THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough, Master-in-Equity

Circuit Court Case No. 2020-CP-10-04185
Court of Appeals Case No. 2020-001583

Bonnie Wall, individually and derivatively,
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.

APPELLANTS' REPLY BRIEF

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Respondents' arguments are, tellingly, very complicated—and they are fact-intensive. But this appeal of a summary judgment order is really very simple. The Order on appeal, granting summary judgment in favor of the Respondents, is short:

> Defendant's summary judgment motion as to Plaintiff's claims for Breach of Fiduciary Duty and Civil Conspiracy are GRANTED as [1] there is no fiduciary duty owed by the Directors to the Plaintiff and [2] no evidence of special damages has been shown by the Plaintiff to constitute a civil conspiracy.

(Order, R. p. 10). In this single, conclusory sentence, the lower court found as a matter of law that (1) the directors of a nonprofit corporation owe no fiduciary duty to the corporation or to its members (although the Walls filed both individual and derivative claims), and (2) that there was "no evidence of special damages."

The Walls' appeal is as straightforward as the order itself: the lower court must be reversed because it made an error of law on fiduciary duty, and because it overlooked evidence precluding summary judgment. Respondents' Brief unleashes a legion of disputed facts, which Respondents proclaim somehow make summary judgment proper. Their argument is wrong under the rules, the law, and the facts.

ARGUMENT IN REPLY

As Respondents say: context matters. The context of this appeal is a grant of summary judgment by the Master-in-Equity in favor of Respondents and against the Walls, which was ordered less than 45 days after the complaint was filed, and before any discovery took place. The context of this case is that the evidence, and all reasonable inferences, were supposed to be taken in the light most favorable to the Walls. The

context of this case is that there were not any "undisputed facts," as the Respondents wrongly assert in their brief (while citing to their own allegations, but not the Walls'),[1] because **all of the facts were in dispute** at the outset of litigation.

Notably, the context of this case is that the Walls had filed two verified complaints, numerous exhibits, and a supporting affidavit, attesting to and evidencing the following facts:

- The members of Shellmore Homeowners' Association had voted to forbid covered docks in the community.
- Respondent Director John Chakides, individually, wanted a covered dock.
- Respondents Jonathan and Shaun Dye wanted a covered dock.
- The governing documents of the Association require prior written approval by the Association of dock plans, before construction may commence.
- The Dyes' dock plans were never reviewed.
- The Dyes did not have valid approval for their covered dock, and they knew it.
- The Dyes had begun construction of their covered dock, without approval.
- The Directors of the Association were complicit in helping the Dyes to circumvent the governing documents and the will of the corporation to forbid covered docks.
- Certain Directors were themselves deliberately circumventing the governing documents and the will of the corporation to forbid covered docks.
- The purported "architectural review committee" was invalid and had no authority.

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[1] This Court should note that the Respondents cite almost exclusively to facts alleged by the Respondents themselves, peppering their brief with self-serving references to allegations made by Respondent Jonathan Dye. If, when moving for summary judgment, you need to cite to your own allegations rather than those of the opposing party, then chances are good there is a dispute of fact and summary judgment is not proper.

- Certain Directors had conflicts of interest.

- The members of the purported "architectural review committee" were appointed by a conflicted Director motivated by his own desire to build a covered dock on his own property, despite the vote of the corporation to forbid covered docks.

- Another Director described the purported "architectural review committee" at Shellmore as "out of control" and acting improperly.

- Certain Directors were acting in bad faith.

- The Dyes bought the votes of two out of three Directors.

- The Directors were acting *ultra vires*, including by failing to comply with the Nonprofit Act, failing to comply with the HOA Act, actively seeking to circumvent the governing documents, acting in bad faith, and disregarding the expressed will of the corporation to forbid covered docks.

- The Dyes and a Director conspired, unlawfully and in breach of the covenants, to harm the Walls and their property.

- The conspiracy caused the Walls special damages, in numerous regards.

See Verified Amended Complaint and its Exhibits 1-6 (R. pp. 13-61); Motion for Temporary Injunction and Memorandum in Support, and Exhibits (R. pp. 13-61); Affidavit of H. Fritz (R. p. 163); Ex. 3 to Dye MSJ (R. pp. 334, 337).

Those are the facts for which there was evidence when the Master wrongly granted summary judgment to the Respondents. Those facts are the context through which the Court should evaluate this appeal, to determine whether the Master erred.

