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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court err in determining that Appellant had a duty to investigate to determine whether to assess individual co-owners for damage to the common elements?

II. Did the circuit court err in determining that Appellant's conduct should not be evaluated under the business judgment rule?

III. Did the circuit court err in holding, as a matter of law, that Appellant breached its duty?

STATEMENT OF THE CASE

This action arises out of two cases: Civil Action No. 2009-CP-22-0152, filed January 29, 2009, and Civil Action No. 2009-CP-22-01655, filed October 7, 2009. These cases were consolidated under the latter number. Trial was scheduled for May 21, 2012. On that date, before trial commenced, the trial judge heard arguments from counsel on several pre-trial motions. One of those was Respondents' "Motion for Summary Judgment and/or Partial Summary Judgment Against the [Appellant]." After hearing arguments from counsel, the trial court ruled from the bench in favor of Respondents, granting partial summary judgment in their favor on the issues of duty and breach on their negligence and breach of fiduciary duty causes of action.

On May 23, 2012, the trial court executed and filed a Form 4 Order, stating as follows: "Partial Summary Judgment Granted/Case Stayed by filing of Appeal." On June 6, 2012, Appellant filed a Motion to Reconsider, Alter, or Amend Pursuant to Rules 52 and 59, SCRCP. On June 18, 2012, Respondents filed a motion in opposition to

Appellant's motion, and on July 12, 2012, Appellant filed a response to Respondents' motion in opposition.

On November 15, 2012, the trial court held a hearing on Appellant's motion to reconsider. Later that day, the trial court's Form 4 Order denying that motion was filed. On November 16, 2012, the trial court's written order for its May ruling granting partial summary judgment to Respondents was filed.[1] On November 19, 2012, Appellant received written notice of the trial court's Form 4 Order denying the motion to reconsider. Appellant served and filed a timely notice of appeal on December 12, 2012.

STATEMENT OF THE FACTS

In 1982, the condominium development known as Shipyard Village Horizontal Property Regime ("Shipyard Village") was established, and Appellant, the homeowners association, was incorporated. Shipyard Village is a two-phase development. Phase I consists of Buildings A and B, each of which has forty units. These two buildings were completed in 1982, at the development's inception. Phase II consists of Buildings C and D, each of which contains thirty units. These buildings were completed in 1998.

Shipyard Village's master deed ("Master Deed") was recorded in Georgetown County's Office of the Registrar of Deeds in Deed Book 201 at Page 880. The regime's bylaws ("Bylaws") are recorded in the same deed book, beginning at Page 929. Section 3.6(c) of the Master Deed provides, in part, that each unit's balcony doors and the "window glasses, screens, frames, and casings" are part of each unit, rather than part of the common elements. [R. p. 968.] Section 3.7(a) states that the general common elements include the roofs and the buildings' stucco exteriors. [R. p. 969.]

[1]After issuing his verbal ruling in May 2012, the trial judge forgot to ask Respondents' counsel to draft a proposed order. When the trial judge realized his omission, in early November, he asked counsel to do so, hence the delayed filing of the written order.

Section 6.1 of the Bylaws provides that the manager or the board of directors is responsible for the maintenance and repair of the common elements, while Section 6.2 makes unit owners responsible for the maintenance of their units. [R. pp. 1018–19.] Section 5.6 of the Master Deed provides that expenses incurred in repairing and replacing the common elements are common expenses "except in the case of the negligence of a Co-owner . . . , and in the event of such negligence, such expenses or a portion thereof may be assessed as an individual assessment pursuant to the terms of Article XII hereof." [R. pp. 974–75.] Section 12.1 of the Master Deed states that if the regime property is damaged due to "the neglect, willful act or abuse" of a co-owner, and if insurance proceeds are insufficient to cover the cost of the damage, the deficiency amount "shall be charged to such Co-owner as an individual assessment." [R. p. 993.]

Section 6.4 of the Bylaws states that all maintenance expenses by the board are common expenses, except that when the expenses "are necessitated by (1) the failure of a Co-owner to perform the maintenance required by these Bylaws or . . . (2) the willful act, neglect, or abuse of a Co-owner, they shall be charged to such Co-owner as an Individual Assessment." [R. p. 1019.] Section 6.3 of the Bylaws provides that if a co-owner fails to perform the maintenance required by the Bylaws, the board "shall . . . cause such maintenance to be performed and charge all reasonable expenses of so doing to such Co-owner by an Individual Assessment." [R. p. 1019.]

Respondents are owners of units in Buildings C and D. This case, which was initiated in 2009, arises out of a dispute over the handling of payment for repairs to Buildings A and B. Over time, Buildings A and B began experiencing leaks that were manifesting in some of the units at the windows and balcony doors. Appellant's board of

directors engaged numerous professionals to assess these problems, and Appellant received conflicting information about the source of the leaks.

