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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Brooks P. Goldsmith, Circuit Court Judge

Supreme Court Case No. 2024-001281

Court of Appeals Case No. 2020-001500
Opinion No. 24-UP-082, Filed March 20, 2024
Withdrawn, Substituted, and Refiled May 22, 2024

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

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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II. Did the Court of Appeals properly affirm the circuit court's exercise of the discretion granted to it by the Nonprofit Corporation Act when it ordered Appellant (a nonprofit corporation) to permit Respondent (its member) to inspect corporate records that regulate and manage the affairs of the corporation?

III. Did the Court of Appeals properly affirm the circuit court's exercise of the discretion granted to it by the Nonprofit Corporation Act when it ordered Appellant (a nonprofit corporation) to permit Respondent (its member) to inspect corporate records fundamental to the finances of the corporation?

IV. Did the Court of Appeals properly exercise its discretion under the Rules of Civil Procedure when it compelled production of documents by Appellant to Respondent?

THIS CASE DOES NOT WARRANT REVIEW UNDER RULE 242(b), SCACR

To an extent, Petitioner is correct: yes, the Nonprofit Corporation Act gives corporate members a statutory right to inspect corporate documents and to apply to the circuit court for inspection of those documents if the corporation refuses; yes, the appellate courts have not published an opinion on the scope of a member's rights, nor have appellate courts opined on types of documents to which the inspection right applies; yes, community associations and their management companies are, appropriately, frequently asked by members to make documents available for inspection and copying; and yes, the statutory language, and interpretive opinions of the South Carolina Attorney General's Office, guides community associations in evaluating inspection requests.

Nevertheless, there are good reasons ***why*** appellate courts have not been involved and ***why*** this Court should decline to take this case. The Nonprofit Corporation Act expressly gives the circuit court <u>discretion</u> to decide which documents are subject to inspection rights.

Like other day-to-day matters (discovery disputes, denial of summary judgment motions, etc.), South Carolina's Legislature left these decisions up to the discretion of the circuit courts—**none of us want to live in a world where every request for a homeowner association's documents is elevated to an appealable issue on statutory interpretation.** As a result, the clear statutory language provides circuit courts the guidance they need to exercise the discretion they are granted, based on the facts before them. Consequently, this case does not present a novel issue of law. Rather, the statute answers the question posed.

Here, the circuit court properly exercised its statutorily-granted discretion to decide to subject the document at issue to inspection by members. Adhering to legislative intent and the statutory language, the Court of Appeals unanimously and properly affirmed the circuit court's discretionary decision. Lacking any special considerations for granting Petitioner's request, this Court should decline to take this case.

INTRODUCTION

This case concerns one, simple question that has been answered, correctly, by the circuit court pursuant to the discretionary authority vested in it by the Legislature, and affirmed, correctly, by the Court of Appeals. The question is whether a nonprofit corporation can withhold from its member the right to inspect a governing document, despite the Legislature's deliberate provisions imparting the member with inspection rights. As it did before the circuit court, and again before the Court of Appeals, Petitioner attempts to cloud the issue with complicated facts about a complicated organization with a complicated history. Neither the circuit court nor the Court of Appeals fell for this move, and this Court should not, either.

Here is what matters: Respondent Advocaat is a member of Petitioner, Community

Services Associates, Inc. ("CSA"). CSA is a massive nonprofit corporation that by definition is a homeowners' association ("HOA"). CSA's given purpose is to maintain the common areas in Sea Pines Plantation, a massive development in Hilton Head, South Carolina ("Sea Pines"). Notably, CSA has two classes of members, one being residential property owners, and the other having commercial interests.[1]

In contrast to CSA's description, the document that CSA tried to withhold from its members is not an ordinary, private contract with third parties. Rather, this document is an intra-corporate agreement between CSA and select commercial **members** of CSA, which purports to dictate the **internal** terms by which a major source of CSA's revenue is to be collected and used. Significantly, CSA has previously allowed its members to inspect past versions of this agreement. In fact, CSA previously posted copies on its own website. But in 2018, CSA—with two commercial members—amended the agreement ("2018 Amendment") and then attempted to conceal the amendment from residential members like Advocaat.

Troublingly, the 2018 Amendment faced friction from the beginning—one CSA board member recused himself, on advice of counsel, writing (among other things):

> This imposition of a potentially unlimited financial burden upon CSA is unprecedented, unnecessary and not in the best interests of CSA. . . .
>
> For [these] reason[s], and on the advice of counsel, I shall recuse myself from board decisions concerning the proposed amendment to the gate fee policy in its current form, and I will not sign it.

(R. p. 171).

