THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-in-Equity

Circuit Court Case No. 2020-CP-10-04185

Court of Appeals Case No. 2020-001583

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

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.

APPELLANTS' FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authority

ISSUES ON APPEAL

I. Did the Master-in-Equity err as a matter of law in holding that the directors of a nonprofit corporation do not owe a fiduciary duty to its members or to the corporation?

II. Did the Master-in-Equity err in granting summary judgment and holding that there was no evidence of special damages to support plaintiff's claim for civil conspiracy?

STATEMENT OF THE CASE AND FACTS

This is a dispute over the governance of a nonprofit corporation and the power of homeowners' associations over their constituents' property values. The vehicle for the dispute is whether a purported architectural review committee had the authority to approve a covered dock.

At issue are two questions. The first is strictly one of law, as to whether the directors of a homeowners' association, which has elected to organize itself as a nonprofit corporation, owe a fiduciary duty to the corporation and to its members. The second question is more fact-based—whether the evidence demonstrated that the Appellants had been damaged by a civil conspiracy amongst the Respondents.

Because this is an appeal from the Master-in-Equity's improper grant of summary judgment, the facts should be construed in the light most favorable to the Appellants, who were the non-moving party. The facts may be found within—and inferred from—the verified pleadings, as well as filed affidavits and exhibits.

A. Factual Background

More than twenty years ago, Appellants Bonnie and Walter Wall (the "Walls") bought their lot in the Shellmore subdivision, in rural McClellanville, in Charleston County, South Carolina. Shellmore is a unique, small, coastal development. A large part 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 Shellmore because of its sweeping views of the waterway and the wildlife refuge. (Amended Complaint) (R. pp. 16-17).

The beautiful views of Shellmore's residents are entirely unobstructed by any covered or roofed docks, or large boat lifts. It has been that way ever since Shellmore was first developed almost fifty years ago, in 1975. In the fifty-year history of Shellmore, covered docks and boat lifts have always been prohibited. (R. pp. 16-19, 163).

As the reader might have deduced, Respondents Shaun and Jonathan Dye (the "Dyes") moved into Shellmore . . . and they wanted to build a covered, roofed dock. The Dyes live next door to the Walls, and a covered dock will obstruct the Walls' views. (*Id.*). The typical docks on Shellmore are essentially flat platforms on the water; the Dyes' proposed covered dock was essentially a building—the only building—on the beautiful marsh landscape.

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, Being a Part of "Kensington Plantation"* (the "Declaration") (as amended), which was duly recorded in the Office of the Register of Deeds for Charleston County. (R. pp. 36-48). The Declaration, which touches and concerns the land and is binding on all purchasers of lots within the subdivision, contains covenants and restrictions "for the purpose of protecting the value and desirability of" the property in Shellmore. Every owner in Shellmore is bound by the Declaration. (R. p. 37).

After the developer sold its lots in the community, it turned Shellmore over to the homeowners, organizing Respondent Shellmore Homeowners' Association, Inc. (the

"Association") for the purpose of enforcing the Declaration and maintaining architectural control. The Association is a creature born of the Declaration,[1] and it is bound by the Declaration. The Association is a nonprofit corporation, subject to the South Carolina Nonprofit Corporation Act, S.C. Code § 33-31-101 *et seq.* (the "Nonprofit Act"). The Association is also subject to the South Carolina Homeowners Association Act, S.C. Code § 27-30-110 *et seq.* (the "HOA Act"). Every owner of property within Shellmore is a member of the Association.

Under the clear terms of the Declaration, no owner may construct any dock whatsoever without first getting written approval from the Association. The Declaration unequivocally states:

> No boat houses, docks, piers, or wharves shall be constructed on any lot **without first obtaining the written approval of the Association**, or its designated representative.

