THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Judge

Appellate Case No. 2020-000056

Sterling Hills Homeowners Association,....………………………………...Respondent,

v.

Elliot Hayes,..Appellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES

I. Did the lower court err reversibly in referring this case to the master-in-equity?

II. Did the lower court err reversibly in dismissing Appellant's breach of contract counterclaim?

III. Did the lower court err reversibly in in dismissing Appellant's Unfair Trade Practices counterclaim?

IV. Did the lower court err reversibly in dismissing Appellant's breach of contract and Unfair Trade Practices counterclaim without allowing Appellant an opportunity to amend?

V. Did the lower court err reversibly in granting summary judgment against Appellant on his *ultra vires* declaratory judgment counterclaim?

STATEMENT OF THE CASE

The Respondent, Sterling Hills Homeowners' Association, Inc. (hereinafter "the HOA"), sued the Appellant, Elliot Hayes (hereinafter "Hayes"), alleging that Hayes, a member of the HOA by virtue of his ownership of a house within the subdivision associated with the HOA, had violated and was continuing to violate provisions of the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills (hereinafter "the covenants"). (R. pp. ___; summons and complaint.) The HOA pled causes of action 1) for breach of contract, seeking damages, 2) seeking enforcement of the covenants in equity "[t]o the extent there is no adequate remedy at law," 3) for specific performance, 4) for injunctive relief, and 5) seeking a declaratory judgment that the HOA has the right under the covenants to perform maintenance on Hayes' property and charge him the cost of that maintenance as an assessment on his lot. (R. pp. ___; summons and complaint pp. 5-7.) The HOA later amended its complaint, pleading the same causes of action but adding allegations to the effect that Hayes was allowing someone to live on his porch and urinate and defecate outside at his house. (R. pp. ____; order granting motion to amend and compelling discovery; amended complaint.) In both its original and amended complaints, the HOA specifically stated in its prayer that was seeking "actual and consequential damages[.]" (R. pp. ___; summons and complaint p. 7; amended complaint p. 8.) In response to both the original and amended complaints, Hayes answered and counterclaimed, demanding a jury trial. (R. pp. ____; answer and counterclaim; answer and counterclaim to amended complaint; demand for jury trial.) In response to the amended complaint, Hayes denied the HOA's material allegations and asserted affirmative defenses that the HOA's attempt to enforce unrecorded by-laws and rules was barred by S.C. Code Ann. § 27-30-130, unclean hands, the HOA's own breach of the covenants, and that the

HOA's actions were *ultra vires*. (R. pp. ____; answer and counterclaim to amended complaint pp. 6-7.) Hayes pled counterclaims for breach of contract, for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (hereinafter "the Unfair Trade Practices Act"), for a declaratory judgment that the HOA's acts were *ultra vires*, and for an order directing the HOA to allow Hayes access to its books and records. (R. pp. ____; answer and counterclaim to amended complaint pp. 7-9.)

Hayes moved for summary judgment on the HOA's claims on the grounds that the covenant and bylaws provisions on which the HOA based its claims were so vague as to be unenforceable, as well as that the HOA was seeking to enforce rules or regulations that were not recorded in the register of deeds' office and were thus unenforceable under S.C. Code Ann. § 27-30-130. (R. pp. ___; defendant's motion for summary judgment as to plaintiff's claims.) The HOA moved to dismiss Hayes' counterclaims and to refer the action to the master-in-equity. (R. pp. ___; motion to dismiss counterclaims and refer.) The HOA later moved for summary judgment on Hayes' counterclaims. (R. pp. ___; motion for summary judgment on counterclaims.) Both parties filed affidavits and other factual materials. (R. pp. ___; defendant's responses to discovery requests; affidavit of Calvert; affidavit of Stokes; affidavit of Hayes; affidavit of Radeker; chart.)

The Honorable Thomas A. Russo heard all three motions. (R. pp. ___; transcript.) He denied Hayes' motion for summary judgment[1] and granted the HOA's motions to dismiss and for summary judgment. (R. pp. ___; order dismissing defendant's motion for summary

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[1] Hayes was entitled to summary judgment. Since it is settled law, however, that the denial of summary judgment is not appealable at all, Hayes does not appeal the denial of his summary judgment motion. Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 580 S.E.2d 440 (2003).

judgment, granting plaintiff's motion to dismiss and motion for summary judgment, and order of reference to master in equity.) He also referred the case to the master-in-equity. (R. pp. ___; order dismissing defendant's motion for summary judgment, granting plaintiff's motion to dismiss and motion for summary judgment, and order of reference to master in equity.)

Hayes moved to reconsider. (R. pp. ___; motion to reconsider.) Judge Russo denied that motion without a hearing. (R. pp. ___; order denying motion to reconsider.)

This appeal followed.

