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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' REPLY BRIEF

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In their brief, Respondents misstate the Walls' legal arguments, creating a distracting straw man—which they then try to light on fire. The Walls did not argue that the Shellmore covenants expressly prohibit covered docks. Instead, the Walls argued that the Shellmore covenants have express requirements for submission and review of construction plans, prior to commencement of construction, *which requirements the Dyes and the HOA breached*. Therefore—under the facts and circumstances of this case—**the Dyes' covered dock could not be (and was not) reasonably approved or permitted by the HOA**. This is an appeal from an improper, premature grant of summary judgment, and this Court should reverse and remand for discovery and trial.

Reply to Respondents' Statement of the Case

Respondents begin: "the Walls do not like covered docks." (Resp. Br. p. 2). To be accurate, what the Walls do not like is a planned community where a self-selected few disregard the recorded covenants and the law, while demanding that everyone else obey. The Walls bought into a neighborhood protected by covenants, where they were to be governed by a nonprofit homeowner's association, and by a board of directors with fiduciary duties and an obligation to follow and enforce the rules. The covenants contain procedures, which were deliberately subverted here by the Respondents in an effort to get something which Respondents knew was otherwise not allowed (a covered dock).[1]

[1] On page 2 of their brief, Respondents wrongly rephrase the covenants by saying that the "Declaration names [the HOA] as the 'Association' having jurisdiction to enforce the restrictive covenants of the subdivision." This is not the whole truth. In fact, "The Association, **or any owner**, shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants . . . of this Declaration." (R. p. 74). This is because the covenants are reciprocal in nature; they run with and are binding "on all parties having any right, title, or

Respondents' Statement of the Case contains a heading entitled, "Undisputed Facts." When compared with the Walls' Statement of the Facts, it should be clear to the Court that this title is a misnomer. **To be clear, the Walls dispute nearly all of Respondents' "undisputed" facts.** At the summary judgment stage, the facts, and every inference to be drawn from them, must be construed in the light most favorable to the Walls. The Walls submitted evidence calling into question (*inter alia*) the procedural propriety of the Dyes' dock application, the impropriety of the purported ARC's appointment and actions, the lack of any review or vote by the Board of Directors, the corporation's long history of prohibiting covered docks, the conflicts of interest of directors, and other evidence that the Respondents had breached the covenants. (*See* R. pp. 605-621, 41-89).

In opposition to facts that do not favor them, the Respondents argue that every shred of evidence the Walls presented in opposition to summary judgment just happens to be inadmissible . . . while all of Respondents' evidence is, conveniently, perfectly fine. Maybe it is easier to argue admissibility than to admit a dispute exists, but only willful blindness could ignore that there were numerous questions of fact here. On summary judgment a court is not to adjudge credibility, nor to weigh the evidence, nor to view facts in a light most favorable to the moving party. Instead, under the applicable standard, the court is to look to see whether a scintilla of evidence exists that indicates a

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interest" in property in Shellmore and they "shall inure to the benefit of each owner thereof." (R. p. 65). Moreover, the Walls brought the lawsuit derivatively as well as individually, to enforce the covenants on behalf of all members of the HOA. Every party to this litigation owns property subject to the covenants and is reciprocally bound by them.

dispute of material fact. Here, there was much more than a scintilla, and summary judgment in favor of the Respondents was improper. This Court should reverse.

ARGUMENT IN REPLY

Respondents' two procedural arguments mischaracterize the proceedings below and improperly attempt to turn certain rules into a "gotcha" game. When they turn to the merits, Respondents mis-state the relevant legal issues.

I. Summary judgment on Respondents' fact-intensive motion was improper prior to discovery.

Respondents first argue that the Walls never uttered magic words contained within Rule 56(f), SCRCP, and that therefore the Walls automatically must lose. This Court should disregard this argument, which spectacularly misrepresents the proceedings below, beginning with Respondents' first sentence which wrongly states, "For the first time on appeal, Appellants formally complain of the lack of discovery." (Resp. Br. p. 10). In direct contrast to this statement, the order on appeal holds that the Walls' "pending motion to compel discovery" is denied "as moot" and that "the Parties' competing discovery motions, being rendered moot by the granting of summary judgment ending the case, are denied as moot." (R. pp. 16, 22).

