THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Brooks P. Goldsmith, Circuit Court Judge

Appellate Case No. 2020-001500

Case No. 2020-CP-07-00768

Dana Advocaat, both individually and as Trustee of the Advocaat Living Trust dated March 7, 2019, ... Respondent,

v.

Community Services Associates, Inc.,..... Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Other Authorities

INTRODUCTION

According to Advocaat, "[a]ll this Court needs to know is" that she is a member of CSA. Resp't's Br. 2. Rarely does a case require knowing only a single fact. And this case is no exception.

What the document is that Advocaat demands to see is an equally important fact. Although Advocaat tries to defend every basis of the circuit court's order, her attempt from the beginning of her brief to recharacterize the 2018 Gate Agreement is telling. Instead of accepting the fact that the 2018 Gate Agreement is a contract between three separate legal entities, Advocaat tries to frame it as an *intra*corporate agreement because Sea Pines Resort and Sea Pines Center Associates are members of CSA. Sea Pines Resort and Sea Pines Center Associates may be members of CSA, but that does not change the fact that the 2018 Gate Agreement is a contract between three distinct entities.

Presumably Advocaat takes this approach because, ultimately, she realizes that she cannot prevail otherwise. A contract is not a bylaw or an accounting record, as the circuit court wrongly concluded. No court in this State has ever recognized a common-law right to inspect corporate contracts. And compelling production under Rule 34 means that a rule of procedure would eliminate a substantive provision of State law, which the General Assembly has expressly stated should never happen. The circuit court's order should therefore be reversed.

Indeed, reversing that order is important because it sets a dangerous and unworkable precedent. Under the circuit court's reasoning, the scope of what

documents can be inspected is greatly expanded, giving any malcontents in nonprofit corporations a weapon to harass organizations and keep them from doing the things that need to be done to fulfill their missions. In the Nonprofit Corporation Act, the General Assembly struck a careful balance that ensures members have access to certain, important records, while ensuring organizations can function without constantly dealing with a barrage of unreasonable document requests. This Court should preserve that balance by reversing the circuit court.

ARGUMENT

I. This Court reviews de novo questions of statutory interpretation.

Advocaat contends that everything in this case—including issues related to the Nonprofit Corporation Act and the common law—should be reviewed for abuse of discretion. *See* Resp't's Br. 7–9. This is incorrect, and this error permeates Advocaat's arguments.

No one in this case disputes that if the 2018 Gate Agreement is a bylaw or accounting record, the Nonprofit Corporation Act requires CSA to allow Advocaat to inspect that document. The question here is what "bylaw" and "accounting record" mean in the Nonprofit Corporation Act. That is a classic question of statutory interpretation. And questions of statutory interpretation are reviewed de novo. *See Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017). Put another way, before a court can know if the 2018 Gate Agreement is a bylaw or accounting record, a court must know what constitutes a bylaw or accounting record under the Nonprofit Corporation Act. Confirming this is that other state courts have

reviewed de novo questions about the scope of inspection rights. *See, e.g.*, *Feuer v. Merck & Co.*, 187 A.3d 873, 877 (N.J. App. Div. 2018), *aff'd,* 238 N.J. 27, 207 A.3d 264 (N.J. 2019) (reviewing de novo an appeal that "raise[d] a purely legal question as to the scope of a shareholder's inspection right"). Therefore, in analyzing how the act defines bylaw or accounting record, this Court owes no deference to the circuit court.

II. Some of Advocaat's specific points are irrelevant or mistaken.

Before turning to the various bases on which the circuit court ordered that CSA provide the 2018 Gate Agreement to Advocaat, a handful of points that appear throughout Advocaat's brief should be addressed up front.