(R. p. 46, Article V, § 8) (emphasis added). The Association has **never**, in the almost fifty-year history of the development, given approval to any covered dock. The Association has on several occasions **denied** its approval to covered docks and lifts. (R. pp. 16-19, 50, 163, 244-246). The Declaration also requires that plans and specifications for proposed structures be reviewed for "harmony of external design" with existing structures. (R. p. 43).

Respondent Jon Dye was the president of the Association in 2016. He wanted a covered dock and boat lift on his lot. At the Association's annual meeting in 2016, Dye

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[1] The Association is successor to the Cape Romain Lookout Homeowners Association, Inc., named in § I.1 of the Declaration.

moved for a vote on covered docks. After discussing the history of the community, and the importance of preserving the views of their neighbors, the **Association voted to prohibit the construction of covered docks**. (R. p. 50, "2016 Shellmore HOA Minutes," "The vote passed to prohibit covered docks and lifts.").

The Dyes did not like the outcome of the Association's vote to prohibit docks. Neither did Respondent John Chakides, a Director of the Association. Chakides also wants his own covered dock and boat lift. (Fritz Aff., 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.

In the past, there has been an informal group of Shellmore homeowners who review architectural plans and report to the Association on those plans.[2] To keep things simple for this appeal, there is a dispute as to whether that group, which calls itself the "architectural review committee" is lawful and whether it has any authority over the property of residents of Shellmore.[3] Chakides, individually and as a Director of the

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[2] While this group was apparently active years ago, there is no evidence in the record of any activity whatsoever by the purported architectural committee in about 10 years. (R. pp. 420, line 20 – 421).

[3] This question was the subject of the Walls' Motion for Summary Judgment, which argued that the architectural review committee has no authority because the Association never recorded any sort of instrument giving it power over homeowners' property, which would have been required by the HOA Act. Moreover, the Nonprofit Act requires that committees be comprised of directors if they are to have any authority over the corporation; the purported architectural review committee is not comprised of directors and is therefore invalid under the Nonprofit Act. (*See*, R. pp. 127-166, 356-373). The Master denied the Walls' motion, reserving this question for trial. (R. p. 10).

Association, purported to appoint to the alleged committee selected people whom he knew to be in favor of covered docks. (R. p. 20 ¶ 36; R. pp. 163-164).

In an effort to circumvent the vote of the Association and the Declaration of Covenants, Respondents the Dyes and Director Chakides worked together to have the Dyes submit plans for a dock with a large, covered roof to the purported architectural review committee. The Dyes did not provide notice to their neighbors of the plans. Without reviewing plans, conducting a meeting, or communicating with members, the alleged architectural review committee purported to "approve" of the Dyes' dock. (R. pp. 18-22; R. pp. 163-165).

The Association's Board of Directors knew that the members had voted to prohibit covered docks. (Minutes, 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 the covenants require that new structures be consistent in design with existing structures. (Declaration, 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 Association, had entrusted the Directors with preserving their property values by consistently enforcing the Declaration, among other things. 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 of Covenants, because the Association that they serve exists to enforce it, and because the directors own bound lots in Shellmore.

The Directors sent an email out to the homeowners, telling them that the vote of the purported architectural review committee, purporting to approve of the Dyes' covered dock and lift plans, would stand. (R. p. 228).

Naturally, this email from the Directors set off a firestorm of discontent. The Walls sent a series of demand letters to the board. (R. pp. 51-58). The purpose of the letters, *inter alia*, was to request that the Board hold a meeting of the Association to discuss the Dyes' dock plans. This was because the Declaration of Covenants require written approval from the Association for the construction of any dock.[4] (R. p. 46). Two of the Directors apparently wanted a special meeting of the Association, but no meeting ever took place. (Fritz Aff., R. p. 164-165). The Walls, joined by the requisite number of other members, called for a special meeting of the Association. (R. pp. 54-55). That meeting did not take place.

One Director of the Association stated that the purported architectural review committee was "out of control." (R. p. 165 ¶ 23).

