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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

Circuit Court Case No. 2020-CP-10-04185

Court of Appeals Case No. 2021-001014

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.

APPELLANTS' FINAL BRIEF

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I. Did the Master-in-Equity err in granting summary judgment before discovery could be conducted on disputed facts?

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This case is about violation by a homeowners' association ("HOA") of its members' rights under the association's governing documents, the law of real property, as well as statutory law. This *appeal* is about an improper and premature grant of summary judgment and the clear errors of law in the orders on appeal.

The setting is a development called Shellmore. Shellmore is a community that is bound by covenants and restrictions. By design, it is a planned development with established procedures that do not involve raw majority rule. Minority rights are protected by the covenants' established, mandatory procedures.

The Shellmore HOA's violation of its members' rights falls into two categories: process and substance. The HOA disregarded the *process* in the governing documents and statutory law, and the HOA violated the *substance* of the governing documents. The orders on appeal steamroll over questions of fact in both categories, despite the procedural posture of the case, which was one of summary judgment early in the case—before discovery occurred. Appellants respectfully request that this Court reverse the Master-in-Equity's orders and remand for discovery and trial.

STATEMENT OF THE CASE

Because this is an appeal from the Master-in-Equity's improper grant of summary judgment, the facts must be construed in the light most favorable to the Appellants, who were the non-moving party. The facts may be found within—and inferred from—the verified pleadings, as well as many filed affidavits by non-party witnesses, and exhibits.

Notably, if the Respondents dispute the facts below, then this Court immediately should reverse the lower court's grant of summary judgment.

Moreover, if Respondents concede the facts below, then this Court also should reverse the lower court's grant of summary judgment.

A. Statement of the Facts

This is the second appeal in this lawsuit, and so this Court already may be familiar with some of the background facts. However, several significant events took place between the order at issue in the first appeal[1] and those orders that are the subject of this second appeal. Those events changed the landscape of the case and make this appeal different from the first.

Appellants Bonnie and Wally Wall (the "Walls") have lived in the Shellmore subdivision, in rural McClellanville, South Carolina, for more than twenty years. Shellmore is a unique, small, coastal community, which was developed more than fifty years ago. A large part of the value of the community is derived from its location on the Intracoastal Waterway, directly across from the Cape Romain Wildlife Refuge. The Walls, like other homeowners in the development, were attracted to Shellmore because of its sweeping views of the waterway and the wildlife refuge. (R. pp. 43-50).

[1] The first appeal pertains to two discrete issues: (1) whether the Board of Directors of a non-profit HOA have fiduciary duties; and (2) whether there was evidence of damages sufficient to defeat summary judgment on the Walls' cause of action for civil conspiracy.

Community History

Upon purchase of their property, the Walls appreciated and understood that the Shellmore development was subject to restrictive covenants, which were imposed more than fifty years ago by the developer "for the purpose of protecting the value and desirability of" the property in Shellmore. (*Declaration of Covenants, Conditions, and Restrictions on Cape Romain Lookout Subdivision, Being a Part of "Kensington Plantation"*) (the "Declaration") (R. p. 64). After the developer sold all its lots in the community, it turned Shellmore over to the homeowners, organizing Respondent Shellmore Homeowners' Association, Inc. (the "HOA") for the purpose of enforcing the Declaration and maintaining "architectural control." (Articles of Incorporation, R. p. 194). The conduct of the HOA is dictated by several sources of authority:

- The Shellmore HOA is a creature born of the Declaration,[2] and it is bound by the Declaration.
- The Shellmore HOA is a nonprofit corporation, and it is subject to the South Carolina Nonprofit Corporation Act, S.C. Code § 33-31-101 *et seq.* (the "Nonprofit Act").
- The Shellmore HOA is also subject to the South Carolina Homeowners Association Act, S.C. Code § 27-30-110 *et seq*. (the "HOA Act").

[2] The HOA is successor to the Cape Romain Lookout Homeowners Association, Inc., named in § I.1 of the Declaration. The community changed its name to "Shellmore" in 1994.

Every owner of property within Shellmore is a member of the HOA, and every party to this appeal owns property in Shellmore.

The Shellmore HOA has a fifty-year history of flatly prohibiting roofed docks and large boat lifts. (*e.g.,* R. pp. 45, 78, 605-624, 272-273, 274, 286). The HOA has the authority to prohibit certain construction due to restrictions within the Declaration, which require owners to first obtain written approval from the HOA of their potential construction plans. Submission of plans and garnering of approval is a necessary process that must be completed by owners, prior to construction.

The Declaration's Article V contains a mandatory rubric for the evaluation of plans, which rubric is intentionally designed to maintain consistency of design within Shellmore. Under the clear terms of the Declaration, no owner may construct any dock whatsoever without first getting written approval from the HOA. The Declaration unequivocally states:

> No boat houses, **docks**, piers, or wharves shall be constructed on any lot **without first obtaining the written approval of the Association**, or its designated representative.

(R. p. 74, Declaration, Article V, § 8) (emphasis added). The HOA has never, in the almost fifty-year history of the development, given approval to any covered dock. The HOA has on multiple occasions **denied** its approval to covered docks and lifts. (*e.g.,* R. pp. 45, 78, 605-624, 272-273, 274, 286).

The Declaration requires that plans and specifications for proposed new structures, including docks, be reviewed for "harmony of external design" with existing structures. (R. p. 71). The "external design" of every dock at Shellmore is that it is a flat,

low-lying, uncovered platform on the water. Hence, throughout the history of the development, the HOA has found covered docks to lack the requisite "harmony of external design."

Of particular importance to this case is the mandatory procedure that the Declaration requires before any property owner may build (or change) a structure in Shellmore. The Declaration requires that a homeowner first submit plans to the HOA, which plans must be evaluated for particular factors which are itemized by the covenants, and then either approved or disapproved. In short, all plans must be evaluated for (1) location in relation to surrounding structures, (2) harmony of design with existing structures, (3) harmony specifically as to: nature, kind, shape, height, materials, and location. (R. p. 71, Declaration, Article V). Significantly, for the purpose of this appeal, the Declaration requires plans to be reviewed and evaluated by the HOA[3] prior to the commencement of any construction.