STATEMENT OF FACTS

The HOA is in unlawful shambles. Its so-called board of directors is composed of unelected purported appointees to the board appointed by past directors or ostensible directors, as it has not held director elections since 2002. (R. pp. ___; defendant's responses to discovery requests; affidavit of Calvert.) These are *not* holdover directors, as the HOA argued and the lower court found. Indeed, it is impossible for the board to be composed of the same people who were the last elected directors, as affidavit testimony from one of the ostensible directors shows. As Ella Calvert's affidavit indicates, the HOA does *something* other than an election that it contends vests people with director status, since she gave affidavit testimony that she became a director of the HOA in 2015, some 13 years after the HOA last held director elections. (R. pp. ___; defendant's responses to discovery requests; affidavit of Calvert.)

The HOA routinely attempts to force its members to comply with "rules" that do not exist, such as the demand it seeks to enforce in this case that Hayes paint his garage door white or that Hayes keep his garbage cans so that they are not visible from the street. (R. pp. ____; amended complaint; affidavit of Hayes; affidavit of Radeker; covenants; by-laws; chart.) As it is doing in this case, it relies on vague and subjective wording in the covenants to make

vague and subjective demands of its members to do or not do things with their property, then takes action against them based on its purported board's subjective determination of whether its members have met its vague demands. (R. pp. ____; amended complaint; affidavit of Hayes; affidavit of Radeker; covenants; by-laws; chart.) The HOA has accused Hayes of doing things that it has no evidence that he has done, such as letting someone live on his porch and urinate and defecate outside his house. (R. pp. ____; amended complaint; affidavit of Calvert; affidavit of Stokes; affidavit of Hayes; chart.)

STANDARD OF REVIEW

Order of reference and right to a jury trial. "Whether a party is entitled to a jury trial is a question of law." Verenes v. Alvanos, 387 S.C. 11, 15, 690 S.E.2d 771, 772 (2010). "An appellate court may decide questions of law with no particular deference to the [lower] court." Id. at 15.

The right to a jury trial is a substantial right, and any contended waiver of the right to trial by jury is strictly construed. Broome v. Watts, 319 S.C. 337, 340, 461 S.E.2d 46 (1995); North Charleston Joint Venture v. Kitchens of Island Fudge Shoppe, Inc., 307 S.C. 533, 535, 416 S.E.2d 637 (1992); Beach Co. v. Twillman, Ltd., 351 S.C. 56, 64, 566 S.E.2d 863 (Ct. App. 2002).

Motion to dismiss under Rule 12(b)(6), SCRCP. "In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citation omitted). The ruling on a motion to dismiss for failure to state facts sufficient to constitute a cause of action must be based solely upon the allegations set forth in the pleading. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). "In evaluating a motion to dismiss

pursuant to this rule, the circuit court must view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff." Benedict Coll. v. Natl. Credit Systems, Inc., 400 S.C. 538, 544, 735 S.E.2d 518, 521 (Ct. App. 2012). "The motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. The question is whether in the light most favorable to plaintiff, and with every doubt resolved in her behalf, the complaint states any valid claim for relief." Dye v. Gainey, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). "If those facts and inferences would entitle the plaintiff to relief on any theory, then a dismissal for failure to state a claim is improper." Benedict Coll., 400 S.C. at 544. Counterclaims are treated no differently from complaints in this regard. Charleston County School Dist. v. Laidlaw Transit Inc., 348 S.C. 420, 424, 559 S.E.2d 362 (Ct. App. 2001). The claim should not be dismissed even if the court doubts the claimant will prevail in the action. Dye, 320 S.C. at 67-68. The question is whether, in the light most favorable to the party asserting the counterclaim, and with every doubt resolved in his favor, the counterclaim states any valid claim for relief. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

"[T]he circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted." Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019). This principle, too, applies to counterclaims. See Charleston County School Dist., 348 S.C. at 424,

Summary judgment. 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) (citing Spencer v. Miller, 259 S.C. 453, 192 S.E.2d 863 (1972)).

"All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004) (citing Bayle v. South Carolina Dep't of Transp., 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001); Hall v. Fedor, 349 S.C. 169, 173-74, 561 S.E.2d 654, 656 (Ct. App. 2002)) (internal citations omitted). If "the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, . . . that simply establishes that summary judgment is not appropriate[.]" Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 29 (2008) (citing Wilson v. Style Crest Products, Inc., 367 S.C. 653, 656, 627 S.E.2d 733, 735 (2006)).

> 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. Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that a litigant will not be improperly deprived of a trial on disputed factual issues.

Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008) (citing David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); Rule 56(c), SCRCP) (internal citations omitted).

In 2009, the South Carolina Supreme Court clarified earlier confusion about whether a scintilla of evidence is sufficient to defeat summary judgment. See Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802-03 (2009). In Hancock, the Court held that "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Id. at 330, 673 S.E.2d at 803. More than a scintilla is required only in cases requiring heightened burdens of proof or applying federal law. Id. at 330-31, 673 S.E.2d at 803.

ARGUMENT

I. Hayes has the right to a jury trial in this action, and the circuit court erred in referring it to the master-in-equity.