I. Directors of a nonprofit corporation owe fiduciary duties to the corporation and to its members.

The Master-in-Equity's decision, finding as a matter of law that there is no fiduciary duty owed by directors of a nonprofit corporation,[2] is a radical departure from South Carolina law. Nonprofit corporations in South Carolina include hospitals, churches, clubs, charities, schools, foundations, and, yes, homeowners' associations. As their name implies, nonprofit corporations are organized—not to make a business profit—but for a collective social or public benefit.[3] Members of nonprofit corporations invest time, property, faith, and money in the organization, in trust that the organization will use those resources to further the collective purpose. In return, the directors of nonprofit corporations are unequivocally charged with the highest duties of loyalty and good faith in the management of that purpose and the affairs of the corporation.

Respondents comb the common law, attempting to carve out a complicated exception for homeowners' associations, and to differentiate, gymnastically, between duties in contract versus those in tort. But it is much more simple than that. The fiduciary

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[2] Significantly, the Master's Order is not qualified in any way. Respondents attempt to paint the order as nuanced, but the order on appeal is a simple, outright holding that "there is no fiduciary duty owed by the Directors to the Plaintiff [individually or derivatively]." The Walls argued that the Directors had obligations as fiduciaries to act fairly, in good faith, without conflict, in the best interest of the Association and for the benefit of the Association, and to act within the scope of their authority under the covenants (and South Carolina law), rather than actively seeking to circumvent it and failing to adhere to its provisions. *See*, *e.g.*, R. pp. 25-28, 130-132, 143-146.

[3] "'Corporation' means public benefit, mutual benefit, and religious corporation." S.C. Code § 33-31-140, Definitions. The Shellmore Homeowners' Association is a mutual benefit corporation.

duty owed by directors of nonprofit corporations is (among other things) an express, statutory duty established by the Legislature.[4]

A. Homeowners' Associations which have elected to organize as nonprofit corporations are bound by South Carolina's Nonprofit Corporation Act and the fiduciary duties the Act imposes.

It is a question of law for the Court as to whether a fiduciary relationship exists. But, in the case of directors of nonprofit corporations, that question of law is answered by the Legislature. The Legislature codified the existence of the fiduciary relationship between directors, the corporation, and its members. The Nonprofit Corporation Act is clear that a director has a fiduciary duty of loyalty to the corporation, and to its members:

> (b) Unless the articles provide otherwise, no director of the corporation is personally liable for monetary damages for breach of any duty to the corporation or members. However, this provision shall not eliminate or limit the liability of a director:
>
> (1) for any breach of the director's duty of loyalty to the corporation or its members;
>
> (2) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law;
>
> (3) for any transaction from which a director derived an improper personal benefit; or
>
> (4) under Sections 33-31-831 through 33-31-833.

S.C. Code § 33-31-202 (emphasis added). The Nonprofit Corporation Act goes on to distinctly set forth the "General standards for directors," requiring them to act "in good

[4] *See* Trans. pp. 54-56, "In fact, Board member's fiduciary duty to the organization has been codified by the Legislature in the South Carolina Nonprofit Corporation Act, which requires—it sets for Board members a codified fiduciary duty to act in good faith and in the best interest of the corporation." (R. p. 433-434).

faith" and "in the best interests of the corporation." S.C. Code § 33-31-830. The Act expressly itemizes additional duties of loyalty, prohibiting directors from engaging in conflict-of-interest transactions.[5]

The Shellmore Homeowners' Association, Inc. organized itself as a nonprofit corporation and it is bound by the Act's provisions. S.C. Code § 33-31-1701. The Nonprofit Corporation Act is clear that its fiduciary obligations cannot be eliminated by the corporation's governing documents. S.C. Code § 33-31-202; S.C. Code § 33-31-206 ("The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation") (emphasis added). As a matter of statutory law, the Directors of Shellmore Homeowners' Association are fiduciaries. They are bound to act within the scope of their authority, putting the corporation's and its members' interests ahead of their own. They have a duty to apply the governing documents in good faith, without conflict, and in the best interest of the corporation. This Court should reverse the Master-in-Equity's erroneous decision that no duty exists.

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[5] In this case, promptly after the Walls filed suit, two out of three Directors of the corporation entered into voting and proxy agreements with the Dyes and their attorney, in which the Directors contracted to vote in favor of the Dyes' dock plans. (R. pp. 334, 337). These voting agreements, which are contracts requiring consideration, gave the Directors a financial stake in the outcome of the vote, and they constituted an insurmountable conflict of interest for the directors. (*See* R. pp. 433-435). **In other words, the Dyes bought the votes of two out of three Directors.** The Walls also demonstrated that Director Chakides had a property interest in supporting the covered dock, due to his own pending application for a covered dock, despite his knowledge that the corporation had previously voted to forbid them. (*See* R. pp. 21, 50, 163-165).