[1] The original developer of Sea Pines designed it to be comprised of both residential units and commercial interests. The owners of residential units, as well as the owners of commercial interests, within Sea Pines are members of CSA. In other words–putting into a nutshell what is in actuality a rather complicated nonprofit corporation–CSA is comprised of several classes of members, including residential and commercial, which together: control CSA; are obligated to pay assessments; and regulate and maintain the development as a whole. *See* R. p. 173.

In the Nonprofit Corporation Act and the Homeowners' Association Act, the Legislature set forth a member's right to inspect corporate records and governing documents. Advocaat filed this lawsuit pursuant to those statutes. The circuit court correctly found that she had the right to inspect the records she sought. The Court of Appeals correctly and unanimously affirmed the circuit court's discretionary decision.

COUNTER-STATEMENT OF THE CASE

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

CSA is a nonprofit corporation, organized pursuant to the South Carolina Nonprofit Corporation Act. CSA's corporate purpose (*inter alia*) is to manage and maintain the expansive common areas within Sea Pines.

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

The manner in which CSA runs and controls the gates hinges upon a "Gate Agreement." The Gate Agreement controls the amount of gate fees collected, and it purports to dictate the way those millions of dollars in fees are to be spent. The Gate Agreement is an

[2] *See* R. p. 172; R. p. 430. CSA's overall annual revenue in 2018 was nearly $12 million.

internal agreement between CSA and two of its commercial members: Sea Pines Resort, LLC (the "Resort"), and Sea Pines Center Associates, LLC (the "Center"). A variation of the Gate Agreement originally appears in the 1988 Declaration for Sea Pines, and its terms are specifically incorporated into that recorded document, which binds all property in Sea Pines Plantation. R. p. 178. Since 1988, the Gate Agreement has been amended several times.

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

However, in 2018, CSA entered into an *amendment* to the Gate Agreement with certain of its commercial members. The 2018 Amendment pertains to (among other things) the prices of gate entry fees from 2018 through 2021. Notably, the residential members, including Advocaat, believe that the Amendment identifies new items on which those common funds may be spent, in violation of the covenants. As previously mentioned, at least one CSA board member refused to participate in the decision, on advice of counsel, partly because "This imposition of a potentially unlimited financial burden upon CSA is unprecedented, unnecessary and not in the best interests of CSA." (R. p. 171).

CSA refuses to allow its members (except for specific commercial members, who are signatories and hold eight seats on CSA's board) to see the 2018 Amendment. However, CSA's board has expended a remarkable amount of corporate energy in describing to its residential members *limited* portions of the 2018 Amendment and harping on its significant financial ramifications for the community. (*See* R. pp. 402–15).

Respondent Advocaat is a member of CSA by virtue of her ownership of property encumbered by the various declarations of covenants imposed upon the property. *See* R. pp 53, 173. She properly asked to see the Gate Agreement, and its amendments. CSA refused to allow her to do so. R. pp. 489–92. The circuit court properly found that Advocaat was entitled to view the Gate Agreement and its amendments, which directly bears on her membership and property. This Court should not further review the lower court's discretionary decision.

ARGUMENT

This Court should deny CSA's Petition for two broad reasons. First, this all went according to the statutory plan. The Legislature intended for circuit courts to use their discretion to dispense with disputes over the inspection rights at issue in this case. Here, the circuit court did so, and the Court of Appeals properly, and unanimously, affirmed. This Court need not get involved; the circuit court operated just as the applicable statute intended. Second, and simply, the circuit court, and the Court of Appeals, got it right.

Properly reviewing the circuit court's decision under the abuse of discretion standard, the Court of Appeals affirmed the circuit court on three legal grounds as to why CSA was required to permit Advocaat to inspect the records that she properly requested.[3] The first two reasons are that CSA has a statutory duty to permit inspection, pursuant to sections of the South Carolina Nonprofit Corporation Act pertaining to bylaws and accounting records. The third reason stems from the Nonprofit Corporation Act's express acknowledgment of a

[3] The circuit court ordered CSA to permit Advocaat to inspect the requested records, including the Gate Agreement and any amendments. (R. p. 3). This is potentially important due to the timeline of this appeal, which may not be resolved before CSA enters into yet another amendment to the Gate Agreement. However, for ease of reading, this Return refers to the "Gate Agreement" with the intent to incorporate all the records that the circuit court ordered CSA to allow Advocaat to inspect.

litigant's right to discovery of corporate records.

Each of these reasons is an independent ground for inspection; each is an independent ground for sustaining the circuit court's decision. This Court should decline CSA's Petition.

I. The Court of Appeals properly reviewed the circuit court's decision under the abuse of discretion standard because the circuit court directed CSA to produce the 2018 Amendment as authorized by the Nonprofit Corporation Act.

