THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Mikell R. Scarborough, Master-In-Equity

Case No. 2020-CP-10-04185

Bonnie Wall, individually and derivatiely,
and Walter B. Wall, Jr., ……... Appellants,

v.

Jonathan Dye, Shaun Dye, Shellmore Homeowners' Association, Inc., and John H. Chakides, Jr., individually and in his capacity as Director of Shellmore Homeowners' Association, Inc., ……..……... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

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2. Should the Master-In-Equity's decision granting summary judgment against Appellants on their breach of fiduciary duty claims be affirmed based on the additional sustaining grounds that the board of directors complied with the covenants and, thus, the business judgment rule applies?

3. Did the Master-In-Equity correctly grant summary judgment against Appellants on their civil conspiracy claim based on a finding that Appellants failed to present evidence of special damages?

4. Should the Master-In-Equity's decision granting summary judgment against Appellants on their civil conspiracy claim be upheld based on additional sustaining grounds under both the pre- and post-*Paradis* framework?

STATEMENT OF THE CASE

Appellants, the Walls, do not like covered docks. When their neighbors, the Dyes, received approval from the neighborhood architectural review committee for a covered dock and started construction, Appellants sued.[1] All of the claims asserted by Appellants are based on their assertion that the appointment of the architectural review committee by the board of the homeowners' association was legally invalid and that the committee's approval of the Dyes' covered dock was invalid as well. The Respondents counter that the restrictive covenants, as a matter of law, authorize the board to appoint an architectural committee for the consideration and approval of covered docks and, thus, the approval of the Dyes' dock was proper. The determination of the case and this Appeal depends upon which interpretation of the restrictive covenants is legally correct.

A. Undisputed Facts

Shellmore is a waterfront subdivision consisting of fourteen (14) lots[2] located in McClellanville, South Carolina. (*See* Am. Compl., ¶¶ 1-2, 8-9.) The lots in Shellmore are subject to certain restrictive covenants set out in a Declaration of Covenants ("Declaration") dated March 18, 1975 and recorded March 19, 1975 in the Charleston County Register of Deeds Office in Book J106, Page 195. (*See* Dye MSJ, Ex. 1 (Decl. of Shellmore HOA), ¶ 4, Ex. 1-B; Am. Compl., ¶¶ 12-14.) No amendments to the Declaration have ever been recorded. *Id.* The Declaration names Cape Romain Lookout Homeowners Association, Inc., as the "Association" having jurisdiction to enforce the restrictive covenants of the subdivision. (Dye MSJ, Ex. 1-B.) Later, the name of the

[1] Although Appellants named the Dyes, the homeowners' association, and a board member in their lawsuit, Appellants did not name the architectural review committee or any of its members in their lawsuit.

[2] Charleston County property records and related GIS system show fourteen (14) lots within the Shellmore community identified by the following parcel numbers: 712-0000089, 712-0000090, 712-0000091, 712-0000092, 712-0000093, 712-0000094, 712-0000095, 712-0000096, 712-0000097, 712-0000098, 712-0000099, 712-0000100, 712-0000101, and 712-0000102. To the extent necessary, Defendants ask the Court to take judicial notice of facts reflected in public filings and property records. *See S.C. Dep't of Soc. Servs. v. Janice C.*, 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009) ("[A] court can take judicial notice of its own records, files and proceedings for all proper purposes including facts established in its records.").

Association was changed to Shellmore Homeowners Association, Inc. ("Association"), a nonprofit corporation organized pursuant to the South Carolina Nonprofit Corporation Act. (*See* Dye MSJ, Ex. 1, ¶ 5, Ex. 1-C.)

The Declaration contains restrictive covenants vesting architectural control of exterior improvements within Shellmore with the Board of Directors ("Board") of the Association or an Architectural Review Committee ("ARC") designated by the Board. (*See* Dye MSJ, Ex. 1-B, p. 8.) Article V, Section 1, of the Declaration states in pertinent part:

> Section 1. Architectural Control. No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by an architectural committee composed of three (3) or more representatives appointed by the Board. In the event said Board, or its designated committee, fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this Article will be deemed to have been fully complied with.

(Dye MSJ, Ex. 1-B, p. 8.) Article V of the Declaration goes on to specifically address the construction of docks in Section 8 and states in pertinent part:

> Section 8. Boat Houses, Docks, etc. No boat houses, docks, piers, or wharves shall be constructed on any lot without first obtaining the written approval of the Association, or its designated representative.

(Dye MSJ, Ex. 1-B, p. 11.)

Respondents Jonathan and Shaun Dye own and reside at 945 Shellmore Lane within the Shellmore subdivision. (*See* Dye MSJ, Ex. 2 (Decl. of J. Dye), ¶ 3.) In January of 2020, the Dyes submitted a permit application to the Office of Ocean & Coastal Resource Management ("OCRM") and a federal permit application with the United States Army Corps of Engineers ("USACOE") with plans and specifications for the construction of a proposed covered dock. (Dye

MSJ, Ex. 2, ¶¶ 8, 13.) The Dyes also submitted the same plans to the ARC which voted to approve the Dyes' proposed dock. (Dye MSJ, Ex. 1 at ¶¶ 10-11, Ex. 1-H, and Ex. 2 at ¶¶ 9-10.) Subsequently, the Board considered and upheld the ARC's vote approving the Dyes' proposed dock. (Dye MSJ, Ex. 1 at ¶ 12, Ex. 1-I, and Ex. 2 at ¶ 11.) The Dyes later submitted revised plans to both OCRM and the ARC deleting a proposed boat lift but keeping the proposed covered dock. (Dye MSJ, Ex. 1 at ¶ 13, Ex. 1-J, and Ex. 2 at ¶¶ 12-13.) Both OCRM and the ARC approved the Dyes' revised plans. (Dye MSJ, Ex. 1 at ¶ 13, Ex. 1-J, and Ex. 2 at ¶¶ 14-15.) In all, OCRM, USACOE, the ARC, and the Board approved the Dyes' plans for the construction of a covered dock with OCRM and USACOE issuing the required permits. (Dye MSJ, Ex. 2, ¶¶ 10-15.)

After OCRM issued the Dyes a permit to construct their dock, the Dyes' immediate neighbors, Larry Fritz to the south and the Appellants, the Walls, to the north, requested review of OCRM's decision by the Board of Health and Environmental Control to which OCRM staff filed a response. (Dye MSJ, Ex. 2, ¶ 16, Ex. 2-A.) Ultimately, the review requests were denied. (Dye MSJ, Ex. 2, ¶ 17.) Thereafter, the Dyes commenced construction on their covered dock. (Dye MSJ, Ex. 2, ¶ 18.) This litigation ensued.

B. Procedural History

Appellants commenced the action below via the filing of a summons and verified complaint on September 22, 2020 asserting claims against the Dyes for breach of the restrictive covenants, declaratory and injunctive relief, and nuisance claiming that the Dyes' proposed covered dock had not been properly approved as required under the Declaration. Appellants also filed a petition for an *ex parte* temporary restraining order and a motion for temporary injunction on September 23, 2020. On September 29, 2020, the Dyes filed a motion to dismiss the complaint and briefing in opposition to the Appellants' requested injunctive relief. On September 30, 2020, a hearing was

held before the Hon. Roger Young, Circuit Judge, on the motions for preliminary injunctive relief. That day, Judge Young issued an order declining to issue the requested injunctive relief and referring the case to the Master-In-Equity in accordance with Rule 53, SCRCP. (Order, dated Sept. 20, 2020.)

On October 2, 2020, the Master-In-Equity issued an order preliminarily granting the Appellants' requested injunctive relief to preserve the status quo as to the proposed roof on the Dyes' dock but denying the Appellants' request to halt construction of the other portions of the dock. (Order, dated Oct. 2, 2020.) Additionally, based on the representations and agreement made by the parties at the hearing, the Master-In-Equity ordered a briefing schedule for cross motions for summary judgment.

On October 5, 2020, the Appellants filed a Verified Amended Complaint naming the Association and John H. Chakides, Jr. ("Chakides"), as additional defendants and asserting claims for injunction and declaratory judgment (against the Dyes and the Association), breach of restrictive covenants (against the Dyes and the Association), breach of fiduciary duty claims (against the Association and Chakides), civil conspiracy (against Jonathan Dye, Chakides, and the Association), and nuisance (against the Dyes). (Am. Compl.)

