THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Circuit Court Case No. 2022-CP-07-00632
Court of Appeals Case No. 2022-001587

---

315 Corley CW LLC; 368 Mount Pelia LLC; Bridge Charleston Investments B LLC; Bridge Charleston Investments C LLC; Bridge Charleston Investments E LLC; Bridge Charleston Investments H LLC; Anne Bosler and Dylan Hart as Trustees of the Bosler-Hart Trust; Geoffrey J. Block; R. Jeffrey Kimball and Deborah S. Kimball; Sebrina Leigh-Jones and Chris Leigh-Jones; Jennifer Albero; Live Oak Assets LLC; Matthew N. Lynch and Barbara A. Lynch; MKM 22 West LLC; One Rumford Lane LLC; Salt Works LLC; and TTJR LLC; individually, derivatively, and as class representatives……..……Respondents/Cross-Appellants,

v.

Palmetto Bluff Development, LLC; Palmetto Bluff Club, LLC; Palmetto Bluff Real Estate Company, LLC; PBLH, LLC; Montage Palmetto Bluff, LLC; Palmetto Bluff Preservation Trust, Inc.; Palmetto Bluff Preservation Trust Board of Stewards: Jordan Phillips; Mark Polites; Gray Ferguson; Henry Armistead; South Street Partners LLC; and John Does 1-25 .....Appellants/Cross-Respondents.

REPLY BRIEF
of RESPONDENTS/CROSS-APPELLANTS

FORD WALLACE THOMSON LLC
Ian S. Ford
Ainsley F. Tillman
Hunter H. James
715 King Street
Charleston, South Carolina 29403
(843) 277-2011
Attorneys for Respondents/Cross-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

IN REPLY

Remarkably, Developers' Brief ignores the substantive merits of Homeowners' arguments entirely. Developers do not claim that Homeowners' issues on appeal are anything other than strictly legal questions capable of decision as a matter of law. They do not point to any questions of fact that would make judgment improper or premature. Developers do not claim that their covenants and contracts are ambiguous or otherwise not capable of construction by this Court as a matter of law. They do not argue that South Carolina's statutory prohibition against transfer fee covenants is somehow unclear. Developers are dodging the substance of this dispute because they hope to avoid for as long as feasibly possible a court ruling that they have shackled Homeowners' property with unenforceable transfer fee covenants and the unlawful requirement that any owner of Homeowners' property must pay money in perpetuity to Developers' for-profit business.[1]

Developers' arguments are strictly procedural—and those procedural arguments are wrong. Our Supreme Court has expressly recognized that appellate courts have discretion to review purportedly unappealable issues in conjunction with other rulings properly before the appellate court. *See Morris v. Anderson County*, 564 S.E.2d 649, 349 S.C. 607 (2002) (Court may "consider an unappealable order along with an appealable issue where such a ruling will avoid unnecessary litigation."); *Edge v. State*

[1] Developers are motivated to prolong this dispute by money, of course. For every year that passes with these issues unresolved, Developers pocket over $6,000,000 in illegal transfer fees and over $9,000,000 in ostensibly mandatory payments for fictional "membership" in Developers' for-profit business entity called Palmetto Bluff Club LLC. One year has already passed, at the time of this writing, and Developers have gained $15 million by this delay.

Farm Mut. Auto. Ins. Co., 366 S.C. 511, 517, 623 S.E.2d 387, 390 (2005) (entertaining a discretionary appeal of a motion to dismiss in the interest of judicial economy because a related issue in a cross-appeal was properly before the court); *Brown v. County of Berkeley*, 366 S.C. 354, 362 n. 5, 622 S.E.2d 533, 538 n.5 (2005) (appellate court has discretion to review unappealable order); *Historic Charleston Holdings v. Mallon*, 673 S.E.2d 448, fn. 2, 381 S.C. 417 (2009) (ruling on issues in interest of judicial economy). Indeed, this Court may consider and decide the outcome of *Developers'* appeal **on any grounds appearing in the Record on Appeal, including those raised in Homeowners' summary judgment arguments and this cross-appeal**. Rule 220(c), SCACR.