In 1999, Henderson Waterproofing performed stucco and concrete repairs to Buildings A and B. [R. p. 2148.] Appellant's site maintenance supervisor, Bobby Warner, monitored the work and informed Appellant's board of directors that the damage to the buildings was not as severe as Henderson had reported and that an engineer was not needed to assess the buildings. [R. p. 2148.] In 2002, Appellant engaged McGee Consulting Associates ("McGee") to study the windows in Buildings A and B. McGee performed hose testing and claimed that many of the windows leaked under hose spray. [R. p. 1127-A.] This hose testing, however, did not comply with published standards for window leak testing. [R. p. 2155.]

The next year, Keystone Construction studied leaks that were manifesting themselves at some of the windows. Keystone concluded that the water was leaking through the stucco and not the windows. [R. p. 2148.] Keystone found that non-existent window flashing was part of the problem. [R. p. 2148.] Notably, window flashing is not the responsibility of individual unit owners under Section 3.6(c) of the Master Deed. [R. p. 968.]

Ben Morrow, the owner of unit B-28, informed Appellant's board of directors that he was having a water intrusion problem in his unit. Bobby Warner reported to the board that water was leaking through the windows. [R. p. 1135.] Morrow replaced his windows in 2005, but reported to the board that he was still having leaks, despite the new windows. [R. pp. 1137, 1141.] Morrow hired an architect to investigate the cause of the water intrusion issues. [R. p. 1141.] The architect, Joe W. Hiller, Jr., made clear to

Morrow that he believed the windows were not the source of the leaks: "It seems obvious to me that there is water migration through the exterior wall that is not related to the window sill, jamb or header." [R. p. 2270.] The new site maintenance supervisor, Richard Bennett, also looked at the issue and found that sealant joint failures at the window–stucco interface as well as cracked stucco could be causing the problem. [R. pp. 1145, 2152.] In 2006, Morrow attended a board meeting with Don Manning, an engineer he had engaged; Manning reported that repairing one window would not solve the leak issues and that an entire vertical stack of windows needed to be removed, flashed, and replaced. [R. pp. 1149, 2152.]

In addition to the fact that leak issues could not be solved by replacing the windows in any one unit, Appellant was concerned about uniform window appearance, code compliance, and the risk of stucco damage during window replacement. [R. pp. 1149–50, 1155.] Thus, Appellant's board of directors began discussing the possibility of amending the Master Deed to make windows and doors part of the common elements. [R. pp. 1149–50, 1155.] At the annual members' meeting on April 15, 2006, a vote was held to amend the Master Deed to classify the windows and balcony doors as common elements, making them the responsibility of Appellant rather than individual co-owners. Of the 140 units in Shipyard Village, 101 participated in the vote; of those units, 90 voted in favor of the amendment and 11 voted against it. [R. pp. 1165–66.] The 90 units voting in favor constituted 63.59% of ownership in the common elements, which fell short of the required 66.67% affirmative vote. [R. p. 1166.] Given the amendment's widespread support, along with the co-owners' sentiments expressed at the meeting, the board of directors believed that most of the owners wanted the amendment to pass. Upon

the motion of a Building D unit owner, voting on the amendment was left open for thirty days so that non-voting co-owners could vote. [R. p. 1166.] The amendment eventually passed through proxy voting, by over 80% of the membership. [R. pp. 1278–79.]

Later in 2006, the board of directors hired Schneider and Associates ("Schneider") to assess the problems in Buildings A and B. [R. p. 1168.] Schneider performed destructive testing on Buildings A and B. In a February 2007 letter to Kellie A. Diehl, Appellant's property manager, Schneider stated that during destructive testing on Ben Morrow's unit it was discovered that "the 'stack' of units was leaking from top-to-bottom at the jamb and sill terminations. The existing conditions rely on the window-wall's frame configuration to 'turn' the water to the exterior. The spandrel, formed by the slab edge, is insufficient to accomplish this alone." [R. p. 1325.] Schneider recommended enlarging the spandrel's vertical dimension to allow space for separate flashing assemblies. [R. pp. 1325–26.]

The board of directors eventually became dissatisfied with Schneider's performance and lack of progress. [R. pp. 1174–75.] After Schneider oversaw repairs to two Building A units in the spring of 2007, the company was not retained for further services. [R. pp. 1179, 1190, 1233.] Subsequently, the board hired MEC Engineering Services, Inc. ("MEC") to represent the homeowners during the renovations to Buildings A and B. [R. p. 1186.] MEC prepared a plan for the repairs, including bid solicitations and project drawings. The board also asked MEC to obtain at least three bids from contractors for the repair work. [R. p. 1215.]

