THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Judge

Appellate Case No. 2014-002587

S. Coley Brown,.....Appellant,

v.

Spring Valley Homeowners Association, Inc.....Respondent.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

SOUTH CAROLINA STATUTES

OTHER STATES' STATUTES

COURT RULES

OTHER SOURCES

STATEMENT OF ISSUES

I. **Did the circuit court err in ruling that the Respondent, a non-governmental, private entity, could lawfully impose the fines it levied on the Appellant?**

II. **Is the prohibition on for-sale signs in the subdivision subject of this case a restraint on alienation that violates South Carolina public policy?**

III. **Where there were facts in the record showing that the Respondent wrongfully recorded an unfounded claim on Appellant's property, did the circuit court err in granting summary judgment on Appellant's slander of title claim?**

IV. **Where the record showed the Respondent, a homeowners' association, is involved in the trade or commerce of distributing the services of such an association and where its policies state that it will apply its unlawful fining activities to all association members, did the circuit court erred in granting summary judgment on Appellant's Unfair Trade Practices Act claim?**

STATEMENT OF THE CASE

This case concerns, *inter alia*, whether a homeowners' association can fine its members under South Carolina law.

Appellant, S. Coley Brown (hereinafter "Brown") is an owner of property in the Spring Valley subdivision in Columbia, South Carolina. (R. pp. 24, 35.) The Respondent, Spring Valley Homeowners Association, Inc. (hereinafter "the Association") is organized as a nonprofit corporation to function as a homeowners' association for the owners of property in the Spring Valley subdivision. (R. pp. 25, 35.) Owners of property in Spring Valley automatically become members of the Association by virtue of their property ownership when they become owners. (R. pp. 25, 35.) The Association is a private corporation, is not a sovereign, is not a federal, state, county, or municipal government, and is not an agency or other part, arm, or branch of any federal, state, county, or municipal government. (R. pp. 24, 35.) The deeds to all lots in the Spring Valley subdivision contain covenants restricting use of the property and making owners of the lots members of the Association. (R. pp. 25, 35.)

The covenants at issue provide that property owners in Spring Valley are obligated to pay to the Association periodic assessments for the purpose of maintenance of Spring Valley's streets, roads, storm drains, common areas, and security services. (R. pp. 272-76, 431-35.) They provide that those periodic assessments shall constitute a lien on the subject property, as well as a personal obligation of the property owner and every succeeding owner. (R. pp. 272-76, 431-35.) The only liens in favor of the Association that are provided for in the covenants are liens for periodic assessments for

maintenance. (R. pp. 272-76, 431-35.) The covenants do not state that the Association has any power or authority to fine owners of property in Spring Valley. (R. pp272-76, 431-35.)

Brown bought his property in Spring Valley in 2007. (R. pp. 268-70.) At the time, the Association provided him with an "information guide" that purported to set out the terms of the covenants applicable in Spring Valley and the by-laws and rules and regulations of the Association. (R. pp. 113, 116-47.) That document did not state anything about any fines or power or authority of the Association to impose fines. (R. pp. 116-47.)

In 2004, however, the Association had purported to amend its by-laws to provide that the Association's board of directors has the power to "adopt and publish a schedule of fines as appropriate, for violations of covenants, deed restrictions, rules and regulations and/or By-Laws of the Spring Valley Homeowners Association" and to provide that the Association's board of directors has the duty to "assess and collect fines for the continuous and repeated violation(s) of covenants, deed restrictions, rules and regulations, and/or By-Laws" by owners of property in Spring Valley "until the violation(s) is/are abated." (R. p. 311.) The Association also purported to issue "Rules and Regulations" that state that the Association's board of directors "has the right to fine" owners of property in Spring Valley "$100.00 weekly, until abatement, or the fine reaches $1,500.00 per violation per year" for "any violations of the Deed Restrictions, [the Association's] Rules and Regulations, and Richland County Ordinances." (R. p. 319.)

The Spring Valley covenants provide that no "'Sale' or 'Rent' signs or other types of advertising or billboards shall be permitted" on property subject to the covenants, except for a for sale sign for a newly constructed dwelling and "except that in cases of hardship, subject to prior approval by [the Association], one 'For Sale' sign, not larger than 2 feet by 3 feet may be installed where there is a dwelling house for sale." (R. p. 274.)

