No. 22-0002

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

at Charleston

Justice Holdings LLC

Petitioner,

v.

Glade Springs Village Property Owners Association, Inc.,

Respondent.

From the Circuit Court of Raleigh County, West Virginia
Civil Action No. 19-C-481

PETITIONER JUSTICE HOLDINGS LLC'S REPLY BRIEF

Shawn P. George, Esq. (WVSB #1370)
Jennie Ovrom Ferretti, Esq. (WVSB #1189)
George & Lorensen, PLLC
1526 Kanawha Blvd., East
Charleston, WV 25311
PH: (304) 343-5555/Fax: (304) 342-2513
sgeorge@gandllaw.com
jferretti@gandllaw.com
Counsel for Justice Holdings LLC

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

The Petition raises important issues of first impression in West Virginia, which merit this Court's careful review, analysis and reversal under Rule 20. Nothing in the POA's Response disproves or defeats Petitioner's arguments. Petitioner has shown UCIOA should not apply to GSV. The parties never intended that result. They intended the Declaration to exempt GSV from UCIOA under W.Va. Code § 36B-1-203(2). The Declaration and unrebutted Basore Affidavit confirm this.[1] The Circuit Court's adoption of UCIOA is reversible error. The same is true of its selective, uneven and/or erroneous application of some UCIOA provisions to benefit only the POA, or avoidance of others to void the POA's 11.4 million debt to Petitioner for the Utility Loan and create after 19 years a $6.6 million assessment liability of Petitioner to the POA.[2]

The POA's reliance on UCIOA as a consumer protection statute is misplaced, as are the POA's attempts to recast the parties, history of events, and the facts in dispute to conform with the POA's consumer protection theme. The POA ignores the legislative history of UCIOA's enactment and pays short shrift to the other three (3) sections of the UCIOA statute. Most glaring, is the POA claim that Petitioner has no equitable rights under UCIOA. The statute expressly incorporates equity in W.Va. Code § 36B-1-108 - and extends it to instances of "mistake". UCIOA does not obviate the common law. By revisionist history, the POA disembowels the Declaration and other operative documents and dismisses the 19-year operating history of GSV. GSV is a square peg. It does not fit and was never intended to fit in the UCIOA round hole. Forcing this result has done and will do untold, unnecessary damage. The POA fails in its attempt to defend the Circuit Court's orders transferring $18 million in wealth from Petitioner to the POA, which is unsupported whether

[1] This Reply later proves the Burger three-word testimony is not contrary, of no effect and inadmissible.
[2] Names abbreviated in Petitioner's Brief on Appeal have the same meanings in this Reply.

in law or equity, or just, fair and right. This preface provides a record-based context for the appeal. There are substantial legal reasons and facts to find that UCIOA does not apply to GSV, or if it applies, to apply it completely, evenly, correctly. The Circuit Court failed to do so, which mandates reversal and vacation of its Orders and entry of relief as requested by Petitioner.

1. UCIOA. The Model Uniform Common Interest Ownership Act is a five-article model act drafted by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") in 1982. The five articles were Article I General Provisions, Article II Creation Alteration and Termination of Common Interest Communities, Article 3 Management of the Common Interest Community, Article 4 Protection of Purchasers, and Article 5 Administration and Registration of Common Interest Communities. In 1986, West Virginia adopted Articles 1-4 of the model act with significant West Virginia-specific changes that included reducing the applicability of the Act under Article 1 and the consumer protection provisions of Article 4.

The Model Act drafters' commentary refutes the POA's argument that UCIOA was enacted to protect consumers from developers. The drafters' goal was to achieve uniformity among various forms of ownership, and to provide states with "comprehensive legislation, providing maximum flexibility and certainty to all developers, lenders, and title insurers, while at the same time providing all unit purchasers and their associations a uniform level of disclosure, warranty protection, and other rights." UCIOA (1982) Prefatory Note, p. 10. The 61 sections in West Virginia's three non-consumer UCIOA articles cover virtually every aspect of a common interest community ("CIC"), including scope, application, exemption, form of CIC, declarant elections, real estate to which it applies, when and how units are created, expansion, and management of the CIC, and include such unquestionably non-consumer concepts as how a declarant reserves

"development rights" and "special declarant rights", as well as the association's obligations regarding the budget for the CIC and assessment of unit owners.

