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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough, Master-in-Equity

Court of Appeals Case No. 2020-001583

Bonnie Wall, individually and derivatively,
and Walter B. Wall, Jr.……..……Petitioners,

v.

Jonathan Dye, Shaun Dye, Shellmore Homeowners' Association, Inc., and
John H. Chakides, Jr., individually and
in his capacity as Director of Shellmore Homeowners' Association, Inc.,
……..……..……Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATION OF COUNSEL

Pursuant to South Carolina Rule of Appellate Practice 242(d)(1), the undersigned counsel for Petitioners certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on July 11, 2024.

QUESTIONS PRESENTED

I. Did the Court of Appeals err when it held that the directors of a homeowners' association, organized as a nonprofit corporation pursuant to South Carolina's Nonprofit Corporation Act, are not statutorily charged with fiduciary duties to the members and to the organization?

II. Did the Court of Appeals err by failing to recognize that homeowners' associations have fiduciary duties arising out of their relationship with the community, which mirror the relationship and duties of developers?

III. Did the Court of Appeals disregard this Court's clear direction in *Paradis* by refusing to apply its holding to a case that had not yet been tried?

Petitioners Bonnie and Walter Wall ("Petitioners" or the "Walls") respectfully ask this Court to issue a writ of certiorari to review the Court of Appeals' final decision in this case (Opinion No. 2024-UP-159, the "Opinion"), because the Opinion is in conflict with statutory law, the public policy of this State, and this Court's precedent.

SPECIAL CONSIDERATIONS FOR GRANTING A WRIT OF CERTIORARI

Everyone knows that the directors of nonprofit corporations—charged with the management and control of their members' property, interests, and money—owe the highest duty of care, loyalty, and good faith to their members and to the organization. In South Carolina, nonprofit corporations include hospitals, schools, charities, churches, and (as here) homeowners' associations.

And yet . . . the question of law as to whether such fiduciary duties exist is eerily unanswered by the common law. For example, Justice Hearn struggled to find a citation for the proposition that directors of nonprofit corporations have fiduciary duties, in the

case of *Protestant Episcopal Church in the Diocese of S.C. v. Episcopal Church*; she ultimately resorted to a reference to general corporate law and a case pertaining to a publicly traded corporation. 421 S.C. 211, 247, 806 S.E.2d 82, 101 (2017) (*citing* S.C. Code § 33-8-300). Similarly, while there is a growing body of law on the fiduciary duties of ***developers***, the common law is quiet on the duties of homeowners' associations ("HOAs")—which are in the same relational position in the community, after turnover, as developers are, pre-turnover. *Walbeck v. I'On Co.,* 439 S.C. 568, 889 S.E.2d 537 (2023) (developer duties).

Many HOAs, like the one at issue here, are organized as nonprofit corporations. South Carolina's Nonprofit Corporation Act is clear that the directors of nonprofits owe a "duty of loyalty to the corporation [and] its members." *E.g.*, S.C. Code § 33-31-202(b). But, in this case, the Court of Appeals disagreed, finding that the corporate status of the homeowners' association was immaterial to its directors' standard of care. Op. at p. 3 ("we find no indication in our precedent that such a distinction matters."). The Court of Appeals was led astray—and it is not alone—by a confusing, out-of-context soundbite from the 1992 case of *O'Shea v. Lesser,* in which this Court held: "We have never imposed the high standard of fiduciary duty on planned community organizations, such as the Board . . . ." *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992). Although this soundbite superficially seems on-point, the holding in the *O'Shea* case pre-dated the South Carolina Nonprofit Corporation Act and the South Carolina Homeowners' Association Act, and it pertained to an unincorporated, developer-controlled group. Moreover, the developer-appointed "Board" (which was not a board of directors) in *O'Shea* had expressly provided-for "sole and uncontrolled discretion" over its decisions

in the community. *Id*. at fn. 1.

In addition to the Legislature's clear direction in the Nonprofit Corporation Act, the Court of Appeals also misapprehended the relational position of HOAs, which have enormous control over the money and property values belonging to homeowners.[1] The unfortunate reality in South Carolina is that the power and authority of HOAs over their members' property **is prone to abuse**. The South Carolina Department of Consumer Affairs reported 1,182 complaints made to it pertaining to HOAs in the five years after the Legislature enacted the South Carolina Homeowners' Association Act. Notably, "[T]he top complaint concern was a failure to adhere to and/or enforce covenants and bylaws (24.32%)."[2] When HOA directors fail to adhere to or enforce covenants and bylaws, the result is disparate treatment, diminished trust, and the erosion of property values community-wide. (*See, e.g.,* R. pp. 26-30).

This Court should grant this Petition and clarify the law on the fiduciary responsibilities of HOAs and their directors, where this Court's own, oft-quoted, out-of-context soundbite from *O'Shea* is confusing and conflicts with the Legislature's statutory intent, and public policy. This case presents a good platform to do so—the lower court's decision on summary judgment was **strictly a decision of law** on the question of whether or not a duty exists, and this Court's standard of review on questions of law is de novo. *Hendricks v. Clemson University*, 353 S.C. 449, 578 S.E.2d 711 (2003).