The Association purported to fine Brown $500 for a claimed violation of this covenant provision. (R. pp. 28, 37, 148, 150, 165, 436-37.) Brown later gave an affidavit stating, in part, the following:

> [W]hen I wanted to sell my Spring Valley property, I went to Russ Templeton, head of the Association's architectural committee, to ask him about getting approval for a for sale sign. He said that I should not bring him a proposed sign, that he would not consider a proposed sign, and that no sign would be approved.
>
> At the Demates' house around the corner from the house I own in Spring Valley, a for sale sign was up for over a year and was not taken down until the house sold. I looked into whether the owner got permission from the Association to put up a sign, and, to the best of my knowledge, the Association was never even asked for such permission, yet the Association took no action and did nothing about the for sale sign.

(R. pp. 113-14.)

Brown attempted to challenge the imposition of the fine within the Association, notifying the Association of his position that that it lacked the power to fine anyone under the law, that he had never been afforded any opportunity to demonstrate hardship, and that what is tantamount to a ban on for sale signs in Spring Valley made it effectively impossible for him to sell his property. (R. pp. 148, 156-64, 436-37.) The

Association declined to rescind the fine and then recorded a notice of lien document with the Richland County Register of Deeds' office. (R. pp. 148, 165-67, 172-74, 437.) The notice of lien document claimed a lien in favor of the Association for the amount of the fine. (R. p. 172.)

Brown brought the instant case against the Association, in which he sought declaratory judgments that the Association (which is not a government) does not have the power or authority to fine him, that the purported fines by the Association would be unenforceable contractual penalties in any event, that the Association's conduct has waived any right it might have had to enforce the for-sale-sign covenant, and that the for-sale-sign covenant violates public policy by restricting alienation of property in Spring Valley. (R. pp. 30-32.) He also asserted two damages claims against the Association, for slander of title and for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA"). (R. pp. 32-34.)

The Association answered the complaint, admitting much of the facts of the case but denying Brown was entitled to any relief. (R. pp. 35-39.) The Association pled a number of affirmative defenses and also counterclaimed for the $500.00 in fines. (R. pp. 39-45.) Brown replied to the counterclaim, denying the Association was entitled to judgment on the counterclaim and essentially pleading that the matters stated in the complaint barred the Association from relief in the case. (R. pp. 47-51.)

Both parties moved for summary judgment, with the Association moving for summary judgment on the entire case and Brown moving for summary judgment on the issue of liability as to the claims involved. (R. pp. 52-58.) Both parties submitted memoranda to the court in connection with the hearing on these motions. (R. pp. 83-

112, 243-446.) The circuit court denied Brown's motion and granted the Association's motion for summary judgment, rendering judgment in favor of the Association for the amount of the fines. (R. pp. 1-17.) Brown moved to reconsider, and the circuit court denied that motion. (R. pp. 18-19, 59-80.)

This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). That standard is that "summary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

This court reviews all questions of law *de novo*. Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772-73 (2010) ("appellate court may decide questions of law with no particular deference to the trial court").

ARGUMENT

I. The Association, which is not a part of any government, has no power or authority to impose fines.

The circuit court recognized that whether a homeowners' association has the power to levy fines is a novel issue in South Carolina. (R. p. 6.) As discussed below, with the possible exception of one state, the appellate courts of every state in this country that have addressed this issue have, unlike the circuit court, held that where there is no statute by which a state's legislature empowers homeowners' associations to fine their members, they are not empowered to do so, as the sovereign power to fine remains with the sovereign, the government.

Though neither the circuit court, this court, or any court is a legislature, the Association essentially brought before the court a legislative question: whether the law *ought to* allow a homeowners' association to fine its members. The Association's argument to the circuit court was replete with appeals to what it saw as the practicality of a homeowners' association being able to fine its members. (R. pp. 93-94, 96-97, 99-101, 106.) Because the law is that a homeowners association *is not* allowed to fine its members, this is dispositive of the question of whether the Association may fine Brown. The question of whether the law should be changed to allow this remains one for the branch of government that concerns itself with promulgating and changing laws, not the one whose province is "to say what the law is." Marbury v. Madison, 5 U.S. 137,

138 (1803); accord State v. Langford, 400 S.C. 421, 735 S.E.2d 471 (2012) (generally discussing separation of powers).

