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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. 2021-001014
Opinion No. 2024-UP-254

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 (the "Walls"), hereby respectfully petition for rehearing as to this Court's Unpublished Opinion No. 2014-UP-254, filed July 10, 2024 (the "Opinion").

This Court must rehear its Opinion, first because it errs on a straightforward question of law, which is a lynchpin to this case. Moreover, as to the facts applied to the law, this Court errs as to its standard of review, including by weighing the evidence and giving deference to the lower court where it is entitled to none. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party

below." *Loflin v. BMP Dev., LP*, 427 S.C. 580, 588–89, 832 S.E.2d 294, 299 (Ct. App. 2019). Further, this Court reviews questions of law de novo, without deference to the factual findings of the circuit court. *Callawassie Island Members Club, Inc. v. Martin*, 437 S.C. 148, 877 S.E.2d 341 (2022) ("This Court applies de novo review to questions of law, so it need not defer to the determination of the court below."). The Opinion should be withdrawn; its errors as to the law and facts must be corrected.[1]

I. A question of law, on which this Court erred, is the lynchpin of this case.

This Court's Opinion misapprehends statutory requirements which control the HOA and its directors. The Opinion—like the lower court's order—turns on its erroneous conclusion that the ostensible architectural review committee (the "ARC") was the "designated representative" of the HOA's board of directors and therefore capable of making decisions for the board and the HOA. The Opinion is wrong because South Carolina's Nonprofit Corporation Act mandates ("shall") that committees be comprised of directors, and this committee was not so comprised. This is the law, and the only exception is if the corporation's "articles" delegate the board's authority to some other person. S.C. Code § 33-31-825; S.C. Code § 33-31-801(c). **The Shellmore HOA's articles of incorporation are in the Record, and they do not authorize any person other than the board to exercise the powers of the board.** (R. p. 194, stating that the corporation is organized "subject to all the limitations and liabilities" imposed by statute, which would include requirements as to the composition of committees). In fact, the Shellmore HOA amended its articles in 1993, and it still did not elect to imbue anyone other than the board with the authority of the board. (R. pp. 238-239).[2]

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[1] The Walls incorporate herein the arguments made in their appellate briefs, filed August 25, 2022.

[2] The amended articles reiterate that the corporation is subject to § 33-31-1005 of the 1976 South Carolina Code, as amended. *See also,* S.C. Code § 33-31-1701: "This chapter applies to all domestic

This Court must correct its error of law as to the clear language of the Nonprofit Corporation Act, which error is the faulty lynchpin of its entire Opinion. (*see e.g.* Op. at p. 5, "We find the record demonstrates the [Dyes] received the required written approval prior to constructing their dock . . . the record is clear that the ARC received the Dyes' plans[3] for a covered dock and approved them.").

This a straightforward case of the HOA's failure to meet a statutory requirement. Because the HOA's articles of incorporation do not authorize anyone other than the directors to exercise corporate powers, the architectural review committee at Shellmore must either (1) be comprised of "two or more directors," per the statute's mandate, or (2) lack authority to make corporate decisions, per the statute. S.C. Code § 33-31-825; S.C. Code § 33-31-801(c). Either option requires reversal and remand for trial under the facts here.

The HOA is a nonprofit corporation, and it is bound by South Carolina law governing nonprofit corporations. The Nonprofit Corporation Act requires that corporate governance is to be carried out by a board of directors, who are fiduciaries, bound by the highest standard of duty and care to act in good faith and in the best interest of the corporation. S.C. Code § 33-31-202, § 33-31-830. The Nonprofit Act expressly mandates that committees must be comprised of directors. S.C. Code § 33-31-825 ("a board of directors may create one or more committees of the board and appoint members of the board to serve on them. Each committee shall have two or more directors who serve at the pleasure of the board."). **This statutory**

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corporations which on this chapter's effective date were governed by Title 33, Chapter 31 of the 1976 Code."

[3] The record is not clear that the ARC received the plans; this is a disputed issue of material fact. (R. pp. 577, 656) ("**Mr. Dye does not have the specifics of his request** for a covered dock other than to say it will cover approximently [sic] 25% of his pier head and be of standard height with a pitched roof.") (*see infra*).

requirement is intentional. It assures that corporate decisions will be made by fiduciaries, in good faith and in the best interest of the corporation—something that did not happen here, where the evidence shows collusion, lack of notice, and disregard of the members' expressed will. (*See, e.g.*, R. pp. 621-624, 606).

