

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

Hon. John C. Hayes, III  
Presiding Circuit Court Judge

RECEIVED

MAY 17 2013

SC Court of Appeals

Consolidated case no. 2010-CP-46-2326

Juontonio Pinckney, et al. .... Appellants,

v.

Epon Communities, Inc., Epon Communities Franchising, Inc.,  
Brock L. Fankhauser, Fankhauser Property Group, Inc.,  
Stonecrest Villas of Tega Cay, LLC,

and

Stonecrest Villas of Tega Cay Owners' Association, Inc. .... Respondent

APPELLANTS' RETURN TO RESPONDENT/CROSS APPELLANT'S  
MOTION TO DISMISS AND MEMORANDUM IN OPPOSITION

Pursuant to SCACR 240(e) Appellants file their return and this memorandum in opposition to Respondent and Cross Appellant Stonecrest Villas of Tega Cay Owners' Association, Inc. motion to dismiss served May 13, 2013. Appellants would respectfully show that a motion was filed on April 25, 2013 with the court for extension of time to file initial brief and request for consolidation of prior orders as to matters now pending appeal. Additionally, Appellants filed a Motion to Dismiss Cross Appellant's appeal on April 4, 2013, thus staying the time limits for perfecting the appeal until the Motion to Dismiss is decided as stated in SCACR 240.

Appellants would respectfully show that several orders in this case were entered in the year 2012 and the prior 2012 rulings of the trial court were not final, not immediately

appealable, and did not until January 23, 2013 implicate a substantial right or an adjudication on the merits. The orders, nevertheless, implicate equitable standing and priority of claims under review of restrictive covenants implicated in later rulings of law by the trial court on January 23, 2013, February 27, 2013 and April 5, 2013 respectively. The rulings of the trial court likewise involve legal rulings based on stipulated facts. The reason the COA seeks exclusion is patent: the damage claims of Plaintiffs in the case are distinctly separate and implicate individual damage other than global *costs of repair*.

#### PROCEDURAL BACKGROUND

Appellants agree generally with the Procedural Background recited by Respondent's memorandum and respectfully assert the trial court's prior rulings directly bear on one of the novel and complex issues now being addressed by this court: *whether the same set of damages* has been pursued by the parties in the case at bar. Plaintiff counsel requested the transcript of oral arguments related to common element damage claims heard before the circuit court on December 19, 2012, receiving it on February 27, 2013.

The transcript was distributed on March 15, 2013 via electronic delivery to all counsel. (Exhibit A) Counsel for respondent seemingly invokes the transcript order date under SCACR 207 related to initial briefs as prejudice <sup>1</sup> because transcript was ordered prior to notice of appeal being filed. SCACR 207 does not specifically address the issue of a transcript being ordered prior to appeal, however, it is common practice for litigants to order a transcript prior to deciding to file an appeal, particularly for reference in motions to alter or amend. SCACR 208 clearly states the initial brief is due thirty days

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<sup>1</sup> To the extent that the Respondent's procedural argument attempts to argue prejudice or lack of notice, the December 19, 2013 hearing transcript was distributed to all, including Respondent counsel, on March 15, 2013 prior to a determination on appeal having been made.

from filing Notice of Appeal. Appellants filed for and extension on April 25, 2013, however, this is mooted due to the stay or time limits by Rule 240.

This case was designated complex below by consent, and it involves no less than (44) trial court orders being entered by the circuit court. The latest five (5) orders implicate substantial rights. This case likewise involves multiple notices of appeal, the first having been filed by Fankhauser Property Group on December 17, 2012.

- 1. Appellants moved to extend time and requested consolidation of all prior orders, including transcripts of successive motion hearings bearing on damages, equitable standing, and alleged controlling errors of law, by motion dated April 26 2013.**

Appellants acknowledge that a transcript of the December 19, 2012 oral arguments was requested of the court reporter, prior to the determination being made to file an appeal. The transcript was received by Appellants' counsel on February 27, 2013 and distributed to all counsel of record. (Exhibit A) A determination by the twelve owners was made to initiate the appeal and a Notice of Appeal filed and served on March 25, 2013. The notice of appeal followed successive year 2012 and 2013 orders of the trial court on damage claims and the parties' respective arguments on equitable standing, culminating in the 2013 orders that appellate review is now being requested upon.

