

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.

SUPPLEMENTAL
RECORD ON APPEAL

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT) 2020-CP-07-00768

DANA KINDEL ADVOCAT,)
ET AL.,)

Plaintiffs,)

vs.)

COMMUNITY SERVICES)
ASSOCIATES, INC.,)

Defendant.)

Transcript of Record
(WebEx Motion Hearing)

August 4, 2020

B E F O R E:

Honorable Brooks Goldsmith

A P P E A R A N C E S:

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Ainsley Fisher Tillman, Esquire
Attorneys for Plaintiff Advocaat

Michael Christopher Masciale, Esquire
Douglas Walker MacKelcan, III, Esquire
Attorneys for Defendant

Kay H. Richardson
Circuit Court Reporter

ALSO PRESENT:

Dana Kindel Advocaat
Plaintiff

ALL PARTIES PRESENT VIA WEBEX

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E X H I B I T S

No.

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(No exhibits were marked or admitted during hearing.)

1 **AUGUST 4 2020 @ 9:58 A.M.**

2 MR. FORD: Are you ready for me to proceed, Your Honor?

3 THE COURT: I am.

4 MR. FORD: Thank you. My name is Ian Ford and I
5 represent, with my colleague Ainsley Tillman, Ms. Advocaat,
6 and our motion is for the Sea Pines CSA to let us see a
7 document under the Nonprofit Corporation Act, and that's the
8 gist of it.

9 A little bit of background, Your Honor, and if I could
10 I'd like to share my screen so I can show you some exhibits,
11 and I've done this before with y'all, share content. Can
12 y'all see my screen with the covenant gate fees right here?

13 MR. MASCALE: No, I ---

14 MR. FORD: Covenant gate fees.

15 Your Honor, are you good with that?

16 THE COURT: I can't see it.

17 MR. FORD: I'm sorry, was that a yes?

18 THE COURT: Any objection to it? I can see it -- I can't
19 read it but I can see it.

20 MR. FORD: I will try to make it bigger. It's in the
21 record, but I -- I really just have some minor points I'd just
22 like to see. So this is a homeowners association matter, Your
23 Honor. I represent a member of the homeowners association,
24 and my esteemed colleagues on the other side represent the
25 HOA, also called CSA. Again, Ms. Advocaat is a member, my

1 client, she would like to see a document that we believe she
2 is entitled to, that's what this lawsuit and this motion is
3 about. We believe she is entitled to it under the Nonprofit
4 Corporation Act, under common law, under property law, and so
5 on. CSA, the HOA, has refused to produce it citing executive
6 privilege, and that's the first time I have ever seen
7 executive privilege on a privilege log, and I had to double
8 check to see if I had pled the emoluments clause, and I had
9 not. So this is new ground for me because I'm not really sure
10 what executive privilege is in this context and -- but we're
11 gonna deal with it as best we can. The bottom line is that my
12 client, as a member of the HOA, is allowed to see inside
13 agreements among other members that divvy up essentially
14 millions of dollars in HOA money. And what this is about is a
15 gate fee agreement. And like it sounds, Sea Pines -- I don't
16 know if Your Honor has ever been there but it's a gated
17 community with a lot of shops and things, and there's a gate,
18 and people have to pay to get through it, and that is a big
19 deal. We've been learning that it's essentially three million
20 dollars, I think, a year in gate fees. So that's a lot of
21 money. And, as a legal backdrop to this request, Your Honor,
22 that gate fee money cannot just be spent for anything. What
23 I've got up on the screen is one of the covenants. And what
24 it says is all gate fees collected by the company shall be
25 contributed to and used for community services. So -- and the

1 other side disagrees with what that means, and that's fine; we
2 don't need Your Honor to decide that for us today. For
3 purposes of today, the important context is the covenants and
4 declarations that specify how that money may be used. And so
5 there's a -- and you might imagine from millions of dollars
6 there is tension. People want to get at that money as in
7 every human organization, they want to get at that money, the
8 commercial interests and so on. But that money is governed by
9 the covenants in this provision here. Okay. I'm gonna move
10 on from that just as long as I establish that's not a slush
11 fund; it's governed by the governing documents.

12 Previous versions of this gate fee agreement were
13 released, and here's an example on the screen. Your Honor can
14 look at it at your leisure. The, the -- point is that this
15 was disclosed to the members for years. And it was
16 incorporated into the governing documents by cross reference
17 through the covenants and declarations. This was not a
18 secret. And it is very, very important because it divvies up
19 how these millions of dollars are going to be used. So here
20 is just -- a previous gate fee agreement and I will scroll
21 past it. We've submitted it. I don't think there is dispute
22 that previous versions were unreleased. And then 2018 came
23 along and something very important happened. And that is they
24 -- the parties in interest are working to amend it, amend the
25 gate agreement, and that apparently was problematic. So