Respondents Dye and Chakides Rock the Boat

This litigation arose when Respondents Shaun Dye and Jonathan Dye (the "Dyes") decided to build a covered dock and sought to avoid the mandatory process to do so. The typical docks on Shellmore are flat platforms on the water; the Dyes' covered dock is essentially a building—the only building—on the beautiful marsh landscape.

Several years ago, Respondent Jon Dye was the president of the HOA. He wanted a covered dock and boat lift on his lot. At the HOA's annual meeting in 2016, Mr. Dye—

[3] The lower court's order wrongly found that a purported "architectural review committee" at Shellmore has the authority to approve plans on behalf of the HOA, as discussed herein.

obviously aware that he needed approval before construction—moved for a vote of the membership on covered docks. After the members discussed the history of the community, and the importance of preserving the views of their neighbors, the HOA voted to prohibit the construction of covered docks. (R. p. 78, "The vote passed to prohibit covered docks and lifts.").

The Dyes did not like the outcome of the HOA's vote to prohibit docks. Neither did Respondent John Chakides, a Director of the Association. Chakides also wants his own covered dock and boat lift. (R. pp. 48-49, 607). Director Chakides' personal desire for a covered dock on his property is in direct conflict with the expressed will of the corporation "to prohibit covered docks and lifts" in Shellmore.

Aggrieved and entitled, the Dyes and Chakides hatched a plan.

In the past, there had been an informal group of Shellmore homeowners who reviewed architectural plans and reported to the HOA on those plans. It is unclear whether that group, which was sometimes referred to as the "architectural review committee" ("ARC"), was comprised of directors or individual members. Limited corporate records indicate that the ARC had not been active in the community since 2010. (R. p. 264-285). The scope of the ARC's purview never was delineated in any recorded document, as required by South Carolina's HOA Act. As such, the informal "committee" was legally incapable of making decisions on behalf of the corporation and regarding property at Shellmore.[4]

[4] *See, infra.* The architectural review committee has no authority because the Association never recorded any sort of instrument giving it power over homeowners' property, which would

However, acting in collusion with the Dyes, the HOA's Director Chakides, purported to appoint to an alleged "ARC" certain carefully curated people whom he knew to be in favor of covered docks. (R. pp. 48, 606, 609, 622).

In an effort to circumvent the Declaration of Covenants' approval process, as well as the HOA's prior vote to prohibit covered docks, Respondents the Dyes and Director Chakides worked together to get the idea of the Dyes building a dock with a large, covered roof to the purported ARC for "review." The Dyes did not provide to their neighbors any notice of their building intentions. (R. p. 606). **Without reviewing plans, conducting a meeting, or communicating with members, two hand-picked members of the purported ARC purported to "approve" of the Dyes' dock.** (R. pp. 605-624). The thrust of the Respondents' argument to the lower court eventually became that those two people, who were not directors of the HOA and were not elected to their purported position by the HOA members, somehow had the authority to overturn fifty years of community precedent and corporate action prohibiting covered docks. (*See, e.g.,* R. pp. 624, ¶ 15). **Importantly, this is legally wrong.**

The HOA's Board of Directors knew that the HOA's members had voted to prohibit covered docks. (Minutes, R. p. 78). The Board knew that no roofed or covered docks have ever been approved in Shellmore and that applications for them had always been denied. (R. pp. 41-89, 605-624). The Board knew that the covenants require that

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have been required by the HOA Act. Moreover, the Nonprofit Act requires that committees be comprised of directors if they are to have any authority to act on behalf of the corporation; the purported architectural review committee is not comprised of directors and is therefore invalid under the Nonprofit Act. (*See infra*; *see also* R. pp. 165-168, 388-394).

new structures be consistent in design with existing structures. (Declaration, R. p. 71). The Board knew that the purported "architectural review committee" did not have authority to approve dock applications. (Declaration, R. p. 74). The Board knew that the Walls, and other members of the HOA, had entrusted the Board with preserving their property values by consistently enforcing the Declaration, among other things. The Board knew that the Dyes' neighbors on either side objected to covered docks, which would obstruct the very views which gave value to their homes. (R. pp. 41-89, 605-624). The Board of Directors is bound by the Declaration of Covenants, because the HOA that they serve exists to enforce it, and because the Directors own bound lots in Shellmore. The Board is also bound by the vote of the corporation to prohibit covered docks, because the HOA is a nonprofit corporation.

Despite this knowledge, the Directors sent an email out to the homeowners, telling them that the decision of the purported architectural review committee, purporting to approve of the Dyes' covered dock and lift plans, would stand. (R. p. 256). **Notably, the Board itself never reviewed any plans nor took any vote or other corporate action.** (*See, e.g.*, 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 standard height with a pitched roof.").

Naturally, this email from the Board to the members set off a firestorm of discontent. The Walls sent a series of demand letters to the Board. (R. pp. 79-85). The purpose of the letters, *inter alia*, was to request that the Board hold a meeting of the HOA to discuss the Dyes' dock plans. This was because the Declaration of Covenants requires

written approval from the HOA for the construction of any dock, which the Dyes did not have. (*e.g.*, R. pp. 608-612). Two out of three of the Directors apparently wanted a special meeting of the HOA, but no meeting ever took place. (R. pp. 605-612). The Walls, joined by the requisite number of other members, called for a special meeting of the Association. (R. pp. 82-83). That meeting also did not take place.

One Director of the Association stated that the purported architectural review committee was "out of control." (R. p. 607, ¶ 23).

In the meantime, the Dyes changed their dock plans. (R. pp. 299 ¶¶ 13-14). There no evidence that either the Board or the HOA ever reviewed or discussed or approved the Dyes' ***revised*** plans, and there is evidence suggesting they did not. (R. pp. 605-624, 656). The Declaration expressly requires that owners first obtain the "written approval of the Association," prior to construction of any dock. (R. p. 74, § V.8). There is **no evidence** of such written approval of the Dyes' plans, including their revised plans, and there is evidence to the contrary. (*See, e.g.*, R. pp. 605-624) ("[the Dyes] had not received the necessary written approval of the Association."). Nonetheless, despite these required and covenanted pre-conditions for construction, which bind the Board and the HOA members, and which exist to protect the property values in the community, the Board ultimately took the position that it would not stop the Dyes from proceeding with construction of their improper covered dock.