B. There is no common law exemption for incorporated homeowners' associations.

The Respondents argue that the common law does not require directors of homeowners' associations to act as fiduciaries, allegedly because their duties are strictly contractual and found solely within the governing documents. This is wrong for numerous reasons. First, it is wrong because the Nonprofit Corporation Act is a part of the contract. *Catawba Indian Tribe v. State*, 372 S.C. 519,642 S.E.2d 751, 756 (2007) ("[I]t is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract."). Put simply, because the governing documents integrate South Carolina law, the contract itself imposes on the directors the obligation to act as fiduciaries.

A second reason that this Court should reject the Respondents' argument about contractual duties to the exclusion of all others is because it is nonsensical. Respondents' argument is tantamount to saying that a trustee does not have fiduciary obligations to beneficiaries because there is a trust instrument, or that a lawyer does not have fiduciary obligations to his client, outside of his representation agreement. But fiduciary duties go beyond the contract: **they are relational**. The law is clear that when a person stands in a position of special trust with relation to another's property, or money, then a fiduciary relationship arises. *Walbeck v. The I'On Co.*, 426 S.C. 494, 827 S.E.2d 348 (Ct. App. 2018) ("A confidential or fiduciary relationship exists when one reposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence.").

The cases the Respondents cite are not on point, and none involve the issue of whether the directors of a homeowners' association organized pursuant to the Nonprofit Corporation Act have fiduciary duties. *O'Shea v. Lesser*, which was wrongly relied on by the Master for the soundbite that "We have never imposed the high standard of fiduciary duty on planned community organizations . . .", pertained to an unincorporated group appointed by a for-profit developer, both of which were unconstrained by the Legislature's provisions on nonprofits. *O'Shea v. Lesser*, 308 S.C. 10, 416 S.E.2d 629 (1992) (further noting in its footnote that the developer had reserved to itself "sole and uncontrolled discretion" to approve proposed construction plans). The *Cedar Cove* case does not even involve the question of fiduciary duties and it is not remotely applicable to the issue on appeal.[6] *Cedar Cove Homeowners Ass'n v. DiPietro*, 628 S.E.2d 284 (Ct. App. 2006).

Incorrectly citing *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, Respondents contend that *Cedar Cove* and *Walbeck* involve an application of the economic loss rule, which excludes tort liability in relationships governed by contract. 320 S.C. 49, 463 S.E.2d 85 (1995) (Initial Brief of Respondents, p. 10). But that is not a complete or accurate description of the holding of *Griffin Plumbing & Heating*. Indeed—and this is exactly on point in the Walls' present appeal—the Supreme Court

[6] *Cedar Cove* involves the question of whether the common law of trespass could trump the unique provisions of the express reciprocal covenants at issue in that case.

found that a fiduciary relationship does give rise to a tort action, in addition to one in contract:

> In most instances, a negligence action will not lie when the parties are in privity of contract. **When, however, there is a special relationship between the alleged tortfeasor and the injured party not arising in contract, the breach of that duty of care will support a tort action.** [internal citations omitted] ("special relationship" creates duty of care outside terms of contract). These concepts are not new. [citations omitted]. Rather, we restate the traditional concepts in modern terms.
>
> Applying these concepts to professional liability, we have long held lawyers and accountants liable in tort for malpractice. *See, e.g., Lloyd v. Walters*, 276 S.C. 223, 277 S.E.2d 888 (1981) (attorney liable for economic loss to corporate shareholder when attorney breached duty to corporation); *Georganne Apparel v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct.App.1991) (accountant malpractice dismissed for failure to prosecute). In many cases, the lawyer or the accountant will be in privity of contract with the plaintiff. These professionals, however, owe a duty to the client and sometimes to third parties which arises separate and distinct from the contract for services. [citations omitted].

Tommy L. Griffin Plumbing & Heating Co., at 55, 463 S.E.2d at 88-89 (emphasis added). Similarly, the directors of a homeowners' association owe a duty to the corporation and its members, which arises separately from the governing documents.