As Hayes noted at the motions hearing, not only did he plead at-law counterclaims in this action, the HOA's first cause of action asserted against him is an at-law claim that seeks damages for breach of contract. (R. pp. ____; amended complaint pp. 6, 9; transcript p. 34 ln. 15-18.)[2] Hayes properly demanded a jury trial on this breach of contract claim and his at-law

[2] The transcript in this case is riddled with errors. The transcript reads as though Hayes' counsel said, "Speaking to that briefly, not only have we pled couple legal expository counterclaims. Well, the plaintiffs were – their first off reaction is for Breach of Contract. And they plead that there weren't damages." (R. pp. ____; transcript p. 34 ln. 15-18.) What Hayes' counsel actually said was, "Speaking to that briefly, not only have we pled a couple of legal compulsory counterclaims, well, the plaintiff's were – their first cause of action is for breach of contract, and they plead that they want damages." (R. pp. ____; transcript p. 34 ln. 15-18.)

counterclaims, first in his answer and counterclaim to the original complaint and then in a separate jury demand made within the time limit of Rule 38(b), SCRCP. (R. pp. ____; answer and counterclaim p. 1; answer and counterclaim to amended complaint; reply to answer and counterclaim to amended complaint; demand for jury trial.) Well-established law provides that, even if this court were to affirm the dismissal and summary judgment rulings on Hayes' counterclaims, Hayes has the right to a jury trial in this action.

a. The HOA has sued Hayes on a breach of contract claim that seeks damages. That is an at-law claim.

Without explanation or analysis, the circuit court ruled "that Plaintiff's claims resound [sic] in equity." (R. p. ___; order dismissing defendant's motion for summary judgment, etc. p. 9.) The HOA's claims do not all sound in equity, however, as the HOA pled an at-law claim against Hayes, which it styled as "breach of covenants" and through which it seeks a judgment for "actual and consequential damages[.]" (R. pp. ____; amended complaint pp. 6, 8.)

Under the South Carolina Constitution, "[t]he right of trial by jury is preserved inviolate." S.C. Const. art. I, § 14. "The right of trial by jury as declared by the Constitution or as given by a statute of South Carolina shall be preserved to the parties inviolate. Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived." Rule 38(a), SCRCP. "This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at the time of the adoption of the Constitution in 1868." Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997).

In 1712, before American independence and before the adoption of South Carolina's first constitution, the colony of South Carolina enacted a statute that adopted, among other

things, English common law as the law of South Carolina. Harold Simmons Tate, Jr., South Carolina's Reception of English Law iii (Univ. S.C. 2008). This reception statute, as it is known, is codified now at S.C. Code Ann. § 14-1-50. "The reception statute of South Carolina is unique in that no other North American colony adopted a statute so comprehensive so early in its history." Tate, supra at iii.

This reception of English law included the right to trial by jury in suits seeking a money judgment. See Cooper, 326 S.C. at 48. The right to trial by jury in suits of this sort between private entities had been recognized in the Magna Carta as a definitive right of Englishmen about 500 years before the enactment of the reception statute. Tate, supra at 159. The right to trial by jury in a suit for breach of a contract was definitively a part of South Carolina law in 1712.

With the American Revolution came South Carolina's first constitution, in 1776. South Carolina has had six constitutions – those of 1776, 1778, 1790, 1865, 1868, and 1895. Each of these constitutions preserved existing law, including the right to trial by jury as it existed before the constitution's adoption. Tate, supra at 232 (citing Art. V, § 3 of S.C. Const. of 1868). Each overhaul of the South Carolina Constitution simply incorporated *en masse* the body of law about entitlement to a jury trial in a civil suit that existed under the previous constitution. The English law adopted in 1712, including that of the right to trial by jury, has thus been carried forward with each of our constitutions. As observed by our Supreme Court in 1919 – under the present, 1895 constitution – the common law of England is the law of South Carolina. State v. Charleston Bridge Co., 113 S.C. 115, 125, 101 S.E. 657 (1919).

Under the common law, a claim seeking damages for breach of a contract carries with it the right of either party to trial by jury. Cooper, 326 S.C. at 48. Restrictive covenants are

contracts. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 894 (1987); Kinard v. Richardson, 407 S.C. 247, 754 S.E.2d 888, 893 (Ct. App. 2014); Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp., 368 S.C. 342, 628 S.E.2d 902, 913 (Ct. App. 2006); Houck v. Rivers, 316 S.C. 414, 418, 450 S.E.2d 106, 109 (Ct. App. 1994). A claim that a party has violated a restrictive covenant is a claim that the party has breached the contract embodied in the covenants. See Kinard, 754 S.E.2d at 893; Queen's Grant, 628 S.E.2d at 913.