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[1] When developers leave communities, they pass on their power to HOAs. "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832.

[2] https://consumer.sc.gov/sites/consumer/files/Documents/HOA/HOA%20Five-Year%20Report.pdf

The Walls respectfully ask that this Court would also review the Court of Appeals' error as to this Court's clear direction in *Paradis,* pertaining to the obsolete special damages element in claims for civil conspiracy. The construction of a court order is a question of law, and this Court's *Paradis* decision is unambiguous. This Court clearly instructed that the pre-*Paradis* framework would apply only to cases "that have already been tried under the *Todd* framework." *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774, 781 (2021) (emphasis added). Because the Walls' case has not been tried (indeed, summary judgment was granted only two months after filing), it should properly (and very simply) be reversed and remanded for discovery and trial pursuant to this Court's instruction and the *Paradis* elements of civil conspiracy.

STATEMENT OF THE CASE AND FACTS

The facts of this case are lengthy and somewhat complex. But they are important to understanding the relationships and background behind the questions posed by this Petition. This case is about the violation by an HOA and its directors of its members' rights under the association's governing documents, the law of real property, as well as statutory law. The vehicle for the dispute is the process by which the Respondent HOA purported to "approve" of a covered dock—in a community in which the corporate records of the HOA unequivocally indicate that covered docks are, and always have been, forbidden. **The Directors thereby breached their fiduciary duties, and they gave a right to one member of the HOA which had been previously and uniformly denied to many others, for half a century.**

Before this Court are three questions. The first two are strictly questions of law, as

to whether the Directors of an HOA owe fiduciary duties to the corporation and to its members. The third question is also one of law, as to the construction of this Court's clear direction in *Paradis v. Charleston County School District* pertaining to the element of special damages in a cause of action for civil conspiracy.

Statement of the Case

The procedural posture of this case is one of summary judgment, and it spans less than two months in the circuit court. The Walls filed this action on September 22, 2020,[3] seeking a declaratory judgment and injunction to prevent their neighbors, the Dyes, from constructing a large roof on their dock, in contravention of the HOA's vote to prohibit covered docks and its fifty-year history of denying applications for covered docks. The Walls brought causes of action for breach of covenants, nuisance, and civil conspiracy, as well as derivative claims against the HOA for breach of fiduciary duty and breach of covenants. **The Walls alleged that the Directors of the HOA were (*inter alia*) intentionally violating the community's governing documents, and actively circumventing the governing documents, for their own benefit**.[4] (R. pp. 25-28).

Ten days into the case, on October 2, 2020, the Master-in-Equity granted the Walls' motion for preliminary injunction against the Dyes' construction of their dock cover, and he ordered the parties to file summary judgment motions by October 15, 2020. (R. pp. 4, 87-116). Accordingly, the Dyes ceased construction. The Walls and the Dyes then filed

[3] Verified Amended Complaint filed October 5, 2020. (R. pp. 15-61).

[4] Respondent Director John Chakides intended and planned to use the Dyes' request as "precedent" to allow him to build his own covered dock and boat lift to benefit his property. (R. pp. 20-21, 27-28, 165 ¶ 22; 228 "[this decision] lays groundwork for the future of similar requests").

the motions for summary judgment, as ordered. (R. pp. 127, 167). Pertinent to this Petition for Certiorari, the Dyes argued that (1) the Directors of a homeowners' association do not owe any fiduciary duties to the association or its members, as a matter of law, and that (2) the Walls failed to plead special damages for civil conspiracy. (*See* R. pp. 72 ¶ 102, 143-146, 182).

The lower court held a hearing on November 2, 2020. On November 19, 2020, the court granted summary judgment in favor of the Dyes and the HOA on the Walls' claims for breach of fiduciary duty, finding that "there is no fiduciary duty owed" by the board of directors of the HOA to the Walls. (R. p. 10). The court also found "no evidence of special damages has been shown by the [Walls] to constitute a civil conspiracy." *Id.*

The Walls filed their Notice of Appeal on November 22, 2021.[5] The Court of Appeals held oral argument on February 8, 2024, and it issued its Opinion on May 8, 2024, affirming the lower court's decision. The Walls filed their Petition for Rehearing on May 14, 2024. The Court of Appeals requested a Return from Respondents, which they filed on May 23, 2024, to which the Walls replied on June 17, 2024. On July 11, 2024, the Court of Appeals issued its order denying the Walls' Petition for Rehearing.

Statement of the Facts

Petitioners Bonnie and Walter Wall (the "Walls") own a home in the Shellmore subdivision in rural McClellanville, in Charleston County, South Carolina. Respondents

[5] In the order that is the subject of this appeal, the circuit court denied summary judgment on the remaining claims and issues, setting them for a trial on the disputed facts. (R. p. 10). However, neither trial nor discovery ever occurred in this case, and the master subsequently granted summary judgment on the same disputed facts. The master's second order is the subject of a second appeal by the Walls, which has not yet been finally decided at the time of this filing. (Ct. App. Case No. 2021-1014).

the Dyes own a home next-door to the Walls.