The Dyes say, "F.U.," in Semaphore

The Dyes commenced and completed construction of their covered dock. Consistent with their unfortunate attitude toward their elderly neighbors, the Dyes

promptly hung from the dock's flagpole an "F.U." Flag, directed at the Walls and their other neighbors, the Fritzes. (R. p. 611, ¶ 21). Procedurally, the Dyes completed their covered dock while this litigation was ongoing and while there was an ongoing dispute as to whether they had valid approval to do so.[5]

Still, the Dyes were aware and concerned that they had not gotten the necessary approval for their covered dock. (*See, e.g.*, R. p. 623, ¶ 19). They—along with their attorney in this litigation—therefore went around to the directors and members of the HOA (while this litigation was ongoing) and solicited proxies and "Voting Agreements," for undisclosed consideration,[6] to be enforced in the event that "it be judicially determined that a vote of the membership of the Association be necessary for the approval of docks within the Shellmore community." ("Voting Agreements") (R. pp. 359-365). The Voting Agreements were "specifically enforceable" and mandated those signing to "vote **FOR** the approval of construction of Jonathan and Shaun Dyes' covered dock." (*Id.*). Interestingly, the term of years varies greatly, with some Voting Agreements being binding for one year, some for three years, some for ten years—suggesting that consideration may have varied, as well. (R. pp. 359-365). It is not yet clear what the Dyes or their attorney told or promised or gave the directors and members in exchange for

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[5] As discussed below, the Master-in-Equity granted a temporary injunction, but subsequently lifted it, deciding that the Walls would suffer no irreparable harm in the event that the Dyes constructed their dock. (R. p. 13, Order, filed December 7, 2020) ("As the Plaintiffs seek a mandatory injunction which can reasonably require the removal of the cover in the event Plaintiffs ultimately prevail, this court finds they will not suffer irreparable harm and denies the motion to reinstate the Injunction.")

[6] Voting agreements, like any other contract, require consideration.

these agreements, and no discovery was allowed on the maneuver before summary judgment was granted.

The Voting Agreements were deeply problematic, for numerous reasons. For example, the Voting Agreements were solicited by the Dyes' attorney from parties to the litigation, including members and directors of the HOA, while this derivative litigation was ongoing. Two out of three Directors of the Shellmore HOA entered into the Voting Agreements, which was a clear conflict of interest because (among other reasons) those Directors were contracting to be bound to vote for the Dyes' dock, regardless of whether it was in the best interest of the HOA. (*See*, Aff. Schweers ¶ 29, R. p. 623). Moreover, the terms of the Voting Agreements are premised on the material misrepresentation that the vote was to be conducted on a dock that was "submitted to and approved by the . . . Board of Directors of the Association." (R. p. 359) (*But see*, R. pp. 614-617, ¶¶ 5, 23, 26, 30; R. p. 621-624, ¶¶ 4, 19, 30-31). The evidence shows that the Dyes never submitted plans to the Board of Directors, and the Board never actually approved of the plans, either.

After soliciting the Voting Agreements, but before any vote took place, the Dyes finished construction of their covered dock and unfurled their "F.U." flag. It bears repeating that the Declaration expressly requires the HOA's written approval, **prior to** construction. (R. p. 74).

Thereafter, in January 2021, the HOA held its annual meeting of the members. In attendance at the meeting, and fully participating in the meeting, was the Dyes' personal

attorney in this litigation, Andrew Connor.[7] (*See*, R. pp. 608-624). The Dyes were also present at the meeting, and participating in it, and so obviously Attorney Connor was not acting as their proxy. According to several witnesses, Attorney Connor made a motion to the members of the HOA that they vote on the Dyes' dock, dictating to the members the terms of that vote. (R. pp. 614-624). The motion was seconded by Director Chakides. Several members of the HOA asked questions about the procedural validity of a vote on a dock that had already been constructed. *(Id.)*. Attorney Connor, citing the Voting Agreements, insisted to the members that the vote be held, as Attorney Connor had moved for it to be. (*Id.*) Again, this meeting was held while this litigation was ongoing, and before any final order was rendered. The result of the vote was that a simple majority of the members voted in favor of the Dyes' already-constructed dock.[8] For multiple reasons, discussed herein, this vote of the HOA did not constitute lawful approval of the Dyes' dock.

Ultimately, the vote by the members was an improper basis for the lower court's final orders, now on appeal. The Master-in-Equity held, "[A]fter allowing the entire HOA membership to vote on the issue, the covered dock was approved by majority vote . . . .

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[7] The Walls' attorney did not attend the meeting and did not learn until afterward that the Dyes' attorney was present and participated. Attorney Connor does not own property in Shellmore, and he is not a member of the Shellmore HOA.

[8] There was discussion at the meeting about the enforceability of the voting agreements, particularly since the dock had already been constructed. Attorney Connor made the motion precisely to conform with the voting agreements (although not with reality). Thus, those voting in favor were those bound by the Voting Agreements. (R. pp. 608-624).

The Court knows of no other more democratic process." (R. p. 38-39). But there was nothing democratic, or valid, about that particular vote.

B. Procedural History

Appellants Bonnie and Walter Wall (the "Walls") filed a Verified Amended Complaint, bringing individual and derivative claims against Respondents: (1) the Dyes, (2) Chakides, and (3) the HOA.[9] (R. p. 41). The Walls sought a declaratory judgment and injunction regarding the Dyes' construction of a large roof on their dock, which would block the Walls' view. The Walls also brought causes of action for breach of covenants, nuisance, and civil conspiracy, as well as derivative claims for breach of fiduciary duty, breach of covenants, and civil conspiracy. The Walls' theory was that the Dyes did not have the necessary approval from the Association to construct the dock. They further alleged that the directors of the Association were (*inter alia*) actively seeking to circumvent the community's governing documents. (R. pp. 41-89).

The Master-in-Equity granted a preliminary injunction against the Dyes' construction of their dock cover, and he ordered the parties to file summary judgment motions by October 15, 2020. (R. p. 4). The Walls and the Dyes each filed motions for summary judgment on October 15, 2020. The Walls sought partial summary judgment, only on their causes of action pertaining to the construction of unambiguous contracts, which could be decided as a matter of law. After all, no discovery had yet taken place,

[9] The Walls' original verified complaint was filed 13 days prior, on September 22, 2020. The circuit court referred the case to the Master-in-Equity on September 30, 2020.

and the Dyes had not yet even filed an Answer. In contrast, the Dyes sought summary judgment on every cause of action. Both the Dyes and the Walls filed lengthy memoranda in support and opposition, as well as conflicting affidavits on the facts, as well as numerous exhibits. (R. pp. 155-365).