GSV was not set up as a UCIOA community and did not operate for 18 years as a UCIOA community. This is where the square peg and round hole analogy applies and why this Court does not need to reach UCIOA. Each variation in the Declaration and related documents from UCIOA's requirements serves to reinforce that GSV was not and was never intended to be a UCIOA community. If this Court finds that all of UCIOA applies to GSV, then all of GSV's documents and history must be reformed to comply with UCIOA and UCIOA must be applied evenly, objectively and equitably to each step, stage, transaction and instrument. The Circuit Court failed to do so. After 18 years of GSV existence as a non-UCIOA CIC, any global retroactive application of UCIOA to GSV will affect every aspect of the community, including what real estate comprises GSV, what lots are units in GSV, whether units could be added and were added to GSV properly, and the process whereby POA assessments are made and to which units they apply (only units added to GSV in compliance with UCIOA). The magnitude of recasting the documents, events and transactions over from 2001 to today cannot be overstated, but is unnecessary if UCIOA does not apply. The POA dismisses all of this by ignoring it, or claiming it is trivial. It is not. The only way this Court may avoid that process under UCIOA is if GSV is not subject to UCIOA.

2. History. On May 24, 2001, Cooper Land Development ("CLD") owned real estate in Raleigh County, West Virginia, which would eventually become GSV. The property was not subdivided into Lots, there were no houses, and utilities had not been extended through the property so that houses could be built and occupied. CLD made a single-party deed known as a Declaration, followed by Supplemental Declarations, which (i) divided portions of CLD's real property into either Lots or Common Areas collectively named Glade Springs Village, (ii)

allocated to each Lot in GSV one membership in a Lot owners' or property owners' association, (iii) designated Glade Springs Village Property Owners Association, Inc. (the POA), as the association of Lot owners; (iv) charged the Association with maintenance, upkeep and improvement of the Common Areas at the expense of its Lot owner members; and (v) allocated to each Lot, and all future Lots, one membership vote in the corporation. On July 1, 2001, CLD made a zero-interest $8 million dollar loan to the POA so the POA could begin constructing infrastructure to the Lots consistent with the recitals and related provisions in the Declaration. This loan was repayable over time from access fees and POA assessments to existing and future Lots.

In March 2001, CLD created the POA to represent unit owners in what was to become GSV a few months later. As authorized in the Declaration and as customary in developments when there are as yet no other unit owners, CLD elected and appointed officers and directors of the POA. On July 1, 2001, GSV had one lot. CLD owned it as reflected in the Exhibit to the Declaration. CLD agreed to be the lender to the POA under the zero-interest infrastructure loan. Also on July 1, 2001, there were no other lot owners, or any homes in GSV. Membership in the POA is not linked to whether a home has been constructed on any Lot.[3] Respondent nonetheless characterizes itself as a "consumer" and a "homeowners association," while repeatedly and spuriously claiming coercive and oppressive conduct by CLD in making that zero-interest loan to a Lot owners' association when CLD was the only lot owner. The interest-free infrastructure $8 million loan was but a small part of CLD's investment in GSV. It was made so the POA could construct and

[3] The words home and homeowner never appear in UCIOA. Rather, UCIOA applies to all units created in compliance with UCIOA, without regard to ownership, state of improvement or occupancy. UCIOA's application is based on how a unit may be used rather than how the unit is owned or improved, and can by section 36B-1-207, apply to non-residential CICs as well as residential CICs.

complete certain utility systems for which the Declaration made the POA responsible. No interest was payable by the POA or Lot owners and none accrued for the benefit of CLD on this $8 million investment. A borrower pays interest on a loan to represent the time value of money. Each dollar a borrower repays years later is, due to inflation and passage of time, worth less than when loaned. The Bureau of Labor Statistics CPI Inflation Calculator estimates it would take over $13 million current dollars to repay $8 million invested in May 2001. This 61% loss in purchasing power by the Developer, alone, demonstrates the benefit and value to the POA of the interest free $8 million Utilities Loan. Moreover, instead of the $8 million interest free loan, CLD could have increased the initial sales price of each Lot and recouped the $8 million from sales. Had it done so, each purchaser would have paid its share of the loan at purchase, and each purchaser's mortgage would have included that share with bank interest at a rate greater than zero. It is not oppressive or coercive to allow Lot purchasers to pay their share of infrastructure costs after purchase, interest free.

While the interest-free loan was modified and extended seven times between 2001 and 2018 to cover the increased cost to complete certain utility system installation and construction, each time, no interest was imposed- until the sixth amendment, in 2018. No interest was ever paid. Each increase in the principal balance was an investment of additional Developer capital so the POA could complete its responsibility under the Declaration. Each extension reduced the Developer's return on investment as confirmed by the BLS. Respondent miscasts these investments and extensions as coercive and oppressive. They were not and only deprived the Developer of the time value of its money and return on its capital for the POA's benefit.

