IN THE SUPREME COURT OF MISSISSIPPI

No. 2020-CA-01355

SRHS AMBULATORY SERVICES, INC.

Plaintiff-Appellant,

v.

PINEHAVEN GROUP, LLC and
FIRST AMERICAN TITLE COMPANY

Defendants-Appellees.

Appeal from the Circuit Court of
Harrison County, Mississippi

BRIEF OF APPELLANT SRHS AMBULATORY SERVICES, INC.

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ORAL ARGUMENT REQUESTED

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons and entities may have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. SRHS Ambulatory Services, Inc., appellant;
2. Singing River Health System, a community hospital established by Jackson County, Mississippi, the sole owner of appellant;
3. Michael J. Bentley, Christina M. Seanor, Stevie F. Rushing, and the law firm of Bradley Arant Boult Cummings, LLP, attorneys for appellant;
4. Patrick R. Buchanan and the law firm of Brown Buchanan, P.A., attorneys for appellant;
5. Michael E. Bruffey and MEB Professional & Legal Services, attorney for appellant;
6. Pinehaven Group, LLC, appellee;
7. Charles J. Swayze, Jr., Charles J. Swayze, III, and the law firm of Whittington, Brock & Swayze, P.A., attorneys for appellee Pinehaven Group, LLC;
8. First American Title Insurance Company, appellee;
9. G. Dewey Hembree, III and the law firm of McGlinchey Stafford, PLLC, attorneys for appellee First American Title Insurance Company; and
10. The Honorable Lawrence P. Bourgeois, Jr., Circuit Court Judge.

So certified: July 12, 2021.

s/ Michael J. Bentley
Michael J. Bentley

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

STATEMENT REGARDING ORAL ARGUMENT

Appellant SRHS Ambulatory Services, Inc. requests oral argument. This case involves an unratified expenditure of $3,600,000 public funds to buy vacant land, and the appeal presents several questions of first impression—including (1) what type of healthcare facilities come within the definition of "community hospital" in Mississippi Code § 41-13-10 *et seq*. (the Act governing community hospitals) and are, therefore, bound by the Act's "ratification requirement" for real property purchases, *see* Miss. Code § 41-13-15(4); (2) whether a nonprofit entity that is established, owned, and controlled by a community hospital is bound by the ratification requirement just as the community hospital itself would be; and (3) does Mississippi law allow a purchaser to bring a neligence claim against a title insurance company that undertakes to investigate and confirm the validity of title prior to closing, but fails to use reasonable care when doing so.

The circuit court's summary judgment orders resolve each of these questions—along with other legal claims—against Appellant SRHS Ambulatory. The effect of those orders is to declare that ratification by the board of supervisors is *not required* to validate a $3,600,000 expenditure of community hospital funds to purchase real property and, even if ratificaiton was required, SRHS Ambulatory has no remedy against its title insurer for losses due to its invalid title. Oral argument may assist the Court in its *de novo* review of those orders and rulings.

STATEMENT OF THE ISSUES

The Mississippi Legislature created "community hospitals," defined the types of healthcare facilities that qualify as community hospitals, and set limits on their powers. Among those limitations, a community hospital may purchase real property, *but only if* the purchase contract is ratified by the board of supervisors that owns the hospital. *See* Miss. Code § 41-13-15(4). This appeal involves an unratified purchase of vacant land by SRHS Ambulatory Services, Inc. ("SRHS Ambulatory"), a nonprofit healthcare entity created and owned by the Board of Trustees of Singing River Health System ("Singing River"). The appeal presents four questions:

1. Whether SRHS Ambulatory is a "community hospital," as that term is defined by Section 41-13-10(c), because it is a healthcare facility that was established by the Board of Trustees of Singing River.

2. Whether, even if SRHS Ambulatory is not itself a "community hospital," it is still bound by Section 41-13-15(4)'s ratification requirement, just as its owner Singing River is bound, because it is a nonprofit healthcare facility created, owned, and controlled by a community hospital.

3. Whether the policy exclusions invoked by First American Title Insurance Company to deny SRHS Ambulatory's insurance claim may be construed to bar coverage for the ratification defect suffered by SRHS Ambulatory.

4. Whether Mississippi tort law recognizes a purchaser's right to bring a negligence claim against a title insurer who undertakes to investigate and confirm the validity of title prior to closing, but fails to use reasonable care when doing so and, thereby, causes the purchaser to take invalid title.

STATEMENT OF ASSIGNMENT

The Supreme Court should retain jurisdiction over this appeal, which involves an expenditure of $3,600,000 in public funds on a land purchase that has been publicly challenged as unlawful, and presents issues of first impression regarding the interpretation of Section 41-13-10 *et seq.*, which defines "community hospitals" and establishes the nature of and limits on their powers as public bodies. *See* Miss. R. App. P. 16(d)(1). The case also presents an unresolved question under Mississippi tort law as to the duties that a title insurance company owes the title purchaser.

STATEMENT OF THE CASE

This case involves Mississippi Code § 41-13-15(4)'s ratification requirement, which authorizes a community hospital to purchase land "provided that any contract for the purchase of real property must be ratified by the owner . . . ." SRHS Ambulatory Services, Inc. ("SRHS Ambulatory"), a nonprofit corporation created and owned by a community hospital, Singing River Health System ("Singing River"), attempted to purchase property for use as a surgery center. Singing River provided $3,600,000 in public funds to make the purchase, but the purchase was never ratified by Singing River's owner—the Jackson County Board of Supervisors.

When the deficiency was discovered, SRHS Ambulatory sought to return the property and recover the purchase price. The seller refused, the title insurer denied coverage, and this suit was filed. On motions for summary judgment, the circuit court declared that Mississippi law does not require the Board of Supervisors to ratify a $3,600,000 expenditure of public funds by SRHS Ambulatory.

I. Statement of Facts

A. Singing River Health System is a public body subject to the laws governing community hospitals.

Singing River Health System is a county-owned community hospital that was established by the Board of Supervisors of Jackson County. As a community hospital created pursuant to Mississippi Code § 41-13-10 *et seq.*, Singing River is a public entity and political subdivision of Jackson County. *See KPMG, LLP v. Singing River Health Sys.*, 283 So. 3d 662, 664 (Miss. 2018).

As a public body entrusted with the management of public property and public funds, Singing River's powers are defined and limited by the Legislature. *See id.*; *accord Prichard v. Cleveland*, 314 So. 2d 729, 731-23 (Miss. 1975). Relevant here, Singing River may acquire real property, *provided that* the Jackson County Board of Supervisors—the ultimate owner of the hospital—ratifies the purchase:

> Owners and boards of trustees, acting jointly or severally, may acquire and hold real estate for offices for physicians and other health care practitioners and related health care or support facilities, provided that any contract for the purchase of real property must be ratified by the owner . . . .

Miss. Code § 41-13-15(4); *accord* Miss. Code § 41-13-35(o) ("the board of trustees shall also have authority to acquire, by lease or purchase, such facilities and real property within the service area, whether or not adjacent to existing facilities, provided that any contract for the purchase of real property shall be ratified by the owner"). Under the governing statute, the "owner" is the Board of Supervisors.[1]

The Board of Supervisors' power to ratify—or reject—a community hospital's

[1] As defined in the statutes, "owner" means "any board of supervisors of any county having an ownership interest in any community hospital . . . ." Miss. Code § 41-13-10(d).

purchase of real property is one of several powers reserved by the Legislature for the owner. *See* 5 Encyclopedia of Mississippi Law § 36:10, *Public Hospitals* (3d ed. & West Update April 2021). Like the other reserved powers, the ratification requirement permits a board of supervisors to check a community hospital's use and expenditure of public funds. *See id.*

B. Singing River establishes SRHS Ambulatory to fulfill its goals of providing healthcare to the local community.

In 1998, Singing River created SRHS Ambulatory for the purpose of partnering with physicians to develop ambulatory surgery centers in the community. *See* R.811-16 (testimony of Chris Anderson, former CEO of Singing River); R.1261-62 (testimony of Kevin Holland, CEO of Singing River at time of litigation); R.199 (Kevin Holland affidavit). An ambulatory surgery center is a healthcare facility that provides patients with surgical procedures outside of a hospital setting.[2] As explained by Chris Anderson, Singing River's chief executive officer, SRHS Ambulatory "existed to support the [] strategic goals of Singing River Health System." R.815.

SRHS Ambulatory was formed as a Mississippi nonprofit corporation. R.1840-43 (Articles of Incorporation). Singing River is the sole member of SRHS Ambulatory. *Id.*; *see also* R.1844-61 (SRHS Ambulatory Bylaws, Section II(1)). SRHS Ambulatory's board of directors is appointed by Singing River's Board of Trustees, and the directors may be removed at will by Singing River's chief executive officer. R.1844-61 (Bylaws, Section III(2)-(3)); *see also* R.1262-63 (Holland testimony). Upon dissolution of SRHS

[2] *See* Miss. Dep't of Health, Minimum Standards of Operation for Ambulatory Surgical Facilities, Miss. Admin. Code, Title 15, Part 16, Subpart 1, Ch. 42, Rule 42.2.1 (defining "ambulatory surgery" and "ambulatory surgical facility").

Ambulatory, its assets revert to Singing River or to whatever charitable entity Singing River selects. R.1842 (Articles of Incorporation).

Since its creation, SRHS Ambulatory has operated two ambulatory surgery centers for Singing River, one in Ocean Springs and another in Pascagoula. R.1262.

C. SRHS Ambulatory uses $3,600,000 in public funds to purchase property from Pinehaven, but the Board of Supervisors never ratifies the purchase contract.

