IN THE

Supreme Court of Virginia

RECORD NO. 181037

SANJAY SAINANI, *et al.*,

Appellants,

v.

BELMONT GLEN HOMEOWNERS ASSOCIATION, INC.,

Appellee.

REPLY BRIEF OF APPELLANTS

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Introduction

The Merged Association's Brief ("Opposition"), in effect, says to this Court: Give us a pass on the specific requirements of the basic contract and statute. Count the vote on the corporate Plan of Merger as a vote to amend the Original Declaration with the April 2014 Draft Declaration. Disregard the subsequent, unvoted changes resulting in the materially different August 2014 Declaration. And construe the recorded August 2014 Declaration as a substitute for the never-recorded April 2014 Draft Declaration so as to make the August 2014 Declaration effective and enforceable. In like manner, the Opposition glosses over the plain language of the <u>only</u> <u>restrictive</u> covenant pertaining to lighting, and instead seeks cover for its seasonal lighting restrictions under the generalized declaration provisions relating to architectural review, esthetics, community harmony, keeping up appearances, etc., none of which impose any restrictions on lighting.

Notwithstanding the Opposition's penchant for loose construction, and imaginings about the basis of the trial court's rulings, the central issues in this case were, and always have been, whether the August 2014 Declaration is ineffective and unenforceable, and whether the Merged Association's seasonal lighting guidelines exceeded the authority granted in the declaration and were unreasonable. These issues were pled in the Sainanis' grounds of defense, briefed

in the Sainanis' fifteen-page Trial Memorandum (Record,[1] pp. 912-1067), supported by evidence adduced at trial, and argued to the trial court, whose judgment the Sainanis now respectfully submit should be reversed.

I. The Sainanis' Answers and Grounds of Defense denied that they were subject to the August 2014 Declaration and affirmatively alleged that the Declaration was "ineffective," with no authority for the Merged Association to impose charges or suspend privileges.

The Opposition contends that the trial court's ruling "was based, in part, upon the fact that the Sainanis did not plead a claim to have the July/August 2014 Declaration declared void or unenforceable or to void the 2014 Plan of Merger," citing an extended colloquy after the Merged Association's closing argument. Opp. 6, JA534-40. There, the Court indicated to the Sainanis' counsel that it did not see any claim challenging the declaration. JA534-35. The Sainanis' counsel pointed out that the Court was looking at the Sainanis' Amended Counterclaim and that the primary basis for the Sainanis' position was the grounds of defense alleged in their Answer, namely, that the Amended Declaration was not effective because it had not been properly amended. JA535, 539. The Sainanis' counsel continued to explain that the issue was not "void or voidable," as with a corporate document, but whether the purportedly Amended Declaration was "ineffective," as alleged in

[1] The citation is to the Record of proceedings forwarded by the Clerk of the trial court pursuant to Rule 5:13, hereafter cited as "R" followed by page number(s).

the Sainanis' grounds of defense, to which the court responded: "Okay. I think I understand you now." JA539-40.[2]

The Opposition's contention that the trial court's decision was based on a failure to plead is further belied by the trial court's rulings which clearly found that the declaration was not ineffective and that the Merged Association possessed authority to enforce the restrictive covenants. JA172, 556. These trial court rulings were keyed to the Sainanis' pleadings. The Sainanis' original Answer denied "all allegations" that their property was subject to the Declaration (JA56, ¶¶1-2, 4), and pled the affirmative defense that the Merged Association had no authority to allege covenant violations against the Sainanis or to assess charges or suspend privileges because the declaration relied upon was not "effective." JA56, ¶33. After the Merged Association was granted leave to file its Amended Bill of Particulars on April 7, 2017 (JA89), the Sainanis again repeatedly denied their property was subject to the Amended Declaration (JA91, ¶¶1- 25) and re-alleged the grounds of defense that the August 2014 Declaration was not "effective," and that the Merged Association had no authority to assess charges or suspend privileges (JA98, ¶60). Finally, the Sainanis' Trial Memorandum explicitly addressed the defaults under

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[2] The term "void" means "of no legal effect," Black's Law Dictionary (10th Ed. 2014). The Sainanis pled that the August 2014 Declaration was *not* effective, and that the Merged Association possessed no authority to impose charges or suspend privileges. JA59, 98.

Section 13.01 of the Original Declaration, and BGHOA's failure to obtain, and record, a properly approved amendment. *See* R913-17. In sum, the Opposition's contentions about defective pleading are a misplaced diversion and contradicted by the pleadings, the evidence, argument at trial, and the court's rulings below.