3. <u>Respondent's Brief</u>. The Response comes out red hot with claims of lies, failures, chaos, coercion, and other predatory behavior. This diversionary tactic is as old as the hills, and the

Response is notable for its failure to acknowledge this appeal is premised on four fundamental, overarching legal questions on the record below. The answer to each is "no". First, was the Circuit Court correct in ignoring the intent of the parties to exempt Glade Springs Village ("GSV") from virtually all the provisions of UCIOA, as permitted by the statute, and confirmed by the parties' performance under the Declaration from 2001 until 2019? Second, can UCIOA apply where the Declaration fails to comply with its requirements? Third, if all of the provisions of UCIOA apply to GSV, did the Circuit Court correctly apply them? Fourth, was the Circuit Court correct that Petitioner has no redress, either in law or in equity, for the costs of the Utilities Loan and construction, and/or the retroactive imposition of assessments on Developer Lots as determined by the Circuit Court?

This case presents questions of first impression, and there are significant money and rights involved, retroactively, currently and prospectively. This Court's decisions will determine whether the Declaration is a contract, the legal definition of "termination," and whether and to what extent UCIOA applies to GSV, which operated for 18 years without any claim that UCIOA applied and under a belief it did not. Respondent dismisses Petitioner's assertion that upholding the rulings of the lower court will have a chilling effect on development in West Virginia. It cannot reasonably be argued otherwise. Fundamentally, the enforcement of the rule of law matters. Where the rule of law is ignored or perverted, those with capital to invest will invest it elsewhere. Few if any developers will sign on in West Virginia to risk their capital in this circumstance. Unvarnished, if the Circuit Court orders stand, they will have facilitated a Brinks heist of Petitioner's capital, 21 years after GSV was created. They will have done so despite Petitioner's lack of knowledge that UCIOA applied, and full disclosure of the obligation without objection for 18 years. Prospective developers will know they cannot rely on the provisions of recorded, foundational documents. The

concepts of contract, enforceable obligations, rights and remedies will be shown to be unavailable to a developer. If this occurs to Petitioner, who has acted honorably and consistently with the Declaration, it will be bad business for West Virginia.

GENERAL REBUTTALS

1. **The record lacks evidence of "coercion" and the Court should reject this claim.**

For the first 18 years of its existence, CLD, Justice Holdings, *and GSV unit owners,* operated on the basis that UCIOA did not govern GSV, and the Developer appointed the members of the POA Board of Directors from 2001 until mid-2019. See App. 514. The lower court did not rule on when the period of declarant control ended or when GSV unit owners were entitled to call for an election of independent directors to the GSV Board. The fact is no group of unit owners ever approached Petitioner about holding such an election until 2018. Petitioner acceded to the request. See App. 398. There is no indication any member of the POA Board was ever forced to do anything against his or her will. Notwithstanding these facts, Respondent misleadingly refers to the Developer's "coercion" of the POA multiple times- regarding the interest-free Utilities Loan and its subsequent extensions by amendment. See Respondent's Brief ("RB") at 10, 11, 12. The POA voluntarily agreed to the actions in each case to meet, interest-free, the POA's obligations to pay for the utility systems under the Declaration. It is beyond logic or common sense for the POA to assert that the interest-free extension of the POA's obligation to repay $11.4 million is coercive.

2. **There has been no violation of W.Va. R. App. Pro. 10(c)(7).**

Respondent claims Petitioner's Brief violates W.Va. R. App. Pro 10(c)(7) by insufficient citation to legal authorities and the appendix in all but one of Petitioner's legal arguments. See RB at 7. Any fair reading of the Petition renders Respondent's complaint baseless. On Petitioner's First Assignment of Error, for example, there are citations to three cases decided by this Court,

multiple citations to sections of UCIOA, identification of when and how the issue was presented to the Circuit Court, and references to at least 10 different documents in the Appendix. See Petitioner's Brief ("PB") at 12-16. The quality of one's citations and references is what matters.

3. This appeal seeks relief in law and equity.

Contrary to the characterizations in Respondent's Brief that Justice Holdings seeks to make this case all about equity, Justice Holdings seeks relief in law and equity, together or in the alternative. Whether the Declaration is a contract is a legal issue. Whether UCIOA applies to GSV is a legal issue. Whether the POA can "terminate" the Utilities Loan and related $11.4 obligation under UCIOA is legal question. Whether the POA has complied with UCIOA and can assess Petitioner's Developer Lots is a legal question. Whether the barring of a legal remedy precludes relief in equity is a legal question. Certainly, Petitioner has raised equitable questions, in response to the Circuit Court's refusal to provide Petitioner any legal remedy. Equity applies under common law and UCIOA. W.Va. Code § 36B-1-108. This provision expressly incorporates law and equity to correct a "mistake". Further, UCIOA must be liberally administered "to the end that the aggrieved party is put in as good a position as if the other party had fully performed." W.Va. Code § 36B-1-113(b). It is not limited to protect only the POA and the Circuit Court's failure to recognize this is reversible error.

I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ENFORCE THE UNCONTROVERTED INTENT OF THE PARTIES TO THE DECLARATION.

