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SC Court of Appeals

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

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.

PETITION FOR REHEARING

Appellants Bonnie and Walter Wall, Jr. (the “Walls”), hereby petition for rehearing as to this Court’s Unpublished Opinion No. 2014-UP-159, filed May 8, 2024 (the “Opinion”). As set forth below, the Walls respectfully submit that the Opinion misapprehends the import of the Nonprofit Corporation Act, misunderstands precedent, mistakes disputed facts for the truth (despite its standard of review), and misreads the Supreme Court’s plain and unambiguous instruction that *Paradis* should be applied to all cases that have not yet been tried.

The Opinion should be withdrawn and its errors of law corrected. At a minimum, the disputed facts—selected from Respondents’ papers in misapprehension of Appellants’ evidence to the contrary—should be removed from the Opinion so that Appellants may proceed to petition the South Carolina Supreme Court to correct the clear issues of law.¹

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

The Court mistakenly elevates judicial common law over express statutory provisions that impose enforceable fiduciary duties on nonprofit corporations and their directors. The Opinion first finds that an HOA has a different relationship with homeowners than a developer, and therefore that the common law imposes no fiduciary responsibilities on the directors of an HOA.² But by relying only on (inapplicable) “precedent” from the Courts, the Opinion erroneously ignores the Legislature:

Although the Walls attempt to distinguish the instant case from *O’Shea* by asserting the Association is a nonprofit corporation whereas the review board in *O’Shea* was unincorporated, **we find no indication in our precedent that such a distinction matters.**

Opinion at p. 2 (emphasis added). South Carolina’s Nonprofit Corporation Act (the “Nonprofit Act”)—although not court “precedent”—unequivocally imposes fiduciary

¹ The Walls incorporate herein by reference the legal arguments made in their appellate Brief and their Reply Brief, filed November 8, 2021.

² 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.

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, they are bound by fiduciary duties imposed by the statute.

The Nonprofit Corporation Act unambiguously charges directors of nonprofit corporations with fiduciary duties of care, loyalty, and obedience. In South Carolina, nonprofit corporations include hospitals, schools, churches, and (as here) homeowners' associations. Directors of those entities are charged by the Nonprofit 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 expressly itemizes additional duties of loyalty, including by prohibiting directors from engaging in conflict-of-interest transactions.³ S.C. Code § 33-31-831. So critical is a directors' fiduciary duty to the nonprofit corporation that the Act expressly **prevents** a corporation's articles from exempting directors from personal liability for "any breach of the director's duty of loyalty to the corporation or its members." S.C. Code § 33-31-202 ("However, this provision shall not eliminate or limit the liability of a director: . . . (1) for any breach of the director's duty of loyalty to the corporation or its members; (2) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (3) for any transaction from which a director derived an improper personal benefit").

³ The Opinion erroneously answers the disputed question of fact of whether the directors here *breached* their duties (including as fiduciaries or even as reasonable men bound to act in good faith). The procedural posture of this case was one of summary judgment, one month after the lawsuit was initiated. As discussed herein, this Court must remove these statements, which are improper findings of fact, from its Opinion.

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 multiple places to the liability of directors to the members and the corporation,⁴ 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 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).

It is significant that the Nonprofit Corporation Act refers to an action against “a director” – in the singular. S.C. Code § 33-31-830(f). **This Court mistakenly overlooked that the Walls’ claim for self-dealing was filed solely against Director Chakides (and not the entire Board),** when it held: “Although the Walls contend the Board breached its duty by ‘self-dealing’ because Chakides had a separate application for a covered dock on his own property, we find this argument lacks merit. Chakides was only one member of the Board.” (Opinion at p. 4) (*But see* R. pp. 27-28).

⁴ See, e.g., S.C. Code §§ 33-31-202(b), -304, -810, -830, -831, -833, -850, -851, -853, -855, -858.