CSA incorrectly argues that the circuit court interpreted the statute in ordering inspection of the 2018 Amendment. But the circuit court was not interpreting or construing the statute, which is unambiguous. Instead, the court was acting pursuant to the statute's clear directive: where a nonprofit corporation refuses to permit its member to inspect a corporate record, the court has discretion to order inspection. In other words, the circuit court compelled CSA to allow Advocaat's inspection of the 2018 Amendment because the court had explicit discretion to do so under the statute. Thus, the Court of Appeals should have, and properly did, review that order under the abuse of discretion standard. This Court should decline to review the Court of Appeals.

The statutory scheme grants to circuit courts the discretionary authority to order nonprofit corporations to permit inspection of records upon demand by a member. Initially, the scheme imposes a duty upon nonprofit corporations, like CSA, to permit their members, like Advocaat, to inspect corporate records. The duty is triggered when the member provides the corporation with statutorily sufficient notice of the member's intent to inspect and, with regard to accounting records, identifies a proper purpose for the request:

> a member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in Section 33-31-1601(e)[4] if the member gives the corporation written notice or a

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

> written demand at least five business days before the date on which the member wishes to inspect and copy.

S.C. Code § 33-31-1602(a).[5]

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

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

S.C. Code § 33-31-1604(a) (emphasis added).[6] This summary process is intended to bring swift resolution to members, who are entitled to transparency from the nonprofit.

Because the circuit court acted with the discretion afforded to it in ordering CSA to allow Advocaat to inspect the records she requested, the Court of Appeals properly reviewed the circuit court's order under the abuse of discretion standard.

---

[5] The fact that Advocaat made a statutorily sufficient request is the undisputed law of the case. CSA did not appeal the portions of the order pertaining to the sufficiency of Advocaat's notice and demand to inspect CSA's records, nor as to her stated purpose for inspection. (R. pp. 3–4, 6, 8).

[6] As a roadmap for this Court, Advocaat brought her Application to Inspect Corporate Records pursuant to Article 16 of the S.C. Nonprofit Corporation Act, which sets forth the framework for members' inspection rights. S.C. Code § 33-31-1604 has several subsections, in addition to the one quoted, which identify the "hoops" that a member must jump through in order to inspect particular types of corporate records, as well as the function of the judiciary in enforcing the members' inspection rights. S.C. Code § 33-31-1604(b) contains a similar mandate to the block quote above, with room for a bit more discretion by the court as to the reasonableness of the time taken by the corporation to furnish the records. Here, the circuit court quoted both subsections in its Order, and it found that Advocaat had properly jumped through the requisite statutory hoops, entitling her to inspect the records she requested. (R. pp. 8–9).

Moreover, the Court of Appeals correctly reviewed the circuit court's decision under the abuse of discretion standard because the circuit court's order is one that is injunctive in nature and springs from an action taken pursuant to statutory authority. In Advocaat's Brief to the Court of Appeals, Advocaat likened the circuit court's order to a writ of mandamus, urging the Court of Appeals to review the circuit court's decision under the abuse of discretion standard. *See Richland Cnty. v. S.C. Dep't of Revenue*, 422 S.C. 292, 307, 811 S.E.2d 758, 766 (2018) (the decision on whether to issue a writ of mandamus is "within the sound discretion of the circuit court, and an appellate court will not overturn that decision unless the circuit court abuses its discretion."). Resp. Br. pp. 7-10.

Similarly, the Court of Appeals likened the circuit court's order to an injunction and thus reviewed it under the abuse of discretion standard. *See Hook Point, LLC v. Branch Banking & Tr. Co.*, 397 S.C. 507, 510, 725 S.E.2d 681, 683 (2012) ("The grant of an injunction is reviewed for abuse of discretion."). An injunction and a writ of mandamus are both compulsory in nature, as the court compels certain parties to do certain things. Here, the circuit court, acting with the discretionary authority given to it by statute, compelled CSA to allow Advocaat to inspect the records she requested. In contrast to CSA's argument in its Petition, the circuit court did not have to "interpret" the statute to make its order. Rather, the statute directed the circuit court to exercise its discretion to make such an order. Such a compulsory action is to be, and was correctly, reviewed for an abuse of discretion.

Moreover, CSA references the circuit court's decision that the 2018 Amendment was discoverable pursuant to the Rules of Civil Procedure. Discovery decisions are not disturbed on appeal absent abuse of discretion, and the appellate court must find the circuit court's decision was controlled by an error of law to overturn the discovery decision. *Evening Post*

Publ'g Co. v. Berkeley County Sch. Dist., 392 S.C. 76, 708 S.E.2d 745 (2011).

