THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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Withdrawn, Substituted, and Refiled May 22, 2024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…….Petitioner.

REPLY TO RETURN TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

This appeal is about a nonprofit community association's private contract and whether a member of the association has a right to inspect the contract under the Nonprofit Corporation Act. The Gate Agreement at issue is a contract between three parties that establishes gate entry fees for public access to the community between 2018 and 2021, and outlines how the fees should be used. This appeal is not about how the association uses the gate fee revenue and whether the Gate Agreement is discoverable in such a case. This appeal is—or should be—purely about inspection rights under section 33-31-1602 of the South Carolina Code.

The circuit court found the private contract was a "bylaw" and "accounting record" under the NonProfit Corporation Act (Act), and that Respondent had a common law right and right as a litigant to inspect the private contract. The Court of Appeals made numerous, compounding errors in rubber stamping the circuit court's decision.

Appellant petitioned for writ of certiorari on August 7, 2024, asking this Court to correct the glaring errors. Respondent Advocaat filed a return to the petition on September 6, 2024. Appellant timely files this Reply under Rule 242(g), SCACR.

REPLY TO RESPONDENT'S POSITION ON CONSIDERATIONS UNDER RULE 242(B), SCACR

Respondent agrees that no appellate court has published an opinion on the scope of a member's inspection rights or on the types of documents to which that right applies under the Act. Further, Respondent agrees that community associations are frequently asked by their members to inspect documents. Yet Respondent advocates this Court should not address the issue because it involves a circuit court's discretion and "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." **Resp. Return at 2**. Respondent compares a decision under the Act to a circuit

court's decision in discovery disputes and denying summary judgment, and effectively says the language in the Act is sufficient to guide courts. Respondent's position is unconvincing.

First, the right to appeal exists independent of whether the circuit court's decision is discretionary or on an issue of law—this is precisely why different standards of review exist.

Second, Respondent's analogy to discovery orders and orders denying summary judgment as being properly vested in the circuit court's discretion suggests she advocates that a decision under the Act is not immediately appealable. That ship has sailed. The parties jointly petitioned the Court of Appeals to rehear its order dismissing the appeal as interlocutory, agreeing the issue was immediately appealable. Regardless, the Act allows the circuit court to summarily decide inspection rights. Thus, once the circuit court summarily decides those rights, that decision is appealable. The decision is not at all like a decision on discovery disputes or the denial of summary judgment, which decides nothing about a case and the parties are free to raise the issues later.

Third, Respondent asserts the clear statutory language provides the guidance circuit courts need to make decisions under the Act and, therefore, this Court does not need to hear the appeal. However, in the parties' joint petition for rehearing to the Court of Appeals Respondent agreed "the issue [is] of significant importance to the bench and bar given the dearth of case law interpreting a statute frequently handled by litigants and circuit courts, [and] judicial economy favors deciding the issue on the merits and providing guidance to the bench and bar." **Joint Petition at 7**.

Ultimately, the issues in the case are novel and the appealed decision if allowed to stand is troublesome because the courts have not addressed the consequences of their decisions: the finding that a private contract is a "bylaw" under the Act requires the private contract to be recorded pursuant to the Homeowners Association Act in order to be enforceable. Such a decision could

require *every* agreement of a nonprofit to be recorded, from a construction contract to employment contracts. This Court should grant the petition for writ, correct the errors, and provide guidance to the bench and bar.

ARGUMENT

I. Contrary to Respondent's arguments, the issues involve statutory interpretation that are subject to a de novo review and the Court of Appeals erred in applying the abuse of discretion standard.

Issues of statutory interpretation are questions of law to be reviewed de novo on appeal. *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 663 S.E.2d 484 (2008). De novo review applies even if the question may involve findings of fact or the application of law to fact. *See generally Charleston Cnty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995).

A request for relief injunctive in nature (the basis of the Court of Appeals' analysis—which Petitioner asserts was incorrect, *infra*) does not change the standard of review: "Although an order granting or denying a request for injunctive relief is generally reviewed for an abuse of discretion, 'where the decision turns on statutory interpretation . . . this presents a questions of law.'" *May for A.R.M. v. Dorchester Sch. Dist. Two*, 442 S.C. 686, 693, 901 S.E.2d 36, 39 (Ct. App. 2024) (quoting *Lambries v. Saluda Cnty. Council*, 409 S.C. 1, 8, 760 S.E.2d 785, 788 (2014)). This Court in *Lambries* established the principle that an injunction that turns on a question of statutory interpretation is nonetheless reviewed de novo. 409 S.C. at 8, 760 S.E.2d at 788 ("We find that, while an injunction is equitable and subject to the trial court's discretion, where the decision turns on statutory interpretation—here an interpretation of section 30-40-80 in FOIA—this presents a question of law. As a result, this Court need not give deference to the trial court's interpretation.").