Pinehaven Group, LLC ("Pinehaven") was formed on March 8, 2007 to buy and sell property along the Mississippi Gulf Coast. R.1401-02. On March 22, 2007, two weeks after its formation, Pinehaven purchased 1,200 acres of land just north of Interstate 10 and east of Highway 67, near D'Iberville. R.1402-03. Pinehaven paid approximately $20,208 per acre for the property, which included 460 acres of wetlands that were not suitable for development. R.1406-07; R.1434. Pinehaven's managing partner testified that, after the wetlands were accounted for, Pinehaven "had about $50,000 an acre in the usable property." R.1407.

After acquiring the 1,200 acres, Pinehaven advertised the property for sale through real estate agent Caryn Hanson R.343 (Caryn Hanson affidavit). Around the time that Pinehaven listed the property, SRHS Ambulatory was being encouraged by developers of a residential community called "Tradition," which was near D'Iberville, to locate a hospital close by their planned development. R.1274-76; 1386-87. When SRHS Ambulatory's business development director, Greg Shoemaker, called Hanson about some property she had listed in the area, Hanson steered him to the less-expensive Pinehaven property—in particular, a 12-acre tract with road frontage on Highway 67. R.344-45 (Hanson affidavit); *see also* R.1277 (Shoemaker testimony).

Pinehaven offered to sell the 12-acre tract to SRHS Ambulatory for $350,000 per acre. R.345. SRHS Ambulatory countered at $250,000 per acre. R.345. The parties compromised at a price of $300,000 per acre, for a total purchase price of $3,600,000 for the 12-acre tract. *See* R.345; R.1278-79 (Shoemaker testimony).[3]

In July 2007, SRHS Ambulatory's board of directors held a special meeting at which the directors learned that Singing River's Board of Trustees supported SRHS Ambulatory's acquisition of the Pinehaven property. R.1937 (minutes). SRHS Ambulatory's board voted unanimously to enter a contract to purchase the Pinehaven property for $3,600,000. R.1937. The purchase contract was executed by Pinehaven and SRHS Ambulatory on July 26, 2007. R.60-63. In October 2007, the Singing River Board of Trustees passed a resolution approving SRHS Ambulatory's purchase of the property and authorizing the transfer of $3,600,000 from Singing River to SRHS Ambulatory to cover the purchase price. R.1946-47. Singing River then issued a check to SRHS Ambulatory for the purchase price. R.1269-73.

In November 2007, shortly after the purchase contract was executed, the 12-acre tract appraised for only $3,000,000, about 17% less than what SRHS Ambulatory had paid and only $250,000 per acre. R.1290-1374 (appraisal report). Even so, the parties closed the deal in December 2007, and Pinehaven issued a warranty deed for the property to SRHS Ambulatory. R.2026-40 (warranty deed). Throughout these negotiations, Pinehaven knew that it was dealing with a nonprofit healthcare facility

[3] As noted, Pinehaven paid about "$50,000 an acre in the usable property." R.1407. Around the time of SRHS Ambulatory's purchase, Pinehaven also sold a portion of the 1,200-acre property to Mississippi Power Company for $83,333 per acre and another portion to the Harrison County Utility Authority for $45,000 per acre. R.1409.

established by Singing River. R.306 (Pinehaven's admission "that it was advised that SRHS, Inc., was established by the Board of Trustees of Singing River Hospital system to operate ambulatory surgical facilities and immediate care facilities").

First American Title Insurance Company ("First American") issued an owner's policy insuring SRHS Ambulatory's title for $3,600,000 against claims and defects. R.2070-77 (title policy).[4] Darryl Dryden, who acted as both a closing attorney for SRHS Ambulatory and an agent for First American, recalled discussing a statute governing land purchases by a community hospital at the closing. R.1699-1700. Dryden testified that he and others at the closing "went back and forth" over whether the statute applied to the Pinehaven transaction, but Dryden ultimately concluded that it did not. R.1699-1700; *see also* R.2233-34 (Dryden testimony). Dryden was not certain if he had alerted First American to his quandary over the community hospital statute, but acknowledged that he "could have." R.1700.

The Jackson County Board of Supervisors never ratified the contract for the purchase of the 12-acre Pinehaven property. *See* R.1172 (First American claim denial, acknowledging that the Board did not ratify the contract); R.1421-23, 1479-80 (title insurer's counsel discussing research of board minutes and confirming that no evidence of ratification exists); *see also* R.494 (letter from title insurer's counsel stating "I am certain the Jackson County Board of Supervisors did not ratify this purchase in 2007 . . . .").

[4] Although First American willingly insured the Pinehaven purchase for $3,600,000, its attorneys began calling the purchase "a bad financial move" after this suit was filed. R.1987.

D. SRHS Ambulatory discovers the ratification defect long after its purchase, but Pinehaven refuses to return the purchase price and First American denies coverage.

SRHS Ambulatory never developed the Pinehaven property. R.1107 (Holland testimony). In the summer of 2013, SRHS Ambulatory listed the property for sale, but found no buyers. R.1107; R.1743-58 (listing agreement). The property sat vacant and unused, and was still listed for sale as an empty lot in August 2018. R.2505.

In February 2015, William Guice—an attorney for the Jackson County Board of Supervisors—advised SRHS Ambulatory that, based on his research, the attempted purchase of the Pinehaven property was invalid. R.1165, 1175, 1178-80 (discussing Guice letter). Mr. Guice concluded that SRHS Ambulatory did not have title to the property. *Id.* In June 2015, Mr. Guice shared his concerns with the media, and the *Mississippi Press* published his comments on the invalid title in a newspaper article. R.1178, 1626-27 (discussing Guice's comments to the press).[5] Mr. Guice told the press that the Pinehaven property was illegally acquired, and SRHS Ambulatory should file suit to recover the purchase price. R.1627.

Caryn Hanson, the real estate agent who brokered the sale of the Pinehaven property, described the title issues raised by Mr. Guice as "front page news for quite some time." R.1463. First American's policy issuing agent, Dryden, understood Mr. Guice to be questioning the validity of SRHS Ambulatory's title both in his February 2015 letter to SRHS Ambulatory and his June 2015 statements to the press. R.1695-

[5] Among Mr. Guice's concerns, as First American understood them, were that Singing River and SRHS Ambulatory did not comply with the requirement that real property be appraised *before* public funds are used for the purchase, Miss. Code § 43-37-3, and that the county had not given permission to purchase the Pinehaven property. R.1178.

96. Braxton Wagnon, an in-house attorney and claim adjuster for First American, also recognized that Mr. Guice had challenged the validity of SRHS Ambulatory's title, though he disagreed with Mr. Guice's analysis. R.1616-28.

The Jackson County Board of Supervisors never ratified the purchase, even after Mr. Guice's claims of illegality were made public. After researching Mr. Guice's concerns, First American recognized that ratification would cure the title defect and believed that the Board of Supervisors would ratify the purchase "even at this late date." R.1477 (Dryden testimony in April 2018); *see also* R.494 (Dryden letter). So far as the record discloses, however, neither Pinehaven nor First American ever asked the Board of Supervisors to ratify the purchase contract.

In February 2017, SRHS Ambulatory made a claim against its title insurance policy, explaining that the purchase was void, requesting that First American pay the $3,600,000 policy amount, and offering to assist First American in pursuing recovery from Pinehaven. R.1139-1150. After an exchange of information and position letters, First American denied the claim. R.1151-86. First American asserted that ratification by the Board of Supervisors was not required and, therefore, SRHS Ambulatory had valid title. R.1177-86. Even if ratification was required, First American invoked several policy exclusions to deny SRHS Ambulatory's insurance claim. *Id.*

SRHS Ambulatory was stuck: It was confronting public allegations that its purchase of the Pinehaven property was illegal and void; it could not sell the property, despite attempts to do so; Pinehaven would not retake the property and return the purchase price; and First American would not honor its coverage obligations. SRHS Ambulatory turned to the courts for a resolution.

II. Course of Proceedings and Disposition in Trial Court

A. SRHS Ambulatory files suit seeking return of the $3,600,000 purchase price and a declaration of insurance coverage.

In March 2017, SRHS Ambulatory filed suit against Pinehaven seeking a declaration that its attempt to purchase the Pinehaven property was void for lack of ratification and, therefore, Pinehaven must refund the purchase price. R.48-53. In June 2017, after First American denied its insurance claim, SRHS Ambulatory amended its complaint to assert a claim against First American for benefits owed under the title policy and damages causes by First American's negligence. R.104-15 (amended complaint); R.102-03 (order granting leave to amend).

First American answered the amended complaint. R.143-57. Pinehaven answered the amended complaint and counterclaimed for a declaration of the parties' rights under the disputed purchase contract. R.172-84

SRHS Ambulatory filed an early motion for summary judgment seeking a declaration that its attempt to purchase the Pinehaven property was void because the Board of Supervisors never ratified the purchase. R.194-213. Pinehaven and First American opposed the motion as premature and requested a continuance to allow discovery. R.220-31 (First American motion to continue); R.242-44 (Pinehaven joinder). SRHS Ambulatory opposed the continuance because, in its view, the motion presented a pure question of law that turned on a universally acknowledged fact: the Board of Supervisors never ratified the purchase. R.245-66.