Procedurally, as set forth in more detail in the Walls' opening brief to this Court, the Walls moved for *partial* summary judgment on certain questions of law to be answered by the unambiguous covenants, the Nonprofit Corporation Act, and the Homeowners' Association Act. (*See* Walls' Brief, Statement of the Case; *see also* R. pp. 155-194). In contrast, the Respondents moved for summary judgment on the whole

enchilada, basing their motion on limited corporate records to which only they had access, and on their own self-serving affidavits. (R. pp. 195-365, 383). Initially, the Master-in-Equity denied both motions. (R. p. 10-12). Respondents then renewed their motions two months later, again based on all the same dubious factual evidence and also on an engineered vote which Respondents later conceded "was not authorized by the covenants and the law." (R. pp. 38-39; R. pp. 421-430, 431).

The Walls opposed the Respondents' renewed motions for summary judgment in a procedurally appropriate manner. First, the Walls filed a memorandum in opposition, arguing that numerous disputes of material fact precluded summary judgment. (R. pp. 432-438). Second, to demonstrate disputed facts, the Walls pointed to their verified complaints and to previously-filed exhibits and an affidavit. (R. pp. 41-89, 605-608). Moreover, the Walls filed three additional affidavits in opposition to summary judgment, which the Walls urge this Court to read. (R. pp. 605-624). Each of these items conformed to Rule 56, which states that a party opposing summary judgment "must set forth specific facts showing that there is a genuine issue for trial," including within pleadings and affidavits. Rule 56, SCRCP. Finally, the Walls filed a Motion to Compel discovery, including document production and Respondents' depositions. (R. pp. 439-447).[2] The Motion to Compel was necessary because Respondents refused to participate in discovery, and instead stonewalled on document requests and discovery notices issued by the Walls.

[2] Both the lower court and the Respondents (who filed a competing discovery motion) were aware of the Walls' motion to compel. (*See* R. pp. 448, 16, 22, 625-652).

Within their Brief to this Court, Respondents argue that all of this opposition was insufficient, because the Walls did not hyper-technically comply with Rule 56(f) by uttering within an affidavit the exact words: "I need more time for discovery." (Resp. Br. pp. 10-12). This "Gotcha!" argument relies on a rule that applies only "When Affidavits Are Unavailable" (Rule 56(f), SCRCP), and it would render meaningless a motion to compel discovery, which the lower court knew about and ruled upon.

Importantly, the Respondents' assertions in their Brief, that the Walls somehow failed to "formally complain of the lack of discovery," and that the Walls "fail[ed] to properly raise this issue in the lower court," are simply not true. Here are some examples of instances in which the Walls argued to the lower court that summary judgment was premature because discovery was needed:

- "All of the Defendants' exhibits at this stage of litigation where no discovery has been conducted are cherry picked from corporate records that only the Defendant has access to. The Walls have not had an opportunity to examine the corporate records." (R. p. 524: 11-16).

- "The question to me, which ultimately will need to be decided in the course of discovery -- but the question is: What is the consideration for those voting agreements? There must be some, and it must vary because of the different terms of years that are given by the individual members. Did the Board members have independent counsel advising them as they were entering into these voting agreements in the midst of litigation over this question? Did the Board members disclose this interest to the other members of the corporation?" (R. p. 536: 2-12)

- "Defendants Jonathan Dye and Shaun Dye attached as exhibits to their Motion for Summary Judgment over 200 pages of documents . . . from corporate records to which only the Defendants have access at this pre-discovery stage of litigation. Procedurally speaking, these numerous exhibits and materials do little more than establish that summary judgment in favor of Defendants is premature, because it would require decisions by

this Court on numerous, factually-disputed matters such as [. . . enumerating myriad facts in dispute]." (R. pp. 384-385).

- "this Court should deny Defendants' motions for summary judgment, to dismiss, and to dissolve the temporary injunction, because they are incorrect as a matter of law, and because they require decisions on disputed facts." (R. p. 400).