First, Advocaat points out that one board member thought approving the 2018 Gate Agreement was a bad idea and recused himself on the advice of counsel, suggesting this proves there is something wrong with the gate agreement. *See* Resp't's Br. 3, 5, 17 n.13. One board member's view, however, carries little weight. Think of the analogy to a legislature. In that multimember body, members may (and often do) view an issue differently. For example, many members of Congress thought the Affordable Care Act's individual mandate was unconstitutional. *See, e.g.*, *The Constitutionality of the Affordable Care Act before the S. Comm. on the Judiciary*, 112th Cong. 278 (2011) (written material from Sen. Hatch), https://tinyurl.com/36a2d7xm. But of course, the United States Supreme Court upheld the constitutionality of the individual mandate, despite the fact legislators disagreed with that conclusion. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012). Just as that disagreement was not relevant to the Supreme Court's analysis of the individual mandate, so too is one board member's

objection to the 2018 Gate Agreement. Plus, that one member's opinion says nothing about whether the 2018 Gate Agreement falls within the scope of inspection rights under the Nonprofit Corporation Act, which—as even Advocaat admits, *see* Resp't's Br. 2—is the only question in this case.

Second, in trying to simplify the case, Advocaat ignores the precise relationship of CSA, Sea Pines Resort, LLC, and Sea Pines Center Associates, LLC and why a gate agreement is required. *See* Resp't's Br. 1–2, 15 n.12. True, Sea Pines Resort and Sea Pines Center Associates are members of CSA. They have a certain number of seats on the CSA board because the 1988 covenants that govern CSA provide for those seats. (*See* R. pp. __–__ (Pl.'s Reply on Application Ex. 3 at 10–11).) Still, Sea Pines Resort and Sea Pines Center Associates are also separate legal entities. In that legal capacity, they are free to enter into contracts, just as any other member of CSA (such as Advocaat) is.

Additionally, Advocaat overlooks the fact that gate agreements are necessary if the gate fee is to be increased. Both Sea Pines Resort and Sea Pines Center Associates must consent if the gate fee is to increase from the $3 daily pass for visitors that existed in 1988 because they were given this approval right by the bankrupt developer (through the bankruptcy trustee). (*See* R. pp. __–__ (Pl.'s Reply on Application Ex. 3b at 6–7)); Beaufort Cty. Register of Deeds Book 11, Page 2163. Thus, without a gate agreement, the gate fee would be unchanged for the past three decades, and CSA would have less revenue to use for its members' benefit.

Third, Advocaat repeatedly notes that previous gate agreements have been released and details about the 2018 Gate Agreement have been shared. *See* Resp't's Br. 22–25. This is of no import. The inspection rights in the Nonprofit Corporation Act set a floor of what must be disclosed to members upon request, not a ceiling. A nonprofit corporation may therefore share with its members documents that the members have no statutory right to inspect. Doing that in no way requires a nonprofit corporation to continue doing so in the future or gives a member the right to inspect those documents if the corporation decides not to release them.

III. No basis the circuit court gave for ordering inspection of the 2018 Gate Agreement withstands scrutiny.

With those preliminary issues cleared up, turn now to the four reasons the circuit court gave for ordering CSA to provide the 2018 Gate Agreement to Advocaat. Nothing Advocaat argues supports affirming the circuit court's order.

A. The 2018 Gate Agreement is not a bylaw.

Advocaat makes two arguments in pushing her contention that the 2018 Gate Agreement is a bylaw. First, she says the statutory definition supports her. Second, she insists there is nothing bad that will happen if her expansive definition of bylaw is adopted. On both fronts, she is mistaken.

The analysis starts, as it must, with the language of the statute. The General Assembly has defined "bylaws" as "the code or codes of rules, other than the articles, adopted pursuant to this chapter for the regulation or management of the affairs of the corporation irrespective of the name or names by which the rules are designated." S.C. Code Ann. § 33-31-140(4). On a plain reading, this is clear: A set of rules that

governs a corporation's management is a bylaw and subject to inspection. From experience, we know what this means. Virtually every entity has a set of bylaws by which that entity operates.

Advocaat makes a big deal that the name of the document does not matter. And she is right about that. Bylaws are bylaws, no matter the formal title at the top of the document. But still, bylaws are bylaws—not anything else.

From here, it's not exactly clear what Advocaat's position is. One the one hand, she seems to say the statutory definition of "bylaw" is broad enough to encompass a contract. On the other, she appears to suggest the 2018 Gate Agreement is not actually a contract but an internal-governance document. Either way, she is mistaken.