The POA argues on the first Assignment of Error that the parties' intent is not undisputed, Petitioner's request for reformation of the Declaration is equitable, and if all else fails, the parties' intent is irrelevant. Each of these arguments fails for black letter, longstanding legal and factual reasons- which the POA failed in its duty of candor to this Court to disclose or address. Let's

examine the record. Justice Holdings offered the Declaration and Affidavit of Neff Basore, App. 1171-73, as evidence of the parties' intent. It attests to the following facts, among others:

- Mr. Basore was Senior VP and a member of the Board of Directors of CLD's corporate parent when CLD was evaluating a development at Glade Springs Village (¶ 4);
- In 2003, he joined the board of directors of the POA and later became its chairman (¶ 3);
- He was aware when CLD was evaluating a possible development that West Virginia had adopted UCIOA (¶ 4);
- He was aware that if UCIOA applied, CLD might be subject to unfavorable contract termination provisions and might not be able to exempt its developer lots from annual assessments (¶ 5);
- Development of GSV would have been too costly if UCIOA applied. (¶ 5)
- He understood GSV could be exempt from most provisions of UCIOA if the annual member assessment was less than a certain statutory amount (¶ 7);
- The annual assessment was set at $630 to exempt GSV from UCIOA (¶ 15);
- It was CLD's intention UCIOA not govern or apply to GSV to the greatest extent permitted by law (¶ 8); and
- CLD closed the transaction and executed the Declaration after Mr. Basore was satisfied UCIOA would not apply to GSV (¶ 11).

The only evidence the POA offers to contradict the Basore Affidavit is a three-word answer of CLD's corporate designee, Kent Burger, in a deposition which comprises 225 pages and took seven hours to complete. See RB at 22.[4] Specifically, when the POA asked Mr. Burger on cross-

[4] Respondent made the same argument in a Motion to Strike the Affidavit. See Doc. 147, App. 4195.

examination whether CLD was aware of UCIOA when it was considering a development at GSV, he answered, "I don't know." App. 1589 (117:7-15). CLD was not asked to produce a witness on this topic and did not produce Mr. Burger to address this topic. Neither Petitioner's Notice of Rule 30(b)(7) deposition of CLD filed on February 7, 2020, Docket no. 35, App. 4185, or Respondent's Cross-Notice filed on February 21, 2020, See Docket no. 55, App. 4186, lists UCIOA as a topic. Neither lists as a topic CLD's intent in drafting GSV's Declaration. It is beyond disingenuous for the POA not to so advise this Court and then argue the Burger answer binds CLD, contradicts the Basore Affidavit, or other evidence in the Declaration of the parties' intent to exempt GSV from UCIOIA. It is inadmissible and does not.

The Burger answer was given to an unnoticed topic about something 20 years earlier. Under Rule 30(b)(7), a corporate party is required to produce one or more officers, directors, managing agents or others to testify on its behalf on specified topics in a notice. *See United Hosp. Center, Inc. v. Bedell*, 199 W.Va. 316, 484 S.E.2d 199, 215-16 (1997). A corporation is not required to respond to questions outside the Notice. *See, e.g., Palakovic v. Wetzel*, No. 3:14-145 (W.D. Pa. Dec. 18, 2019), at 18 ("If the designee does not know the answers to questions outside the scope of the notice, however, that is the deposing party's 'problem,' not the fault of the responding entity"). Thus, the problem here is the POA's. Desperate to find something to argue on this point, the POA attempts to elevate Burger's three words, but West Virginia law precludes it. The POA cannot now complain about its defective Cross-Notice.

Compounding this problem for the POA is that the POA never deposed Basore. The POA never offered any evidence of CLD's intent regarding the Declaration or developing GSV. The Basore Affidavit and the Declaration are the only competent evidence on the parties' intent to exempt GSV from UCIOA, the setting of the assessment amount to fall within the exemption and

other matters addressed. That the POA chose, voluntarily, never to depose Basore or to attempt to elicit contrary testimony is its decision, made at its peril. This lays bare the falsity of the POA's claim Petitioner "lied" that the record is uncontroverted on the parties' intent.