In sum, the Court of Appeals correctly reviewed the circuit court's decision under the abuse of discretion standard. This Court need not reconsider and should deny CSA's Petition.

II. The Court of Appeals properly affirmed the circuit court's exercise of its discretion pursuant to the Nonprofit Corporation Act by ordering CSA, a nonprofit corporation, to permit Advocaat, its member, to inspect corporate records that regulate and manage the affairs of the corporation.

Put simply, this Court should deny CSA's petition because the 2018 Amendment is a bylaw governing the affairs of CSA, which the circuit court correctly held members of CSA are entitled to view. The Nonprofit Corporation Act gives members the absolute right to inspect certain corporate records:

> A member is entitled to inspect and copy, at a reasonable time and location specified by the corporation, any of the records of the corporation described in Section 33-31-1601(e)[7] if the member gives the corporation written notice or a written demand at least five business days before the date on which the member wishes to inspect and copy.

S.C. Code § 33-31-1602(a). These records include the governing documents of the corporation, such as bylaws.

To promote transparency and discourage gamesmanship by corporations, the statute's definition of "Bylaws" is designed to encompass <u>any</u> document used by the corporation for the management of corporate affairs. The statute defines "Bylaws" broadly:

> "Bylaws" means the code or codes of rules, other than the articles, adopted pursuant to this chapter **for the regulation or management of the affairs of the corporation <u>irrespective of the name</u> or names by which the rules are designated**.

S.C. Code § 33-31-140(b)(4) ("Definitions") (emphasis added). Thus, the statute cares about

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

the function, rather than the name, of the document at issue. Accordingly, the statute specifies that any document intended to regulate and manage the affairs of the corporation is a bylaw, regardless of its name. Whether that corporation chooses to name the document a "Rule" or a "Commandment" or an "Agreement" or a "Royal Decree" is irrelevant.

Using the discretion afforded to it by statute, the circuit court determined that the 2018 Amendment is a bylaw intended to regulate the affairs of the corporation, and that Advocaat has the right to inspect it. The Court of Appeals unanimously affirmed, reasoning CSA adopted the documents to regulate and manage its affairs.

In its Petition, CSA advances three arguments as to why the circuit court and the Court of Appeals reached an incorrect conclusion. As discussed below, all three are insufficient for this Court to grant CSA's Petition.

A. The circuit court and Court of Appeals both correctly saw through the mirage. Although the Gate Agreement is labeled a contract, it is in fact a bylaw subject to inspection rights under the Nonprofit Corporation Act.

CSA claims that the Gate Agreement is only a "contract," and the court ignored statutory language in ruling that the Gate Agreement is a bylaw. So, according to CSA, the lower court's decision was a reversible error of law. But CSA's argument oversimplifies the Gate Agreement and fails to consider its implications that directly bear on CSA's members.

Contrary to CSA's argument, the statutory definition of "Bylaws" unequivocally includes certain agreements (contracts) like the Gate Agreement. The definition plainly applies to <u>any</u> code or rules that regulate or manage the affairs of the corporation "<u>irrespective of the name</u> or names by which the rules are designated." S.C. Code § 33-31-1604(a) (emphasis added). Thus, the definition includes internal rules (agreements; contracts) among members of the corporation which dictate the terms by which the

corporation fulfills its corporate functions.

Using its discretion, the circuit court found that, despite its name, the Gate Agreement regulates and manages the affairs of the corporation. Thus, the circuit court held the Gate Agreement is a bylaw for purposes of the statutory provision. Notably, CSA's corporate affairs include managing and maintaining the common areas, and the Gate Agreement regulates and manages the gates to the community (a common area) while also regulating the corporation's use of the fees associated therewith (used to maintain the common areas). Further, since the Gate Agreement is between CSA and two of its commercial members, the Gate Agreement regulates the behavior of the corporation with those members.

The 2018 Amendment pertains to a major, multi-million-dollar resource of the corporation (the gate fees), and it purports to dictate its use for common areas. Consequently, the circuit court properly looked past the name and into the function of the Gate Agreement, holding the Gate Agreement is a bylaw and subject to inspection rights. S.C. Code § 33-31-1602(a) ("the circuit court . . . may summarily order inspection and copying of the records demanded . . ."). The Court of Appeals properly, and unanimously, affirmed. Similarly, this Court should deny CSA's Petition.

B. The Parade of Horribles lacks the requisite horror.

Hoping to scare this Court into granting its Petition, CSA next argues the Court of Appeals misconstrued legislative intent and would require all contracts a nonprofit corporation enters into be considered a bylaw of that corporation. Fear not! The ruling does not go so far, and CSA's worries are alleviated by the facts surrounding the Gate Agreement.