Under the South Carolina Constitution, the HOA's claim seeking damages for breach of contract is one on which both the HOA and Hayes have the right to a jury trial. This claim, which seeks a money damages judgment for breach of contract (R. pp. ____; amended complaint pp. 6, 9), is an action at law. E.g., Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 307, 698 S.E.2d 773, 777 (2010) (action for breach of contract is at law); First Citizens Bank & Trust Co. of S.C. v. Hucks, 305 S.C. 296, 408 S.E.2d 222, 223 (1991) (same); Branche Builders, Inc. v. Coggins, 386 S.C. 43, 47, 686 S.E.2d 200, 202 (Ct. App. 2009) (action seeking damages for breach of contract is action at law). "Under the common law, legal actions for the recovery of money" – like HOA's damages claim for breach of contract – "were triable by a jury." Cooper, 326 S.C. at 48.

This is significant. In light of Hayes' jury demand, it was reversible, prejudicial error for the circuit court to refer this case to a master-in-equity. See S.C. Const. art. I, § 14; S.C. Community Bank v. Salon Proz, LLC, 420 S.C. 89, 800 S.E.2d 488 (Ct. App. 2017) (reference to master-in-equity never should have been made where jury trial properly demanded on at-law causes of action).

b. Hayes pled at-law counterclaims and has the right to trial by jury on them.

The HOA's damages claim for breach of contract is also significant because it disposes of the need to determine whether Hayes' at-law counterclaims for breach of contract and violation of the Unfair Trade Practices Act are compulsory or permissive. This court need not make that determination to find that Hayes has the right to trial by jury on these counterclaims. Where the plaintiff pleads an at-law claim, the defendant is entitled to a jury trial on that claim and on any legal counterclaims he may assert, even if they are permissive. Wachovia Bank, N.A. v. Blackburn, 407 S.C. 321, 330, 755 S.E.2d 437, 441 (2014); Johnson v. S.C. Nat. Bank, 292 S.C. 51, 54-56, 354 S.E.2d 895 (1987). Even if the court determines that the main purpose of the HOA's complaint is to seek equitable relief, Hayes still has the right to a jury trial, since an action's "main purpose" does not trump the requirement "that in instances where legal and equitable issues or rights are asserted in the same complaint, the legal issues are for determination by a jury and the equitable issues are to be decided by the court." Floyd v. Floyd, 306 S.C. 378, 380, 412 S.E.2d 397, 399 (1991).

Hayes pled at-law counterclaims, and, should this court correctly reverse and remand those claims for trial, Hayes is entitled to a jury trial on them, regardless of whether they are permissive or compulsory. S.C. Const. art. I, § 14; Blackburn, 407 S.C. at 330; Cooper, 326 S.C. at 48; Johnson, 292 S.C. at 54-56.

As discussed above, a breach of contract claim seeking damages, as Hayes' claim does (R. pp. ____; answer and counterclaim to amended complaint pp. 7, 9), is an at-law claim. E.g., Mathis, 389 S.C. at 307; Hucks, 408 S.E.2d at 223; Branche Builders, 386 S.C. at 47. A claim under the Unfair Trade Practices Act seeking damages, as Hayes' claim does (R. pp. ____; answer and counterclaim to amended complaint pp. 8, 9), is also an at-law claim. Salon

Proz, 420 S.C. at 97; Payne v. Holiday Towers, Inc., 283 S.C. 210, 215, 321 S.E.2d 179, 182 (S.C. App. 1984). Hayes demanded a jury trial on them. (R. pp. ____; answer and counterclaim p. 1; demand for jury trial.) He is entitled to a jury trial on them. S.C. Const. art. I, § 14; Blackburn, 407 S.C. at 330; Cooper, 326 S.C. at 48; Johnson, 292 S.C. at 54-56. It was reversible, prejudicial error for the circuit court to refer this case to the master-in-equity. See Salon Proz, 420 S.C. at 95, 97.

II. Hayes pled facts sufficient to constitute causes of action for breach of contract and under the Unfair Trade Practices Act, and the circuit court erred in dismissing those causes of action.

The circuit court dismissed Hayes' breach of contract and Unfair Trade Practices Act counterclaims. That was error, and this court should reverse and remand these causes of action for trial.

a. When the correct standard is applied, Hayes' answer and counterclaim passes muster to plead facts that show a breach of contract claim.

To recover for breach of contract, a claimant must prove that there was a binding contract entered into by the parties, the other party breached the contract, and damage as a proximate result. See Fuller v. Eastern Fire & Cas. Ins. Co., 240 S.C. 75, 124 S.E.2d 602, 610 (1962). Citing inapplicable federal law, Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), the circuit court ruled that Hayes had not alleged any acts that would constitute a breach of the covenants.

The specificity level required by the Twombly federal court pleading standard is more stringent than that under South Carolina state law. Id.

> Rule 8(b), SCRCP, requires that a defendant provide a statement "in short and plain terms [of] the facts constituting his defenses to each cause of action asserted." The Rule further mandates that a pleading contain "ultimate facts" rather than "evidentiary facts" to state a cause of action. Watts v. Metro Sec. Agency,

> 346 S.C. 235, 240, 550 S.E.2d 869, 871 (Ct.App.2001). "Ultimate facts fall somewhere between the verbosity of evidentiary facts and the sparsity of 'legal conclusions.'" Id.

RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881 (Ct. App. 2004).

Hayes has pled ultimate facts that support his breach of contract counterclaim. Hayes' answer and counterclaim alleges that the HOA has been "refusing to hold elections for directors and operating in flagrant disregard of the covenants the [HOA] claims bind the property subject of this case." (R. pp. ___; answer and counterclaim to amended complaint p. 6.) The answer and counterclaim also alleges that the HOA "has improperly assessed purported fines and assessments and has improperly taken actions against members or purported members of the [HOA]." (R. pp. ___; answer and counterclaim to amended complaint p. 8.) It alleges that the HOA "is and for quite some time has been operating in an *ultra vires* state" and that "[n]one of the Plaintiff's actions during this long time period have been lawful or valid." (R. pp. ___; answer and counterclaim to amended complaint pp. 8-9.)

The question on a motion to dismiss a counterclaim is whether, in the light most favorable to the counterclaimant and with every reasonable inference drawn in his favor, the counterclaim states any valid claim for relief. Charleston County School Dist., 348 S.C. at 424. The covenants at issue are part of the pleadings in this case, having been referenced in the HOA's original and amended complaint, and must be considered in light of Hayes' reference to them in alleging that the HOA has breached them. Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009) (proper for court to consider documents referenced in pleading on motion to dismiss). Viewed in the light most favorable to Hayes, as they must be, the allegations of the answer and counterclaim allege that the HOA breached the provisions of

the covenants relating to director elections, the charging of fines and assessments, and what actions the HOA can take against members, and it is certainly inferable, in light of the HOA's allegations against Hayes, that the HOA directed against Hayes acts that were unauthorized by the covenants. (R. pp. ___; answer and counterclaim to amended complaint pp. 6, 8-9.)

These allegations are also consistent with a theory of the case that is fleshed out by Hayes' affidavit, that the HOA has been insisting that he "perform" under the covenants by doing things that are not required under the covenants, with the HOA then taking action against him for this purported lack of performance. (R. pp. ___; answer and counterclaim to amended complaint pp. 6, 8-9; affidavit of Hayes.) The chart presented by Hayes at the motion hearing details how the HOA is seeking to enforce nonexistent obligations through its claims in this case. (R. pp. ___; amended complaint; chart.) If Hayes' allegations would entitle him to relief under any theory, dismissal is improper. Benedict Coll., 400 S.C. at 544. Dismissal was improper here. When one party to a contract demands that another party "perform" by doing things that are not required by the contract, the making of that demand is a breach of the contract. Hunter Bros. Systems, Inc. v. Brantley Const. Co., Inc., 286 S.C. 59, 66, 332 S.E.2d 206, 210 (1985). In Hunter Brothers, a subcontractor was not required under the terms of its agreement with the general contractor to perform certain work until that work was approved by the owner of the property involved. Id. The general contractor instructed the subcontractor to go forward with the work without approval by the owner, and the subcontractor refused and sued the general contractor, which eventually led the Supreme Court to "hold that, absent such Owner approval, [the general contractor]'s instruction that [the subcontractor] proceed breached their contract." Id. Hunter Brothers is binding precedent, and the circuit court's order ran afoul of it. Id.

The answer and counterclaim also alleges that the HOA "is seeking to enforce by-laws and, to the extent they exist, rules and regulations that have never been recorded as required by S.C. Code Ann. § 27-30-130" and that "[s]uch by-laws and rules and regulations are unenforceable." (R. pp. ___; answer and counterclaim to amended complaint p. 6.) This Code section provides that "in order to be enforceable, a homeowners association's governing documents must be recorded in the clerk of court's, Register of Mesne Conveyance (RMC), or register of deeds office in the county where the property is located." S.C. Code Ann. § 27-30-130(A)(1). The HOA has sued Hayes for him not doing things that the recorded covenants and the recorded by-laws of the HOA do not require him to do, such as painting his garage door white or keeping his trash cans out of view of the street. (R. pp. ___; amended complaint; covenants; by-laws; chart.) The recorded covenants and by-laws were put into the record, but there are no provisions in them requiring Hayes (or any other HOA member) to do these things. (R. pp. ___; affidavit of Radeker; covenants; by-laws.) Contrary to what the circuit court found, the HOA is suing Hayes for not meeting the HOA's demands to do things that the covenants do not say he must do. (R. pp. ___; order dismissing defendant's motion for summary judgment p. 7; amended complaint; covenants; by-laws; chart.) For example, the HOA seeks to require Hayes to do things that can only be required by an "Architectural Control Committee"; however, the HOA does not have and has not had such a committee. (R. pp. ___; amended complaint; affidavit of Hayes; covenants; by-laws; chart.) Viewed in the light most favorable to Hayes, the HOA is *not* seeking to enforce the terms of the covenants; rather, it seeks to have the court enforce some other set of "rules." (R. pp. ___; amended complaint; affidavit of Hayes; covenants; by-laws; chart.) Whatever this other set of rules is, it is not

recorded with the Richland County Register of Deeds. (R. pp. ___; affidavit of Radeker; covenants; by-laws.)

