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**Nov 04 2024**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas  
The Honorable Mikell R. Scarborough, Master-in-Equity

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Court of Appeals Case No. 2021-001014  
Opinion No. 2024-UP-254

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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.

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**REPLY IN SUPPORT OF PETITION FOR REHEARING**

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Respondents’ opposition to Appellants’ Petition for Rehearing revolves around two incorrect arguments: (1) homeowners’ associations that are organized as nonprofit corporations are singularly above the law that is the Nonprofit Corporation Act; and (2) Respondents’ evidence is more credible than Appellants’ conflicting evidence on the same questions of fact. The first argument is wrong because the Legislature did not carve out a special exception for HOAs to the statute that is otherwise binding on all nonprofit corporations, state-wide. The second argument is wrong because the posture of this case is one of summary judgment and therefore the Respondents’ two affidavits should be given no more weight than Appellants’ four affidavits and documentary evidence to the

contrary; instead, the simple reality that the evidence conflicts on material questions should compel reversal of summary judgment. The Walls respectfully ask this Court to withdraw its Opinion and reverse the lower court's summary judgment order.

**I. The Shellmore committee was invalidly comprised under the Nonprofit Corporation Act and therefore lacked authority to bind the corporation.**

Respondents argue that homeowners' associations are "unlike other nonprofit corporations" because their restrictive covenants make them special. (Return at p. 1). This is a disquieting argument. Restrictive covenants are contracts, and other nonprofit corporations certainly make and are bound by contracts. *Hoffman v. Cohen*, 202 S.E.2d 363, 262 S.C. 71 (1974) ("Restrictive covenants are contractual in nature."). But **corporations cannot contract themselves out of the law**. The Shellmore Homeowners' Association chose to organize itself as a nonprofit corporation, and—just like every other nonprofit corporation in South Carolina—it is bound by South Carolina's Nonprofit Corporation Act.

The Respondents' argument, that nonprofit homeowners' associations are an "exception" to the Nonprofit Corporation Act, is a radical departure from South Carolina law, which this Court should not countenance. First, the Act itself makes no exceptions. Second, when the Legislature recently(-ish) enacted the South Carolina Homeowners' Association Act ("HOA Act"), it gave express deference to the Nonprofit Corporation Act, making clear in multiple places that the provisions of the Nonprofit Corporation Act bind HOAs organized as nonprofits. *See*, S.C. Code § 27-30-170 ("No provision of this article may be construed to be in conflict with the provisions of the South Carolina Nonprofit Corporation Act."); S.C. Code § 27-30-150 (members' access and inspection

rights found in the Nonprofit Act apply to homeowners' associations, even those that are not nonprofits). Moreover, as part of the HOA Act, the Legislature charged the South Carolina Department of Consumer Affairs with making information available to the public on the governance of homeowners' associations. S.C. Code § 27-30-330(2). In fulfilling the Legislature's charge, the department specifically indicates (*inter alia*) that the law governing homeowners' associations organized as nonprofits—including their boards of directors—is to be found in the Nonprofit Corporation Act:<sup>1</sup>

#### WHICH LAW(S) APPLY TO THE NEIGHBORHOOD THAT I LIVE IN?

While South Carolina does not have a state specific law detailing how a homeowners association must operate, several South Carolina laws may apply. The most common laws are:

**The Nonprofit Corporation Act** applies to HOAs that have filed its nonprofit articles of incorporation with the Secretary of State. The law provides details on meetings (including notice & quorum requirements), rules for the board of directors and homeowners access to records. To find out if a HOA is registered as a non-profit visit the SC Secretary of State's website: <https://businessfilings.sc.gov/BusinessFiling/Entity/Search>.

**The Horizontal Property Act** applies to apartments/condominiums. This law provides details on how to set up a horizontal property regime, what must be included in the master deed/ lease and bylaws, record keeping requirements and allocation of expenses.

**The Homeowners Association Act** applies to communities and horizontal property regimes requiring homeowners to pay assessments. (Does not include timeshares). The law requires governing documents to be filed, provides certain meeting notice requirements and access to budget and membership lists. The law also requires DCA to collect specific data on HOA complaints, which are compiled and shared with the Governor and the General Assembly each year.