This Court should remember two things, both already analyzed, when assessing CSA's policy argument here. First, the statutory definition of "bylaw" is broad—if CSA takes

issue with its breadth, its issue is with the Legislature, not with this Court. The Legislature has directed circuit courts to use discretion to apply the broad definition of "bylaw" to dispense with disputes over inspection rights, which the lower court properly did.

Second, CSA oversimplifies the Gate Agreement and overexaggerates the ruling below, misconstruing its effect. CSA tries to characterize the Gate Agreement as a simple agreement between CSA and two third parties. According to CSA, it follows that the ruling below would allow every contract a nonprofit corporation enters be deemed a bylaw. But CSA's characterization is inaccurate. For starters, as already discussed and contrary to CSA's argument, the Gate Agreement is <u>not</u> a simple contract between CSA and two third parties. The Gate Agreement is an *intra*-company agreement between CSA and two of its members, which regulates and manages a major resource of the corporation. While the statute does not require every contract to be subject to inspection rights, the Gate Agreement is not a close case. Nor is it one that needs published appellate court commentary. The statue absolutely includes a nonprofit corporation's internal agreements (rules) with members of that nonprofit corporation—and particularly internal agreements which dictate the terms by which the corporation fulfills its corporate functions. In any event, the circuit court had statutory discretion to compel the inspection rights.

Ultimately, the Nonprofit Corporation Act intends for members of nonprofit corporations to have access to the corporation's records, especially those that dictate the management and regulation of the affairs of the nonprofit corporation and its members. The ruling below does not raise questions about whether every contract is a bylaw—the ruling upholds the circuit court's exercise of its statutory discretion to resolve a dispute over the inspection rights concerning a governing document. As a result, this Court should deny

CSA's Petition.

C. Similarly, CSA's concerns that it may have to record the Gate Agreement are overblown.

Finally, with another fear-mongering policy argument, CSA urges this Court to grant its Petition on the alleged grounds that if the circuit court's order stands, CSA would need to record the 2018 Amendment . . . as if that were a bad thing. Referencing the requirement under the Homeowners Association Act, in S.C. Code § 27-30-130(A), that bylaws must be recorded in order to be enforceable, CSA complains that the rulings below would require it to record the Gate Agreement. That may be correct. Further, CSA suggests the ruling below would require it, and other HOAs, to record every contract. *That* is incorrect.

The Legislature and statute is clear: if a nonprofit corporation executes an internal agreement (rule) that internally divvies up millions of its members' dollars, the members must know about it. So yes, CSA may need to record the Gate Agreement, including the 2018 Amendment. That should not be problematic. The 2018 Amendment dictates CSA's use of significant common property. Members cannot properly understand the governance and management of this corporation without access to it. Thus, recordation of the 2018 Amendment would benefit current and prospective residential and commercial members of CSA who need to know what regime they are under or what they are buying into, respectively. So, yes, CSA likely would need to fulfill its statutory obligations and record the 2018 Amendment for public notice of how it uses significant common property.

But CSA and other HOAs need not worry about whether they need to record every contract. They do not need to do so, and the ruling below would not require them to. Pursuant to the statutes, CSA and other HOAs would simply need to record documents that regulate and manage the affairs of the nonprofit corporation. Whether the applicable HOA

wants to label such a document as a Bylaw, a Covenant, or an Agreement is up to them. But the argument that this Court should grant the Petition because a nonprofit corporation does not want to record documents that affect their members' property interests is insufficient.

In sum, this Court should decline CSA's Petition because, as the circuit court decided pursuant to its statutory discretion, and as the Court of Appeals correctly and unanimously affirmed, the 2018 Amendment is a bylaw that governs the affairs of CSA.

III. The Court of Appeals properly affirmed the circuit court's exercise of its discretion given by the Nonprofit Corporation Act when it ordered CSA, a nonprofit corporation, to permit Advocaat, its member, to inspect corporate records fundamental to the finances of the corporation.

Next, the Court of Appeals affirmed the circuit court's order allowing Advocaat to inspect the records she properly requested on the grounds that the circuit court made no error in ruling the records are accounting records. In its Petition, CSA urges this Court to grant a writ of certiorari for two related reasons. First, CSA wrongly argues the circuit court's decision demonstrates it engaged in statutory interpretation, so the Court of Appeals should have reviewed its decision de novo. Second, CSA wrongly argues the circuit court lacked reasonable evidentiary support to conclude the records were accounting records, so the circuit court committed reversible error even under the abuse of discretion standard of review. Both of CSA's arguments miss the mark.