In a classic case of fear-mongering, the POA argues that if the POA is required to comply with UCIOA's assessment rules, or the Court reforms or applies the Declaration consistent with the Basore Affidavit, it will cause unmitigated chaos. See RB at 22-23. This is a red herring. As this Court knows, potential challenges to applying the law are no reason to prevent the Court from reaching the right legal or equitable result. Ironically, but not surprisingly, the POA has no issue, problem, or reservation in asking this Court to impose 10 years of retroactive assessments amounting to $6.6 million against Petitioner on Developer Lots that were never and should not be subject to assessment. Such an action also exposes the POA to the same types of unit owner claims of over-assessment. See PB at 38-39.[5]

Moreover, as pointed out in the introduction to this Reply, a ruling upholding the application of UCIOA to GSV would have far more disruptive consequences. Specifically, strict application of UCIOA has consequences for GSV beyond termination of the Utilities Loan and elimination of the exemption for Developer Lots. Both the Developers and the POA did many things between 2001 and 2019 that did not comply with UCIOA. The largest of these was failure to follow the statute's requirements for reserving "development rights" and other "special declarant rights." There is no dispute the GSV Declaration reserves the right to add property by Supplemental

[5] Respondent also disputes the relevance of clarifying the meaning of W.Va. Code § 36B-1-203(2). See RB at 23-24. As set out in Petitioner's Response to the POA's Motion for Summary Judgment on UCIOA, the Circuit Court's interpretation of W.Va. Code § 36B-1-203(2) as setting a limit on assessments that is "frozen in time" was plain error. See App. 1854-56. Justice Holdings acknowledges that a ruling on this issue would only be directly implicated in this case should the Court order reformation of the Declaration to comply with the parties' intent.

Declaration under the ordinary rules on contract, see Art. II, § 2, App. 7, but that reservation does not comply with UCIOA's requirements that the declaration state a maximum number of units, W.Va. Code § 36B-2-105, and a time limit by which development rights must be exercised, W.Va. Code § 36B-2-105(8). The Declaration does not contain these terms. There is no way to square the Circuit Court's invocation of all of UCIOA to punish Petitioner- who had nothing to do with the drafting of the documents- and then refuse to require strict compliance with the dictates of UCIOA otherwise. The Circuit Court held Justice Holdings is charged with knowledge of the law. See App. 3658, ¶ 43; 3972, ¶ 59. So is the POA. If UCIOA is the law of this case, then the failure of the Declaration to include the required specific elements to add property to GSV renders any such purported additions of no legal force or effect. **It does not invalidate the buyers' good title to the property, or the deeded rights conveyed**. It simply means these units are not properly subject to the GSV Declaration, subject to assessment, or lien for failure to pay assessments. What is sauce for the goose is sauce for the gander.

II. IF UCIOA APPLIES, THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY RENDERING VOID AN $11.4 MILLION UTILITIES LOAN, WHICH HAD BEEN DISCLOSED AND UNCHALLENGED FOR 19 YEARS.

A. The Utilities Loan was not a "sweetheart deal" for this Developer.

If this Court confirms the rulings of the Circuit Court holding that UCIOA applies to GSV despite evidence that the parties to the Declaration intended otherwise, the question the Court must answer is: does the POA's right to terminate without penalty any contract or lease that was entered into during the period of declarant control include voiding the obligation *ab initio*? See W.Va. Code § 36B-3-105. It does not. The interest-free Utilities Loan was no one-sided deal. It inured to the POA's benefit from inception of GSV. First, the Basore Affidavit makes it plain, CLD would not have developed GSV if the POA could terminate the Utilities Loan. App. 1172, ¶ 5. Second,

the Utilities Loan allowed an interest-free mechanism for the POA to comply with its obligations in the Declaration to pay for the installation and construction of certain utility systems. App. 285, § 3. The Circuit Court never found the POA did not benefit from the Utilities Loan, or that it was a sweetheart deal for CLD, or Petitioner. Third, CLD spent more than $10 million building two championship golf courses, which CLD deeded to the POA debt and lien free. If the Circuit Court's ruling terminating *ab initio* the Utilities Loan stands, Petitioner will lose over $11.4 million paid for the POA with **everyone's** full expectation that the POA owed the Developer these sums and must repay them. This expectation was grounded in the Declaration and the deed to every property transferred to any unit owner, disclosed to unit owners at annual meetings, in POA records, annual property reports, on the POA website and otherwise. See PB at 20, nn. 18, 19. The facts here are inconsistent with every case cited by Respondent allowing a POA to terminate a contract under this UCIOA provision, which has seldom been before the courts. In almost every case, the "contract or lease" involved was a long-term service or amenity provided by the developer for a periodic fee. *See, e.g., Energy Ctr. LLC v. Falls & Pinnacle Owners' Ass'n* (No. A11-1023, Minn. App. Jan. 30, 2012) (contract for heating and cooling services); *W.H.I., Inc. v. Courter,* no. WC-2015-0463 (R.I. Super. May 1, 2018) (contract for parking management services); *Hunt Club v. Mac-Gray Services*, 721 N.W.2d 117, 2006 WI App 167, 295 Wis.2d 780 (2006) (10-year lease to supply coin-operated laundry machines). In each case, the remedy sought was termination of a continuing obligation. In none is there any mention of ordering a refund for prior performance or payments.[6]

B. The Utilities Loan does not provide for any penalty on termination.

[6] The sole outlier is *Genoa Lakes Resort Homeowners Assn v. Genoa Developer Assocs.*, 2015 Nev. Dist. LEXIS 2869 (2015), App. 528, which is distinguished at length in Petitioner's Brief at 18-21.