Even without the Nonprofit Corporation Act's statutory provisions, it just makes sense to charge homeowners' associations with fiduciary duties. Planned developments like Shellmore link numerous properties and people together, for the common benefit. It is understood that there is inherent value in consistency of design among structures in a subdivision. To appreciate the concept, this Court can meander through virtually any recent "cookie-cutter" design neighborhood, or through historic Charleston, South of Broad Street, to witness communities bound to adhere to design standards, paint colors,

construction plans, and landscaping—which uniformity increases the value of each of the individual properties. Homeowners' associations throughout South Carolina are entrusted with maintaining architectural control, managing community funds, and enforcing rules and standards. These are powers that can be abused, and sometimes are. Where those charged with maintaining architectural controls disregard the covenants, or fail to apply them, or seek to circumvent them, it is to the detriment of every property owner who buys trusting the neighborhood's reciprocal covenants will be enforced. (*See* R. p. 37, Shellmore Declaration of Covenants) ("the following . . . covenants . . . are for the purpose of protecting the value and desirability of, and shall run with, the real property . . . and shall inure to the benefit of each owner thereof.").

Finally, Respondents' argument is wrong (particularly on summary judgment) because the evidence shows that directors of the Shellmore Homeowners' Association were breaching the law and the governing documents, and that they were actively seeking to circumvent them.[7] As one example, South Carolina recently enacted the Homeowners' Association Act, which requires such associations to have recorded with the register of deeds their governing documents by January 10, 2019. The purpose of this

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[7] The facts here are myriad, and summary judgment was not proper. For example:

- The evidence showed a vote by the corporation to forbid covered docks, making the question of whether a covered dock is in the best interest of the corporation at the very least a question of fact. (R. p. 50).
- The evidence showed that the Respondents (the Dyes) bought the votes of some directors, raising a question of fact as to whether they were conflicted. (R. pp. 334, 337).
- The evidence showed that throughout its 50-year history, the corporation had denied applications for covered docks, raising a question of fact as to whether a covered dock could be approved in good faith. (*See*, *e.g.* R. pp. 163-165; 244-246).

requirement was to give homeowners notice of documents that affect their real property, and to prevent homeowners' associations from playing "fast and loose" with the rules and the value of their members' homes. The Walls contended that the Board in this case never recorded any instrument designating an "architectural review committee" as having the power to decide matters affecting property at Shellmore. (R. p. 18). For that reason, among many others, the "architectural review committee" which is touted throughout Respondents' Initial Brief was invalid, and it had no authority at Shellmore.

As a matter of law, there is no question that the Master-in-Equity erred in holding outright that the directors of the Shellmore Homeowners' Association did not owe a fiduciary duty to the Walls (who had brought both individual and derivative claims). As a matter of fact, the Walls' testimony that the directors acted in bad faith, in an effort to circumvent the governing documents, and with conflicts of interest—as well as the same allegations from a nonparty witness—each and all were enough to prevent summary judgment on the issue. This Court should therefore reverse and remand for trial.

II. On review of a grant of summary judgment, because the evidence shows bad faith and *ultra vires* acts by the Directors, the business judgment rule does not apply as additional sustaining grounds.

Respondents next argue that the business judgment rule presents independent sustaining ground for affirmance of the Master-in-Equity's decision. But they forget that context matters. The business judgment rule does not apply in the face of bad faith, or to actions that are ultra vires. *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 781 S.E.2d 903 (2016) ("The business judgment rule applies to *intra vires* acts of the corporation, but not to *ultra vires* acts. . . . the business judgment rule is not a cloak that

protects a corporation from a violation of its own bylaws.") (internal citations omitted); *see also Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (business judgment rule does not apply upon "a showing of bad faith, dishonesty, or incompetence"). Here, the Walls demonstrated that the Directors acted outside of their authority, in contravention of the covenants and the law, and in bad faith.

Whether the Directors of the Shellmore Homeowners' Association acted in bad faith or *ultra vires* is a question of fact. *Youmans v. Youmans*, 128 S.C. 31, 121 S.E.2d 674 (1924) (the question of bad faith is one of fact); *Guerin v. Hunt*, 118 S.C. 21, 110 S.E. 71 (1921) (where there is conflicting evidence or testimony, the question is one of fact). Respondents attempt to hide the ball, veering into a lengthy discussion of whether the covenants prohibit covered docks. But the Walls' point, on the fiduciary duty issue, is not only whether or not covered docks are allowed or could hypothetically be approved,[8] but **whether the Directors worked to circumvent the approval process itself**. In other words, the Walls alleged that the Directors were violating the covenants and the law, not

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[8] If this Court is inclined to delve into the question of whether the covenants operate to prohibit covered docks, this issue was briefed at length to the lower court, which declined to decide it due to questions of fact.

