IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 25-401

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STATE OF WEST VIRGINIA EX REL. JUSTICE HOLDINGS, LLC
Petitioner,

vs.

THE HONORABLE TODD KIRBY,
GLADE SPRINGS VILLAGE PROPERTY OWNERS ASSOCIATION, INC.,
UNITED BANK, and GREENBRIER WEST VIRGINIA HOLDINGS, LLC
Respondents.

UNITED BANK'S RESPONSE TO THE VERIFIED PETITION FOR WRIT OF PROHIBITION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. Question Presented

1. Did the Circuit Court exceed its legitimate powers by ordering the Special Commissioner to sell the real property of Petitioner Justice Holdings, LLC to satisfy assessment liens claimed by Respondent Glade Springs Village Property Owners Association, Inc., when the liens and enforcement thereof arise pursuant to the provisions of the Uniform Common Interest Ownership Act ("UCIOA"), West Virginia Code Section 36B-1-101 *et seq.*, but the Declaration creating the common interest community does not contain essential language necessary to make assessments on the subject real estate, in violation of West Virginia Code Section 36B-2-105?

II. Statement of the Case

This original proceeding arises from an attempt by Respondent Glade Springs Village Property Owners Association, Inc. ("GSVPOA") to judicially foreclose upon assessment liens for unpaid homeowners' association dues, and thereby sell hundreds of lots owned by Petitioner Justice Holdings, LLC ("Justice Holdings"). [Petr.'s App. 0068, ¶ 14].

United Bank is a secured creditor of Justice Holdings, holding a deed of trust recorded in 2018 against many of the same lots. [Petr.'s App. 0066, ¶ 5]. United Bank's deed of trust pre-dates the assessment liens that GSVPOA seeks to enforce. [Petr.'s App. 0069, ¶ 21]. United Bank takes no position on whether the Declaration is effective under UCIOA. Rather, United Bank files this response to the petition for writ of prohibition in order to address the narrow but critical issue of the scope of lien priority under W. Va. Code § 36B-3-116, as it affects United Bank's interests. *See* Rule 16(d)(3) of the Rules of Appellate Procedure (explaining that the statement of a question presented is deemed to include all subsidiary questions fairly comprised therein).

GSVPOA initially obtained a judgment in 2021 for approximately $6 million in unpaid assessments (the "Judgment Lien"). [Petr.'s App. 0110]. In March 2022, GSVPOA filed an action

with the Circuit Court below seeking to enforce that judgment lien by sale of Justice Holdings' lots. While that action was pending, the Supreme Court of Appeals decided a related appeal on June 15, 2023, confirming that Glade Springs Village is a common interest community subject to UCIOA and remanding certain issues to the Circuit Court. [Petr.'s App. 0037].

Following the remand, GSVPOA shifted strategy: it filed a Substituted Amended Complaint on October 31, 2023 that dropped the judgment lien count and instead sought to enforce four newly-asserted statutory assessment liens for fiscal years 2019–2020, 2020–2021, 2021–2022, and 2022–2023 (the "Assessment Liens"). [Petr.'s App. 0065]. These Assessment Liens were founded on UCIOA's lien provision, W. Va. Code § 36B-3-116, which generally grants homeowners' associations a lien for unpaid assessments. Justice Holdings and the other defendants (including United Bank and JPMorgan Chase Bank, N.A. ("JPMorgan")[1], another deed of trust holder) disputed both the validity and the priority of the Assessment Liens. [United Bank App. 000001-000014].

Recognizing that factual questions existed, the Circuit Court on April 11, 2024 appointed a Special Commissioner to investigate and report on "the validity, scope and priority" of all liens claimed against the property. [Petr.'s App. 0113].

On June 6, 2024, the Special Commissioner filed a Report, without taking any evidence, summarily opining that GSVPOA's Assessment Liens were valid and enjoyed "super priority" over the deeds of trust held by United Bank and JPMorgan. [Petr.'s App. 0124]. In reaching this conclusion, the Special Commissioner found that all four years of assessments (2019–2023) were entitled to *six-month* "superpriority" status under W. Va. Code § 36B-3-116(b) and further

[1] Upon information and belief, the JPMorgan obligation has been assigned to Greenbrier West Virginia Holdings, LLC.

reasoned that the Assessment Liens "have priority over any liens that qualify under [the first-deed-of-trust provision] in the absence of acceleration". [Petr.'s App. 0125-0126. ¶ 4].

In other words, the Special Commissioner interpreted the statute as giving the GSVPOA's liens priority over United Bank's earlier-recorded deed of trust because neither United Bank nor JPMorgan had accelerated their loans in the six months before the Association's action was filed. This "acceleration" theory was never argued by any party prior to the Special Commissioner's Report.