Shellmore is a unique, small, coastal community, which was developed more than fifty years ago. Much of the value of the community is derived from its location on the Intracoastal Waterway, directly across from the Cape Romain Wildlife Refuge. The Walls, like other homeowners in the development, were attracted to buy a home in Shellmore because of its pristine, clean views of the Intracoastal Waterway and the Wildlife Refuge. (R. 16-17).

The sweeping views of Shellmore's residents over and across the waterway have been unobstructed by any roofed docks or large boat lifts ever since Shellmore was first developed in 1975. In the fifty-year history of Shellmore, covered docks and boat lifts have always been prohibited. (R. pp. 16-19, 50, 129, 163-165).

Community Governance

Typical of most planned developments, the Shellmore community is governed both by real property covenants and restrictions, as well as by numerous corporate documents pertaining to its HOA, a nonprofit corporation. Thus, this Petition argues that the HOA and its Directors have duties springing from (1) real property law, as well as from (2) corporation law, including the Nonprofit Corporation Act.

Fifty years ago, the developer of the Shellmore subdivision subjected the property to the *Declaration of Covenants, Conditions, and Restrictions on Cape Romain Lookout Subdivision* (the "Declaration"). (R. pp. 36-48). The Declaration is binding on all purchasers of lots within the subdivision; it contains covenants and restrictions "for the purpose of protecting the value and desirability of" the property in Shellmore, to be

enforced by the HOA.[6] (R. p. 37).

After the developer sold all its lots in the community, it turned its control of the development over to Respondent Shellmore Homeowners' Association, Inc. (the "HOA"), organizing the HOA for the express corporate purposes of enforcing the Declaration and preserving and maintaining "architectural control." (R. p. 166). The conduct of the HOA is dictated by several sources of authority:

- The Shellmore HOA is bound by the Declaration.
- The Shellmore HOA is a nonprofit corporation, and it is subject to the South Carolina Nonprofit Corporation Act, S.C. Code § 33-31-101 *et seq*.
- As a corporation, Shellmore HOA's conduct is subject to prior corporate actions.

Every owner of property within Shellmore is a member of the HOA, and every party to this appeal owns property in Shellmore.

The Shellmore HOA has a fifty-year history of flatly prohibiting roofed docks and large boat lifts. (*e.g.,* R. pp. 15-19, 50, 162, 163-165, 244, 245, 246). The HOA has the authority to prohibit certain construction because of restrictions within the Declaration, which require owners to first obtain written approval from the HOA of their potential construction plans. (R. pp. 129; 155-156). No party in this appeal disputes that the HOA has this authority. Submission of plans and garnering of approval is a necessary process that must be completed prior to construction. The Declaration speaks to "view of the water" and maintaining "the maximum amount of view. . . to each home." (*Id*.).

The Declaration contains a rubric for the evaluation of proposed construction

[6] Owners also have enforcement power; the Walls therefore brought this suit individually and derivatively.

plans, which is intended to maintain consistency of design within Shellmore—and every dock at Shellmore is designed as a low-lying, flat platform on the water which does not interfere with views of the Intracoastal Waterway and Cape Romain Wildlife Refuge.[7] The Declaration is clear that no owner may construct a dock without first getting written approval from the HOA. (R. p. 155). The HOA has never, in the almost fifty-year history of the development, given approval to any covered dock. The HOA has on multiple occasions **denied** its approval to covered docks and lifts.[8] (*e.g.,* R. pp. 15-19, 50, 162, 163-165, 244, 245, 246). In other words, over its fifty-year history, homeowners who asked to build covered docks were consistently denied this possibility by the HOA.

Importantly, at an annual meeting of the HOA a few years before this lawsuit, the **members voted to <u>prohibit</u> the construction of covered docks**. (R. p. 50, "The vote passed to prohibit covered docks and lifts."). This vote was called for by Respondent Dye, who was President of the HOA. (R. pp. 50, 163-165). The meeting minutes reflect that the members discussed the history of the community, and the importance of preserving the views of their neighbors, before taking a vote at which the "vast majority" voted to prohibit the construction of covered docks. (R. p. 163).

Respondents Dye and Director Chakides Rock the Boat

This litigation arose when Respondents the Dyes renewed their resolve to build a covered dock—despite already having been <u>denied</u> the request by vote of the HOA. (R.

[7] The developer named the community the "Cape Romain Lookout Subdivision." Op. at fn. 2; R. p. 36.

[8] For example, a 20-year-old corporate record from 2003 states: "*Approval is contingent on no roof and no boat lift being built due to impact on views. In the 25 years since Shellmore's development, no roofs or boat lifts have ever existed." R. p. 245.

p. 50). The Dyes thus sought to circumvent the mandatory process, and to construct what is essentially a building—the only such building in Shellmore—on the marsh landscape.

In their effort to circumvent the mandatory process for getting approval of construction in Shellmore, the Dyes conspired with Respondent John Chakides, a Director of the HOA who also wants his own covered dock and boat lift. (R. pp. 163-165). Director Chakides' personal desire for a covered dock on his property is in direct conflict with the expressed will of the corporation "to prohibit covered docks and lifts" in Shellmore. (R. p. 50).

