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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 22-0002



JUSTICE HOLDINGS LLC,

Plaintiff Below, Petitioner,

v.

**(On Appeal from Civil Action No. 19-C-481; in the
Circuit Court of Raleigh County, West Virginia)**

GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC.,

Defendant Below, Respondent,

**BRIEF OF ELMER COPPOOLSE, JAMES TERRY MILLER, AND B. ELAINE
BUTLER AS AMICUS CURIAE IN SUPPORT OF THE POSITION OF PETITIONER
JUSTICE HOLDINGS LLC**

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INTRODUCTION

Elmer Coppoolse, James Terry Miller, and B. Elaine Butler [the “Individual Defendants”] file this brief as *amicus curiae* in support of the position of Petitioner Justice Holdings LLC [“Justice Holdings”] in its appeal. The Individual Defendants do so because of a grave concern that the *Order Granting Glade Springs Village Property Owners Association, Inc.’s Motion for Summary Judgment on Count III of its Second Amended Answer, Affirmative Defenses and Counterclaims* and *Order Granting Glade Springs Village Property Owners Association, Inc.’s Motion for Summary Judgment that UCIOA Applies and Motion for Summary Judgment that Justice Holdings is the Declarant of GSV* entered by the Circuit Court of Raleigh County, West Virginia, on October 6, 2020 and October 23, 2020, respectively, retroactively applies the West Virginia Uniform Common Interest Ownership Act [“UCIOA”] to a planned community that is almost twenty-one years old and that was never intended to be governed by UCIOA.¹ The Individual Defendants respectfully request that this Court reverse the Circuit Court’s holdings to the extent that it found all of UCIOA, West Virginia Code Section 36B-1-101 *et. seq.*, applies to Glade Springs Village [“GSV”].²

STATEMENT OF THE CASE

The Individual Defendants incorporate by reference the Statement of the Case set forth by Justice Holdings in Petitioner’s Brief.

¹ The *amicus curiae* brief has been authored in its entirety by the undersigned counsel. Neither party nor their respective counsel made a monetary contribution specifically intended to fund the preparation or submission of this brief. Counsel for the Petitioner was provided a copy of the brief in advance of filing, but made no contribution to its contents. This disclosure is made pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure.

² Pursuant to Rule 30(b) of the West Virginia Rules of Appellate Procedure, the Individual Defendants provided notice on March 28, 2022, to all parties of its intention of filing an *amicus curiae* brief.

STATEMENT OF INTEREST

The Individual Defendants are named defendants in a separate case brought by Respondent Glade Springs Village Property Owners Association, Inc. ["GSVPOA"], Civil Action No. 19-C-357, that is currently pending in the Circuit Court of Raleigh County, West Virginia, Business Court Division, before the Honorable Judge Jennifer P. Dent. The Individual Defendants are former members of the declarant board of directors of GSV, a planned community located in Raleigh County, West Virginia. GSVPOA has moved for partial summary judgment in that case that GSV is a planned community subject to the whole of UCIOA, in order to apply the statutory standard of care explicitly imposed under West Virginia Code Section 36B-3-103(a) — that required of fiduciaries of the unit owners — on the Individual Defendants' conduct while they served on the declarant board of directors.

The Individual Defendants file this brief, pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure, in support of the position of Justice Holdings in its appeal because the Individual Defendants have a strong interest in ensuring that GSV is not subject to the whole of UCIOA. The Circuit Court of Raleigh County erred by finding that UCIOA's substantive provisions were applicable to GSV and by failing to enforce the uncontroverted intent of the parties to the Declaration of Covenants and Restrictions ["Declaration"] to exempt GSV from the substantive provisions of UCIOA as permitted by West Virginia Code Section 36B-1-203(2). The decision of the Circuit Court of Raleigh County to retroactively apply UCIOA threatens to upend the well-established law giving effect to the formation of planned communities and to force the Individual Defendants' conduct during their time serving as directors on the declarant board of

directors to be judged through the lens of a statute that was never intended to govern from which manifest injustice will result. Accordingly, the Individual Defendants appear as *amicus curiae* because the Circuit Court's decisions have placed the Individual Defendants as well as every developer seeking to create a common interest community in West Virginia in great jeopardy, and this must be rectified now in order to avoid future circumstances where the intent of the parties are inexplicably ignored. The Individual Defendants urge the Court to reverse the Circuit Court's grant of GSVPOA's motions for summary judgment that UCIOA applies and hold that GSV is exempt from UCIOA's substantive provisions and, therefore, UCIOA is not applicable to GSV.