One of the board's consultants, HICAPS, gave a presentation to the board in July 2008 identifying the problems in Buildings A and B. HICAPS identified the two primary problems to be failures in the structural concrete and the building envelope:

1. Structural Concrete Failing
    a) Over the years there has been water and salt intrusion in the concrete
        1) Salt, from ocean spray, has slowly worked its way into the concrete. The salt has reached the reinforcing steel. The concrete has high levels of chlorides. This is a permanent condition.
    b) The reinforcing steel has corroded
        1) Reinforcing Steel (rebar) has expanded causing concrete to pop off (spalling).
        2) Prestressed concrete stands have lost adhesion to concrete.

2. Building envelope not weather tight
    a) Allows water to enter the structure
    b) Window systems are failing
        1) At the end of their service life
    c) Causes wood to rot in walls framing windows and sliders
    d) Any paint/sealer is at the end of its lifespan

[R. p. 1350.]

The board eventually became displeased with the lack of proper communication by MEC. [R. p. 1244.] The board decided to retain Sutton-Kennerly & Associates, Inc. ("SKA") and Spectrum Engineering Services, Inc. ("Spectrum") to review MEC's engineering reports, drawings, and bid specifications. [R. p. 1244.]

SKA, after reviewing the information related to MEC's repair approach, opined that the repairs could be done at a lower cost. SKA also expressed some concerns regarding some of the proposed repair methodology and some project drawings, which lacked sufficient detail. [R. pp. 1249–51.] After receiving this information from SKA,

the board of directors informed MEC that its services would no longer be needed. [R. pp. 1251–52.]

Shortly thereafter, Spectrum presented to the board of directors a report listing numerous "failures" in Buildings A and B, listed in the following order: roof failure, façade failure, edge beam failure, soffit failure, concrete failure, expansion joint failure, horizontal surface failure, HVAC anchorage failure, and windows and doors. [R. pp. 2247–48.] Spectrum's report found that rainwater was penetrating the roof, the stucco, lanai slabs, floor beams, and hollow core slabs. [R. pp. 2247–48.] Regarding the windows and doors, Spectrum found that these components "have poor to nonexistent flashing to prevent wind driven rain from getting into the units." [R. p. 2248.] As stated previously, the flashing is not the responsibility of the co-owners under Section 3.6(c) of the Master Deed.

In January 2009, Appellant's board of directors asked SKA to perform tests and investigative work to determine the full scope of repairs required by Buildings A and B and to provide a cost estimate. [R. p. 1271.] After hearing the findings of SKA's investigative work and after considering SKA's and Spectrum's proposals, the board retained SKA to proceed with drafting designs for the repairs and to begin soliciting bids for the work. [R. p. 1275.]

Subsequently, several homeowners challenged the validity of the 2006 amendment that made windows and balcony doors common elements. [R. p. 1278.] As a result of those concerns, Appellant's board of directors called a special membership meeting on March 21, 2009. [R. p. 1278.] A re-vote on the amendment was held, and

48.31% of the ownership voted in favor of it. [R. p. 1283.] Because of the amendment's failure, balcony doors and windows again became the responsibility of each co-owner.

In July 2009, Appellant notified co-owners that SKA would be beginning repairs later that year, with Building B repairs occurring from September 2009 through May 2010, and Building A repairs taking place from September 2010 through May 2011. [R. p. 1293.] The total cost for the repairs, including a 15% contingency, totaled $10,944,468. [R. p. 1292.] Appellant recommended that the repairs be financed through a special assessment. [R. pp. 1293–94.] The per-unit assessment amounts were as follows: $88,398 for Buildings A and B; $64,868 for three-bedroom units in Buildings C and D; and $68,471 for four-bedroom units in Buildings C and D. [R. p. 1291.] The assessment amount for the units in Buildings A and B was higher because it included the hard costs of their windows and sliding balcony doors, which were being replaced. [R. p. 733.]

Co-owners were informed that a special members' meeting was scheduled for August 1, 2009, to vote on the proposed special assessment. [R. p. 1294.] The co-owners did not approve the special assessment. [R. p. 2268.] As a result, Appellant informed the co-owners that the repair costs would be incorporated into the 2010 and 2011 annual operating budgets and would be billed monthly to the owners along with their regular assessments. [R. p. 2268.]