The chancery court—where the case was pending at the time—never ruled on the defendants' motion to continue or on SRHS Ambulatory's summary judgment motion. The parties engaged in discovery over an eight-month period. *See* R.6-12

(docket sheet reflecting discovery entries). After discovery was largely complete, the case was transferred to circuit court. *See* R.993-995 (*sua sponte* transfer order).[6]

Now in circuit court, SRHS Ambulatory filed a revised motion for summary judgment against Pinehaven, arguing that SRHS Ambulatory's attempt to purchase the Pinehaven property was void for lack of ratification and that Pinehaven should be ordered to refund the purchase price. R.1252-1489 (motion and exhibits); R.1490-1506 (memorandum brief). First American also filed a motion for summary judgment, in which it argued that the purchase was valid or, alternatively, that the title policy's exclusions barred coverage for SRHS Ambulatory's insurance claim. R.1027-1186 (motion and exhibits); R.1187-1218 (memorandum brief). Pinehaven's earlier-filed motion for a declaratory judgment also remained pending. R.347-50.

B. The circuit court grants summary judgment to Pinehaven and First American, rejecting all of SRHS Ambulatory's claims.

In 2018, the circuit court (Bourgeois, J.) conducted two hearings at which all pending motions were argued. R.2435-634 (hearing transcripts). The court did not issue any bench rulings, *see id.*, and briefing by the parties continued after the last hearing, *see* R.15-16 (docket sheet reflecting post-hearing briefing). In June 2020, the circuit court held a status conference at which it announced that SRHS Ambulatory's summary judgment motion was denied and First American's summary judgment motion was granted. R.2435-41 (hearing transcript). The circuit judge did not rule on

[6] SRHS Ambulatory filed its original complaint for declaratory relief in the Harrison County Chancery Court. R.48-53. After the amended complaint was filed, discovery was completed, and summary judgment motions were briefed, the chancery judge *sua sponte* transferred the case to Harrison County Circuit Court. R.993-1001. The chancery judge found that the new claims in SRHS Ambulatory's amended complaint made the matter appropriate for circuit court resolution. R.995.

Pinehaven's motion for declaratory judgment at the status conference, but stated that he would consider it and issue a ruling later. *Id.* At the close of the status conference, the judge requested proposed orders memorializing his rulings. R.2440-41.

The circuit court issued its final written orders in late 2020. The court denied SRHS Ambulatory's motion for summary judgment in a three-page order that referred generally to the arguments and evidence presented by the parties, but did not discuss or analyze those arguments. R.2350-52 (order).

The court granted Pinehaven's motion for a declaratory judgment, ruling that SRHS Ambulatory's purchase of the 12-acre tract was valid and enforceable. R.2369-79. The court found no evidence of ratification by the Board of Supervisors, but—adopting Pinehaven's arguments—declared ratification to be unnecessary. Under the circuit court's analysis, SRHS Ambulatory was not a "community hospital" and, therefore, Section 41-13-15(4)'s ratification requirement did not apply. *Id.* Instead, the court declared SRHS Ambulatory to be a generic nonprofit organization subject only to the "general corporate powers for Mississippi nonprofit corporations" provided in Mississippi Code § 79-11-51, which grants nonprofits the power to purchase real property. *Id.* Alternatively, the court held that SRHS Ambulatory was estopped from challenging or voiding the purchase even if ratification was required. *Id.* The court's order did not address the undisputed fact that SRHS Ambulatory used $3,600,000 of public funds provided by Singing River to make the unratified purchase.

The circuit court also granted First American's motion for summary judgment. R.2355-68 (order and final judgment). As in its order granting Pinehaven's motion, the court ruled that SRHS Ambulatory was not a community hospital, but was a

separate entity subject only to the general nonprofit statutes. *Id.* Alternatively, citing this Court's opinion in *Greene County v. Corporate Management, Inc.*, 10 So. 3d 424 (Miss. 2009), the court ruled that ratification by the Board of Supervisors is *never* required when a community hospital *acquires* property; it is required only if a hospital *alienates* property. R.2365-66. The court also found that, even if ratification was required, First American's title policy excluded coverage for SRHS Ambulatory's losses because SRHS Ambulatory: (a) failed to seek ratification, (b) did not make First American aware of the ratification defect, and (c) had suffered no loss or adverse claim against its title. R.2360-64. Finally, if the exclusions were not applicable, the court held SRHS Ambulatory was equitably estopped from challenging the purchase.

The circuit court also dismissed SRHS Ambulatory's negligence claims against First American. Although it found no precedent from this Court to guide its decision, the circuit court declared that Mississippi tort law does not impose a duty on title insurers to perform a title search and, therefore, a title insurer can never be liable for performing a negligent title search that causes a title defect. R.2358-59.[7]

SRHS Ambulatory now appeals to this Court. R.2380-82.

[7] Each of the orders was prepared by defense counsel and entered verbatim by the circuit judge, *see* R.2350-52 (order denying SRHS Ambulatory's motion), R.2355-68 (order granting First American's motion), or near verbatim in the case of Pinehaven's proposed findings and conclusions, *see* R.2369-79 (order granting Pinehaven's motion). While this practice would normally warrant a heightened review, a heightened standard of review is not needed here because "the applicable one is already a completely new look at the case." *Stuart v. St. Dominic-Jackson Mem'l Hosp.*, 311 So. 3d 1192, 1202 (Miss. Ct. App. 2020).

STANDARD OF REVIEW

The circuit court resolved this case on motions for summary judgment and declaratory judgment. This Court applies a *de novo* standard when reviewing the grant or denial of summary judgment and views the evidence in the light most favorable to the party against whom the motion was made. *Double Quick, Inc. v. Moore*, 73 So. 3d 1162, 1165 (Miss. 2011). The Court's review is plenary, afresh, and without deference to the trial court's rulings—"a completely new look at the case." *Stuart*, 311 So. 3d at 1202. The circuit court's declaratory judgment rulings are also reviewed *de novo*. *S.C. Ins. Co. v. Keymon*, 974 So. 2d 226, 229 (Miss. 2008).

The circuit court's rulings also involve questions of statutory interpretation and insurance contract interpretation, which are reviewed *de novo* on appeal. *HWCC-Tunica, Inc. v. Miss. Dep't of Revenue*, 296 So. 3d 668, 673 (Miss. 2020) ("Matters of statutory interpretation also are reviewed by this Court using a de novo standard."); *Hinton v. Pekin Ins. Co.*, 268 So. 3d 543, 551 (Miss. 2019) ("The Court proceeds under a de novo standard of review for any interpretation of an insurance policy.").

SUMMARY OF THE ARGUMENT

The Mississippi Legislature has mandated that any attempt by a community hospital to purchase real property must be ratified by the board of supervisors that owns the hospital. Miss. Code § 41-13-15(4). The Jackson County Board of Supervisors never ratified SRHS Ambulatory's attempt to purchase the Pinehaven property for $3,600,000. The purchase contract is unenforceable, and Pinehaven must return the purchase money to SRHS Ambulatory for three reasons:

First, SRHS Ambulatory is a community hospital and, as such, its attempt to purchase the Pinehaven property fails for lack of ratification. The Legislature has defined a "community hospital" as "any hospital, nursing home and/or health related facilities or programs, including, without limitation, ambulatory surgical facilities . . . *established* and acquired *by boards of trustees* . . . ." Miss. Code § 41-13-10(c) (emphasis added). SRHS Ambulatory comes within the plain meaning of "community hospital": SRHS Ambulatory is an operator of ambulatory surgical facilities that was *established by a board of trustees*—the Board of Trustees for Singing River.

The circuit court departed from this straightforward textual analysis because, in its view, SRHS Ambulatory's incorporation under the general nonprofit statutes gave it the powers of any other nonprofit—including an unlimited power to purchase property with public funds. That was error. Nothing in the definition of "community hospital" depends on how a healthcare facility is established. If a healthcare facility meets the definition of "community hospital," then the means by which it is formed cannot remove it from that definition. Otherwise, a community hospital could circumvent the ratification requirement by establishing a nonprofit corporation to make the very same purchase (using the very same public funds) that the board of supervisors had refused to ratify. The Court should reject such an unreasonable reading of the community hospital statutes.

Second, even if SRHS Ambulatory is not itself a "community hospital," it is still subject to the ratification requirement as a nonprofit health facility established, owned, and controlled by Singing River. It is an extension of Singing River, created to fulfill Singing River's mission of providing healthcare—specifically, outpatient

surgical procedures—to citizens in the community. As such, SRHS Ambulatory is bound by the ratification requirement just as Singing River would be. The Mississippi Attorney General has adopted this practical interpretation of the ratification requirement, recognizing that, while a nonprofit entity established by a community hospital is "free to acquire by lease or purchase new real property to be held for the benefit of the hospital, such acquisition to be subject to ratification by the county board of supervisors, as provided in 41-13-35(5)(o)." Miss. A.G. Op. 2007-00527 (Albert G. Delgadillo), 2008 WL 965691 (Mar. 28, 2008). That interpretation is also consistent with this Court's decision that a nonprofit entity owned and controlled by a community hospital is an "instrumentality" of the hospital, afforded the protections of the Mississippi Tort Claims Act, which protects public funds from tort-based losses. *Bolivar Leflore Med. All., LLP v. Williams*, 938 So. 2d 1222, 1231-32 (Miss. 2006).

Third, contrary to the circuit court's holding, the ratification defect cannot be overcome by an equitable estoppel defense. A board of supervisors must ratify a purchase contract by a formal vote, recorded in the official board minutes. Absent official ratification, the "minutes rule" prohibits private parties from binding public bodies through estoppel arguments. While the rule may be harsh, it is strictly applied because it serves an important public policy—preventing the unauthorized use of public funds—that is "paramount over other individual rights which may also be involved." *Butler v. Bd. of Sup'rs for Hinds Cty.*, 659 So. 2d 578, 579 (Miss. 1995).