ARGUMENT

I. Under the plain language of UCIOA, a "limited expense liability planned community" is exempt from the substantive provisions of UCIOA.

The Circuit Court erred in holding that UCIOA applies to GSV because under the plain language of UCIOA a "limited expense liability planned community" is exempt from the substantive provisions of UCIOA. The plain language of UCIOA authorizes a "limited expense liability planned community" to be excepted from most of the provisions of UCIOA. See W. Va. Code § 36B-1-203.

If statutory language is plain, courts apply, rather than construe, the enactment. See *Concept Mining, Inc. v. Helton*, 217 W. Va. 298, 303, 617 S.E.2d 845, 850 (2005). "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 2, *Univ. Commons Riverside Home Owners Ass'n v. Univ. Commons Morgantown*, 230 W. Va. 589, 741 S.E.2d 613 (2013) (citing Syl. Pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951) ("Where the language of a statutory provision is

plain, its terms should be applied as written and not construed.”)). Thus, the UCIOA provisions at issue should be applied as enacted to the facts of GSV’s formation.

Pursuant to West Virginia Code Section 36B-1-203:

If a planned community

(1) Contains no more than twelve units and is not subject to any development rights; or

(2) Provides, in its declaration, that the annual average common expense liability of all units restricted to residential purposes, exclusive of optional user fees and any insurance premiums paid by the association, may not exceed \$300 as adjusted pursuant to [West Virginia Code Section 36B-1-114] (adjustment of dollar amounts), it is subject only to [West Virginia Code Section 36B-1-105] (separate titles and taxation), [West Virginia Code Section 36B-1-106] (applicability of local ordinances, regulations and building codes) and [West Virginia Code Section 36B-1-107] (eminent domain) unless the declaration provides that this entire chapter is applicable.

W. Va. Code § 36B-1-203. West Virginia Code Section 36B-1-203 is plainly written. As stated in West Virginia Code Section 36B-1-203(2), the annual average common expense liability may not exceed \$300 as adjusted for cost-of-living and allowing certain other deductions. W. Va. Code § 36B-1-203(2). Also, the declaration must not provide that UCIOA applies. *Id.*

Here, the Declaration limits the common expense annual assessment to an amount that is less than the statutory maximum, as adjusted by law, to qualify for the exemption. Further, the Declaration does not state that UCIOA applies. Therefore, West Virginia Code Section 36B-1-203(2) exempts GSV from the application of UCIOA. Despite this clear language, the Circuit Court ruled that GSV is not a “limited expenses liability planned community” as intended, but rather a “common interest community” that exists under and is subject to UCIOA. The Circuit Court’s findings must be reversed as

they are unquestionably at odds with the plain language of the statute and the intent of the parties to the Declaration.

II. Pursuant to the well-settled law of this Court, the intention of the parties to the Declaration to exempt GSV from the substantive provisions of UCIOA governs.

The holdings of the Circuit Court must be reversed because they are in direct conflict with well-settled precedent of this Court regarding construing covenants and restrictive agreements. This Court has held that in terms of constructing the various restrictions contained in covenants affecting real estate usage, intent is the key factor. *See Foster v. Orchard Dev. Co., LLC*, 227 W. Va. 119, 129, 705 S.E.2d 816, 826 (2010) (finding several obvious indicators of the intentions of the appellee to maintain the distinctions and separations of the declaration and the design guidelines). “The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by the restriction is created, the surrounding circumstances and the objects which the covenant designed to accomplish.” Syl. Pt. 6, *Foster v. Orchard Dev. Co., LLC*, 227 W. Va. 119, 705 S.E.2d 816 (citing Syl. Pt. 2, *Allemong v. Frenzel*, 178 W. Va. 601, 363 S.E.2d 487 (1987)).

In *Foster*, this Court extensively examined and evaluated a declaration of covenants and restrictions³ of a planned community that was recorded in the Berkeley County Clerk’s Office and the design guidelines that were defined in the declaration. *Id.*, 227 W. Va. at 122-25, 705 S.E.2d at 819-22. In granting the developers’ motion for

³ The declaration at issue in *Foster* was entitled “Declaration of Covenants, Conditions and Restrictions for the Gallery Subdivision.” The declaration established The Gallery subdivision as a planned community and tracked the language of UCIOA. *Foster*, 227 W. Va. at 121, 705 S.E.2d at 818.

summary judgment, the circuit court found that when viewing the entire plan for developing the subdivision the documents were unambiguous and it was undisputed that the developers intended to retain the benefit of the recorded declaration as well as the separate, more flexible design guidelines so that it could meet changing market conditions and sell all the lots/units it had planned for the subdivision. *Id.* at 227 W. Va. at 126-27, 705 S.E.2d at 823-24. Thus, the circuit court viewed the declaration and the design guidelines as two separate and distinct documents. *Id.* at 227 W. Va. at 127, 705 S.E.2d at 824.