There are no appellate opinions in South Carolina that answer the specific question of whether a property owners' association may impose a punishment, a fine, on another private entity (a natural person) that historically has been and normally is meted out only by the sovereign as a sentence for a criminal infraction.[1]

The power to fine is a sovereign power, vested in the government. Authorities agree. Consistently with jurisprudence from across the nation, Black's Law Dictionary defines "fine" as "[a] pecuniary criminal punishment or civil penalty payable to the public treasury." Black's Law Dictionary 284 (2d pocket ed 2001). In a 2012 case involving a fine, the Supreme Court of the United States discussed cases that involved "imprisonment or a death sentence" and noted that the distinction between those forms of punishment and fines was immaterial to the issue at hand, stating that "fines, like these other forms of punishments, are penalties inflicted by the sovereign for the commission of offenses." So. Union Co. v. U.S., ___ U.S. ____, 132 S.Ct. 2344, 2350 (2012).

"Bail, fines, and punishment traditionally have been associated with the criminal process," as our nation's Supreme Court stated on another occasion. Ingraham v. Wright, 430 U.S. 651, 664 (1977). "Fines were by far the most common form of noncapital punishment in colonial America." So. Union, 132 S.Ct. at 2350. At the

[1] Three South Carolina cases, River Hills Property Owners Assn. v. Amato, 326 S.C. 255, 487 S.E.2d 179 (1997), Rawlinson Road Homeowners Assn., Inc. v. Jackson, 395 S.C. 25, 31, 716 S.E.2d 337, 340 (Ct. App. 2011), and Seabrook Island Property Owners Assn. v. Berger, 365 S.C. 234, 239, 616 S.E.2d 431, 434 (Ct. App. 2005), mention fines by property owners' associations. In none of those cases was the issue of the power of such an association to levy fines addressed.

time of the drafting and adoption of the Constitution of the United States, "the word 'fine' was understood to mean a payment to a sovereign as punishment for some offense. Then, as now, fines were assessed in criminal, rather than private civil, actions." Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, 492 U.S. 257, 265 (1989).

South Carolina law is consistent with this. In State v. Stevens, our state Supreme Court appeared to reject rather roundly the idea of a fine being paid to the prosecutor of a criminal case rather than to the government. 116 S.C. 210, 211, 107 S.E. 906 (1921). Our Supreme Court also has also noted that "[a] fine is usually a sum of money exacted from a person guilty of a crime as pecuniary punishment[.]" S.C. State Hwy. Dept. v. So. Ry. Co., 239 S.C. 227, 230, 122 S.E.2d 422, 424 (1961).

As noted by the Supreme Court of Virginia,

> The imposition of a fine is a governmental power. The sovereign cannot be preempted of this power, and the power cannot be delegated or exercised other than in accordance with the provisions of the Constitution of the United States and of [the state (there, Virginia)].

Unit Owners Assn. of BuildAmerica-1 v. Gillman, 223 Va. 752, 764, 292 S.E.2d 378, 384 (1982).

The South Carolina General Assembly has not delegated to property owners' associations any power to impose fines. South Carolina has enacted the Horizontal Property Act, S.C. Code Ann. §§ 27-31-10 - -440, but this Act does not empower any such association to levy fines for anything. A writer on South Carolina law on this subject has noted that "[c]ommentaries have expressed doubt about the legality of levying fines in the absence of statutory authority, of which there is none in the SCHPA

[the Horizontal Property Act]. *The courts generally agree that absent statutory authorization a council of co-owners may not levy fines.*" Douglas Scott MacGregor, Condominium Law in South Carolina 49 (3d ed. 2013) (emphasis added).