In the meantime, the Dyes revised their dock plans. (R. pp. 271, 164). There is no evidence that the Board or the Association ever reviewed or discussed or approved the Dyes' ***revised*** plans. The Declaration expressly requires that owners first obtain the "written approval of the Association," prior to construction of any dock. (R. p. 46,

[4] The Question of what percentage of members of the Association would be necessary for approval was also the subject of the Walls' Motion for Partial Summary Judgment. The Walls contended it would require a 75% vote, since it would amount to a change in the common scheme of development. (*See*, R. pp. 356-372). The Master denied the Walls' motion, reserving this question for trial. (R. p. 10).

Declaration, Article V, § 8). There is **no evidence** of such written approval of the Dyes' plans. Nonetheless, despite this required and covenanted condition, which binds the Board and the Association members, and which exists to protect the property values in the community, the Directors took the 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. It is about the Directors of the Association, who repeatedly failed to enforce the community's covenants, and who actively sought to circumvent the Declaration. The strength of the Declaration to protect property values now has been eroded. As a result of these events—and of the clear indication that the Directors of the Association would not enforce the covenants—several other homeowners (including Director Chakides[5]) have submitted applications to the purported "architectural review committee," seeking their own roofed docks and large boat lifts. (Fritz Aff., R. p. 165 ¶ 22).

As they say, "there goes the neighborhood."

B. Procedural History

On October 5, 2020, Appellants Bonnie and Walter Wall (the "Walls") filed a Verified Amended Complaint against (1) the Dyes, (2) the Association, and (3) Chakides.[6] (R. p. 13). The Walls sought a declaratory judgment and injunction to prevent the Dyes

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[5] The initial brief mistakenly said "Director Dye" instead of "Director Chakides."

[6] The Walls' original verified complaint was filed 13 days prior, on September 22, 2020. The circuit court referred the case to the Master-in-Equity on September 30, 2020.

from constructing a large roof on their dock, which would block the Walls' view. The Walls also brought causes of action for breach of covenants, nuisance, and civil conspiracy, as well as derivative claims for breach of fiduciary duty, breach of covenants, and civil conspiracy. The Walls' theory was that the Dyes did not have the necessary approval from the Association to construct the dock. They further alleged that the directors of the Association were (*inter alia*) actively seeking to circumvent the community's governing documents. (R. pp. 25-28).

The Master-in-Equity granted a 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. p. 4).

The Walls and the Dyes filed cross-motions for summary judgment on October 15, 2020. The Walls sought summary judgment only on their causes of action pertaining to the construction of unambiguous contracts, which could be decided as a matter of law. After all, no discovery had yet taken place, and the Dyes had not even yet filed an Answer. In contrast, the Dyes sought summary judgment on every cause of action. Pertinent to this appeal, the Dyes argued that directors of a homeowners' association do not owe any fiduciary duty, as a matter of law, and that the Walls failed to plead special damages for civil conspiracy. Both the Dyes and the Walls filed lengthy memoranda in support and opposition, as well as conflicting affidavits on the facts, as well as numerous exhibits. (R. pp. 127, 167). The Association filed a one-page motion for summary judgment, incorporating the Dyes' arguments, on October 23, 2020. (R. p. 355).

The Master-in-Equity held a virtual hearing on November 2, 2020. At the conclusion of the hearing, the Master requested supplemental briefing, which the Dyes and the Walls filed on November 6, 2020. (R. pp. 356, 374). The Association did not file any supplemental briefing, and it never gave legal arguments on whether its directors have a fiduciary duty, nor on whether an alleged civil conspiracy could be claimed against its directors.

On November 19, 2020, the court filed its order which is the subject of this appeal. It dissolved the temporary injunction, and it ruled as a matter of law that the directors of the Association owe no fiduciary duty. It further found "no evidence of special damages" to constitute civil conspiracy. (R. p. 10).

The Walls timely filed their Notice of Appeal on November 22, 2021.