On October 15, 2020, the Dyes filed their motion for summary judgment (Dye MSJ) and Appellants filed a motion for partial summary judgment. (Wall MSJ.) The Dyes filed their Answer to the Amended Complaint on October 20, 2020. (Dye Answer.) The Dyes also filed a motion to dissolve the preliminary injunction on October 21, 2020 (Mot. To Dissolve) to which Appellants filed opposing briefing the next day. (Opp. to Mot. To Dissolve.) On October 23, 2020, Respondents the Association and Chakides filed their Answer (HOA Answer) and motion for summary judgment. (HOA MSJ.)

The Master-In-Equity held a hearing on the cross motions for summary judgment and the motion to dissolve the preliminary injunction on November 2, 2020. The Master took the matter under advisement and allowed the parties time to submit additional briefing for consideration. The Dyes and the Walls submitted additional briefing on November 6, 2020. (Dye Supp. MSJ; Wall Supp. MSJ.)

On November 19, 2020, the Master-In-Equity entered an order on the then-pending motions. (Order, dated Nov. 19, 2020.) In the order, the Master granted the Dyes' motion to dissolve the preliminary injunction based on the Appellants' failure to establish the required elements for preliminary injunctive relief. Next, the lower court granted the Respondents' motions for summary judgment as to the Appellants' claims for breach of fiduciary duty upon a finding that no fiduciary duty exists in this context. The Master also granted the Respondents' motions for summary judgment as to Appellants' claim for civil conspiracy finding that Appellants had failed to present any evidence of special damages. However, the lower court denied the parties' cross motions for summary judgment as to Appellants' remaining claims of declaratory judgment, breach of the restrictive covenants, and nuisance and directed the parties to resolve the remaining issues by mediation or by vote at the annual meeting of the Association to be held in January 2021.

On November 22, 2020, Appellants filed a notice of appeal of the Master's November 19, 2020 order.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP. *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011) (citing *Fleming v. Rose,* 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002)). Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Id.*; Rule 56(c), SCRCP. "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." Turner, 392 S.C. at 122, 708 S.E.2d at 769 (quoting *Fleming,* 350 S.C. at 493–94, 567 S.E.2d at 860).

"Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ." *ABB, Inc. v. Integrated Recycling Grp. of SC, LLC*, 432 S.C. 545, 551–52, 854 S.E.2d 171, 174–75 (Ct. App. 2021) (citations omitted), *reh'g denied* (Feb. 12, 2021). "When a party makes no factual showing in opposition to a motion for summary judgment, the trial court must grant summary judgment to the moving party if, under the facts presented, the latter is entitled to summary judgment as matter of law." *Id.* (citations omitted). "[T]o resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial." *Id.*; *see also* Rule 56(e), SCRCP ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

"The existence of a duty owed is a question of law for the courts." *Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007).

"It is a question of law for the court whether the language of a contract is ambiguous" and "the construction of a clear and unambiguous deed is a question of law for the court." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001).

"Determining the proper interpretation of a statute is a question of law" which is reviewed de novo on appeal. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ARGUMENT

I. The Master-In-Equity Correctly Denied Appellants' Breach of Fiduciary Duty Claims Because There Is No Fiduciary Duty Owed by the Directors of the Homeowners' Association to Appellants in the Context of This Case.

In determining the existence of a fiduciary duty, context matters. The Master-In-Equity properly found that there is no fiduciary duty in the context of the present case in which the issue to be decided—whether the Board complied with the restrictive covenants—is resolvable by reference to the Declaration. Duties arising under restrictive covenants are contractual in nature and, thus, tort-based duties, such as a fiduciary duty, do not apply. Appellants ignore the context of the present dispute and argue for a fiduciary duty which does not exist.

Appellants argue that the Board has a fiduciary duty to abide by and enforce the restrictive covenants in the Declaration and that the Board breached that duty by appointing the ARC and allowing the ARC to approve the Dyes' covered dock. Although Appellants label these duties as "fiduciary", duties imposed by restrictive covenants are contractual—not fiduciary—in nature. *Town of McClellanville*, 345 S.C. at 622, 550 S.E.2d at 302 ("Restrictive covenants are contractual in nature".) (quoting *Taylor v. Lindsey*, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-64 (1998)). In

defining these "fiduciary" duties, Appellants rely solely on the Declaration and its restrictive covenants to define the scope of the Board's alleged duties at issue in this case. Indeed, the Declaration, in Sections 1 and 8 of Article V, explicitly governs the appointment of an ARC, the entities having authority to approve docks, and whether covered docks can be approved. (Dye MSJ, Ex. 1-B, pp. 8, 11.) Whether the Board possesses the corporate authority to designate an ARC as its representative for the approval of covered docks can, therefore, be resolved by reference to the Declaration's restrictive covenants. Because these questions can be resolved by the restrictive covenants, the restrictive covenants, rather than any purported fiduciary duties, control. *See Walbeck v. I'On Co.*, 426 S.C. 494, 517-18, 827 S.E.2d 348, 360 (Ct. App. 2018) (refusing to find a fiduciary duty where issues raised could be resolved by reference to the restrictive covenants) (citing *Cedar Cove Homeowners Ass'n, Inc. v. DiPietro*, 368 S.C. 254, 259, 628 S.E.2d 284, 286 (Ct. App. 2006) ("Where ... issues involving the common area of a subdivision—as raised by the pleadings—are resolved by reference to the applicable restrictive covenants, those covenants control.")). Thus, while the Board may have contractual duties under the Declaration, there is no tort-based fiduciary duty imposed on the Board in this context.

Cedar Cove is instructive. In that case, the Court of Appeals evaluated a homeowners' association's claims for trespass and breach of restrictive covenants related to the defendant homeowners' construction of a patio which encroached into the common area of the development. At issue was whether the homeowners had complied with the architectural approval process required by certain restrictive covenants which contained very similar language to the Declaration in the present case. While the association had alleged separate claims for breach of the covenants and trespass, both claims were based on an alleged breach of the restrictive covenants. Because the relevant issues for both claims were resolvable under the covenants, the court held that the

covenants, rather than the tort law of trespass, controlled the resolution of the case. *Cedar Cove*, 368 S.C. at 259, 628 S.E.2d at 286.

Likewise, in *Walbeck*, the Court of Appeals evaluated a homeowner's derivative claim on behalf of a homeowners' association for breach of fiduciary duty and breach of contract related to the defendant developer's refusal to convey title for the common areas of the development to the association. At issue was whether, under the restrictive covenants, the association was required to own the common areas or whether title could be held by some other entity. The *Walbeck* court held that because the issue in the case was controlled by the development's restrictive covenants, the covenants controlled, and no fiduciary duty existed. *Walbeck*, 426 S.C. at 518, 827 S.E.2d at 360.

In both cases, the Court of Appeals found that when a party's duties are governed by restrictive covenants which are contractual in nature, tort liability—whether based on trespass or a fiduciary duty—does not apply. Although not explicitly named, the Court's analysis in these cases was an application of the economic loss rule which prohibits tort liability for duties imposed by contract. *See Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 54–55, 463 S.E.2d 85, 88 (1995) ("A breach of a duty which arises under the provisions of a contract between the parties must be redressed under contract, and a tort action will not lie.").

Such is the import of the Supreme Court's decision in *O'Shea v. Lesser*, 308 S.C. 10, 416 S.E.2d 629 (1992). The dispute in *O'Shea* involved a homeowner's claims for breach of restrictive covenants and breach of fiduciary duty related to an architectural review board's approval of her neighbor's proposed deck enclosure which would partially block the homeowner's view of an adjoining golf course. Specifically, the plaintiff homeowner claimed the architectural review board

owed her a fiduciary duty to consult with her prior to approving modifications to neighboring property and to hire an architect to render an opinion as to the proposed modification's "harmony and compatibility" with surrounding structures. *Id.*, 308 S.C. at 15, 416 S.E.2d at 631-32. As the Supreme Court recognized, the restrictive covenants "vested" the architectural review board "with the discretion to ensure that proposed modifications to residential property enhance the entire community." *Id.*, 308 S.C. at 15, 416 S.E.2d at 632. Thus, because the issues raised by the plaintiff homeowner were resolved by reference to the restrictive covenants, the Supreme Court held that no fiduciary duty attached:

> We have never imposed the high standard of fiduciary duty on planned community organizations, such as the Board, which are vested with the discretion to ensure that proposed modifications to residential property enhance the entire community. Instead, under the correct standard, the Board has a duty to exercise judgment reasonably and in good faith. We hold that the master-in-equity did not err in finding that the Board did not owe appellant a fiduciary duty.