Appellants respectfully ask this Court to withdraw and reconsider its Opinion, which mistakenly discounts the actionable fiduciary duties imposed by the Nonprofit Corporation Act. Additionally, the Opinion misapprehends that the Walls brought a breach of fiduciary duty claim against Director Chakides, specifically, not only for his conflict of interest but also for his acts to circumvent the will of the Association's members and the governing documents.⁵ (R. pp. 27-28). Because the Opinion misapprehends the Nonprofit Corporation Act, the Walls respectfully ask that the Opinion be withdrawn to correct the law.

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

The Board [of Shellmore Homeowners' Association] has a fiduciary duty to all owners . . . to enforce the rules and protect property values . . . and to act in the best interest of all owners on a fair and equal basis at all times.

This quotation is from a letter that the Board sent to Bonnie Wall – while this appeal was pending – to justify the Board's having placed two liens on the Walls' property for the collection of attorney's fees related to this litigation. (See Exhibit 1, attached).

A. Most lawyers who practice HOA law recognize the fiduciary relationship between the directors and the members of the Association.

The letter quoted above is part of a fairly boilerplate debt collection letter, typical of those from an HOA to a member regarding assessments. This Court's Opinion, finding as a matter of law that there is no fiduciary duty owed by directors of a homeowners'

⁵ Whether Director Chakides breached his fiduciary duties is a disputed factual question to be resolved after discovery and trial. *Walbeck v. l'On Co.*, 439 S.C. 568, 889 S.E.2d 537, 546 (2023).

association,⁶ is a radical departure from generally acknowledged, “boilerplate” South Carolina law. The South Carolina Bar’s Committee on Community Association Law has published materials from its 2022 Seminar, in which it dedicated a subsection to “Board Member Fiduciary Duties.” 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 2).

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 various court decisions, relied on and cited in the Opinion, in which the Supreme Court said “We have never imposed the high standard of fiduciary duty on planned community

⁶ The Walls argued that the Directors had obligations as fiduciaries to act fairly, in good faith, without conflict, in the best interest of the Association and for the benefit of the Association, 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.

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-appointed⁷ architectural review board, to which the covenants granted “‘sole and uncontrolled 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 1993, before the law on developers as fiduciaries evolved in recent years. Moreover, the *O’Shea* decision was published one year before the South Carolina Nonprofit Corporation Act of 1994 was enacted. S.C. Code § 33-31-101 (“This chapter may be cited as the South Carolina Nonprofit Corporation Act of 1994.”). Or, it may be simply because it is generally recognized that the developer-appointed “board” in *O’Shea* was not a nonprofit entity.

A fiduciary duty is a relational duty. When developers leave communities, they turn over their responsibilities to homeowners associations, 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 (quoting *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987)).

⁷ The Opinion mistakenly 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).

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 with the utmost loyalty and good faith. Moreover, the Walls relied on the Association to enforce the covenants running with the land 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, Declaration) ("which are for the purpose of protecting the value and desirability of, and which shall run with, the real property. . .").

Although this Court may at times find homeowner association disputes tedious, **it 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 homeowners' associations are entrusted with the property values of the members, and have a great deal of control over their property, they are therefore in a fiduciary relationship with the homeowners that they serve. This Court should withdraw

its Opinion and hold that the master erred in finding as a matter of law the “there is no fiduciary duty owed by Directors.”

B. The Opinion errs in focusing on the contract, rather than the behavior of the fiduciary.

This Court makes the same mistake that it did in its previous *Walbeck* decision, focusing too heavily on the contract at the expense of the **relationship**. *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 is especially incongruous on summary judgment, because most questions in a breach of fiduciary claim are questions of fact.⁸ At page 3, the Opinion narrowly finds that the contract (and the Court’s mistaken factual opinion that there was no breach of it) trumps 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.

When it reversed this Court’s *Walbeck* decision, the South Carolina Supreme 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 therefore it will be – unabashedly – quoted it at great length in the hopes that this Court will read it and reconsider:

We agree with Homeowners that the 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**

⁸ 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 breach.” *Walbeck v. I’On Co.*, 439 S.C. 568, 889 S.E.2d 537, 546 (2023). Only the first element is a question of law.

promises, and self-dealing, all of which support the jury's verdict on Homeowners' breach of fiduciary duty cause of action. . . .