Prior to these orders the court had considered equitable standing arguments advanced by both parties on two occasions, in September of 2012 and October of 2012. The *third* such arguments occurred on December 19, 2012 heard in conjunction with a motion to approve settlement, extinguish and dismiss damage claims as requested by the COA. The last final order involved oral arguments heard before the court on March 20, 2013 culminating in the order dated April 5, 2013.<sup>1</sup> The Notice of Appeal by Plaintiffs was

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filed March 25, 2013 in the interim of the January 23, 2013 and April 5, 2013 orders of the trial court.

**2. The prior year 2012 trial court orders were interlocutory, non-final, and not immediately appealable. S.C. Code Ann. § 14-3-330.**

The August 27, 2012 and October 15, 2012 “equitable standing” orders of the court related to the parties respective claims do not fall within a category listed in S.C. Code Ann. § 14-3-330. *Woodward v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995). Neither involved an action on the merits, or implicated a substantial right. As such, they were not final and not immediately appealable. It is a fundamental rule of appellate procedure that a judgment or order must be final before it can be appealed. *Culbertson v. Clemens*, 322 S.C. 20, 471 S.E.2d 163 (1996). SCACR 201(a). Lastly, denial of the parties respective motions for summary judgment did not, *prior to* January 23, 2013 finally determine anything about the merits of the parties’ respective cases, other than establishing both parties had standing to pursue damage. Conversely, the grants of summary judgment by the trial court in year 2013 orders is appealable because both the January 23, 2013 and April 5, 2013 trial court orders involved an adjudication on the merits, rendering a final determination on plaintiffs’ property damage rights forming the whole of their causes of action. *Link v. School Dist. of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990).

**3. The successive year 2013 trial court orders involved a *dismissal on the merits* and affected a *substantial rights and mode of trial* on Plaintiffs’ causation and damage claims.**

“Final Judgment” is a term of art denoting the disposition of *all* (emphasis) issues in the action. In defining whether a trial court order implicates a substantial right, the

Supreme Court has held that “[T]his is when such order would discontinue an action, prevent an appeal, grant or otherwise refuse a new trial, or strike out an action or defense.” *Mid-State Distrib., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334 n.4, 426 S.E.2d 777, 780 n.4 (1993). The court’s January 23, 2013 order dismissed *all* parties claims, inclusive of Plaintiffs, as to the building envelopes and exteriors. The subsequent April 5, 2013 order dismissed *all* Plaintiffs’ causes of action as against the COA. Both 2013 orders rendered an adjudication on the merits; both struck out Plaintiffs’ causes of action on damages and causation entirely. Both effectively rendered a discontinuation as to claims against the association in a case involving progressive water intrusion damage to real property spanning several years.

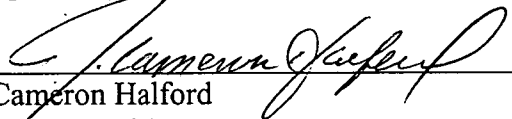
As cited by both litigant parties, the instant case is a novel and complex case involving novel issues. No less than 44 court orders have been entered by the circuit court to date, the latest dispositive orders being that of January 23, 2013 and a series of April 5, 2013 orders, respectively. The February 27, 2013 order on Plaintiffs’ Rule 60 Motion contested by Respondent counsel is illustrative of controlling error in this case, namely rulings of law as to property damage and damage related to Plaintiffs’ homes. The dismissal arguments of respondent seeks to invoke as final, based on the trial court’s incorporated order of Pulliam case no. 2008-CP-46-2158 (which neither party challenged) the “essence” that the only damages capable of being sought under the facts of the instant case was that for “cost of repair” of construction defects. As cited by the trial court, “The Pulliam Order, is incorporated by reference *insofar as context permits* (sic).” [See Exhibit B, 00013-0028 Respondents’ 5/13/2013 motion]. Respondent’s argument is misguided, confusing costs of repair with de facto property damage sustained by the plaintiff owners.

