THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court Of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No: 2009-CP-22-01655

Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008, and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t/ July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC; Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H. S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998; Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, David T. McGill and Carol G. McGill,

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v.

Shipyard Village Council of Co-Owners, Inc., ... Appellant.

Shipyard Village Council of Co-Owners, Inc., ... Third-Party Plaintiff,

v.

Cincinnati Insurance Company, Travelers Insurance Company, Companion Property & Casualty Insurance Company, Philadelphia Insurance Company, Zurich American Insurance Company, American Guarantee and Liability Ins. Co., St. Paul Fire and Marine Insurance Company, and Illinois National Insurance Company, ... Third-Party Defendants.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ARGUMENT

I.

Appellant did not have a "duty to investigate."

(A) The Master Deed and Bylaws do not impose such a duty on Appellant.

Respondents incorrectly argue that Appellant previously acknowledged it had a duty to investigate pursuant to the Master Deed and Bylaws. In support of their assertion, Respondents point to the following exchange between the trial judge and Appellant's counsel:

> THE COURT: We're not in trial yet. I just want to put this one question to you, Miss Boan. If you're on the Board and you've got a problem and you've got people giving you two or three causes for the problem, okay, there is one of them you can get some money for, and that is why you attribute it to these homeowners, these unit owners not maintaining their building, under the bylaws they are supposed to pay for it, shouldn't you, and the other two everybody is going to have to share, don't you have a duty to these other members to go back and at least check on the theory of whether or not the individual owners of the A and B units, where you had leak problems, should have paid?
>
> MISS BOAN: I think, Your Honor, to answer your question, yes, I think you do look into it and I think this Board did. I think this Board considered it and that is how --

[5/21/12 Hearing Transcript p. 69.] Though its question is unclear, the trial court appears to be merely asking about the duty imposed on the board by Section 6.3 of the Bylaws, which states that if a co-owner's failure to perform required maintenance impairs the common elements, "the Board of Directors shall, after giving such Co-owner reasonable notice and opportunity to perform such maintenance, cause such maintenance to be performed" and assess that co-owner for the expense. [Bylaws p. 14.] The trial court's question did not implicate the duty on which it subsequently granted summary judgment,

which is the duty to investigate, upon receiving information that co-owner neglect has damaged the common elements, to determine whether to assess individual co-owners for the damage. Specifically, the trial court's question did not include an assumption that the board had already received evidence that co-owner neglect was responsible for harm to the common elements.

Appellant's position on the "duty to investigate" was clearly expressed later in the hearing, when the following exchange occurred:

> THE COURT: Let me stop you a minute. Mr. Mills, tell me, tell me, Miss Boan has said they got conflicting reports as to the damage or the cause of the damage. Well, that does nothing more than tell me that they received some report. What is your position on the duty to investigate to determine whether or not these damages are attributable to individual unit owners and what did they do, if anything.
>
> MR. MILLS: Our position is, Your Honor, there is no such duty to make that inquiry.

[5/21/12 Hearing Transcript p. 112-13.]

Respondents also assert that Sections 9.4, 12.1, and 16.2 of the Master Deed, as well as Sections 6.3, 6.4, and 7.3 of the Bylaws,[1] are restrictive covenants that impose contractual obligations on Appellant. Respondents contend that conglomerating these sections impose on Appellant a contractual duty to investigate. However, Respondents fail to consider a central canon of contract interpretation: "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citation omitted). The trial court did not find that any provisions of the Bylaws

[1] See pp. 12-13 of Appellant's Brief for a discussion of these provisions.

or Master Deed were ambiguous. Accordingly, these six sections must be interpreted according to their plain language, and none of them impose a duty to investigate.

(B) The South Carolina Nonprofit Corporation Act does not impose a "duty to investigate" on Appellant.

Contrary to Respondents' assertion, the South Carolina Nonprofit Corporation Act does not impose a "duty to investigate." Respondents base their argument on a sentence in the Official Comment to S.C. Code Ann. § 33-31-830 (2006) that states, "In appropriate circumstances the duty of care requires reasonable inquiry." The concept of "reasonable inquiry" is not at issue. As discussed in Appellant's brief, Appellant certainly undertook a reasonable inquiry into the water intrusion issues in Buildings A and B by engaging multiple professionals to address the problems. "Reasonable inquiry" differs from the duty at issue on appeal, which is the "duty to investigate," and that duty is not found in the Code, in any Official Comments, or in Appellant's governing documents.

II.

Appellant is entitled to have its actions evaluated under the business judgment rule.