The Walls contend that the covenants do act to prohibit covered docks, because the covenants expressly require that proposed plans be evaluated with reference to existing structures, for conformance with them. In a neighborhood devoid of covered docks, which was devoid of covered docks because of consistent, repeated, disapproval of covered docks by the Association for the entire 50 years of the neighborhood's existence, a covered dock would not conform—it would stick out like a sore thumb. For detailed legal arguments on this question, see Walls' Motion for Summary Judgment and Walls' Supplemental Memorandum, which are incorporated herein by reference. (R. pp. 127, 356). For evidence that applications for covered docks were always denied by the Association, *see, e.g.*, R. pp. 50; 163-165; 244-246, 258.

At a minimum, this is a question of fact and not proper sustaining grounds on appeal of a grant of summary judgment.

only substantively but also procedurally. The Walls presented evidence that the Directors acted in bad faith, in disregard of the covenants' approval procedures, with knowledge that the majority of the members of the corporation had voted to prohibit covered docks, without reviewing plans, without notice to the members, with conflicts of interest, and without heeding legitimate calls by the members for special meetings of the Association. (*See, e.g.,* R. pp. 13-61, including several shareholder demands to the Board for special meetings; *see also* R. p. 163). The evidence of procedural impropriety—of which there was much more than a scintilla—made summary judgment improper on the questions of whether the Directors were acting in bad faith or *ultra vires*.

The question of fact as to whether the business judgment rule applies to the Directors' actions at Shellmore cannot be sustaining grounds on appeal of a grant of summary judgment. "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Loflin v. BMP Dev., LP*, 427 S.C. 580, 588–89, 832 S.E.2d 294, 299 (Ct. App. 2019) (internal quotation marks omitted). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts" and "is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.* at 588–89, 832 S.E.2d at 299 (internal quotation marks omitted). The Master was wrong as a matter of law to grant summary judgment on the issue of fiduciary duty, and no amount of disputed facts can sustain his decision.

This Court should hold that the Directors of Shellmore Homeowners' Association, Inc. had a fiduciary obligation to adhere to the law and the covenants, and to apply them in good faith, and it should reverse and remand for trial on the questions of fact.

III. Respondents' evidentiary arguments are wrong, and they are not preserved.

On review of a grant of summary judgment, this Court must apply the same standard as the lower court should have, and it must reverse the lower court if judgment was not appropriate because the facts were in dispute. Submitted to the lower court was conflicting testimony from the Walls, the Association, the Dyes, and a non-party witness, Mr. Fritz, as well as numerous exhibits. The Master-in-Equity wrongly disregarded this evidence, which unequivocally implicated factual questions.

On pages 28-32 of their Initial Brief, Respondents make two arguments in an attempt to avoid the reversal by this Court that is required under its standard of review. (*See* Resp. Br., Issues II.E and II.F). First, they argue that the evidence before the Court is inadmissible. Second, they argue that the Walls should have asked for discovery. Both of these arguments fail.

A. Respondents failed to contemporaneously object to the Walls' evidence.

Respondents painstakingly list out the manifold disputed facts, in single-spaced bullet points . . . and then they claim that all those disputed facts are not admissible. They proclaim that the Walls' evidence is hearsay, or lacks foundation, or that it is speculative. However, the Respondents failed to file contemporaneous objections with the lower court, nor did they file a motion to strike, nor a motion *in limine* to exclude Mr. Fritz's

Affidavit or the Walls' Verified Complaints from evidence. Respondents thus waived their objections, and they are wrong to raise them to this Court on appeal.

To preserve an issue regarding the admissibility of evidence, a contemporaneous objection must be made. *Doe v. S.B.M.*, 327 S.C. 352, 488 S.E.2d 878 (Ct. App. 1997); *see also,* Rule 103, South Carolina Rules of Evidence. Failure to object when the evidence is offered constitutes a waiver of the right to object, as well as a waiver of the right to have the issue considered on appeal. *Id.*

Because none of the Respondents objected to the Walls' evidence, they waived their objections. This Court should not give credence to their unpreserved arguments on admissibility. Instead, this Court should find that the myriad disputed facts admitted without objection constitute grounds for reversal of the order on appeal.

B. Respondents' Rule 56(f) argument is nonsensical.

Respondents next argue that the myriad disputed facts, some of which that they had only just finished itemizing on the previous pages of their brief (in single-spaced bullet points), were not sufficient, and that the Walls should have somehow done more to thwart summary judgment. As a threshold matter, the standard is clear that summary judgment is not appropriate where there is even a scintilla of evidence raising a factual dispute. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009). The Walls submitted far more than a scintilla.