The circuit court also erred in summarily dismissing SRHS Ambulatory's claims against its title insurer, First American. SRHS Ambulatory's claims against First American should be reinstated for two reasons:

First, the policy exclusions invoked by First American, which must be strictly construed against the insurer, do not remove coverage. The circuit court misapplied both Exclusion 3(a), which bars coverage for "agreed defects," and Exclusion 3(b), which bars coverage for "known defects," based on its mistaken view that SRHS Ambulatory was responsible for seeking ratification. Under established law, SRHS Ambulatory had no duty to secure ratification; that duty fell to Pinehaven, the party attempting to sell property to a public body. Further, the facts do not support the circuit court's contention that SRHS ambulatory *indisputably agreed* to take defective title or had *actual knowledge* that its title was defective at closing. Instead, all parties at the closing—SRHS Ambulatory, Pinehaven, and First American—were under the mistaken assumption that ratification was not required. SRHS Ambulatory only learned of the defect years after the closing, when an attorney for the Board of Supervisors publicly challenged the purchase as illegal. Finally, Exclusion 3(c), which bars claims for defects that cause no loss, does not apply. On the disputed facts in this record, a jury could find that SRHS Ambulatory's title is void and unmarketable and, therefore, that it has suffered the complete loss of its purchase payment.

Second, Mississippi tort law should recognize that title insurers have a duty to perform reasonable title searches, particularly in "gratuitous undertaking" cases like this one. First American voluntarily sought to determine that the Pinehaven purchase was valid, properly approved, and free from defects. Having undertaken that service, First American assumed a duty to discharge it reasonably and to advise SRHS Ambulatory of defects that it discovered. A jury could find that First American breached that duty by failing to identify the consequences of the ratification defect.

ARGUMENT

I. SRHS Ambulatory's attempt to purchase the Pinehaven property is void because it was never ratified by the Board of Supervisors, and the circuit court's contrary ruling was reversible error.

SRHS Ambulatory cannot purchase real property unless the Jackson County Board of Supervisors ratifies the purchase contract. This is so for two reasons: (1) SRHS Ambulatory is itself a "community hospital" as that term is defined by statute; and (2) alternatively, SRHS Ambulatory—a nonprofit healthcare facility created, owned, and controlled by a community hospital—is bound by the same ratification requirements that bind its creator and owner, Singing River.

The Board of Supervisors never ratified the use of $3,600,000 in public funds to purchase the Pinehaven property, so the purchase contract is void as a matter of law. The public policy underlying this rule is paramount to individual interests, and no equitable defenses that can overcome that policy. This Court should reverse the circuit court's decision, render a judgment against Pinehaven and First American declaring the purchase void, and remand the case for a determination of amounts due to SRHS Ambulatory by Pinehaven and First American.

A. A community hospital's contract to purchase real property must be ratified by the Board of Supervisors.

The Mississippi Legislature has granted community hospitals the power to purchase real property, but with a clear and important limitation: "any contract for the purchase of real property *must be ratified by the owner* . . . ." Miss. Code § 41-13-15(4) (emphasis added); *accord* Miss. Code § 41-13-35(o). The purpose of the ratification requirement is to ensure that public funds are not spent without express

permission of the public body that owns the community hospital—in this case, the Jackson County Board of Supervisors.

Ratification of a purchase contract cannot be implied or presumed; it must be reflected in the official minutes of the Board of Supervisors. *See Wellness, Inc. v. Pearl River Cty. Hosp.*, 178 So. 3d 1287, 1290-93 (Miss. 2015) (discussing "minutes rule"); *accord KPMG, LLP*, 283 So. 3d at 669 (tracing Supreme Court's consistent application of "minutes rule" for 138 years); *Butler v. Bd. of Sup'rs for Hinds Cty.*, 659 So. 2d 578, 579 (Miss. 1995). If an order ratifying the purchase contract does not appear in the board minutes, then the purchase is void and unenforceable. *Martin v. Newell*, 23 So. 2d 796, 797 (Miss. 1945) (refusing to enforce contract for purchase of land that did not appear in board of supervisors' official minutes); *KPMG, LLP*, 283 So. 3d at 674 (declaring arbitration agreement "unenforceable" under minutes rule); *Lefoldt v. Horne, L.L.P.*, 938 F.3d 549, 550 (5th Cir. 2019) ("Mississippi courts will not give legal effect to a contract with a public board unless the board's approval of the contract is reflected in its minutes.").

The "minutes rule" and its animating policy of protecting public funds is so well established that "everyone" is "charged with the knowledge that a board of supervisors can only make a the county liable for a contract by a valid order duly entered upon its minutes." *Butler*, 659 So. 2d at 582. As applied here, the rule requires that any contract for the purchase of real property by a community hospital be ratified by an official order of the Board of Supervisors. The Court cannot enforce a purchase contract that is not so ratified. *See Wellness, Inc.*, 178 So. 3d at 1291.

B. SRHS Ambulatory may not purchase real property unless the purchase contract is ratified by the Board of Supervisors.

The Board of Supervisors never ratified SRHS Ambulatory's $3,600,0000 purchase contract for the Pinehaven property. This fact is undisputed. The circuit court deemed ratification unnecessary for two reasons: (1) SRHS Ambulatory is not a "community hospital" as defined by Section 41-13-10(c), and (2) general nonprofit laws and notions of "corporate separateness" overcome the Legislature's ratification requirement even in this case, where a community hospital's wholly owned subsidiary uses public funds to purchase real property that will be used to support the community hospital's mission. The circuit court erred on both counts.

1. SRHS Ambulatory is a community hospital that is bound by the ratification requirement.

SRHS Ambulatory is itself a "community hospital" as that term is used in Section 41-13-10(c) because SRHS Ambulatory is an ambulatory surgical facility *established by* the Singing River Board of Trustees.

When addressing questions of statutory interpretation, this Court's "primary objective" is to "adopt that interpretation which will meet the true meaning of the Legislature." *Scaggs v. GPCH-GP, Inc.*, 931 So. 2d 1274, 1276 (Miss. 2006). The Court's analysis begins with the statute's text: "Where a statute is unambiguous, the Court must apply the statute according to its plain meaning, refraining from principles of statutory construction." *HWCC-Tunica, Inc.*, 296 So. 3d at 673. If a statute is "ambiguous or silent on a specific issue," the Court employs canons or rules of statutory construction. *Id.*; *accord Nissan N. Am., Inc. v. Tillman*, 273 So. 3d 710, 714 (Miss. 2019). In all events, "Courts have a duty to give statutes a practical

application consistent with their wording, unless such application is inconsistent with the obvious intent of the legislature." *Nissan*, 273 So. 3d at 715.

The Mississippi Legislature has provided a two-part definition of "community hospital" in Section 41-13-10(c). That section provides:

> "Community hospital" shall mean any hospital, nursing home and/or related health facilities or programs, including, without limitation, ambulatory surgical facilities, intermediate care facilities, after-hours clinics, home health agencies and rehabilitation facilities, established and acquired by boards of trustees or by one or more owners which is governed, operated and maintained by a board of trustees.

Miss. Code § 41-13-10(c). The statute's first clause lists the type of health facilities that qualify as "community hospitals"—hospitals, nursing homes, after-hours clinics, ambulatory surgical facilities, and so on. The second clause modifies the first by limiting "community hospitals" to health facilities that are *either* "established and acquired by boards of trustees" *or* "established and acquired . . . by one or more owners which is governed, operated and maintained by a board of trustees."

SRHS Ambulatory comes within the plain meaning of "community hospital" because it is (1) an operator of ambulatory surgical facilities that (2) was established and acquired by a board of trustees—the Board of Trustees for Singing River. The ordinary meaning of "establish" is to bring a thing into existence or to start something that will exist for a long time.[8] The Singing River Board of Trustees brought SRHS Ambulatory into existence in 1998. Since then, Singing River has retained ownership

[8] *See* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/establish (visited June 11, 2021) (defining "establish" as "to bring into existence"); Cambridge Online Dictionary (defining "establish" as "to start a company or organization that will continue for a long time"), https://dictionary.cambridge.org/ us/dictionary/english/establish (visited June 11, 2021); *Black's Law Dictionary* (7th ed. 2000) (defining "establish" as "[t]o make or form; to bring about or into existence").

and control over SRHS Ambulatory—acting as its sole member, maintaining control over appointments to its board of directors, providing public funds for its real property acquisitions, and ensuring that any property held by SRHS Ambulatory will revert to Singing River upon dissolution.

The Legislature did not specify how a community hospital may or must "establish" a health care facility, and the plain meaning of that term imposes no legal restrictions. Accordingly, Singing River's decision to establish SRHS Ambulatory by incorporating it as a Mississippi nonprofit company, the sole member of which is Singing River, does not alter SRHS Ambulatory's status as a community hospital under the plain terms of Section 41-13-10(c).

The circuit court's contrary ruling was error. Ignoring the statutory text and relying instead on concepts of corporate separateness, the circuit court declared that SRHS Ambulatory was not a community hospital because it was incorporated as a nonprofit and, as a general matter, "a corporation is separate and distinct from its shareholders." R.2364-65 (summary judgment order); *see also* R.2372-74 (declaratory judgment). The circuit court's ruling runs afoul of the "well-settled" rule that, "when construing two statutes that encompass the same subject matter, a specific statute will control over a general one." *Wilbourn v. Hobson*, 608 So. 2d 1187, 1191 (Miss. 1992) (citing cases); *see also Parker v. N.Y. Life Ins. Co.*, 107 So. 198, 198 (Miss. 1926) (explaining that specific statute controls over common law). The Legislature has specifically defined certain entities to be "community hospitals" without tying that definition to a particular method of establishment. That specific definition, provided

in Section 41-13-10(c), controls over general nonprofit statutes and common law principles of corporate separateness.