The Opinion is wrong, according to the plain language of the Act, that a "declaration of covenants" is the same as "the articles" described in S.C. Code § 33-31-801(c) ("the ***articles*** may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board."). First, if covenants and articles were the same, they would have the same name and be the same document. Second, the Opinion overlooks that "articles" is a defined term within the Act, referring to the "articles of incorporation." S.C. Code § 33-31-140(2); S.C. Code § 33-31-202 ("Articles of Incorporation").[4] Third, the Opinion misapprehends that the Act provides another definition into which the covenants fall. The covenants meet the definition of "bylaws" of the corporation, which the Nonprofit Act identifies as "rules, **other than the articles**. . . 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 § 33-31-140(4) (emphasis added). Because the covenants are "rules, other than the articles" designed for the "management of the affairs of the corporation," they fit the Act's definition of "bylaws"—irrespective of their name. In any event, the covenants certainly are not "articles" and therefore they cannot lawfully serve as the vehicle to divest directors of their statutory obligation to make decisions on behalf of the corporation. (R. pp. 194, 393).

The Act's deference to corporate articles is deliberate. The articles are the

[4] The Articles of incorporation are the formative document of a nonprofit corporation, which are filed with the Secretary of State by the incorporators. S.C. Code § 33-31-201. They contain very specific, statutorily required information, and it is in the articles only that a corporation may elect to delegate the board's authority. S.C. Code § 33-31-202.

hierarchically superior governing document of every nonprofit corporation, and any conflict between them and the "bylaws" ("irrespective of the name," covenants) is resolved in favor of the articles. *See* S.C. Code § 33-31-206(b) ("The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with the law or the articles of incorporation.").

The Shellmore HOA chose to organize itself under the Nonprofit Corporation Act, and it is bound by its provisions—it is not somehow exempt from the Act's requirements because it is a homeowners' association. When the Declaration contemplates that the corporation's Board of Directors may designate an architectural committee, it integrates the Act's constraint that such a committee would be comprised of Directors. *City of North Charleston v. North Charleston Dist.*, 346 S.E.2d 712, 715 (1986) ("It is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract."). This is important because (*inter alia*) a nonprofit board cannot simply delegate its legal and fiduciary duties to a committee without board presence on that committee.

Moreover, the Act is clear that committees must be created (and their members appointed) in strict compliance with the Act's requirements for actions by the board of directors, including detailed procedural requirements on notice, meeting, voting, and quorum. S.C. Code § 33-31-825. There is ample evidence in the record that these fundamental requirements were not met. The evidence is clear that the purported ARC at Shellmore was <u>not</u> comprised of members of Shellmore's Board of Directors; and, at a minimum, the Walls are entitled to discovery on whether its members were improperly "appointed" secretly without notice. (R. p. 48, ¶ 36, R. p. 615, ¶ 14, R. p. 622, ¶13).

Because the purported architectural "committee" was invalidly composed in clear violation of the Nonprofit Corporation Act, it did not have authority to act on behalf of the directors or the corporation to "approve" of the Dyes' dock, as a matter of law. This Court should rehear and correct its decision that the ARC held the authority of the corporation, which is error under the plain language of the Nonprofit Corporation Act.

II. The Opinion wrongly ignores that the HOA is a nonprofit corporation.

Not once does the Opinion take into account, or refer to, the corporate form of the Shellmore HOA. This is error of law. It ***matters*** that the HOA chose to organize itself as a nonprofit corporation, because it thereby agreed to be bound by statutory requirements governing nonprofits. The fiduciary obligations imposed on the directors by the South Carolina Nonprofit Corporation Act are the subject of the Walls' *Petition for Writ of Certiorari*, currently pending before the South Carolina Supreme Court as Case No. 2024-001293. As argued in the Walls' Motion to Stay, filed contemporaneously with this Petition, this Court should defer to the Supreme Court before finally deciding this appeal.