Respondents are not correct that HOAs are “unlike other nonprofit corporations.”

Respondents wrongly rely on common law as the source of their theory that they are not subject to statutory law. However, the “black-letter law” case that Respondents cite in support of their argument that homeowners' associations are immune to the Nonprofit Corporation Act *says nothing of the sort*. Appellants do not dispute that the mechanism by which homeowners' associations gain authority over property is by covenants that run with the land, which is what Respondents' case says.<sup>2</sup> However, those

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<sup>1</sup> See <https://consumer.sc.gov/HOA-Ed>

<sup>2</sup> This premise supports Appellants' fiduciary duty argument, because control over others' property is a hefty responsibility to be exercised with the utmost care and good faith.

covenants incorporate the law of South Carolina, including the Nonprofit Corporation Act. And because the Nonprofit Corporation Act requires that committees “shall” be made up of “two or more directors,” then so it must be. Compare 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.”) with R. p. 71 (allowing an “architectural committee” “*appointed* by the Board.”).

Lastly, the Respondents argue that the following email from the Board was “essentially ratifying the ARC decision”:

Dear Shellmore Homeowners.

The Board of Directors met today to discuss the application of the Dye's dock permit. There was much discussion as the controversial issue affects us all and lays groundwork for the future of similar requests. It was decided that the ARB Board does represent the Homeowners and their vote stands. The passing of this ARB vote will be reported to the officials at OCRM and Army Corp of Engineers as having been approved. Anyone who wishes to make comments of your approval or disapproval may do so to : Jacqueline Adams, Critical Area Project Manager, Ocean and Coastal Resource Management. Her email is : adamsja@dhec.sc.gov.

(R. p. 256). This is not ratification, which is a legal word with legal meaning, elements, and requirements. Among other things, ratification requires the full recognition of the unauthorized acts of another, and then the approval of them. Restatement (Third) of Agency § 4.06 (2006). This email does the opposite—it states that the “ARB Board does represent the homeowners” — which is legally incorrect. Moreover, ratification requires full knowledge of the material facts, and the Directors unequivocally stated that they did not have such knowledge. (R. p. 656) (“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 the standard height with a pitched roof.”) (*see also* R. p. 606 ¶ 13); *Lincoln v. Aetna Cas. & Sur. Co.*, 386 S.E.2d 801, 300 S.C. 188 (Ct. App. 1989), *citing* 2A C.J.S. Agency

Section 71 (1972) (“Ratification exists upon the concurrence of three elements: (1) acceptance by the principal of the benefits of the agent’s acts, (2) **full knowledge of the facts**, and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements.”) (emphasis added). **Finally, the HOA did not raise the affirmative defense of ratification in its Answer**, and at a minimum the Walls are entitled to discovery on this new, fact-intensive defense if it is now to be put forth as the basis of judgment. (R. pp. 111-114, Answer of Shellmore Homeowners’ Association).

Because the purported architectural committee was invalidly composed in clear violation of the Nonprofit Corporation Act’s requirements, the committee did not have authority to act on behalf of 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 power of the corporation, which is error under the plain language of the Nonprofit Corporation Act. The proper disposition, here, is reversal of the lower court’s error and remand for discovery and trial.

**II. The existence of a contract does not obviate statutorily-imposed fiduciary duties, nor the implied covenant of good faith and fair dealing.**

Respondents argue that the covenants give “the Board and the ARC authority to approve the Dyes’ covered dock.” (Resp. Return at II.). But that statement is not correct. First, while the covenants may give the Board the authority to make decisions on proposed structures, the covenants do not dictate *approval*, nor do they mention the Dyes’ dock. Instead, the covenants state that the corporation must evaluate submitted “plans and specifications” according to a rubric that requires the directors to consider existing structures and the impact of the plans on other homeowners. It is in those details that the

devil resides. The directors are given contractual responsibility, which is overlaid by statutorily-imposed fiduciary duties and an obligation to act in good faith, in consideration of the community as a whole. *See Road LLC v. Beaufort Cnty.*, S.C. Supreme Court Opinion No. 28204, (May 15, 2024) (discussing the “*manner* in which parties to a contract . . . carry out their existing contractual duties - express or implied.”)

