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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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.……..……Petitioners,

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 A WRIT OF CERTIORARI

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April 16, 2025

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CERTIFICATION OF COUNSEL

Pursuant to South Carolina Rule of Appellate Practice 242(d)(1), the undersigned counsel for Petitioners certifies that a petition for rehearing was made and finally ruled on by the Court of Appeals on February 5, 2025.

QUESTIONS PRESENTED

I. **Within a community with a homeowners' association, is the board of directors required to follow the mandates of the South Carolina Nonprofit Corporation Act?**

II. **Did the Court of Appeals deprive Petitioners of due process by affirming a grant of summary judgment based on claims within Respondents' own self-serving affidavits, prior to discovery, and despite Petitioners' evidence and affidavits to the contrary?**

III. **The absence of *prohibition* is not the same as *permission*: did Court of Appeals apply this Court's precedent on the common plan of development?**

Petitioners Bonnie and Walter Wall ("Petitioners" or the "Walls") respectfully ask this Court to issue a writ of certiorari to review the Court of Appeals' final decision in this case (Opinion No. 2024-UP-254, the "Opinion"), because the Opinion conflicts with statutory law, the rules of court, the public policy of this State, and the Record on Appeal.

INTRODUCTION

The Court of Appeals' Opinion errs on a straightforward question of law, which is a lynchpin to this case, concerning the application of South Carolina's Nonprofit Corporation Act to an incorporated homeowners' association and its directors. Moreover, as to the facts applied to the law, the Opinion errs in the implementation of the court's standard of review, including by weighing factual evidence and giving deference to the lower court where it is entitled to none.

The Court of Appeals' errors fall into two categories: (1) error on the law, including the novel question of how statutory law governing nonprofit corporations interacts with community covenants, and (2) error on adjudication of the facts, including the peculiar

question (in the aftermath of *Kitchen Planners*) of how competing, conflicting affidavits should be treated by circuit courts on summary judgment. Therefore, pursuant to Rule 242(b) of the South Carolina Appellate Court Rules, Petitioners Bonnie and Walter Wall respectfully request this Court to grant their Petition for Writ of Certiorari to correct the Court of Appeals, and to clarify and distill the law in both regards.[1]

STATEMENT OF THE CASE

Like thousands of other South Carolinians, Petitioners Bonnie and Walter Wall (the "Walls") invested in a home in a neighborhood protected by covenants, where they and their fellow homeowners were to be governed by a homeowner's association ("HOA"), organized under South Carolina law as a nonprofit corporation, and by a board of directors with fiduciary duties and an obligation to follow and enforce the covenants. The covenants contain a detailed process, which Respondents deliberately subverted to get something which Respondents knew the HOA members previously had voted to forbid (a covered dock).[2] (R. p. 78).

Respondents circumvented the process by secretly funneling the Dyes' dock concept through an illegitimate "committee" composed of two unelected guys, who were not directors, who never saw actual plans, who never met in person, who lacked authority, but who announced nonetheless that the Dyes' dock was "approved." (R. pp.

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[1] The Walls incorporate herein the arguments made in their appellate briefs, filed August 25, 2022, as well as in their Petition for Rehearing and Reply in Support of Rehearing, filed October 7, 2024 and November 4, 2024.

[2] The covered dock could be *anything*, really – a serpentine wall; a turret; a Byzantine dome. **This lawsuit's focus is on the corrupt and secretive manner by which the Dyes ostensibly gained "approval," and not on the architectural feature itself.**

605-624). In the aftermath of this pronouncement, which took the community by surprise because the events occurred in secret and without notice, the members twice called for a special meeting of the HOA corporation, which the HOA's directors refused to conduct. (*Id.*; *see also* R. pp. 82-83).

"Approval" in hand, the Dyes started construction of their covered dock as quick as they could go, and their neighbors the Walls filed this lawsuit along with a motion for temporary injunction. (R. p. 41; 115).

In swift progression, the circuit court: granted the Walls' motion for a temporary injunction; requested cross motions for summary judgment; denied those cross motions due to questions of fact; ordered a trial; ordered mediation;[3] denied discovery motions as "moot"; and then granted summary judgment to the Respondents on the same questions it had previously identified as factual.[4] (R. pp. 1-40). Discovery never happened, although the Walls noticed depositions, requested documents, and filed a motion to compel.

The Walls appealed to the Court of Appeals, arguing that summary judgment on the facts was premature and improper, that the purported "committee" violated the Nonprofit Corporation Act's explicit requirement that committees must be comprised of directors of the corporation, and that the purported "approval" of the dock was unreasonable, in bad faith, and contrary to law. The Court of Appeals affirmed, in reliance on Respondents' version of the facts and its own misapprehension of the law.