1 problematic that a board member recused himself in writing
2 through a letter, and here is the letter, and we've submitted
3 it into the record. It talks about the gate agreement. It
4 talks about his concerns about denying the HOA hundreds of
5 thousands of dollars annually by giving away those funds in
6 the form of free gate passes. It talks about taking on
7 potentially unlimited financial liability -- he's concerned
8 about that -- that are not in the best interest of CSA. This
9 is a board member in writing who puts that as he recuses
10 himself. It gives these other entities, who are members,
11 significant control over these millions of dollars of gate fee
12 revenue, and he recuses himself. He cannot lawfully or
13 ethically take action, and he recuses himself. So that's
14 important. We've got this problem that this board member, you
15 know, some people might call this a CYA letter. He's sounding
16 the alarm. He's covering himself, and he's recusing himself
17 -- The board, apparently without this gentleman, rams it
18 through anyway; they pass it. So everyone wants to see it
19 because there's this kerfuffle about it. First time in CSA
20 history that where they're not giving it to people. It's
21 suddenly executive privilege, and that is alarming. What are
22 they hiding? Well, we have an idea, Your Honor, because
23 here's the draft. And I'm putting it up. Your Honor, can
24 pursue [sic] it at your leisure. It says final; it may be the
25 draft. It's not signed but it's leaked out. And everyone

1 wants to know is this the final draft. Is this what they
2 agreed to, because it's problematic. And Your Honor can
3 review it at your leisure; we've submitted it. But some key
4 points, it references the declarations. This is part of the
5 declarations. It is incorporated into the declarations of the
6 community; it says so and alludes to it on its face. It goes
7 through, and I've underlined some key points. Your Honor can
8 pursue -- you know, peruse it at your leisure. It talks about
9 giving \$75,000 to a marketing fund. It talks about increasing
10 that to \$150,000. It talks about this marketing fund, which
11 is important for commercial interests. Remember, we learned
12 from the covenants that it can only be used for certain
13 community services. But this agreement is talking about using
14 it for commercial interests, as an example of why it's so
15 troubling. And we've underlined some other key parts in it.
16 It talks about giving away visitor passes to certain
17 commercial entities. That was alluded to in the letter, the
18 recusal letter. This accounts for hundreds of thousands
19 dollars of money being given away to commercial interests.
20 And it agrees to indemnify the -- the other members, and this
21 is what the board member alluded to. He says, this is -- he
22 had a dramatic term, but something like unprecedented
23 financial liability. That's not quite right but -- he said in
24 very dramatic terms he was concerned about this. So we got a
25 draft. Is it the final one, Judge? We don't know. They

1 won't tell us -- for the first time that we're aware in CSA
2 history. So what we did is what we're required to do under
3 the statute, we submitted a request, a formal request. They
4 denied it. Then we kind of went round and round. We didn't
5 really want to have to file a lawsuit on this, Judge, but they
6 really, really dug in, and therefore the Nonprofit Corporation
7 Act requires us to come to Your Honor and request it. So we
8 have several legitimate, legal reasons that we are allowed,
9 Ms. Advocaat -- and frankly other members but Ms. Advocaat is
10 my client -- why she is allowed to see this document. And I'm
11 gonna go through the technicalities of it, meaning the law,
12 but in summary it touches and affects her property, so she has
13 a property interest and a common law right. It is a governing
14 document of the community; so, as a member of the HOA, she's
15 allowed to see it. There's a serious question of legal and
16 ethical issues raised both by that letter from the board
17 member and by this supposed final draft itself. And just as
18 importantly, South Carolina law lets her see it. The
19 Nonprofit Corporation Act and the Homeowners Association Act
20 all give her the right as a member to see this document.

21 Moving on to my technical arguments, Your Honor. First,
22 South Carolina Nonprofit Corporation Act, and this also
23 applies to the Homeowners Association Act, they both emphasize
24 transparency to members. And this is not just some normal
25 contract, which is a clever counterargument by the other side.

1 This is an inside deal to allocate millions of dollars among
2 members of the HOA. But the Nonprofit Corporation Act under
3 its every reasonable interpretation considers this agreement
4 to be a governing document. And my client, Ms. Advocaat, is a
5 member of the HOA; she is allowed to see these kinds of
6 documents. This document, as we saw, is incorporated by
7 reference into the declaration and the covenants. A draft of
8 the agreement, which may be the final -- this all may be moot;
9 they won't tell us -- is -- the draft agreement talks about
10 the declarations how the declarations and assignments require
11 this. And so they cross reference each other, and that means
12 because they cross reference each other on what's sort of a --
13 part of a single legal scheme -- I don't mean that unkindly --
14 single legal web. And, therefore, my client, as a member, is
15 permitted to see it under the Nonprofit Corporation Act,
16 because it is in fact a governing document. CSA acknowledges
17 that the governing documents call for this agreement. They
18 call -- the governing documents call for this agreement, and
19 therefore it becomes incorporated by cross reference in it.
20 So that's our first point under the Nonprofit Corporation Act.
21 This is really an addendum or part and parcel of the governing
22 documents. And therefore, my client, as a member of the HOA,
23 is allowed to see it.