Id. (internal citations omitted). The duties imposed on the architectural review board in *O'Shea* were contractual in nature, arising solely from the restrictive covenants. The duty imposed on the board in *O'Shea* to act "reasonably and in good faith" is simply a reiteration of their implied contractual duties under the covenants. *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995) ("There exists in every contract an implied covenant of good faith and fair dealing.") Thus, the Supreme Court found, the tort-based duty of a fiduciary did not apply.

The present case presents the same situation addressed in *Cedar Creek*, *Walbeck*, and *O'Shea*. Here, Appellants have brought claims for breach of the restrictive covenants and breach of fiduciary duty against the Board and Chakides based on an alleged failure to adhere to and enforce the restrictive covenants. (Am. Compl.) Specifically, Appellants allege that the Board owed them a fiduciary duty to follow and enforce the restrictive covenants of the Association which the Board allegedly breached in designating the ARC and allowing it to approve the Dyes'

covered dock. However, any duties owed by the Board or its members regarding the appointment of the ARC or the approval of covered docks are governed solely by the restrictive covenants in the Declaration. Such duties are, therefore, contractual in nature and tort liability does not apply. Just as in *Cedar Creek*, *Walbeck*, and *O'Shea* cited above, and consistent with the economic loss rule, all issues as to the existence or extent of the Board's duties in this regard are properly resolved by reference to the Declaration, which Appellants admit controls. Thus, in this context, where the Board's authority and duties are contractual in nature and delineated by the Declaration, there is no tort-based fiduciary duty. Rather, the language of the Declaration controls and resolves the issues raised by Appellants.

Appellants attempt to distinguish *O'Shea* by asserting that the architectural review board discussed in that case was unincorporated but that the Association in this case, which the Board governs, is incorporated. (Br. of App., pp. 17-18.) However, Appellants fail to cite any authority or make any argument explaining why such a distinction is relevant. Instead, case law indicates such a distinction is immaterial. In *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 409 S.C. 164, 760 S.E.2d 121 (Ct. App. 2014), *aff'd as modified,* 415 S.C. 256, 781 S.E.2d 903 (2016), the Court of Appeals, citing *O'Shea*, found that the incorporated association, "Shipyard Village Council of Co-Owners, Inc.", did not owe a fiduciary duty to the members of the association. *Id.*, 409 S.C. at 177 n. 2, 760 S.E. at 128 n. 2 (reversing trial court to the extent a fiduciary duty was found to exist). Thus, the status of a planned community organization as unincorporated or incorporated makes no difference. Rather, the relevant inquiry is whether the claims levied against the planned community organization can be resolved through reference to the restrictive covenants. In such a case, the contract-based covenants control and no tort-based fiduciary duty arises. *See Walbeck*, 426 S.C. at 517-18, 827 S.E.2d at 360. As demonstrated above, this case is resolvable

through reference to the Declaration and, thus, the Board does not have a fiduciary duty to the Association or its members in the present context.

Except for *Walbeck* and *Fisher*, which both held there is no fiduciary duty in this context, none of the cases cited by Appellants for the existence of a fiduciary duty involved a dispute which could be resolved by reference to applicable restrictive covenants.[3] As discussed above, *Walbeck* and *Fisher* militate against a finding of a fiduciary duty in the context presented by this case as the Supreme Court held in *O'Shea*. Appellants have failed to properly distinguish *O'Shea* and have failed to cite any contrary authority imposing a fiduciary duty on the board of a homeowners' association where the issues involved are resolvable through reference to the association's restrictive covenants. The Association's and the Board's duties related to the appointment of the ARC and the approval of the Dyes' dock, if any, are contractual, not fiduciary, in nature and governed by the Declaration. There is no fiduciary duty in this context.

II. The Master-In-Equity's Decision Granting Summary Judgment Against Appellants on Their Breach of Fiduciary Duty Claims Should Be Affirmed Based on the Additional Sustaining Grounds That the Board Complied With the Covenants and, Thus, the Business Judgment Rule Applies.

Appellants base their breach of fiduciary duty claims—including the existence of a duty—on the erroneous and conclusory premise that the Declaration prohibits covered docks and that the appointment of the ARC contravened the Declaration and state law. In doing so, Appellants ignore

[3] Plaintiff cited the following cases: *Hendricks v. Clemson Univ.*, 353 S.C. 449, 578 S.E.2d 711 (2003) (involving claims by student against university for improper academic advisement); *Protestant Episcopal Church in the Diocese of SC v. Episcopal Church*, 421 S.C. 211, 806 S.E.2d 82 (2017) (Op. of J. Hearn) (one of five separate opinions in case involving property dispute between local diocese and national church); *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 744 S.E.2d 178 (2013) (applying Delaware law in dispute involving investment firm which owned shares in two companies which merged); *Hite v. Thomas & Howard Co. of Florence, Inc.*, 305 S.C. 358, 409 S.E.2d 340 (1991) (minority shareholder suit alleging diminution of ownership share); *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 64 S.E.2d 524 (1951) (suit to void sale of corporate property to member of board of directors); *Clearwater Trust v. Bunting*, 367 S.C. 340, 626 S.E.2d 334 (2006) (suit by shareholders of closely held corporation against director involving pre-merger sale of stock back to corporation); and *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993) (suit involving developer's turnover of unmaintained common elements to under-funded association in which Court assumed a duty for the sake of argument but did not so hold).

the plain and unambiguous language of the Declaration, disregard relevant statutory provisions, and apply an overbroad and unworkable interpretation of the conflict of interest rules. Contrary to Appellants' claims, covered docks are not prohibited in Shellmore but may be approved in the discretion of the Board, or its designated ARC. Also, the Declaration and state law provide the Board with authority to designate the ARC for the consideration and approval of covered docks. Because the Board acted within their authority under the Declaration, the business judgment rule precludes Appellants' claims for breach of fiduciary duty.

A. Covered docks are not prohibited in Shellmore.

As an initial matter, Appellants offer the erroneous legal conclusion that covered docks are prohibited within Shellmore through either the restrictive covenants, a common scheme of development, or a 2016 vote of the Association's membership. Upon closer examination, Appellants' conclusory assertions are without any basis in law or admissible fact.

i. The restrictive covenants do not prohibit covered docks.

First, the restrictive covenants contained in the Declaration—and which Appellants have admitted are binding and unambiguous[4]—do not prohibit covered docks.[5] Our Supreme Court has repeatedly set out the rules for interpreting restrictive covenants in South Carolina:

> Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document. The court may not limit a restriction in a deed, *nor, on the other hand, will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.* It is still the settled rule in this jurisdiction that restrictions as to the use of real estate should be strictly construed and *all doubts resolved in favor of the free use of the property,*

[4] In their pleadings, the Appellants admitted that the Declaration is controlling (*see* Am. Compl., ¶¶ 12-14, 17) and affirmatively alleged that the Declaration is unambiguous. (Am. Compl., ¶ 49.)

[5] "It is a question of law for the court whether the language of a contract is ambiguous" and "the construction of a clear and unambiguous deed is a question of law for the court." *Town of McClellanville,* 345 S.C. at 623, 550 S.E.2d 299.

> subject, however, to the provision that this rule of strict construction should not be applied so as to defeat the plain and obvious purpose of the instrument. It follows, of course, that where the language of the restrictions is equally capable of two or more different constructions that construction will be adopted which least restricts the use of the property. A *restriction on the use of property must be created in express terms or by plain and unmistakable implication,* and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.

Town of McClellanville, 345 S.C. at 622, 550 S.E.2d at 302 (emphasis in original) (quoting *Taylor*, 332 S.C. 1, 4-5, 498 S.E.2d 862, 863-64 (1998)). Thus, for covered docks to be prohibited within Shellmore, the restriction must be "created in express terms or by plain and unmistakable implication". *Id.* The Declaration contains no such language, express or implied.