STANDARD OF REVIEW

There are two different standards of review applicable in this appeal: (1) mere scintilla of evidence, as to factual issues; and (2) de novo, as to questions of law.

First, this is an appeal from the circuit court's improper grant of summary judgment to the Respondents. Appellate courts use the same standard of review as the trial court to review a grant of summary judgment. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Loflin v. BMP Dev., LP*, 427 S.C. 580, 588–89, 832 S.E.2d 294, 299 (Ct. App. 2019) (internal quotation marks omitted). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). A scintilla of evidence is "the smallest trace" of evidence or "any material evidence that, if true, would tend to establish the issue in the mind of a reasonable jury." *Loflin*, 427 S.C. at 589, 832 S.E.2d at 299 (internal quotation marks omitted).

"Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts" and "is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* at 588–89, 832 S.E.2d at 299 (internal quotation marks omitted). Importantly, when it rules on a summary judgment motion,

"the court does not weigh conflicting evidence with respect to a disputed material fact." *Id.* at 589, 832 S.E.2d at 294.

Additionally, there is a question of law at the core of this appeal, as to whether the directors of a nonprofit corporation owe a fiduciary duty to the corporation and its members. This Court reviews questions of law de novo. *The Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 493, 821 S.E.2d 667 (2018).

ARGUMENT

The circuit court's order granting summary judgment makes errors of law and fact which compel reversal. First, the lower court erred as a matter of law in finding that the directors of a nonprofit corporation do not owe a fiduciary duty to the corporation and its members. Second, the lower court erred in overlooking evidence of damages, and in mistaking the elements of a cause of action for civil conspiracy. This court should remand for trial on the Walls' causes of action for breach of fiduciary duty and civil conspiracy.

I. The Master-in-Equity erred as a matter of law in holding that the directors of a nonprofit corporation do not owe any fiduciary duty to the corporation and its members.

This one is easy. The Shellmore Homeowners' Association, Inc. is a nonprofit corporation, organized and existing under the law of South Carolina. The Walls are members of the corporation. They filed this lawsuit individually and derivatively, including individual and derivative claims for breach of fiduciary duty. In essence, the Walls alleged that the directors of the Association acted in bad faith, in an effort to circumvent the governing documents of the corporation, in refusing to enforce the governing documents of the corporation, out of their own personal self-interest, contrary to the expressed will of the corporation, and not in the corporation's best interest. (*See*, R. pp. 19-28 ¶¶ 25-44, 66-69, 74).[7] The Walls alleged that the actions of the directors

[7] In reviewing a grant of summary judgment, this Court should view the allegations of the Walls' Verified Amended Complaint, and all reasonable inferences to be drawn therefrom, in the light most favorable to the Walls.

damaged the Association as a whole, as well as the value of the Walls' individual property.[8]

The lower court wrongly granted summary judgment on the breach of fiduciary duty claims, erroneously concluding:

> Defendants' summary judgment motion as to Plaintiffs' claims for Breach of Fiduciary Duty . . . [is] GRANTED as there is no fiduciary duty owed by the Directors to the Plaintiff.

(Order, R. p. 10). This Court should reverse because, as a matter of law, the directors of a nonprofit corporation unequivocally owe fiduciary duties to the corporation, and to its members. *Walbeck v. I'On Co.*, 426 S.C. 494, 514, 827 S.E.2d 348 (Ct. App. 2018), *citing Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) ("Whether the law recognizes a particular duty is an issue of law to be decided by the [c]ourt.").