II. The Merged Association's statute of limitations arguments were not ruled on by the trial court, and are otherwise meritless and waived.

The Opposition alleges that the Sainanis' claims were "untimely" under Va. Code §55-515.1(E) which requires any action challenging an amendment to be brought within one year after the amendment is effective. Opp. 8. However, no part of the trial court ruling was made on statute of limitations grounds. JA171-79. Absent objection below and assignment of cross-error, the Merged Association is precluded from raising that issue on appeal. Va. Sup. Ct. R. 5:18(c), 5:25; *Loving v. Hayden*, 245 Va. 441, 445 (1993). The Opposition further contends that its §55-515.1(F) "certification" of the August 2014 Declaration recorded on March 16, 2016 barred any challenge to the declaration after March 16, 2017, pointing to the Sainanis' May 19, 2017, Answer and Grounds of Defense (in response to the April 7, 2017, Amended Bill of Particulars). The Opposition conveniently omits to apprise this Court that the Sainanis' grounds of defense directly related back to the defense included in their *original* answer filed on July 18, 2016 (s*ee* Va. Code § 8.01-6.1), fully within the one-year period from March 16, 2016. JA56, 890. The Sainanis also made the same allegation in their Amended Counterclaim (JA106,

¶9, 112-15), but the Merged Association pled no affirmative statute of limitations defense. JA135-45. Having failed to plead the defense in its responsive pleading, as required by Va. Code §8.01-235, the Merged Association's "timeliness" claims have been waived.

Without prejudice to the foregoing, the Opposition further contends that the August 2014 Declaration became "effective" when it was recorded, based on Section 13.01 of the Original Declaration, but this flies directly in the face of this Court's decision in *Tvardek v. Powhatan Vill. Homeowners Ass'n, Inc.*, 291 Va. 269 (2016). The Court there held that an amendment to a declaration becomes "effective" *only* after recordation of a proper certification of the amendment pursuant to § 55-515.1(F), rejecting arguments that recordation alone of a defectively certified amendment triggered the limitations period. *Id*. at 278. In addition, here, material parts of the August 2014 Declaration were not presented to the lot owners with the Plan of Merger, and thus there could not have been any "signed ratifications" by the required majority of lot owners, a separate requirement of § 55-515.1(F). *See Tvardek*, 291 Va. at 276-77, 281; *Shepherd v. Conde*, 293 Va. 274, 287-88 (2017).

The Opposition contends that the certification requirement in §55-515.1(F) did not apply to *all* declaration amendments, including the August 2014 Declaration. In its words, certification is only "an additional requirement *when an*

amendment is adopted pursuant to §55-515.1(D)." Opp. 8; *see also Dalrymple v. Effingham Farm Homeowners Ass'n*, 95 Va. 498, 501 (2017). The applicable wording of § 55-515.1(D) that was in effect throughout 2014 simply provided that "[a] declaration *may* be amended by a two-thirds vote of the owners." (Emphasis added). The latter provision provided a basis for approval of amendments when a declaration was silent as to procedure for amendment. The *Tvardek* declaration, however, was not amended under clause (D), but under its explicitly stated provisions for amendment.[3] Thus, at that time, the § 55-515.1(F) certification requirements were not limited to declarations amended only pursuant to § 55-515.1(D). Indeed, the fundamental premise of the *Tvardek* decision was that the General Assembly had uniformly abrogated the common law's requirement of privity for <u>all</u> restrictive covenants governed by the POA. *See Tvardek*, 291 Va. at 275-76, 279 ("[T]he General Assembly created something entirely new to the law (the right to form private associations having power over land use) *while adding precautions to honor the common law's ancient antipathy toward restrictions on the free use of private property*." (emphasis added)). Later, in 2017, the General Assembly did indeed amend §§ 55-515.1 (D) & (F) to limit the clause (F) certification requirement to amendment of declarations "adopted pursuant to

[3] *See Tvardek* Declaration, Section 9.2, *Tvardek* Joint Appendix, p. 98, in the archives of this Court.

subsection D." 2017 Va. Acts Ch. 374. However, that enactment, which became effective on July 1, 2017, exempted application of the change to amendments recorded *prior* to that date. *Id*. Sect. 2; § 55-515.1 (G). Thus, the 2017 amendments to clauses (D) and (F) are not relevant to this case.