24 Second point on the Nonprofit Corporation Act, Your
25 Honor, is that the Nonprofit Corporation Act allows members to

1 inspect key documents. This is in addition to the fact that
2 this is just a governing document. And as a governing
3 document, as an aside, we think this is not enforceable until
4 it's filed with the clerk of court under the HOA act, that is
5 for another day. But we think the HOA -- this violates the
6 HOA act. We're not asking you to decide that, but that is one
7 of the significant points that we are, frankly, investigating.
8 Second point that this is -- the Nonprofit Corporation Act
9 allows our client, a member, to inspect key documents such as
10 bylaws. And bylaws are defined in the Nonprofit Corporation
11 Act. Ms. Tillman and I argued this to the Court of Appeals;
12 we've argued it to the Supreme Court. Basically, Section 33-
13 31-140(b)(4) states -- and we cite this in our brief -- that
14 bylaws -- it defines them -- and their codes are codes of
15 rules other than articles adopted pursuant to the chapter for
16 the regulation and management of the affairs of a corporation
17 irrespective of the name or names by which the rules are
18 designated. And that is key. The affairs of the corporation
19 irrespective of what they're called. Just because it's called
20 some other name, if it's governing the affairs of the
21 corporation, it falls under the rubric of what members are
22 allowed to look at. And Section 1601(e) allows members to
23 inspect them at reasonable locations and time upon a written
24 submission, which we've done in spades. Our last resort was
25 to come before Your Honor, before the Court, to look at a

1 document that we might already have -- through the draft. So,
2 we're here in front of Your Honor under Section 1604 of that
3 statute which says a circuit court in the county where the
4 corporation is located may summarily order inspection and
5 copying of the records demanded at the corporation's expense
6 upon application by the member. That's what this is today.
7 This is our application to Your Honor to let us see this
8 document, and that is among other things one of the statutory
9 authorities Your Honor has to allow us to see this document.

10 A third point under the Nonprofit Corporation Act is in
11 addition to the other things I've said, this constitutes --
12 this agreement constitutes an accounting record under the
13 statutes. And I'm on Section 1602 of the statute for the
14 authority under that. And members are allowed to look at
15 accounting records. They have to make a written demand in
16 good faith. We've met all that. And accounting records --
17 it's expanded on by our Attorney General, but I'll get into
18 that in a moment. This document, this gate agreement,
19 controls and allocates the spending of millions of dollars of
20 HOA money. There's no dispute about that. Tells how that
21 money can be spent, it tells which members benefit, which
22 special members get benefit of that \$150,000 contribution -- a
23 special committee that apparently is formed where they get to
24 divide it up. And I think they each get a third, if the draft
25 is right. I hope the draft is wrong, but -- an example of how

1 important this is as -- is that CSA in the exhibits we've
2 submitted describes the gate agreement and the gate fees as,
3 quote, major revenue source. Another quote is the gate fees
4 are largest ongoing revenue increase at Sea Pines. Quote,
5 They're used to address critical projects of Sea Pines.
6 Another quote, They're critical to Sea Pines. This is a huge
7 revenue allocation. And, therefore, it constitutes, we
8 believe, an accounting record underneath the sub -- the
9 Nonprofit Corporation Act, that members are allowed to see.
10 The South Carolina Attorney General has been asked about what
11 this means, and we cite this in our brief. It's January 26,
12 2016 opinion. And what the Attorney General at least said,
13 and we quote it in our brief, Legislative intent was for any
14 and all underlying documents or materials used to prepare the
15 nonprofit corporation's accounting statements to be inspected
16 by a member as long as the member provides written notice, and
17 the quote goes on. But we believe this is all consistent with
18 the intent of the HOA Act, the Nonprofit Corporation Act, that
19 members be allowed to see these critical documents -- and some
20 on this particular point. The CSA doesn't want members to see
21 this gate agreement because it's an important financial
22 document. It divvies up millions of dollars. We're allowed
23 to see it because it is an important financial -- if somebody
24 would mute themselves, please -- we're allowed to see it
25 because it is an important financial document that divvies up

1 millions of dollars. So on that point, we may agree but we
2 come to opposite conclusions, which is why we're before Your
3 Honor.

4 Moving on to my final point, Your Honor, and I am now
5 stepping outside of the Nonprofit Corporation Act, and I'm
6 stepping outside of the HOA Act to the common law. I'm sorry;
7 I'm getting feedback. The Nonprofit Corporation Act says that
8 the common law property rights are not abrogated, and the HOA
9 Act says that as well. Ms. Advocaat's common law rights
10 remain intact, and she is entitled to the document under that.
11 And now I'm going to step into property law. The CSA, the
12 HOA, is the owner of the roads and gates under the governing
13 documents. Members of the HOA, like my client, therefore have
14 a special property interest in the gates. That easement, if
15 you search in there, in the members title, will be an
16 easement, in agreement burdens a property interest of my
17 client, Ms. Advocaat, her property interest or special
18 interest in the gate. If this agreement, this document that's
19 incorporated in the governing documents burdens my client's
20 special property interest in that gate, she is entitled to see
21 it. She's entitled to see documents, agreements, amendments,
22 or references in the covenants that burden her special
23 interest in the gate, her property interest. In sum, Your
24 Honor, this is not just some standard contract, as my learned
25 colleagues are going to argue that we want to see every