A thorough examination of the Declaration reveals no express prohibition on covered docks in Shellmore. Indeed, the only portion of the Declaration which expressly mentions docks in any capacity—whether covered or uncovered—occurs in Article V, Section 8, which reads as follows:

> Section 8. Boat Houses, Docks, etc. No boat houses, *docks*, piers, or wharves shall be constructed on any lot without first obtaining the written approval of the Association, or its designated representative.

(Dye MSJ, Ex. 1-B, p. 11 (emphasis added).) Thus, the Declaration allows construction of docks upon "written approval" but makes no distinction between covered or uncovered docks even though the drafter could have easily made such a distinction and prohibited covered docks. Consequently, there is no express prohibition on covered docks in the Declaration. *See Town of McClellanville,* 345 S.C. at 621, 550 S.E.2d 299 (upholding decision of Master in Equity refusing "to read restrictions into the deed which [the drafter] could have effortlessly written in itself"); *Taylor,* 332 S.C. at 5-6, 498 S.E.2d 862 (refusing to index minimum home value restriction in deed to inflation where grantor "could have easily done so" but did not).

Moreover, the language of the Declaration clearly implies that covered docks are allowed upon "written approval." The same Article V, Section 8, cited above expressly contemplates the approval of "boat houses" which are, essentially, covered docks for boats. *See Serra v. Maryland Dept. of Envir.*, 758 A.2d 1057, 1059 (Md. App. 1999) ("Boathouse means a structure with a roof or cover, or similar device placed over open water to protect a boat or other vessel."). If roof coverings large enough to house a boat can be approved, covered docks can also be approved pursuant to the Declaration.

ii. The absence of covered docks does not prohibit their future approval and construction.

Next, Appellants appear to argue under multiple theories that the absence of covered docks within Shellmore prior to construction of the Dyes' dock should have precluded approval of the Dyes' covered dock. Under one ill-founded theory, Appellants claim that the Declaration precludes approval of the Dyes' covered dock because, in the absence of other covered docks, the Dyes' dock lacks "harmony of external design" with other structures in Shellmore. (Br. of Appellants, pp. 4-6.) Appellants cited language comes from Article V, Section 1, of the Declaration which provides, in pertinent part:

> No building, fence, wall or other structure shall be commenced, erected or maintained upon the Properties, nor shall any exterior addition to or change or alteration therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to *harmony of external design* and location in relation to surrounding structures and topography by the Board of Directors of the Association, or by an architectural committee composed of three (3) or more representatives appointed by the Board.

(Dye MSJ, Ex. 1-B, p. 8 (emphasis added).) All the various considerations listed in the cited section, including "harmony of external design", are subjective aesthetic considerations which the Declaration indicates are to be judged in the discretion of the Board, or its designated ARC. *See*

Palmetto Dunes Resort, Div. of Greenwood Dev. Corp. v. Brown, 287 S.C. 1, 7, 336 S.E.2d 15, 19 (Ct. App. 1985) (covenant requiring preconstruction approval of structures based on aesthetic considerations vested approving entity with discretion to render decision). Our Supreme Court, considering a nearly identical provision[6] in a restrictive covenant listing "harmony and compatibility of . . . external design" as a criterion, found the covenant vested the community architectural review board with discretion to make approval decisions "constrained only to act reasonably and in good faith." *O'Shea*, 308 S.C. at 16, 416 S.E.2d at 632. Similarly, in this case, rather than require rigid uniformity, the Declaration vests the Board, or its designated ARC, with the discretion to approve or disapprove of structures based on subjective aesthetic considerations. In Article V, Section 2, the Declaration provides that "the Declarant reserves unto itself, its successors and assigns, or its designated representative, the right to control absolutely and solely to decide the precise site and location of any home or other structure upon the lots". (Dye MSJ, Ex. 1-B, p. 9.) Thus, either the Association, as successor to the Declarant and governed by the Board, or the ARC, as its designated representative, possesses sole and absolute discretion to approve structures in Shellmore. Although the Appellants may have aesthetic sensibilities disfavoring covered docks, under the Declaration, discretionary approval authority for docks—covered or uncovered—rests with the Board, or its designated ARC. *O'Shea*, 308 S.C. at 16, 416 S.E.2d at 632. ("Although people reasonably may differ as to whether an addition is aesthetically pleasing, the Board has been vested with the sole authority to make this judgment.").

[6] The provision, as cited in the Supreme Court's opinion, read as follows: "No building, wall, fence, swimming pool, or other structure shall be commenced, erected, or maintained upon the common properties, nor shall any landscaping be done, nor shall any exterior addition to any such existing structure or change or alteration therein, be made until the plans and specification therefor showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to the harmony and compatibility of its external design and location, with the surrounding structures and topography, by Fripp Island Development Corporation and its duly appointed agents." *O'Shea*, 308 S.C. at 13, 416 S.E.2d at 631.

Furthermore, Appellants' argument is circular and unworkable when taken to its logical conclusion. Appellants argue that the Dyes' covered dock could not be properly approved because, at the time it was approved, no other covered docks existed in Shellmore. According to Appellants, the absence of covered docks precludes approval of any covered dock in the future. Thus, under Appellants' argument, architectural approval is dependent on the prior existence of similar structures within the neighborhood. The question then becomes, how did the first dock—or the first house—in Shellmore get approved? Indeed, under Appellants' argument, without any pre-existing structures for reference, approval of the first dock or house in the neighborhood would be impossible. Accordingly, when tested, Appellants' argument fails.

Under another theory, Appellants appear to argue that the historical absence of covered docks in Shellmore and previous denials of covered dock applications evidences the intent of the original developer to enforce some common scheme of development binding the Association and prohibiting covered docks. Appellants, however, failed to present the Master-In-Equity with any competent, admissible evidence tending to show any such scheme.

"Generally, the developer must establish the general scheme of development before any lots are sold." *Gambrell v. Schriver*, 312 S.C. 354, 358, 440 S.E.2d 393, 395 (Ct. App. 1993). Here, the only competent, admissible evidence offered by any party in this case which pre-dates the first sale of property within Shellmore[7] is the Declaration. As demonstrated above, however,

[7] In their pleadings and submissions, Appellants and their affiant purport to testify that "[i]n the fifty-year history of Shellmore, covered docks and boat lifts have always been prohibited." (Br. of Appellant, p. 7 (citing Am. Compl., ¶¶ 9, 11, and 22; Wall MSJ, Ex. 3 (Fritz Aff.), ¶ 21).) However, by her own admission, Appellant Bonnie Wall has only owned property in Shellmore since 1995. (Am. Compl., ¶ 10.) Similarly, Appellants' affiant, Mr. Fritz, admits to purchasing property in Shellmore later than Mrs. Wall in 2000 or 2001. (Wall MSJ, Ex. 3, ¶ 4.) Neither the Appellants nor Mr. Fritz offered any foundational testimony indicating any of them had any personal knowledge regarding the prohibition or absence of covered docks prior to their respective property purchases. Further, Mr. Fritz's testimony that he was told at the time of his property purchase that covered docks were prohibited in Shellmore is blatant hearsay. Consequently, their purported testimony on this point is inadmissible and properly disregarded on summary judgment and this Appeal.

the express language of the Declaration anticipating approval of "boat houses" militates against a finding that covered docks are clearly and unmistakably prohibited by a common scheme of development. Moreover, the remaining evidence cited by Appellants on this point—e.g., that previous covered dock applications were denied—post-dates the first sale of property within Shellmore and is, thus, irrelevant and inadmissible to show that the developer implemented a general scheme of development prohibiting covered docks. Even if considered, previous denials of covered docks indicate only the exercise of the then-existing ARC's or Board's discretion without any prohibitory effect on future covered docks. Furthermore, the extrinsic evidence on which Appellants' argument relies is also inadmissible because the Declaration is, as Appellants allege in their Amended Complaint (*see* Am. Compl., ¶ 49), unambiguous on its face. *See Town of McClellanville*, 345 S.C. at 623 (holding only after "the court decides the language [of a deed] is ambiguous . . . may [evidence] be admitted to show the intent of the parties"); *Mooney v. James*, 288 S.C. 466, 467, 343 S.E.2d 453 (Ct. App. 1986) ("One of the most valuable safeguards thrown around a deed is that parol evidence is not admissible to vary or contradict the terms of a written contract, and this applies in all its strictness to actions involving deeds.") (quoting *Scott v. Scott*, 216 S.C. 280, 293, 57 S.E.2d 470, 476 (1950)).