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

According to CSA, the two facts that, one, the phrase "accounting record" is undefined, and, two, the circuit court considered an opinion from the South Carolina Attorney General's Office, demonstrates that the circuit court engaged in statutory interpretation, so its decision should have been reviewed de novo. Essentially, CSA makes

much out of the fact that "accounting record" is undefined, arguing the circuit court must have *interpreted* that phrase to reach its conclusion. As a result, returning to the first issue analyzed herein, CSA would have this Court hear this case to clarify the review should have been conducted de novo. Crucially, though, CSA fails to consider key provisions under the Nonprofit Corporation Act that expressly grant discretion to the circuit courts to determine, on a case-by-case basis based on a holistic review of the facts before it, what an accounting record is. Thus, CSA's argument fails, and this Court should deny its Petition.

Under the Nonprofit Corporation Act, a nonprofit corporation must "maintain appropriate accounting records," and its members have the right to inspect them.[8] S.C. Code §§ 33-31-1601, 1602(b)(2) *et seq.* Importantly, the Legislature **delegated to local circuit courts** the question of <u>which</u> accounting records a member is entitled to inspect. The statute imparts to those local courts broad discretion in making that determination:

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

S.C. Code § 33-31-1604(b) (emphasis added). In this instance, the circuit court examined the facts before it and concluded that, under these circumstances, the 2018 Amendment constitutes an accounting record of the corporation. Because the circuit court did not abuse that discretion when it ordered CSA to permit Advocaat to inspect the Gate Agreement, the Court of Appeals properly affirmed. *See Richland Cnty. v. S.C. Dep't of Revenue*, 422. S.C. 292,

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

307, 811 S.E.2d 758, 766 (2018) (internal citations omitted) ("An abuse of discretion arises where the circuit court was controlled by an error of law or where its order is based on factual conclusions that are without evidentiary support.").

In short, the circuit court did not engage in statutory interpretation to determine whether the records Advocaat requested were accounting records. Rather, the circuit court made its decision, based on the facts before it, under the discretion granted to it by the Nonprofit Corporation Act. Consequently, CSA's argument that the circuit court interpreted the statute's non-definition of "accounting records" fails.

B. The circuit court properly determined the Gate Agreement is an accounting record under these circumstances.

In its next point, CSA attempts to argue the circuit court rendered its decision without any reasonable factual support, so the circuit court made a reversible error even under the abuse of discretion standard of review. CSA wrongly posits that for a document to be an accounting record, it must be used to prepare financial records. Additionally, notwithstanding its contention the circuit court lacked any reasonable evidence to support its order, CSA admits the circuit court considered that CSA's own statements to its members supported the ruling that the Gate Agreement was a financial record; however, CSA seemingly argues that the evidence does not show CSA actually used the Gate Agreement to prepare its financials. As discussed below, CSA's argument fails, and this Court should decline CSA's Petition.

(i) A document does not have to be used to actually prepare financials to be deemed an accounting record.

CSA asks this Court to grant its Petition and clarify that an accounting record is only one which an accountant actually uses to prepare the financial records for a nonprofit

corporation. To address this point, it bears repeating that the circuit court exercised the discretion given to it by the Legislature in deciding, under these particular circumstances, the 2018 Amendment is an accounting record open to inspection by members. S.C. Code § 33-31-1604(b) ("the member . . . may apply to the circuit court in the county where the corporation's principal office . . . is located . . . for an order to permit inspection . . . on an expedited basis"). Without a statutory definition of "accounting record," the circuit court had discretion to determine whether the 2018 Amendment is an accounting record based on the totality of the circumstances before it. If accounting records were limited only to those actually used to prepare financial records, the circuit court would have no discretion at all, and the legislative intent would be defeated.

Moreover, the circuit court's order aligned with the South Carolina Attorney General Office's opinion on what an accounting record may be:

> [W]e believe that Legislative intent was for any and all underlying documents or materials used to prepare a non-profit corporation's financial statements to be inspected by a member so long as the member provides written notice, the member's demand is in good faith and for a proper purpose, the member specifically describes the purpose and the records he wants to inspect, and the records are directly connected with the purpose.

S.C. Atty. Gen. Op. dated Jan. 26, 2016, at 4 (2016 WL 963698). Notably, that opinion does <u>not</u> suggest a document <u>must</u> be used to <u>actually</u> prepare financial records for that document to be deemed an accounting record.

Significantly, the official commentary to the Nonprofit Corporation Act deliberately leaves open the question of which accounting records a corporation must permit its members to inspect, permitting courts to decide, on a case-by-case basis: "***The question of what accounting records are 'appropriate' depends on the nature, size and other characteristics of the corporation.***" Off. Cmt. 2, § 33-31-1601 (emphasis added).