1 contract; this is a special deal. This is an inside deal
2 where some members are giving up millions of dollars, and
3 they're hiding it for the first time that we're aware of in
4 CSA history. It's so egregious that a board member recused
5 himself and covered himself in letter and refused to vote on
6 it. We respectfully submit that Ms. Advocaat is allowed to
7 see this document and the underlying calculations and that,
8 because she's had to bring this case, that she under the
9 statute is entitled to fees and costs incurred in having to
10 come before Your Honor and bring this case.

11 I appreciate your attention, Your Honor.

12 THE COURT: All right. Thank you.

13 Who is going to respond for the defense?

14 MR. MASCIALE: I am, Your Honor. Michael Masciale of
15 Copeland Stair. I'm here today for Community Service
16 Associates, otherwise known as CSA. And, Your Honor, just to
17 begin, to briefly respond regarding the allegations of
18 executive privilege by the other side. This document was
19 presented, reviewed, and approved by the board during
20 executive session of the board, and there was an expectation
21 on which, when the board entered into this doctrine with Sea
22 Pines Resort and the Sea Pines Center, there was an
23 expectation that the confidentiality of (inaudible) ---

24 THE COURT: Let me interrupt you just one minute, Mr.
25 Masciale. I'm hearing an awful lot of feedback here. Can

1 anybody ---

2 MR. FORD: That may be me, Your Honor. Let me try to
3 mute myself.

4 THE COURT: I'm having some feedback ---

5 MR. FORD: I'm having some problems. Let me see if can
6 mute myself.

7 LAW CLERK: I can mute you, Mr. Ford.

8 MR. FORD: Would you mind? I'm not able to see it.

9 LAW CLARK: No, that's fine.

10 MR. FORD: Thank you.

11 THE COURT: Mr. Ford, if you need to be heard, just raise
12 your hand.

13 Mr. Masciale, go ahead.

14 MR. MASCIALE: Okay. Thank you, Your Honor.

15 As an initial matter, the plaintiff, and I know in their
16 brief they referenced a definition of community services,
17 which does not apply to this particular case. They cited and
18 referred to a capitalized version of community services, which
19 is contained in Article II, Section 3(a) of the 1974
20 covenants, which do govern CSA's use of the gate funds.

21 However, that particular definition refers only, as the Court
22 can see by looking at that section, it refers only to land --
23 potential usage for not less than 15 acres of land within Sea
24 Pines. The provision specifically states that Community
25 Services, capitalized, when used herein shall mean land use

1 for education facilities, fire stations, and/or community
2 service maintenance facilities. The second sentence of that
3 very provision which they cite goes on to say that not less
4 than 15 acres of land within Sea Pines Plantation shall be
5 designated as Community Services land. It's noteworthy that
6 community services nowhere else in the 1974 covenants is
7 Community Services capitalized -- it's only capitalized in
8 that specific division because it denotes a very specific term
9 which would -- is addressed to the type of use which not less
10 than 15 acres of lands within Sea Pines would be devoted. By
11 contrast, the applicable definition of community services here
12 is the non-capitalized definition found in -- well, initially
13 identified in Article II, Section (b)(11) of the 1974
14 covenants, which identifies it, and Mr. Ford cited it, which
15 identifies purpose for which the gate entry fees may be used,
16 which provides that all gate entry fees collected will be
17 contributed and used for community services. Now, directly
18 following that article -- Article II, Section (b)(11), Article
19 III mentions the community fund which provides the correct
20 definition of community services, which among other things
21 states that the community services are for the maintenance and
22 improvement of the Properties, and Properties is capitalized,
23 that means the Sea Pines common areas or other parcels of land
24 under CSA control. Pest and insect control, and generally --
25 and this is the important part -- generally, services

1 important to the maintenance and preservation of an attractive
2 community. The Article III, Section (c), which is contained
3 within that community fund provision, makes it expressly clear
4 that CSA is authorized to contribute gate fund -- or gate fees
5 collected to community services as defined in the community
6 fund. It states that CSA's obligation to furnish community
7 services, which again is not capitalized, is limited to the
8 extent that the cost of such services can be defrayed by,
9 among other things, gate entry fees. It makes it abundantly
10 clear that the correct definition of community services, which
11 CSA can contribute gate entry fees to, is what is defined by
12 Article III in the community fund. And further using the
13 Plaintiff's Exhibit 3-A to their reply to our memorandum, they
14 included the irrevocable trust agreements, which initially was
15 used and set up the community fund, and again that's Exhibit
16 3-A. And if Your Honor will notice, in the third paragraph,
17 which is the second whereas paragraph, the document refers to
18 community services for which the community fund was set up as
19 services important to the maintenance and preservation of an
20 attractive community and to maintain the general safety of Sea
21 Pines Plantation. So, again, Your Honor, that just further
22 reinforces that the correct definition of community services
23 is not the Article II definition that the plaintiff is trying
24 to apply to CSA's management of the gates. The proper
25 definition, again, is found in Article III of the 1974

1 covenants. So, again, plaintiff's entire assertion that this
2 agreement, this gate pass agreement, this 2018 amendment is
3 somehow improper because it expands the scope of services for
4 which gate fees can be used is just -- it's inaccurate because
5 it's based on a misinterpretation of the Sea Pines governing
6 documents, specifically the 1974 covenants.