The Dyes filed their Answer on October 20, 2020. (R. p. 90). On October 21, 2020, the Dyes filed a Motion to Dissolve the Temporary Injunction. (R. p. 366). The Walls filed a Reply to the Motion to Dissolve on October 22, 2020. (R. p. 377). The HOA filed a one-page motion for summary judgment, incorporating the Dyes' arguments, on October 23, 2020, as well as an Answer. (R. pp. 103, 383).

The Master-in-Equity held a virtual hearing on November 2, 2020. At the conclusion of the hearing, the Master requested supplemental briefing, which the Dyes and the Walls filed on November 6, 2020. (R. pp. 384-406).

In an order filed November 19, 2020, the court dissolved the temporary injunction and granted summary judgment as to certain causes of action.[10] (R. p. 10). The Walls filed their Notice of Appeal of that order on November 22, 2020. (Appellate Case No. 2020-1583). On the same day, the Walls filed a Motion to Stay the Order, pending their appeal; they also filed a Memorandum in Support of their Motion. (R. p. 407-413). The Master-in-Equity denied the Walls' Motion to Stay on December 7, 2020. (R. p. 13).

[10] The improper grants of summary judgment as to the Walls' causes of action for breach of fiduciary duty and civil conspiracy are the subject of the Walls' first appeal, Appellate Case No. 2020-1582.

In December of 2020, the Dyes finished building their dock, including its large roof. In January of 2021, at the annual meeting of the Shellmore HOA, Attorney Connor moved for the above-described vote, which resulted in a majority vote "to approve the Dyes' covered dock." (R. p. 428). On the grounds that "The Dyes' dock has been approved by a majority of the members of the Shellmore [HOA]," the Dyes filed a Renewed Motion for Summary Judgment, on January 26, 2021. (R. p. 402).

Because of the many questions of fact on which the Dyes' renewed motion hinged, the Walls made several attempts to notice depositions and obtain documents in this case. The Walls ultimately filed a Motion to Compel depositions and documents. (R. p. 439). The Walls also filed a Renewed Motion for Partial Summary Judgment and in Opposition to Defendants' Renewed Motions for Summary Judgment. (R. p. 432). The HOA filed a Motion for Protection from Discovery. (R. p. 448).

With the Walls' Motion to Compel pending, the court scheduled a hearing for March 22, 2021. The Walls requested that the discovery motions be heard prior to those for summary judgment. (R. p. 627-634). The Master-in-Equity heard the summary judgment motions but not the discovery motions.

On July 28, 2021, the court filed its *Order Granting Defendants' Summary Judgment*. (R. p. 16). The Walls filed a Motion Pursuant to Rule 59, SCRCP, on August 9, 2021. (R. p. 470). The Master denied that motion to reconsider in an order filed August 13, 2021. (R. p. 38).

The Walls timely served their Notice of Appeal on September 13, 2021.

STANDARD OF REVIEW

This is an appeal from the Master-in-Equity's improper grant of summary judgment in favor of the Respondents. Appellate courts use the same standard of review as the trial court to review a grant of summary judgment. "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) (internal quotation marks omitted). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). A scintilla of evidence is "the smallest trace" of evidence or "any material evidence that, if true, would tend to establish the issue in the mind of a reasonable jury." *Loflin*, 427 S.C. at 589, 832 S.E.2d at 299 (internal quotation marks omitted).

"Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts" and "is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* at 588–89, 832 S.E.2d at 299 (internal quotation marks omitted). Importantly, when it rules on a summary judgment motion, "the court does not weigh conflicting evidence with respect to a disputed material fact." *Id.* at 589, 832 S.E.2d at 294.

ARGUMENT

Summary judgment on the facts, prior to discovery, was premature. Even so, the Walls presented at least a scintilla of evidence that the Dyes did not properly apply for or obtain the requisite written approval for their covered dock prior to its construction. The Walls also presented at least a scintilla of evidence that the Dyes' dock, as constructed, violates the covenants and the common plan of development at Shellmore. Finally, the Walls presented at least a scintilla of evidence that the vote of the membership was unlawful and invalid. Therefore, this Court should reverse the Master-in-Equity's grant of summary judgment.

In addition to the above factual disputes—which themselves compel reversal of summary judgment—the Master-in-Equity erred as a matter of law in disregarding provisions within the South Carolina Nonprofit Corporation Act ("Nonprofit Act") and the Homeowners' Association Act ("HOA Act") which render Shellmore's purported "architectural review committee" and its actions invalid, and which barred approval of the Dyes' dock under the facts here. The Master's order is erroneously founded on error of law as to the question of common plan of development, which must be corrected by this Court. As a matter of law, any discretion in evaluating applications for construction must be tempered by reference to existing structures, pursuant to the rubric delineated in the Declaration. Finally, as a matter of law, construction prior to approval violates the covenants and is incapable of post hoc ratification.

There are two orders on appeal. The first order is the *Master's Order Granting Defendants' Summary Judgment* (the "first order"). The second order is the *Form 4 Order* in response to the Walls' Motion Pursuant to Rule 59 (the "second order").

Four things about the first order on appeal are particularly telling of error. First, the order states that its conclusions are "based on the record presented to this Court." Given that there was a pending motion by the Walls to compel discovery, this phrase indicates the court's awareness that the record was not complete. Second, and in the same vein, the order "DENIES the pending discovery motions as moot"—which is particularly improper on summary judgment. Third, the order's numerous citations to the purported "record" consist almost entirely of citations to disputed evidence submitted by the Dyes, completely disregarding the verified complaint and three non-party affidavits which were submitted by the Walls, as well as numerous exhibits also submitted by the Walls, all of which should have defeated summary judgment, particularly at such an early stage of the lawsuit. Fourth, the first order's rulings were ultimately contradicted by the court's second order. In the second order, the Master changed his basis for granting summary judgment, wrongly finding the requirements of the community's covenants to be supplanted by a corrupted popular vote. Both orders should be reversed by this Court and the case remanded for discovery and trial.