Moreover, South Carolina's Nonprofit Corporation Act is clear: "A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted." S.C. Code § 33-31-830 (subsection (b) refers to a director's ability to rely on a—validly—comprised committee, or legal counsel, or financial advisor). The Opinion is wrong to disregard this statutory definition of bad faith, which must be considered in evaluating the facts here. The evidence shows that Shellmore HOA's directors did <u>not</u> act reasonably or in good faith, pursuant to the statute, because of their actual knowledge that the HOA had previously voted to prohibit covered docks, in general—and the Dyes' covered dock, specifically—and had for fifty years

denied applications for them. (R. p. 78; R. pp. 264-285, R. pp. 621-622). Further, the HOA, as a nonprofit, has a duty to enforce the rights and obligations of its members consistently. *See, e.g.* S.C. Code § 33-31-610. Within the institutional knowledge of the Shellmore HOA (and its Board) are: (1) the provisions of the Declaration requiring harmony with existing structures; (2) the numerous past decisions of the HOA denying covered docks and lifts (and none approving them); and (3) the 2016 vote by the Association, at its annual meeting, to prohibit covered docks and lifts. (R. p. 78; R. pp. 264-285; R. p. 622). This knowledge renders the directors' actions here improper under the plain language of S.C. Code § 33-31-830. It would not be reasonable, nor consistent, nor in good faith, nor in the best interest of the corporation to approve of an unprecedented, forbidden covered dock that defies a prior vote specific to the Respondents Dye. (R. p. 78).

The Opinion must be reheard to conform to the requirements of statutory law.

III. Summary judgment was *wrong* prior to discovery in the face of disputed facts.

The Walls respectfully ask that this Court would rehear its decision to deprive them of due process, including their rights to discovery and cross-examination of Respondents on their self-serving statements which were the improper basis for this Court's Opinion.[5] Where case-determinative decisions turn on questions of fact, due process requires discovery and the opportunity to confront and cross-examine adverse witnesses. *Brown v. South Carolina State Bd. of Educ.*, 391 S.E.2d 866, 301 S.C. 326 (1990); *see also Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 721 S.E.2d 430 (2012); *accord* Rule 56, SCRCP.

To contradict the Respondents' factual claims, the Walls filed four affidavits of non-

[5] Both this Court and the lower court wrongly accepted as "true" the affidavits of Respondent HOA and Respondent Jon Dye, while entirely discounting the contradictory statements within the affidavits submitted by the Walls.

parties, and a verified Complaint. The Opinion wrongly rejects ***all*** of them, outright—in their entirety (!)—for the completely incorrect and improper reason that "we find these affidavits were not admissible because they contain conclusions of law." Op. at p. 5.[6] But Rule 56(e), SCRCP, simply expects that a party opposing summary judgment "set forth specific facts showing that there is a genuine issue for trial," by affidavit or otherwise. "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Callawassie Island Members Club, Inc. v. Martin*, 437 S.C. 148, 157, 877 S.E.2d 341, 345 (2022), *cited with approval by Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297, 301 (2023). Properly, this Court should have reviewed all ambiguities, conclusions, and inferences arising from those affidavits in the light most favorable to the Walls. *Loflin*, 427 S.C. 580, 588–89, 832 S.E.2d 294, 299.

There is important purpose behind the standard of review's requirement that appellate courts consider the evidence (including the inferences to be drawn from it) in the light most favorable to the non-moving party. **The justice system is carefully designed with a dichotomy between the law and the facts.** Decisions of law are for judges—questions of law pertain to unambiguous written instruments: contracts, statutes, rules. But decisions of fact by nature require the weighing of evidence and the evaluation of credibility, and for that reason they are exclusively for the factfinder to decide at a trial, safeguarded by the rules of evidence and the opportunity for cross-examination. Discovery and cross-examination of witnesses on the facts are fundamental due process requirements to which the Walls were entitled.[7]

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[6] The affidavits are in the Record at pp. 605-624. The Verified Complaint is at R. pp. 41-89.