- "Here is my procedural concern: we have not yet conducted discovery in this case. I had held off, because I assumed everything was stayed due to the appeal [of the first order].[3] After the present motions were filed, I asked for deposition dates from opposing counsel. The response I received from opposing counsel was that discovery was not appropriate due to the pending appeal. With a hearing now scheduled for February 24, I'd like to notice party depositions in 10 days, which would fall on February 23 (the day before the hearing). There are also 3 non-party depositions that I would like to take. **If the court could give me some additional time to take those depositions and absorb what I discover, I would be grateful**." (R. pp. 627).

- Motion to Compel and its exhibits. (R. pp. 439-447).

- "[W]e think that because the Defendants' summary judgment motions hinge on disputed facts, the Plaintiffs' Motion to Compel Defendants' Depositions should be heard before Defendants' motions." (R. pp. 632).

- "This Court has wrongly made numerous factual findings—despite pending, competing discovery motions and the important procedural fact that this lawsuit was filed less than four months prior to Defendants' Renewed Motion for Summary Judgment. Troublingly, the Order incorrectly and without legal basis finds discovery motions filed mere months into the case to be mooted by the Court's decision on disputed facts on summary judgment." (R. pp. 471-472).

- "Moreover, the Walls moved to compel discovery, including the defendants' depositions. Importantly, Defendants have never been cross-examined under oath as to their self-serving and untrue statements, which this Court has nonetheless wrongly found to be fact." (*Id.*).

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[3] In an early order, the master-in-equity dismissed two of the Walls' causes of action: for breach of fiduciary duty and for civil conspiracy. The Walls appealed that order. (Appellate Case No. 202-001583).

- "The Order notes that 'no evidence' was submitted on certain issues pertaining to the corporation. Given that the corporation was a defendant, **and it refused to participate in discovery**, these findings by the court are improper." (R. p. 473, fn. 2) (internal citations omitted; emphasis added).

- "This is a heavily fact-laden case with many disputed factual and other issues. It was error for the Court to grant summary judgment in the teeth of those disputed facts, **without allowing discovery to take place**." (R. p. 480; emphasis added).

This Court should disregard Respondents' arguments that the Walls did not raise lack of discovery to the lower court.

Further, the lower court ruled on the issue, denying the discovery motions as "moot." The procedural fact that the court indeed made a ruling on the question sufficiently establishes this Court's jurisdiction to review the decision. *See Roche v. S.C. Alcoholic Beverage Control Comm'n*, 263 S.C. 451, 211 S.E.2d 243 (1975) (explaining that the purpose of an appeal is to determine whether the trial judge acted erroneously). "[W]here the question of issue preservation is subject to multiple interpretations, any doubt should be resolved in favor of preservation." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (Toal, C.J., concurring in result in part and dissenting in part).

Similarly, Respondents' judicial estoppel argument misrepresents the procedural posture. The Walls moved for *partial* summary judgment, only, and they repeatedly acknowledged that some issues were not ripe for summary judgment due to factual dispute and lack of discovery.[4] The rules expressly permit a party to seek partial

[4] *Inter alia*, the Walls moved for a summary declaratory judgment that the purported architectural committee was neither validly comprised nor properly designated pursuant to

summary judgment on issues of law, without sacrificing discovery on the facts. Rule 56(a), SCRCP ("A party . . . may . . . move with or without supporting affidavits for a summary judgment in his favor **upon all or any part [of his claims]**.") (emphasis added); *see also* Rule 56(d) ("Case Not Fully Adjudicated on Motion."). This Court should find that the Walls are not judicially estopped from seeking discovery by their motion for partial summary judgment on matters of law.

Summary judgment on disputed facts was improper and premature, and the order on appeal wrongly denies competing discovery motions as moot. The Walls respectfully request this Court to reverse and remand for discovery and trial.

II. The Master-in-Equity improperly failed to consider the Walls' evidence in opposition to summary judgment.

The Order wrongly overlooked a remarkable amount of evidence when it made a blanket holding that "the Walls have failed to adduce any admissible evidence suggesting a common scheme of development prohibiting covered docks within Shellmore or disputing that the Dyes' dock plans were submitted to and properly approved by the ARC, the Board, and the HOA membership." (R. p. 24). As they must, the Respondents admit that the Walls submitted significant evidence in opposition to summary judgment—including two verified pleadings and four affidavits—which the Master-in-

statutory requirements. (*See* R. pp. 165-168, 388-394). They also moved for a declaratory judgment on the common scheme of development. (R. pp. 168-170, 394-398). Later, the Walls opposed Respondents' renewed motions for summary judgment by requesting a declaratory judgment that, as a matter of law, the covenants do not permit post-construction approval. (R. pp. 433-436).