I. Summary judgment on the facts, before discovery, was premature.

Within four months of the Walls' initiation of this lawsuit, the Respondents filed their renewed motions for summary judgment which underlie this appeal.[11] In the meantime, Respondents refused to participate in discovery noticed by the Walls, including standard requests for production of documents and depositions. (R. p. 625). Discovery was critical to the Walls' prosecution of the case, as well as to their defense against summary judgment motions filed by the Respondents, which hinged on statements made by the Respondents themselves. (*See* R. pp. 384-389, incorporated by reference at R. p. 432).

Among other things, the Walls sought to examine the Respondents under oath as to their assertions that the Dyes' dock plan had actually been reviewed and properly approved. The Walls had several affidavits to the contrary. (R. pp. 605-624). The Walls also sought documentary discovery as to the HOA's corporate records, which the HOA alone had access to, and which it was clutching tightly to its corporate chest. (R. p. 439). For example, the Walls were seeking minutes from meetings by the board of directors at which any alleged corporate action might have been taken to approve of the Dyes' dock. (*Id*.). **Importantly, although the HOA and the Dyes baldly asserted that both the purported ARC and the Board had approved of the Dye dock, they <u>never</u> put into evidence any meeting minutes to that effect.** *But see* S.C. Code § 33-31-1601(a) ("A corporation shall keep as permanent records minutes of all meetings of its members and

[11] The lower court had previously granted in part and denied in part previous motions for summary judgment by the Respondents. (Order, R. p. 10); Appellate Case No. 2020-1583.

board of directors, a record of all actions taken by the members or directors without a meeting, and a record of all actions taken by committees of the board of directors[12] as authorized by Section 33-31-825(d).").

The Walls filed a motion to compel certain discovery, including depositions and requests to produce documents. (R. p. 439). In return, Respondents filed motions for protection from discovery. (R. p. 448). The Walls requested that their motion to compel would be heard prior to arguments on summary judgment. (R. p. 627-652). Respondents argued that their motions for summary judgment would make "moot" the need for discovery. (*Id.*).

The Walls did not want to go into a hearing on summary judgment—however premature it may have been—without evidence demonstrating questions of fact. Thus, they filed four affidavits—including three from non-parties—showing numerous facts in dispute. (R. pp. 605-624). As set forth in the filed affidavits, factual questions prevented summary judgment on, *inter alia*, the issues of (a) the common scheme of development in Shellmore, (b) the procedural propriety of the various actions by the Dyes and the Board of Directors, (c) the purported architectural review committee, as well as (d) the validity of the vote by the members at the HOA's annual meeting. (R. pp. 432-437). In addition, the Walls relied on their verified pleadings to demonstrate that there were genuine issues

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12 *See infra* for discussion on the Nonprofit Corporation Act's requirement, reflected by this phrase, that committees consist of members of the board of directors. Shellmore's purported architectural review committee was not made up of any directors, which is one reason it lacked authority to act on behalf of the corporation. (R. p. 623, Schweers Aff. ¶ 13, "[the ARC's'] members are not members of the Board of Directors, and the circumstances of their appointment is questionable, lacking valid documentation by the Board of its action in appointing certain members.").

for trial. The Walls also pointed out the ***absence*** of evidence from the Respondents in support of their arguments. (*e.g.*, R. p. 576: 14 - 577: 23; p. 590: 23- 591: 25).

In contrast, the Respondents' factual assertions were attested within two self-serving declarations from the Respondents themselves, about which they were never permitted to be cross-examined under oath. Respondents also attached as exhibits to their motions various corporate documents, much of which were cherry-picked from corporate records—which the Respondent HOA prevented access by the Walls. In discovery, the Walls requested those withheld corporate documents, and they sought the opportunity to cross-examine Respondents under oath.

The Master-in-Equity acknowledged in his order that discovery motions were pending: "the Walls had filed a pending motion to compel discovery and Shellmore HOA had filed a competing motion for protective order." (Order, R. p. 16). But the order goes on to give a six-page recitation of the "facts," citing exclusively to materials submitted by the Dyes. (R. pp. 16-23 and fn. 3-26, entirely citing to the Dyes' motion and exhibits). The order then ends this one-sided recitation of highly disputed facts with the conclusory holding:

> The Parties' competing discovery motions, being rendered moot by the granting of summary judgment ending the case, are denied as moot.

(R. p. 22).

This was error, and especially so in a case that was less than five months old. Summary judgment before a party has a full and fair opportunity to conduct discovery is premature. *Gary v. Askew*, 423 S.C. 47, 813 S.E.2d 717 (2018). The South Carolina Rules

of Civil Procedure specifically contemplate that discovery will have been conducted on the facts, prior to summary judgment being granted. Rule 56(c) instructs that summary judgment is proper "**if** the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact . . . ". Rule 56, SCRCP (emphasis added). In other words, because discovery methods are expressly incorporated into the rule itself, Rule 56(c) renders summary judgment on the facts premature prior to discovery. "[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery." *Baird v. Charleston Cty.*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *see also Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (holding summary judgment was premature where the plaintiff did not have an adequate opportunity to conduct discovery on the issue of medical causation). "[S]ince it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues." *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004).

This Court should reverse the Master-in-Equity's grant of summary judgment, which was wrongly decided before the Walls had a full and fair opportunity to obtain discovery on the facts asserted by the Respondents within their motions.

II. The Walls presented at least a scintilla of evidence demonstrating that the Dyes did not obtain the requisite written approval for their covered dock prior to its construction.

The Master-in-Equity wrongly based summary judgment on the premise that the "undisputed record evidence indicates that the Dyes properly submitted and received

appropriate approval for their covered dock." (R. p. 30). Indeed, that is a grammatically-loaded sentence, which is followed by a grammatically-loaded paragraph which obscures the prematurity of summary judgment and purports to eradicate factual disputes by nothing more than sheer willpower:

> In their submissions to this Court, the Dyes have submitted **uncontroverted** admissible evidence and testimony that: they submitted the plans and specifications for their proposed covered dock to OCRM, USACOE, and the Shellmore ARC; that OCRM and USACOE approved the Dyes' plans and issued the appropriate permits, that the ARC approved the Dyes' covered dock plans via written email; that the Shellmore Board of Directors affirmed the vote of the ARC and reiterated its designation of the ARC as the Board's representative under the Declaration; and that nine (9) of the fourteen (14) members of the HOA voted to approve the Dyes' covered dock at the Shellmore HOA's annual meeting. The Walls have failed to submit or cite to any competent, admissible evidence creating a genuine dispute as to these facts. Nor, have the Walls submitted any evidence raising any other issues of fact pertaining to these approvals.