In the past, a group of homeowners, called the "architectural review committee," reviewed architectural plans and reported to the HOA on those plans. Due to the long passage of time since it was last active, it is unclear whether this group was historically comprised of directors.[9] In 2020, Director Chakides hand-selected people he knew to be in favor of lifts and covered docks to "serve" on the committee. (R. p. 20 ¶ 36; R. pp. 163-164). The Walls contend that this purported "architectural review committee," made up of only three people, has no decision-making authority over the property of residents of Shellmore, because (*inter alia*) the Nonprofit Corporation Act requires that committees be comprised of directors if they are to hold the power of the corporation. In contrast to that statutory requirement, the purported architectural review committee here is <u>not</u> comprised of directors and is therefore invalid under the Nonprofit Act. (*See* S.C. Code § 33-31-825(a): "a board of directors may create one or more committees of the board and appoint members of the board to serve on them. Each committee shall have two or more

[9] The purported architectural committee had been inactive for more than 10 years at the time of this suit. (R. pp. 420, line 20 – 421).

directors who serve at the pleasure of the board.") (*See*, R. 127-133, 139-140, 364-366).

In their effort to circumvent the vote of the HOA to prohibit covered docks, and the Declaration's rubric requiring consistency of design, Respondents the Dyes and Director Chakides conspired to have the Dyes ***secretly*** approach the purported architectural review committee with a request for a boat lift and dock with large, covered roof. (R. pp. 163-164; 19-21). No notice was given to the members of the HOA of the request. Without reviewing plans, conducting a meeting, or communicating with members, two individuals on the alleged architectural review committee purported to "approve" of the Dyes' dock. (R. pp. 18-22; 163-165). The purported committee—which did not contain any board members—reported its decision to the Board of Directors.

The Knowledge of the Board of Directors

The Association's Board of Directors knew that the members had voted to prohibit covered docks. (R. p. 50). The Directors knew that no roofed or covered docks have ever been approved in Shellmore. (R. p. 19, 22, 26-27). The Directors knew that applications for covered docks had always been denied in Shellmore. (*Id.*, pp. 163-165). The Directors knew that the covenants require that new structures be consistent in design with existing structures. (R. p. 43). The Directors knew that the purported "architectural review committee" did not have authority to approve dock applications. (*e.g.*, R. p. 20, 43, 46). The Directors knew that the Walls, and other members of the HOA, had entrusted the Directors with preserving their property values by consistently and uniformly enforcing the governing documents. The Directors knew that the Dyes' neighbors on either side objected to covered docks, which would obstruct the very views which gave value to

their homes. (R. pp. 25-26, 163-165). The Directors are bound by the Declaration, because the HOA that they serve exists to enforce it, and because the directors own bound lots in Shellmore. The Directors are charged with knowledge of past corporate action, including the consistent prohibition against covered docks.

Nonetheless, the Directors sent an email to the homeowners, telling them that the decision—by two members of the purported architectural review "committee"—purporting to approve of the Dyes' covered dock and lift, "does represent the Homeowners and their vote stands." (R. p. 228). **In other words, the Directors took the position that two individuals, neither of whom were directors of the corporation, could overturn fifty years of past precedent.**

The Directors acknowledged in their email that this decision was "controversial" and that it "lays groundwork for future similar requests." (R. p. 228) (*i.e.,* Director Chakides' own pending request for a covered dock). This *fait accompli* email from the Directors set off a firestorm of discontent in the community. The Walls sent a series of derivative demand letters to the Board. (R. pp. 51-58). A purpose of the letters was to request that the Board hold a special meeting of the HOA to discuss the Dyes' dock plans. *See* S.C. Code § 33-31-702. Although two of the Directors apparently wanted a special meeting of the HOA, such a meeting was not held. (R. p. 164-165). In response, the Walls—joined by the requisite number of other HOA members—again called for a special meeting of the HOA. (R. pp. 54-55). But even this properly-requested special meeting did not take place.

In the midst of this turmoil, one Director of the HOA described the purported

architectural review committee as "***out of control***." (R. p. 165 ¶ 23). The Directors nonetheless dug in on their position that the Dyes could proceed with construction of their covered dock. (*e.g.*, R. p. 164 ¶ 20).

To the Walls, this case is not only about their obstructed view. This case is about the Directors of the HOA, who had knowledge that made their actions unreasonable, disloyal, and in bad faith, who failed to enforce, and actively sought to circumvent, the community's governing documents in violation of the law. **The ability of the HOA to protect property values in the future now has been eroded.** As a result of these events—and of the clear indication that the Directors of the HOA will not enforce the governing documents—several other homeowners (including Director Chakides) have submitted applications to the purported "architectural review committee," seeking their own roofed docks and large boat lifts. (R. p. 165 ¶ 22).

As they say, "*there goes the neighborhood*."