Equity "disregarded." (Respondent brief § II). That alone requires reversal of the order granting summary judgment.

Respondents attempt an end-run by arguing that the Walls' evidence was inadmissible and that that issue is not preserved. Those arguments fail under the law and the clear record. First, the admissibility issue was preserved for appeal. "For an issue to be properly preserved it has to be raised and ruled on by the trial court." *Johnson v. Lloyd*, 407 S.C. 610, 757 S.E.2d 705 (2014) (internal quotations and citations omitted). "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) (citations omitted). Here, the Dyes first raised admissibility objections in their memorandum in reply and opposition, filed shortly before the court hearing.[5] (R. p. 455). The Walls indisputably opposed all issues in the Dyes' motion for summary judgment and the Dyes' response. There is no requirement that the Walls file a written sur-reply to the Dyes' reply brief to preserve issues that the Walls opposed. The Master issued his order. The issue having been raised and ruled upon, there was no requirement for a motion for reconsideration to further preserve the issue. *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1997) ("Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but

[5] Respondent HOA did not raise any admissibility objections.

not yet ruled upon by it."). As such, the issue is preserved for appeal.[6] As stated by the South Carolina Supreme Court, "preservation rules are not a 'gotcha' game aimed at embarrassing attorneys or harming litigants and noting it is 'good practice' to reach the merits when preservation is unclear." *Singh v. Singh*, 434 S.C. 223, 863 S.E.2d 330, 334 n.7 (2021) (internal quotations and citations omitted).

Respondents' second attempted end-run is their claim that all the Walls' evidence was purportedly inadmissible. The argument fails. As an initial matter, Respondents' one cited case is not on point. *Dawkins v. Fields* involved an expert affidavit that essentially told the trial court how it should rule on corporation law. The expert thus was "testifying" on matters that were the exclusive province of the trial court. The South Carolina Supreme Court agreed that the trial court appropriately refused to consider that specific expert opinion:

> Professor Freeman's affidavit inappropriately attempted to usurp the trial court's role in determining whether petitioners were entitled to summary judgment. *See O'Quinn v. Beach Assocs.*, 272 S.C. 95, 106- 07, 249 S.E.2d 734, 739-40 (1978) (where expert testimony was offered to establish a conclusion of law, the Court held that the trial court properly excluded the testimony because that was within the exclusive province of the trial court).

354 S.C. 58, 65, 580 S.E.2d 433 (2003).

In contrast, it is well-established that affidavits of fact witnesses are appropriate at the summary judgment stage. *See, e.g.*, Rule 56(e), SCRCP. Here, the Master refused to consider the Walls' four affidavits of fact witnesses on factual issues. Those witnesses

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[6] Respondents' sole cited case on the preservation issue ultimately holds in favor of the Walls: "[W]e disagree with Buyer's contention that Seller waived or failed to preserve its position on these issues." *Wilder Corp. v. Wilke*, 330 S.C. 71, 497 S.E.2d 731, 734 (1997).

indisputably would have testified at trial, and their testimony on the factual issues was admissible because, *inter alia*, it was made on personal knowledge and under oath. The Walls strongly encourage the Court to review the affidavits of Herbert Fritz, Henry D. Schweers, III, and Walter B. Wall, Jr., which are thorough and can be found in the Record at pages 605-624.