More broadly, "it is [] well settled" that those in a fiduciary relationship with another party must not act to "make use of that relationship to benefit his own personal interests." Conduct that violates this mandate includes **self-dealing, fraud, unconscionable conduct, misrepresentations, etc.** This makes sense because the fiduciary relationship imposes 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 reposing confidence."

The trial judge consistently questioned whether Developers' argument—that nonconveyance is only a contractual issue rather than a potential breach of fiduciary duty—was too narrow. This occurred at the directed verdict stage, as well as in the court's order denying JNOV, where she stated, "a developer's failure to convey community properties in their entirety is at least the equivalent of conveying them in 'substandard condition' (if not worse), and thus, any distinction between properties which should have been conveyed and properties which were actually conveyed in a substandard condition is a distinction without a difference." However, the court **decided to send this cause of action to the jury based not only on the nonconveyance but also on the evidence of bad faith and self-dealing** that was presented, and the court denied Developers' motion for JNOV on that additional ground as well.

In its second opinion, which reversed the jury's verdict on breach of fiduciary duty, the court of appeals pivoted and embraced the Developers' narrow approach, focusing only on the Developers' act of nonconveyance.

Homeowners argue this holding was unnecessarily and erroneously constricted, as the two relationships between Developers and the HOA—contractual and fiduciary—are inextricably intertwined. Under this analysis, the contractual duty to convey was overlaid by a fiduciary relationship, which means that while the nonconveyance was certainly a breach of contract, the subsequent self-dealing by Developers through the secret sale of the property to a third party constituted a breach of the Developers' fiduciary duties to the HOA. Stated differently, if the only evidence in the record of a breach of fiduciary duty was that Developers did not convey the property, that claim might well be limited to a breach of contract. While Developers urge this Court to focus only on the nonconveyance, Homeowners have never taken such a limited approach, nor did the trial court. Instead, **there was sufficient evidence of bad faith, promises made and broken, and self-dealing presented in addition to the**

breach of contract, to warrant submission of the fiduciary claim to the jury. This nefarious conduct includes, but is not limited to, the secretive sale to Russo, the false representation regarding the property's rightful ownership, and the easement granted to third parties when the property had been promised to the HOA. This kind of conduct, by those in a fiduciary relationship, has clearly led to breaches in other cases and, though springing from contract in this case, constitutes breaches of fiduciary duty.

"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." Accordingly, we reverse the court of appeals and reinstate the jury verdict as to this cause of action.

Walbeck v. I'On Co., 439 S.C. 568, 889 S.E.2d 537 (2023).

Here, despite improper lack of discovery, the Walls demonstrated that the Board, and particularly Director Chakides, had behaved secretly, 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. pp. 15-33; 162; 163-165). **This evidence was sufficient to survive summary judgment on the question of breach.** The question of breach is a factual one, and it is not properly decided without a trial. However, this Court and the lower Court mistook the law on duty, while justifying their decision with disputed facts going to the question of breach (not the question of duty). The Opinion should be withdrawn and the case reheard and reconsidered, as further discussed next.

III. The Opinion improperly decides disputed facts.

On appeal from a grant of summary judgment, this Court (like the lower court) does not have authority to make credibility determinations, resolve inferences to be made from the evidence, or otherwise find the facts in favor of one party or the other. **Facts are**

the exclusive province of the fact-finder at trial. Rule 56, SCRCPP; *Fairchild v. S.C. Dep't of Transp.*, 398 S.C. 90, 99, 727 S.E.2d 407, 411 (2012) (“It is not the duty of the court to weigh the testimony”); *Englert, Inc. v. Leafguard Usa, Inc.*, 659 S.E.2d 496, 377 S.C. 129 (2008) (“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.”); *see also Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 40, 43 (1984) (discussing court’s inability to weigh evidence and axiomatic necessity of submitting all fact questions to the factfinder); *see also Jones v. Gen. Elec. Co.*, 331 S.C. 351, 356, 503 S.E.2d 173, 176 (1998) (“The [] court should be ‘concerned only with the existence or nonexistence of evidence,’ not its credibility or weight.”).