Examining the documents establishing the planned community in terms of the developers' intentions, this Court found that there were several obvious indicators of the developers' intent to maintain the distinctness and separateness of the declaration and design guidelines, including that the design guidelines were specifically defined in the declaration as a document established separately by the property owners association and that the design guidelines were not recorded in the Berkeley County Clerk's Office as the declaration was. *Id.* at 227 W. Va. at 129, 705 S.E.2d at 826. This Court also determined that the evidence clearly supported "the circuit court's findings that the unrecorded nature of the [design guidelines] fell within the conceived plan for the changing developmental needs of the subdivision" and that had the developers "intended for the [design guidelines] to be held to the same standard of interpretation and amendment as the [declaration], it would not have created a separate unrecorded document." *Id.* Ultimately, this Court held that the design guidelines were separate from the declaration and affirmed the circuit court's grant of summary judgment in favor of the developers. *Id.* at 227 W. Va. at 131, 705 S.E.2d at 828.

Here, there are also several obvious indicators of the parties to the Declaration's intent. The parties to the Declaration sought from the inception of GSV to avoid the application of UCIOA and intended to exempt GSV from UCIOA's substantive provisions by qualifying it as a "limited expense liability planned community," as defined in West Virginia Code Section 36B-1-203(2). The Declaration does not mention UCIOA or provide that UCIOA applies and the initial assessment was set below the \$300 limit, as adjusted, required by West Virginia Code Section 36B-1-203(2). Further, GSV operated for eighteen years on the assumption that UCIOA did not apply, and, during those eighteen years, the non-application of UCIOA to GSV was never challenged.

Despite the clear and unambiguous intent and language contained in the Declaration, the Circuit Court ruled that the whole of UCIOA applies to GSV. Because the Declaration clearly intends to exempt GSV from the substantive provisions of UCIOA and there are several obvious indicators of the parties to the Declaration's intent to accomplish those ends, that intent should govern based on this Court's decision in *Foster* and the Circuit Court's findings must be reversed.

III. If left undisturbed, the Circuit Court's ruling places the Individual Defendants in jeopardy of being subjected to the statutory standard of care explicitly imposed under West Virginia Code Section 36B-3-103(a).

The Circuit Court's refusal to recognize GSV's exemption from the substantive provisions of UCIOA, despite the parties to the Declaration's clear and unambiguous intent to do so, effectively subjects the Individual Defendants to the statutory standard of care explicitly imposed under West Virginia Code Section 36B-3-103(a) — that required of fiduciaries of the unit owner. The Individual Defendants are concerned that if the Circuit Court's decision stands, it will wreak havoc on not only the Individual

Defendants, but also developers and other developer appointed members of other homeowners association boards of directors. Every developer seeking to create a common interest community in West Virginia will be unable to predict whether West Virginia courts will give effect to the clear and unambiguous intent contained in their declarations. If a declaration's intent to exempt a planned community from the substantive provisions of UCIOA can be ignored by courts, developer appointed directors will be unable to predict what standard of care their conduct while serving on homeowners boards of directors will be judged under. This will lead to inconsistency in courts' application of UCIOA and, in turn, the statutory standard of care imposed under West Virginia Code Section 36B-3-103(a), and the Individual Defendants and other developer appointed members of other homeowners association boards of directors will be forced, at great cost, to defend cases where there would otherwise be no liability. It is, therefore, important that this Court correct this error now to avoid such an undesirable and harmful result.

CONCLUSION

The Individual Defendants urge the Court to rectify the Circuit Court's error and prevent the Individual Defendants from suffering the fallout that will result from the Circuit Court's misinterpretation of the Declaration and misapplication of UCIOA. The Court should reverse the Circuit Court's *Order Granting Glade Springs Village Property Owners Association, Inc.'s Motion for Summary Judgment on Count III of its Second Amended Answer, Affirmative Defenses, and Counterclaims* and *Order Granting Glade Springs Village Property Owners Association, Inc.'s Motion for Summary Judgment that UCIOA Applies and Motion for Summary Judgment that Justice Holdings is the*

Declarant of GSV and hold that GSV is exempt from UCIOA's substantive provisions and, therefore, UCIOA is not applicable to GSV.

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