The deed restrictions at issue in this case do not appear to have been made pursuant to the Horizontal Property Act, in any event, as the Association was keen to point out and which the lower court appears to have used as a basis for its ruling. (R. p. 7, p. 102 ln. 11-20.) Brown is unsure why the Association took the trouble to remark that the covenantal restrictions at issue are not promulgated pursuant to the Horizontal Property Act. To do so only points out that there is absolutely no statute from which the Association could even argue any interpretation at all, even a plainly incorrect one, that our legislature has empowered homeowners' associations to levy fines. This absence of a statutory scheme governing the Association simply illustrates, yet again, that there exists no legal authority for the Association to impose fines. There is no authority for a homeowners association to fine people that can arise purely from "deed covenants and restrictions, the bylaws, and common law[,]" as the circuit court reasoned is the case here. (R. p. 7.) At common law, the power to fine is vested solely in the sovereign. So. Union, 132 S.Ct. at 2350; Browning-Ferris Indus., 492 U.S. at 265; Ingraham, 430 U.S. at 664; S.C. State Hwy. Dept., 239 S.C. at 230; Stevens, 116 S.C. at 211. It is not a question of homeowners' associations being "constrained to act[,]" as the circuit court put it. (R. p. 7.) The Association never received dispensation from the State to exercise the State's fining power.

Replacing the term "fine" with the word "imprisonment" illustrates the hole in the circuit court's logic in this regard. What if the by-laws said that the Association

could jail Spring Valley property owners for non-compliance with the covenants? While imprisonment is often more harsh than the imposition of a fine, there is no difference between these punishments that is material to the question at hand. They are both punishments that the sovereign is exclusively empowered to impose, and *that* is the reason that neither a contract nor a corporate by-law is permitted to provide for imprisonment of a party as a consequence of breach or violation. See So. Union, 132 S.Ct. at 2350; Ingraham, 430 U.S. at 664. It is the same with the death penalty. While killing a person for violating a restrictive covenant would indeed be harsh medicine, that is not what would make a contract that provided death as a remedy for its breach an unenforceable one. What would make such a contract unenforceable is the public policy that only the government has the lawful authority to mete out a death sentence. See So. Union, 132 S.Ct. at 2344. The power to levy a fine is similarly something only the government possesses the power to do.

It is the public policy of this state that only the government has the power to levy a fine. This principle is borne out by S.C. Code Ann. § 16-17-735, which makes the use of sham legal process a crime. This section provides that:

> (3) "Sham legal process" means the issuance, display, delivery, distribution, reliance on as lawful authority, or other use of an instrument that is not lawfully issued, whether or not the instrument is produced for inspection or actually exists, which purports to:
>
> (a) be a summons, subpoena, judgment, lien, arrest warrant, search warrant, or other order of a court of this State, a law enforcement officer, or a legislative, executive, or administrative agency established by state law;
>
> . . .

> (4) "Lawfully issued" means adopted, issued, or rendered in accordance with the applicable statutes, rules, regulations, and ordinances of the United States, a state, an agency, or a political subdivision of a state.

S.C. Code Ann. § 16-17-735.

"Restrictive covenants will be enforced unless they are indefinite or *contravene public policy*." Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 628 S.E.2d 902, 913 (Ct. App. 2006) (emphasis added); accord Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987); Vickery v. Powell, 267 S.C. 23, 28, 225 S.E.2d 856, 858 (1976); Siau v. Kassel, 369 S.C. 631, 632 S.E.2d 888, 893 (Ct. App. 2006) *overruled in part on other grounds by* Buffington v. T.O.E. Enters., 383 S.C. 388, 680 S.E.2d 289, 291 (2009); Houck v. Rivers, 316 S.C. 414, 416, 450 S.E.2d 106, 108 (Ct. App. 1994), *overruled in part on other grounds by* Buffington, 680 S.E.2d at 291. "The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions." White v. J.M. Amusement Co., Inc., 360 S.C. 366, 601 S.E.2d 342, 345 (2004). There are some things one just cannot contract to do. If the restrictive covenants really do provide the basis for the Association to fine people, as the lower court reasoned, then they violate public policy. The many authorities cited in this brief and to the circuit court reveal that public policy is that, like the power to execute and imprison criminals, the power to fine is a punitive power vested solely in the government. To the extent that the circuit court based its ruling on the contention that the deed restrictions at issue here

gave the Association *carte blanche* to do anything it wanted, whether lawful or not, in its by-laws, rules, and regulations, that is contrary to South Carolina law. Corporate by-laws (or even covenants) that purport to vest the sovereign's power to fine in a private entity violate public policy and are unenforceable.

