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 REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES

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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?**

ARGUMENT

Appellant, S. Coley Brown (hereinafter "Brown") submits this brief in reply to that submitted by the Respondent, Spring Valley Homeowners Association, Inc. (hereinafter "the Association"). It would be difficult or impossible for Brown to respond to every contention made by the Association in its brief. Accordingly, Brown limits this reply brief to addressing the major flaws in the Association's argument and to responding to assertions newly made by the Association in its brief. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address additional sustaining ground arguments in reply brief). Brown does not respond to every contention made by the Association because some responses would simply duplicate what is in his appellant's brief.

I. All of Brown's arguments are embraced by his statement of issues, and the Association cannot prevail on this basis.

The Association contends that Brown violated Rule 208(b)(1)(B), SCACR, by discussing the inapplicability of the business judgment rule in his brief. (Initial Brief of Respondent p. 40.) The Association also states that Brown violated the same rule by discussing in his brief that the restrictive covenants at issue do not state that they authorize the Association to fine anyone for their violation. (Initial Brief of Respondent p. 42.)

Rule 208(b)(1)(B), SCACR, provides that an appellant's statement of issues in that section of his brief "shall be concise and direct as to each issue," in addition to stating that "[o]rdinarily, no point will be considered which is not set forth in the statement of this issues on appeal." Juxtaposition of Brown's statement of issues on

appeal with the content of his brief and the trial court's order reveals that Brown did not violate this rule. The statement of issues is required to be concise and direct, not a listing of everything contained in the appellant's argument about each issue.

Brown's statement of issues in his appellant's brief is as follows:

> 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?

(Initial Brief of Appellant p. 1.)

Brown's arguments with which the Association takes issue in this regard are embraced in Issues I, III, and IV. Brown's argument about the Association's purported fines being unlawful because they exceed the authority of the covenants that provide for its existence is embraced in the question of whether the Association could lawfully impose the fines it levied on Brown. The circuit court discussed the business judgment rule only in the context of whether it provided the Association a defense to Brown's slander of title claim and claim for violation of for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "UTPA");

thus, Brown's argument about it relates to and is embraced in his statement of issues about those claims. (R. pp. 12-13.) Brown's business judgment rule argument also relates to Issue I, since corporate acts that are not authorized by law are *ultra vires* and beyond the protection of the business judgment rule. Fisher v. Shipyard Village Council of Co-owners, Inc., 409 S.C. 164, 760 S.E.2d 121, 130 (Ct. App. 2014). What little case law there is on this issue indicates that Rule 208(b)(1)(B)'s directive that the statement of issues be concise means that the appellant is not required to mention in that statement every argument he makes in his brief about why the issues ought to be decided in his favor. Eubank v. Eubank, 347 S.C. 367, 373 n. 2, 555 S.E.2d 413 (Ct. App. 2001) (holding that rather simple statement of issue adequately raised issue when read in conjunction with argument in brief).

In the alternative, even were the court to see Brown's brief as violating Rule 208(b)(1)(B), there would be no prejudice to the Association as a result of such violation. The purpose of the rule is to notify the opposing party of the issues involved in the case. To the extent that the court determines that Brown's argument went beyond what is embraced in his statement of issues, the Association plainly picked up on what was being argued anyway, as its brief shows by presenting counterargument to the very arguments it complains it was not told of in Brown's statement of issues. (Initial Brief of Respondent pp. 40-44.) If the court perceives a violation of Rule 208(b)(1)(B) here, the court should treat it as it did in Southern Welding Works v. K & S Construction Company, 286 S.C. 158, 160, 332 S.E.2d 102, 104 (Ct. App. 1985), in which this court dealt with a party's "plain violation" by failure to sufficiently state exceptions under the Supreme Court Rules (that predated the South Carolina Appellate Court Rules) by

"elect[ing] to consider those issues which are reasonably clear from K & S's argument and which were ruled on by the trial court."

II. The Association improperly includes in its brief purported factual material that was never presented to the court below.