For example, Herbert L. Fritz, Jr. submitted sworn testimony that:

1. For many years, covered docks and large boat lifts have not been allowed at Shellmore due to the concern that the docks would obstruct the sweeping views that Shellmore homeowners enjoyed. (R. p. 605, ¶ 4).
2. Mr. Fritz served on the Association board and ARC, and they never approved a covered dock or boat lift. (R. p. 605, ¶ 6).
3. The last dock the Association approved was in <u>2004</u>, as a result of Hurricane Gaston. That was Mr. Fritz's (uncovered) dock. (R. p. 605, ¶ 7).
4. The Association voted against Dye's request for a covered dock and boat lift in 2016. (R. p. 605, ¶¶ 9–10).
5. In his next attempt, in 2020, Dye attempted to circumvent the covenants. He submitted his plans to the purported ARC without sending them to the Association Board, and with no notice to his neighbors. (R. p. 606, ¶¶ 11–13).
6. The "architectural committee" is invalid, including because its members are not members of the Board of Directors. (R. p. 615-616, ¶¶ 14, 17).
7. Shellmore has 40 years of consistent design, which does not include covered docks. (R. p. 616, ¶ 17).

8. The Dyes did not receive the necessary prior written approval of the Association. (R. p. 616, ¶ 23).

Henry D. Schweers, III, submitted sworn testimony that:

9. The covenants require prior approval of the Association for any dock or structure, and the Dyes did not receive prior approval. (R. p. 621, ¶¶ 3–4).
10. The later vote was improperly conducted. Among other things, it was manipulated by Andrew Conner. (R. p. 622, 623, ¶¶ 5, 27–28).
11. Covered docks and elevated boat lifts have never been approved at Shellmore. (R. p. 622, ¶ 8).
12. The Association overwhelmingly voted to prohibit docks and elevated boat lifts. (R. p. 622, ¶ 12).
13. The ARC is invalid, including because the ARC members are not members of the Board of Directors, and the circumstances of their appointment are questionable and lack valid documentation. (R. p. 622, ¶¶ 13–14).
14. The ARC vote on the Dyes' dock was not valid. (R. p. 622, ¶ 15).
15. The Dyes' covered dock is unprecedented, does not conform to the covenants or scheme of development at Shellmore, obstructs Mr. Schweers' views of the waterway, and has decreased Mr. Schweers' enjoyment of his property. (R. p. 624, ¶¶ 31–32).

Walter B. Wall, Jr., submitted sworn testimony that:

16. Since completing their dock, the Dyes have been flying an "F.U." flag directed at their neighbors. (R. p. 611, ¶ 21).
17. The Dyes did not receive the approval of the Association prior to construction, as is required. (R. p. 608, ¶¶ 3–4).
18. The later vote was improperly conducted. Among other things, Andrew Conner manipulated the vote. (R. p. 609-610, ¶¶ 5, 29, 30).
19. The ARC is invalid, including because its members are not members of the Board of Directors and the circumstances of their appointment are questionable and lack valid documentation for appointing members. (R. p. 609, ¶ 12).
20. The Board of Directors never approved the Dyes' dock. (R. p. 609, ¶ 15).[7]
21. Members of the Board of Directors agreed that the ARC's decision was invalid. (R. p. 609, ¶ 17).
22. Attorney Andrew Connor improperly manipulated the Association meeting and vote. (R. p. 611, ¶¶ 23, 25, 25, 26, 27, 28, 29, 30). That vote was invalid. (R. p. 611-612, ¶¶ 30, 31, 32, 33, 34).
23. The Dyes' dock does not maintain consistency or harmony of design at Shellmore. (R. p. 612, ¶ 35).

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[7] On this point, the Dyes' Response Brief misrepresents the evidence, when it states that Wall "admitted the Board 'decided that the ARB Board does represent the Homeowners and their vote stands.' " (Dyes' Resp. pp. 15–16). In that paragraph of Wall's affidavit, he is quoting an email, which he states is not true. Instead, Wall testifies that "The Board of Directors never approved the Dyes' dock." (R. p. 609, ¶ 15).

24. The Dyes' dock is unprecedented and is against the covenants and the scheme of Development at Shellmore. (R. p. 612, ¶ 36). The covered dock obstructs Wall's views of the waterway and has decreased his enjoyment of his property. (R. p. 612, ¶ 37).

This list is just certain examples; there is significant additional admissible, factual testimony in the affidavits. (*See* R. pp. 605-624).

Also, the Walls' two Complaints are verified, and the South Carolina Supreme Court has ruled that verified complaints can defeat summary judgment:

> We agree with the Court of Appeals' well-supported conclusion that a verified complaint is an acceptable substitute for an affidavit at the summary judgment phase as long as the pleading satisfies Rule 56(e).