If a healthcare facility comes within Section 41-13-10(c)'s definition of "community hospital," then the manner in which it is established cannot alter its status as a community hospital. To hold otherwise would depart from Section 41-13-10(c)'s plain language and nullify the ratification requirement's purpose, which is to ensure that a board of supervisors may check a community hospital's expenditure of public funds by refusing to ratify its real property purchases.

Take the obvious problem that arises from the circuit court's holding: A community hospital, like Singing River, may not purchase real property for use as a health facility without ratification by the Board of Supervisors. Yet, the hospital may circumvent the ratification requirement by establishing a nonprofit corporation that—using public funds provided by the community hospital—will make the very same purchase that the Board of Supervisors refused to ratify. The Legislature could not have intended such an absurd result, under which the ratification requirement's purpose—vesting ultimate authority over expenditures of public funds in boards of supervisors—is so easily defeated. The Court should reject such an unreasonable reading. *See Brown v. Staple Cotton Co-op. Ass'n*, 96 So. 849, 855 (Miss. 1923) ("A statute will not be construed so as to lead to unreasonable or absurd results if that can be avoided."); *In re B.A.H.*, 225 So. 3d 1220, 1237 (Miss. Ct. App. 2016) (same).

SRHS Ambulatory is a community hospital as defined by Section 41-13-10(c), and the Jackson County Board of Supervisors must ratify any attempts by SRHS Ambulatory to purchase real property. The Board of Supervisors did not ratify the

Pinehaven purchase contract. The purchase is void and unenforceable, and this Court should reverse the circuit court's order.

2. SRHS Ambulatory—a nonprofit entity created, owned, and controlled by a community hospital—is bound by the ratification requirement.

Even if SRHS Ambulatory is not itself a "community hospital" under Section 41-13-10(c), it is a nonprofit health facility established, owned, and controlled by Singing River. Accordingly, SRHS Ambulatory is bound by statutes governing a community hospital's acquisition of real property—including the ratification requirement—just as Singing River is bound by those statutes.

This Court gives all statutes a "practical application" that is consistent with legislative intent. *Nissan*, 273 So. 3d at 715; *see also Gore v. Patrick*, 150 So. 2d 169, 171 (Miss. 1963) ("Statutes must be given a sensible construction so as to be practical or workable."). Statutes governing community hospitals must be liberally construed to give effect to the Legislature's purpose and intent. *See Bolivar Leflore Med. All., LLP v. Williams*, 938 So. 2d 1222, 1229 n.11 (Miss. 2006) (citing 1985 Miss. Laws ch. 511, § 1). The Legislature is presumed to have intended a sensible and practical restriction on the use of public funds to purchase real property, whether by a community hospital or by its wholly owned subsidiary, and not an illusory restriction that may be easily defeated by corporate formalities.

SRHS Ambulatory is an extension of Singing River, created by Singing River to fulfill the community hospital's mission of providing healthcare—specifically, outpatient surgical procedures—to citizens in the community. SRHS Ambulatory was acting in that capacity when it attempted to purchase the Pinehaven property. There

is no dispute about this: Singing River is SRHS Ambulatory's sole owner; Singing River appoints 100% of SRHS Ambulatory's directors and may remove them at will; SRHS Ambulatory's assets revert to Singing River upon its dissolution; and Singing River provided the $3,600,000 in public funds to pay for the Pinehaven property. *See supra*, 4-5 (citing record). Although SRHS Ambulatory made the purchase, it was—as a practical matter—an acquisition of real property by Singing River.

Under these facts and a practical application of the ratification requirement, SRHS Ambulatory's real-property purchases must be ratified by the Board of Supervisors, just as purchases by its sole owner (Singing River) must be ratified. The Mississippi Attorney General has adopted this sensible interpretation of the ratification requirement. *See* Miss. A.G. Op. 2007-00527 (Albert G. Delgadillo), 2008 WL 965691 (Mar. 28, 2008).[9] In the *Delgadillo Opinion*, the Attorney General reasoned that, if a community hospital establishes a nonprofit entity to acquire and hold real property for the hospital's benefit, then the nonprofit entity—like the community hospital itself—is subject to the ratification requirement. *Id.* ("Once created and established, the nonprofit is free to acquire by lease or purchase new real property to be held for the benefit of the hospital, such acquisition to be subject to ratification by the county board of supervisors, as provided in 41-13-35(5)(o)."). The Attorney General also reasoned that property acquired by this design would be public property, even though it was held by a separate nonprofit entity and not by the

[9] "While Attorney General opinions are not binding on this Court, they certainly are useful in offering guidance to the Court." *Hemphill Constr. Co., Inc. v. City of Clarksdale*, 250 So. 3d 1258, 1263 (Miss. 2018) (internal quotation marks omitted).

community hospital itself. *Id.* (citing *Miss. Surplus Lines Ass'n v. State of Miss.*, 442 F. Supp. 2d 335, 338 (S.D. Miss. 2006)).

The *Delgadillo Opinion* and the *Mississippi Surplus Lines* decision on which it relied recognize the practical rule that, if a nonprofit entity is established to assist a public body in fulfilling its public functions and is entrusted with public funds to do so, then it must also be bound by laws regulating the use of those public funds. The fact that the nonprofit is established under the Mississippi Nonprofit Corporations Act, and acquires the powers of a private nonprofit, does not alter the entity's true nature or override specific statutes governing the public functions that it serves. *See Delgadillo Op.*, 2008 WL 965691 at *2; *Miss. Surplus Lines*, 442 F. Supp. 2d at 338-41. As noted above, "a specific statute will control over a general one." *Wilbourn*, 608 So. 2d at 1191. This rule should apply with particular force when a statute requires a board of supervisors to approve the expenditure of public funds. *See Butler*, 659 So. 2d at 579 ("[T]he policy of protecting the public's funds for use by and for the public is paramount to other individual rights which may also be involved.").

In an analogous context, this Court has held that a medical clinic established jointly by a community hospital and two physicians was an "instrumentality" of the community hospital and, as such, was governed and protected by the Mississippi Tort Claims Act ("MTCA"). *Bolivar Leflore Med. All., LLP*, 938 So. 2d at 1231-32. In *Bolivar Leflore*, the community hospital owned 98% of the separate medical clinic and held a majority (two-thirds) control over the entity's executive committee. *Id.* The Court found that this arrangement made the clinic an "intermediary or agent through which certain functions of [the community hospital] are accomplished." *Id.* at 1232.

Even though the clinic was a separate entity, like the community hospital that created and controlled it, the clinic was afforded the protections and immunities of the MTCA—chief among them, protection of public funds from tort-related losses. *Id.* Here, SRHS Ambulatory is *100% owned* by Singing River, and its board is *fully controlled* by Singing River. SRHS Ambulatory is, therefore, an agent of Singing River, established to fulfill the hospital's healthcare mission, and it should be subject to the same ratification requirement for purchases of real property with public funds.

Given these authorities and principles, the circuit court erred in holding that SRHS Ambulatory's formation as a separate entity under the Mississippi Nonprofit Corporations Act and its general powers as a nonprofit override Section 41-13-15(4)'s express ratification requirement. *See* R.2364-66 (summary judgment order); R.2372-74 (declaratory judgment order). The circuit court's attempt to distinguish the *Delgadillo Opinion* based on a nonprofit's federal tax status—a 501(c)(2) tax election in *Delgadillo*, as opposed to a 501(c)(3) election by SRHS Ambulatory—was mistaken. The 501(c)(2) designation is merely a federal tax status election; it has nothing to do with the nonprofit corporation's powers or limitations under Mississippi law, which is what the Attorney General's analysis concerned. Although the *Delgadillo Opinion* involved a 501(c)(2) entity, it relied primarily on the *Mississippi Surplus Lines* decision, which involved a 501(c)(3) entity. Further confirming the irrelevance of the 501(c) status, in a companion opinion, the Attorney General applied the same legal principles to the community hospital's proposed formation of a 501(c)(3) nonprofit in determining that the 501(c)(3) entity would also "be a public entity performing

governmental functions." *See* Miss. A.G. Op. 2007-00528 (Albert G. Delgadillo), 2008 WL 965692, *2 (Mar. 28, 2008).

The circuit court also erred in adopting First American's argument that Singing River and SRHS Ambulatory may sidestep Section 41-13-15(4)'s ratification requirement and, instead, rely Section 41-13-38(2)'s provision allowing community hospitals to provide grants or financial assistance to nonprofit corporations. *See* R.2365 (summary judgment order). Contrary to the circuit court's view, Section 41-13-38(2)'s financial assistance provision should not be read to conflict with—and defeat—Section 41-13-15(4)'s ratification requirement. Instead, these two provisions should be read in harmony, so that Section 41-13-38(2) governs grants and financial assistance to nonprofits, while Section 41-13-15(4) applies if public funds are being used to purchase real property. *See Cellular S., Inc. v. BellSouth Telecomms., LLC*, 214 So. 3d 208, 212 (Miss. 2017) (explaining that "statutes within an Act should be construed to 'harmonize with' one another").

Applying these two provisions as the circuit court did would produce the same unintended result noted above: When transferring millions of dollars in public funds to its wholly owned nonprofit entity for the purpose of purchasing real property, the community hospital could simply reference Section 41-13-38(2) in its appropriation order and, thereby, defeat the Board of Supervisors' power to ratify or reject the purchase under Section 41-13-15(4). The better reading of these statutes is one that harmonizes them by enforcing the ratification requirement when a community hospital or its wholly owned nonprofit purchases real property and applying Section

41-13-38(2)'s financial assistance provision to grants, loans, or the like that that do not involve such real-property purchases.