The Loan Agreement and Revolving Note "Utilities Loan", do not provide any penalty for termination, which makes inapplicable the statutory "without penalty" language in W.Va. Code § 36B-3-105. The 2001 Loan Agreement does not mention penalties for termination. See App. 418, Art. V. The Second Amendment, signed by CLD and the POA in 2009, expressly provides, "Borrower may repay principal amounts prior to the due date *without premium or penalty*." App. 429 (¶ 2) (emphasis added). Justice Holdings repeated the "without penalty" language in the several Amendments extending time for repayment. See App. 440, 442, 446, 448, 452, ¶ 2.

C. "Terminate without penalty" does not mean "void ab initio."

Respondent equates "termination without penalty" with rendering a contract "void ab initio." See RB at 26 ("[W]hen 'termination' is coupled 'without penalty' [sic] the phrase is plain to mean that the association may terminate a contract without remedy or recourse for the non-terminating party.") The Circuit Court agreed. See App. 2530, ¶ 63; App. 3100, ¶ G. Such a definition defies common sense and the law of West Virginia. "A penalty is a sum inserted in a contract, not as a measure of compensation for its breach, but rather as punishment for default …." Black's Law Dictionary, "Penalty" (5th Ed. 1979). This Court has observed:

> A "statutory penalty," is defined as a "penalty imposed for a statutory violation; esp., a penalty imposing automatic liability on a wrongdoer for violation of a statute's terms without reference to any actual damages suffered." Black's Law Dictionary 1247 (9th ed.2009). Thus, a statutory penalty "(1) impose[s] automatic liability for a violation of its terms; (2) set[s] forth a predetermined amount of damages; and (3) impose[s] damages without regard to the actual damages suffered by the plaintiff.

Thomas v. McDermitt, 232 W.Va. 159, 751 S.E.2d 264, 280 n.13 (2013). The underlying Utilities Loan obligation remains. There is no penalty sought to be assessed here. No "penalty," does not mean "no debt." The same is true when a mortgage provides "no penalty for prepayment." The language does not negate the obligation to repay the underlying debt.

III. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO EMPLOY EQUITY TO PREVENT A GROSSLY UNJUST RESULT OR TO FASHION AN APPROPRIATE REMEDY.

The Circuit Court also applied UCIOA to impose $6.6 million in surprise assessments on Developer Lots held in inventory, but exempt from assessment under the Declaration. The gross injustice of piling this obligation onto negating the $11.4 million Utilities Loan cannot stand on the Court's *de novo* review. Petitioner: a) complied with the express terms of the GSV Declaration regarding the assessments; b) paid millions to acquire the obligation and advanced additional millions in reliance on it; and c) continued a course of dealing that had been in place and uncontested since 2001. If this Court affirms that UCIOA applies, and termination under section 36B-3-105 renders the obligation void, the Court should grant relief in equity for the reasons set out in Petitioner's Brief at 22-27. The Circuit Court's refusal to even consider equitable relief was clearly erroneous. See PB at 23-24.

Respondent's contention that the POA received no benefit from the Utilities Loan is wrong. See RB at 34. The Declaration obligates the Developer to construct the streets within the development, App. 285, § 4, and convey them to the POA as common property, App. 288, § 3. Under it the Developer built and paid for two 18-hole championship golf courses and a lake, and conveyed the golf courses to the POA, See App. 286, Art. VII § 1; App 288, § 3. Together with the Utilities Loan documents, the Declaration obligates the POA to pay for construction of utilities, and to convey the utilities infrastructure to the respective utility companies, App. 271, 284-85, Art. VI, §§ 1 and 3. As acknowledged by the POA's corporate representative David McClure, Cooper conveyed the Stonehaven golf course to the POA, free and clear of any debt, in 2003. See App. 4070. The same subsequently also happened with the Woodhaven golf course. In this way, the

Developer and the POA built and financed construction of roads, utilities and recreational amenities for their mutual benefit.

IV. THE CIRCUIT COURT ERRED BY ORDERING JUSTICE HOLDINGS TO PAY $6.6 MILLION IN RETROACTIVE HOMEOWNER ASSESSMENTS ON DEVELOPER LOTS THAT WERE EXEMPT FROM ASSESSMENT UNDER THE EXPRESS TERMS OF THE DECLARATION.