The Walls argued that the directors breached the contract, by failing to apply its rubric, *and* breached their fiduciary responsibilities, by acting in bad faith, secretively, inconsistently, and selectively. The covered dock is only a symptom of the disease: these are directors who do not believe the law applies to them (as they unabashedly argue on page 1 of their Return). *See also* R. pp. 605-624. The Board’s secretiveness, conspiracy, and disparate treatment of members are the hallmarks of an unlawfully-run corporation, at the expense of the members’ property values. The community’s predictable mechanisms improperly have been replaced with a popularity contest. The South Carolina Nonprofit Corporation Act entitles the Walls, and all of the members of the Shellmore Homeowners’ Association, to transparency, good faith, loyalty, and consistent treatment of members and their property.<sup>3</sup>

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<sup>3</sup> It is significant that this request for a covered dock was the second such request by the Dyes. The first time they made the request, the Dyes asked for a vote by the entire membership. As a result, the membership voted “to prohibit covered docks” – specifically *the Dyes’* request for a covered dock. (R. p. 78):

12. At the time they constructed their covered dock, Jonathan and Shaun Dye had actual knowledge that covered docks are forbidden at Shellmore. I was present at the 2016 annual meeting of the Association, and I witnessed Jonathan Dye request a vote of the membership as to covered docks. The members overwhelmingly voted to prohibit covered docks and elevated boat lifts.

(R. p. 622 ¶12); *see also*:

The Walls respectfully ask this Court to reconsider its Opinion, which overlooks the corporate form of the Respondent HOA and the significance of the Nonprofit Corporation Act on its governance.

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

Throughout their Return, Respondents make factual arguments. They argue that an email from the directors is a “fact [which] renders Appellants’ argument inconsequential.” (Return at p. 2). They argue the fact-intensive defense of ratification, although they never raised it in their answer. *Id.* They make speculative factual protestations about what might happen to other HOAs if it turns out that the Walls are right. *Id.* They argue about past ARC decisions, notwithstanding that the Record’s evidence on prior ARCs is incomplete (the Walls requested this information in discovery, at R. pp. 442 - 443). *Id.* They argue about the decision on the Dyes’ dock, which concerns the disputed facts and circumstances of the review of purported “plans and

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9. In 2016, my direct neighbor Jon Dye requested to have Association members approve construction of his boat lift and covered dock at our Annual Meeting.

10. I was present at the Annual Meeting when Jon Dye, then President of the Association asked for a vote, and I voted against his request. The vast majority of Shellmore homeowners joined me in our vote against his request.

(R. pp. 605-606). Mr. Dye, then-president of the HOA, resigned. He simmered for a bit and then conspired with Director Chakides to re-submit the same request, in secret, to a purported architectural committee that he and Chakides stacked to elicit a “yes” vote:

12. Upon information and belief, the Dyes, with Director Johnny Chakides, worked to appoint members to the ARB in an attempt to circumvent the Association vote.

13. Jon Dye submitted his plans to the ARB without sending them to the Association Board and with no notice to his neighbors.

(R. p. 606). This lawsuit would likely be different if it involved someone other than Mr. Dye—for example, a good faith purchaser for value who was unaware of the corporate vote.

specifications.” (Return pp. 2-3). **And throughout their factual arguments, the Respondents incorrectly ask this Court to presume that Respondents’ own version of the facts is true and more credible than the Walls’.**

On page 3 of their Return, Respondents (*i.e.*, the HOA and the Dyes) describe the “competent testimony found in the HOA’s affidavit and Mr. Dye’s affidavit,” while asking this Court to find that “none of the affiant testimony submitted by Appellants on this issue contained any foundational testimony indicating the affiants had personal knowledge.” This is simply wrong. The affidavits submitted by the Walls in opposition to summary judgment each indicate that the affiant had personal knowledge:

1. I am over the age of 21 and am competent to make the statements in this affidavit, which are made from personal knowledge under oath and penalty of perjury.