The HOA's insistence that Hayes comply with its demands that exceed the requirements of the parties' contract is a breach of that contract, as discussed above. Hunter Bros., 286 S.C. at 66. But that is not all. "When a contract is made it is presumed to be made with reference to the existing law applicable to its terms[.]" Witte Brothers v. Clarke, 17 S.C. 313, 316 (1882). It is a part of the parties' contract that the HOA's unrecorded (and seemingly unwritten) rules cannot be enforced. See id.; S.C. Code Ann. § 27-30-130(A)(1). The HOA's attempts to enforce them breach the contract.

Hayes can achieve relief under breach of contract theories within what is pled in his answer and counterclaim; thus, the circuit court's dismissal was improper, reversible error. dismissal is improper. Benedict Coll., 400 S.C. at 544.

b. The lower court's decision to dismiss the Unfair Trade Practices claim is founded upon an erroneous conclusion, and the proper ruling was to deny the motion to dismiss that claim.

The circuit court found that the HOA "is a homeowners association and not an entity engaged in trade or commerce as defined by the Unfair Trade Practices Act. Accordingly, the Unfair Trade Practices Act is inapplicable, and Defendant's counterclaim fails to state a cognizable claim." (R. p. __; order dismissing defendant's motion for summary judgment, etc. p. 4.) The circuit court was wrong.

A claimant under the Unfair Trade Practices Act must show: (1) the other party violated S.C. Code Ann. § 39-5-20 by engaging in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the claimant suffered damages as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

The HOA sought for the circuit court to rely on an unpublished opinion that it contended implied that HOAs are not subject to the Unfair Trade Practices Act, arguing that it is not engaged in trade or commerce for purposes of the Unfair Trade Practices Act. (R. pp. ___; transcript p. 25 ln. 13 through p. 28 ln. 3.) Hayes objected to this unpublished opinion being used. (R. pp. ___; transcript p. 25 ln. 23-24.)[3] The HOA stated this unpublished opinion was the basis on which it sought dismissal of Hayes' Unfair Trade Practices Act claim. (R. pp. ___; transcript p. 28 ln. 2-3.)

The HOA's use of an unpublished opinion was error and is specifically prohibited by law. See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC, 422 S.C. 544, 554-56, 813 S.E.2d 292, 297-99 (Ct. App. 2018); Higgins v. Med. Univ. of S.C., 326 S.C. 592, 601, 486 S.E.2d 269, 273 (Ct. App. 1997). "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR. Considering that the circuit court ruled to dismiss the Unfair Trade Practices Act claim on the very same basis that the HOA argued the unpublished opinion stood for, the circuit court erroneously relied on the improperly cited unpublished opinion.

Moreover, it would make no sense for the Unfair Trade Practices Act not to apply to HOAs. For purposes of the Unfair Trade Practices Act, "'[t]rade' 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) (emphasis added). This court has held that "[t]he statute's use of the words 'shall

[3] The transcript erroneously attributes this objection to the court.

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)). An HOA distributes HOA services, such as covenant compliance enforcement and maintenance of HOA common areas for the benefit of the HOA's members, and collection of money assessed to its members. The very nature of an HOA is commercial: it collects money from its members and uses that money to provide services to its members. Those things fall within the Unfair Trade Practices Act's broad definition of *trade* and *commerce*. See Baker, 306 S.C. at 208-09; Connolly, 294 S.C. at 359; McTeer, 712 F. Supp. at 515. Viewing the answer and counterclaim in the light most favorable to Hayes, there is at least a fact question about whether the HOA's acts subject of the Unfair Trade Practices Act claim fall within the broadly construed meaning of *trade* or *commerce* under the Act.

Nor are the other elements of an Unfair Trade Practices Act claim lacking in what Hayes pled. This court's recent decision of Beneficial Financial I, Inc. v. Windham, 431 S.C. 256, 847 S.E.2d 793 (Ct. App. 2020), summarized the law of an Unfair Trade Practices cause of action. There, the court stated as follows:

> The SCUTPA establishes: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." S.C. Code Ann. § 39-5-20(a) (1985). "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006) (quoting Wogan v. Kunze, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005)). "In order to be actionable under SCUTPA, the unfair or deceptive act or practice must have an impact on the public