CONCLUSION

Appellants request that the court of appeals deny the relief sought by the Respondent for the reasons set forth above, and permit consolidation of all orders of the trial court below as bearing direct on the novel and complex issues of whether the “*same set of damage*” has been pursued by the parties within the same lawsuit and whether the trial court’s determinations are controlled by error of law in granting summary judgment and dismissing all claims on January 23, 2013 and April 5, 2013.

This 16th day of May, 2013.

Respectfully submitted,



J. Cameron Halford

S.C. Bar 17184

Halford, Niemiec & Freeman, L.L.P.

238 Rockmont Drive

Fort Mill, South Carolina 29708

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Attorney for Appellants

**EXHIBIT A**

15 March 2013 Email Providing  
Opposing Counsel With Transcript of  
December 19, 2012 Hearing

**From:** Kristie Williams [kwilliams@fortmilllaw.com]

**Sent:** Friday, March 15, 2013 10:27 AM

**To:** 'Alison D. Watkins'; 'Bradford W. Cranshaw'; 'Brett Dressler'; 'Brian Edwards'; 'Christi P. Cox'; 'Christy Mahon'; 'Cranshaw Paralegal'; 'Curtis Dowling'; 'David Cleveland'; 'Derham Cole'; 'ggonzalez'; 'Graham P. Powell'; 'Leigh Eldada'; 'Lindsey Demirjian'; 'Melissa Wilkes'; 'Paul M. Newell II'; 'Payton D. Hoover'; 'Sarah Wetmore'; 'Stephanie H. Burton'; 'Thomas Chase'; 'Tom Dougall'; 'Tracy Vann'; 'Veronica Stafford (Hoover's Paralegal)'; 'Wendy Brewer'

**Cc:** 'DPayne@GrierCoxandCranshaw.com'

**Subject:** Pinckney v Fankhauser Transcript of Record Hearing Date December 19, 2012

Hello Counsel:

Per Mr. Halford, please find a copy of the Transcript of Record for the December 19, 2012 hearing on the FTP server in the Transcript folder.

**FTP Server**

FTP://64.128.219.95

user name:stonecrest

password: responses

Sincerely,

Kristie Williams  
Paralegal to J. Cameron Halford  
Halford Niemiec & Freeman, L.L.P.  
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Fort Mill, South Carolina 29708  
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*Signature of Authenticity: This message has originated From Attorney J. Cameron Halford's Workstation. This workstation is located at 238 Rockmont Drive Fort Mill South Carolina, 29708. If you have a question or a concern with the Authenticity of this message, call our office at (803) 548-3206*

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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Stonecrest Villas of Tega Cay, LLC,

and

Stonecrest Villas of Tega Cay Owners' Association, Inc. .... Respondent

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PROOF OF SERVICE

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I certify that I have served the foregoing Appellant Return and Memorandum in Opposition on counsel for Respondent Cross Appellant, and counsel for the parties listed below, by depositing a copy of the same in the United States mail this 16 day of May, 2013, addressed as follows:

Brett Dressler  
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301 S. McDowell Street, Suite 410  
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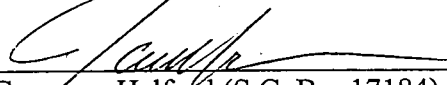
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MAY 17 2013

**SC Court of Appeals**

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May 16, 2013

Jenny Abbott Kitchings, Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

Re: *Juontonio Pinckney, et al. v. Brock L. Fankhauser, et al.*  
York County Consolidated Case No.: 2010-CP-46-2326  
South Carolina Appellate Case No.: 2013-000327

Dear Ms. Kitchings:

Please find enclosed an original and six copies of the Appellants' Return To Respondent/Cross Appellant's Motion to Dismiss and Memorandum in Opposition in the above matter. Please file the originals and return a filed copy to me in the self addressed envelope provided. Respondents and all counsel for parties appearing in the above case are copied. Thank you.

With kind regards, I remain

Respectfully,

  
J. Cameron Halford

JCH/klw  
Enclosures

cc: Curtis Dowling, Esquire  
Brett Dressler, Esquire  
Graham P. Powell, Esquire  
Brad Cranshaw, Esquire  
Michael B.T. Wilkes, Esquire