing before the circuit court, and the court was empowered to rule on production of the document. (R. pp. 510, 520, 535 (Transcript pp. 4, 14, 29: "CSA, the HOA, has refused to produce it citing executive privilege, and that's the first time I have ever seen executive privilege on a privilege log, and I had to double check to see if I had pled the emoluments clause, and I had not.")).

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official records and papers secret." *Black's Law Dictionary*, p. 1451, executive privilege (11th ed. 2019).

[20] Rule 37(a) specifies that a party "may" apply to the court for an order compel production of a document. If the only method to obtain a document was thus, the rule would state "shall" and make that method mandatory. CSA's argument here is essentially that a trial court is powerless to act on discovery matters without a motion to compel under Rule 37(a), which clearly is incorrect.

CSA next makes a handful of arguments that, boiled down, assert a policy argument that adhering to the South Carolina Rules of Civil Procedure would eclipse the statute. CSA basically argues that CSA should be allowed to hide the document, and simply represent its content to the circuit court and the other parties, with nobody else being allowed to see the document or confirm CSA's representations under any circumstance. This is incorrect for numerous reasons.

First, the Legislature obviously intended for the statute to work together with the South Carolina Rules of Civil Procedure. Certainly Rules 26 and 24 do not nullify the statute, and similarly the statute does not nullify the discovery rules and powers vested in the circuit court by the Rules. Those Rules stand, and the circuit court was correct in relying on them.

Second, it is absolutely reasonable, and likely, that a circuit court could order disclosure of a disputed document without deciding the ultimate question in the case. That is because neither the circuit court, nor the requesting party, is required to simply swallow the corporation's self-serving description of a document's contents. For example, the circuit court could order the document viewed by the court *in camera*, or by the parties to the lawsuit under a protective order, or by the lawyers to the case under an "attorneys eyes only" instruction. Such orders would allow—and at times be necessary to—a productive discussion as to whether or not a particular document falls under the provisions of the statute.

Here, an *in camera* or similar order was not necessary because Advocaat presented to the circuit court, among other things, (i) a previous version of the 2018 Gate

Agreement, (ii) the "final" draft of the document itself, and (iii) voluminous evidence of CSA's description of the document. Therefore, the circuit court already had ample evidence on which to base its ruling. CSA's "nullify the statute" argument therefore is both inapplicable to this specific situation, and is not correct in any circumstance—the circuit court certainly has authority to order a review of the document that is at issue, under the South Carolina Rules of Civil Procedure.

In sum, the South Carolina Rules of Civil Procedure "govern the procedure in all South Carolina Courts in all suits of a civil nature"[21] and the circuit court was correct to rely on them in rendering its decision.

CONCLUSION

For each, or any one, of the within reasons, this Court should affirm the circuit court, which did not abuse its discretion in ordering CSA to permit Advocaat to inspect the records she requested. Further, this Court should affirm the circuit court's award of fees and costs, and order that fees and costs be awarded for this appeal, pursuant to the statutory mandate in S.C. Code § 33-31-1604(c).

[21] S.C. R. Civ. P. 1 ("Scope of the Rules").

Respectfully submitted,

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