7 Now, moving on to the South Carolina Nonprofit
8 Corporation Act, and the definition of bylaws is set out in
9 the Act. And as Mr. Ford stated, the definition of bylaws is
10 the code or codes of rules adopted pursuant to this chapter
11 for the regulation or management of the affairs of the
12 corporation, irrespective of the name or names by which the
13 rules are designated. Unfortunately, the term is not further
14 defined by the Nonprofit Corporation Act or any South Carolina
15 case law. However, when the Court construes a statute, the
16 cardinal rule here, and this has been set forth by the Supreme
17 Court, is that the Court needs to ascertain and effectuate the
18 intent of the legislature. The words of the statute must be
19 given their plain and ordinary meaning without resort to
20 subtle or forced construction to limit or expand the statute's
21 operation. Here the gate pass agreement and its amendments,
22 specifically the 2018 amendments are simply not bylaws of CSA
23 as defined by this Act. As their name suggests, this was just
24 a contractual agreement between CSA and the Sea Pines Resort
25 and the Sea Pines Center who hold special rights with regard

1 to the gate policy and increases of gate entry fees by virtue
2 of certain assignments. One of which is the 19 -- or I think
3 they're both 1987 assignments, which were part of the Sea
4 Pines governing documents, and they're included in Plaintiff's
5 Exhibit 3. Basically, Sea Pines' right, which it acquired in
6 1988 by an assignment also constituted part of the governing
7 documents. CSA's right to administer the gate policy is
8 subject to the approval rights for the Sea Pines Resort and
9 the Sea Pines Center. These are not -- these agreements
10 between these three parties are not part of the Sea Pines'
11 governing documents; they're simply a reality of these rights
12 that the Resort and Center hold. They've lost their -- the
13 Resort and Center are both required parties or necessary
14 parties for any negotiations for an increase of the gate fee
15 or certain other modifications to the gate policy by virtue of
16 these governing documents. But these agreements are just a
17 byproduct of the governing documents; they're not part of the
18 governing documents. Further, they're not a code or a code of
19 rules, and they don't provide rules as we cited in our initial
20 memorandum and I think our reply as well. They don't provide
21 rules for the internal control or governments of CSA or
22 general rules for dealing with external parties, as Black's
23 Law Dictionary defines bylaws. These are merely simply
24 contractual agreements between CSA, the Sea Pines Resort, and
25 the Sea Pines Center for an increase in the gate entry fees,

1 which the Resort and Center must approve pursuant to the Sea
2 Pines governing documents. And, and so, and again,
3 plaintiff's interpretation of affairs here under the Nonprofit
4 Corporation Act and the definition of bylaws as a whole --
5 forced -- then is a forced construction and an attempt to
6 expand the operation of the Nonprofit Corporation Act beyond
7 legislative intent. Mr. Ford said earlier the legislature's
8 intent on this Act was corporate transparency and the
9 governance of nonprofit corporations. But, Your Honor, the
10 Nonprofit Corporation Act specifically delineates which
11 documents a nonprofit corporation is required to produce to
12 its members and by implication delineates which documents a
13 corporation is not required to produce to its members. The
14 plaintiff's interpretation of affairs conflates the purpose
15 for which CSA was organized with the corporation's affairs.
16 And again, I would cite to the Black's Law Dictionary
17 definition of bylaws, which would imply that the affairs of
18 the corporation are the internal governance and control of the
19 corporation and rules for dealing with -- and general rules
20 for dealing with external parties. Corporations routinely
21 enter into contracts with outside parties, with any parties,
22 which assist the corporation in carrying out its corporate
23 purpose. For example, if a shipping company's purpose
24 obviously is to deliver goods or correspondence anywhere, if
25 they contract with a third party vehicle, or driver, or plane,