Therefore, if the circuit court's decision turns on statutory interpretation, this Court must—and the Court of Appeals should have—reviewed that aspect of the decision de novo.

This appeal involves multiple questions of statutory interpretation that should be reviewed de novo. The question of whether the Gate Agreement is a "bylaw" under the Act requires evaluating the definition of a bylaw under the statute, and determining whether the Gate Agreement fits within that definition. The Court of Appeals cited the definition of "bylaw" and found the contract fit a segment of the definition, but completely ignored the statute's language defining a bylaw as "a code or code of rules . . . adopted pursuant to this chapter." Likewise, the question of whether the Gate Agreement is an "accounting record" requires interpreting that undefined phrase to determine legislative intent, then determining if the Gate Agreement fits that definition. The Court of Appeals recognized the term was undefined and, instead of performing its own interpretation, rubber stamped the circuit court's reliance on a nonbinding Attorney General opinion.

In support of the position an abuse of discretion applies, Respondent references the argument to the Court of Appeals that a decision under the Act is akin to a writ of mandamus that is reviewed for an abuse of discretion. The Court of Appeals, however, rejected this comparison because there is no public official involved. Nevertheless, the Court of Appeals decided the order was injunctive in nature and should be reviewed for an abuse of discretion. As outlined above, however, when injunctive relief turns on a question of statutory interpretation—like how to define and apply "bylaw" or "accounting record"—the decision is reviewed de novo with no deference to the circuit court. Because these questions involve interpreting the Act, regardless of whether the relief was injunctive, the court's decision must be reviewed de novo.

II. Respondent does not address the lower courts' failure to consider key language in the Act's definition of Bylaw, leading to an overly expansive definition with unintended consequences.

Respondent asserts "the statute's definition of 'Bylaws' is designed to encompass any document used by the corporation for the management of corporate affairs." **Resp. Return at 10**. Respondent then cites the language of the statute in full:

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

S.C. Code Ann. § 22-31-140(4). That interpretation, however, is unsupported by the plain language of the definition, which requires the document to be a "code or code of rules . . . adopted pursuant to this chapter." "By the word 'code' is usually meant a compilation or revision of a body of law. A broader definition is a system of rules." *Wilentz v. Crown Laundry Serv*., 116 N.J. Eq. 40, 42, 172 A. 331, 332 (Ch. 1934). As noted by one court in interpreting a similar provision in that state's Nonprofit Act: "[t]hus, what counts in determining the governing bylaws of a corporation have more to do with function than form." *Kitazato v. Black Diamond Hosp. Invs., LLC*, 655 F. Supp. 2d 1139, 1146 (D. Haw. 2009). Respondent and the lower courts have effectively written out this requirement in the definition, and instead want it to read that a bylaw is "[any document] for the regulation or management of the affairs of the corporation."

However, a contract between three entities, regardless of whether two of the entities are members of the other, is not a "code or code of rules" adopted pursuant to the Act to govern the affairs of the entity. Rather, a "code or code of rules" speak to the *process* by which management of the corporation occurs, not the actual management decisions themselves. The corporation's officers and board must follow the bylaws—the rules—when making decisions. Contrary to Respondents' arguments, in § 33-31-140(4) the phrase "irrespective of the name or names by

which the rules are designated" does not mean that a contract should be a bylaw, rather, this means that a document that clearly provides for the authority and/or method for the officers or directors to act is a bylaw, even if called something entirely different.

If a normal contract could be considered a bylaw, then the rules that apply to the amendment of bylaws, see S.C. Code § 33-31-1021, would have to be followed every time a nonprofit entered into a contract, a ridiculous hurdle to contracting. For example, if a contract is a bylaw, then every time the nonprofit entered into a contract, it would require notice of a meeting and all the requirements followed for amending bylaws as provided in § 33-31-1021. In nonprofits where only members can amend bylaws, a membership vote would be required to enter into a simple contract, which requires a member meeting per S.C. Code § 33-31-701 *et seq*. This cannot be the intent of the Act.

a. Respondent's argument "Bylaws" should be interpreted broadly to include the Gate Agreement is belied by the statute's language describing the types of documents that can be inspected.