Finally, the circuit court held that ratification is *never* required when a community hospital purchases real property, but only when it sells real property. R.2366 (citing *Greene County*, 10 So. 3d at 430-31). This is plainly wrong. In *Greene County*, this Court addressed an entirely different and separate provision of the Act, one that permits community hospitals to enter leases or lease-purchase agreements for the provision of property, equipment, or services. *See* 10 So. 3d at 430-31 (citing and discussing Miss. Code § 41-13-35(5)(g)). This Court did not purport to construe the provisions of the Act at issue here, much less to declare that the Legislature's ratification requirement—as set forth in Miss. Code § 41-13-15(4) and § 41-13-35(o)—was a nullity. In fact, *Greene County* reinforces two legal principles that support SRHS Ambulatory's position on appeal: (1) a community hospital's powers are defined by the Legislature, and community hospitals may not act beyond those powers; and (2) if a community hospital's act requires approval by the board of supervisors, then board approval "must be evidenced by an entry in its minutes to be valid." *Id.* at 431 (citing "minutes rule" authorities).

Pinehaven's and First American's arguments elevate legal form above the substance of the transaction at issue, so that Pinehaven may retain $3,600,000 in public funds paid under a purchase contract that the Board of Supervisors never ratified. If those arguments prevail, then the Legislature's ratification requirement will be a toothless provision. What the Legislature intended as a key check on the use of public funds to purchase real property, can be sidestepped by having a wholly

owned nonprofit do what the community hospital cannot. The Legislature did not intend such an unreasonable result, and this Court should not countenance it.

C. The ratification defect cannot be "cured" by equitable defenses.

Finally, the circuit court ruled that SRHS Ambulatory was estopped from challenging the purchase contract's validity and its title to the Pinehaven property. R.2366-68 (summary judgment order); R.2376-77 (declaratory judgment order). That is, the circuit court held that even if the Board of Supervisors was required to ratify the purchase contract, SRHS Ambulatory—and, by extension, the Board of Supervisors—was equitably estopped from invalidating the contract due to the lack of ratification. *See id.* In the circuit court's view, SRHS Ambulatory was at fault for failing to obtain ratification, *see id.*, and invalidating the Pinehaven purchase would "produce[] an unconscionable impact upon Pinehaven and indirectly on First American, should coverage apply," R.2367.

This holding was also error. As discussed above, the Board of Supervisors may only ratify the Pinehaven purchase by a vote of the supervisors, recorded in the official board minutes. *See Wellness, Inc.*, 178 So. 3d at 1290-93 (discussing "minutes rule"); *see also Greene County*, 10 So. 3d at 431; *Butler*, 659 So. 2d at 579. There are no equitable exceptions to the minutes rule. As the Fifth Circuit noted, after examining the relevant authorities, "Mississippi courts have consistently denied attempts to overcome the minutes rule based on equitable arguments." *Lefoldt for Natchez Reg'l Med. Ctr. Liquidation Tr. v. Horne, L.L.P.*, 853 F.3d 804, 821 (5th Cir. 2017). This Court has repeatedly rejected arguments that a public board may be bound by estoppel to honor contracts that do not appear in its official minutes. *E.g.*,

KPMG, LLC, 283 So. 3d at 675-76 (rejecting "direct-benefit estoppel" exception to minutes rule); *Rawls Springs Util. Dist. v. Novak*, 765 So. 2d 1288, 1292 (Miss. 2000) (rejecting "equitable estoppel" exception to minutes rule); *Butler*, 659 So. 2d at 581-82 (rejecting use of quantum meruit theory to estop county from denying void oral contract); *see also Urb. Devs. LLC v. City of Jackson, Miss.*, 468 F.3d 281, 298 (5th Cir. 2006) (rejecting equitable estoppel arguments).

Simply put, "a public board may not be bound by estoppel unless the agreement at issue is duly and lawfully entered upon its minutes." *KPMG, LLP*, 283 So. 3d at 676. All parties agree that the Jackson County Board of Supervisors never ratified the Pinehaven purchase contract, so there are no official orders or minutes reflecting ratification. Accordingly, the purchase contract is void and unenforceable.

The circuit court's reasons for resorting to equitable estoppel have also been rejected by this Court. *First*, the circuit court reasoned that SRHS Ambulatory was responsible for securing ratification. The law is just the opposite: "It is the responsibility of the entity contracting with the Board, not the responsibility of the Board itself, to ensure that 'the contract is legal and properly recorded on the minutes of the board.'" *KPMG, LLP*, 283 So. 3d at 674 (quoting *Wellness, Inc.*, 178 So. 3d at 1291); *accord* Martin, 815, 23 So. 2d at 797 ("We have also held it to be the duty of a person dealing with the board of supervisors to see that his contract is legal."); *Jackson Equip. & Serv. Co. v. Dunlop*, 160 So. 734, 737 (Miss. 1935) (same). As the party seeking to enforce a purchase contract, Pinehaven had a "clear and well-established duty" to ensure that the Board of Supervisors properly and formally ratified the contract. *Wellness, Inc.*, 178 So. 3d at 1293. Pinehaven's failure to fulfill

its own duty to ensure proper ratification does not entitle it to an equitable exemption from the well-established minutes rule. *See id.*

Second, the circuit court found that applying the ratification requirement to invalidate the purchase would have an "unconscionable" effect on Pinehaven and First American. While Pinehaven and First American may think that is true, claims of inequity have never been accepted as a reason to disregard the minutes rule. This Court has long-recognized that the consequences of the minutes rule can be harsh or "may work an apparent injustice" on the party attempting to contract with a public body. *See Wellness, Inc.*, 178 So. 3d at 1293; *Colle Towing Co. v. Harrison Cty.*, 57 So. 2d 171, 173 (Miss. 1952). Even so, the rule is strictly applied because it serves an important public policy—preventing the unauthorized use of public funds—that is "paramount over other individual rights which may also be involved." *Butler*, 659 So. 2d at 579; *see also Wellness, Inc.*, 178 So. 3d at 1292-93.

While Pinehaven and First American may view application of the minutes rule as unfair, they—like everyone else—are "charged with the knowledge that a board of supervisors can only make a the county liable for a contract by a valid order duly entered upon its minutes." *Butler*, 659 So. 2d at 582. The Board of Supervisors never ratified the Pinehaven purchase contract. As a result, the contract is void and unenforceable as a matter of law.

* * *

This Court should reverse the circuit court's orders, render a judgment against Pinehaven and First American declaring the purchase void, and remand the case for a decision on amounts due to SRHS Ambulatory by Pinehaven and First American.

II. The circuit court's summary dismissal of SRHS Ambulatory's claims against First American for insurance coverage and tort damages was reversible error.

In addition to requesting that Pinehaven reimburse the purchase price for the property, SRHS Ambulatory sought insurance coverage from First American for any losses incurred due to the title defect. R.104-15 (amended complaint). SRHS Ambulatory also sought damages under a negligence theory. *Id.* First American denied coverage and moved for summary judgment on SRHS Ambulatory's claims. R.1027-1186 (motion); R.1187-1218 (memorandum brief).

In granting First American's summary judgment motion, the circuit court first ruled that ratification was not required, an erroneous holding that is addressed in Argument Section I, *supra*. The court next held that, even if SRHS Ambulatory's title was void due to the ratification defect, several exclusions in the title policy removed coverage for SRHS Ambulatory's losses. The circuit court also rejected SRHS Ambulatory's negligence claim, finding that Mississippi law does not impose a duty on title insurers to conduct a reasonably diligent title search. R.2355-68.

The circuit court erred on all counts. The exclusions invoked by First American do not bar coverage given the factual disputes remaining in this case, particularly when the exclusions are construed strongly against First American—as they must be under Mississippi law. Further, and even if coverage is excluded under the title policy, First American owed—and a jury could find that it breached—a duty to make a reasonable search for title defects and to report any defects to SRHS Ambulatory.

A. First American's title policy does not exclude coverage for the losses incurred by SRHS Ambulatory.

The title policy issued by First American protects SRHS Ambulatory against loss sustained due to (1) "title to the estate or interest described [in the policy] being vested other than as stated therein; (2) any defect in or lien or encumbrance on the title; and (3) unmarketability of the title." R.2073. First American does not dispute that, if ratification is required, then SRHS Ambulatory's claim comes within this broad coverage grant. Instead, First American relied on policy exclusions to deny coverage, and the circuit court held that all three exclusions applied. *See* R.2360-64. That ruling was error, and the circuit court's order should be reversed.

1. Exclusions in insurance policies are construed strongly against the insurer and in favor of the insured.

A title insurance policy protects the insured against loss or damage incurred due to defects in the title or marketability of the insured property. *See* Barlow Burke, *The Law of Title Insurance* § 2.01 (Aspen Publishers, 3d ed. 2021 Supp.); 11A *Couch on Insurance* § 159:5 (3d ed. June 2021 Update). When applying title insurance policies, like other insurance contracts, courts "look at the policy as a whole, consider all relevant portions together and, whenever possible, give operative effect to every provision in order to reach a reasonable overall result." *Minn. Life Ins. Co. v. Columbia Cas. Co.*, 164 So. 3d 954, 968 (Miss. 2014). Insurance policies "are liberally construed in favor of the insured and strictly construed against the insurer." *Miss. Farm Bureau Mut. Ins. Co. v. Jones*, 754 So. 2d 1203, 1204 (Miss. 2000); *accord Porter v. Grand Casino of Miss., Inc.*, 181 So. 3d 980, 983 (Miss. 2016).