Even if the Declaration is found to be ambiguous, that ambiguity must, as a matter of law, be "resolved in favor of the free use of property" which, in this case, would favor construction of the Dyes' covered dock. *Town of McClellanville*, 345 S.C. at 622, 550 S.E.2d at 302. Similarly, any doubts regarding the creation of a general scheme of development "must be resolved in favor of the freedom of land from restriction." *Gambrell*, 312 S.C. at 358, 440 S.E.2d 393. Consequently, even if the evidence proffered by the Appellants were admissible, despite the parol

evidence rule, it would, at best, create an ambiguity or an uncertainty necessitating a resolution in favor of the Dyes.

iii. The 2016 "vote" was ineffective to prohibit covered docks.

Appellants contend that a vote of the Association's membership during the 2016 annual meeting was effective to "prohibit covered docks and lifts" within Shellmore. (Br. of Appellant, pp. 5-6.) However, Appellants failed to produce any evidence to the lower court—and there is none—that the 2016 "vote" met the Declaration's requirements for amending its restrictive covenants. Article VI, Section 3, of the Declaration contains the requirements for amendment and states, in pertinent part:

> Section 3. Amendment. . . . This Declaration may be amended . . . by an instrument signed by not less than seventy-five percent (75%) of the Lot Owners. Any amendment must be recorded.

(Dye MSJ, Ex. 1-B, p. 11.) Accordingly, for the Declaration to be amended to prohibit docks, seventy-five percent (75%) of the owners in Shellmore would have had to sign a recorded amendment to that effect. It remains undisputed—indeed, it is a matter of public record—that the Declaration has never been amended. (*See* Dye MSJ, Ex. 1, ¶ 4.) Without such an amendment, the purported 2016 "vote" has no restrictive effect on the Dyes' property. *See Town of McClellanville*, 345 S.C. 617, 550 S.E.2d 299 (refusing to restrict town from charging permit fees for public boat landing where there was no prohibition on permit fees in the restrictive covenants); *Taylor*, 332 S.C. at 4-5, 498 S.E.2d at 863-64 (refusing to enlarge a restrictive covenant beyond its plain language in order to prohibit the erection of mobile homes).

For these reasons, covered docks are not prohibited in Shellmore. Instead, they may be approved in the discretion of the Board or its designated ARC.

B. The Board was authorized under the plain and unambiguous language of the Declaration to designate the ARC as its representative for the consideration and approval of the Dyes' covered dock.

Appellants offer the specious argument that neither the Board nor the ARC had authority under the Declaration to approve covered docks in Shellmore. Instead, Appellants wrongly argue that only a vote of the Association's full membership can properly approve construction of a dock. In doing so, Appellants, ignore the clear and unambiguous language in the Declaration and misinterpret multiple state statutes.

The Declaration clearly and unambiguously vests authority for approval of all exterior structures in Shellmore with either the Board, or its designated ARC. In that regard, Article V, Section 1, states in pertinent part:

> No building, fence, wall or *other structure* shall be commenced, erected or maintained upon the Properties, nor shall *any exterior addition to or change or alteration* therein be made until the plans and specifications showing the nature, kind, shape, height, materials, and location of the same shall have been submitted to and approved in writing as to harmony of external design and location in relation to surrounding structures and topography by the *Board of Directors of the Association*, or by an *architectural committee* composed of three (3) or more representatives appointed by the Board. In the event said Board, or *its designated committee*, fails to approve or disapprove such design and location within thirty (30) days after said plans and specifications have been submitted to it, approval will not be required and this Article will be deemed to have been fully complied with.

(Dye MSJ, Ex. 1-B, p. 8 (emphasis added).) Thus, the Declaration plainly and unmistakably grants the Board the authority to approve or disapprove of any "structure" in Shellmore or to designate an ARC with the same power. *Id.* Further down in Article V, Section 8, of the Declaration specifically addresses the construction of docks within the Shellmore community:

> Section 8. Boat Houses, Docks, etc. No boat houses, docks, piers, or wharves shall be constructed on any lot without first obtaining the written approval of the Association, or its designated representative.

Ex. 1-B, p. 11. Thus, the Declaration explicitly designates both "the Association" and "its designated representative" as entities with authority to approve the construction of docks in Shellmore. Reading Sections 1 and 8 of Article V together, reference to "the Association" in Section 8 plainly refers to "the Board" as referenced in Section 1. Similarly, the "designated representative" mentioned in Section 8 unmistakably refers to the "representatives" on the "designated" "architectural committee" as referenced in Section 1.

Appellants claim otherwise. They argue that reference to "the Association" in Article V, Section 8, refers to the membership of the Association, at large. Thus, according to Appellants, only a vote of the membership is valid to approve construction of a dock or to designate a representative with the same power. Appellants' argument, however, ignores that the "Association" is a defined term under the Declaration.

Article I, Section 1, of the Declaration defines "Association" as the corporate entity "Cape Romain Lookout Homeowners Association, Inc., its successors and assigns." (Dye MSJ, Ex. 1-B, p. 2.) In 1994, that corporation filed Articles of Amendment changing its name to the "Shellmore Homeowners Association, Inc." (Dye MSJ, Ex. 1-C.) Thus, it is the corporate HOA entity, and not the membership at large, which constitutes the "Association" under the Declaration.[8] In South Carolina, the control of a corporate entity—and, thus, the authority to act on its behalf—is vested in the entity's board of directors, not its membership or shareholders. *See* S.C. Code § 33-31-801

[8] When referring to the individual members of the HOA, the Declaration uses the term "Owner" which is defined in Article I, Section 2, as "the record owner . . . of a fee simple title to any Lot". (*See* Dye MSJ, Ex. 1-B, p. 2.) If the intent had been to require approval of docks by a vote of the owners, the drafter could have easily stated so but did not. *See Town of McClellanville,* 345 S.C. at 621, 550 S.E.2d 299 (upholding decision of Master in Equity refusing "to read restrictions into the deed which [the drafter] could have effortlessly written in itself"); *Taylor,* 332 S.C. at 5-6, 498 S.E.2d 862 (refusing to index minimum home value restriction in deed to inflation where grantor "could have easily done so" but did not). Indeed, other portions of the Declaration specifically require a vote of the owners in certain circumstances. For example, Article IV, Section 4, requires assent of two-thirds of the members for a special assessment. (Dye MSJ, Ex. 1-B, p. 6.) Instead, Article V, Section 8, of the Declaration refers to "the Association" which it defines as the HOA corporate entity and which, by statute, is controlled by the Board.

("Except as provided in this chapter . . . 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."); S.C. Code § 33-8-101 ("Unless otherwise provided . . . all corporate powers must be exercised by or under the authority of, and the business and affairs of a corporation must be managed under the direction of, a board of directors."); *see also Carolina First Corp. v. Whittle*, 343 S.C. 176, 185, 539 S.E.2d 402, 407 (Ct. App. 2000) ("In South Carolina, the authority to direct the business and affairs of a corporation is delegated to a board of directors, not the shareholders."). Thus, under the plain terms of the Declaration and pursuant to black letter law, the Board of Directors is authorized to approve or disapprove of docks either directly or through the appointment of an ARC as its designated representative.[9] There is no other reasonable interpretation of the Declaration.

C. The Board acted within its authority in designating the ARC and allowing it to approve the Dyes' covered dock.

Under the uncontroverted facts presented to the lower court, the Board exercised its authority under the Declaration to designate an ARC for the approval of docks in Shellmore.[10] The meeting minutes for the Association's 2019 annual meeting indicate that Michael Grooms and John Horres were appointed to the ARC at a meeting of the Board held on March 26, 2018. (*See* Dye MSJ, Ex. 1, ¶ 7, Ex. 1-E.) The Board subsequently solicited additional volunteers to serve on

[9] Furthermore, under Article V, Section 1, when the Board or the ARC to fails to timely respond to an approval request, "approval will not be required and this *Article* will be deemed to have been fully complied with." (Dye MSJ, Ex. 1-B, at p. 8 (emphasis added).) Thus, under the plain language of the Declaration, the same approval process required under Section 1 of Article V is extended to all of Article V—including Section 8 pertaining to docks. Because dock approvals fall under this same Article V, failure by the Board or the ARC to timely respond to a request for a dock approval would necessarily result in automatic approval of the dock plans under the terms of the Declaration.