As the above-quoted author of Condominium Law in South Carolina notes, there is indeed wide agreement by courts that have addressed the issue of whether a homeowners' association can fine its members in the absence of statutory authorization to do so. Wise v. Harrington Grove Community Assn., 357 N.C. 396, 584 S.E.2d 731 (2003) (until enactment of statute that delegated power to fine to homeowners' associations, those associations had no such power); Holbert v. Great Gorge Village South Condominium Council, Inc., 281 N.J.Super. 22, 656 A.2d 1315 (1994)(absent statutory authorization, association could not levy fines, impose penalties, or charge late fees for failure to pay common expenses); Elbadramany v. Oceans Seven Condominium Assn., 461 So.2d 1001 (Fla. 5th DCA 1984); Gillman, 223 Va. At 764; Vernon Manor Co-op Apts., Section I v. Salatino, 178 N.Y.S.2d 895 (1958); see Stewart v. Kopp, 454 S.E.2d 672 (N.C. App. 1994) (where North Carolina's condominium statute *did* authorize fines and declaration of covenants incorporated the statute, association could levy fines for rule violation). Courts across the country generally agree that the power to impose fines, as a governmental function, cannot be exercised by a private actor unless the sovereign has expressly delegated the exercise of that power. See id.

A number of states have enacted statutes that delegate the power to fine to associations of property owners. E.g., N.C.G.S. § 47F-1-102; Nev. Rev. Statutes §

116.310305; Fla. Code § 718.303(3); Ga. Code Ann. § 85-1613e. South Carolina is not among them. With the possible exception of Wisconsin[2], were our Supreme Court or this Court of Appeals to hold that, in the absence of a statute delegating the fining power to them, homeowners' associations *are* permitted to fine their members, South Carolina would be the only state in our country to so hold. While Brown recognizes that South Carolina has certainly bucked its share of national trends, he is not asking this court to rule with the great majority of courts just because they are in the majority. He is asking this court to do so because those courts are right. The reason that other jurisdictions recognize this principle is not because of quirky differences between those states' law and South Carolina law. (On this issue, there are no such differences). Their holdings are consistent with legal principles about the nature of the power to fine that are foundational and accepted throughout this nation, including in South Carolina (as discussed above), and in Anglo-American jurisprudence generally.

The circuit court's reliance in its order on the powers of nonprofit corporations set out in S.C. Code Ann. §§ 33-31-206 and -302 is misplaced. Our General Assembly provided in S.C. Code Ann. § 33-31-206 that a nonprofit corporation's "bylaws may contain any provision for regulating and managing the affairs of the corporation that is *not inconsistent with law* or the articles of incorporation." (Emphasis added). As a matter of law, the power to fine is vested solely in the government, absent a delegation of that power (which has not been made in this state). See, e.g., So. Union, 132 S.Ct. at 2350; S.C. State Hwy. Dept., 239 S.C. at 230; Gillman, 223 Va. at 764. Enshrining a purported power to fine in a corporation's by-laws *is* inconsistent with law. (The

[2] Crouse v. Lake Camelot Property Owners' Assn., 122 Wis.2d 773, 362 N.W.2d 446 (Ct. App. 1984).

Association's arguments about various organizations (e.g., the NCAA) fining their members are unavailing. The members of those organizations can pay the fines or leave the organization, but that does not mean that a court can enforce the fines.)

Further, the plain language of S.C. Code Ann. § 33-31-302 provides that a nonprofit corporation "has the same powers *as an individual*" – not a governmental entity – "to do all things necessary or convenient to carry out its affairs[.]" (Emphasis added). Individuals are not governments; they do not have the power to levy fines. Since the undersigned individual has no power or authority to fine people, neither can the Association have such a power.

"[A] corporation cannot impose an assessment or fine for a violation of its by-laws unless it is expressly authorized by statute." Vernon Manor Co-op Apts, 178 N.Y.S.2d at 902 (internal citations omitted). The circuit court ruled that an amendment to the Association's bylaws purporting to authorize the Association to fine was "duly adopted in 2004": however, such a provision could not have been *duly* adopted, as it could not have been lawfully adopted. (R. p. 4.) The law does not countenance the usurpation of a government power by a private entity.