In general, directors of nonprofit corporations "owe[] a fiduciary duty of care, loyalty, and good faith" to the corporation. *See Protestant Episcopal Church in the Diocese of SC v. Episcopal Church*, 421 S.C. 211, 247, 806 S.E.2d 82, 101 (2017) (Op. of J. Hearn) (discussing at length the fiduciary duty of the bishop as the director of a nonprofit corporation), *citing* S.C. Code § 33-8-300, *also citing Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 531, 744 S.E.2d 178, 183 (2013) ("The duty of loyalty requires corporate officers

[8] A shareholder may bring a cause of action for breach of fiduciary duty in an individual capacity, rather than as a derivative suit, where his loss is separate and distinct for that of the corporation. *See, Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 409 S.E.2d 340 (1991), *overruled on other grounds by Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995).

and directors to act in the best interest of the corporation and prioritize the corporation's interest above their own.").

Fiduciary relations are deemed to arise when a person reposes trust or special confidence in another. *Walbeck*, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2018) ("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.") (citations omitted) (also noting that the requirement of good faith on the part of directors of an homeowners' association "is compatible with the good faith requirement for fiduciaries").

In the context of homeowners' associations, the members of the homeowners' association entrust the directors of the association with the worth of their property. A core *purpose* of a homeowners' association is generally to preserve the property values of all members by maintaining the common areas and enforcing a common scheme of development.

The Shellmore Association specifically exists for the benefit of its individual members, whose homes are in thrall of the Association's decisions. The stated purpose of the Shellmore Association "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, Certificate of Incorporation). This is a hefty responsibility, which should be carried out in good faith. Moreover, the Walls in this case relied on the Association to enforce the covenants running with the land, which are expressly tied to

the property values of every owner and member of the corporation. (R. p. 36, Declaration) ("which are for the purpose of protecting the value and desirability of, and which shall run with, the real property . . . ").

The Shellmore Homeowners' Association, Inc., is a nonprofit corporation, subject to the corporation law of this State:

> '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 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**.'

Gilbert v. McLeod Infirmary, 219 S.C. 174, 64 S.E.2d 524, (1951) (emphasis added) (quoting 1 Bogert on Trusts 59); *see also Clearwater Trust v. Bunting*, 626 S.E.2d 334, 367 S.C. 340 (2006) ("The common law fiduciary duty, first recognized in 1913, owed to shareholders by corporate officers and directors has been codified by §§ 33-8-300 and -420.").

In this case, the lower court cited no law, nor provided any reasoning for its decision to veer from established corporate law when it held that the directors of a homeowners' association, which elected to organize itself as a nonprofit corporation, owe no fiduciary duty to the corporation or its members. However, it is likely that the Master-in-Equity wrongly adopted the Dyes'[9] arguments on the issue. The Dyes argued that the directors of homeowners' associations are exempt from the fiduciary requirements imposed upon corporate directors in general. (R. pp. 401:4 – 402:3).

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[9] Respondent Shellmore Homeowners' Association did not make any arguments about whether its directors owe a fiduciary duty to its members or the corporation.

The improper basis of the Dyes' argument was the case of *O'Shea v. Lesser*, 416 S.E.2d 629, 308 S.C. 10 (1992). (*Id.*); (R. pp. 374-377). The Dyes touted the *O'Shea* Court's holding that "We have never imposed the high standard of fiduciary duty on planned community organizations, such as the Board." (*Id.*). But the Master-in-Equity was wrong to follow *O'Shea* because that case pertained to an **unincorporated** organization. *O'Shea* discussed the duty of an architectural review board (somewhat confusingly called "the Board") on Fripp Island, which review board had been appointed by the developer in the time before the community was turned over to the homeowners. *O'Shea* at 13, 416 S.E.2d 630 ("respondents are all members of an architectural review board (the Board) appointed by the developer"). It was only under that specific fact pattern that the Court declined to find a fiduciary duty on the part of an (unincorporated) design review board.

However, there is no real question that directors of **incorporated** homeowners' associations are bound by the same fiduciary requirements as the directors of any other corporation. *Protestant Episcopal Church in the Diocese of S.C.* at 247, 806 S.E.2d 82 (S.C. 2017) ("as the director of a nonprofit organization, the bishop owes a fiduciary duty of care, loyalty, and good faith"); *see also, Walbeck* at 515-516, 827 S.E.2d at 358-359 (discussing the good faith required of directors of homeowners' associations and noting "[t]his is compatible with the good faith requirement for fiduciaries"). The Legislature codified this fiduciary duty by requiring Directors to act in "good faith" and in the best interest of the corporation. *See* S.C. Code § 33-8-300. *(see also,* R. p. 433: 19 – 434: 20).