It is interesting that the Association makes a nitpicking argument about Brown's statement of issues. The Association has committed a much more grave infraction of the Appellate Court Rules in its brief than that of which it accuses Brown. The Association argues from the content of documents never presented to the trial court – those of the Bent Tree Community, Inc. in Georgia – and tries to slip in the content of those documents as though they were part of the record here by masquerading them as argument in its brief. (Initial Brief of Respondent pp. 32-33.)

This is an attempt at an end-run around Rules 209(b) and 210(c), SCACR. Rule 210(c), SCACR, prohibits the inclusion in the Record on Appeal of "matter which was not presented to the lower court or tribunal." Accord State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007); Sanders v. Salley, 283 S.C. 458, 460, 322 S.E.2d 829, 830 (Ct. App. 1984); see Cobb v. Benjamin, 325 S.C. 573, 581 n. 2, 482 S.E.2d 589, 593 n. 2 (Ct. App. 1997).

The purpose of an appeal is for the appellate court "to review the judgment of the circuit court for reversible error based on the issues and evidence presented to that court." Sanders, 283 S.C. at 460. The Court of Appeals "does not sit as a trial court to receive evidence on disputed issues of fact[.]" Id. "[A]ppellate review should be limited to the record in the trial court." Id. at 461.

It is not proper for the Association to argue from what was never presented to the lower court, and this court should not entertain that argument.

III. The Association's argument that the common law or South Carolina corporation statutes provide it with a power to fine has several major flaws.

The Association has apparently searched, thoroughly, far and wide for authority to support its argument that it has the power to fine its members under either the common law or South Carolina statutory law concerning the powers of corporations. Problematic for the Association is that its argument in this regard ignores S.C. Code Ann. § 33-31-302 and other South Carolina law, relies on inapposite authority, and reaches an internally inconsistent conclusion when it attempt to distinguish adverse authority.

a. The levying of fines exceeds the powers the General Assembly has conferred upon nonprofit corporations like the Association.

The Association contends that South Carolina's statutory law of nonprofit corporations vests it with the power to fine. As it acknowledges, the Association is a nonprofit corporation organized under South Carolina law. (R. pp. 25, 35.) The Association – and the lower court – must have had to avert their eyes as they read S.C. Code Ann. § 33-31-302, which provides for the general empowerment of South Carolina nonprofit corporations. Both the lower court and the Association have cited this statue in support of their reasoning, but the language of the statute actually deeply undercuts it. Accepted principles of the power of corporations and the words of that statute defeat the Association's contention and demonstrate that it has no power to fine.

Corpus Juris Secundum, often cited by the Association in its brief, notes as follows:

> Corporations cannot be created nor exist, nor corporate powers be assumed, by mere agreement of the parties, and they instead require authority from the sovereign

> power, express or implied. A corporation acquires it existence and authority to act from the state.

18 C.J.S. Corporations § 43.

"State legislatures generally exercise the power to create corporations[,]" and "the legislature of a state has the inherent power to determine and prescribe . . . the powers which will be conferred on them[.]" 18 C.J.S. Corporations § 44. "Legislation confers corporate power through general or specific statutes." Id.

"Corporations are creations of state law and can exercise only those powers conferred upon them by statute." Seven Springs Farm, Inc. v. Croker, 801 A.2d 1212, 1216 (Pa. 2002).

> A corporation is a creature of statute. A corporation derives its power and capacity from the statutes, and it can exercise only those powers conferred upon it by statute.

18 C.J.S. Corporations § 49. "[A] corporation is a creature of statute, acquiring its existence and authority to act from the state." Baldwin County Elec. Membership Corp. v. Lee, 804 So.2d 1087, 1090 (Ala. 2001) (quoting 1 Charles Keating & Gail O'Gradney, Fletcher Cyclopedia of the Law of Private Corporation § 3635, at 226 (1990)). "The laws of the state that grants or restricts the powers of the corporation become part of the articles of incorporation or charter of the corporation." 18 Am.Jur.2d Corporations § 14.