The Opposition defaults to a statement in Article XVIII, Section 3 of the August 2014 Declaration to the effect that the amendment had been approved "in full accordance with Article 13.01 of the BGHOA Declaration and Section 55-515.1 of the Code of Virginia." JA857. That statement obviously did not satisfy the specific certification requirements of § 55-515.1(F) in effect in 2014. Moreover, Merged Association counsel admitted, and argued to the court, that the BGHOA's subsequent March 2016 Certification of the August 2014 Declaration (JA890) was recorded to comply with the requirements of §55-515.1(F) as interpreted by the Court in *Tvardek* (JA549-551). Even that Certification was false and ineffective because the BGHOA President admitted under oath at trial that the material changes in the August 2014 Declaration had <u>never</u> been approved by BGHOA members, or its board. JA265-77, 890.

III. The BGHOA's amendment process departed materially from the requirements of Section 13.01 of the Original Declaration and cannot be cured by vague notions of "intent" or general agency.

The Opposition characterizes the Sainanis' objection as simply complaining about "less than artful phrasing." Opp.14. It contends that the BGHOA can deem

the members' proxy votes to constitute approval of an "instrument" under Section 13.01 of the Original Declaration based on (1) the exercise of the proxy holder's "agency" to vote the proxy, and (2) because "there would be no point in granting authority for execution of documents" if the members did not mean to approve the amendment. Opp. 10-11. Far from "inartful phrasing," the evidence at trial showed blatant BGHOA departures from the amendment process in Section 13.01 of the Original Declaration. These ersatz procedures were based on a legal approach that assumed that "approval of the Plan of Merger by a Member constitutes approval of the terms of the Plan, including in this case, approval of the instrument that is the amendment of the Original Declaration." Opp. 13.

There are several problems with this approach. First, as discussed in more detail below, the Proxy did not authorize any proxy holder to vote to approve the April 2014 Draft Declaration. Second, the Notice of Meeting indicated that the purpose of the meeting was "to discuss and vote on the proposed Plan of Merger," not the Draft Declaration. Third, the Plan of Merger stated in Section 7 that the "New Board" would "adopt an amendment to the Belmont Glen Declaration . . . ." (JA686-87), with no mention of BGHOA member approval. Finally, even if the Plan of Merger vote was sufficient to approve the Draft Declaration, the ostensibly "approved" April 2014 Draft Declaration was <u>never</u> recorded in the land records, as required by Section 13.01 for it to be "effective." Instead, the July/August 2014

Declarations with materially different provisions inserted by third parties were recorded without *any* board or member approval whatsoever. JA272-74.[4]

The Opposition urges the Court to assume the members' "intent" (without any supporting record cite), contending that the members "knew what they were doing," and that they will otherwise be disenfranchised. The irony is that the BGHOA officers and board have by their own actions "disenfranchised" the members by hi-jacking the amendment process, substantially altering documents, and falsely attesting to a statutory certification. The Opposition also asserts that BGHOA reasonably considered the proxy holders to be "agents" authorized to approve the April 2014 Draft Declaration. However, the proxy was not a general grant of discretion, but a specifically limited grant of authority to vote at the April 30, 2014 special meeting. *Stovall v. Commonwealth*, 84 Va. 246, 248-49 (1887); *Bowles v. Rice*, 107 Va. 51, 52-53 (1907). Under special agency principles, "delegated powers *cannot be enlarged by construction.*" *Stovall* at 248-49 (emphasis added). In addition, "the powers of a special agent are to be strictly

[4] The Opposition suggests the April 2014 Draft Declaration was approved pursuant to an "organic document" of a "party to the merger," *citing* Va. Code § 13.1-894. However, the Original Declaration by definition is not an "organic document" filed "of public record to create an unincorporated entity." *See* Va. Code § 13.1-803. Nor were the *members* of BGHOA "parties to the merger" as defined under Va. Code §13.1-893.1. Finally, the Plan of Merger did not "implement" Section 13.01 of the Original Declaration with member approval, but called for the "New Board" to adopt the Amended Declaration. JA686-87 ¶7.

construed," and there is "no implied authority beyond what is indispensable to the exercise of the power *expressly conferred*, and must keep within the limits of his commission." *Bowles* at 53 (emphasis added); *accord Rhoades v. Banking, Trust & Mortg. Co*., 125 Va. 320, 334-35 (1919) (Exercise of corporate proxy not valid because it was not "within the scope of proxy holders actual or apparent authority as proxy or as attorney").

The Opposition urges that because the changed provisions in the July/August 2014 Declarations did not involve the provisions being enforced against the Sainanis, the Sainanis may still be sanctioned for violation of the other unchanged provisions, relying on the severability provision in the August 2014 Declaration. However, the missing essential predicate is the lawful approval, certification and recordation of an "instrument" amending the Original Declaration for it to be "effective." Without it, the August 2014 Declaration, including the severability clause, is ineffective.