(R. p. 30) (emphasis added). But the Walls presented significant evidence demonstrating that neither the Dyes and nor the HOA followed the process that would have been necessary to gain valid approval of the Dyes' dock. For purposes of brevity in this potentially long(er) appeal brief, the Walls submitted four affidavits and a verified complaint, all of which demonstrate a clear controversy as to those "uncontroverted" facts that were the basis for the court's improper grant of summary judgment. The Walls respectfully request that this Court would read those affidavits and the complaint in their entirety, which are in the Record at pages 605-624. Here are some excerpts particularly highlighting disputed facts:

- "The Dyes completed construction of their covered dock in December of 2020, despite that they had not received the necessary prior written approval of the Association." (R. p. 610, ¶ 20; R. p. 23, ¶ 19).
- "The Dyes did not receive the approval of the Association prior to construction of the as-built dock in question." (R. p.621, ¶ 4; R. p. 614, ¶ 5).
- "[T]he Dyes clearly violated Section 5.8 of the Shellmore covenants by not seeking prior approval of the Association before constructing their dock." (R. p. 615, ¶ 7).
- "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." (R. p. 605-606).
- "The Board of Directors never approved the Dyes' dock." (R. p. 610, ¶15).
- "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." (R. p. 656).
- "the ARB [sic] never met in person to review the dock and has never reviewed the Dyes' plans to be in harmony with design and location with the surrounding structures." (R. p. 606, ¶ 14).
- HOA "Board member David Walker advised me that the ARB was out of control, thought dissolution of the ARB is the best approach to solving this problem of the ARB's abuse of power and the ARB vote was not proper." (R. p. 607, ¶ 23).

- "At the [annual] meeting, Attorney Andrew Connor was also present, along with his clients Jonathon and Shaun Dye. Neither the Walls' counsel nor the [HOA]'s litigation counsel was present." (R. p. 623, ¶ 21).
- "[T]his was a manipulation of the vote by Andrew Connor, designed to shape the terms of a vote by the membership to the interests of a select few, and to command adherence to voting contracts that would not have been required if the vote had been phrased differently." (R. p. 624, ¶ 27; R. p. 611 ¶ 29).
- "[I]t was a conflict of interest for members of the Board of Directors to have signed contracts to vote in favor of one member. I believe their favorable votes further tainted the process." (R. p. 624, ¶ 29).
- "At the time they constructed their covered dock, Jonathan and Shaun Dye had actual knowledge that covered docks are forbidden at Shellmore." (R. p. 623, ¶ 12; p. 615, ¶ 13).
- "The Dyes' covered dock is unprecedented. It does not conform to the covenants or the scheme of development at Shellmore." (R. p. 624, ¶ 31).

The sworn statements submitted by the Walls in opposition to summary judgment constituted far more than a scintilla of evidence that the facts going to approval, authority, and procedural and substantive compliance were in dispute. Under the rules and the law, that evidence should have been sufficient to defeat summary judgment. "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a

motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Despite the procedural posture and the Walls' evidence in opposition—which was amassed even though Respondents refused to participate in discovery—the Master-in-Equity made numerous fact-intensive rulings in favor of Respondents within the *Order Granting Defendants' [sic] Summary Judgment*. (R. p. 16). Indeed the Master's order contains as the basis for its rulings more than six pages of "Factual Background," with citation solely to the Dyes' disputed account of the facts. (R. pp. 17-22, fn. 3-19, 25-26). Wrongly, the Master found the Respondents' statements to be "uncontroverted," while finding that the Walls did not submit any "competent" evidence. (R. p. 30). This was error within an order granting summary judgment, when all doubt must be resolved in favor of the non-moving party (the Walls). *Loflin* at 588-89 (on summary judgment, "all ambiguities, conclusions, and inferences arising in and from the evidence" must be viewed "in a light most favorable to the non-moving party"). When it rules on a summary judgment motion, "the court does not weigh conflicting evidence with respect to a disputed material fact." *Id.* at 589, 832 S.E.2d at 294.

By citing exclusively to the Dyes' disputed testimony,[13] the Master-in-Equity: (1) erroneously weighed the evidence; (2) wrongly made credibility determinations; (3) improperly failed to view the evidence in the light most favorable to the Walls; and (4)

[13] The Order also notes that "no evidence" was submitted on certain issues pertaining to the corporation. (*See, e.g.*, R. p. 35). Given that the corporation was a defendant, and it refused to participate in discovery, these findings by the court are improper.

(at a minimum) disregarded the proverbial "mere scintilla" of evidence that makes summary judgment improper. (*See* R. pp. 470-481).

This Court should find that the questions of whether the Dyes properly submitted plans, in compliance with the covenants, and received appropriate approval for their covered dock are questions of material, disputed fact which render summary judgment improper. The Walls respectfully request reversal and remand for discovery and trial.

III. As a matter of law, Respondents did not comply with the Declaration and statutory law as to the purported approval of the Dyes' dock.

The Shellmore HOA was incorporated more than fifty years ago for the express purpose of "maintenance, preservation, and architectural control" in the Shellmore subdivision. (R. p. 194, Articles of Incorporation). Two bodies of law command the actions of the HOA: common property law and statutory law. Respondents' actions unquestionably violated real property servitudes, as well as statutory law governing homeowners' associations organized under the Nonprofit Act. First, as a matter of law, the purported "architectural review committee" lacked authority to act on behalf of the HOA, and this Court should reverse the lower court's error in that regard. Second, as a matter of law, the HOA lacked power to approve of the Dyes' covered dock.

a. The purported ARC was invalid under the Nonprofit Act.

The Shellmore Homeowners' Association is a nonprofit corporation, charged with the enforcement of the community's restrictive covenants and organized pursuant to the South Carolina Nonprofit Corporation Act. The Nonprofit Act contemplates that corporate governance is to be carried out by a Board of Directors, who are 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.

Shellmore's Declaration, which refers often to the Board of Directors, contemplates the possibility of an "architectural committee." (R. p. 71, Article V). The Declaration states that the Board of the Association **may** appoint an "architectural committee composed of three or more representatives." (R. p. 71). There is no evidence that the Shellmore HOA ever validly appointed such a committee, in conformance with statutory law.