This affects a corporation's power to enact by-laws, which cannot go beyond the scope of the power conferred on a corporation by the legislature. 18 C.J.S. Corporations § 155.

> [T]he power to enact by-laws is not unlimited, but may be expressly, and is always impliedly, limited by the

> charter or general law, and only such by-laws may be enacted as are consistent with the constitution, charter, or governing statute and the articles or certificate of incorporation, and such as are not contrary to general law.

Id. (citing King v. Ligon, 180 S.C. 224, 185 S.E. 305 (1936)). In the event of an inconsistency, "where a corporation's by-laws conflict with the statute under which the corporation was organized, the statute controls." 18 C.J.S. Corporations § 163; accord Baldwin County Elec. Membership Corp., 804 So.2d at 1090 ("where the articles of incorporation or the bylaws conflict with the statute, the statute controls").

The South Carolina General Assembly, in S.C. Code Ann. § 33-31-302, vested South Carolina nonprofit corporations with the only powers they have: "the same powers as an individual to do all things necessary or convenient to carry out its affairs[.]" It is apodictic that an individual has no power to levy a fine under South Carolina law. Further, that is consistent with South Carolina case law discussing the nature of fines, as noted in Brown's initial brief, and law about this generally, as also noted in the brief. S.C. State Hwy. Dept. v. So. Ry. Co., 239 S.C. 227, 230, 122 S.E.2d 422, 424 (1961); State v. Stevens, 116 S.C. 210, 211, 107 S.E. 906 (1921). Brown points out that the Association never once argues that an individual *does* have the power to impose fines.

The Association essentially argues in its brief that its powers to further its corporate objectives are virtually unfettered. It would seem from the Association's brief that its powers are circumscribed by nothing and it can enact any by-law it pleases. That is not the law.

It might be closer to the law in Illinois, a jurisdiction on whose case law the Association leans heavily in its brief. Unlike S.C. Code Ann. § 33-31-302, Illinois' nonprofit corporation empowerment statute "broadly provides that each corporation shall 'have and exercise *all powers* necessary or convenient to effect any or all of the purposes for which the corporation is formed.'" Poris v. Lake Holiday Prop. Owners Assn., 983 N.E.2d 993, 1001, 368 Ill. Dec. 189 (Ill. 2013) (quoting 805 ILCS 105/103.10(r) (West 2008)) (emphasis added). That is different, materially different, from the South Carolina statute involved in this case. Illinois' statute vests corporations with *all* powers – which may obviously include government powers, like fining – and not just those possessed by individuals. (Whether Illinois may have done more than it should have by vesting so much power in corporations is a question for that state's legislature and not for our courts.)

The by-laws of a nonprofit corporation are, of course, "subject to review . . . for legality," and "by-laws *inconsistent with statutory law, the common law, or with public policy* or good morals, are void, even though they may have been unanimously assented to by the stockholders or members." 18 C.J.S. Corporations §§ 161, 163 (emphasis added). A by-law "is void" if it "is inconsistent with any statute or rule of common law[.]" Frantz Mfg. Co. v. EAC Industries, 501 A.2d 401 (Del. Supr. 1985).

> It has been held that a by-law, imposing a fine upon any stockholder violating it, is invalid, in the absence of express legislative authority, where the stockholder is subject to civil suit by the corporation for such violation.

18 C.J.S. Corporations § 171.

Under South Carolina law, "[a]ll resolutions and by-laws must be conformable and subordinate to the general laws." King, 185 S.E. at 309. That includes S.C. Code

Ann. § 33-31-302, by which our legislature conferred upon nonprofit corporations only the same powers possessed by an individual, who cannot fine anyone.

The Association is wrong to argue that, as a nonprofit corporation, it possesses the power to fine anyone, and the lower court was wrong to decide that it does. The Association's argument on this point in its brief has a large logical and legal hole in its center. That hole is that South Carolina law only empowers a corporation like the Association to do what an individual can do.

b. Since a federal statute permits labor unions to fine their members under certain circumstances, the Association's reliance on cases about labor unions is misplaced.