Therefore, the net in which a document may be caught as an accounting record may be a big one, depending on the circumstances. Importantly, but in contrast to CSA's argument in its Petition, that net does not require a document actually be used for the preparation of an accounting record. Rather, if a document could be helpful for the preparation of an accounting record, or contains accounting information, that document may be an accounting record. This broad definition is particularly fitting for a nonprofit corporation where the policy is to allow the members of a nonprofit corporation broad access to the corporation's records. S.C. Atty. Gen. Op. dated Jan. 26, 2016, at 4 (2016 WL 963698) (". . . Legislative intent was for any and all underlying documents or materials used to prepare a non-profit corporation's financial statements to be inspected by a member . . .") (emphasis added).

This Court should not buy in to CSA's assertion that a document must be used to actually prepare financial records to be deemed an accounting record. In contrast, the circuit properly exercised its discretion to determine the 2018 Amendment was an accounting record under these circumstances, and the Court of Appeals appropriately affirmed.

(ii) Reasonable evidence supported the circuit court's finding that the 2018 Amendment is an accounting record.

CSA asserts a total lack of evidentiary support for the circuit court's finding that the 2018 Amendment is an accounting record, urging this Court to grant its Petition to consider reversing what CSA would classify as an error of law. Nevertheless, in its argument, CSA admits the circuit court considered certain evidence to support the conclusion it reached. The Court of Appeals, considering that same reasoning, properly found it sufficient to uphold the circuit court's discretionary conclusion. Because reasonable evidentiary support for the circuit court's conclusion does exist, this Court should deny CSA's Petition.

Here, the circuit court, as empowered by the Legislature, properly examined the particular circumstances of Advocaat's record request in light of CSA's size, nature, and factual circumstances surrounding the particular document sought. The court properly based its judgment on the facts before it, which indicated that CSA is a large, sophisticated corporation, with a $13 million annual budget and complex accounting records, charged with managing the finances and property interests of thousands of members. (R. pp. 1-12).

Although CSA withheld the Gate Agreement from its members, CSA expended a huge amount of corporate energy explaining the financial ramifications of the Agreement to its members. (R. pp. 402–15). For example, CSA has emphasized to its members how critical gate fees are to Sea Pines' finances:

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

(R. pp. 402–403).

Looking at all the evidence, the circuit court decided, in its discretion, that it "is clear from CSA's own communications to its members that the documents Plaintiff seeks to inspect are very much accounting records of the corporation, profoundly affecting its finances." (R. p. 7). This makes sense: because the 2018 Amendment provides the rules and context

surrounding CSA's use of a significant source of its financial resources, reviewing the 2018 Amendment would undoubtedly assist any preparation of financial records for CSA. Additionally, CSA admitted to its members that the 2018 Amendment imposed a significant effect on valuable common resources.

In conclusion, the circuit court properly exercised its discretion, ruling that the requested document—which dictates the collection and use of millions of dollars of CSA's money—fell under the category of accounting records in this instance, taking into account the facts as a whole. Considering that reasonable evidence supported that conclusion, the Court of Appeals appropriately affirmed. As a result, this Court should deny CSA's Petition.

IV. The Court of Appeals properly exercised its discretion under the Rules of Civil Procedure when it compelled production of documents by CSA to Advocaat.

Finally, the Court of Appeals properly upheld the circuit court's decision to treat Advocaat's complaint, which sought inspection of the Gate Agreement, as a motion to compel production under the South Carolina Rules of Civil Procedure. Now, CSA argues the Court of Appeals erred because, according to CSA, the Nonprofit Corporation Act renders the Rules of Civil Procedure essentially inoperative. However, because the Nonprofit Corporation Act and the Rules of Civil Procedure cooperate with each other, and because the Rules of Civil Procedure provide the circuit court with discretion to handle discovery, CSA's argument fails, and this Court should deny its Petition.

CSA advances three key points. First, CSA argues the circuit court rendered language in the Nonprofit Corporation Act superfluous or a nullity. Second, CSA contends the Nonprofit Corporation Act's specific and blanket exclusion of its limitations on the Rules of Civil Procedure are inapplicable to this case. And third, CSA argues the Court of Appeals

relied on inapplicable case law in its reasoning that the substance, rather than the name, of Advocaat's complaint allowed it to be considered a motion to compel. Because the Nonprofit Corporation Act directly addresses its relationship with the Rules of Civil Procedure, CSA's first and second arguments are defeated and should be considered together.