ARGUMENT

The questions presented in this Petition pertaining to the fiduciary duties of corporate directors are of urgent importance to the people of South Carolina, a growing number of whom live in planned communities governed by homeowners' associations ("HOAs"), as well as to South Carolinians who participate in all nonprofit corporations—which include charities, churches, schools, and hospitals. Both the master-in-equity and the Court of Appeals wrongly held that the directors of such a nonprofit organization are without fiduciary responsibility to the corporation or its members. **This cannot be the law in South Carolina.**

Moreover, the Court of Appeals has the jurisdiction and the responsibility to correct errors of law. *See, e.g.,* S.C. Code § 14-3-330 (The Court "shall have appellate jurisdiction for correction of errors of law in law cases."). In this case, the Court reinforced two patent legal errors: the fiduciary duty question (which is a question of law) and the construction of this Court's order in *Paradis* that its holding is to apply to cases that have not yet been **tried** (also an issue of law). The Walls respectfully ask that this Court would grant this Petition, correct the Court of Appeals' errors, and remand this case for discovery and trial on the disputed facts.

I. The directors of homeowners' associations organized as nonprofit corporations are statutorily charged with fiduciary duties to the members and the organization.

The Court of Appeals wrongly elevated inapplicable judicial common law over express statutory provisions that impose enforceable fiduciary duties on nonprofit corporations and their directors. After erroneously finding that an HOA has a different relationship with homeowners than a developer, and thus that its directors owe no common-law fiduciary duty,[10] the Opinion compounded its error by holding that "our precedent" does not make a distinction for HOAs organized as nonprofit corporations. Opinion at p. 3. But it's not (just) a question of court precedent. A legal duty can be "created by statute, contract, relationship, status, property interest, or some other special circumstance." *Spence v. Wingate,* 395 S.C. 148, 716 S.E.2d 920 (2011) (emphasis added).

[10] As discussed below, this is wrong. In fact and reality, HOAs step into the shoes of developers at turnover (when the developer has sold its lots and exits the community), and they take the place of the developer with regards to maintaining the common area, ensuring architectural control, and thereby safeguarding the property values in the development. HOAs therefore inherit the developers' fiduciary duties, even under the common law.

South Carolina's Nonprofit Corporation Act (the "Nonprofit Act") unequivocally imposes fiduciary duties on nonprofit corporations and their directors. The Respondent Shellmore Homeowners' Association, Inc., is a nonprofit corporation. The Respondent John Chakides is a director of a nonprofit corporation. Thus, Chakides and other directors of nonprofit corporations are bound by fiduciary duties imposed by statute.

The Nonprofit Corporation Act unambiguously charges directors of nonprofit corporations with fiduciary duties of care, loyalty, and obedience. Directors of those entities—which include schools, charities, hospitals, and homeowners' associations—are expressly charged by the Act with the highest duty of care and self-sublimation, to act "in good faith" and "in the best interests of the corporation." S.C. Code § 33-31-830. The Act pointedly itemizes additional duties of loyalty, including by prohibiting directors from engaging in conflict-of-interest transactions or deriving a personal benefit. S.C. Code § 33-31-831. So critical is a directors' fiduciary duty to the nonprofit corporation that the Act expressly recognizes that a director may be held ***personally*** liable for "any breach of the director's duty of loyalty to the corporation or its members," "for acts or omissions not in good faith," and "for any transaction from which a director derived an improper personal benefit." S.C. Code § 33-31-202(b). The Act does not carve out an exception for HOAs and their directors, and nor should any court.

Not only does the Nonprofit Corporation Act impose fiduciary duties on the corporation and its directors, but those duties are unmistakably owed "to the corporation or its members." *Id.* (emphasis added). Moreover, **the breach of those duties is expressly actionable**. The Act refers in eleven different subparts to the liability of

directors to the members and the corporation,[11] and it explicitly contemplates "[a]n action against a director asserting the director's failure to act in compliance with [standards for directors] and consequent liability." S.C. Code § 33-31-830 (imposing a statute of limitations for actions against directors); *see also Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 886 S.E.2d 228 (2023) ("courts are bound to give effect to the expressed intent of the legislature . . . when a statute creates a duty of care and sets the standard by which a breach is measured, the statute no longer gives rise to a negligence *per se* claim but rather creates a right of action.") (discussing at length the interplay between common law and statutory duties in the context of a negligence action).

Appellants respectfully ask this Court to issue a Writ of Certiorari, to correct the Court of Appeals' error in disregarding the expressly actionable fiduciary duties imposed by the Legislature on the directors of all nonprofits, in the Nonprofit Corporation Act.

II. Homeowners' Associations are in the same relational position as developers and have fiduciary duties arising out of their relationship with the community.

The Court of Appeals' Opinion, finding as a matter of law that there is no fiduciary duty owed by directors of a homeowners' association,[12] is a radical departure from generally acknowledged South Carolina law. For example, the South Carolina Bar's Committee on Community Association Law has published the materials from its 2022

[11] *See, e.g.*, S.C. Code §§ 33-31-202(b), -304, -810, -830, -831, -833, -850, -851, -853, -855, -858.