Respondents assert that Appellant is not entitled to the protection of the business judgment rule because (1) Appellant's method of assessing co-owners for the repair costs violated the Master Deed, (2) Appellant violated the Bylaws by enacting the 2006 window amendment, and (3) Appellant violated the Bylaws by failing to place its annual operating budgets on the agendas at the annual members' meetings in 2009 and 2010. However, this argument is misplaced. Even if Respondents' contentions were factually accurate, which they are not, these issues are not relevant to this appeal, because the

specific duty at issue on appeal is the "duty to investigate." In other words, the application of the business judgment rule here depends on whether the board's actions taken in furtherance of the duty to investigate were *intra vires* or *ultra vires*; the propriety of its actions taken in furtherance of separate, unrelated duties, such as the duty to impose assessments in accordance with the Master Deed or the proper procedure for amending the Bylaws, is irrelevant.

Respondents also assert that Appellant is not entitled to the business judgment rule's protection because of Appellant's "inaction and failure to make definite plans for necessary repairs to the common areas." Respondents seem to be drawing a line between action and inaction for purposes of the rule—arguing, in other words, that negligent inaction is to be treated more harshly than negligent action. However, the law makes no such distinction. Regardless, as detailed at length in Appellant's brief, Appellant did not sit idly; it acted affirmatively based on the advice of the professionals it hired.

III.

Even if Appellant owed a duty to Respondents, it did not breach that duty.

In arguing that no genuine issue of material fact exists on the question of whether Appellant breached its duty, Respondents overlook all of the evidence to the contrary. The trial court ruled that Appellant's duty to investigate attached when Appellant received evidence demonstrating that co-owner neglect was to blame for water intrusion into the building envelope. In other words, this duty involves a two-step inquiry: (1) whether the water intrusion was occurring as a result of deficient windows and doors, as opposed to deficient stucco, roofing, or another deficient building component; and (2) if so, whether the deficiency in the windows and doors was attributable to co-owner

neglect—stated differently, the standard is one of negligence, not strict liability. The evidence cited by Respondents merely states that water intrusion was occurring. It does not demonstrate how any co-owner was negligent. Furthermore, Respondents ignore the evidence discussed in Section III of Appellant's Brief establishing that Appellant's board received a plethora of information about the causes of the water intrusion and properly exercised its business judgment in deciding how to proceed. Importantly, Appellant's evidence exceeds the "mere scintilla" standard, and viewing this evidence in the light most favorable to Appellant reveals the existence of genuine issues of material fact.

IV.

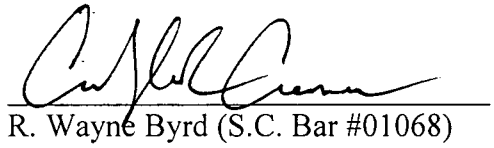
Respondents' purported additional sustaining grounds do not support the trial court's conclusion.

As their first additional sustaining ground, Respondents allege that Appellant was aware of water intrusion issues back in the 1990s. Even if this were true, this is unrelated to the existence of a "duty to investigate" and whether that duty was breached. Respondents also cite the case of *Greenstein v. Council of Unit Owners of Avalon Court Six Condo., Inc.*, 29 A.3d 604 (Md. Ct. Spec. App. 2011) in support of their argument that Appellant breached a duty owed to Respondents. However, *Greenstein* merely holds that individual unit owners may sue a condominium association when the association fails to pursue a claim for construction defects in the common elements. *Id.* at 614-15. The case does not address the "duty to investigate" and does not involve alleged neglect on the part of unit owners. Accordingly, it is not relevant and provides no guidance.

CONCLUSION

Based on the arguments presented above and in Appellant's brief, this Court should reverse the trial court's order and remand this case for trial.

Respectfully submitted,



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PROOF OF SERVICE OF INITIAL REPLY BRIEF

I certify that I have served Appellant's Initial Reply Brief on the Respondents by depositing a copy of it in the United States Mail, postage prepaid, on June 19, 2013, addressed to their attorneys of record at the address listed below.

[Signature page to follow.]

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June 19, 2013

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June 19, 2013

The Honorable Jenny Abbott Kitchings
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Columbia, South Carolina 29211

Re: **Richard A. Fisher et al. v. Shipyard Village Council of Co-Owners, Inc.**
Appellate Case No. 2012-213634

Dear Ms. Kitchings:

Enclosed for filing is the Initial Reply Brief. A copy is included as well. Please file the original and return the clocked copy to me in the enclosed self-addressed, stamped envelope. Also enclosed is proof of service of the brief.

We are herewith serving the Initial Reply Brief on counsel for the Respondents. Thank you for your assistance in this matter, and please notify me if you have any questions.

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

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Enclosures

cc: Howell V. Bellamy, Jr., Esquire
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