1 or pilot provider, this contract is obviously made in
2 furtherance of the corporation's purpose. However, this would
3 not transform such a contract into a corporate bylaw merely
4 because it's intending to help carry out the corporation's
5 purpose. But, by the plaintiff's reasoning, the contractual
6 rights and obligations of any of the corporation under any
7 contract, which was entered into to carry out the
8 corporation's purpose, would constitute affairs of the
9 corporation, which would be governed by the terms of the
10 contract themselves and would transform just a contract into a
11 bylaw of that corporation. Obviously, the corporate purpose
12 of CSA is to manage and maintain the Sea Pines common areas,
13 including the Sea Pines entry gate. Again, this contract is a
14 necessary contract because of the rights held by Sea Pines
15 Center and the Sea Pines Resort, and it's in furtherance or it
16 could be considered in furtherance of Sea Pines overall
17 corporate purpose, but that does not transform the obligations
18 of CSA under this agreement into the corporation's affairs and
19 transform this contract into bylaws. Because to take the
20 plaintiff's interpretation of the bylaws provision in the
21 Nonprofit Corporation Act, this would require a corporation to
22 disclose really any contract to its members at any time and
23 without really any showing of justification for the production
24 of the contract simply because it's in furtherance of the
25 corporation's purpose, and that was clearly not the South

1 Carolina Legislature's intent when they drafted the statute.
2 If they had intended it to include contracts within the
3 documents, which a nonprofit corporation must produce to its
4 members, they could easily have stated that but they didn't.
5 Further, again, the South Carolina Supreme Court has said that
6 in statutory construction, however plain the ordinary meaning
7 of the words used in the statute may be, the courts will
8 reject that meaning when to accept it would lead to results of
9 plainly absurd, that it could not possibly (inaudible). Here
10 the plaintiff is asking the Court to expand the definition of
11 bylaw to include any contract between CSA and other parties,
12 which again by that reasoning would result in a corporation
13 having to produce any contract that they've entered into with
14 any parties. That's clearly not the intent of the
15 legislature, Your Honor.

16 And so, in concluding on that point, the plain meaning of
17 bylaw in the Nonprofit Corporation Act without resort to any
18 subtle or forced constructions of the term or any of its
19 constituent terms would exclude the gate pass agreement and
20 its amendments because they're only contracts.

21 Now, moving on to the next contention of the plaintiff
22 that somehow the gate pass agreement and amendments to it are
23 accounting records of CSA -- and Your Honor, that's just
24 plainly inaccurate. The plaintiff basically had stated that
25 because gate revenue or revenue from gate entry fees is so

1 substantial and so important to CSA that that somehow
2 transforms, again, a contractual agreement into accounting
3 records. And, unfortunately, the statute -- the Nonprofit
4 Corporation Act and South Carolina case law do not further
5 define accounting records. And I know Mr. Ford cited an
6 attorney general's opinion regarding what the attorney general
7 believes is the proper scope of accounting record documents.
8 I don't have to tell the Court that an attorney general's
9 opinion is non-binding, it's non-mandatory authority. It's
10 merely, at best, persuasive. But this particular opinion is
11 conclusory. It speculates as to the belief that the
12 legislature, and it doesn't really provide any legal support
13 for its conclusion. So I think it's not a particularly
14 persuasive opinion. In fact, the opinion itself states that
15 we believe -- we believe the legislature's intent was for any
16 and all underlying documents to be included in accounting
17 records. And they further state that the legislature may want
18 to provide clarification on this. But again, there's no real
19 legal support for the attorney general's conclusion in that
20 opinion. And additionally, Your Honor, I would -- I would
21 note that there is legal support to our argument and it's
22 found in official comment to the Section 33-31-1601, which
23 addresses the type of accounting records that a nonprofit
24 corporation must keep. And that comment states the required
25 records are the current accounting records of the corporation,

1 and appropriate records should allow the financial statements
2 to be prepared in a fashion that fairly presents the financial
3 condition that results of operations of the corporation. I
4 would note that CSA does produce its current accounting
5 records to all members and even members of the public on its
6 publicly available website in its annual financial statements,
7 which include statements such as cash flow, revenues, and, and
8 other records, and we attached that as Exhibit -- I believe
9 Exhibit A to our reply to the plaintiff's memo in reply to our
10 memorandum. But clearly here the standard is not how
11 important a document may be to a corporation or how important
12 in this case a gate entry funds are the source of revenue to
13 CSA but whether the document allows the corporation's
14 financial statements to be prepared in a fashion that fairly
15 represents the financial condition and results of the
16 operation of the corporation. And here the gate pass
17 agreement and its amendments simply do not do that. They
18 don't track any, any transactions; they don't record any gate
19 fees collected or how those gate fees were spent; or do -- or
20 perform really any other accounting functions. This is simply
21 a contract, again, between CSA and the Resort and Center by
22 virtue of their gate policy rights must agree to these
23 changes. So this document is incapable of doing -- of fairly
24 presenting the financial condition of CSA. And that is the --
25 and that's the exact type of document which would be excluded

1 by Comment 2 because it cannot in anyway really help to
2 present a -- the financial condition of CSA. And I saw in the
3 plaintiff's briefs they argued that the plaintiff would not be
4 able to determine any additional, I think, future or potential
5 for future income without this agreement. Well, Your Honor,
6 again, the required records are the current accounting
7 records, records that allow the current state of the
8 corporation to be fairly presented. This doesn't deal with
9 future projections, but even if it did, CSA publishes -- and
10 this is Exhibit D to our reply -- CSA publishes the quarterly
11 and the annual visitor volume on its publicly available
12 website, and the plaintiff would be free to extrapolate those
13 numbers and estimate potential future revenue at any given
14 price based on those records.