When an insurer invokes an exclusion to deny coverage, this rule operates with even greater force: "We have also held that language in exclusionary clauses must be written in clear and unmistakable language and that such clauses are always strictly interpreted." *Miss. Farm Bureau Mut. Ins. Co.*, 754 So. 2d at 1204; *accord Burton v. Choctaw Cty.*, 730 So. 2d 1, 8 (Miss. 1997) ("[O]ur jurisprudence requires that the language in insurance contracts, especially exclusionary clauses, be construed strongly against the drafter."); *The Law of Title Insurance* § 4.01 ("Exclusions, then, are typically accorded a strict and narrow construction, and are not to be extended by interpretation of or implication from what it said in the policy."). These rules of construction reflect the reality that "insureds are purchasing insurance, not exclusions, and the principal focus must always be on what they purchased, not what was withheld." *The Law of Title Insurance* § 4.01.

Further, "any ambiguities in an insurance contract must be construed against the insurer and in favor of the insured and a finding of coverage." *Burton*, 730 So. 2d at 8. The insurer bears the burden to prove that an exclusion applies. *Atlanta Cas. Co. v. Payne*, 603 So. 2d 343, 348 (Miss. 1992). Finally, while the proper construction of an insurance contract is a matter of law, the circuit court may not grant summary judgment if there are disputed facts that are material to the application of the policy terms. *See Infinity Ins. Co. v. Patel*, 737 So. 2d 366, 370 (Miss. Ct. App. 1998).

2. The policy exclusions invoked by First American do not remove coverage on the facts of this case.

The three exclusions invoked by First American do not preclude coverage under SRHS Ambulatory's title insurance policy. Each exclusion is addressed in turn.

Exclusion 3(a) – Agreed Defects. The circuit court first applied Exclusion 3(a) against SRHS Ambulatory, an exclusion that removes coverage for "[d]efects, liens, encumbrances, adverse claims or other matters . . . created, suffered, assumed or agreed to by the insured claimant[.]" R.2360-62; *see also* R.2070-77 (title policy). The court recognized that this standard exclusion is "intended to protect the insurer from liability for matters caused by the insured's own intentional misconduct, breach of duty, or otherwise inequitable dealings." R.2361 (citing *Moser v. Fid. Nat'l Title Ins. Co.*, 2018 WL 1413346, *6 (E.D. Tex. Mar. 21, 2018)). The circuit court applied the exclusion based on its view that SRHS Ambulatory made an "affirmative decision to not seek ratification" and thereby "created its own title defect." R.2361. The court cited no facts or evidence to support this conclusion. *See id.*

The circuit court's application of Exclusion 3(a) should be reversed. Contrary to the court's finding, SRHS Ambulatory had no affirmative obligation or duty to secure ratification of the purchase contract. As a matter of well-established law, that duty fell to Pinehaven, the party attempting to sell property to a public body. *See KPMG, LLP*, 283 So. 3d at 674; *Wellness, Inc.*, 178 So. 3d at 1291; *Martin*, 815, 23 So. 2d at 797; *Jackson Equip. & Serv. Co.*, 160 So. at 737. SRHS Ambulatory could not *intentionally* fail to undertake a task that it had no legal obligation to undertake. *See Lawyers Title Ins. Corp. v. Doubletree Partners, L.P.*, 739 F.3d 848, 866 (5th Cir. 2014) (explaining that Exclusion 3(a) requires "some degree of intent to acquire the property with defects in its title"); *The Law of Title Insurance* § 4.04 ("The insured must have intended the defect to occur."). The failure to obtain ratification was not the fault of

SRHS Ambulatory; under Mississippi law, the only party who can be faulted for that title defect is Pinehaven.

As a matter of fact, there is no evidence to support a finding that SRHS Ambulatory *intended or agreed* to take a void title at the time of purchase. SRHS Ambulatory did not offer to seek ratification or discourage Pinehaven from fulling its legal duty to do so. To the contrary, First American's policy issuing agent (Dryden) testified that the need for ratification was discussed at the closing in December 2007, but those present decided that ratification was not needed. R.1699-1700. So, at the time of the purchase, all parties were operating under the mistaken assumption that ratification was unnecessary. Only years later, after Mr. Guice made his concerns known in February 2015, *see* R.1165, 1175, 1178-80, did SRHS Ambulatory discover the ratification defect. First American offered no proof at all—much less the undisputed proof required to avoid trial—that SRHS Ambulatory secretly disagreed with the consensus at closing and *intended to take defective title*, which is the burden of proof required to prevail under Exclusion 3(a).

Exclusion 3(b) – Known Defects. The circuit court next found that coverage was removed by Exclusion 3(b), which excludes coverage for defects "not known to the Company, not recorded in the public records at Date of Policy, but known to the insured claimant and not disclosed in writing to the Company by the insured claimant prior to the date the insured claimant became an insured under this policy." R.2360-62. Under this prior knowledge exclusion, the insured must have "actual knowledge" of a defect about which the insurer has no knowledge. R.2362 (citing cases). The circuit court held, again without citing evidence, that SRHS Ambulatory "obviously

had prior knowledge that it did not seek ratification from anyone for its purchase of the [Pinehaven] property." R.2362.

The circuit court's erroneous application of Exclusion 3(b) flows from the same mistakes of law and fact that led it to misapply the first exclusion. Application of a prior knowledge exclusion involves both a subjective and objective inquiry into the parties' knowledge. *National Cas. Co. v. Franklin Co., Miss.*, 718 F. Supp. 2d 785, 793 (S.D. Miss. 2010). The insurer must satisfy "four distinct elements: (1) an adverse claim not known to the insurer, (2) that is not recorded in the public records as of the policy date, (3) about which the insured was aware and (4) did not disclose prior to the insured becoming an insured under the policy. *The Law of Title Insurance* § 4.05. Because the exclusion turns on the actual knowledge of the insurer and the insured, "[l]itigation involving this exclusion makes summary judgment unlikely." *Id.*

Summary judgment was improper here for two reasons. *First*, SRHS Ambulatory was not obligated to seek ratification by the Board of Supervisors; that was Pinehaven's duty under Mississippi law. SRHS Ambulatory cannot be faulted for Pinehaven's failure to fulfill its own obligations. *Wellness, Inc.*, 178 So. 3d at 1293. *Second*, as outlined above, First American offered no evidence that that SRHS Ambulatory knew in December 2007 that the Pinehaven purchase would be void if not ratified, much less that it failed to disclose that knowledge (which it did not have). Instead, the evidence shows that First American's agent, Dryden, openly questioned whether ratification might be required at the closing, but ultimately concluded that it was not. When these facts are viewed most favorably to SRHS Ambulatory, a jury could well find that First American had superior knowledge of a possible ratification

defect, and it elected to issue the title policy notwithstanding its knowledge. At most, the parties' knowledge on this possible defect was equal, and the exclusion does not apply when the insurer has knowledge of the defect at the time of purchase that it later claims was not disclosed. *See The Law of Title Insurance* § 4.05.

Exclusion 3(c) – No Loss or Damage. Finally, the circuit court ruled that Exclusion 3(c) relieves First American of its coverage obligations. Exclusion 3(c) bars coverage for defects "resulting in no loss or damage to the insured claimant[.]" R.2360. According to the circuit court, "[t]here has been no substantiated claim against Ambulatory Services' title to the Subject Property and it has suffered no actual loss as the result of the alleged defects as of the date of the claim." R.2363. The court also suggested that the denial of coverage was permissible because SRHS Ambulatory could defend its title by making an adverse possession argument if anyone were to challenge it. R.2363.

The circuit court's application of Exclusion 3(c) is contrary to the law and the facts in this case. As an initial matter, SRHS Ambulatory has suffered a total failure of title because—absent ratification by the Board of Supervisors—the purchase contract is void. SRHS Ambulatory has no legal authority to claim ownership of the property. In fact, Mississippi public policy forbids it from claiming ownership. Under these facts, Mississippi law recognizes that SRHS Ambulatory has a compensable claim for "total failure of title." *See Brooks v. Black*, 8 So. 332, 335 (Miss. 1890) ("The measure of damages on a total failure of title, even on the covenant of warranty, is the value of the land at the execution of the deed; and the evidence of that value is

the consideration money, with interest and costs."). SRHS has suffered a $3,600,000 loss caused by the void and unenforceable purchase contract.

SRHS Ambulatory's title is not only unenforceable as a matter of Mississippi law, it is "unmarketable" under the terms of its insurance policy. The policy insures SRHS Ambulatory against losses due to "unmarketability of the title," R.2073, and defines "unmarketability" as:

> an alleged or apparent matter affecting the title to the land, not excluded or excepted from coverage, which would entitle a purchaser of the estate or interest described in Schedule A or the insured mortgage to be released from the obligation to purchase by virtue of a contractual condition requiring the delivery of marketable title.

R.2074; *see also The Law of Title Insurance* § 3.07 ("A marketable title is reasonably free of the risk of litigation . . . ."). Mr. Guice's private and public statements challenging the validity of SRHS Ambulatory's title undoubtedly affect its marketability. The facts show that SRHS Ambulatory has attempted for several years to sell the property, but can find no buyers. R.1107; R.1743-58 (listing agreement); R.2505 (explaining that property was vacant and unused even in August 2018). As a result, SRHS Ambulatory has suffered a loss of $3,600,000, the amount that it paid for title that that is unenforceable and unmarketable. At the very least, the facts on SRHS Ambulatory's losses are disputed, and SRHS Ambulatory is entitled to a trial on its contract claim against First American.