The Walls were not required to implore the Court for discovery, nor to submit additional affidavits stating "reasons why they could not marshall sufficient factual evidence to oppose Respondents' motions for summary judgment." (Resp. Br. p. 31-32).

Having indeed marshalled factual evidence, including exhibits, a non-party affidavit, and sworn pleadings, the Walls felt assured by the rules and law that summary judgment on factual questions would be improper. Moreover, the Walls marshalled this evidence within mere weeks after the lawsuit commenced, despite lack of discovery and the fact that the Defendant corporation was improperly clutching its corporate records tightly to its chest.[9] The rules and the law did not require the Walls to do more, and particularly not in the primitive stage of the case, weeks after filing and before discovery.

Nonetheless, counsel for the Walls did alert the Court that discovery was necessary and the facts were in dispute.[10] And the Court itself was certainly mindful of the stage of the litigation:

> THE COURT: We had a temporary restraining order/preliminary injunction hearing about a month ago. I requested that the parties brief the matter in the form of Cross Motions for Summary Judgment which I'm prepared to entertain this morning. . . . Mr. Andrew Connor, if you would like to be heard on that I would be glad to hear from you before we get into the merits of the Summary Judgment Motions which I think would be dispositive provided that the parties agree as to what the facts are, or at least the Court finds that there's no genuine issue of material fact. After my most recent reversal in the Supreme Court, not only what the facts are, but what the meaning of those facts might be. That was the hotly contested case over on Sullivan's Island, Bluestein versus whatever it was. Anyway, that case is now making the newspapers because they've settled it. It's even making more news than it was before.

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[9] *See* R. p. 357, fn. 1.

[10] Out of an abundance of caution in reply to this "technical foul" argument by the Respondents, the Walls will list the following places in the Record where they did raise to the lower court arguments that the facts were in dispute and that discovery was necessary: (R. pp. 421, 425, 433; R. pp. 356-357, 372).

(R. p. 382). The Master was referring to the case of *Bluestein v. Town of Sullivan's Island*, in which the Supreme Court reversed his order of summary judgment as improper due to factual questions on the construction and application of language in a deed. 429 S.C. 458, 839 S.E.2d 879 (2020) ("Based on the current record and limiting our analysis to the four corners of the 1991 deed, this dispute may not be resolved as a matter of law. Genuine issues of material fact exist, precluding summary judgment."). The Fourth Circuit has explained it well: "Summary judgment before discovery forces the non-moving party into a fencing match without a sword or mask." *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 483 (4th Cir. 2014).

This Court should reverse the Master-in-Equity's erroneous ruling that the Association's Directors were not bound by fiduciary duties, and it should remand for discovery and trial on the questions (*inter alia*) of bad faith, whether the business judgment rule should apply, and on civil conspiracy, discussed next.

IV. The Master-in-Equity improperly granted summary judgment on the civil conspiracy claim on the basis that "no evidence of special damages has been shown."

Respondents' brief strays from the actual ruling of the Master, which incorrectly granted summary judgment on the ground that there was "no evidence" of special damages:

> Defendants' summary judgment motion as to Plaintiffs' claims for . . . Civil Conspiracy is GRANTED as . . . no evidence of special damages has been shown by the Plaintiff to constitute a civil conspiracy.

(Order) (R. p. 10). Respondents' brief attempts to distract from the erroneous conclusion of the Order that there is "no evidence."

A. *Paradis* applies here.

Respondents incorrectly argue that *Paradis* does not apply here because the ruling is "prospective only." This is wrong—the Supreme Court specified that, going forward, the former *Todd* framework should apply only to cases that are (i) on appeal, and (ii) have already been tried, (iii) under the *Todd* framework. *Paradis v. Chas. County School Dist.*, App. Case No. 2018-002025 (Aug. 18, 2021) ("Any other cases on appeal that have already been tried under the *Todd* framework shall be decided using the *Todd* analysis."). The Walls' case against the Respondents has not been tried—under *Todd* or any other framework—and therefore the *Todd* framework on special damages does not apply here.

In specifying the cases to which the *Todd* analysis still applies, the Supreme Court chose its words carefully. The Supreme Court did not state that the *Todd* framework applies to cases "ruled upon," "adjudicated," "decided," (etc.) under *Todd*.[11] Instead, it held that the old framework still applies to "cases that have already been tried." *Paradis* at p. __ (emphasis added). This Court is required to follow the Supreme Court's directive and must therefore reverse the Master's ruling; its analysis may end here.