A large portion of the Association's brief is spent discussing labor union law. Since federal statutory law authorizes labor unions to fine their members under certain conditions, this body of jurisprudence is inapposite and does not help resolve the issue at hand.

As set out in 29 U.S.C. § 411(a)(5), one of the things done by the Labor Management Reporting and Disclosure Act of 1959, also known as the Landrum-Griffin Act, was to remove any doubt about whether labor unions had the power under previous legislation such as the National Labor Relations Act of 1935 or its Taft-Hartley Amendments of 1947 to fine their members. Under 29 U.S.C. § 411(a)(5), "a member of any labor organization may be fined," provided that certain procedural conditions are met. The Association relies heavily on what is really just dicta from National Labor Relations Board v. Allis-Chalmers Manufacturing Company, 388 U.S. 175 (1967); however, that reliance is misplaced, as 29 U.S.C. § 411(a)(5) was already in place at the time that case was decided and whether a union could impose fines on

its members was not at issue there. Allis-Chalmers, 388 U.S. at 176. The issue, rather, was whether the particular fines imposed under the circumstances of that case constituted an unfair labor practice. Id. at 176, 192. No one involved in the case appears to have contended that the union could not impose fines, and the Supreme Court did not address that issue – in light of the Landrum-Griffin Act, it did not need to. Indeed, language from the Allis-Chalmers opinion appears to indicate that the Court made use of the Landrum-Griffin Act in interpreting whether the Taft-Hartley amendments had *already* authorized the fining of members by labor unions but left government regulation of that process to a future Congress. Id. at 194. "Courts may properly take into account the later Act when asked to extend the reach of the earlier Act's vague language to the limits which, read literally, the words might permit." Id. (quoting NLRB v. Drivers, etc., Local Union No. 639, 362 U.S. 274, 291-92 (1960)).

The labor union cases cited by the Association that uphold fines against labor union members and discuss their validity in various situations all cite either 29 U.S.C. § 411(a)(5), Allis-Chalmers, or both to support their conclusion. This is law about the interpretation of statutes governing labor unions. One of these statutes specifically says that labor unions can fine their members. 29 U.S.C. § 411(a)(5). None of this law is applicable to the parties in the instant case, which are not labor unions or members thereof. There is no comparable statute to 29 U.S.C. § 411(a)(5) in South Carolina, but there is a preponderance and more in the case law from across the country to the effect that homeowners' associations cannot fine in the absence of legislatively conferred authority.

c. If homeowners' associations possessed a common-law power to fine, the results and reasoning in the cases the Association tries to distinguish would have been different.

The Association tries to distinguish Unit Owners Assn. of BuildAmerica-1 v. Gillman, 223 Va. 752, 292 S.E.2d 378 (1982), Holbert v. Great Gorge Village South Condominium Council, Inc., 281 N.J.Super. 22, 656 A.2d 1315 (1994), Elbadramany v. Oceans Seven Condominium Assn., 461 So.2d 1001 (Fla. 5th DCA 1984), Vernon Manor Co-op Apts., Section I v. Salatino, 178 N.Y.S.2d 895 (1958), and Stewart v. Kopp, 454 S.E.2d 672 (N.C. App. 1994), by arguing that "[c]ondominium associations and other HOAs governed by comprehensive regulatory schemes are created and governed by statute, thus their powers and authority must derive from statute." (Initial Brief of Respondent pp. 26-27.) As discussed above, nonprofit corporations like the Association *are* created and governed by statute. *Their* powers and authority must derive from statute.