[12] The Walls argued that the Directors had obligations as fiduciaries to act fairly, in good faith, without conflict, in the best interest of the HOA and for the benefit of the HOA, and to act within the scope of their authority under the governing documents (and South Carolina law), rather than actively seeking to circumvent the members' will as expressed by the 2016 vote and the long-standing community precedent. *See*, *e.g.*, R. pp. 25-28, 130-132, 143-146.

Seminar, in which it dedicated a subsection to "Board Member Fiduciary Duties," pertaining to HOA directors. In pertinent part, the Committee states:

> [HOA] board members should be made aware of their fiduciary duties and should be motivated to act by the consequences of failing to fulfill those duties. A fiduciary is a person legally entrusted with the care of another's interests. "The term fiduciary implies that one party is in a superior position to the other and that such position enables him to exercise influence over one who reposes special trust and confidence in him." *Burvell v. S.C. Nat. Bank*, 288 S.C. 79, 340 S.E.2d 786 (1986); see also, e.g., *Pittman v. Grand Strand Entertainment, Inc.*, 363 S.C. 531, 537, 611 S.E.2d 922, 925 (2005) ("A fiduciary relationship exists when one has a special confidence in another so that the latter, in equity and good conscience, is bound to act in good faith."). Because a corporation's board members serve in a position of trust, the board members owe a fiduciary duty to the corporation and its shareholders. *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 185, 64 S.E.2d 524, 528-29 (1951)("Undoubtedly the directors of a corporation in the management of the corporate affairs occupy a position of extreme trust and confidence and exercise great power for the good or bad over the corporation and its shareholders. They are agents for the corporation. Toward it and the shareholders they undoubtedly stand in a fiduciary relation as far as corporate business is concerned.").

(Excerpts from the 2022 Community Association Update, attached as Exhibit 1).

But, why do most lawyers recognize this to be the law? After all, the *O'Shea v. Lesser* case has that catchy soundbite, which has been picked up here and there by at least one court decision relied on and cited in the Opinion, in which this Supreme Court said: "We have never imposed the high standard of fiduciary duty on planned community organizations, such as the Board." 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992). It may be because it is generally recognized that *O'Shea* dealt with a developer-appointed[13] architectural review board, to which the covenants granted "'sole and uncontrolled

[13] The Opinion wrongly states that the ARB in *O'Shea* had been "designated by the homeowners association." Op. at p. 2. But *O'Shea* is clear: "The remaining respondents are all **members of an architectural review board (the Board) appointed by the developer**." 416 S.E.2d at 630 (emphasis added).

discretion' to approve proposed plans." *Id.* at n.1. Given the developer control, and the governing documents' allowance for "uncontrolled discretion," it is hard to imagine what duties the Fripp Island ARB might possibly have had, way back in 1989, before the law on developers as fiduciaries evolved in recent years. Moreover, the *O'Shea* decision was published in 1992, two years before the South Carolina Nonprofit Corporation Act of 1994 was enacted. S.C. Code § 33-31-101. It may simply be that it is generally recognized that the developer-appointed "board" in *O'Shea* was not a nonprofit entity.

A fiduciary duty is a relational duty. A legal fiduciary duty can be "created by statute, contract, relationship, status, property interest, or some other special circumstance." *Spence,* 395 S.C. 148, 716 S.E.2d 920 (emphasis added). When developers leave communities, they turn over their responsibilities to HOAs, which act as their successors and which take over the critical tasks (formerly belonging to the developer) of maintaining community property values and common areas. "A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832(1992).

In the context of homeowners' associations, the members of the HOA entrust the directors of the HOA with the worth of their property. A core *purpose* of a homeowners' association is generally to preserve the property values of all members by enforcing a common scheme of development and maintaining the common areas. The Shellmore HOA specifically exists for the benefit of its individual members, whose homes are in

thrall of the HOA's decisions. The stated purpose of the Shellmore HOA "is to provide for . . . preservation and architectural control of the resident lots . . . and to promote the health, safety, and welfare of the residents thereof." (R. p. 166). This is a hefty responsibility, which should be carried out with the utmost loyalty and good faith. Moreover, the Walls relied on the HOA to enforce the covenants running with the land, the corporation's governing documents, and the common scheme of development, which are expressly tied to the property values of every owner and member of the corporation. (R. p. 36) ("which are for the purpose of protecting the value and desirability of, and which shall run with, the real property. . . ").

This Court should not overlook that—for most South Carolinians—the purchase of a home is the biggest investment of their lifetime. Community values can rise and fall on the manner in which the development is governed, maintained, and preserved. Because the directors of HOAs are entrusted with the property values of the members, and have a great deal of control over homeowners' property and lives, they are therefore in a fiduciary relationship with the homeowners that they serve.