[10] In their Verified Amended Complaint, Appellants offer the conclusory assertion that "[t]he Association has never designated a representative for the purpose of approving the items identified in Article V, Section 8 of the Declaration." (*See* Am. Compl. ¶ 20.) This assertion does not create a dispute of fact because it is inadmissible and because Appellants' definition of "Association" differs from that provided in the Declaration. As explained herein, Appellants define "Association" as the HOA's membership. This is contrary to the Declaration's definition of "Association" which refers to the HOA corporation. Using the Appellants' definition, their assertion is that the membership of the HOA has never voted to designate the ARC, or another entity, as its representative for approving docks. Respondents do not contest this fact. There is no dispute that the Board designated the ARC for this purpose. The remaining dispute is simply a legal question as to the Board's authority to act under the Declaration.

the ARC; however, only Bernard Bozzelli volunteered. (Dye MSJ, Ex. 1, ¶ 8, Ex. 1-F.) The Board unanimously approved Mr. Bozzelli's appointment to the ARC on February 14, 2020. (Dye MSJ, Ex. 1, ¶ 9, Ex. 1-G.) This ARC—composed of John Horres, Michael Grooms, and Bernard Bozzelli—voted to approve both the original and the revised proposed covered dock plans submitted by the Dyes. (Dye MSJ, Ex. 1, ¶¶ 11, 13, Ex. 1-H, Ex. 1-J.) Moreover, the Board explicitly and unanimously upheld the authority of the ARC as its designated representative for the approval of the Dyes' dock. *Id.* at ¶ 12; Ex. 1-I. Thus, the ARC was properly designated by the Board under the Declaration and properly acted to approve the Dyes' covered dock.

In addition to their arguments based on the Declaration, Appellants argue, incorrectly, that the appointment of the ARC by the Board was invalid under both the HOA Act and the Nonprofit Corporation Act. First, Appellants argue that "the architectural review committee has no authority because the Association never recorded any sort of instrument giving it power over homeowners' property, which would have been required by the HOA Act." (Br. of App., pp. 5-6, fn. 3.) Appellants' argument fails on both the law and the facts. The undisputed facts in this case indicate that the Declaration, giving the Board authority to designate the ARC as its representative for the approval of structures including docks, was recorded. Appellants appear to suggest that an additional resolution of the Board explicitly designating the ARC should have been recorded. However, there is no such requirement under the HOA Act. Indeed, the HOA Act only requires the recording of "governing documents" defined as the "declaration, master deeds, or bylaws, or any amendments" and "rules, regulations, and amendments". *See* S.C. Code § 27-30-130. There is no statutory requirement that an HOA record a designation of an architectural committee as its representative. Appellants' proposed reading of the HOA Act would require recording of every decision of every HOA board throughout the state and deed recording offices would be overrun

with unnecessary filings. The statute is not so broad. Accordingly, Appellants' argument based on the HOA Act fails.

Second, Appellants argue that the ARC's appointment is invalid under the South Carolina Nonprofit Corporation Act because the ARC members are not Board members. (Br. of App., pp. 5-6, fn. 3.) Appellants would point to S.C. Code § 33-31-825(a) which allows the Board of Directors to create "committees of the board and appoint members of the board to serve on them." S.C. Code § 33-31-825(a). Under S.C. Code § 33-31-801(c), however, "[t]he articles" or, in the case of a homeowners association, the restrictive covenants, "may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board." S.C. Code § 33-31-801(c); *see also Seabrook Island Prop. Owners Ass'n v. Marshland Tr., Inc.*, 358 S.C. 655, 663, 596 S.E.2d 380, 384 (Ct. App. 2004) (recognizing architectural review board's authority granted by restrictive covenants); 17 S.C. Jur. Covenants § 88 ("Restrictive covenants often authorize the creation of a homeowners' association, usually in the form of a not-for-profit corporation, and grant it authority to manage common areas, make regulations, levy assessments, and other similar privileges."). The Declaration plainly authorizes the Board of Directors to appoint non-board members to the ARC and, thus, the Board's appointment of the ARC complies with S.C. Code § 33-31-801(c) of the South Carolina Nonprofit Corporation Act. Appellants' argument to the contrary is without merit.

Finally, Appellants argue that the Board acted in bad faith in its appointment of the ARC because, according to Appellants, Chakides' personal desire for a covered dock was an undisclosed conflict of interest. (Br. of App., p. 18, fn. 9.) Appellants' arguments are without merit. It is undisputed that Defendant Chakides has no ownership interest in the Dyes' property. Thus, Respondent Chakides had no direct interest in the approval or disapproval of the Dyes' dock by

the ARC. Moreover, Appellants submitted no evidence that Chakides was involved in any entity standing to benefit from the approval of the Dyes' dock. Thus, under S.C. Code § 33-31-831, there is no conceivable conflict of interest which would have precluded Chakides—regardless of his personal preferences concerning covered docks—from participating in the vote to appoint members to the ARC or to ratify the ARC's approval of the Dyes' dock. Mr. Chakides' personal desire for approval of his own covered dock is simply not a conflict of interest under the Nonprofit Corporation Act which would disqualify him from voting to appoint members of the ARC. Taken to its inevitable conclusion, Appellants' position would necessitate the disqualification of all association board members from voting on any matters regarding their own neighborhoods because the board members, as owners within the neighborhood, would, by definition, have varying personal interests in the outcome. Regardless, the undisputed evidence submitted in this case indicates that Mr. Chakides only participated in the appointment of a single member of the ARC and that ARC member was approved unanimously by the Shellmore Board. (Dyes' MSJ, Ex. 1, ¶¶ 7-9, Ex. 1-E, Ex. 1-F, Ex. 1-G.). Mr. Chakides' vote on the matter made no difference. Thus, Appellants' conclusory allegations of impropriety are unsupported by either the law or the record.

Consequently, based on the undisputed factual record, the Board acted within its authority granted under the Declaration.

D. Because the Board acted within its authority granted under the Declaration, the business judgment rule applies.

The application of the business judgment rule in this context comports with the holdings of *O'Shea* and other cases cited above. Appellants are correct that the business judgment rule applies to *intra vires* but not *ultra vires* acts. *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). In the present context, however, the line between what constitutes *intra vires* versus *ultra vires* acts is delineated by the restrictive covenants in the

Declaration. So long as the Board acted within its authority granted by the Declaration, the business judgment rule prevents judicial second-guessing of the Board's actions absent a showing of "bad faith, dishonesty, or incompetence". *Id.*, 415 S.C. at 270-71, 781 S.E.2d at 910-11 ("The business judgment rule applies to disputes between directors of a homeowners' association and aggrieved homeowners, and as the court of appeals has stated, 'the conduct of the directors should be judged by the business judgment rule and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action.'") (quoting *Goddard*, 310 S.C. at 414, 426 S.E.2d at 832). Thus, application of the business judgment rule is ascertainable by reference to the restrictive covenants which is precisely the context in which *O'Shea* and *Walbeck* hold there is no fiduciary duty because the covenants control.

In their brief, Appellants draw attention to their conclusory allegations in their verified complaint and submitted affidavit that the Board's acts were *ultra vires* and in bad faith to avoid application of the business judgment rule. (Br. of App., p. 18 n. 9.) Whether the Board's acts were *intra vires* or *ultra vires*, can be ascertained only through the interpretation of the Declaration which is a legal question. *See Town of McClellanville,* 345 S.C. at 623, 550 S.E.2d 299 ("[T]he construction of a clear and unambiguous deed is a question of law for the court."). Thus, any allegations presented by Appellants on this matter are inadmissible and should be disregarded. *See Dawkins v. Fields*, 354 S.C. 58, 65, 580 S.E.2d 433 (2003) (upholding trial court's refusal to consider affidavit offering legal conclusions in opposing summary judgment because it impermissibly invaded the exclusive province of the trial court). Similarly, Appellants' allegations of bad faith are premised on claimed violations of the Declaration, statute statutes, and applicable conflict of interest rules. Because those issues are properly decided by reference to the Declaration and state statute, Appellants conclusory legal claims are properly excluded and should be

disregarded. Moreover, as demonstrated above, the Board acted within the scope of its authority under the Declaration, and, thus, did not act in bad faith as a matter of law. *Adams*, 320 S.C. at 277, 465 S.E.2d at 85 ("[T]here is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do.").