IV. The Merged Association's justification of the Seasonal Guidelines has no valid nexus with a restrictive covenant.

The Opposition defends the Seasonal Guidelines based on the broad duties of the Architectural Review Board (ARB), its rule-making powers, community harmony, keeping up appearances, maintaining aesthetics, review of applications for structure alterations, etc. The Opposition meanwhile glosses over the language of the only restrictive covenant containing limitations on lighting, namely, Article

IX, Section 3(C). The latter prohibits lighting directed to outside boundaries of lots and lighting "which results in an adverse visual impact to adjacent Lots, whether *by location, wattage or other features*. . . ." JA839 (emphasis added). The Sananis' string of small lights on their deck and around the front door, less intrusive than a porch light, cannot reasonably be deemed to be lighting "directed" outside the boundaries of their lot. R.1748-50, JA300, 306-07. The restriction on "adverse visual impact" is limited only to the criteria of "location, wattage or other features." Notably, the Seasonal Guidelines contain no reference whatsoever to "adverse visual impact." JA993-94, 1019-20. They instead impose restrictions on "dates" and "times" for "seasonal" lighting and displays, matters <u>not</u> included within the criteria in the covenant. *Id*. Importantly, none of the notices of violation, hearing and/or decision served on the Sainanis charged them with lighting having an "adverse visual impact," or made reference to the "location, wattage or other features" of their lights. JA1033, 1035-36, 1038-40, 1042-45, 1048. Thus, the Seasonal Guidelines and their enforcement were not grounded in any restrictive covenant on lighting, but manufactured out of whole cloth.

The Merged Association did adopt an Architectural Design Guideline labeled appropriately "EXTERIOR LIGHTING," fully in line with the Article IX, Section 3(C) lighting covenant. JA974, 986, 1000, 1012. The "EXTERIOR LIGHTING" rule regulates the "altering of lighting *which is part of the original*

structure. . ." and otherwise tracks the language of the covenant regarding adverse visual impact by *location*, *wattage* or *other features*. (Emphasis added). Thus, contrary to the Opposition's argument that the Sainanis are "reading in language that does not exist," the Merged Association's own EXTERIOR LIGHTING rule serves to highlight that its Seasonal Guidelines are "reading in language that does not exist" in the August 2014 Declaration.

The Opposition's basic defense relies on a loose construction and interpretation of covenant language that is otherwise required to be "construed most strictly against the grantor and persons seeking to enforce them." *Fein v. Payandeh*, 284 Va. 599, 606 (2012) (emphasis added) (*quoting Scott v. Walker,* 274 Va. 209, 212–13 (2007)); *Tvardek*, 291 Va. at 275. The Opposition thus resorts to unhinged general architectural design powers and duties, broad community standards, as well as the introductory heading authorizing the regulation of nuisances. The latter, though relevant, is limited by the wording of its subset lighting and other restrictions under the maxim of *noscitur a socii* (general words are limited by the specific). *See Cape Henry Towers, Inc. v. National Gypsum Co.*, 229 Va. 596, 603 (1985). In sum, the Opposition's attempted justification of the Seasonal Guidelines is not reasonably related to any restrictive covenant and their enforcement is, therefore, arbitrary, capricious and unreasonable.

V. The Sainanis properly preserved their objections to the trial court's ruling on the Merged Association's Motion to Strike.

The Opposition contends that the Sainanis did not properly object to the trial court's failure to draw all reasonably favorable inferences to their evidence in granting the motion to strike the counterclaims. *Austin v. Shoney's, Inc*., 254 Va. 134, 138 (1997); *Claycomb v. Didawick*, 256 Va. 332, 335 (1998), This court has confirmed that a motion to strike alone, without specific objections to evidence, nevertheless constitutes a proper objection to the sufficiency of the evidence. *Kondaurov v. Kerdasha*, 271 Va. 646, 655 (2006). It follows that objection to a trial court's decision to strike a claim preserves an assignment of error as to whether the court failed to draw all reasonably favorable inferences in making the ruling. JA146-47, 149-50, 517-520; *see* Va. Code § 8.01-384(A). Here, the trial court's decision to strike was made despite numerous disputed material facts relating to the counterclaims, particularly regarding the ineffectiveness of the August 2014 Declaration for enforcement. JA507-520.