The Dyes further argued that the business judgment rule absolves directors of their fiduciary responsibilities. This is also wrong. The business judgment rule does not

apply where, as alleged here,[10] the directors have acted outside of their scope of authority, or in bad faith,[11] or with an undisclosed conflict of interest. *See Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 781 S.E.2d 903 (2016) ("The business judgment rule applies to *intra vires* acts of the corporation, but not to *ultra vires* acts. In other words . . . the business judgment rule is not a cloak that protects a corporation from a violation of its own bylaws.") (internal citations omitted); *see also Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct.App.1993) (discussing fiduciary relationship of developer to nascent homeowners' association, and noting that business judgment rule does not apply upon "a showing of bad faith, dishonesty, or incompetence").

Because, the Shellmore Association is a nonprofit corporation, entrusted with preserving the property values of its members, its directors owe a fiduciary duty to its members, and to the corporation as whole, as a matter of law. This Court should reverse the Master-in-Equity's error and remand for trial on the question of whether the directors breached their fiduciary duty in this case.

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[10] The Walls submitted a verified complaint, as well as an affidavit from another member of the Shellmore Homeowners' Association, asserting that the directors of the Association acted in bad faith, contrary to the governing documents, beyond the scope of their authority, and with an undisclosed conflict of interest. (Verified Amended Complaint, R. pp. 13-61); (Affidavit of Fritz, R. p. 163-165). On review of a grant of summary judgment, that evidence—and the reasonable inferences to be drawn from it—must be taken by this Court in the light most favorable to the Walls, who were the non-moving party.

[11] Whether a party acted in good faith is a question of fact. *Youmans v. Youmans*, 128 S.C. 31, 121 S.E.2d 674 (1924). Since the Walls submitted evidence that the directors acted in bad faith, summary judgment is not appropriate on the question. Rule 56, SCRCP (judgment is appropriate when there "is **no** genuine issue as to **any material fact** and . . . the moving party is entitled to judgment as a matter of law.") (emphasis added).

II. The Master-in-Equity erred in finding on summary judgment that there was "no evidence of special damages" to support plaintiff's claim for civil conspiracy.

The Master-in-Equity's error in granting summary judgment on the Walls' civil conspiracy claim was at least two-fold. The order erroneously holds:

> Defendants' summary judgment motion as to Plaintiffs' claims for . . . Civil Conspiracy is GRANTED as . . . no evidence of special damages has been shown by the Plaintiff to constitute a civil conspiracy.

(Order, R. p. 10). First, there was evidence of the Walls' damages, which should have precluded summary judgment. Second, as a matter of law, there is no specific requirement that a plaintiff plead "special damages" in alleging civil conspiracy. For either—or both—of these reasons, this Court should reverse and remand for trial on the issue.

a. Evidence of the Walls' damages made summary judgment improper.

Particularly in light of the procedural posture of this case, the Master-in-Equity was wrong to find that there was "no" evidence that the Walls were damaged by the conspiracy between the Dyes and the interested director of the Association. Initially, it is important for this Court to understand that this lawsuit was only just filed about a month before the Master-in-Equity heard summary judgment motions.[12] No discovery had

[12] Summary judgment motions were filed early on because the court asked for them in its order granting a preliminary injunction. (Order) (R. p. 4). This made sense at the time, to counsel for the Walls, who believed that many issues between the parties could be resolved by declaratory judgment from the court on the covenants. Thus, the Walls' motion sought partial summary judgment, only on questions of law pertaining to the construction of unambiguous covenants and statutory law; however, in contrast, the Dyes went "whole hog," asking for judgment on numerous questions of fact, including the question of civil conspiracy and its damages. Importantly, the Master evidently agreed with the Walls that there were facts in dispute, as he denied the remainder of the motions and set the case for trial. (Order) (R. p.10).

taken place at all. In opposition to summary judgment, the Walls submitted their verified complaint, numerous documents, and the affidavit of another member of the Association. (R. pp. 13-61, pp. 163-165).