Because the Board's and Chakides' actions were *intra vires*, the business judgment rule applies and the Master's grant of summary judgment against Appellants' claims for breach of fiduciary duty should be affirmed on this additional sustaining ground.

E. The "facts" submitted by Appellants were not properly admissible evidence and are properly disregarded on summary judgment and this Appeal.

Appellants "evidentiary" submissions are not limited to "facts as would be admissible in evidence" as is required under Rule 56, SCRCP. Rather, they contain an abundance of conclusory allegations, legal opinions, argument, inadmissible hearsay, and other irrelevant, inadmissible material. The inadmissible material presented by these submissions was properly disregarded by the lower court and should be disregarded on this Appeal. *See Dawkins*, 354 S.C. at 65, 580 S.E.2d 433 (upholding trial court's refusal to consider affidavit offering legal conclusions in opposing summary judgment because it impermissibly invaded the exclusive province of the trial court); *id.*, 354 S.C. at 68 ("Likewise, because of the abundance of conclusory allegations found in respondents' verified complaint, it simply is not an appropriate substitute for an affidavit."); *see also* SCRCP 56 (requiring that affidavits "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."); 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 3d § 2738 (1998) ("Few pleadings will satisfy these requirements, even when verified."). The remaining factual allegations of the verified

pleading and the affidavit were not and are not in dispute and, thus, summary judgment was properly found in the Dyes' favor.

As noted above, Appellants' verified Amended Complaint is riddled with legal conclusions and other inadmissible testimony. Relevant portions of the verified pleading are addressed below:

- Concerning Paragraphs 1 and 10, whether Appellant Walter B. Wall, Jr., is an owner of property within Shellmore is a legal conclusion to be assessed based on the relevant deed to the property and is not admissible factual testimony.
- Paragraphs 5, 6, and 7 contain legal conclusions regarding jurisdiction and venue in this case.
- Concerning Paragraph 8, whether the Shellmore community "prides itself . . . on the broad, seeping views that its homeowners have" is speculation concerning the collective state of mind of the community and not based on personal knowledge.
- Concerning Paragraphs 9, 11, and 22, Appellants failed to show adequate foundation that they have personal knowledge as to whether there has ever been a covered dock in Shellmore since the inception of the community in 1975.
- Concerning Paragraphs 16, 17, and 32, the determination of whether a violation of the HOA Act has occurred or the legal enforceability of the Association's governing documents are legal questions—not factual testimony.
- Concerning Paragraphs 18, 19, 24, 28, 29, 30, 33, and 43, the interpretation of the terms of the Declaration is a legal conclusion and not proper factual testimony.
- Concerning Paragraphs 20, 21, 27, 31, 35, 36, 39, 41, 42, and 47, the validity of acts carried out by the Association, its Board, or the ARC and the authority of those entities under the Declaration is a question of law not proper factual testimony.
- Concerning Paragraph 26, the assertion that "the majority of homeowners within Shellmore are opposed to covered docks", without more, is either speculative or only supportable through hearsay.
- Concerning Paragraph 34, the interpretation and application of state statutes are matters of law not proper factual testimony.
- Concerning Paragraph 38, the interpretation and application of conflict of interest rules either in the Association's governing documents or state statute is a matter of law and not proper factual testimony.
- Concerning Paragraphs 49, 50, 51, 52, 54, 55, 56, 57, 58, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 73, 74, 75, 76, 78, 79, 80, 81, 82, 83, 85, 86, 87, 88, 89, 90, 91, 92, and 93, Plaintiffs are merely reciting the relief they seek, various legal conclusions, and conclusory opinions regarding the merits of their claims.

(Am. Compl.) As for the potentially admissible factual allegations of the pleading, the Appellants state merely that the Declaration was recorded (Paragraph 12), the Dyes' plan to build a covered dock (Paragraph 26), the ARC approved the Dyes' covered dock (Paragraph 40), and the

Appellants do not like the Dyes' covered dock (Paragraph 92). None of these facts were or are disputed in this case and none have any material effect on the outcome. As a result, Appellants' verified pleading failed to raise any dispute of any material fact which would have precluded summary judgment in this case.

Likewise, the numerous legal opinions, conclusory statements, and hearsay statements offered in Mr. Fritz's affidavit were improper and not admissible testimony. *Dawkins*, 354 S.C. 58, 65, 580 S.E.2d 433; 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 3d § 2738 (1998) ("ultimate or conclusory facts and conclusions of law, as well as statements made on . . . 'information and belief,' cannot be utilized on a summary-judgment motion"). The relevant portions of Mr. Fritz's affidavit are addressed below:

- Concerning Paragraphs 4, 11, 14, 15, 17, 18, 20, 23, and 26, Mr. Fritz's testimony is reliant on and/or reiterates inadmissible hearsay.
- Concerning Paragraph 7, Mr. Fritz has failed to show adequate foundation that he has personal knowledge as to whether there has ever been a covered dock in Shellmore since the inception of the community in 1975.
- Concerning Paragraph 7, the validity of acts carried out by the Association, its Board, or the ARC and the authority of those entities under the Declaration is a question of law and not proper factual testimony.
- Concerning Paragraph 11, the interpretation of the terms of the Declaration is a legal conclusion and not proper factual testimony.
- Concerning Paragraph 11, Mr. Fritz's testimony regarding the intent or state of mind of his neighbors is speculation and not based on personal knowledge.
- Concerning Paragraphs 12, 14, and 16, Mr. Fritz's supposed testimony is made "upon information and belief" which does not meet the personal knowledge requirement for an affidavit under Rule 56(e), SCRCP.
- Concerning Paragraph 13, Mr. Fritz has failed to provide adequate foundation to support his testimony that Mr. Dye gave "no notice to his neighbors."
- Concerning Paragraphs 14, 15, 20, 21, and 25, Mr. Fritz is merely reciting personal opinions, argument, and legal conclusions and not setting out any admissible factual testimony.

As for the potentially admissible factual allegations of Mr. Fritz's first affidavit, he states merely that:

- He lives in Shellmore (Paragraphs 2, 3).

- His residence was purchased nineteen years ago (Paragraph 4).
- Mr. Fritz has served on the Association's Board and ARC and he believes he has an understanding of the relevant governing documents (Paragraph 5).
- During the period of time Mr. Fritz served on the Board and the ARC, neither entity approved a covered dock (Paragraph 6).
- Mr. Fritz's dock was destroyed by Hurricane Gaston in 2004 and he submitted plans for a new dock which did not have a cover and those plans were approved (Paragraph 7).
- While Mr. Fritz has lived in Shellmore, special association meetings have been called.
- A prior vote of a majority of the Association's members disfavored covered docks (Paragraphs 9, 10).
- The Dyes applied to the ARC, not the Board, for approval of their covered dock (Paragraph 11).
- Mr. Fritz appealed OCRM's approval of the Dyes' covered dock (Paragraph 19).
- Mr. Chakides told Mr. Fritz that he submitted plans for a covered dock and another neighbor had submitted plans for a boat lift (Paragraph 22).
- As of the signing of his affidavit, no Association meeting had been called (Paragraph 24).

(Wall MSJ, Ex. 3.) None of these facts were or are disputed in this case. Moreover, none of these facts, would have any material effect on the outcome of the case. As a result, Mr. Fritz's affidavit does not raise any dispute of any material fact which would have precluded summary judgment in this case

F. Appellants failed to properly request additional time for discovery from the lower court.

At several points in their brief, Appellants complain of the lack of discovery prior to the parties' submission of cross motions for summary judgment in the lower court. (Br. of App., pp. 9, 19-20.) Appellants failed to properly raise this issue with the lower court pursuant to Rule 56(f), SCRCP, which states:

> **When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Rule 56(f), SCRCP. Appellants did not submit any affidavits to the lower court stating reasons why they could not marshal sufficient factual evidence to oppose Respondents' motions for summary judgment. Appellants also did not submit any affidavits to the lower court stating reasons why additional discovery was needed. Appellants' complaints that additional discovery was needed are improperly raised for the first time on appeal and should be dismissed. *See Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 480, 465 S.E.2d 765, 771 (Ct. App. 1995) (affirming summary judgment where the record disclosed opposing party made no formal motion for a continuance or pointed out in any specific manner how it would be prejudiced by its inability to conduct discovery under Rule 56(f), SCRCP); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

III. The Master-In-Equity Correctly Denied Appellants' Civil Conspiracy Claim Based on a Finding that Appellants Failed to Present Evidence of Special Damages.