A. The Nonprofit Corporation Act does not limit the Rules of Civil Procedure.

The Nonprofit Corporation Act "does not affect: (1) the right of a member to inspect records . . ., if the member is in litigation with the corporation, to the same extent as any other litigant." S.C. Code § 33-31-1602(d). But, before mentioning the rule quoted above, which is tucked between its two main arguments, CSA asserts that compelling the production of the Gate Agreement under the Rules of Civil Procedure renders language in the Nonprofit Corporation Act superfluous or a nullity. Additionally, CSA proposes that because the Nonprofit Corporation Act is more specific than the Rules of Civil Procedure, the Gate Agreement should not have been produced pursuant to the Rules of Civil Procedure. After spilling plenty of ink, CSA acknowledges this statute's express language, but attempts to argue the rule cannot apply in this case because this rule only applies when the litigation regards a claim other than access to documents under the Nonprofit Corporation Act.

CSA's argument is lacking. The rule quoted above demonstrates the legislative intent that the Rules of Civil Procedure cooperate with the Nonprofit Corporation Act. The Rules of Civil Procedure do not nullify the statute, and the Nonprofit Corporation Act does not nullify the Rules of Civil Procedure, which vest certain powers in the circuit court. Additionally, CSA may be concerned about parties simply suing nonprofit corporations to obtain documents in discovery, essentially as a run-around to evade the Nonprofit Corporation Act; however, such a concern is overblown as the Rules of Civil Procedure

provide protection for documents produced in discovery. Circuit courts often order disclosures of disputed documents in highly contested litigation. If discoverable documents deserve protection, circuit courts can order documents to be protected by a confidentiality order. Such orders would allow—and at times be necessary to—a productive discussion as to whether or not a particular document falls under the provisions of the Nonprofit Corporation Act. In any event, CSA's argument that production under the Rules of Civil Procedure nullifies the Nonprofit Corporation Act is inapplicable in this case and nevertheless incorrect; the circuit court has authority to order a review of the document at issue under the South Carolina Rules of Civil Procedure.

In sum, the South Carolina Rules of Civil Procedure "govern the procedure in all South Carolina Courts in all suits of a civil nature." Rule 1, SCRCP. Thus, the Rules of Civil Procedure cooperate with, and do not nullify, the Nonprofit Corporation Act.

B. The Rules of Civil Procedure grant the circuit court discretion to handle discovery.

Next, CSA argues the Court of Appeals erroneously relied on cases suggesting that pleadings and motions should be treated based on substance and effect rather than name when it found the circuit court properly treated the complaint as a motion to compel. And, CSA argues, Advocaat was not attempting to obtain relevant information through discovery but was, instead, solely attempting to obtain the document at issue.

But CSA's argument does not move the needle because it fails to consider the discretion given to circuit courts by Rules 26 and 34 of the Rules of Civil Procedure:

> Parties may obtain discovery regarding **any matter, not privileged, which is relevant to the subject matter involved in the pending action**, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible

> things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence.

Rule 26(b)(1), S.C. R. Civ. P. (emphasis added). Here, Advocaat requested the 2018 Gate Agreement in discovery, and CSA refused to produce it based on privilege. (R. p. 504). Because CSA lacked any viable privilege, CSA improperly withheld the 2018 Gate Agreement, and Advocaat was entitled to receive it.

CSA opines the Court of Appeals cited inapplicable case law in support of the circuit court treating Advocaat's complaint as a motion to compel as it compelled the production of the 2018 Amendment under the discovery rules. In support of its argument, CSA attempts to discern the differences between the cited case law and the case at hand; however, critically, CSA fails to consider the discretion afforded to the circuit court in dealing with discovery disputes. While litigants may file a motion to compel as *one* way to get a document under Rules 26 and 34,[9] another way is for the court to so order under the authority vested in it, including under the Rules of Civil Procedure. *C.f. Samples v. Mitchell*, 329 S.C. 105, 109, 495 S.E.2d 213, 215 (Ct. App. 1997) ("In South Carolina the scope of discovery is very broad and 'an objection on relevance grounds is likely to omit only the most excessive discovery request.' . . ." (internal quotations and citations omitted).

In this case, the parties argued discovery issues before the circuit court, and that court was empowered to rule on the production on the document. (R. pp. 510, 520, 535). Because the circuit court had discretion to compel the production of that document, the Court of

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

Appeals appropriately affirmed its decision. Consequently, this Court should deny CSA's Petition.

CONCLUSION

Respondent respectfully requests this Court deny Appellant's Petition. There are no special considerations that warrant this Court's review of the Court of Appeals' unpublished decision. The Court of Appeals correctly reviewed the circuit court's discretionary decision under the abuse of discretion standard of review. The Court of Appeals correctly affirmed the circuit court's discretionary decision that Advocaat could inspect the 2018 Amendment as a bylaw and an accounting record pursuant to the Nonprofit Corporation Act. Lastly, the Court of Appeals correctly affirmed the circuit court's decision to compel the production of the 2018 Amendment under the South Carolina Rules of Civil Procedure.

Respectfully submitted,

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