While Developers are not wrong that a denial of summary judgment is ordinarily not immediately appealable, they fail to point out that exceptions to this general rule exist. Exceptions to the rule stem from the appellate court's innate discretion to decide issues of law in cases that are properly before it on appeal. This discretion indubitably extends to permit review of an order denying summary judgment. *Morris*, 349 S.C. at 610-611 (specifically acknowledging discretion to review denial of summary judgment); *Queen's Grant v. Greenwood Development*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006) (appellate courts may in their discretion review denial of summary judgment when it is a companion to reviewable issues).[2]

---

[2] Developers rely on the case of *Skywaves I Corp. v. Branch Banking & Trust Co.* to argue that denials of summary judgment orders are never immediately appealable, which Homeowners do not dispute. 814 S.E.2d 643 (Ct. App. 2018). **As set forth in their opening brief, Homeowners are aware that this Court's analysis of the declaratory judgment questions would be discretionary, and they respectfully request that this Court would exercise that discretion to decide strictly legal issues.**

The *Skywaves* case is distinguishable because in that case the bank was asking the Court

A justification for discretionary review of the denial of summary judgment is that it is efficient. For example, such discretion may be invoked to avoid protracted litigation. *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985) (permissive appeal of order denying summary judgment). Further, when parties and issues already are before the appellate court based on a directly appealable order, then judicial economy is well-served by simultaneous review of otherwise unappealable questions. *Roberts v. Recovery Bureau,*

---

to grant discretionary review of denial of summary judgment on its cause of action for fraud—an inherently fact-dependent claim. *Skywaves* cited *Olson v. Faculty House of Carolina, Inc.*, which declined to review the denial of summary judgment to Faculty House on its fact-intensive common law negligence claim and reiterated that the denial was not immediately appealable. 354 S.C. 161, 163, 580 S.E.2d 440, 441 (2003). *Olson* specifically overruled three cases in which the Court of Appeals had reviewed denials of fact-laden summary judgment questions: (1) *Tanner v. Florence City-County Bldg. Com'n*, 333 S.C. 549, 511 S.E.2d 369 (Ct. App. 1998) (questions of fact as to Department of Correction's tort liability); (2) *Anthony v. Padmar, Inc.*, 415 S.E.2d 828, 307 S.C. 503 (Ct. App. 1991) (in which Court of Appeals waded into deeply factual ratification questions on which summary judgment was denied); (3) *Garrett v. Snedigar*, 293 S.C. 176, 359 S.E.2d 283 (Ct. App. 1987) (fact-intensive review of denial of summary judgment in negligence action). *Olson* held that "the denial of a motion for summary judgment is not appealable, even after final judgment." *Olson*, 354 S.C. at 169.

This Court should focus on what *Olson* did not do. It discussed and did not overrule *Davis v. Lunceford*, 287 S.C. 242, 335 S.E.2d 798 (1985), in which the Court entertained discretionary review of the denial of a summary judgment motion. *Olson* did not overrule any of the cases cited in the body of this brief, which each hold that appellate courts have discretion to review typically unappealable orders, particularly in the interest of judicial economy. All *Olson* did was reiterate that the denial of summary judgment is an unappealable order and decline to exercise discretion in that fact-laden case. **In contrast, Homeowners' cross-appeal pertains to questions of law—and none of fact.**

The *Olson* Court did not hold that appellate courts never have the discretion to review an unappealable order—even one denying summary judgment. Indeed, this discretion is alive and well after the 2003 decision in *Olson*. *See, e.g., Historic Charleston Holdings*, 673 S.E.2d 448, fn. 2 (2009); *Brown,* 366 S.C. 354, 362 n. 5, 622 S.E.2d 533, 538 n. 5 (2005); *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511 (2005); *Queen's Grant,* 368 S.C. 342 (Ct. App. 2006); *Southeastern Housing Foundation v. Smith*, 380 S.C. 621 at n. 14, 670 S.E.2d 680, n. 14 (Ct. App. 2008); *Davis v. Dunn,* Unpublished Op. No. 2021-UP-045 (Ct. App. 2021); *see also, Kubic v. Merscorp Holdings, Inc.,* 416 S.C. 161, 785 S.E.2d 595 (2016) (discretionary review of denial of motion to dismiss); *see also* Rule 220(c), SCACR. This Court should exercise its discretion to decide Homeowners' questions.

Inc., 316 S.C. 492, 450 S.E.2d 616, at n. 2 (Ct. App. 1994) ("Ordinarily, the denial of summary judgment is not appealable. The appellate courts have discretion, however, to consider an unappealable order if an appealable issue is before the court and a ruling on appeal will avoid unnecessary litigation. We exercise this discretion to reach and reverse the denial of summary judgment to the plaintiff and avoid unnecessary litigation upon remand.").

In this case, there is a significant nexus between the issues that Developers have raised in their appeal of the arbitration order and the strictly legal questions posed by Homeowners in this cross-appeal. For example, this Court could affirm the circuit court's order denying arbitration on the basis of Homeowners' summary judgment argument that Developers' governing documents are unlawful, invalid, unconscionable, and void, pursuant to Rule 220(c), SCACR. All the issues before this Court—in the appeal and the cross-appeal—stem from the same Palmetto Bluff governing documents which are already in the Record. All the issues center around the lawfulness and enforceability of those documents. All the issues were fully briefed to the circuit court, and all were argued to the circuit court at the same hearing and decided in the same Order (now on appeal). All the issues arise from the same South Carolina real property law that steers the development of the Palmetto Bluff community. *Queen's Grant*, 368 S.C. 342 (appellate courts may in their discretion review denial of summary judgment when it is a companion to reviewable issues); *see also Pitts v. Jackson Nat. Life Ins. Co.*, 352 S.C. 319, 574 S.E.2d 502 (Ct. App. 2002).