But, in addition, the Association's argument on this point is missing the third leg of its stool. It cannot stand, much less provide a secure resting place for this court's decision. If there were a common-law power for property owners' associations to fine, as the Association claims, the results and reasoning in the Gillman, Holbert, Elbadramany, Vernon Manor, and Stewart cases would have been different. If a homeowners' association had a common-law power to fine its members, they would have that power regardless of what other statutory powers they might have, and each of those cases would have held that the common law provided the source of that power and no legislation to confer it was necessary. That is not what they held.

d. South Carolina has never implicitly recognized that a property owners' association can fine people.

Contrary to the Association's contention, South Carolina has never implicitly recognized any authority by homeowners' associations to fine their members. Neither 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), nor Seabrook Island Property Owners Assn. v. Berger, 365 S.C. 234, 239, 616 S.E.2d 431, 434 (Ct. App. 2005), addressed whether the associations involved in those cases had such authority. Apparently, no one made an issue of that in those cases. "Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." State v. Austin, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991). These decisions simply do not speak to this issue at all. There are South Carolina Supreme Court decisions, however, that do support the nature of a fine as being a criminal penalty imposed by the government and not by a private entity, as discussed in Brown's appellant's brief. S.C. State Hwy. Dept., 239 S.C. at 230; Stevens, 116 S.C. at 211. The Association does not mention those.

e. The Association has had to reach so far afield for authority because the authority that does address the issue is against it.

The reason that the Association has to reach so far to find authority to cite in its arguments in this case is because the indirect South Carolina authority that does exist supports Brown's argument and the great weight of on-point authorities from other jurisdictions is against the Association's position.

Most of that is discussed above, in Brown's appellant's brief, or both. But the Association has also gone to great pains to avoid another portion of a source it often cites in its brief: Corpus Juris Secundum. There is an entire topic in that legal encyclopedia devoted to fines. A few quotations demonstrate why the Association failed to cite any sections from that part of this source:

> A "fine" is a sum expressly imposed in lieu of, or in addition to, a term of imprisonment or as any part of the punishment for an offense. A fine is punitive in nature; it is a pecuniary punishment imposed as part of a sentence by a lawful tribunal on a person convicted of a crime or misdemeanor.
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> . . .
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> A "fine" is not a debt.
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> . . .
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> As generally understood, a fine is a sum of money exacted of a person guilty of a crime, the amount of which may be fixed by law or left in the discretion of the court, . . .
>
> A fine is imposed in a criminal action or proceeding . . .
>
> . . . a fine is discretionary within the limits prescribed and is paid to the State.
>
> . . .
>
> Subject to constitutional restriction, the imposition and regulation of fines belong to the legislature . . .

36A C.J.S. Fines §§ 1, 2, 3.

Imprisonment and execution differ from fining in degree, not in kind. All three are criminal sanctions that only the sovereign possesses the power to inflict, absent a delegation of that authority. So. Union Co. v. U.S., ___ U.S. ____, 132 S.Ct. 2344,

2350 (2012); Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, 492 U.S. 257, 265 (1989); Ingraham v. Wright, 430 U.S. 651, 664 (1977); Unit Owners Assn. of BuildAmerica-1, 223 Va. 752.

IV. The Association ignores South Carolina law on contractual penalties.

The Association does not even discuss the South Carolina law prohibiting enforcement of contractual penalties cited by Brown in his brief. The Association appears to have conceded that 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. First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996)(where respondent fails to respond to issue in respondent's brief, court may treat failure to respond as concession that appellant is correct). On this basis alone, Brown would be entitled to reversal.

V. The Association has pointed to no facts that would supply any reasonable basis whatsoever for the Association to believe it had a lien for its purported fines.

The Association argues that its actions in recording a notice of lien document stating that it held a lien on Brown's property for the amount of the fines was done in good faith. Poppycock. A simple examination of the documents at issue shows that it could not have been done in good faith, as no reasonable person would believe that the fines constituted a lien on Brown's property.

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. 273.) 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. p. 273.) The only liens in favor of the Association that are provided for in the covenants are liens for periodic assessments for maintenance. (R. pp. 272-74.) Nothing even purporting to be authority for fines becoming liens was ever presented to the lower court. With all due respect to the directors of the Association, if they believed that the Association had a lien for the fines, that belief was wholly unreasonable. What would it have come from?