Significantly, the Court of Appeals here made the same mistake here that it did in the *Walbeck* case, by focusing too heavily on what it perceived to be the contract, at the expense of the **relationship**. *See Walbeck v. I'On Co.*, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2018), *reversed by Walbeck v. I'On Co.*, 439 S.C. 568, 889 S.E.2d 537 (2023). This error was especially incongruous on summary judgment, because most questions in a breach of fiduciary claim are questions of fact.[14] At page 3, the Opinion narrowly found that the

[14] The elements of breach of fiduciary duty echo those in a negligence action: "(1) existence of the relationship, (2) breach of the duty owed to the Plaintiff, (3) damages proximately resulting from that

contract (and the Court's mistaken factual opinion that there was no breach of it) trumped the tort claim:

> The applicable covenants within "Declaration of Covenants, Conditions, and Restrictions on Cape Romain Lookout Subdivision, Being a Part of 'Kensington Plantation'" (the Declaration) are unambiguous, *and the record shows Respondents complied with the established requirements*.

(emphasis added). The italicized part of this quotation is a factual determination on the question of breach, which does not belong in an Opinion reviewing a decision of law on the existence of a duty, rendered on summary judgment. When it reversed the Court of Appeal's *Walbeck* decision, this Court provided an instructive ruling on the components of a claim for breach of fiduciary duty, as distinguished from contractual responsibilities, which is applicable here and highlights the Court of Appeals' error. *Walbeck,* 439 S.C. 568, 889 S.E.2d 537 (2023). ("[T]he court of appeals focused too narrowly on the Developers' failure to convey the disputed properties, **ignoring the plethora of other evidence presented of the Developers' bad faith, broken promises, and self-dealing,** all of which support the jury's verdict on Homeowners' breach of fiduciary duty cause of action . . . 'Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud.'").

Here, despite improper lack of discovery, the Walls' evidence—including the sworn affidavit of a non-party, numerous exhibits, and a verified complaint—demonstrated that the Directors, including Director Chakides, had behaved secretively,

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breach." *Walbeck*, 439 S.C. 568, 889 S.E.2d 537, 546 (2023). Only the first element is a question of law.

without notice to the members, without following procedure, in collusion with a select few members, without disclosing material facts, in disregard of the voiced will of the homeowners, and in pursuit of individual desires and interests. (R. 15-33, 162, 163-165).

Similarly, the Court of Appeals misapprehended that **fiduciary duty and the business judgment rule are two sides of the same coin. This is a significant mistake that must be clarified for attorneys practicing in South Carolina.** The business judgment rule co-exists with fiduciary responsibility. Further, the Court of Appeals misunderstood that the business judgment rule is a fact-intensive affirmative defense which may protect corporate directors who, in fact, have acted within their fiduciary standard of care. *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 270-272, 781 S.E.2d 903, 910-911 (2016) ("the trial court should permit [board of directors] to assert the business judgment rule as a defense at trial."). The business judgment rule has important common factors with fiduciary responsibility, because both require corporate directors to act in good faith and in the best interest of the corporation. *Id*. Thus, our law is clear that the application of the business judgment rule is for a factfinder at trial, and it does not apply if there is "a [factual] showing of bad faith, dishonesty, or incompetence." *Id.* ("the Board will not be entitled to the protection of the business judgment rule if the jury finds that the Board acted beyond the scope of its authority or acted with corrupt motives or in bad faith.").

In this case, the Walls made the necessary factual showing of bad faith, dishonesty, and/or incompetence by submitting a verified complaint, documentary evidence, and supporting affidavits. The Walls' factual showing should have propelled the case to

discovery and trial on the questions of fact—including whether the Respondents acted with bad faith, dishonesty, or incompetence such that the defense of the business judgment rule would not apply. "Summary judgment before discovery forces the non-moving party into a fencing match without a sword or mask." *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 483 (4th Cir. 2014). It was error for the Court of Appeals (and the circuit court) to weigh the evidence, and to make credibility determinations, to arrive at the conclusion that "Respondents complied with the established requirements." Op. at 3. Because there was significant evidence to the contrary, the question was one of fact and improperly decided on summary judgment. (*See* R. pp. 13-61, 163-165).

The Court of Appeals erred as to the law on the existence of duty, while wrongly justifying its decision with disputed facts going to the question of breach. The Walls respectfully ask this Court to review the lower courts' error; the law in South Carolina must be made clear that directors of HOAs, who are entrusted with protecting property, interests, and money, do owe fiduciary duties to the HOA and its members.

III. The Opinion disregards this Court's clear instruction in *Paradis*.

While this appeal of a grant of summary judgment was pending, this Supreme Court clarified the elements of a claim for civil conspiracy to eliminate the perceived necessity of pleading special damages. *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 861 S.E.2d 774 (2021). The *Paradis* Court provided clear and unambiguous direction as to how its decision was to be applied going forward: "cases on appeal that have already been tried under the *Todd* framework shall be decided using the *Todd* analysis." *Id*. at 781 (emphasis added). **The Walls' case has not yet been tried. Nor has discovery been**

conducted. But the Court of Appeals misperceived the *Paradis* Court's directive.

Court opinions, judgments, and orders are to be construed like written instruments. *Petition of White*, 299 S.C. 406, 385 S.E.2d 211, 215 (Ct. App. 1989). "[I]f the language employed is plain and unambiguous, there is no room for construction or interpretation and the effect thereof must be declared in the light of the literal meaning of the language used." *Id*. The Court of Appeals misapprehended the plain meaning of the word "tried" within the Supreme Court's directive. "Tried" is the past tense of the verb "to try," from which stems the noun, "trial." A trial is a proceeding, conducted in accordance with Rules 38-53 SCRCP, in which "the testimony of witnesses shall be taken orally in open court" and Rules of Evidence are applied. Rule 43, SCRCP.