Although this Court found as a matter of law that the directors do not have fiduciary duties, it also found that the directors do have affirmative duties under the covenants and pursuant to the business judgment rule. “If a duty exists, the **[factfinder]** determines whether a breach of the duty that resulted in damages occurred.” *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 781 S.E.2d 903 (2016) (“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. Therefore, ultimately, the jury must decide whether the Board violated the requirements of the Master Deed and Bylaws, which of the Board’s actions were intra vires and which were ultra vires, and the impact of that breakdown on Petitioners’ negligence claim.”)⁹ (emphasis added); *Youmans v. Youmans*, 128 S.C. 31, 121 S.E.2d 674

⁹ This case was referred to the Master-in-Equity, who will be the factfinder at trial – hearing the evidence and the testimony of witnesses subject to cross-examination.

(1924) (the question of bad faith is one of fact); *see also* *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (business judgment rule does not apply upon “a showing of bad faith, dishonesty, or incompetence”). Here, the Walls made a factual showing that the Directors acted outside of their authority, in contravention of the covenants and the law, and in bad faith.

And yet, this Court’s Opinion mistakenly *decides facts* in the face of conflicting evidence. **Respectfully, Appellants ask this Court to withdraw the Opinion and remove the following sections of its Opinion in which it discusses how the Court believes that (disputed) facts might apply to the question of breach of duty – thereby improperly answering questions meant for the factfinder.** The following statements do not belong in the Opinion, in which the issue before the Court was simply the question of law of whether homeowners’ associations and their directors have fiduciary duties:

1. Opinion at p. 3: “[T]he record fails to show the Board of Directors of the Association (the Board) acted unreasonably or in bad faith such that the business judgment rule would not apply.”

Reasonableness is a fact question. *Lyons v. Fid. Nat'l Title Ins. Co.*, 415 S.C. 115, 781 S.E.2d 126 (Ct. App. 2015); *Coake v. Burt*, 391 S.C. 201, 705 S.E.2d 453 (Ct. App. 2011); *Ravan v. Greenville County*, 434 S.E.2d 296, 315 S.C. 447 (Ct. App. 1993) (“the question of reasonableness is ordinarily a question of fact for the jury”). “A director *is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance [on a committee] unwarranted.*” S.C. Code § 33-31-830 (emphasis added). The directors had the following knowledge, implicating a fact question as to their good faith and reasonableness:

- “The vote passed to prohibit covered docks and lifts.” (R. p. 162).
- “The Association has never, in the almost 50-year history of the development, given approval to any covered dock.” (R. p. 18).
- “The Association has on several occasions denied approval to covered docks.” (R. p. 19).
- **“Association Director David Walker advised me that the ARB was out of control . . . and the ARB vote was not proper.”** (R. p. 164).
- R. pp. 334, 337 (Voting agreements by 2 out of 3 directors).

In short, there is a factual showing of bad faith, as well as evidence from which inferences of unreasonableness and bad faith can be drawn. This evidence was sufficient to create a dispute on the material, fact issues of reasonableness, intent, and bad faith, and the Court should remove from its Opinion its finding of fact on this question.

2. Opinion at p. 3: “[T]he record shows Respondents complied with the established requirements.”

In contrast to this factual determination by the Court, the record shows the converse – that Respondents did not comply with the established requirements. *See, e.g.* R. pp. 18-24 (Verified Complaint) (“The Dyes **do not** have valid written approval from the Association for construction of their dock”); (“The Shellmore ARC is not comprised of directors, but rather of a select few ordinary members of the Association. As such, its actions are invalid and cannot bind the Association.”); *see also* R. pp. 51-59; *see also* R. pp. 163-165 (Affidavit of L. Fritz) (attesting to the Board’s failure to give notice, lack of meetings, improper procedure, and one Director’s statements that the “ARB was out of control” and that the “ARB vote was not proper,” and describing “ARB abuse of

power.”). Due to conflicting evidence on the factual question of whether Respondents complied with the “established requirements,” a genuine dispute of fact exists. The Walls ask that this Court would remove this statement from the Opinion and remand for discovery and trial.