This also undercuts the Association's business judgment rule argument, as there is simply no source of a rational belief that the fines would constitute a lien on the property. To hold such a belief *is* evidence of incompetence, and no reasonable lawyer would advise a client that a lien for the fines existed without some basis in a statute, at common law, or in any of the Association's governing documents. What if the Association's lawyer had told it that it could kill Mr. Brown for not paying the fines or throw him in jail until he paid the fines? Could it escape the reach of the law then? Again, the difference is one of degree (of the severity of what would be done to Brown), not kind (of advice) – either piece of advice would be patently unreasonable.

VI. What is truly frightening is the idea that homeowners' associations could exercise government's traditional criminal enforcement powers in an unfettered way.

The Association argues that it is "desirable public policy for HOAs to be able to levy fines" and that "if a HOA is found to not have authority to issue fines to enforce its covenants and restrictions, ultimately it will be the homeowners that suffer." (Initial Brief of Respondent p. 38.) It argues that "if a legal action had to be filed for every

violation of the rules and restrictions, it would open a whole new floodgate of lawsuits, placing an undue burden and stain on our judicial system." (Initial Brief of Respondent p. 39.)

While the nature of these arguments is such that they should properly be raised to the General Assembly, not this court, Brown will respond to them since the Association has raised them. The Association argues as though victory for Brown in this case would somehow mandate that homeowners' associations run down and file a lawsuit for every petty violation of covenants and by-laws. What it would likely produce is the opposite result. Knowing that homeowners' associations lack the authority to levy fines, the directors of homeowners' associations would probably not attempt to do so. This would likely *lessen* the amount of litigation, as associations would not be making claims to be owed money where they have not been damaged (as here), recording false lien documents (as here), or generally behaving as though they were cloaked with the authority of government officials. They might realize that they are *just* homeowners' associations, not little lords paramount.

The Association contends that it is somehow the homeowners who will suffer if this court decides that homeowners' associations do not have a state power the state has never given to them. To the contrary, the virtually unfettered ability to fine that the Association seeks this court to enshrine as South Carolina law presents a lurking danger to homeowners that they may realize only when it is upon them.

Homeowners' associations *should* be about neighbors helping neighbors. All too frequently, however, they are anything but.

> The absence of meaningful checks and balances on homeowners' association authority is a portent for abuse.

> The potential for autocratic rule is compounded by less than participatory governance structures and resident apathy.
>
> . . .
>
> Examples of bad judgment abound as associations go about their work. A North Carolina resident, fined $75 per day because his dog exceeded governing weight limitations, was forced to declare bankruptcy when the cumulative assessment against him totaled $11,000. A Texas resident whose brain tumor caused him to fall behind on $600 in dues was sued, generating $4,600 in legal fees, which he was unable to pay. The association foreclosed on his home. When a California couple returned from vacation, they found that their association had cut down their very expensive pine trees in response to a neighbor's complaint that the trees violated a covenant preventing foliage from obstructing views – no matter that the association had approved the trees in the first place. That is not nice.
>
> Aggressive homeowners' associations have prompted what some describe as a "budding national backlash," turning residents against their associations and sometimes against each other. Some associations have been described by disgruntled residents as petty, tyrannical, and despotic. Litigious results follow.
>
> . . .
>
> To prevent homeowners' associations from becoming petty or, even worse, corrupt autocracies, a meaningful system of checks and balances, together with transparency and more egalitarian governance structures, must be imposed.

Paula A. Franseze, "Privatization and Its Discontents: Common Interest Communities and the Rise of Government for the 'Nice'" The Urban Lawyer Vol. 37, No. 3, pp. 335, 343-44, 357 (Summer 2005).

> Joseph Haggerty may own the most expensive garbage can in America.