B. The Walls showed special damages under pre-*Paradis* framework.

Regardless of whether *Todd* or *Paradis* is applied to the facts of this case, reversal is necessary. Respondents challenge the pleadings under the pre-*Paradis* framework.

[11] The Order on appeal here was decided during motions practice. The *South Carolina Rules of Civil Procedure* specify that "motions" are different from "trials." For example, "MOTIONS" are governed under Article III, SCRCP, whereas "TRIALS" are governed under Article VI.

This consists of Respondents' "rewording" some of the Walls' allegations in the pleadings and then pronouncing them insufficient.

First, Respondents' argument is simply an attack on the face of the pleadings, and it insists all inferences be taken in Respondents' favor. Respondents' brief refers only to wording of certain allegations in the Amended Complaint, and then decrees them to be lacking. But the Master did not rule that conspiracy was insufficiently pled;[12] instead, he ruled that "no **evidence** of special damages has been shown by the Plaintiff." (R. p. 10) (emphasis added). That is, the Master made a substantive adjudication of the evidence itself and construed the inferences in favor of Respondents. This is improper during summary judgment, in which all inferences must be taken in favor of the Walls. It also is improper less than 45 days into a legal action when no discovery had yet occurred.

Second, Respondents cite no case law for the proposition that they (Respondents) may simply rewrite the Walls' pleadings and then have them dismissed on summary judgment. That novel approach goes against the nature of the adversarial process, in which the actual evidence must be adjudicated. Indeed, in this section, Respondents ignore the Walls' actual evidence of special damages, and simply pronounce that it does not exist (after rewriting the Walls' pleadings).

Third, the Walls submitted significant evidence of special damages. "Special damages, in contrast, are those that might be the natural result of an injury, but not the necessary or usual consequences of the defendant's conduct, and they typically are

[12] If the Master had ruled on the pleadings, the correct remedy would be to allow the Walls' permission to amend their pleadings, or to dismiss that cause of action without prejudice to refile.

unique to a particular case." *See Paradis*, App. Case No. 2018-002025. In addition to the evidence summarized in the Walls' opening Brief, the Walls submitted an affidavit, documents, and verified pleadings. That evidence details the conspiracy among Respondents and others to essentially hijack the Association for their own purposes. After improperly seizing that power (through an unlawful and unauthorized "architectural review committee"), the co-conspirators then sought to reward their friends and to punish their perceived enemies, including the Walls, using the power of the Association. (*See, e.g.*, R. p. 163, ¶¶ 22–26; R. pp. 13-31, ¶¶ 16, 28, 35, 36, 38, 79, 81.a–f, 82). As a result, Respondents and their co-conspirators have damaged and crippled the organization that should be protecting the properties in, and members of, the community—and in doing so have harmed the Walls specifically. Those allegations and damages go beyond the damages alleged against the individuals. They instead flow from the unique nature of the conspiracy itself. The special damages are not duplicative; they are in addition to the damages caused by each individual.

C. The civil conspiracy claim is properly pled and supported by evidence under the pre-*Paradis* framework.

Still under the pre-*Paradis* framework, Respondents next argue that the primary intent of the conspiracy was not to harm the Walls, it instead was to benefit the Respondents. This is akin to an embezzler arguing that he did not have intent to harm his employer, he just wanted money for himself.

First, there is no dispute that a purpose of the conspiracy was to obtain the prohibited covered dock for the Respondents. Respondents knew[13] that would damage the Walls. Covered docks had never been allowed in the community's 50-year history because they would block neighbors' waterfront views "in a similar manner as a billboard." (R. p. 163, ¶ 14; R. p. 14, ¶ 9). "Shellmore is a small community which prides itself on the broad, sweeping views that its homeowners have of the Intracoastal Waterway and the Cape Romain Wildlife Refuge, which is directly across from it." (R. p. 14, ¶ 8). By conspiring to build a "billboard"-like structure that would block the Walls' view, Respondents were indeed conspiring to damage the Walls.

Second, and depressingly, Respondents' argument seems to be that they were only focused on themselves, and they just did not care that their actions harmed their neighbors, the Walls. From this perverse premise, Respondents assert that they could not have the "intent to injure the [Walls]" because they were unconcerned about them. (Resp. Br. p. 34). However, Respondents cite no evidence that recklessness is a defense to a conspiracy claim. And while one of Respondents' intentions may have been "their personal agendas and wishes," as admitted in Respondents' brief, Respondents also knew that their plan would harm the Walls and needed to be done in secret. That is why they concocted the elaborate conspiracy to circumvent the governing documents, including "without communicating with the Board or obtaining Association approval."