3. Opinion at fn. 3: “The Association’s bylaws require the Board to appoint an architectural review committee (ARC).”

There is a question of fact as to whether the bylaws are enforceable. The Walls disputed this because the evidence demonstrated the bylaws had not been recorded as required by the Homeowners’ Association Act. S.C. Code § 27-30-110 *et seq.* Further, the evidence shows the Board had not properly appointed the committee as its designee. *See* R. pp. 18 ¶¶ 16, 20-21 (Verified Complaint); R. pp. 163-165; *see also* R. pp. 137-140, 364-366. Because this is a statement on a disputed fact, this Court should remove it from its Opinion.

4. Opinion at fn. 3: “Before pursuing construction of their covered dock, the Dyes . . . submitted their original plans and revised plans to the ARC.”

This factual issue was very much disputed. The record contains the sworn affidavit of a non-party fact witness, who stated: “the ARB never met in person to review the dock and has never reviewed the Dyes’ plans to be in harmony with external design and location of the surrounding structures.” (R. p. 164). *Moreover, what the Dyes may or may not have done has no bearing on the question of whether the Directors breached their duties.* Therefore, this Court should not have decided this fact question as part of an appeal on an improper grant of summary judgment as to questions of law. The Walls respectfully ask that this statement be removed from the Opinion.

5. Opinion at fn. 3: “[T]he ARC and subsequently the Board approved both sets of plans.”

There is no evidence in the Record that the Board of Directors saw either set of the Dyes’ plans. As a nonprofit corporation, the Association must keep meeting minutes of all meetings of the Board and actions by the Board. S.C. Code § 33-31-1601(a). The Association produced no minutes showing the Board had approved of the Dyes’ plans. As the Walls argued, an inference may be drawn—particularly at summary judgment prior to discovery—that the Board neither held a meeting nor reviewed nor approved the plans. The evidence supports the same inference. *See* R. p. 164 (“Jon Dye submitted his plans to the ARB without sending them to the Association Board and with no notice to his neighbors.”). Properly, this Court should withdraw this statement from its Opinion, and remand for discovery and trial on this question of fact.

6. Opinion at fn. 4: “To the extent the Walls contend Respondents circumvented the covenants of the Declaration because of a vote in 2016, this argument lacks merit. Although the Association voted at the 2016 annual meeting to prohibit the construction of covered docks, the record does not contain any evidence showing the Declaration was ever effectively amended to incorporate the decision of this vote.”

This Court has misunderstood the Walls’ arguments. The Walls argued the Directors circumvented the expressed will of the corporation and the members of the Association, to prohibit covered docks, as reflected in the 2016 vote. The vote was a corporate act, even if it was not transformed into a restriction on real property.¹⁰ The point—on summary judgment—is that the vote raises the inference that the Directors

¹⁰ Whether it was a restriction on property might bear on Respondent Dye, if he were a *bona fide* purchaser for value. Instead, though, Dye is the one who called for the vote and then failed to record it.

were disregarding the will of the corporate entity and the homeowners, which they were bound to serve. The Directors certainly had notice and knowledge of the vote, and therefore their decision to contradict the will of the corporation was arguably in bad faith. *See* S.C. Code 33-31-830(c) (“A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance [on information from a committee] unwarranted.”). Moreover, the (undisputed) fact that the Declaration was never amended to incorporate the vote raises the inference of malfeasance. Respondent Dye was the President of the Association at the time of the vote, and he took no steps to record it.

Because, in any event, the question of whether the evidence shows that the Respondents acted to circumvent the governing documents (which include both real property covenants and corporate records) is a material, highly factual question, which should not be resolved on summary judgment by any court.

7. Opinion at p. 4: “Although the Walls contend the Board breached its duty by ‘self-dealing’ because Chakides had a separate application for a covered dock on his own property, we find this argument lacks merit. Chakides was only one member of the Board, which unanimously approved the plans for the Dyes’ covered dock.”