Both United Bank and JPMorgan promptly lodged objections to the Special Commissioner's Report. [United Bank App. 000001-000014]. United Bank joined in JPMorgan's objections, which set forth the banks' position that: (1) the Assessment Liens do **not** qualify for superpriority status beyond a limited six-month window preceding the institution of an action to enforce those liens; (2) the Special Commissioner's focus on the lack of acceleration of the deeds of trust was misplaced and based on a misreading of W. Va. Code § 36B-3-116(b); and (3) in any event, the issues of lien validity and lien priority should not be resolved without a properly developed evidentiary record. [United Bank App. 000001-000014].

After a hearing on October 11, 2024, the Circuit Court overruled the objections and, on December 5, 2024, entered a Final Order and Decree of Judicial Foreclosure authorizing the Special Commissioner to sell Justice Holdings' lots to satisfy GSVPOA's Assessment Liens (while noting that Defendants' objections were preserved). [Petr.'s App. 0001]. It is that sale order which Justice Holdings now asks this Court to prohibit.

III. Statement Regarding Oral Argument

United Bank does not believe that oral argument is necessary for disposition of this matter.

IV. Argument

1. Standard of Review.

West Virginia Code § 53-1-1 provides that a writ of prohibition will lie as a matter of right when an inferior court has no jurisdiction or, having jurisdiction, "exceeds its legitimate powers". Where a petitioner does not allege a total absence of jurisdiction, but rather that the lower court exceeded its powers, this Court employs a five-factor test to determine whether a discretionary writ should issue, including: (1) whether the petitioner has no other adequate means (such as direct appeal) to obtain the desired relief; (2) whether the petitioner will be damaged in a way not correctable on appeal; (3) whether the lower court's order is clearly erroneous as a matter of law; (4) whether the order represents an oft-repeated error or manifests a persistent disregard of the law; and (5) whether the order raises new and important problems or issues of first impression. Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 14–15, 483 S.E.2d 12, 14–15 (1996). These factors are general guidelines, and "although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight." *Id*.

In the context of this case, factor (3), whether the lower court's order is clearly erroneous as a matter of law, is paramount. United Bank maintains that the Circuit Court's approval of the Special Commissioner and Circuit Court's rolling priority determination rests on a clear error of law in interpreting W. Va. Code § 36B-3-116. This error warrants substantial weight in the analysis.

2. West Virginia Code § 36B-3-116 Limits Any "Superpriority" for Assessment Liens to Six Months' Worth of Assessments.

West Virginia's UCIOA grants homeowners' association assessment liens a limited form of superpriority over previously recorded deeds of trust – but strictly to the extent of six months

of assessments, and only if those assessments accrued in the six-month period immediately preceding the institution of an action to enforce the lien. W. Va. Code § 36B-3-116(b). The operative superpriority language provides that an HOA's assessment lien is

> . . . prior to all security interests described in clause (ii) above to the extent of the common expense assessments based on the periodic budget adopted by the association pursuant to section 3-115(a) which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien.

W. Va. Code § 36B-3-116(b).

In all other respects, a first-recorded deed of trust retains priority over an association's lien. The statute thus strikes a careful balance: it allows an HOA a small cushion (six months) that can prime a first deed of trust, in order to encourage lenders to pay delinquent assessments and protect the common interest community, but it pointedly does not elevate the entire HOA lien above a first deed of trust. *See* Uniform Condominium Act (1980) § 3-116, Comment 2 (discussing purpose of limited six-month lien priority in § 3-116(b), which is identical to W. Va. Code § 36B-3-116(b)). In this case, that balance was upset. The Special Commissioner accorded four years of assessment liens priority status over United Bank's deed of trust – a result flatly inconsistent with the six-month limitation in the statute. [Petr.'s App 0125-0126, ¶ 4].

Under West Virginia Code § 36B-3-116(b), an HOA's lien is prior to a first deed of trust only to the extent of common expense assessments "which would have become due in the absence of acceleration during the *six months immediately preceding institution of an action* to enforce the lien". W. Va. Code § 36B-3-116(b) (emphasis added). By its plain terms, this language imposes two key requirements for an HOA to claim any superpriority amount: (1) the association must institute an action to enforce its lien; and (2) only those assessments coming due in the six months before that action was instituted can enjoy priority over a first deed of trust. *Id*.

The statute "only backdates six months" from the initiation of the enforcement action. West Virginia has not construed the meaning of "action", however, GSVPOA argued below (and the circuit court adopted) the meaning that a civil action is not the sole method to enforce an assessment lien and that recording assessment liens constitute "institution of an action to enforce an assessment lien." [Petr.'s App. 0002]. However, in the context of the statute, "institution of an action to enforce the lien" means filing a civil action, not recording a lien or sending a notice. Under this interpretation, GSVPOA would be entitled to superpriority status for the six months immediately preceding January 13, 2023—when GSVPOA moved to amend its complaint to enforce the assessment liens.