> interest. [. . .]" Skywaves I Corp. v. Branch Banking & Tr. Co., 423 S.C. 432, 453, 814 S.E.2d 643, 655 (Ct. App. 2018) (quoting Noack Enters., Inc. v. Country Corner Interiors, Inc., 290 S.C. 475, 479, 351 S.E.2d 347, 349-50 (Ct. App. 1986)), *cert. denied*, S.C. Sup. Ct. Order dated Nov. 9, 2018.
>
> "After alleging and proving facts demonstrating the potential for repetition of the defendant's actions, the plaintiff has proven an adverse effect on the public interest . . . the plaintiff need not allege or prove anything further in relation to the public interest requirement." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998).
>
>> An impact on the public interest may be shown if the acts or practices have the potential for repetition. The potential for repetition may be shown in either of two ways: (1) by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence; or (2) by showing the company's procedures created a potential for repetition of the unfair and deceptive acts.
>
> Id. at 453-54, 814 S.E.2d at 655 (quoting Singleton v. Stokes Motors, Inc., 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004)). However, these are not the only two ways impact on the public interest may be shown, rather "each case must be evaluated on its own merits." Crary, 329 S.C. at 388, 496 S.E.2d at 23.

Beneficial, 431 S.C. at 268-69.

Let us examine Hayes' answer and counterclaim in the light most favorable to him. The HOA seeks to enforce unwritten and unenforceable rules. (R. pp. ____; amended complaint; answer and counterclaim to amended complaint p. 6.) The HOA "refus[es] to hold elections for directors and operat[es] in flagrant disregard of the covenants[,]" such that it perpetuates *ultra vires* acts whenever it acts, including when it takes action against a member, such as it has against Hayes. (R. pp. ____; answer and counterclaim to amended complaint pp. 6, 7, 8.) That means that *all* of the HOA's actions, on as wide a scale and with as much potential for repetition as possible, exceed its lawful powers, including its actions concerning those with whom it most regularly engages in commerce, its members. The HOA has engaged

in actions, including those subject of its amended complaint in this case, that "constitute violations of the South Carolina Unfair Trade Practices Act" and "offended public policy[.]" (R. pp. ____; answer and counterclaim to amended complaint p. 8.) The HOA "has improperly assessed purported fines and assessments and has improperly taken actions against members or purported members of the [HOA,]" which include fines, assessments, and other actions taken against HOA members for purported violation of nonexistent rules. (R. pp. ____; answer and counterclaim to amended complaint pp. 6, 8.) "These acts were immoral, oppressive, unscrupulous, and substantially injured Hayes." (R. pp. ____; answer and counterclaim to amended complaint p. 8.) The HOA "knew or should have known that these actions were violations of the Unfair Trade Practices Act and constituted unfair and deceptive acts in trade or commerce." (R. pp. ____; answer and counterclaim to amended complaint p. 8.) The HOA's "actions have an impact upon the public interest and are capable of repetition" – and, since they have been repeated, as alleged, of course they do. (R. pp. ____; answer and counterclaim to amended complaint p. 8.) "Hayes has suffered damages as a direct, consequent, and proximate result of these actions of the [HOA]." (R. pp. ____; answer and counterclaim to amended complaint p. 8.)

The allegations touch on every element of an Unfair Trade Practices claim. Wright, 372 S.C. at 23. Hayes alleged sufficient facts to constitute a cause of action for violation of the Unfair Trade Practices Act, especially when they are viewed, as they must be, in the light most favorable to him. Id. The circuit court's dismissal of the Unfair Trade Practices Act counterclaim – which seems to be made on the basis that an HOA *cannot*, as a matter of law, be engaged in activities that fall within the Unfair Trade Practices Act's broad definition of

trade and *commerce* – is reversible error that is grounded in a misperception of the law. (R. p. __; order dismissing defendant's motion for summary judgment, etc. p. 4.)

c. If the court sees the allegations of the counterclaim as lacking, Hayes should be allowed to amend.

"[T]he circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted." Skydive Myrtle Beach, 426 S.C. at 189. That did not happen here. Instead, the circuit court dismissed Hayes' breach of contract and Unfair Trade Practices Act claims with prejudice, giving Hayes no opportunity to amend. (R. p. __; order dismissing defendant's motion for summary judgment, etc.) In the event that this court sees Hayes' answer and counterclaim as lacking some needed facts to plead viable claims, this court should reverse the circuit court's with-prejudice dismissal and remand for Hayes to have an opportunity to amend. See Skydive Myrtle Beach, 426 S.C. at 189. It is far from "certain there is no set of facts upon which relief can be granted." Id.

III. The court erred in granting summary judgment against Hayes on his *ultra vires* declaratory judgment claim.

Summary judgment is proper only where, viewing the record and all reasonable inferences from it in the light most favorable to the non-moving party, Englert, 377 S.C. at 133-34, "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 a judgment as a matter of law." Rule 56(c), SCRCP. Under the applicable standard, "the non-moving party is only required to submit a mere

scintilla of evidence in order to withstand a motion for summary judgment." Hancock at 330, 673 S.E.2d at 803.