The Association acknowledged in its supplemental memorandum that the authority it cited for the proposition that other states' law permits homeowners' associations to fine their members comes from states where statutes have been enacted expressly to permit this to occur. (R. p. 445.) In South Carolina, unless and until our legislature changes the law, homeowners' associations lack any power or authority to impose fines on their members. There is no reason for South Carolina to depart from the general – and apparently universal – rule, recognized in the jurisdictions that have

dealt with this issue, that a homeowners' association cannot fine its members unless a statute has been enacted that authorizes it to do so.

It is plain, despite the circuit court's ruling otherwise and any protestations of the Association, that the provisions of the by-laws at issue here that state they permit the Association to impose fines *do* violate public policy and *are* unenforceable as a matter of law.

Whether the law *ought* to allow homeowners' associations to fine people is not a question for this court or any court; instead, it is a question for the South Carolina General Assembly. It is not the role of this court to change the law, whether to empower homeowners' associations to assess fines or to do anything else. "Our constitution mandates that 'the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.' S.C. Const. art. I, § 8." Langford, 400 S.C. at 434. Our legislature has not empowered homeowners' associations to fine people by delegating that state power to them. Unless and until that happens, they cannot exercise that exclusively governmental power.

It was reversible error for the circuit court to grant summary judgment to the Association on this basis.

II. The Association's business judgment rule defense fails as a matter of law.

The business judgment rule defense fails because, contrary to the court's reasoning, that rule protects individual directors who have made errors in taking entrepreneurial risks on behalf of a corporation; further, it does not protect a

corporation from liability for actions that are outside the law. See Kiriakides v. Atlas Food Systems & Servs., Inc. 343 S.C. 587, 606 n. 31, 541 S.E.2d 257, 268 n. 32 (2001); Baumann v. Long Cove Club Owners Assn., Inc., 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008); Goddard v. Fairways Dev. Gen. P'shp., 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993); Dockside Assn., Inc. v. Detyens, 291 S.C. 214, 216-17, 352 S.E.2d 714, 716 (Ct. App. 1987). A corporation cannot exercise powers that are outside the scope of what the law authorizes; such acts are *ultra vires*, which makes the business judgment rule simply inapplicable. This court recently noted that, as follows:

> "[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires*." Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct. App. 1987). The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones.

Fisher v. Shipyard Village Council of Co-owners, Inc., 409 S.C. 164, 760 S.E.2d 121, 130 (Ct. App. 2014).

What a corporation may put in its by-laws is necessarily circumscribed by the law. As discussed above, a nonprofit corporation like the Association has statutory authority to exercise "the same powers *as an individual*" – not a governmental entity – "to do all things necessary or convenient to carry out its affairs[.]" S.C. Code Ann. § 33-31-302 (emphasis added). To fine is a power of a sovereign government, not of any individual. Purporting to usurp that power is beyond the protection of the business judgment rule. That rule is simply inapplicable.

In addition, since Brown's counsel pointed out to the directors on the Association's board several reasons (including many at issue in this case) why it had no power to fine, those directors were not acting in good faith in upholding the fines against Brown. (R. pp. 148, 156-64, 436-37.)

III. The fines would be unenforceable, as contractual penalties, in any event.

While *fines* (government-imposed sentences of monetary payment) are not exactly the same thing as contractual penalties, S.C. State Hwy. Dept., 239 S.C. at 230, the Association's claimed power to levy fines fails to meet the requirements of what makes an enforceable liquidated damages provision different from an unenforceable penalty.

If a contract's purported stipulation of liquidated damages owed in the event of breach of the contract actually constitutes a penalty, it will not be enforced. Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011); Tate v. Le Master, 231 S.C. 429, 442, 99 S.E.2d 39, 46 (1957). Courts look principally to the intent of the parties to the contract in determining whether a provision constitutes a penalty, usually by looking to the language used in the document. Tate, 231 S.C. at 429; Erie Ins. Co. v. Winter Const. Co., 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011). Where the stipulation "is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages." Tate, 231 S.C. at 440. "However, where the stipulation is not based upon contemplated actual damages but *is intended to provide punishment for*

breach of the contract, it is a penalty." Moser v. Gosnell, 334 S.C. 425, 432, 513 S.E.2d 123, 126 (Ct. App. 1999) (emphasis added).