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[3] Respondents would not participate in mediation. (R. p. 586).

[4] This procedural history is somewhat abbreviated, but it happened as swiftly as it reads—within the span of five months from the time the Walls filed the lawsuit, and prior to discovery.

ARGUMENT

This Court should grant a writ of certiorari to review and reverse the Court of Appeals because the interplay between community covenants and South Carolina's Nonprofit Corporation Act is a source of confusion for the courts and citizens in this State—and a novel issue for this Court. Both the Court of Appeals and the circuit court erred in their misapprehension of the hierarchy between the two sources of governance. While covenants may provide restrictions on real property, those covenants are most often applied and enforced by HOAs organized as nonprofit corporations. Because of their corporate form, the corporate actions of those nonprofit HOAs are subject to and dictated by the Nonprofit Corporation Act, and this Court should so hold.

Further, a lower court should never grant summary judgment on material factual issues, in the teeth of contradictory evidence, prior to discovery and while discovery motions are pending. Although this Court's recent *Kitchen Planners* decision went a long way to clear up the standard for summary judgment, there remain questions—at issue here—on how a court should consider competing affidavits and discovery motions filed alongside summary judgment motions. *Kitchen Planners, LLC v. Friedman*, 440 S.C. 456, 892 S.E.2d 297 (2023). This Court should grant a writ of certiorari to further distill the application of the standard for summary judgment when the parties have filed competing affidavits, prior to discovery, and it should clarify (*inter alia*) that the factual testimony within affidavits, and the inferences to be drawn from that testimony, should be taken in the light most favorable to the nonmoving party.

Finally, this Court should take another look at the archaic and confusing law surrounding real property covenants and the common scheme of development. The cases defining the term "common plan," most of them dated more than thirty years ago, need to be revisited and clarified by this Court. The parties to this lawsuit—like numerous citizens in South Carolina—own property that is burdened by covenants from another era (in this case, the 1970s). In such instances, which are frequent in this State, the original developer has long since departed, and the intent of the covenants is best divined from the way in which that developer built out his neighborhood.

The Walls respectfully ask that this Court would grant this Petition for a Writ of Certiorari on these significant and broadly applicable issues.

I. A novel question, at the intersection of corporate law and real property law, is a lynchpin of this case.

The Court of Appeals' Opinion—like the lower court's order—turns on its erroneous conclusion that the ostensible architectural "committee" was the "designated representative" of the HOA's board of directors and therefore capable of making decisions on behalf of the Board and the HOA. The error stems from the Court's decision to elevate community covenants over and above statutory law. But the Court of Appeals got it backward: the community covenants incorporate and are subject to South Carolina statutory law, and particularly when that statutory law speaks directly and specifically to the matter. This Court should grant this Petition to clarify this hierarchy, which confused the lower courts, and which has significant ramifications for the thousands of South Carolinians who have entrusted their property values to the governance of a nonprofit HOA.

South Carolina's Nonprofit Corporation Act mandates ("shall") that committees must be comprised of directors of the corporation, but the "committee" that purportedly "approved" of the Dyes' dock was not so comprised.[5] This statutory requirement is the law, and the statute's 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 of directors 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 the Nonprofit Corporation Act and its requirements for 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).[6] This error of law as to the clear language of the Nonprofit Corporation Act is the faulty lynchpin of the 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[7] for a covered dock and approved them.").

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[5] *e.g.* R. p. 622 ¶ 13.

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

[7] 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*).

The Respondent 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 Corporation 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 requirement is intentional, and it just makes sense.** 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, disregard of the members' expressed will, and purported decision-making by non-fiduciaries. (*See, e.g.*, R. pp. 78, 621-624, 606).

The Court of Appeals' error stems from its confusion over the interplay between the Nonprofit Corporation Act's plain requirements and the community's covenants. The Opinion wrongly finds that a "declaration of covenants" is the same as "the articles" for purposes of construing 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."). The Opinion's statutory construction is incorrect, for at least three reasons.

First, if community covenants and corporate articles were the same thing, 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").[8] Third, the Opinion misapprehends that the Act provides another, different definition into which the covenants fall. The covenants meet the definition of "bylaws" of the corporation, which the Nonprofit Corporation 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 community covenants certainly are not "articles" and therefore they cannot lawfully serve as the vehicle to divest corporate directors of their statutory obligation to make decisions on behalf of the corporation. (R. pp. 194, 392-394).