Dawkins, 354 S.C. at 67, 580 S.E.2d 433. The Verified Complaints make numerous admissible factual allegations, which the Master-in-Equity should have considered and which, alone, should have defeated summary judgment. (*See, e.g.*, R. pp. 41-89, ¶¶ 8–11, 16, 18, 20, 22–28, 30–31, 35, 39, 41–42, 44–47, 56–58, 80, 81). **Instead, the Master-in-Equity incorrectly "disregarded" all of the Walls' evidence, did not find even a mere scintilla in their favor, and granted summary judgment against the Walls without allowing any depositions at all.**

When the Walls' admissible evidence is considered, a mere scintilla exists, for example, that (1) there is a common scheme of development that prohibits covered docks (*see, e.g.*, points 1, 2, 4, 7, 11, 15, 23, 24, above), and (2) the Dyes' dock plans were not properly submitted to, or approved, by the ARC, the Board, or the Association membership (*see, e.g.*, points 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 22, above),

inter alia. In sum, Respondents' attempted end-run to avoid the Walls' factual evidence fails, and this Court should find summary judgment was improper.

It was error for the Master-in-Equity to universally disregard the Walls' evidence, and this Court should reverse and remand for discovery and trial.

III. The purported approval of the Dyes' dock was unreasonable under the facts and in violation of the law.

In the third section (§ III) of their brief, Respondents change the Walls' arguments and then try to refute their own altered version of the Walls' claims. Although it is a neat use of the strawman technique, this Court should not be misled. To be clear, this case is <u>not</u> about whether the restrictive covenants outright prohibit covered docks,[8] or whether the membership's 2016 vote to forbid covered docks amended the covenants,[9] or whether the Board hypothetically had the authority to designate an architectural review committee,[10] or whether the Board itself could hypothetically review the Dyes' dock

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[8] No, the covenants do not expressly state, "covered docks are prohibited," but 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.").

[9] Respondent Dye was the president of the HOA in 2016, when the HOA took no steps to amend the covenants in response to the members' vote to forbid covered docks and lifts. (R. p. 78).

[10] Pursuant to the Nonprofit Corporation Act, corporate decision-making committees must be comprised of directors, which the purported "architectural committee" at Shellmore was not. Pursuant to the HOA Act, procedures for community governance must be recorded with the Register of Deeds; but the purported ARC at Shellmore was revived after more than 10 years of inactivity and its members were hand-selected by Respondent Chakides, working with Respondent Dye, with the goal of getting approval for their covered docks. (R. p. 41-89, 605-624).

application.[11] This case is about the rules limiting the HOA and the Dyes, which are set by the covenants and the applicable law, coupled with the very reasonableness standard to which Respondents give lip service.

a. Respondents Dyes' covered dock violates the restrictive covenants.

The Walls' argument to the lower court was that the Dyes' covered dock violates the covenants, for numerous reasons. The covenants contain express rules for the submittal and evaluation of dock plans, and for the garnering of HOA approval, prior to construction. Neither the Dyes, nor the directors, nor the purported ARC, followed the mandatory rules. (*see, e.g.*, R. pp. 605-624). Among other things, the rules require that proposed plans be evaluated, before construction, for conformity with structures already in existence. (R. p. 71, "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.").

The Respondents argue that this express covenant, requiring reference to existing structures, "is circular and unworkable," because "how did the first dock—or the first house—in Shellmore get approved?" (Resp. Br. pp. 20-21). The question is easily answered in context, by reading the entire Declaration of Shellmore, in which the declarant was the original developer, which dictated the development of the community

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[11] The evidence shows that the Board didn't review anything. (See, e.g., Ex. to Walls' Renewed Motion for Summary Judgment, 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.")

in accordance with the declarant's common plan of development, and then subsequently turned the community over to the HOA to maintain "architectural control" and "harmony of design" with existing structures. (R. p. 71; *see also* R. pp. 387-89). This is how private planned developments all over South Carolina work: a developer, owning a tract of land, imposes restrictions on it and then subdivides it into lots. The developer initially maintains control over the development, constructing homes according to his common plan and then conveying them. The result is appealing uniformity of design, which increases property values.[12] This method of development is neither "circular" nor "unworkable." It is simple, clear, and predictable, and it is in practice in planned developments all over the State at this very moment.[13]