GSVPOA's attempt to bootstrap several years of assessments into a rolling superpriority status beginning in fiscal year 2019 finds no support in the statutory language.[2] In the event that GSVPOA is permitted to "bootstrap" assessments dating back to 2019, it appears the parties agree that only six months' worth of assessments for each assessment year should be entitled to superpriority over United Bank's deed of trust.

Therefore, the Circuit Court's order approving the Special Commissioner's Report of a rolling superpriority status for GSVPOA's Assessment Liens from 2019 through 2023 was grounded in a clear error of law. On this point, the Circuit Court exceeded its legitimate powers, satisfying the third *Hoover* factor (clear legal error) in spades.

[2] United Bank notes that the Uniform Condominium Act was amended in 2017 to make clear that an "association's lien is not capped at only six months of unpaid common expenses assessments." Instead, under the amended statute, the association's lien is entitled to priority under subsection (c) to the extent of six months of unpaid common expenses assessments *each year . . . .*" *See* Uniform Condominium Act (2017), Comment 2, ¶ 10 (emphasis added). However, West Virginia has not adopted this amended version of UCIOA providing a clear rolling superpriority for "each year". *See* W. Va. Code § 36B-3-116(b) (lacking the "each budgeted year" language that was inserted into the 2017 UCIOA amendment). Thus, it is unclear whether, under West Virginia law, a rolling superpriority is permitted.

3. The Special Commissioner's Reliance on the Lenders' Lack of "Acceleration" Misinterprets § 36B-3-116(b) and Does Not Elevate the Association's Liens Over United Bank's Deed of Trust.

Rather than address the statutory limitation discussed above, the Special Commissioner's Report veered onto an unrelated theory: it noted that "the Special Commissioner is unaware of any attempts by JPMorgan Chase Bank, N.A., or United Bank, Inc. to accelerate their respective liens" (i.e. to accelerate the obligations secured by their deeds of trust) and implied that, as a result, the Association's liens maintained priority. [Petr.'s App. 0126]. This theory – seemingly treating the banks' alleged (as no discovery was taken on this issue) inaction on accelerating loans as a condition affecting the HOA lien's priority – is wholly unsupported by § 36B-3-116. It represents a misreading of the statute's reference to "absence of acceleration," which in context applies to the association's assessments, not to the lender's loan.

The crucial statutory phrase again is that the superpriority encompasses only those common expense assessments "which would have become due in the absence of acceleration during the six months immediately preceding institution of an action to enforce the lien". W. Va. Code § 36B-3-116 (emphasis added). The "acceleration" mentioned here plainly refers to any acceleration of the assessment installments by the Association. Many declarations or bylaws allow an association to declare the full year's assessments due if an owner defaults (accelerating the obligation). The UCIOA provision ensures that an association cannot enlarge its superpriority by declaring all future installments immediately due; rather, it is limited to the assessments that *would have come due* in the relevant six-month period had there been no acceleration of those assessments.

As JPMorgan argued and United Bank fully agrees, "whether JPMorgan [or United Bank] accelerated the underlying obligation is irrelevant" to the HOA lien's statutory priority. [United Bank App. 000008]. The Special Commissioner's suggestion to the contrary was erroneous as a

matter of law. It conflated the association's assessment collection practices with the banks' enforcement of their loans, two entirely separate matters.

Notably, this "acceleration" theory was injected into the case by the Special Commissioner *sua sponte*, without any party advocating it beforehand. Neither GSVPOA nor any Defendant had raised or briefed the idea that the banks' lack of loan acceleration could affect lien priority. United Bank and JPMorgan thus had no notice or opportunity to respond to this theory before the Special Commissioner issued his Report. It is unclear what effect, if any, the Circuit Court's adoption of the Special Commissioner's recommendations played in the superpriority finding.

In sum, the Special Commissioner's reliance on the absence of loan acceleration reflects a clear misinterpretation of § 36B-3-116(b). The statute's text, structure, and purpose all confirm that the "absence of acceleration" qualifier pertains to the timing of assessments, not to the status of the borrower's loan with a third-party lender. By misapplying this provision, the Special Commissioner arrived at a result – elevating the Association's liens over United Bank's deed of trust for far more than six months of assessments – that the law does not countenance. Correcting this legal error is essential to protect United Bank's rights, and it reinforces that the Circuit Court exceeded its legitimate powers by basing its order on a plainly wrong interpretation of the statute.

V. Conclusion

In view of the above, the appropriate remedy is for this Court to ensure that the statutory limits on lien priority are observed and to require proper proceedings on remand. Any disposition of this writ should unequivocally uphold the correct interpretation of West Virginia Code § 36B-3-116's priority scheme and ensure that United Bank's rights are not wrongfully impaired.

Respectfully submitted:

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Certificate of Service

The undersigned hereby certifies that on this 21st day of July, 2025, the foregoing **United Bank's Response to the Verified Writ of Prohibition** was served using the electronic File & ServeXpress system, which will send notification of such filing to all counsel of record.

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