Here, the nature of the fines, as contemplated by the Association's by-laws generally and those specifically imposed in this case, is that they are punitive measures, not an attempt to compensate for actual losses. The fines are the same regardless of which restriction or rule's violation leads to a fine being imposed. (R. pp. 311, 319.) They relate in no way to damages; rather, they are intended to punish a Spring Valley lot owner for violating the covenants or the Association's by-laws or rules.

Also, what we do *not* have here is a situation in which Brown entered into a contract with the Association that provided for the Association to fine Brown in certain circumstances. Instead, what is here are covenantal restrictions in a deed that nowhere mention fines or penalties. The claimed fining power purports to come from a change to corporate by-laws, not from an agreement between Brown and the Association. Even if it did result from the latter, however, it would still bear plainly the hallmarks of an unenforceable penalty.

Whether these are fines or contractual penalties, they are unenforceable either way.

IV. Even if the law allowed a homeowners' association to levy fines where the covenants provide for that, this homeowners' association could not do so, since the covenants at issue do not provide for fines.

Here, neither the law (as discussed above) nor the restrictive covenants state that the Association has the power to fine anyone. Even if it were possible for homeowners' associations to fine people in this State, *this* homeowners' association could not do so, as the covenants at issue do not say that they empower or authorize the

levying of any fine. To purport to fine someone for violating the covenants is not "appropriate legal action." (R. pp. 272-74.)

This court upheld in 2011 the ruling of a master-in-equity who held that a homeowners' association's rules could not exceed the scope of what was permitted in the declaration of its governing covenants. Rawlinson Road, 395 S.C. at 31. (While fines were involved in that case, apparently the issue of fines being a governmental function that cannot be usurped by a homeowners' association was not. Rawlinson Road, contrary to the reasoning of the circuit court's order, does not provide authority to support the lower court's answer to a question the Rawlinson Road decision did not address. Also, the Seabrook Island Property Owners Assn. v. Berger case cited by the circuit court similarly did not address the question of whether the law permits a homeowners' association to exercise the sovereign power to fine. 365 S.C. at 239.)

If there were a common-law basis for homeowners' associations fining people, it would have to be based on an authorization in the governing covenants to do so. There is no such authorization here. The circuit court ruled that the covenants provided a basis for the imposition of fines here. By their plain language, they do not. It was error for the circuit court to grant summary judgment to the Association.

V. The for-sale-sign restriction is void as a restraint on alienation.

"Under South Carolina common law, any unreasonable limitation upon the power of alienation is against public policy and must be construed as having no force and effect." Wise v. Poston, 281 S.C. 574, 579, 316 S.E.2d 412, 415 (Ct. App. 1984). An absolute prohibition on for sale signs absent the permission of the Association's board – which may be withheld for any reason, even an arbitrary one – is an

"unreasonable limitation upon the power of alienation" and is, thus, void. Id. The circuit court adopted one other state's reasoning, Georgia's, in the absence of South Carolina authority on point, to summarily dispense with this issue. (R. p. 8.) That reasoning is wrong, and the for-sale-sign prohibition is an "unreasonable limitation upon the power of alienation [that] is against public policy and must be construed as having no force and effect." Id.

VI. As the Association wrongfully recorded an unfounded claim on Brown's property, the circuit court erred in granting summary judgment on Brown's slander of title claim.

The only statutory lien in favor of homeowners' associations under South Carolina law is for unpaid assessments for common expenses in a regime governed by the Horizontal Property Act, which the circuit court found and the Association concedes is not at issue here. S.C. Code Ann. § 27-31-210. The covenants at issue in this case similarly provide for a lien only for unpaid assessments for common expenses. Brown is not, nor has the Association claimed him to be, behind on the payment of his assessments for common expenses. Nowhere is there any basis for the Association to have ever contended that the unpaid fines at issue here constituted a lien of any kind.

"Wrongfully recording an unfounded claim against the property of another generally is actionable as slander of title." Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995). There is no reason to think it would not be actionable here. Leaving aside entirely the question of whether the Association has the power to fine its members, the Association had no reason to believe that any such fines would constitute liens on its members' property. (R. pp. 272-74.) It wrongfully recorded the notice of lien that gave rise to Brown's slander of title claim.