Importantly, the Act's deference to corporate articles is deliberate. The articles are the hierarchically superior governing document of every nonprofit corporation in this State, and any conflict between them and the "bylaws" ("irrespective of the name" of "covenants") is resolved by law 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 has enjoyed its benefits. Consequently, this HOA also is bound by the Act's

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[8] 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.

provisions—it is not somehow exempt from the Act's requirements because it is a homeowners' association. When the community's declaration of covenants contemplates that the corporation's Board of Directors may designate an architectural committee, those covenants integrate 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 purported "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 undisputed that the purported architectural "committee" 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" in this case was invalidly composed in clear violation of the Nonprofit Corporation Act, the Court of Appeals should have found 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. The Walls respectfully

request that this Court grant their Petition to review and correct these important errors and to provide guidance on the proper interaction between the Nonprofit Corporation Act and community covenants.

II. The Court of Appeals deprived Petitioners of due process by affirming a grant of summary judgment based on claims within Respondents' own self-serving affidavits, prior to discovery, and despite Petitioners' evidence and affidavits to the contrary.

In this case, summary judgment was granted on material questions of fact, despite competing affidavits, no permitted discovery, and in the teeth of important, unresolved discovery disputes. 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. But the circuit court's order, granting summary judgment in favor of Respondents, relies exclusively on affidavits submitted by Respondents, and it finds that pending discovery motions were "rendered moot by the granting of summary judgment." (R. p. 22). The Court of Appeals' affirmance was wrong under Rule 56, SCRCP, and the Record on Appeal.

The lower court's order contains nineteen footnotes citing exclusively to Respondents' affidavits for factual propositions. Significantly, the only reason the Respondents would have submitted affidavits on summary judgment in the first place would be to set forth facts. ***Affidavits are factual testimony***, defined by Black's Law Dictionary as "a voluntary declaration of facts written down and sworn to by the declarant." **In other words, in the absence of factual issues, affidavits would be**

unnecessary. Obviously, where competing affidavits conflict in their rendition of the facts, a fact question exists.

The Walls submitted four affidavits, given by nonparty witnesses, which conflicted on the facts with the material claims in Respondents' affidavits. As a simple example, the Court of Appeals affirmed on the grounds that:

> The record is clear that ***the ARC received the Dyes' plans*** for a covered dock and approved them. Thus, there is no genuine issue of fact and summary judgment on this issue was proper.

(Op. at p. 7) (emphasis added). A material question of fact in dispute was the question of whether the Dyes ever actually *submitted* plans to the purported ARC. The Walls offered a contemporaneous email from the HOA's Board of Directors acknowledging the lack of plans and admitting, "Mr. Dye does not have the specifics of his request for a covered dock." (R. p. 656). The Walls also submitted multiple affidavits, including from non-parties, attesting that the Dyes had not in fact submitted plans to the purported ARC. (R. pp. 49 ¶¶ 39, 43; R. p. 79-80; 605-624; 656). In contrast, the Dyes submitted their own affidavit, claiming that they did submit plans. Thus, these competing affidavits on this pivotal factual issue presented a textbook question of material fact, which should have precluded summary judgment.

There is important purpose behind the law's requirement that 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—and this Court should fiercely protect this dichotomy.** 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 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, but of which they were deprived by the circuit court and Court of Appeals.[9]

Similarly troubling is the reason given by the Court of Appeals for ignoring the Walls' factual evidence submitted to withstand summary judgment prior to any discovery. To contradict the factual claims in the Respondents' affidavits, the Walls filed multiple affidavits of non-parties, and a verified Complaint. The Opinion wrongly rejects ***all*** of these affidavits, outright—in their entirety (!)—for the incorrect and improper reason that "we find these affidavits were not admissible because they contain conclusions of law." Op. at p. 5.[10] This Court should grant a writ of certiorari to correct this significant misapprehension of the rules of procedure by the Court of Appeals.

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. If the affidavits submitted by witnesses also happen to "contain conclusions

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[9] "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.

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

of law," there is no precedent permitting the Court of Appeals to disregard and disqualify them in their entirety. "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, the courts 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. Certainly the Court of Appeals should not have discounted all four of them, wholesale, because they "contain conclusions of law."