A member of a nonprofit "is entitled to inspect and copy . . . any of the records of the corporation described in Section 33-31-1601(e)." Subsection (e) lists the following categories of documents:

> (1) its articles or restated articles of incorporation and all amendments to them currently in effect;
>
> (2) its bylaws or restated bylaws and all amendments to them currently in effect;
>
> (3) resolutions adopted by its board of directors relating to the characteristics, qualifications, rights, limitations, and obligations of members or any class or category of members;
>
> (4) the minutes of all meetings of members and records of all actions approved by the members for the past three years;
>
> (5) all written communications to members generally within the past three years, including the financial statements furnished for the past three years under Section 33-31-1620;

> (6) a list of the names and business or home addresses of its current directors and officers; and
>
> (7) its most recent report of each type required to be filed by it with the Secretary of State under this chapter

The records described above all relate to the actual rules by which the nonprofit is governed or the decisions of the governing body (subsection (e)(1), (2), (3), & (4)); identification of those persons who run the nonprofit (subsection (e)(6)); assurances that all members are communicated with equally, particularly with financial reports (subsection (e)(5)); and availability of all publicly available reports filed with the Secretary of State's office (subsection (e)(7)). Contrary to Respondent's unsupported supposition that the term "Bylaws" should be extremely broadly construed to encompass any management function, the contrary is obvious from the items "described" in Subsection (e). These records all deal with transparency in how things are run in the nonprofit, not the nuts and bolts of running managing it. The rules by which the officers and directors must conduct themselves and the duty to communicate equally with all members when such communications are made do not require disclosure of how the cake is made, just that whatever cake is made is done by following the same set of rules that members will know in advance.

Also, the canon of statutory interpretation that the expression or inclusion of one thing implies the exclusion of another would apply here. *See Hodges v. Rainey*, 341 S.C. 177, 533 S.E.2d 578, 582 (2000). If the legislature intended business contracts to be disclosed, it would have listed contracts or agreements within section 1601(e). That it did not "describe" such contracts in section 1601(e) indicates it did not intend to include them.

b. Respondent's attempts to minimalize the effect of the order miss the mark because the circuit court's ruling is broad and, carried to its logical conclusion, would indeed require recording any contract Petitioner enters with anyone.

Respondent asserts the parade of horribles is alleviated by the facts surrounding the Gate Agreement, "reminding" this Court that (1) the definition of Bylaws is broad and Petitioner should take that issue up with the legislature, and (2) Petitioner oversimplifies and overexaggerates the ruling below. **Resp. Return at 13-12**. Petitioner is not alleviated.

First, the definition of Bylaws is not as broad as Respondent suggests, as outlined above. Respondent's arguments, which the courts have adopted, ignore key language in the definition of Bylaws. Because the courts have misconstrued and broadened the definition of Bylaws, it is the purview of this Court to correct that error, not the legislature to redefine Bylaws.

Second, even if Respondent's characterization of the Gate Agreement is accepted in the context of calling it a Bylaw, it would still lead to the absurd conclusion Petitioner seeks to avoid. Respondent asserts the Gate Agreement is an intra-company agreement between Petitioner and two of its members that regulates and manages a major resource of the corporation. **Resp. Return at 13**. Respondent reasons the Gate Agreement concerns the affairs of the corporation because it concerns a common area that the corporation is in charge of regulating and, therefore, it is a Bylaw.

Respondent's reasoning would open up to inspection and require recording of all contracts to which Petitioner is party. CSA can only act pursuant to the authority designated to it under the governing documents, including its covenants and Bylaws. For example, according to the Bylaws, CSA assumes and must perform the duties, rights, and obligations under the Covenants, and must manage the properties. **R. 142.** One obligation is to maintain the common areas over which CSA has dominion. Thus, if CSA contracts with any third party, or another member of CSA, to perform obligations under the Covenants or manage the properties, that contract would be something "adopted by CSA to regulate and manage the affairs of the corporation"—the precise reasoning

the lower courts have found the Gate Agreement a Bylaw. **May 22, 2024 Opinion**. If that reasoning applies to the Gate Agreement, it must be true for any other contract with CSA, including employment contracts. Indeed, Respondent asserts the statute—in its definition of Bylaws—"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." **Resp. Return at 13**.