The circuit court granted summary judgment against Hayes on his claim for a declaratory judgment that the HOA is and has been operating in an *ultra vires* state, reasoning as follows:

> [Hayes'] allegation that Plaintiff's Board of Directors has been operating *ultra vires* merely because there are "holdover" directors on the board is refuted by South Carolina's Nonprofit Corporation Act, S.C. Code § 33-31-101 et seq. Plaintiff is a nonprofit corporation and therefore subject to the provisions of the Nonprofit Corporation Act. Under S.C. Code § 33-31-803(a), a board of directors must consist of no less than three directors. Pursuant to S.C. Code § 33-31-805(d), despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated or appointed, and qualifies, or until there is a decrease in the number of directors. Therefore, if the required quorum of Members to elect new Directors has not participated, as Defendant's own discovery response indicates, then Plaintiff's Board of Directors is merely complying with the Nonprofit Corporation Act in maintaining its current Directors. Furthermore, this Court has reviewed the affidavits of Director Ella Calvert and Property Manager Kayla Stokes presented by Plaintiff which further assert the historical lack of the requisite quorum of Members necessary to elect new directors.

(R. p. __; order dismissing defendant's motion for summary judgment, etc. p. 6.)

The discovery responses to which the circuit court refers in this passage are the following statements: "that the Plaintiff is operated unlawfully by persons claiming to be its directors, even though a the required quorum of Plaintiffs' members to elect directors has not participated in a director's election since at least 2002; [and] that the supposed 'board of directors' of the Plaintiff simply purports to appoint themselves as the Plaintiff's putative directors." (R. p. ___; defendant's discovery responses p. 1.) These statements, far from

condemning Hayes' *ultra vires* claim to summary judgment, illustrate the impropriety of the circuit court's ruling.

The HOA is a nonprofit corporation. (R. p. ___; amended complaint p. 1.) When one actually examines the affidavit of purported board member Ella Calvert and compares it to the statements from the discovery responses, that the HOA's so-called board of directors is *not* composed of allowable holdover directors becomes apparent. (R. pp. ___; defendant's responses to discovery requests; affidavit of Calvert.) Ms. Calvert gave affidavit testimony that she became a director of the HOA *in 2015*, some 13 years after the HOA last held director elections. (R. pp. ___; defendant's responses to discovery requests; affidavit of Calvert.) Ms. Calvert could not be a holdover director from before 2002 *and* have become a director in 2015. She is not a holdover director, and the purported board of directors through which the HOA acts is not composed of directors continuing to hold their positions as allowed under S.C. Code § 33-31-805(d). More to the point for purposes of this appeal, when the record is viewed in the light most favorable to Hayes, as it must be, there is a genuine issue of material fact about whether the HOA has been acting through a group of people who actually, under law, comprise its board of directors. Id. A reasonable inference may be drawn that Ms. Calvert did not obtain her position on the board through any means authorized by law.

The Supreme Court spoke to the difference between *ultra vires* versus *intra vires* acts of a corporation in Fisher v. Shipyard Village Council of Co-Owners, Inc., 415 S.C. 256, 781 S.E.2d 903 (2016). As the Supreme Court observed in Fisher, "[a] corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto." Id. at 271. "A corporation's actions taken within the scope of the powers granted it are considered *intra vires* acts; acts beyond the scope of its powers, however,

are *ultra vires* acts." Id. An act of a corporation that exceeds the powers granted to it under its governing documents is an *ultra vires* act. Id. A corporation's *ultra vires* act is void and entitled to no legal protection. Nettles v. Rhett, 24 F.Supp 304, 308-10 (D.S.C. 1938); see Fisher, 415 S.C. at 271-72.

The HOA can act only if it has a lawfully empowered board of directors, as "all corporate powers must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board" of directors, S.C. Code Ann. § 33-31-801(b), and the HOA's covenants and by-laws do not provide otherwise. (R. pp. ___; covenants; by-laws.) If it is acting through a different group of people, some or all of whom do not lawfully hold director positions, its acts are *ultra vires*. Fisher, 415 S.C. at 271. There is a genuine issue of material fact about that. (R. pp. ___; defendant's responses to discovery requests; affidavit of Calvert.) That genuine issue of material fact precluded summary judgment. Rule 56(c), SCRCP.

The circuit court committed reversible, prejudicial error in granting summary judgment to the HOA on Hayes' counterclaim for a declaratory judgment that the HOA's acts have been *ultra vires*.

CONCLUSION

Respectfully, the lower court erred reversibly and prejudicially in dismissing and granting summary judgment on Hayes' counterclaims, as well as in referring this case to the master-in-equity. This court should reverse these rulings and remand this case for a trial in which a jury will determine questions of material fact that are encompassed within the at-law claims in this case.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Judge

Appellate Case No. 2020-000056

Sterling Hills Homeowners Association,....……………………………...Respondent,

v.

Elliot Hayes,..Appellant.

PROOF OF SERVICE

I certify that I served the foregoing initial brief of appellant in this case by providing a copy of it by email to opposing counsel at the email address shown below and on the date shown below:

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February 16, 2021