A. The *Paradis* decision is prospective only.

Recently, the Supreme Court of South Carolina decided *Paradis v. Charleston County School District*, ___ S.E.2d ___, No. 2018-002025, 2021 WL 1992245 (S.C. May 19, 2021), which overturned forty years of precedent relating to the elements of civil conspiracy claims in South Carolina. Appellants rely on *Paradis* in arguing that a showing of "special damages" is not required. However, the *Paradis* opinion was designated as being prospective only. *Id.*, 2021 WL 1992245, at *7 ("Any other cases on appeal that have already been tried under the *Todd* framework shall be decided using the *Todd* analysis."). Because this case was already on appeal at the time

Paradis was decided, the decision is inapplicable to this case and this Appeal should be decided under the previous framework.

B. Appellants failed to show special damages as required for their civil conspiracy claim under the pre-*Paradis* framework.

Under the pre-*Paradis* framework, the elements of a civil conspiracy in South Carolina were "(1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages." *Pye v. Estate of Fox*, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). Under that framework, "when a party wishes to assert multiple causes of action, including civil conspiracy, it must allege acts in furtherance of the conspiracy and special damages that are *separate and independent of the other acts and damages that underlie the other causes of action within the same complaint*." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 118, 682 S.E.2d 871, 876 (Ct. App. 2009) (emphasis added); *see also Pye*, 369 S.C. 555, 568, 633 S.E.2d 505, 511 ("Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in the other causes of action.").

Here, Appellants failed to show special damages under the pre-*Paradis* framework. In their Amended Complaint, Appellants recite various alleged "special damages". (Am. Compl., ¶ 81.) However, each allegation of damages is simply a reworded reiteration of damages claimed in their other causes of action related to an alleged breach of the restrictive covenants. For instance, Appellants allege that "the covenants . . . have been undermined". (Am. Compl., ¶ 81.a.) This is simply another way to allege that the covenants have been breached. Similarly, Appellants allege that their "confidence that the Association will enforce its rules . . . has been destroyed". (Am. Compl., ¶ 81.e.) Again, Appellants have reworded and reiterated their allegations from their breach of restrictive covenants claim. Appellants' other allegations of "special damages" are similar rewordings of various ways to allege that Appellants claim Respondents breached the covenants.

None of these alleged damages are separate or distinguishable from those asserted in the other causes of action. Indeed, all of Appellants' claimed damages flow from the approval and construction of the Dyes' covered dock. These damages were the subject of, and inseparable from, Appellants' other claims for breach of the covenants. There are no special damages. The Master's decision should be affirmed.

IV. The Master-In-Equity's Decision Granting Summary Judgment Against Appellants on Their Civil Conspiracy Claim Should Be Upheld Based on Additional Sustaining Grounds Under Both the Pre- and Post-*Paradis* Framework.

A. Appellants' civil conspiracy claim fails for additional sustaining grounds under the pre-*Paradis* framework.

Under the pre-*Paradis* framework, "[t]he 'essential consideration' in civil conspiracy 'is . . . whether the primary purpose or object of the combination is to injure the plaintiff.'" *Pye v. Estate of Fox*, 369 S.C. at 566-67, 633 S.E.2d at 511 (quoting *Lee v. Chesterfield General Hosp., Inc.,* 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct.App.1986)). Here, Appellants' own allegations defeat their claim for civil conspiracy. Instead of alleging an intent to injure the Appellants, Appellants affirmatively alleged that the primary purpose of the alleged conspiracy was for Chakides and other members of the Association "to assert their personal agendas and wishes" and "to obtain covered docks of their own". (*See* Am. Compl., ¶ 79, 82.) Thus, Appellants' own allegations defeat the second element of their civil conspiracy claim. Furthermore, Appellants did not produce any evidence—apart from their own unsupported speculation—of any agreement between the Respondents for the purpose of injuring the Appellants. Indeed, the Dyes' "only desire is to construct and enjoy [their] covered dock." (Dyes' MSJ, Ex. 2, ¶ 21.) Consequently, Appellants failed to show admissible facts indicating that the Respondents' primary purpose or object of the

alleged conspiracy was to injure the Appellants. The lower court's decision should be affirmed on this additional sustaining ground.

Moreover, as demonstrated above, the actions complained of—the Board's appointment of the ARC and the ARC's subsequent approval of the Dyes' dock—were carried out exclusively by the Association, its Board, and the duly appointed ARC and were all within the scope of authority set out by the Declaration. As such, there can be no conspiracy. *See McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 565, 626 S.E.2d 884, 887 (2006) ("[W]e hold that no conspiracy can exist if the conduct challenged is a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment."). For this additional reason, Appellants' claim for civil conspiracy was properly dismissed on summary judgment.

B. Even under the elements set out in *Paradis*, Appellants' civil conspiracy claim fails.

Assuming, *arguendo*, the *Paradis* decision applies to the current appeal, Appellants' claim for civil conspiracy still fails. In *Paradis*, the Supreme Court held: "a plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff." *Paradis*, 2021 WL 1992245, at *6. Based on the record, Appellants cannot establish these elements.

First, the record is devoid of any admissible evidence—only unsupported speculation—indicating, or tending to indicate, any agreement between Respondents Dye, Chakides, and the Association.[11] *See Gordon v. Busbee*, 397 S.C. 119, 136, 723 S.E.2d 822, 831 (Ct. App. 2012)

[11] This argument is equally applicable under the pre-*Paradis* framework.

(affirming directed verdict on civil conspiracy claim where the record contained no evidence, only speculation, that any of the parties conspired with each other). Appellants' sole evidence in this regard is their conclusory and speculative assertion in their verified Amended Complaint that Mr. Dye and Mr. Chakides "conspired to circumvent the Declaration". (Am. Compl., ¶ 78.) The submitted affidavit of Mr. Fritz contains a similar conclusory and inadmissible allegation made "[u]pon information and belief". (Wall MSJ, Ex. 3, ¶ 12.) These allegations are insufficient to withstand a summary judgment motion. *Dawkins*, 354 S.C. 58, 65, 580 S.E.2d 433; 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 3d § 2738 (1998) ("ultimate or conclusory facts and conclusions of law, as well as statements made on . . . 'information and belief,' cannot be utilized on a summary-judgment motion").

Moreover, as argued above, the actions Appellants challenge—the appointment of the ARC and the ARC's approval of the Dyes' covered dock—were carried out exclusively by the Association, its Board, and the duly appointed ARC and were all within the scope of authority set out by the Declaration. As such, there can be no conspiracy. *See McMillan*, 367 S.C. at 565, 626 S.E.2d at 887 (2006) ("[W]e hold that no conspiracy can exist if the conduct challenged is a single act by a single corporation acting exclusively through its own directors, officers, and employees, each acting within the scope of his employment.").

Next, as discussed in detail above, the Board's appointment of the ARC and its members, the Dyes' submission of their dock plans to the ARC for approval, and the ARC's approval of the Dyes' covered dock were proper and authorized actions under the Declaration. There are no unlawful acts or unlawful means upon which to base a claim for civil conspiracy.

Finally, Appellants cannot show resulting damages. There is no express prohibition on covered docks in the language of the Declaration. Thus, at the time the Appellants purchased their

property, there was a future possibility that a covered dock would be approved and constructed. That such a possibility is now reality does not constitute compensable damages.

CONCLUSION

For the reasons stated above, Respondents Jonathan and Shaun Dye respectfully request that this Court affirm the Master-In-Equity's Order granting summary judgment in their favor on Appellants' claims for breach of fiduciary duty and civil conspiracy.

Respectfully submitted,

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