On the Count I injunction claim, the Opposition argues the Sainanis did not provide any evidence that it violated a real property interest of the Sainanis so as to constitute irreparable harm. However, the evidence showed that the very rules the Merged Association sought to enforce, *ipso facto*. stemmed from affirmative, direct restrictions placed on the Sainanis' use of their real property. JA1033-50; s*ee Tvardek*, 291 Va. at 274-79. The challenge to the Merged Association's

enforcement of the declaration and Seasonal Guidelines affecting the Sainanis' property rights, raised in both the first and amended counterclaims, and argued to the court, were clearly presented, and should not have been summarily rejected by the trial court on a motion to strike.

The Sainanis' Count II breach of contract claim likewise directly related to the Merged Association's alleged non-compliance with the amendment provisions of Section 13.01 of the Original Declaration. JA512; 37-40, 42-46; 106-115; Trial Memorandum, R912-26. In striking this claim, the trial court expressly determined that the Merged Association could "deal with lighting" and that the Seasonal Guidelines "were not arbitrary, they're not capricious." JA519. These are premature factual determinations made despite evidence presented by the Sainanis' that there was no authority to enforce the Guidelines.

Finally, as to the Count III damage claim for violations of the declaration pursuant to Section 55-515 of the POA Act, the Sainanis presented evidence relating to the arbitrary nature of the Seasonal Guidelines and the lack of authority for their enforcement. On these issues, the trial court's ruling was based on preemptory findings that went to weight and credibility and failed to credit all reasonable inferences in favor of the non-moving party. The Sainanis claimed their damages were a function of the assessments they paid to the Merged Association. JA421-424; *see Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 425-26

(2012) (Damages awarded for improper assignment of parking spaces depriving a benefit of assessments). So too did the trial court discredit the impact of the Merged Association's suspension of the Sainanis' of use of its common areas, a disputed issue of material fact. JA 423-24. The trial court thus erred in cutting off further proceedings on the counterclaims.

VI. The Collateral Source Rule ought not be extended to declarations between member/homeowners and their property owner association.

The Opposition attempts to distinguish this Court's definition of the term "incurred" and extend the collateral source rule, a creature of tort law, to homeowner association declarations. Such an extension is inappropriate because association-paid insurance premiums (JA1185) are, in effect, partially paid by homeowners as part of their general assessments. Opp. 38; JA832, 851. Moreover, homeowners that seek to assert rights under such covenants and applicable statutes are not inherently "bad actors" and courts otherwise have discretion in awarding fees if they, in fact, are. Finally, based on the imbalance of resources and equities, undeserved "windfalls" for amounts "greater than that which [it] would ever be legally obligated to pay" would be tantamount in this instance to added penalties. *Cf. State Farm Mut. Auto Inc. v. Bowers*, 255 Va. 581, 586-87 (1998). The better view is reflected in *Landsdowne Homeowners Ass'n v. Landsdowne Community Development, LLC*, 88 Va. Cir. 397 (Ney, J., 2014), where no recovery was permitted for fees and costs the HOA "did not actually incur directly itself."

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rules 5:26(h) and 32(a)(3)(i) of the Rules of the Virginia Supreme Court, counsel for the Appellants Sanjay S. Sainani and Sona Sainani hereby certifies that on March 8, 2019, the undersigned counsel:

1. Complied with the requirements of Rules 5:6, 5:26 and 5:32 of the Rules of the Supreme Court of Virginia with regard to the filing and service of the Reply Brief of the Appellants, including without limitation the pagination requirements and preparation of an authorized spaced typeface of at least 14 point font ; and

2. Caused an electronic version, in Portable Document Format (PDF), of the Reply Brief of Appellants signed by counsel of record for the Appellants to be filed with Clerk of this Court by electronic transmission in accordance with the VACES Guidelines and User's Manual using the Virginia Appellate Courts eBriefs System; and

3. Caused to be served on opposing counsel, Marla J. Diaz, Whiteford, Taylor & Preston, L.L.P, 3190 Fairview Park Drive, Suite 800, Falls Church, Virginia 22042, copies thereof by email transmission to said counsel's email address at mdiaz@wtplaw.com; and on counsel to amicus curiae, Matthew M. Schultz, Arnold & Porter Kaye Scholer LLP., 601 Massachusetts Avenue, N.W., Washington, D.C. 20001, copies thereof by email transmission to said counsel's email address at Matthew.Shultz@arnoldporter.com; and

4. Caused to be filed in the Office of the Clerk of this Court three (3) printed copies of the Reply Brief of Appellants.

By: /s/ James J. Knicely
Counsel