The Nonprofit Act expressly requires 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.") (emphasis added). This statutory requirement assures that corporate decisions will be made in good faith and in the best interest of the corporation. The Shellmore HOA chose to organize itself under the Nonprofit Act, and it is bound by its provisions. When the Declaration contemplates an architectural committee, it implicitly incorporates the Nonprofit Act's requirement that such a committee would be comprised of directors. Moreover, the Nonprofit Act is clear that committees must be created in strict compliance with the Act's requirements for actions by the Board of Directors, including procedural requirements on notice, meeting, voting, and quorum. Respondents never submitted any evidence of action by the Shellmore Board to create the purported "architectural review committee."

The evidence is clear that the purported ARC at Shellmore was not comprised of members of Shellmore's Board of Directors, but rather of ordinary members who were improperly "appointed" by Director Chakides, who picked them for their sympathy for covered docks. (R. pp. 48, ¶ 36, R. p. 615, ¶ 14, R. p. 622, ¶13). Because the composition of the ARC was invalidly composed under the Nonprofit Act, it was powerless to act on behalf of the HOA in approving docks, as a matter of law.

b. Additionally, the purported "architectural review committee" is without authority pursuant to the HOA Act.

In 2018, the South Carolina Legislature enacted the Homeowner's Association Act (the "HOA Act"). The HOA Act expressly requires that, in order to be enforceable, all governing documents regulating an HOA must have been recorded with the Register of Deeds by January 10, 201 9. S.C. Code § 27-30-130(A).[14] The purpose of HOA Act is to provide notice to homeowners, whose property rights and values are at stake, of the method by which those rights will be determined.

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[14] S.C. Code § 27-30-130 Enforceability of governing documents; recording requirements; rules, regulations, and amendments.

> (A)(1) Except as otherwise provided in this section, in order to be enforceable, a homeowners association's governing documents must be recorded in the clerk of court's, Register of Mesne Conveyance (RMC), or register of deeds office in the county where the property is located.
>
> (2) To continue to be enforceable, any governing document not recorded prior to the effective date of this section must be recorded by January tenth of the year following the effective date of this section in the clerk of court's, Register of Mesne Conveyance (RMC), or register of deeds office in the county where the property is located.
>
> . . . .

The evidence is clear that the Shellmore HOA did not record any bylaws, rules, designations, or other governing documents, whatsoever. The Shellmore HOA is the gatekeeper for proposed construction within the community, charged with maintaining "architectural control." (R. p. 194). Respondents presented no evidence of a recorded instrument assigning architectural control over the community to an informal, invalidly-comprised, dubiously-selected, non-entity "committee." Because the HOA did not validly designate or assign its decision-making authority over docks to an "architectural review committee," this Court should find that the purported ARC did not have such authority, as a matter of law.

c. The Declaration established a common plan of development which Respondents violated.

In finding there is no common plan in Shellmore, the Master-in-Equity's order errs as a matter of law as to the plain and unambiguous language and construction of Shellmore's restrictive covenants.[15] Wrongly focusing on the red herring question of whether covered docks are expressly prohibited by the covenants, the order ignores that both the Dyes and the HOA are bound by the Declaration's clear requirements—both substantive and procedural—limiting and restricting planned construction, which the Walls showed Respondents breached. The Shellmore Declaration itself **is** the common plan, and it operates to prohibit the Dyes' covered dock. *Circle Square Co. v. Atlantis*

[15] The Walls agree with and do not appeal the Master's ruling that the restrictive covenants in the Shellmore Declaration are unambiguous. (R. p. 24).

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.")

"Restrictive covenants are contractual in nature and bind the parties thereto in the same way as any other contract." *Seabrook Island Property v. Berger*, 616 S.E.2d 431, 365 S.C. 234 (2005) (internal citations omitted). Every party to this litigation is subject to the Shellmore Declaration and the restrictions and obligations that it contains. Initially, the plain language of the Declaration is intended to prohibit new construction if it contrasts with that which is already in existence:

> Architectural Control. No . . . structure shall be commenced, erected or maintained . . . until the plans and specifications showing the **nature, kind, shape, height, materials, and location** of the same shall have been submitted to and approved in writing as to **harmony of external design** and location **in relation to surrounding structures** . . . by the Board of Directors . . . [16]
>
> No . . . dock . . . shall be constructed on any lot without first obtaining the written approval of the Association or its designated representative.

(R. p. 71) (emphasis added). The word "shall" establishes that the requirements are mandatory, binding both those submitting plans and those reviewing them.

This article of 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, Art. V). As a threshold matter, the article requires that plans actually be ***submitted*** for approval, which the Walls contend the Dyes failed to do. (R. pp. 49, ¶¶ 39, 43; R. p. 79-80; 656) ("Mr. Dye does not have the specifics of his request for

[16] The ellipses omit language about who has the authority to review plans, which is discussed *infra*.

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."). Second, this section obligates submitted plans to be evaluated for particular factors, designed to maintain harmony of design within the community. Those factors include: "nature, kind, shape, height, materials and location," all of which must be found to be in "harmony of external design" with existing structures.

This rubric was the developer's common plan, which restricts the Dyes as to the use of their property, and it restricts the HOA in the evaluation of plans. The Walls relied on this common plan to protect their own property rights and interests. The case of *Sprouse v. Winston* is 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 size and placement 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.

Put simply, it is very unlikely that plans for a covered dock in Shellmore—if those plans were 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."). Moreover, the Walls' evidence

(and the absence of evidence to the contrary) 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).