This statement by the Court shows it has mistakenly overlooked that the Walls brought a separate claim against only Director Chakides for breach of fiduciary duty, self-dealing, and conflict of interest. (R. pp. 27-29; *see also* p. 165). Therefore, the factual question of whether Chakides was acting in good faith and without conflict of interest should not be cursorily decided by this Court. *See Fisher*, 415 S.C. 256 at 272 (whether a Director acts in bad faith is a question for the factfinder).

Because the above findings in the Opinion are improper factual determinations for which there is conflicting evidence, the Walls respectfully request that this Court remove them from its Opinion.

IV. The Opinion mistakenly disregards the Supreme Court's direction in *Paradis*.

While this appeal of a grant of summary judgment was pending, the South Carolina Supreme Court altered 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 been tried.** The Walls respectfully ask that this Court would withdraw its Opinion, which misperceives the *Paradis* Court’s directive, and remand the case for discovery and trial.

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), citing 46 Am. Jur.2d Judgments Section 73 (1969); 49 C.J.S. Judgments Section 436 (1947). “[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.* This Court misapprehends 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 (among other things) “the testimony of witnesses shall be taken orally in open court” and the 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 tried**. Instead, it was decided on summary judgment by the Master-in-Equity, one month after it was filed, for the sole and erroneous reason that “no evidence of special damages has been shown.” (R. p. 10). 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 trial on disputed factual issues.” *Englert, Inc. v. Leafguard Usa, Inc.*, 659 S.E.2d 496, 498, 377 S.C. 129 (2008) (emphasis added). Therefore, the *Paradis* decision applies to this appeal and to the Walls’ case, which has not been tried, including the change in law eliminating the element of special damages. The Walls respectfully request that this Court withdraw its mistaken Opinion, reverse the Master on this issue, and remand for discovery and trial.

A. Even under the obsolete elements, summary judgment was improper.

Respectfully, this Court’s Opinion does precisely what its own jurisprudence cautions 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 45-days after filing, before any discovery had been conducted. The lower court’s decision was simply that there was “no evidence of special damages shown by Plaintiffs.” (R. p. 10). But the Walls submitted significant evidence

of special damages. “Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant’s conduct.” *Paradis v. Charleston Cnty. Sch. Dist.*, 424 S.C. 603, 615, 819 S.E.2d 147, 153 (Ct. App. 2018) (applying the old framework), *reversed*. 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 homeowners 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) (emphasis added), *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 failed to 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 and the Walls are entitled to discovery and trial. On summary judgment, neither the circuit court nor this Court is empowered to determine questions of fact; the Court’s capacity is limited to deciding matters of law. Rule 56, SCRCF (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.”).

The Opinion improperly criticizes the face of the pleadings, referring to wording of certain allegations in the Amended Complaint, and then decrees them to be lacking.

But the lower court did not rule that conspiracy was insufficiently pled;¹¹ instead, it ruled that “no **evidence** of special damages has been shown by the Plaintiff.” (R. p. 10) (emphasis added). That is, the Master made a substantive adjudication of the *evidence* itself and construed the inferences in favor of Respondents. This was improper during summary judgment, in which all inferences must be taken in favor of the Walls. It also is improper less than 45 days into a legal action when no discovery had yet occurred.

Respectfully, the proper adjudication by this Court is to withdraw the Opinion, and to allow remand for discovery and trial on the claim for civil conspiracy. 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).

CONCLUSION

The Walls request that this Court reconsider its Opinion, which misapprehends the Nonprofit Corporation Act, misunderstands precedent, makes factual determinations not permitted by its standard of review, and mistakes the Supreme Court’s unambiguous instruction that *Paradis* should be applied to all cases that have not yet been tried.

¹¹ If the Master had ruled on the pleadings, the correct remedy would be to allow the Walls’ permission to amend their pleadings, or to dismiss that cause of action without prejudice to refile. This Court should grant the Walls this remedy, if it believes their pleadings to be lacking under the *Todd* framework.

Respectfully, the Walls ask that this Court would correct its errors and remand for discovery and trial.

Respectfully submitted,

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