Finally, the circuit court mistakenly suggested that SRHS Ambulatory could rely on the doctrine of adverse possession to validate its defective title. R.2363. Of course, the decision to bring an adverse possession suit and incur the costs of attempting to meet the "high burden of clear and convincing proof" necessary to

prevail at a trial belongs to SRHS Ambulatory. *See Edwards v. Williams*, 292 So. 3d 586, 592 (Miss. Ct. App. 2019) (discussing burden of proof and elements). The circuit court did not cite any authority holding that, if there is a known title defect, a title insurer may deny coverage on the possibility that the insured could cure the defect through costly and uncertain adverse possession litigation.[10] Indeed, one reason that property owners purchase title insurance is so that they have a ready contractual remedy for title defects, and need not resort to such litigation. *See The Law of Title Insurance* § 3.07 ("A marketable title is reasonably free of the risk of litigation . . . .").

First American may not avoid its coverage obligation on the mere possibility that a known title defect may one day be cured through adverse possession litigation. Rather, it must honor its bargain to protect SRHS Ambulatory from the loss of $3,600,000 that it paid for a void, unenforceable, and unmarketable title.

* * *

This Court should reverse the circuit court's order granting First American's summary judgment motion and remand this case with instructions as to the proper reading of the title policy—both the coverage grant and the exclusions—so that SRHS Ambulatory's contract claims may proceed against First American.

[10] As a procedural matter, the circuit court did not explain how SRHS Ambulatory could assert an adverse possession claim, when such a claim might be ripe, or against whom it might be asserted. Pinehaven has attempted to disclaim its interest in the property, so it would not be a proper defendant in such a suit. Even if it was, SRHS Ambulatory could not establish that its possession was "hostile," as Pinehaven has permitted SRHS Ambulatory to use the property. *See Moran v. Saucier*, 829 So. 2d 695, 699-700 (Miss. Ct. App. 2002) (rejecting adverse possession claim where use of property was permissive in nature).

B. First American owed SRHS Ambulatory a duty of reasonable care in conducting the title search and disclosing title defects.

The circuit court also granted First American's motion for summary judgment on SRHS Ambulatory's negligence claim. R.2358-59. Citing a bankruptcy court decision, the circuit court declared that Mississippi law does not impose a duty on title insurers to perform a title search and, therefore, a title insurer cannot be liable for performing a negligent search. R.2358-59 (citing *In re Evans*, 460 B.R. 848, 882 (Bankr. S.D Miss. 2011), *abrogated by First Am. Bank v. First Am. Transp. Title Ins. Co.*, 759 F.3d 427 (5th Cir. 2014)). The circuit court's flat refusal to consider SRHS Ambulatory's negligence theory was reversible error.

It is true that neither the Mississippi Supreme Court nor the Mississippi Court of Appeals has decided whether a title insurer has an independent duty to perform a title search before issuing a title policy. The jurisdictions that have addressed the question are closely divided. As the *In re Evans* opinion explained:

> [A] slight majority of jurisdictions have refused to impose tort liability on a title insurance company for an undisclosed title defect. On the other hand, a significant number of courts have concluded that a title insurance company has an implied duty to search public records for title defects and should be held liable in tort for negligently performing that duty.

In re Evans, 460 B.R. at 881-82 (citing authorities); *see also The Law of Title Insurance* § 12.03 (discussing split of authorities and historical development of competing rules). Finding no guidance in Mississippi case law, the bankruptcy court made an *Erie* guess that this Court would follow the "slight majority" rule, under which an insurer has no duty to perform a reasonable title search. *In re Evans*, 460 B.R. at 882.

SRHS Ambulatory believes that the *In re Evans* court's guess was wrong, and that Mississippi law should recognize that, if a title insurer undertakes to issue a policy insuring against title defects, then it assumes a duty to search for title defects and use reasonable care in performing the search. The insurer may be held liable in tort for negligently performing that duty. As the Kansas Supreme Court explained, this duty flows logically from the purposes of a title insurance company and its relationship with the purchaser:

> [W]e hold that a corporation organized for the purpose, among others, of examining and guaranteeing titles to real estate and which in all matters relating to conveyancing and searching titles holds itself out to the public, and assumes to discharge the same duties as an individual conveyancer or attorney, has the same responsibilities and its duty to its employer is governed by the principles applicable to attorney and client.

Ford v. Guarantee Abstract & Title Co., 553 P.2d 254, 264 (Kan. 1976). Accordingly, as the Indiana Supreme Court recently held, "a title insurance company and the commitment issuer have duties in tort to search for and disclose all recorded title defects and base that duty on the relationship between the parties, rather than on any agreement between them." *U.S. Bank, N.A. v. Integrity Land Title Corp.*, 929 N.E.2d 742, 746 (Ind. 2010) (adopting minority rule); *accord Shada v. Title & Tr. Co. of Fla.*, 457 So. 2d 553, 557 (Fla. Dist. Ct. App. 1984) ("A title insurance company has a duty to exercise reasonable care when it issues a title binder or commitment and its failure to do so may subject it to liability in either contract or tort.").

If it does answer this question of first impression, the Court should recognize that title insurers have a tort-based duty to search for and disclose potential title defects—a duty that would be consistent with the relationship of the parties and

societal expectations about where a loss should fall under these circumstances.[11] But this Court need not reach that novel question to decide this case. Here, unlike the circumstances in *In re Evans*, First American *voluntarily undertook* to ensure the validity of SRHS Ambulatory's purchase contract and title. Mississippi law has long recognized the "gratuitous undertaking" doctrine, which provides that if a person undertakes to provide services to another, then the person must use reasonable care in performing those services. *See Higgins Lumber Co. v. Rosamond*, 63 So. 2d 408, 410-11 (Miss. 1953) (citing Restatement of the Law of Agency, § 378, p. 835).[12]

Relevant here, Mississippi law recognizes that when a professional entity gratuitously undertakes a task, it assumes a limited duty of care and a negligence claim may proceed if the task is not reasonably performed. *Century 21 Deep S. Properties, Ltd. v. Corson*, 612 So. 2d 359, 368 (Miss. 1992). In *Century 21*, this Court found that neither contract nor Mississippi tort law imposed an affirmative duty on a realtor to perform title work for a purchaser. *Id.* That was not, however, the end of the analysis. In *Century 21*, the realtor advised the buyer that the property's listing agent had asked a law firm to perform title work for the sale. *Id.* at 363. Based on

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[11] In his oft-cited dissertation on the development of tort duties, Professor William Prosser described the courts' task this way: "In the decision whether or not there is a duty, many factors interplay: The hand of history, our ideas of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall. In the end the court will decide whether there is a duty on the basis of the mores of the community, always keeping in mind the fact that we endeavor to make a rule in each case that will be practical and in keeping with the general understanding of mankind." William L. Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 15 (Nov. 1953) (internal quotation marks omitted).

[12] *In re Evans* recognized this theory of liability. After guessing that Mississippi law would not impose an affirmative duty on title insurers, the *In re Evans* court considered whether the title company voluntarily undertook a duty to perform a title search before issuing the policy. Finding no evidence of a voluntary undertaking, the court held the title insurer did not assume any duties outside of the title commitment. *Evans*, 460 B.R. at 883.

that information, the buyer decided not to run his own title search; instead, he relied on the listing agent's effort. *Id.* Under these facts, the listing agent became "a gratuitous agent of the [purchasers] and therefore owed [the purchasers] a duty of care because it undertook the task of ordering title work for the [purchasers]." *Id.* (citing *Higgins*, 63 So. 2d at 410-11; *Coleman v. Louisville Pants Corp.*, 691 F.2d 762, 766 (5th Cir. 1982)).

The same gratuitous undertaking rule applies here. First American, through its agent Dryden, voluntarily undertook to ensure that SRHS Ambulatory's purchase contract and title was valid. Prior to the purchase, First American employed Dryden's law firm in relation to the purchase transaction, R.1942, 1956, making his firm First American's policy-issuing agent, R.1812. Dryden was then asked to work on the Pinehaven transaction. R.1950.

Dryden reviewed the minutes and resolutions of the SRHS Ambulatory board and the Singing River Board of Trustees. R.1952-53. Dryden testified that he wanted to review these documents prior to closing "to be sure that they [SRHS Ambulatory] were getting what they contracted for and we wanted to be sure that they were – that the contracting had been approved, the purchase had been approved." R.1952 (Dryden testimony). Among the minutes that Mr. Dryden reviewed was the set from the July 2007 board meeting of Singing River, R.1952, at which member suggested the Board of Supervisors should be notified of the decision to acquire the property. R.1944. As noted above, Dryden and others at the closing "went back and forth" over whether the statute applied to the Pinehaven transaction, and Dryden ultimately concluded that it did not. R.1699-1700; *see also* R.2233-34 (Dryden testimony).

Under these facts, jurors could find that First American voluntarily undertook to determine that the Pinehaven purchase was valid, properly approved, and free from defects. Having undertaken that service, it assumed a duty to discharge it reasonably. Based on the facts in this record, a jury could also find that First American breached its duty and caused damages to SRHS Ambulatory.

This Court should reverse the circuit court's summary judgment order and remand this case so that SRHS Ambulatory may pursue its negligence claim against First American.

CONCLUSION

This Court should reverse the circuit court's summary judgment orders, render a judgment against Pinehaven and First American declaring the Pinehaven purchase contract void and unenforceable, and remand the case so that SRHS Ambulatory's claims may proceed against Pinehaven and First American.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this day, July 12, 2021, filed with the Clerk of the Court using the MEC system, which will deliver copies to all counsel of record:

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and that I have caused a true and correct copy of the foregoing to be delivered to the following by United States Mail, first-class postage prepaid:

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