(*see* R. pp. 608, 614, 621).

On summary judgment, the Court cannot resolve disputed facts, nor adjudge credibility, and the Opinion should be reheard for this reason. “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 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.

The correct disposition here is reversal of summary judgment, and remand for discovery and trial. The Walls respectfully ask this Court to rehear its Opinion.

#### **IV. Lack of express prohibition is not the same as permission.**

First, the Walls do not “resort to misrepresenting the Record by saying there is doubt that the Dyes actually submitted any plans at all.” (Return p. 3). To contradict the Respondents’ self-serving affidavits, the Walls submitted a letter from the Board itself, to the Walls’ attorney, which states: “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 the standard height with a pitched roof.” (R. p. 656). The Walls also submitted four affidavits and a verified Complaint, all of which are made by witnesses over the age of 21, competent to testify on the matters therein, which give statements under oath and based on personal knowledge. (R. pp. 606-624; *e.g.* R. p. 606 ¶13, “Jon Dye submitted his plans to the ARB without sending them to the Association Board and with no notice to his neighbors.”).

The Walls’ evidence demonstrates that the Dyes and the HOA did not adhere to the covenants’ rubric – or at least that a question of fact exists as to whether the Dyes and the HOA adhered to the covenants’ rubric. No structure in Shellmore can be permitted unless “plans and specifications” are submitted to and evaluated by the HOA, in accordance with the covenants’ clear requirements. The evidence shows a dispute as to whether Respondents failed to follow the plan, and summary judgment on the common scheme was therefore improper.

The bottom line is that the covenants’ requirement that proposed structures be evaluated with specific reference to existing structures means that it would be unreasonable for the Board to approve of something completely different,

unprecedented, and non-conforming – which had been denied to other members in the past – and which previously had been denied *to the Dyes, specifically*. (R. p. 78; *see also, infra*, fn. 3).

The Walls’ position on the common scheme is consistent with South Carolina precedent on the construction of covenants promulgating a common plan. Essentially, restrictive covenants are partially integrated contracts, in which the ongoing development of property itself is made a part of the contract. This is particularly true in this case, where Shellmore’s Declaration requires consideration of plans for proposed structures with reference to existing structures. (R. p. 71). The Walls respectfully ask this Court to reconsider its decision that the fifty-year history of Shellmore, during which the corporation repeatedly applied the covenants to prohibit covered docks, is immaterial to the question of a common scheme. The Opinion misapprehends the law:

It has also been stated that where there is any ambiguity in a contract, or where there is doubt as to the proper construction thereof, the construction placed thereon by the parties themselves is entitled to great, if not controlling, influence. With reference specifically to the area of restrictive covenants, a similar idea was expressed in *Nance* when **we held, “It is proper to consider the overall plan,” meaning, of course, the overall plan of the subdivision as conceived and carried out.**

The Forest Dunes Subdivision is now a rather fully developed subdivision consisting almost exclusively of single-family residences. . . . The evidence warrants the conclusion that **a general building scheme or plan of development founded on these restrictions has evolved in the area here in question.** The (appellants) in this action and their predecessors in title have obviously relied upon the restrictions in buying and developing the property. The circumstances surrounding the inception of the restrictions and the developments subsequent thereto enforce the argument that the restrictions as drawn were designed and intended to prevent such uses as the (respondent proposes to make of his lots).

*Hoffman v. Cohen*, 202 S.E.2d 363, 262 S.C. 71 (1974) (cleaned up), *citing Sprouse v. Winston*, 212 S.C. 176, 46 S.E.2d 874 (1948), *also citing Nance v. Waldrop*, 187 S.E.2d 226, 258 S.C. 69 (1972).

This Court should rehear its Opinion, which misapprehends the importance of the Declaration’s rubric in effectuating the common plan—and which overlooks evidence that the rubric’s process was not followed. The Walls respectfully request rehearing, and 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 requirement that the Respondents must adhere to the process for plan approval.

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

Respectfully submitted,

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**PROOF OF SERVICE**

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I certify that on November 4, 2024, I have served Appellants' *Reply in Support of Petition for Rehearing* 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*