Further, in South Carolina, "every violation of a legal right imports damage and authorizes the maintenance of an action and recovery of at least nominal damages, regardless of whether any actual damage has been sustained." Stevens v. Allen, 342 S.C. 47, 53 n. 5, 536 S.E.2d 663, 665, n. 5 (2000); accord Grooms v. Med. Soc'y of S.C., 298 S.C. 399, 380 S.E.2d 855 (Ct. App. 1989). Also, Brown's attorney's fees in this case may constitute damages. (R. pp. 76-80.); see Solley v. Navy Fed. Credit Union, 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012).

Further, Brown testified in his affidavit that, if he sold the house, he would pay the Association the $500.00 in order to consummate the transaction. (R. p. 114.)

It was error for the circuit court to grant the Association summary judgment on the slander of title claim.

VII. Where the record showed the Association is involved in trade or commerce and that its policies state that it will apply its unlawful fining activities to all Spring Valley owners, the circuit court erred in granting summary judgment on the UTPA claim.

The court reasoned that Brown's unfair trade practices claim cannot lie because the Association is not engaged in trade or commerce and its actions do not impact the public interest. (R. pp. 9-10.)

An action for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, lies where there is a violation of the Act (i.e., an unfair or deceptive act in trade or commerce that impacts the public interest) that proximately causes damages to the plaintiff. See, e.g., Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 417, 458 S.E.2d 431 (Ct. App. 1995). "'Trade' and 'commerce' shall include the . . . distribution of any services and any property, tangible or intangible, . . . and any other article, commodity or thing of value wherever situate,

and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b). Trade and commerce are interpreted broadly for purposes of the UTPA. The text of S.C. Code Ann. § 39-5-10(b) states that:

> "Trade" and "commerce" shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

This court has held that "[t]he statute's use of the words 'shall include' clearly suggests the legislature did not intend to limit 'trade' and 'commerce' to only the listed transactions." Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (Ct. App. 1991). "[T]he UTPA 'should be given a liberal construction.'" McTeer v. Provident Life and Accident Ins., 712 F. Supp. 512, 515 (D.S.C. 1989) (quoting Connolly v. People's Life Ins. Co., 294 S.C. 355, 359, 364 S.E.2d 475, 477 (Ct. App. 1988)).

The Association provides the services of a homeowners' association: maintenance of common elements, for example. That is "trade" or "commerce" for these purposes.

The South Carolina Supreme Court has stated that demonstrating the potential for an unfair trade practice's repetition is a demonstration of the requisite "adverse effect on the public interest." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21 (1998). The Court has "specifically declined" to hold that such potential for repetition must be demonstrated by any particular means and has stated that "each case must be evaluated on its own merits." Id.

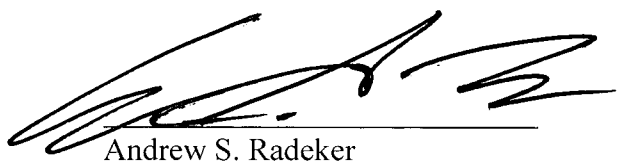
The Association's actions at issue here impact the public interest: they are capable of repetition, as they are enshrined in the Association's by-laws as applicable to all association members, and it is plain that the purported usurpation of the government's power to fine impacts the public interest.

CONCLUSION

As discussed above, whether South Carolina law *ought* to allow homeowners' associations to fine people is not a question for this court or any court. It is a question for the South Carolina General Assembly. If homeowners' associations want the law to allow them to fine their members, they should lobby those who represent them in the legislature.

The circuit court erred in granting summary judgment to the Association. This court should reverse that ruling and remand this case for further proceedings.

Respectfully submitted,



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September 22, 2015

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Judge

Appellate Case No. 2014-002587

S. Coley Brown,.....Appellant,

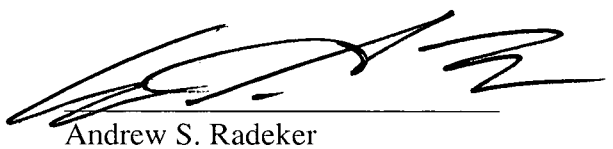
v.

Spring Valley Homeowners Association, Inc,.....Respondent.

CERTIFICATE OF COUNSEL

I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,



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