First, as to the scope of the statutory definition, a contract is different from a bylaw. Bylaws are codes of rules, adopted solely by the corporation, to manage its affairs. Contracts are agreements between two (or more) different parties, with mutual consideration. To be sure, both bylaws and contracts dictate what an entity may or may not do,[1] but they are fundamentally different legal documents. Members have special rights regarding the power to amend or repeal bylaws that they do not have for contracts. *See id.* § 33-31-1021(b). The General Assembly is well aware of

[1] Thus, Advocaat's theory that the contract is a bylaw because the contract imposes requirements about how certain gate-fee revenue is used is flawed. How revenue is used is disclosed to all CSA members in CSA's annual report. To the extent Advocaat does not like how revenue is used, her remedy to is to run for the CSA board and then seek to have CSA not to enter into any new gate agreements or to change the terms of the next gate agreement.

this difference, and when it wants to legislate about contracts, it knows how to do so. *See, e.g.*, *id.* Title 32 ("Contracts and Agents"). The General Assembly did not include contracts among the documents subject to inspection in the Nonprofit Corporation Act. Reading such an inspection right into that act would stretch "bylaw" beyond any reasonable scope.

Next, as to the idea that the 2018 Gate Agreement is not actually a contract, Advocaat appears to argue that CSA has, in essence, taken a bylaw, changed the name, and said, "Ta-da! No bylaw here." Hardly. Advocaat's mistake flows from her misframing of the 2018 Gate Agreement as an *intra*corporate agreement. Sea Pines Resort and Sea Pines Center Associates may be members of CSA, but they are also separate legal entities (as a quick search of the S.C. Secretary of State's website shows). Nothing prohibits an entity from contracting with its members, so Sea Pines Resort and Sea Pines Center Associates may contract with CSA. To hold otherwise would be to cast aside well-established law that corporate entities are legally distinct and should be treated that way.

Turning to the supposed lack of horror Advocaat cites, she misses CSA's point about the United States Code, the South Carolina Code, and local ordinances. Of course CSA's members should be aware of those. (Indeed, the law presumes they—like all people—are. *Cf. S.C. Wildlife & Marine Res. Dep't v. Kunkle*, 287 S.C. 177, 179, 336 S.E.2d 468, 469 (1985) ("it is a well-settled maxim that ignorance of the law is no excuse").) The point here is that no one would reasonably think those public enactments are *bylaws*. Yet under Advocaat's logic, they are because those

enactments regulate CSA's affairs (just as they regulate everyone's affairs). That cannot be right. Bylaws are an internal-governance document, and Advocaat's approach expands bylaws to include things the General Assembly could not have fathomed when it enacted the Nonprofit Corporation Act.

B. The 2018 Gate Agreement is not an accounting record.

Once again, determining whether the 2018 Gate Agreement is an accounting record must start with the statutory language. Because "accounting record" is undefined, we must look to dictionaries. *See Berkeley Cty. Sch. Dist. v. S.C. Dep't of Revenue*, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009).

Advocaat accuses CSA of "cherry-pick[ing]" dictionaries. Resp't's Br. 20. Not quite. CSA relied on two dictionaries. *See* Appellant's Br. 11. The first was the Oxford-English Dictionary, one of the most respected dictionaries in the world and one on which this Court has relied multiple times. *See, e.g.*, *State v. Adams*, 430 S.C. 420, 430, 845 S.E.2d 217, 222 (Ct. App. 2020). The second was Black's Law Dictionary, probably the most respected legal dictionary in American law and one on which this Court has relied hundreds of times. *See, e.g.*, *Miller v. Dillon*, 432 S.C. 197, 208–09, 851 S.E.2d 462, 468 (Ct. App. 2020).

When it comes to the reliability of sources, Advocaat's are the ones that are suspect. For instance, she cites Wikipedia in trying to define "accounting records." *See* Resp't's Br. 20 n.15. This is the only source she cites that lists a contract as an accounting record. Wikipedia is far from academically rigorous or peer reviewed; it is

an online encyclopedia that "*anyone can edit*." Wikipedia, https://tinyurl.com/783354hf (last visited Apr. 20, 2021) (emphasis added).