[7] "The well-established rule in this state is that if there is any testimony whatever to go to the jury on an issue involved in a cause, or even if more than one inference can be drawn from the testimony then

The Opinion improperly finds that "discovery would not uncover additional evidence or create a genuine issue of material fact." Opinion at p. 5. It is hard to fathom how this Court ***knows*** (for example) that the Walls' specific discovery requests to the HOA for the following documents would "not uncover additional evidence"[8] nor bolster the Walls' existing evidence that the Respondents' actions were—at a minimum—unreasonable and not in good faith:

- The notice for every meeting of the purported Architectural Review Committee between the dates of December 1, 2019 through January 31, 2021.
- The minutes of every meeting of the purported Architectural Review Committee between the dates of December 1, 2019 through January 31, 2021.
- The notice for every meeting of the Board of Directors of Shellmore Homeowners' Association, between the dates of December 1, 2019 through January 31, 2021.
- The minutes of every meeting of the Board of Directors of Shellmore Homeowners Association, Inc. between the dates of December 1, 2019 through January 31, 2021.
- The record of every action of the Board of Directors of Shellmore Homeowners' Association, Inc., between the dates of December 1, 2019 through January 31, 2021.
- To the extent not requested above, all documents relating to or referring to the Defendants Shaun and Jonathon Dyes' dock construction, or their application to construct a dock, including but not limited to emails, correspondence, meeting minutes, meeting notes, meeting agendas, and communications of any sort.

(R. pp. 442-443; see also R. pp. 439-447). **The Walls were entitled to discovery into these fundamental corporate records, which the corporation refused to produce.**

Under its standard of review, this Court also must draw inferences from the absence

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it is the duty of the judge to submit the cause to the jury. This is true, even if witnesses for the plaintiff contradict each other, or if a witness himself in his testimony makes conflicting statements. The credibility of witnesses is entirely for the jury." *Glover v. Columbia Hospital of Richland County*, 236 S.C. 410, 418, 114 S.E.2d 565, 569 (1960); *see also Graham Law Firm, P.A.* at 298, 721 S.E.2d at 434-435.

[8] Op. at p. 5.

of evidence in the light most favorable to the non-moving Walls. For example, from the utter absence in the record of ***any notice*** to the homeowners of the Dyes' dock request, this Court should infer that no notice was given and that the lack of notice was deliberately secretive, unreasonable, and/or in bad faith. (*E.g.*, R. pp. 553-554).

This Court also misapprehended significant material facts. Troublingly, the Opinion states, "the record is clear that the . . . bylaws of the HOA were recorded." (Op. at p. 7). In fact, the HOA did not timely record its bylaws,[9] a fact which renders the Opinion's conclusion as to South Carolina's Homeowners' Association Act[10] incorrect.

Finally, in its discussion of the common plan (see *infra* and Op. at pp. 7-9), this Court overlooked clear evidence in the record of such a plan. For example, on page 8 the Opinion wrongly speculates and thereby underscores a factual question properly answerable by discovery: "Such prior docks could have been denied for reasons other than inclusion of the roof." Op. p. 8. The words "could have" indicate that this Court does not know. Not only would the Court's speculation be resolved with discovery, **but the actual evidence in the Record demonstrates that the Court's tentative "could have" is wrong—those docks were indeed denied specifically because of the inclusion of a roof**. The Record shows that in 1999 the HOA decided: "The request for a covered portion on the pierhead is denied." R. p. 272. And in 2003, the corporation determined, with detailed elaboration:

> No approval on roof or boat lift because . . . would destroy [] other homeowners' view of [Wildlife] Refuge and ICW [Intercoastal Waterway] . . . Approval is contingent on no roof and no boat lift being built due to the impact on views. In the 25 years since Shellmore's development, no roofs or boat lifts have ever existed.

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[9] *See* R. p. 33, Order, fn. 28, noting that the HOA "subsequently" (as in, after the events that are the subject of this lawsuit occurred) recorded its bylaws. This fact makes the Opinion's conclusion wrong.

[10] *See* S.C. Code § 27-30-130, requiring bylaws to be recorded "in order to be enforceable."

R. p. 273 (emphasis in original). Importantly, these are just two of several documents in the Record that—viewed in the light most favorable to the Walls—indicate a common plan and/or the unreasonableness of the alleged ARC's decision to purport to permit the Dyes to build a roofed dock.[11]

In sum, the Walls opposed Respondents' motions for summary judgment in a procedurally and substantively correct manner, by demonstrating evidence of disputes of material fact, and they also filed a Motion to Compel demonstrating the disputed facts on which they sought discovery. (R. pp. 439-447). They submitted evidence, both documentary and testimonial (affidavits), which—taken in the light most favorable to the Walls—were sufficient to withstand summary judgment and compel discovery into the facts. This Court erred by disregarding this legitimate, admissible evidence which bore on the disputed factual questions of whether Respondents' actions were reasonable, in good faith, or in breach of statutory duties and covenant requirements. The Walls ask this Court to rehear its Opinion, and to reverse and remand for discovery to which the Walls are entitled.