Importantly, this mandatory rubric renders erroneous the Master's finding that "the Walls have failed to identify any competent, admissible evidence demonstrating a common scheme of development prohibiting covered docks at Shellmore." (R. p. 27, Order). As a matter of law, **this required formula <u>within the Declaration</u> expressly institutes a common plan of development at Shellmore, which had been carried out in the community for fifty years.**

Shellmore's developer imposed the Declaration for the express purpose of "protecting the value and desirability" of the property at Shellmore by maintaining "architectural control" and consistency. (R. p. 65). Since 1975, there has been an established pattern of development at Shellmore—in conformance with the Declaration. Among other things, the Declaration emphasizes the importance to homeowners of privacy, view of the water, and breeze, as well as harmony of external design. (R. p. 71, § V). Hence, throughout the history of the development, only low-lying platform docks have been constructed, to preserve neighbors' views and to maintain consistency. (R. p. 605; R. p. 722, ¶¶ 7-12). Because all lots at Shellmore have low-lying docks and piers, without rooves of any sort, a covered dock or covered lift would not be in harmony of design with its surrounding structures. Indeed, the Association has consistently **<u>denied</u>** requests for covered docks and boat lifts. (R. p. 78; R. pp. 264-285; R. p. 622, ¶ 8). *See Sprouse v. Winston*, 212 S.C. 176, 46 S.E.2d 874 (1948) ("It is clear that when appellant

purchased his property, he relied upon a general building scheme and restrictions."); *Gibbs v. Kimbrell*, 311 S.C. 261, 428 S.E.2d 725, 728-729 (Ct. App. 1993) ("we resolve this uncertainty [as to covenants' effect] by consideration of the general scheme of development of the subdivision").

The HOA has a contractual duty to maintain this common plan, pursuant to the covenants. Moreover, the HOA has a statutory duty under the Nonprofit Act to maintain the common plan. This is because the HOA, acting through its Board of Directors, has the fiduciary duty to evaluate proposed plans reasonably, in good faith, and in the best interest of the corporation. S.C. Code § 33-31-830. Here, the best interest of the corporation is the maintenance and preservation of architectural control and the corresponding vested property interests of its members. (R. p. 194). The HOA must enforce the rights and obligations of its members consistently.

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). 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 is not in harmony of design—particularly as to height, shape, size, and nature—with existing structures. *See River Hills Property Owners Ass'n, Inc. v. Amato*, 487 S.E.2d 179, 326 S.C. 255 (1997) (noting that reasons for ARB decision must bear a reasonable relation to the other buildings or general

plan of development and the ARB had a right to disapprove plans which would mar the general appearance of the subdivision and thus diminish the overall quality of the development."); *Palmetto Dunes Resort, Div. of Greenwood Development Corp. v. Brown*, 336 S.E.2d 15, 287 S.C. 1 (Ct. App. 1985) (finding that ARB's review of a house plan "must bear a reasonable relation to the other buildings or general plan of development.").

The Dyes' covered dock violates the common plan of development as set forth in the Declaration and as established over fifty years of consistent design. Any approval by the Board or the purported "ARC" of such a dock would be patently unreasonable and inconsistent. As an additional point, the Declaration unequivocally requires procedurally proper approval prior to construction. The Dyes' dock—constructed without proper prior approval—violates the common plan and the covenants.

This Court should reverse the Master-in-Equity and find, as a matter of law, that a common plan of development for the Shellmore subdivision was established by the Declaration of Covenants. Moreover, this Court should hold that the Respondents are bound by the common plan and the Nonprofit Corporation Act, which operate to bar the Dyes' covered dock.

IV. The Dyes' engineered "vote" could not spackle over Respondents' violations.

The Master-in-Equity's second order, denying the Walls' motion for reconsideration, should be reversed for the same reasons discussed above. In addition to being based on disputed facts and error of law, the second order relies on an improper, post-construction vote by the membership, which was procedurally invalid and tainted.

As an initial matter, the Master-in-Equity acknowledged that "**Both sides contend this membership vote was not authorized by the covenants and the law**." (R. p. 38) (emphasis added)). Meaning, there is no serious question, by anyone, that the vote was legally improper and *ultra vires* – the vote was not allowed by either (a) the covenants, or (b) the law. Permitting a landowner to "act now and seek forgiveness later," in the form of a corrupted popularity contest, ignores the purpose of purchasing a home in a neighborhood subject to a common plan of development.

The vote's invalidity, acknowledged in the order, is supported by the record. The vote was poisoned in its process and corrupted in its result. The process was poisoned because (among other reasons discussed above), (a) the vote itself was engineered by the Dyes' personal attorney, who improperly made the motion and apparently conducted that part of the meeting himself, and (b) numerous votes were obtained by the Dyes via improper "Voting Agreements" for undisclosed consideration—including votes of acting Directors of the Board, in apparent violation of their fiduciary duties. (R. pp. 362, 365, 605-612; *see* Statement of the Case, *supra*).

The vote also was corrupted because it took place after the dock already had been built, in clear violation of the Declaration. The unambiguous language of the Declaration specifies that written approval of the HOA must be obtained "first."[17] (R. p. 74). Indeed, the Dyes' engineered vote was an acknowledgment that the mandatory process had not

[17] The vote occurred on January 23, 2021. The Dyes finished construction of their covered dock over a month before the vote, in December of 2020. Therefore, there is no question that the Dyes breached the covenants by constructing their dock prior to receiving the required approval of the HOA.

been followed, and they were trying to spackle over the violation.[18] Second, the "vote" was insufficient to alter the Walls' vested property interest in the Declaration's process for prior approval, and in the common scheme of development at Shellmore, which unequivocally does not allow covered docks. (*See* R pp. 614-616, ¶¶ 5-6, 30; 621-624).

Despite acknowledgment in the second order that "[b]oth sides contend this membership vote was not authorized by the covenants and the law," the Master-in-Equity then balked at the remedy, expressing concern about having the cover of the dock removed. (R. pp. 38-39). Rather than considering other damages (such as monetary damages, or declaratory relief to prevent further violations by the Dyes and others) the Master-in-Equity instead ignored the acknowledged liability and simply granted summary judgment in favor of the Dyes. This was legal error.

Due to questions of fact surrounding the propriety of the vote, this Court should reverse for discovery and trial. In addition, this Court should hold as a matter of law that a post-construction "vote" violates the plain language of the Declaration.

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[18] The evidence shows the Dyes had actual notice of the Declaration's requirement that they obtain the Association's approval "first." The Dyes acknowledged this requirement at least two separate times: (1) first, they requested a vote of the Association in 2016; (2) second, they requested the vote of the Association at the January 23, 2021 meeting (albeit after they had completed construction). (*See* R. p. 78, 2016 Minutes). A landowner is bound by covenants of which he has notice; they constitute binding, voluntary contracts. *See Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987) (affirming mandatory injunction requiring owner to remove improvements that were constructed without prior approval).

CONCLUSION

For the reasons set forth above, this Court should reverse the grant of summary judgment, hold as a matter of law that there exists a common plan of development at Shellmore, and remand for discovery and trial.

Respectfully submitted,

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