15 So, again, Your Honor, I circle back to the plaintiff's
16 contention that South Carolina law allows the plaintiff to see
17 this gate pass agreement, but no South Carolina law has
18 actually really been cited other than the statute itself. And
19 the law we've cited clearly states that -- or clearly would
20 indicate that the gate pass agreement as a contract would be
21 excluded from the definition of both accounting records and
22 bylaws. And if the legislature had intended for a corporation
23 to disclose its contracts to a member upon request, it
24 would've so provided. It would've -- could've easily included
25 that in the statute, but it did not.

1 And then regarding the board member's recusal, which was
2 raised, as somehow indicating this, this agreement is
3 improper, Your Honor, the board member's recusal was proper
4 under South Carolina law. This is a interested -- or this was
5 an interested director transaction, which was permitted under
6 the Nonprofit Corporation Act as long as certain protocols are
7 followed, and the board member recused himself properly under
8 the law. And so again, there's really no indication of any
9 impropriety with this agreement. The board member, regardless
10 of how dramatic his language may've been in the letter, was
11 simply following South Carolina law, and there's no reason
12 that should somehow indicate any impropriety of the gate pass
13 agreement.

14 And again, and with regard to the common law arguments,
15 again, this is a contract that does not touch and concern the
16 plaintiff's use or access to her property, and in no way
17 affects her ability to use her access, her property, and it
18 doesn't affect her interest in the gate. This is only a
19 contract for the increase of gate fees charged to visitors,
20 not residents, but visitors -- plaintiff is a resident and
21 should did not be affected by this. And for the disposition
22 of certain gate fees collected. And again, these payments to
23 the commercial entities for marketing purposes fall within the
24 definition -- the correct definition of community services
25 because a robust commercial marketing program will draw in

1 additional visitors to the community, which will mean
2 increased revenue for CSA and increase capacity to, to improve
3 the community and the common elements of Sea Pines. So,
4 again, this is permissible under the governing documents when
5 the correct definition of community services is applied. It's
6 conducive to the maintenance and preservation of an attractive
7 community.

8 And with regard to, to plaintiff's mention of the
9 governing documents and the Nonprofit Corporation Act, Your
10 Honor, the Act does not even specifically mention governing
11 documents. It specifically enumerates, again, the types of
12 documents which the plaintiff is allowed to inspect. And
13 again, that's why they focus on bylaws and accounting records
14 because those are specifically provided for in the Act. But
15 as I said, their definitions of bylaws and accounting records
16 clearly conflict with what is intended by the statute or was
17 intended by the legislature in the statute. And that's in 33-
18 31-1602, which is the (inaudible) documents that plaintiff can
19 inspect. And so for the reasons set forth, Your Honor, the
20 gate pass agreement and its amendments, specifically the 2018
21 amendment, are not either bylaws of CSA, and they're not
22 accounting records of CSA. And therefore, the plaintiff is
23 not entitled to inspect them under the South Carolina
24 Nonprofit Corporation Act. And under the South Carolina
25 Homeowners Association Act, this does not change the result of

1 -- plaintiff cites that these documents are governing
2 documents because they're a necessary byproduct of the Sea
3 Pines governing documents, but the governing documents in the
4 Homeowners Association Act are defined as the declaration, the
5 master deed, or bylaws, or any amendment to the declaration,
6 master deed, or bylaws. And that's Section 27-30-124.
7 Clearly, this agreement is not a declaration; it's not a
8 master deed; and it's not bylaws; and it's not referenced in
9 any of those either. The agreement itself recites and
10 references those documents because those are the documents by
11 which this agreement is necessary by which the Resort and
12 Center acquired their rights. But it's not incorporated in
13 any of the Sea Pines governing documents and, even if it were,
14 I don't think it would still -- it would be the master deed,
15 or a bylaw, or a declaration. But, regardless, it's not, and
16 so the plaintiff is not entitled to inspect it under the South
17 Carolina Homeowners Association Act or common law as well.
18 And so, for those reasons, Your Honor, we would ask that the
19 Court deny the plaintiff's inspection or application for
20 inspection of corporate records and dismiss this action with
21 prejudice.