The Respondents attempt to argue that Shellmore's architectural restrictions contain only "subjective aesthetic considerations," and that the Dyes' construction plans therefore could be approved or denied depending on the fickle, subjective, aesthetic whims of the board, at any given moment in time. (Resp. Br. pp. 19-20). **This is wrong.** First, the reasonableness standard is objective and not subjective. Second, any discretion

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[12] In the Lowcountry, Sea Pines Plantation and Daniel Island bear witness to the success of private planned development. In the upstate, the Cliffs are prominent mountainside and lakeside communities. Elsewhere in South Carolina, the municipality is the developer, with zoning boards empowered to maintain certain standards in conformity with those in existence.

[13] Respondents wrongly argue that the Walls' evidence of the common plan of development is inadmissible parol evidence. The parol evidence rule does not apply because the Walls are not trying to contradict the terms of the contract—they are trying to assure that its plain terms are followed. *Ward v. West Oil Co., Inc.*, 665 S.E.2d 618, 379 S.C. 225 (Ct. App. 2008) ("Under the parol evidence rule, extrinsic evidence is inadmissible to vary or contradict the terms of a contract."). The Shellmore restrictive covenants plainly require reference to external items (like surrounding structures and existing design). In that sense, they are like a partially integrated contract.

Respondents may have is tempered by: (1) the enumerated requirements of the covenant's formula for architectural control; (2) prior corporate decisions about covered docks; (3) the common plan of development at Shellmore; **and** (4) reasonableness, good faith, and the best interest of the corporation. Even in the absence of express, specific design rules like the covenants at Shellmore, those reviewing proposed construction plans in master-planned developments are "constrained" to evaluate applications "reasonably and in good faith." *O'Shea v. Lesser*, 416 S.E.2d 629, 308 S.C. 10 (1992);[14] *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 363 S.E.2d 891 (1987) (denial of architectural plans for "aesthetic reasons" was reasonable when it "bears a sufficient relation to the subdivision's general plan of 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 decision on aesthetics of a house plan "must bear a reasonable relation to the other buildings or general plan of development.").

In addition to the factors (nature, kind, shape, height, materials, and location), which must be compared to existing structures, the covenants unmistakably require approval **<u>prior</u>** to construction. (R. p. 74). The Dyes finished construction of their covered dock in the midst of this litigation, in December of 2020. A little over a month later their

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[14] The *O'Shea* case cited by Respondents is not on point, and Respondents do not tell its whole story. The Supreme Court stated in *O'Shea* that the private developer (<u>not</u> a nonprofit HOA board) had expressly reserved for itself within the applicable covenants the "sole and absolute discretion" to approve construction plans. Respondents disingenuously try to extrapolate this express contractual reservation of a declarant right by the developer into a uniform common law proposition that architectural committees always have such discretion. This Court should not be fooled.

attorney moved at the Association's annual meeting for a vote on the Dyes' finished dock. (*See* R. pp. 433-434). The record shows that the members were worried: they had questions about the propriety of a post-construction vote on a completed dock. (R. pp. 608-624). The record also shows that the members' questions were answered by the Dyes' attorney, who participated in the meeting and dictated the terms of the vote, which occurred while the litigation was ongoing and while counsel for the Walls and the HOA were absent. (*Id*.). To the extent that the Respondents argue, or that the Master found, that the members ratified the Dyes' dock, post-construction, this idea fails under ratification law[15] and because a simple majority of members did not have authority to affect what amounted to an amendment of covenants requiring pre-construction approval and harmony of design.[16] At a minimum, questions of fact on the membership vote exist, which preclude summary judgment.

b. Respondent HOA's status as a nonprofit corporation actually matters.