Third, Petitioner's reasoning the lower courts' rulings would require recording all contracts is not a "fear mongering policy argument"—it's the actual effect of the ruling by Respondent's own logic. Respondent repeatedly characterizes the Gate Agreement as a Bylaw because it regulates and manages the affairs of the nonprofit corporation.

Moreover, Respondent doesn't even attempt to explain against the Homeowners Associations Act's clear language that requires recording Bylaws for the Bylaws to be enforceable. If contracts, including the Gate Agreement, are "Bylaws" as Respondent argues, then the Homeowners Association Act mandates recording for them to be enforceable. Recording is not simply a requirement for disclosure to corporation's members. It directly impacts the enforceability of those agreements. Even if the contract concerns the affairs of the corporation, the legislature certainly did not intend to require it to be recorded to be enforceable. This is why Respondent's and the lower courts' expansive definition of Bylaws is troublesome and must be reversed.

III. Statutory interpretation is necessary to determine the meaning of "accounting record," but even if the decision is purely discretionary, the lower court abused its discretion because its ruling is without factual support.

Respondent argues de novo review is improper despite "accounting record" being undefined and the court relying on an Attorney General opinion to determine the phrase's meaning.

But see Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 23, 579 S.E.2d 334, 337 (Ct. App. 2003) ("When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning."); *see also State v. Ramsey*, 409 S.C. 206, 211, 762 S.E.2d 15, 18 (2014) (discussing the impact of an Attorney General opinion when interpreting a statute). It is nonsensical to assert the court did not need to interpret the phrase "accounting record." Indeed, even Respondent interprets the phrase resorting to the official comments, Attorney General opinion, and descriptions of legislative intent. **Resp. Return at 18-19.** Because the court did interpret the phrase, review of that determination is de novo, the Court of Appeals ignored its duty to interpret the phrase anew, and this Court should accept the writ and correct that error.

Respondent cites section 33-31-1604(b) and highlights the reference to "any other record" to support a claim the legislature delegated broad discretion to the circuit court to determine what records are accounting records. The highlighted language is taken out of context and does not support Respondent's position. Section 1604 describes court-ordered inspection, with subsection (a) describing what a court can do when the corporation does not allow a member to inspect documents it is required to keep at its principal office under 1601(e). 1604(b) describes that a court can order any other record produced if the member complies with 1602(b) and (c), with 1602(b) including three classes of documents (one of which is accounting records) and (c) requiring the member's demand be in good faith and for a proper purpose. 1604(b) cannot be read to give the court broad discretion to order inspection of "any other record" outside of those listed in 1602(b). The court must first interpret the phrase "accounting record" *then* determine if a document fits that description. The circuit court erred in its expansive definition and reliance on the Attorney General opinion and must be reversed.

Respondent asserts a document does not need to be used to prepare financials in order to be considered an accounting record, but this expansive view is contrary to the official comments to the statute and the Attorney General opinion. A corporation is required to keep "appropriate accounting records" under section 33-31-1601. Off. Cmt. 2, § 33-31-1601. Generally, what is "'appropriate' depends on the nature size, and other characteristics of the corporation." *Id.* Examples include "checkbooks, canceled checks, and receipts." *Id.* Ultimately, "[a]ppropriate records should allow the financial statements to be prepared in a fashion that fairly presents the financial condition and results of operations of the corporation." *Id.* (emphasis added). The Attorney General opinion also implies this requirement for a record to be considered an accounting record: "[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" if the member meets the other requirements. 2016 WL 963698, at *4 (S.C.A.G. Jan. 26, 2016) (second emphasis added). If the court properly relied on the official comments and Attorney General opinion, then there would be a requirement the underlying documents were used to prepare the corporation's financial statements.

The court had no evidence that the Gate Agreement was used to prepare Petitioner's financial statements. The fact that Petitioner acknowledged it receives revenue under the Gate Agreement does not make the Gate Agreement an accounting record that was used to prepare financial statements. Thus, whether under a de novo or abuse of discretion standard, the court's decision was erroneous and should be reversed.

Petitioner believes its Petition for Writ otherwise covers responses to Respondent's Return and rests on the Petition.

Conclusion

This case involves novel issues of statutory interpretation where guidance from this Court would assist the bench and bar in handling document requests between nonprofit corporations and their members. Even if there are discretionary aspects of the decision below, the decision was wrong and discretion cannot act to absolve the courts from their duty to interpret and apply the relevant statutes.

This 16th day of September, 2024.

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