[13] The Walls have attested that they repeatedly attempted to resolve the issue amicably before Respondents' covered dock was built and were rebuffed by Respondents. (R. p. 22, ¶¶ 45–46).

(R. p. 164, Fritz Aff. ¶ 16). "Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances." *Island Car Wash, Inc. v. Norris*, 358 S.E.2d 150, 292 S.C. 595, 601 (Ct. App. 1986); *see also Pye v. Estate of Fox*, 633 S.E.2d 505, 511, 369 S.C. 555 (2006) ("The gravamen of the tort of civil conspiracy **is the damage resulting to the plaintiff from an overt act done pursuant to the combination**, **not the agreement or combination per se**.") (emphasis added). Here, the evidence is clear that Respondents conspired to perform an act that they knew would damage the Walls.

Finally, Respondents argue that the conspiracy was carried out exclusively by Association personnel, and therefore could not have been a conspiracy. Conspicuously absent from Respondents' argument is any citation to the Record, which instead shows that a number of the co-conspirators were acting on behalf of themselves personally. For example, neither Respondent Jonathan Dye nor Respondent Shaun Dye was an officer, director, or employee of the Association at the time of the conspiracy. Co-conspirator John Chakides was in certain respects acting individually for his own purposes, and in other respects was acting *ultra vires*.[14] (R. p. 28, ¶¶ 78–79). And the purported ARC was not a valid committee or agent of the Association, in any respect. (R. pp. 19-20, ¶¶ 28, 30, 31). Co-conspirators cannot create a fake "committee" for their personal gain, and then

[14] "While it is true that a corporation cannot conspire with itself, an intracorporate conspiracy may be established where individual defendants are also named and those defendants act outside the scope of their employment for personal reasons." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 326, 701 S.E.2d 39 (Ct. App. 2010) (*quoting Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir.1987)).

claim protection under it. In sum, the conspiracy was the combination of two or more people and was properly pled and evidenced.

D. Respondents' hodgepodge of other arguments fail.

In their final section, Respondents fling a spattering of arguments against the wall, some old, some new.

Respondents first argue that there is no evidence of an agreement between the co-conspirators. This ignores that (a) there is ample evidence, (b) case law supports the Walls' arguments, and (c) the Master incorrectly cut the case short less than 45 days into the legal action. For example, the Verified Amended Complaint and the Affidavit of Herbert L. Fritz, Jr., detail the coordinated actions of the co-conspirators, which clearly were done in concert in order to circumvent the governing documents and previous prohibitions by the Association. (*See, e.g.*, R. pp. 20, ¶¶ 36–38, 69.f, 69.g, 78–82; R. pp. 163, ¶¶ 11–16, 20–24). That evidence meets the standard set by case law for conspiracy, which "involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence." *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140 (2016) ("Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances."). The evidence and verified allegations also are sufficient to survive summary judgment less than 45 days into a case, where no depositions or significant discovery has been conducted.

Next, Respondents repeat their argument that there was no conspiracy because all the conspirators were was within the Association. This incorrect argument has been addressed in Section IV.C, above.

Moving on, Respondents' next argument is a repetition that they win because—when construing all the factual evidence in *Respondents'* favor and without allowing discovery—they surely acted appropriately. Again, this argument has been addressed above and in the Walls' opening brief, and it defies this Court's standard of review. *See also Pye* 633 S.E.2d at 511 ("The gravamen of the tort of civil conspiracy **is the damage resulting to the plaintiff from an overt act done pursuant to the combination**, **not the agreement or combination per se**." (emphasis added).)

Finally, Respondents assert, apparently in all seriousness, that there are no damages at all. No citation or real argument is provided, just a few conclusory statements. As discussed in the Walls' opening Brief, in this Reply, in their Verified Amended Complaint, in the affidavit, and in the documentary evidence, "billboard"-like docks such as this had always been prohibited because they blocked the sweeping views that had been enjoyed for decades. The Respondents' unlawful actions unquestionably damaged the Walls, as set forth in the evidence. (*See, e.g.*, R. pp. 18-, Am. Compl. ¶¶ 8–11, 22–26, 81.a–f, 82).

This Court should reverse and remand for discovery and trial on the Walls' cause of action for civil conspiracy.

CONCLUSION

For the reasons set forth above, as well as in their Initial Brief, the Walls respectfully request that this Court reverse the lower court's improper grant of summary judgment and remand these issues for discovery and trial.

Respectfully submitted,

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