22 Thank you.

23 THE COURT: All right. Thank you.

24 Five minutes, Mr. Ford?

25 MR. FORD: Yes, sir. Five minutes should be plenty, Your

1 Honor. I appreciate your patience.

2 First reply point on counsel's discussion on what
3 community services means, that is irrelevant to this decision,
4 Your Honor. We respect the legal workmanship that has gone
5 into that argument, but we are not asking Your Honor to
6 identify -- to determine whether or not this falls under that
7 definition. That is for another day. There is an irony to
8 CSA defending a document that they will not let us see. They
9 are going to great legal lengths to defend this document that
10 they don't want us to see and won't let us see. And they're
11 saying, it's fine, Judge, but you're not gonna see it and Mr.
12 Ford is not gonna see it; so just take our word for it. But
13 that definition of community services, for this purposes of
14 today, Your Honor, is not relevant. What is relevant is the
15 asserted privilege, executive privilege. That is what they
16 have asserted in their privilege log. They have not argued
17 the elements of it. They have not cited law for it. It is
18 waived because, as we said, they -- one, we may have the
19 document, this draft that we have shown Your Honor. And two,
20 they've released the previous versions of it. This is just an
21 amendment. Under those two decisions, or those two factors,
22 their executive privilege has been waived. And Your Honor may
23 be able to dispose of this very quickly by turning to them and
24 saying, Is this the final document? Because if it is, we've
25 got it. And they just need to produce one with a signature on

1 it. If it's not, then we move onto all these other arguments.
2 But there is an oddity to us saying, is this the final? And
3 they're like, we're not telling you. And that speaks volumes.
4 There is no legal dispute of any credibility that this
5 agreement is part of a covenants of governing documents. It
6 is referenced by them; it's incorporated in by reference. And
7 because it is incorporated in by reference and cross
8 referenced, members can see it. There's no legitimate legal
9 dispute about that.

10 On the common law issue, there is no legitimate dispute
11 that this is a burden on my client's property interest, legal
12 special interest in that gate. This is a burden on it, and
13 she should be allowed to see what that burden is. How are
14 they divvying up these millions of dollars. And not only
15 dictating the amount of the money, but they're dividing it
16 among themselves in secret. And we know that because we look
17 at this draft, which may be the final, and we see them
18 dividing it up. My client, because that is money coming from
19 her special interest in this easement and this common property
20 has a right to know what that is.

21 Addressing the -- any contract argument, the argument is
22 essentially, Your Honor, if you grant this, people get to see
23 any contract, I -- with respect to my learned co-counsel,
24 that's not the best argument, the slippery-slope arguments are
25 never great. This is not any contract. This is an inside

1 deal among members to divvy up millions of dollars. That's
2 what it is. It is this contract that's specifically
3 referenced in the bylaws, it's referred to, the power to enter
4 into it by CSA, it's referenced in the bylaws and covenants.
5 The agreement itself, if what we've got is a final, references
6 the covenants. This is included under definitions of
7 governing documents and attachments. And by that cross
8 reference, members are allowed to see it.

9 We respectfully disagree with the characterizations of
10 his recusal letter is, ah, he just had to recuse himself. If
11 you read it, it is serious business, Judge. I mean, he is
12 saying this is not in the best interest of CSA; he says that
13 among other dramatic language. So one of the criticisms we
14 got in the initial response from CSA is Ms. Advocaat hasn't
15 shown a good reason. Well, here's your good reason, a written
16 CYA letter from a board member and in addition to the bad
17 terms in the draft agreement.

18 So, in conclusion, Your Honor, we ask not only that
19 agreement be disclosed, but that my client be allocated
20 attorney's fees and costs, and that is provided under the
21 statute. It's not a sanction or a Rule 11 thing. The statute
22 specifically allows that under 1604(c), if the Court decides
23 under certain circumstances, it shall order the corporation to
24 pay the member's costs, including reasonable counsel fees
25 incurred to obtain the order, unless -- and it goes on -- the

1 corporation proves that it refused inspection in good faith
2 because they had a reasonable basis for doubt about the right
3 of the member to inspect the records demanded. And I read
4 that caveat because I know that my colleague cites it and I
5 want to be complete. But, they've released this in the past.
6 We've got a draft. There is no good-faith basis for them to
7 hide it and not even tell us if we've got the final draft.
8 Therefore, the legislature set out if a member has to run down
9 her own community service association HOA to get a document
10 she's entitled to, this really is not something HOAs should be
11 doing, so she's entitled to fees and costs. So we'd ask Your
12 Honor to grant those, and we'd be happy to submit an affidavit
13 with an itemization.

14 Thank you, Your Honor.

15 THE COURT: All right. Thank you, sir. As you may've
16 anticipated, I'm going to take this matter under advisement
17 particularly in light of the fact that a number of documents
18 were filed this morning. I've had a limited amount of time to
19 review those. I'll be in touch.

20 Thank you so much.

21 MR. MASCIALE: Thank you, Your Honor.

22 MR. FORD: Thank you, Judge. Take care.

23 Thank you everyone.

24 Bye, Mike.

25 **ADJOURNED - 10:53 A.M.**

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C E R T I F I C A T E

I, the undersigned, Kay H. Richardson, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the hearing held in the case of Dana Kindel Advocaat, et al. v. Community Services Associates, Inc., held in the Court of Common Pleas for Beaufort County via WebEx on August 4, 2020.

I do hereby certify that I am neither of kin, counsel, nor interest to any party hereto.

Kay H. Richardson
Official Court Reporter

December 30, 2020.