Justice Holdings was justified in relying on the exemption stated in the Declaration, which was of record in Raleigh County, provided to every person who purchased a unit in GSV, incorporated in every deed and had been in place, observed and followed, without complaint for ten (10) years **before** Justice Holdings even purchased the assets. The Circuit Court nevertheless held UCIOA required the imposition of $6.6 million of assessments on Developer Lots, see App. 3978, over the objection of Petitioner regarding the failure of these and other lots to be added to GSV as required by UCIOA. See, e.g., App. 3109-12, 3465-67. If UCIOA allows such an unjust and prejudicial result, equity demands a reformation to eliminate or substantially reduce the amount assessed.

V. UCIOA CANNOT APPLY TO A DECLARATION THAT DOES NOT COMPLY WITH UCIOA AND A COMMUNITY THAT OPERATED FOR 18 YEARS ON THE ASSUMPTION THAT UCIOA DID NOT APPLY TO IT.

As to the Fifth Assignment of Error, Respondent asserts reversal of the Circuit Court's holdings might shake the very foundations of the common interest community, see RB at 38. But the opposite is equally true and Justice Holdings has so argued consistently since the Circuit Court held in Fall 2020 that UCIOA applied. See, e.g., Supplemental Filing, App. 3108, Reply to GSVPOA's Response to the Supplemental Filing, App. 3465; information presented at March 18, 2021 Hearing, App. 4718, 4722-25, 4728. The Circuit Court never found that UCIOA should not apply because the Declaration failed to comply with the requirements of W.Va. Code § 36B-2-105. Similarly, it ignored the many times in the community's 20-year history of GSV that actions taken by the Declarant and the POA did not comply with UCIOA requirements.

The Declaration fails to satisfy the mandatory requirements of W.Va. Code § 36B-2-105. This alone is sufficient for this Court to find UCIOA does not apply. *See, e.g., Emerald Ridge Property Owners Association v. Thornton*, 732 A.2d 804 (Conn. App. 1999) (affirming lower court ruling that Connecticut's version of UCIOA did not apply to a CIC whose organizational documents did not satisfy Connecticut Code § 47-224, which is virtually identical to W.Va. Code § 36B-2-105). The GSV Declaration lacks at least three required elements: 1) a statement of the maximum number of units that the declarant reserves the right to create (36B-2-105(a)(4)); 2) a description of any development rights[7] reserved by the declarant, with a legally sufficient description of the real estate to which each right applies and a time limit within which the rights must be exercised (36B-2-105(a)(8)); and 3) an allocation to each unit of the allocated interests in the manner described in section 2-107 (36B-2-105(a)(11)). This is fatal to UCIOA applying to GSV.

The sub-parts of the Fifth Assignment of Error address the Circuit Court's misapplication of UCIOA and the Declaration's failures to comply with UCIOA, assuming *arguendo* that it applies, and address the real, unintended consequences and folly of applying the statute in this case.

A. The Circuit Court's holding allowing the POA to terminate select provisions within the Declaration is clearly erroneous.

Respondent avoids engaging on this issue, asserting the issue is moot, because the lower court concluded that the Declaration "does not include any contract or obligation to which GSVPOA was or is bound to pay for the costs of utilities." RB at 38. To the contrary, the Circuit Court's July 19, 2021 Order explicitly held:

> Summary judgment is should be [sic] and is hereby granted to Defendant on Count I [of the First Amended Complaint] ... on the grounds that there is no issue of fact that Defendant by its notice of October 16, 2020, terminated provisions identified of the Declaration that constitute or may be deemed to constitute a contract.

[7] While the Declaration attempts to reserve a right to add property, it does not meet UCIOA's dictates.

App. 3768, at 3777 ¶ 3. The Court went on to justify this holding at some length, which is at odds with Respondent's assertion of mootness. See App. 3777–81. For the reasons set out in Petitioner's Brief and its Objections to the Order, App. 3849, at 3858-60, the Circuit Court's holding allowing the POA to terminate select provisions of the Declaration is clearly erroneous and should be reversed.

B. Strict application of UCIOA requires adherence to the requirements of W.Va. Code § 36B-3-105 for reserving rights and adding property.

See discussion above at 11-12.

C. The record before the Circuit Court included the POA's noncompliance with UCIOA's budgeting and assessment requirements, but the Circuit Court elected to enforce only those UCIOA provisions that benefited the POA.

The Response to this assignment of error concedes the POA failed to prepare or share a budget before May 2019- as required by UCIOA. See RB at 39. On assessments, the Developer complied with the Declaration, which exempted Developer Lots. Petitioner asked the Circuit Court to consider the ramifications of retroactive application of UCIOA provisions. App. 3108 and 3465. Among other infirmities regarding two other CICs at Glade Springs, The Farms and Phase I, which had not been properly added to GSV under UCIOA and therefore could not be properly assessed by it, Petitioner raised the implications of the Circuit Court's rulings for virtually every action taken by the POA in GSV since the community was founded. See, e.g., App. 4643-44, 4728, 4736. The POA repeatedly reminded the Court that the POA had not followed UCIOA's requirements for budgeting and assessment. See, e.g., App. 410, ¶ 5. If this Court upholds the Circuit Court's ruling that all provisions of UCIOA apply, all assessments collected from homeowners between 2001 and 2019 are subject to question and revision because mandatory provisions of UCIOA were not followed.