The Opinion also improperly finds that "discovery would not uncover additional evidence or create a genuine issue of material fact." Opinion at p. 5. But the Walls had filed a pending Motion to Compel, seeking very specific corporate records[11] as well as

[11] Among other items and testimony, the Walls moved to compel the deposition of the HOA's Rule 30(b)(6), SCRCP, corporate witness, and production of:

- 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,

Respondents' deposition testimony, intending to cross examine Respondents on the factual assertions within Respondents' affidavits—including about the appointment of the ostensible "committee," whether notice was provided to members, how and what corporate decisions were made, and the Dyes' claim to have submitted plans to the "committee." Thus, it is hard to fathom how the Court of Appeals ***knew*** (for example) that the Walls' specific, itemized discovery requests to the HOA would not "uncover additional evidence"[12] nor bolster the Walls' existing evidence on questions of fact. **The Walls were entitled to discovery on corporate records and Respondents' affidavit assertions, which the Respondents refused to produce or provide.**

Under the standard of review—designed to protect the dichotomy between fact and law—the lower courts also were obligated to draw inferences from the absence 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, the courts should have inferred 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). The Court of Appeals also misapprehended significant material facts, which would have been clarified by discovery. For example, the Opinion states, "the record is clear that the . . . bylaws of the HOA were recorded." (Op. at p. 7). In fact, the circuit court acknowledged

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> 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).

[12] Op. at p. 5.

that the HOA did not timely record its bylaws,[13] a fact which renders the Court of Appeals' conclusion as to South Carolina's Homeowners' Association Act[14] incorrect.

In sum, the Respondents stonewalled the Walls' efforts to conduct discovery on the facts. Respondents then filed motions for summary judgment based on their own version of the facts, which they put before the court in affidavits furnished by Respondent Jonathan Dye and the president of Respondent HOA. The Walls opposed Respondents' motions for summary judgment in a procedurally and substantively correct manner, by demonstrating evidence of disputes of material fact pursuant to Rule 56, SCRCP, and they also filed a Motion to Compel demonstrating the disputed facts on which they sought discovery. (R. pp. 439-447). The Walls submitted evidence, both documentary and testimonial (multiple affidavits given by non-party witnesses and a verified complaint), which contradicted Respondents' factual claims. Taken in the light most favorable to the Walls, this competing evidence on material factual issues should have been more than sufficient to withstand summary judgment and compel discovery into the facts.

The Court of Appeals 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—on the improper basis that the affidavits "contain conclusions of law." This was error by the Court of Appeals, based on misapprehension of Rule 56, SCRCP, and its standard of

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13 *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.

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

review. Moreover, discovery motions should ***never*** be determined to be rendered "moot" based on a court's summary judgment on disputed facts. The Walls ask this Court to grant this Petition to correct these errors and to provide further guidance on the proper application of Rule 56, SCRCP, and the standard of review.[15]

III. The absence of *prohibition* is not the same as *permission*: the Court of Appeals did not apply this Court's precedent on the common scheme of development.

The legal term "common plan of development" represents a concept that has been misunderstood by lower courts, including in this case, and which is ripe for clarification by this Court. Since about the 1950s, planned communities—controlled by private covenants and restrictions—have been the preferred mechanism for real estate development in South Carolina. Developers buy a large tracts of land, subject it to a declaration of covenants and restrictions, incorporate an HOA for community governance, build out the infrastructure and homes, and then head off into the sunset with pockets full of money. But what happens when the developer is gone? Typically, the homeowners are left with a yearning for conformity and predictability, and they look to their HOA to provide the same. However, disputes arise (as here) where the intended development plan must be discerned from archaic and dated covenants, which nonetheless have legal teeth. Hence the term "common scheme [or plan] of development," and the body of law on the same. Homeowners like the Wall, having bought into a community restricted by reciprocal covenants, and having forgone their

[15] Both the Court of Appeals 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, for the improper reason that they "contain conclusions of law." This implicates the dichotomy between law and fact, and suggests credibility determinations and the weighing of evidence.

own opportunity to build as they please because of those covenants, have an expectation that their neighbors will similarly be bound.

Fifty years ago, this Court recognized 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 Co. v. Atlantis Development Co., 267 S.C. 618, 630-631, 230 S.E.2d 704, 709 (1976) (emphasis added).

Here, the Court of Appeals got it wrong when it confronted the common plan. (Op. at pp. 8-10). This lawsuit is not about whether the restrictive covenants outright prohibit covered docks.[16] This case is about the ***restrictions limiting the actions and decisions of the HOA and the Dyes***, which are set by the covenants and the applicable law. This is not a reciprocal negative easement case where a court needs to divine whether restrictions on the Dyes' use of their property should be *implied*—because the

[16] Although the covenants do not expressly state, "covered docks are prohibited," the law in South Carolina does not require that they do. *See 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, a particular use or structure may be forbidden by the covenant's general language without an express designation or label.").