The central theme in this case, and in both appeals, is: **did the Developer of**

Palmetto Bluff improperly bury unlawful provisions in covenants it bound to Homeowners' real property and real estate title? Do those unlawful provisions violate South Carolina statutory law and public policy? When does South Carolina law intervene to protect landowners in one of the most significant investments of their lifetime—the ownership of their home? Contrary to arguments in Developers' Brief, these questions were indeed raised to the circuit court, which did rule on them by granting Homeowners' Motion to Stay Arbitration, denying Developers' Motion to Compel Arbitration, and denying Homeowners' Motion for Summary Judgment. (R. p. __, Order). Having obtained a ruling, there was no requirement that Homeowners file a Rule 59 Motion. *Dunn v. Charleston Coca-Cola Bottling Co.*, 311 S.C. 43, 426 S.E.2d 756 (1992). Developers are wrong that the circuit court has "discretion" or is entitled to deference on issues of law. The law is not discretionary, and this Court exists to correct errors of law—which it reviews *de novo*. *Town of Summerville v. North Charleston*, 378 S.C. 107, 662 S.E.2d 40 (2008).

The Developers here seek to deny Homeowners access to the courts for their questions about the legality of Developers' governing documents—covenants which purport to bind Homeowners' land and which unreasonably restrict the alienability of their titles. The proper forum, though, for declaratory judgments—on South Carolina's statutory prohibition against transfer fee covenants and on provisions in covenants that ostensibly will run with title to 4,000 homes in Palmetto Bluff—is a South Carolina court, including an appellate court. *See* S.C. Code § 15-53-20 (courts may determine "any question of construction or validity arising under the instrument, statute, ordinance,

contract, [etc.]. . . ."); § 15-53-30 ("Courts of record may declare rights, status and other legal relations.").

For their own purely economic reasons, Developers want to delay, stall, dawdle, and slow-pedal a court decision on their governing documents for as long as possible. If this Court remands to the circuit court to decide Homeowners' legal questions, rather than deciding them outright as it has the discretion to do, it is highly likely these same parties will be back before this Court for another appeal.

It is most efficient to address Homeowners' questions, now. *See Edge*, 366 S.C. 511 ("An order that is not directly appealable may be considered if there is an appealable issue before the court. Here, an order in this case which is appealable is before the Court and, in an effort to avoid another appeal in the future and potentially narrow the issues for trial (*i.e.* judicial economy), we will consider State Farm's cross-appeal."). The Order is properly before this Court for review because *Developers* have appealed it, as to its arbitration rulings. **Importantly, the arguments in Homeowners' cross-appeal are additional grounds for affirmance of the circuit court's Order.** *See* Rule 208(b)(2) and Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

CONCLUSION

In the interest of judicial economy, to save the courts and Homeowners from protracted litigation, and because they are questions of law ripe for determination, Homeowners respectfully request that this Court would decide the following questions,

as to which the circuit court erroneously denied judgment:

1. Do the unambiguous covenants imposed by Developer, requiring transferees to pay fees to a for-profit endeavor as part of the real estate transfer, violate South Carolina's statutory prohibition against transfer fee covenants as a matter of law?

2. Is mandatory "membership" in a for-profit business unlawful?[3]

If this Court deems that further briefing is necessary, beyond those arguments made by Developers in their memoranda on these issues to the circuit court,[4] Homeowners respectfully request that this Court would order Developers to brief the merits, and grant Homeowners a reply, prior to oral argument in this appeal and cross-appeal.

[signature block appears on the next page]

[3] Developers claim on page 7 of their Brief that the "declaratory judgments Plaintiffs seek on appeal are stated differently than in their Motion, however. As a result . . . it is unclear which of the requested declarations are the subject of this cross-appeal." This is an odd argument, considering that on page 6 of their Brief, the Developers quote the portion of Homeowners' Motion for Summary Judgment in which Homeowners asked for the identical relief that they seek on appeal. (R. p.482, Issue I).

[4] *See* R. p. 732.

Respectfully submitted,

FORD WALLACE THOMSON LLC

By: s/ Ainsley F. Tillman
Ian S. Ford (S.C. Bar No. 12463)
Ian.Ford@FordWallace.com
Ainsley F. Tillman (S.C. Bar No. 70551)
Ainsley.Tillman@FordWallace.com
715 King Street
Charleston, SC 29403
(843) 277-2011
www.FordWallace.com

July 18, 2023
Charleston, South Carolina