The Master wrongly disregarded evidence of damage to the Walls arising out of the conspiracy among the Respondents. The Walls attested in their Verified Amended Complaint that they had sustained economic as well as non-pecuniary damages as a result of Respondents' actions. They attested to damage particularly 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 attested 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 members of the corporation because they were required as a result of the conspiracy to file an expensive lawsuit over an issue that could have been settled by a short special meeting of the Association. (*Id.* ¶ 81); *see*, *Benedict Coll. v. Nat'l Credit Sys., Inc.*, 400 S.C. 538, 735 S.E.2d 518 (Ct. App. 2012) (attorney's fees and costs may constitute special damages in a civil conspiracy claim).

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, 291 S.C. 196 (Ct. App. 1986), *citing* 73 Am.Jur.2d Summary Judgment Section 36 (1974); *see Charles v. Tex. Co.*, 199 S.C. 156, 18 S.E.2d 719, 729 (1942) (discussing at length a civil conspiracy lawsuit, explaining that its elements are fact-laden questions for jury determination, and noting that 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."); *see also Benedict Coll.,* 400 S.C. 538, 549, 735 S.E.2d 518, 524 (Ct. App. 2012) ("Whether the items sought are in-fact special damages is a separate question.").

Moreover, Respondents did not submit contradictory evidence showing that the Walls did not sustain damages; they simply argued that the Walls' alleged damages were not "special." (R. pp. 407: 23- 408: 2). Because the evidence in the record demonstrates at least a question of fact on whether the Walls were damaged by the conspiracy, summary judgment was improper.

On summary judgment, a circuit court is not empowered to determine questions of fact; its capacity is limited to deciding matters of law. Rule 56, S.C.R.C.P. (Judgment is appropriate when there "is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law."). Summary judgment is a drastic remedy and should be cautiously invoked to ensure a litigant is not improperly deprived

of a trial on disputed factual issues. *Gauld v. O'Shaugnessy Realty Co.*, 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008).

This Court should reverse and remand for discovery and trial on the question of whether the Walls were damaged by the civil conspiracy.

b. The law does not require the pleading of "special damages" for civil conspiracy claims.

The second reason this Court should reverse the lower court is because it erred as to the elements of a civil conspiracy claim. The order on appeal grants summary judgment for failure by the Walls to show "special damages . . . to constitute civil conspiracy." (R. p. 10). Although the order does not cite case law or contain reasoning explaining its decision, it is clear that the Master-in-Equity was operating under the incorrect assumption that a plaintiff must plead "special damages" in a civil conspiracy claim. This has never been the law in South Carolina. *See, Paradis v. Charleston County School District*, ___ S.E.2d ___, 2021 WL 1992245 (2021) (discussing at length the history of the civil conspiracy cause of action in South Carolina, abolishing the relatively new understanding that it requires pleading special damages, and restoring the original elements of the claim). As such, the master was wrong as a matter of law to rule out the Walls' conspiracy claims for lack of "special damages," when the Walls indeed plead that they were damaged by the conspiracy.

Pursuant to *Paradis*—and also because the Walls submitted at least a scintilla of evidence that they sustained damages caused by the conspiracy—this Court should reverse the grant of summary judgment and remand for trial on the disputed facts.

CONCLUSION

For the reasons set forth above, and because the lower court 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 reverse the grant of summary judgment and remand for trial on the Walls' causes of action for breach of fiduciary duty and civil conspiracy.

Respectfully submitted,

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