Dyes' use of their property is expressly restricted. Indeed, each Respondent's property[17] is bound by the express restrictions contained in the Shellmore Declaration of Covenants. This Court set forth this law, identifying community covenants as the source of a "common plan of development" in *Circle Square Co.*, explaining that "[b]y its Declaration, The Hilton Head Company established a plan or scheme of development for the property." 267 S.C. 618, 230 S.E.2d 704 (1976). The Court of Appeals misconstrued that Shellmore's Declaration was imposed prior to the first sale of a lot and binds each property. As such, the Declaration imposes a "scheme" or "common plan," in which the homeowners have what this Court called a "vested interest in the continued enforcement," and in which proposed structures must be evaluated for conformity with pre-existing structures, pursuant to a mandatory process. The evidence shows that the Respondents intentionally dodged and conspired to circumvent those mandatory requirements, which is what this lawsuit seeks to unwind.

The Court of Appeals erroneously focused on the physical dock, thereby misapprehending the Walls' argument, which is that what matters is the enforcement of 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

[17] The Respondent HOA owns the common areas, and it is thereby as subject to the covenants as each of its lot-owning members.

of external design" as to "nature, kind, shape, height, materials, and location." (R. p. 71). The result of failure of process is a structure that contravenes the common plan of development.

There was ample evidence in the record that **neither the Dyes nor the Board of Directors followed the process**, making summary judgment on the common plan improper. As a threshold matter, the Declaration requires that "plans and specifications" must 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."). 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 is evidence in the record that the corporation had historically denied requests for covered docks, making any decision to allow one for the Dyes unreasonable:

> 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.

R. p. 273 (emphasis in original); *see also* R. p. 272; *see also* R. p. 78 ("A motion to vote was put forth by Jon Dye . . . The vote passed to prohibit covered docks and lifts."); *see also* S.C. Code § 33-31-610 (requiring consistency by a nonprofit corporation in the treatment of the rights of similarly situated members); *see also* S.C. Code § 33-31-830 ("A director is not acting in good faith if the director has knowledge concerning the matter in question

that makes reliance [on a validly comprised committee] unwarranted.").[18]

There are no meeting minutes or other record of a corporate determination that the Dyes' request conformed with other structures in the community, and the lower courts 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 were 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 of development, 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*—although old—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

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[18] On page 8, the Opinion wrongly speculates and thereby underscores a factual question properly answerable by discovery, which made summary judgment premature and improper: "Such prior docks could have been denied for reasons other than inclusion of the roof." Op. p. 8 (emphasis added). The words "could have" indicate that the Court of Appeals did 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**. *See* R. p. 272 (""The request for a covered portion on the pierhead is denied."); *see also* R. p. 273 ("No approval on roof or boat lift because . . . would destroy [] other homeowners' view of [Wildlife] Refuge and ICW [Intercoastal Waterway]").

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.").

In *Gibbs*, the Court of Appeals 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, the Walls submitted affidavits and evidence showing that this covenant-required plan review never occurred with

respect to the Dyes' dock – to the detriment of the Walls and their neighbors.

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. 78; 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.[19]

This Court should grant a writ of certiorari to review the Opinion, which misapprehends the significance of the community covenants' ***process*** in effectuating the

[19] 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.

common plan for development. This is a confusing area of law, which arises frequently in this State with its many planned communities. The issue is particularly compounded here by the questions surrounding the interplay between covenants and the Nonprofit Corporation Act. Ultimately, the evidence shows that a material question exists as to whether the process was not followed, in breach of the covenants, and summary judgment was therefore improper.

CONCLUSION

This Court should review the Court of Appeals' Opinion, which errs as a matter of law on a case-dispositive question as to the interaction between community covenants and South Carolina's Nonprofit Corporation Act—a novel issue that this Court should review. Further, by its disregard of affidavits, based on its unprecedented determination that they are inadmissible because "they contain conclusions of law," and its affirmance of summary judgment made in the teeth of discovery motions, the Court of Appeals deprived Petitioners of due process and defied the standard of Rule 56, SCRCP. This Court should further clarify the rules' application in the wake of *Kitchen Planners*. Finally, the Opinion mistakes the common plan's requirement that the Respondents adhere to the process for plan approval, wrongly deciding that absence of express prohibition is the same as permission. This Court's decades-old precedent on the application and enforcement of a common scheme of development is in dire need of a refresh.

Respectfully, the Walls ask that this Court would grant their Petition for a Writ of Certiorari, to correct the Court of Appeals' errors, and remand for discovery and trial.

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Respectfully submitted,

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