Respondents next attempt to brush aside the fact that Respondent HOA chose to organize itself as a nonprofit corporation. South Carolina's Nonprofit Corporation Act

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[15] Under South Carolina law, three essential elements are necessary to prove ratification: "(1) acceptance by the principal of the benefits of the agent's acts; (2) *full* knowledge of the facts; and (3) circumstances or an affirmative election indicating an intention to adopt the unauthorized arrangements." *Anthony v. Padmar, Inc.*, 320 S.C. 436, 452, 465 S.E.2d 745, 755 (Ct. App. 1995) (emphasis in original) (finding the general partners' breach of fiduciary duties in failing to disclose material information to limited partners precluded ratification defense). "Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." *Id. at* 449, 465 S.E.2d at 752. "Where the agent fails to disclose material information to the principal concerning the agent's actions, the defense of ratification fails." *Id.*, 320 S.C. at 452-53.

[16] Shellmore's declaration of covenants requires the vote of 75% of lot owners to amend. (R. p. 73, §VI.3).

has an entire section on "Committees," which Respondents would prefer to ignore. S.C. Code § 33-31-825 ("Committees"). Among other things, the statute requires that a nonprofit corporation's committees—which would include any purported "architectural committee" at Shellmore—must be comprised of directors. *Id*. ("Each committee shall have two or more directors who serve at the pleasure of the board."); *see also* S.C. Code §§ 33-31-830, 831, 1601 (referring to "committee[s] of the board of directors"). This statutory requirement ***just makes sense***; elsewise, there would be no assurance that corporate decisions would be made by fiduciaries who are statutorily bound to act in the best interest of the corporation. *See* S.C. Code § 33-31-830 ("General standards for directors").

Respondents claim that despite nonprofit corporate status, Respondent directors could nonetheless pick an informal "committee" (under questionable factual circumstances) to make decisions for the corporation, apparently unfettered by any fiduciary duties to the HOA or its members. The code section they cite in support of this proposition does not apply. S.C. Code § 33-31-801(c) refers to the "articles," which Respondents wrongly attempt to conflate with the restrictive covenants, probably because Respondents are fully aware that the true Articles of Incorporation for Shellmore's HOA do not contain any provision permitting the HOA to delegate its duties. (R. p. 194, Articles of Incorporation; *see also* R. p. 393).[17] Respondents are wrong: when

[17] "Articles" under the Nonprofit Act are corporate documents giving life to the corporation; the restrictive covenants are a property record dictating the relationship between homeowners. If anything, the restrictive covenants fall into the definition of "bylaws" of the corporation, which

the Shellmore covenants contemplate that the Board may designate an architectural committee, the Nonprofit Act's requirement that such a committee would be comprised of directors is binding on the HOA.

To the extent that Respondents argue in their brief that the Board of Directors "ratified" the invalidly comprised architectural committees' decision, that argument fails under ratification law, and because there is no evidence of a vote of the directors, and because the directors could not ratify something they <u>knew</u> to be forbidden. South Carolina's Nonprofit Corporation Act is clear: "A director is not acting in good faith if the director has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted." S.C. Code § 33-31-830 (subsection (b) refers to a director's ability to rely on a – validly - comprised committee, or legal counsel, or financial advisor). In this instance, there is no question that the Shellmore directors patently did <u>not</u> act reasonably and in good faith because of their actual knowledge that the HOA members had voted to prohibit covered docks and had always denied applications for them. (R. p. 78, 2016 Minutes; R. pp. 264-285, prior denials of covered docks).

The Walls' argument is simple: there is no conceivable scenario where a nonprofit corporation's board of directors (or any other valid agent of the corporation) could reasonably and in good faith approve construction plans for a type of structure which radically conflicts with the community's existing structures, and for which approval has

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the Nonprofit Act is clear are "rules, ***other than the articles***." S.C. Code § 33-31-140(4) (emphasis added).

always been denied, and which the corporation had previously voted to forbid. **Respondents are wrong that two members of an invalidly comprised "architectural committee" had the authority and "absolute discretion" to overturn almost fifty years of consistent community design, based on nothing more than that purported committee's current subjective feeling of fondness for something objectively forbidden.**

This Court should find that the covenant's common plan of development at Shellmore, coupled with fifty years of consistent design and corporate action to forbid covered docks, as well as the requirements that the Dyes submit plans and gain approval <u>prior</u> to construction, all operated to bar the Dyes' covered dock as a matter of law. The lower court's order should be reversed.

CONCLUSION

For the reasons set forth above and in the Walls' opening Brief, 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.

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Respectfully submitted,

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