IV. The Court misapprehends the common plan.

This is <u>not</u> a reciprocal negative easement case where the Court needs to divine whether restrictions on the Dyes' use of their property should be *implied*—because the Dyes' use of their property is **expressly restricted**. The Dyes' property is bound by the express restrictions contained in the Shellmore Declaration of Covenants. *Circle Square Co. v. Atlantis Development Co.*, 267 S.C. 618, 230 S.E.2d 704 (1976) ("By its Declaration, The Hilton Head Company established a plan or scheme of development for the property."). Shellmore's

[11] Again, the corporation selected which documents it would provide to the Court—and it otherwise refused to produce its records or to participate in discovery at all, which is why the Walls moved to compel discovery. The inference should be drawn that records unfavorable to the corporation exist but were not produced.

Declaration was imposed prior to the first sale of a lot and binds each property. As such, this Court should rehear its decision incorrectly holding that the Declaration does not impose a scheme or plan in which proposed structures must be evaluated for conformity with existing structures, pursuant to a mandatory process. The evidence shows that the Respondents intentionally dodged and conspired to circumvent those mandatory requirements.

This Court misapprehended the Walls' argument, which is that what matters is the covenanted process. The Declaration expressly (not impliedly) restricts the Dyes—and every party to this litigation—by binding them to a *process* that they must follow, in good faith, prior to the commencement of construction of any structure. The process requires that the Dyes submit "plans and specifications," which the HOA is required in good faith to review and consider "in relation to surrounding structures" for "harmony of external design" as to "nature, kind, shape, height, materials, and location." (R. p. 71).

There was ample evidence in the record that **neither the Dyes nor the Board of Directors followed the process**, making summary judgment improper. As a threshold matter, the Declaration requires that "plans and specifications" actually be submitted for approval, which the evidence shows the Dyes failed to do. (R. pp. 49, ¶¶ 39, 43; R. p. 79-80; 656) (Board statement that: "Mr. Dye does not have the *specifics* of his request for a covered dock, other than to say that it will cover approximately 25% of his pier head and be of standard height with a pitched roof."). Further, the Declaration plainly sets forth a rubric for the evaluation of proposed construction plans which requires reference to and conformity with structures already built. (R. p. 71). There are no meeting minutes or other record of a corporate determination that the Dyes' request conformed with other structures in the community, and this Court should consider this (lack of) evidence in the light most favorable

to the Walls. **In short, the evidence shows that the Respondents failed to follow the *process*, in breach of the Declaration, which was in violation of the unambiguous plan for how the community was to be developed.** At a minimum, the Walls are entitled to discovery and trial on the question of whether Respondents contravened the development plan's required process.

The Declaration's rubric is the common plan, which restricts the Dyes as to the use of their property, and it restricts the HOA in the evaluation of plans—obligating conformance with existing structures. The Walls relied on this common plan to protect their own property rights and interests. The case of *Sprouse v. Winston* is directly on point. 212 S.C. 176, 46 S.E.2d 874 (1948). In that case, Mr. Winston—like the Dyes—bought property in a neighborhood with covenants restricting the construction of garages. In finding that Winston's newly-constructed garage violated the common plan, the Court evaluated the language of the covenants in conjunction with the physical way the neighborhood had been developed. The Court found that the covenants required consistency in garage placement with those already in existence. *See also Gibbs v. Kimbrell*, 311 S.C. 261, 428 S.E.2d 725 (Ct. App. 1993) ("[*Sprouse*] considered the subdivision's 'general scheme of improvement' and determined that the purpose of the allegedly ambiguous restriction was to prevent the respondent's garage from blocking the light, view, and air of the appellant's house.").