D. If UCIOA applies, a formula for allocation of common expenses must be used.

Respondent asserts the Declaration's failure to follow UCIOA mandates for allocation of common expenses under W.Va. Code § 36B-3-115(b) is unimportant, because in practice, the POA

> ... uses a formula to establish allocation of interest in which the numerator is one and the denominator is the total number of Lots subject to assessment. In other words, each Lot and its owner bear one share of the common expense liability expressed through GSVPOA assessments equal to the other shares and assessments for the other Lots and owners.

RB at 39, quoting Affidavit of David B. McClure, App. 2520-21. Failure to include a formula for allocation of common expenses was one of the omissions that caused the court in *Emerald Ridge Property Owners Association v. Thornton*, 732 A.2d 804 (Conn. App. 1999) to find that UCIOA did not apply to that CIC. If this Court finds UCIOA applies, all assessments from 2010 forward must be recalculated in light of UCIOA's requirement that all units must be included in the denominator in determining each unit owner's share of common expenses. See discussion below.

E. Recalculation of past assessments

UCIOA directs that, "... all common expenses must be assessed against all the units in accordance with the allocations set forth in the declaration pursuant to section 2-107(a) and (b)." W.Va. Code § 36B-3-115(b). The GSV Declaration does not comply with the statutory requirement of a formula, but the POA's practice has always been to allocate common expenses to all units equally. See McClure affidavit, App. 323. This has never included the 334 Developer Lots- even in the last three years since the independently elected POA Board. Now that the Circuit Court has ordered Petitioner to pay assessments on these additional Developer Lots each year, retroactive to 2010, 36B-3-115(b) requires re-computation of the annual per-unit assessment. This is a simple and straightforward application of the plain meaning of a statute. Justice Holdings asked the Court to do, see, e.g., Proposed Order on Assessments, App. 3760 nn. 7, 8. It refused.

F. Retroactive assessment of the Developer Lots produces a windfall to the POA, which should be refunded or credited to the unit owners in accordance with W.Va. Code § 36B-3-114.

The Circuit Court has ordered Petitioner to pay the POA an additional $6.6 million in assessments on Developer Lots for fiscal years that are already closed. See Order on Assessments, App. 3945, at 3978. If UCIOA applies, it requires that any such excess amounts be refunded or credited to the unit owners. See W.Va. Code § 36B-3-114.

CONCLUSION

Petitioner requests the Court grant Rule 20 review, schedule oral argument, reverse the Circuit Court Orders and find, *inter alia*, that GSV is not a UCIOA CIC; the Declaration and related documents must be so applied; the POA has no right to terminate the Utilities Loan, or to assess exempt Developer Lots. In the alternative, if UCIOA applies, the POA is still indebted to Petitioner on the Utilities Loan, assessments can only be rendered against units properly added to GSV and not withdrawn, and equity must be employed to put Petitioner in the same place as legal remedies would have provided, along with any other relief that is just and proper.

JUSTICE HOLDINGS LLC
By Counsel

Shawn P. George, Esquire (WV State Bar #1370)
Jennie O. Ferretti, Esquire (WV State Bar #1189)
George & Lorensen PLLC
1526 Kanawha Blvd., East
Charleston, WV 25311
PH: (304) 343-5555/Fax: (304) 342-2513
sgeorge@gandllaw.com
jferretti@gandllaw.com

No. 22-0002

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
at Charleston

Justice Holdings LLC
Petitioner,
v.

Glade Springs Village Property Owners Association, Inc.,

Respondent.

From the Circuit Court of Raleigh County, West Virginia
Civil Action No. 19-C-481

CERTIFICATE OF SERVICE

I, Shawn P. George, do hereby certify that I served Petitioner Justice Holdings LLC's Reply Brief on counsel of record, via US Mail, this 8th day of June, 2022 as follows:

Ramonda C. Marling, Esquire
Mark A. Sadd, Esquire
Lewis Glasser PLLC
300 Summers Street, Suite 700
Charleston, WV 25301
PH: (304) 345-2000
Counsel for Glade Springs Village Property Owners Association, Inc.

Shawn P. George, Esquire (WV State Bar #1370)
Jennie O. Ferretti, Esquire (WV State Bar #1189)
George & Lorensen PLLC
1526 Kanawha Blvd., East
Charleston, WV 25311
PH: (304) 343-5555
Fax: (304) 342-2513
sgeorge@gandllaw.com
jferretti@gandllaw.com