> Because he kept it in the front yard, not the back, his homeowners association took him to court for violating community rules. After a four-year standoff over whether neighbors could see it behind a shrub, he lost and was ordered to pay $11,978.75 in fines and legal fees.
>
> For Ralph Blevins, the problem was an unsightly toolshed behind his town house in Raleigh, N.C. His homeowners association removed the shed one night, and Mr. Blevins, a 62-year-old civil engineer, protested by withholding $750 in maintenance fees. The association foreclosed and bought the town house at an auction for just $3,000.
>
> . . .
>
> Tensions between homeowners and their associations have increased as these communities have proliferated, attracting an increasingly diverse population. Many newcomers join a community run by an association without fully understanding what they are getting into.
>
> . . .
>
> Some *association advocates* say the new laws [in some jurisdictions, restraining homeowners' associations from arbitrary actions] weaken community boards. They *argue that the boards are no different from city governments that foreclose on homeowners who do not pay property taxes.*

Motoko Rich, "Homeowner Boards Blur Line of Who Rules Roost," New York Times July 27, 2003 (emphasis added).

> [A] broad concern, which can affect even residents who agree with association policies, rules, and regulations, is the potential for their heavy-handed or arbitrary administration by the association's governing body. This potential for abuse exists because associations, while private in nature, have governmental-like "tax" (i.e., fees and assessments) and "police" (i.e., rules and regulations) powers, but lack many of the "checks and balances" that serve to constrain abuses of power in the public realm.

> For example, the separation of powers among branches of government, a major constraint of abuse of power in the public realm, is often missing in association governance. For most associations, the elected board of directors combines legislative, executive, and judicial functions. Thus, the same body that "enacts" a rule also exercises authority over how it will be administered – and then serves as prosecutor, judge, and jury should there be an alleged infraction. Not surprisingly, such absolute power can lead to abuses.
>
> In one of the more publicized recent incidents, an association in the San Francisco Bay area initiated a foreclosure action against a member who had failed to pay an assessment of $120. Another case, that also garnered national attention, saw an association order that the parents of a boy battling leukemia dismantle the tree house they'd built him because it violated the association's height restriction.

Alan C. Weinstein, "Homeowners Associations," Planning Comm'rs Journal 58 (Spring 2005).

And the Association asks you to give these people the power to levy fines? That is what they want you to do: give them, for the first time, the power to levy fines. They want *more* power?

If we are to allow homeowners' associations to fine people in South Carolina, that should be through legislative action that comes with limitations and procedural safeguards that are well thought out and the products of robust debate on the floor of our General Assembly. This may be a test case about $500.00 in fines, but this is no small matter. It is quite something to vest a private entity with the power to inflict a punishment previously reserved to the government. There is no authority for that to be done by judicial fiat, nor should it be. Under our law, "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. Homeowners' associations have none of the checks and balances, promoted by a separation of powers, that are at the bedrock of our way of government in these United States. In homeowners' associations, the board is the prosecutor, the judge, the jury, and – if this court lets them – the executioner.

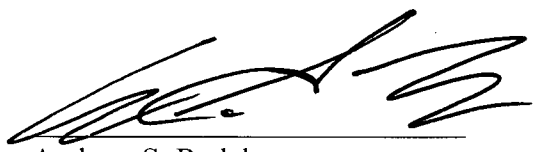
Brown trusts that the judges of this court will see that if they open the door to homeowners' associations exercising the fining power, they open Pandora's box.

CONCLUSION

If the Association believes that it should be able to fine its members, it ought to hire a lobbyist and try to get members of the South Carolina General Assembly – not this court – to change the law to allow it to do that.

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

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Judge

Appellate Case No. 2014-002587

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

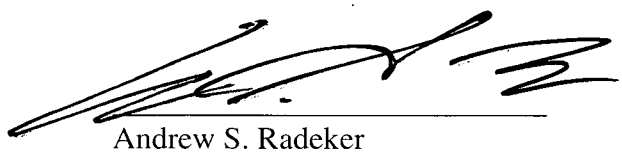
v.

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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