This Court has since reiterated the significance of a common plan as being the general manner in which the subdivision has historically developed, in conjunction with the process in the covenants. In *Gibbs*, this Court considered the subdivision's "general scheme of improvement" and held:

> Although we agree with the Kimbrells that the Diamond Point covenants, **if considered alone** do not define the front of lot 12, **we resolve this uncertainty**

> **by consideration of the general scheme of development of the subdivision** and of what we conclude is the purpose of paragraph 2 of the covenants, to prevent construction of 'outbuildings' or sheds within 150 feet of roads that are within the subdivision.

311 S.C. 261, 428 S.E.2d 725 (Ct. App. 1993) (emphasis added); *see also Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987) ("Although a flagpole, jacuzzi or satellite dish were not expressly named and prohibited [by the covenants], a particular use or structure may be forbidden by the covenant's general language without an express designation or label.").

Here, as in *Gibbs*, the Shellmore Declaration, "if considered alone," arguably does not outright prohibit covered docks. However, the Declaration does require consideration of the plans and specifications for proposed structures with reference to existing structures, and as to their proposed "height," "kind," and "location," as well as "detrimental effects on privacy, view of the water," and "the maximum amount of view and breeze to each home." R. pp. 71-72. Crucially, this covenant-required plan review never occurred with respect to the Dyes' dock – to the detriment of the Walls and their neighbors. Our Supreme Court recognizes the importance of covenants in development and property values:

> Hilton Head Island has been developed as a pleasing and appealing resort and retirement community, and the success of the Island's development is due in no small part to careful planning of development and enforcement of that planning through restrictive covenants. **All the property owners have a vested interest in the continued enforcement of the covenants applicable to the subdivisions on the Island, for upon them largely depend the values of their property**. . . However, when one protected by a covenant seeks enforcement thereof, we cannot endorse change while the developmental scheme is still viable, while the benefits conferred by the scheme are still present.

Circle Square at 630-631, 230 S.E.2d at 709 (emphasis added).

Put simply, it is very unlikely that plans for a covered dock in Shellmore—if those plans actually had been properly evaluated with reference to the Declaration's rubric—

would **ever** be found to have "harmony of external design" with existing docks at Shellmore, each and every one of which has always, throughout the history of the subdivision, been a flat, uncovered, low-lying platform on the water. (R. p. 609, ¶ 8; R. p. 622, ¶ 8: "Covered docks and boat lifts have never been approved at Shellmore."). But the Walls' evidence showed that the Dyes' dock plans were never even evaluated nor approved under this rubric at all. (R. pp. 48-53, ¶¶ 39, 43, 61-62; R. pp. 79-83; R. pp. 606, ¶ 14; R. p. 622-23, ¶¶ 10-15; R. p. 441). As a matter of law, **this required process and formula within the Declaration expressly institutes a common plan of development at Shellmore, which had been carried out in the community for fifty years, and which the Respondents violated.**

As an additional point, the Declaration unequivocally requires procedurally proper approval prior to construction. The Dyes' dock—constructed without proper prior approval—plainly violates the common plan and the covenants.[12]

This Court should rehear its Opinion, which misapprehends the significance of the Declaration's process in effectuating the common plan for development. The evidence shows that process was not followed, in breach of the Declaration, and summary judgment was therefore improper. The Walls respectfully request remand for discovery and trial.

CONCLUSION

The Opinion errs as a matter of law as to the Nonprofit Corporation Act, makes factual determinations not permitted by its standard of review, and mistakes the common plan's

[12] The Dyes finished construction of their covered dock in the midst of this litigation, in December of 2020. A little over a month later the Dyes' attorney moved at the Association's annual meeting for a vote on the Dyes' finished dock. (R. pp. 608-624). The Walls incorporate herein their prior arguments that this vote was in breach of the covenants' requirement that approval be sought prior to construction, and that the directors breached their fiduciary duties by entering into voting agreements with the Dyes, as well as their argument that questions of fact on the membership vote exist, which should have precluded summary judgment. *See* Appellant's Final Brief, pp. 35-37.

requirement that the Respondents adhere to the process for plan approval.

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

Respectfully submitted,

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Charleston, South Carolina
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The Honorable Mikell R. Scarborough, Master-in-Equity

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PROOF OF SERVICE

I certify that on October 7, 2024, I have served Appellants' Petition for Rehearing on Respondents by sending the same to their attorneys of record, Andrew M. Connor and L. Sidney Connor, at their email addresses of record with AIS.

s/ Ainsley F. Tillman
Attorney for Appellants