Although the Walls' case was on appeal when the *Paradis* decision was rendered, **the Walls' case has never been <u>tried</u>**. Instead, it was decided on summary judgment by the master-in-equity, less than two months after it was filed, for the sole and erroneous reason that "no <u>evidence</u>[15] of special damages has been shown." (R. p. 10) (emphasis added). Our courts recognize that summary judgment is vastly different from trial. "[S]ince it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a <u>trial</u> on disputed factual issues." *Englert, Inc. v. Leafguard Usa, Inc.*, 377 S.C. 129, 659 S.E.2d 496, 498 (2008). Therefore, the *Paradis* decision applies to this appeal and to the Walls' case because it has not yet been tried, including the change in law eliminating the element of special damages.

The Court of Appeals' Opinion does precisely what our jurisprudence cautions

[15] This evidentiary determination was wrong on summary judgment, in the teeth of a verified complaint attesting to special damages, as well as numerous documentary exhibits, and the affidavit of a non-party.

against: it deprives the Walls of a trial on disputed facts. Even under the *Todd* framework, the Walls' Complaint should survive what was essentially a motion to dismiss and an attack on the sufficiency of the pleadings, heard as part of summary judgment motions held just forty-five days after filing, before any discovery had been conducted.[16] The lower court's decision was simply that there was "no ***evidence*** of special damages shown by Plaintiffs." (R. p. 10) (emphasis added). But the Walls submitted significant evidence of special damages.[17] "Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct." *Paradis*, 424 S.C. 603, 615 (Ct. App. 2018) (applying the old framework), *reversed*.

For the purposes of opposing summary judgment, the Walls' verified complaint is the equivalent of an affidavit, sufficient to defeat summary judgment on the question of whether the Walls were damaged by the conspiracy. This is especially true because "whether or not [plaintiff] sustained special damages becomes a question of credibility, which is a fact question. A court should not resolve a genuine issue of credibility in a motion for summary judgment." *Forrester v. Smith & Steele Builders, Inc.*, 352 S.E.2d 522,

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[16] If the master had ruled on the pleadings, the correct remedy would be to allow the Walls' to amend their pleadings, or to dismiss that cause of action without prejudice to refile. The Walls ask for this remedy.

[17] The Walls attested in their Verified Complaint that they sustained economic as well as non-pecuniary damages as a result of Respondents' actions. They attested to damage uniquely caused by the conspiracy, including that "the covenants that should protect the Walls' property values have been undermined;" "the Walls' trust that the Association will treat its members equally has been injured;" "the Walls' confidence that the Association will enforce its rules consistently has been damaged;" and that the Walls were "damaged . . . through the use of the Association's resources to advance the improper personal goals [of the Dyes and Director Chakides]." (R. pp. 28-30). The Walls further swore that their quiet enjoyment of their property was materially harmed by the actions of the conspiring defendants. (R. p. 22 ¶ 44). Finally, the Walls alleged that they were harmed by the conspiracy between the interested director and a select few homeowners because they were required as a result of the conspiracy to file a lawsuit over an issue that could have been settled by a short special meeting of the HOA. (*Id.* ¶ 81); *see Benedict Coll. v. Nat'l Credit Sys., Inc.*, 400 S.C. 538 (Ct. App. 2012) (attorney's fees constitute special damages in civil conspiracy claim).

291 S.C. 196 (Ct. App. 1986); *see Charles v. Tex. Co.*, 199 S.C. 156, 18 S.E.2d 719, 729 (1942) (the elements of civil conspiracy are fact-laden questions for jury determination, and the "proper amounts to be rendered, as either actual or punitive damages, are left, under our law, almost entirely to the trial jury and the trial judge.").

The Court of Appeals erred in disregarding the unambiguous instruction of this Court as to the application of *Paradis* to cases that have not yet been ***tried***, and the procedural posture of this case—one of summary judgment on special damages two-months into the lawsuit. The Walls respectfully request that this Court would grant a Writ of Certiorari to the review the Opinion and correct its errors.

CONCLUSION

This case is much more than a dispute about a covered dock. At its core, this is a lawsuit over the actions and responsibilities of a corporate Board of Directors to the organization and its members. If the directors of nonprofit corporations, including HOAs, are untethered from fiduciary duties, then South Carolinians are exposed to the risks of abuse of power, erosion of their property values, and deterioration of the organization as a whole. This Court should use this case to clarify the duties of the directors of nonprofits, which include not only homeowners' associations, but also schools, churches, charities, and hospitals, across South Carolina.

Because the Court of Appeals erred as a matter of law as to the elements of a claim for civil conspiracy, and as to the fiduciary duty of corporate directors, this Court should grant this Petition, reverse the erroneous judgments, and remand for trial on the Walls' causes of action for breach of fiduciary duty and civil conspiracy.

Respectfully submitted,

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