Moreover, Advocaat's reliance on the comments to section 33-31-1601 is misplaced. The comments don't discuss what an "accounting record" is. Rather, they deal with what accounting records are "appropriate" for any particular nonprofit to keep, which varies depending on the "nature, size, and other characteristics of the corporation." S.C. Code Ann. § 33-31-1601 Official Cmt. 2. In other words, what is an "accounting record" does not change. All that changes is what particular records a given nonprofit must keep.

That leaves us where CSA's initial brief started: with defining "accounting record." An accounting record is a document that is used to compile a corporation's financial records. *See* Appellant's Br. 11.

Advocaat's own arguments show why the 2018 Gate Agreement is not an accounting record. In support of her contrary position, Advocaat points to old gate agreements, the draft of the 2018 Gate Agreement, and CSA's statements about the 2018 Gate Agreement. *See* Resp't's Br. 22–25. To be sure, those things discuss revenue, fees, and funding, but significantly, it is all prospective. None of it involves actual revenue that was collected and then spent, and Advocaat offers nothing in response to CSA's point that there is no evidence here that an accountant would need the gate agreement to prepare financial statements. To think about it differently, CSA could have a gate agreement with Sea Pines Resort and Sea Pines Center Associates and still (hypothetically) collect no revenue from gate fees because no

visitors entered Sean Pines. In that scenario, no one could plausibly claim a gate agreement was an accounting record. The gate agreement does not become an accounting record merely because people paid the gate fee.

The record of those fees that were collected and how those fees were spent are accounting records. All of that information is available in CSA's annual report, which is available to CSA members. *See* Appellant's Br. 11–12. CSA has therefore proactively provided substantial accounting records to its members already.

Further, the negative impact of Advocaat's theory on members themselves is significant. Under her broad definition of accounting record, every statement sent to a member and every payment from a member would be an accounting record subject to inspection by any member. Thus, any time any member of any homeowners' association or nonprofit corporation were late paying dues, fined, or had any other financial interactions with the organization, every other member of the organization would be privy to it. The Nonprofit Corporation Act does not contemplate such an automatic sweeping loss of privacy.

C. There is no common-law right to inspect the 2018 Gate Agreement.

CSA's primary argument on this issue was that neither the circuit court nor Advocaat has pointed to any case that establishes a common-law right to inspect the Gate Agreement. In her brief, Advocaat still does not identify such a case. Instead, she cites a case that involves shareholders inspecting bank records and insists the Gate Agreement is part of her bundle of property rights because of the covenants that affect her property. *See* Resp't's Br. 26–28.

It's important to make explicit what Advocaat leaves implicit: She is asking this Court to create a new common-law inspection right for members of homeowners' associations.[2] No court in this State has ever adopted Advocaat's theory before this case.

And for good reason. Under Advocaat's theory, virtually any scrap of paper in CSA's offices or anything on its computers could relate back to the covenants. Such broad inspection rights have never been recognized. *Jolly v. Marion National Bank*, 267 S.C. 681, 231 S.E.2d 206 (1976), which is the only case Advocaat cites in this argument, was about the right to inspect the list of shareholders. Federal law specifically allows that right regarding national banks, *see* 12 U.S.C. § 62, and a list of shareholders or members is also subject to inspection under the Nonprofit Corporation Act, *see* S.C. Code Ann. § 33-31-1602(b)(3). Thus, it was not as if *Jolly* recognized some sweeping inspection right, and the court's discussion of inspection rights there was in the context of type of document with well-established rules for inspection.

Moreover, recognizing such broad inspection rights would effectively eliminate section 33-31-1602 from the S.C. Code. The General Assembly gave members of nonprofit corporations the right to inspect certain documents for a reason. Put differently, if Advocaat's common-law theory were correct, the General Assembly

[2] It is also important to be clear about the standard of review. Advocaat says the circuit court was within its discretion to order CSA to produce the 2018 Gate Agreement under the common law. *See* Resp't's Br. 27–28. The question of whether a common-law right exists to inspect the Gate Agreement is a legal one, which is reviewed de novo.

would have had no need to enact section 33-31-1602. But the General Assembly did include that section, and when it acts, the General Assembly intends "to accomplish something and not to do a futile thing." *State ex rel. McLeod v. Montgomery*, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). That the General Assembly acted is consistent with our Supreme Court's recognition that common-law inspection rights[3] were "materially enlarge[d] and extend[ed]" by statutory inspection rights. *Self v. Langley Mills*, 123 S.C. 179, __, 115 S.E. 754, 757 (1922). Finally, if there were any doubt as to what the General Assembly believes about the inspection rights of homeowners' association members (all of whom are subject to the types of covenants Advocaat is), the Court need look no further than the Homeowners Association Act, which says these members have the same inspection rights as members of any nonprofit corporation. *See* S.C. Code Ann. § 27-30-150.

One last point on this subject: Advocaat says the "original version of the Gate Agreement was incorporated into the" 1988 covenants. Resp't's Br. 27. That is incorrect. Actually, the gate *policy* was incorporated into the 1988 covenants. (R. p. __ (Pl.'s Reply on Application Ex. 3 at Ex. C).) And as CSA pointed out in its opening brief, the current gate *policy* is available to CSA members. *See* Appellant's Br. 5. Therefore, this "significant" thing (to use Advocaat's own word, *see* Resp't's Br. 27) cuts against Advocaat's position.

[3] To be clear, whatever common-law inspection rights exist, no court has recognized such rights for members of homeowners' associations.

D. The 2018 Gate Agreement is not discoverable under Rule 34.

Advocaat recognizes that the Rules of Civil Procedure "do not nullify" the Nonprofit Corporation Act. Resp't's Br. 30. Yet that's exactly what Advocaat's argument does.

The ultimate goal of her lawsuit is to obtain a copy of the 2018 Gate Agreement. The Nonprofit Corporation Act establishes a framework she must satisfy to obtain that document. *See* S.C. Code Ann. § 33-31-1604. Only if Advocaat meets all of the statutory obligations can she get that document.

Under Advocaat's theory, she (or at least her attorneys) can get it during this litigation under Rule 34. That is wrong. If all a plaintiff in Advocaat's position had to do was request the corporate record under Rule 34 after filing a lawsuit, that plaintiff would never have to worry about satisfying section 33-31-1604. That cannot be right because when the General Assembly approved the Rules of Civil Procedure in 1985, it provided:

> In event of conflict between any provision of the South Carolina Rules of Civil Procedure and any other statutory provisions as to practice and procedure not repealed in this act, the provision of the rules shall control. However, neither the promulgation of the rules nor this act may be construed to affect the substantive legal rights of any party to any civil litigation in the courts of this State but shall affect only matters of practice and procedure.

1985 S.C. Acts No. 100, § 3. Thus, Rule 34 applies only to procedure. It cannot allow Advocaat to circumvent the substantive legal rule in this case. But that's exactly what an order compelling production of the 2018 Gate Agreement under Rule 34 does. It gives Advocaat the document she seeks without making her prove that she is entitled

to it under the Nonprofit Corporation Act. Indeed, if Advocaat's logic were correct, it would mean that any member of a nonprofit corporation could obtain *any* corporate record by making a demand to see it, filing a lawsuit when the demand was denied, and then requesting the document under Rule 34—without ever having to show the document falls with the scope of corporate records subject to inspection.

The Court need not deal with Advocaat's in camera review or attorney's eyes only arguments. Neither of those things happened here. Delving into those hypotheticals would thus have the Court answering questions not raised here. *Cf. Rutland v. S.C. Dep't of Transp.*, 400 S.C. 209, 217 n.4, 734 S.E.2d 142, 146 n.4 (2012) ("Appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." (alteration omitted)). What precisely a trial court may do to review itself a corporate record in an action under section 33-31-1604 should be answered when a case actually presents that situation.

CONCLUSION

The circuit court's judgment should be reversed.

Respectfully submitted:

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