Respondents subsequently brought suit, alleging numerous causes of action. The case came up for trial on May 21, 2012. Before trial began, the trial court heard arguments on Respondents' "Motion for Summary Judgment and/or Partial Summary Judgment Against the [Appellant]." [R. p. 219.] Specifically, Respondents sought partial

summary judgment on the issues of duty and breach for their negligence and breach of fiduciary duty claims. [R. p. 749, line 24–p. 750, line 9; p. 755, line 15–p. 756, line 3.] Respondents asserted that Appellant, when presented with conflicting reports about the source of damage to the common elements, had a duty to investigate to determine whether any of that damage was due to the failure of any individual co-owners to properly maintain their windows and doors in accordance with the Master Deed and Bylaws. The trial court concluded that such a duty existed and that the duty was breached.[2] [R. p. 833, line 6–p. 837, line 5.] The trial court denied Appellant's motion to reconsider, and this appeal followed.

STANDARD OF REVIEW

"An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Weston v. Kim's Dollar Store*, 399 S.C. 303, 308, 731 S.E.2d 864, 866 (2012). A trial court may grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Summary judgment should be granted only where it is *perfectly clear* that no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of the law." *Weston*, 399 S.C. at 308, 731 S.E.2d at 866 (emphasis added and internal quotation marks omitted) (quoting *Wortman v. Spartanburg*, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992)).

"In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to

[2] The trial court's order is unclear about whether it grants summary judgment on the negligence claim alone or on both the negligence and breach of fiduciary duty claims. Regardless, Appellant is appealing the order in its entirety and as to all causes of action on which summary judgment was granted.

submit a mere scintilla of evidence." *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 308 (2012) (internal quotation marks omitted). "The appellate court, like the trial court, must view all ambiguities, conclusions, and all inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Smith v. Breedlove*, 377 S.C. 415, 421, 661 S.E.2d 67, 70 (2008). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

ARGUMENT

I.

The trial court erred in determining that Appellant had a duty to investigate to determine whether to assess individual co-owners for damage to the common elements.

The trial court held that when Appellant received information indicating that co-owner neglect had damaged the common elements, Appellant had a "duty to investigate" to determine whether assessing the offending co-owner would be appropriate. [R. p. 29.] The trial court found that this duty was created by reading several sections of the Master Deed and Bylaws as a whole. These sections are as follows:

- Section 9.4 of the Master Deed, which requires co-owners to obey the Master Deed, the Bylaws, and applicable regulations, and allows the board of directors to enter a unit in the event of a violation and "to summarily abate and remove, at the expense of the defaulting Co-owner, any structure, thing, or condition" causing the violation [R. pp., 27, 982–83];

- Section 12.1 of the Master Deed, which states that if regime property is damaged due to "the neglect, willful act or abuse" of a co-owner, and if insurance proceeds are insufficient to cover the cost of the damage, the deficiency amount "shall be charged to such Co-owner as an individual assessment" [R. pp. 28, 993];

- Section 16.2 of the Master Deed, which requires co-owners to comply with the applicable rules and regulations and allows the board of directors, on behalf of the association, to bring suit if a co-owner fails to so comply [R. pp. 28, 999];

- Section 6.3 of the Bylaws, which states that if a co-owner's failure to perform required maintenance "creates or permits a condition which is hazardous to life, health, or property, or which unreasonably interferes with the rights of another Co-owner, or which substantially detracts from the value or appearance of the Regime Property, 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 the co-owner for the expense [R. pp. 28, 1019];

- Section 6.4 of the Bylaws, which states that all maintenance and repair expenses provided by the board of directors are common expenses, except that when such expenses are necessitated by a co-owner's failure to perform required maintenance or by a co-owner's "willful act, neglect, or abuse," they are to be assessed to the co-owner individually [R. pp. 28–29, 1019]; and

- Section 7.3 of the Bylaws, which requires the board of directors to enforce the Master Deed, the Bylaws, the Regime Act, and applicable regulations "by taking prompt and appropriate action to correct any violations" [R. pp. 29, 1021].

Here, after reviewing these six sections of the Master Deed and Bylaws, the trial court found they impose two duties on Appellant: (1) the "duty to enforce the terms of the Act, the Master Deed and these Bylaws by taking prompt and appropriate action to correct any violations," and (2) the duty to investigate,

> when presented with evidence which would show or reasonably show that an individual Unit Owner's neglect in maintaining his or her Unit has resulted in damage to the common elements that an investigation is required by the Bylaws. That is, [Appellant] through its Board, upon receiving such information, would be required to initiate some investigation to determine whether or not it would be appropriate to individually assess the defaulting Unit Owner for the damage.

[R. p. 29.] Appellant does not dispute the existence of the first duty; indeed, it is nearly identical to the language in Section 7.3 of the Bylaws. However, the trial court erred in finding that Appellant has a "duty to investigate," which is found nowhere in the Master Deed, Bylaws, or Regime Act. The trial court merely looked at the six cited sections of

the Master Deed and Bylaws and, without providing an explanation, found that "when read together as a whole," they imposed this duty on the board of directors. [R. p. 29.]

These six foregoing sections can be distilled into three provisions: (a) the requirement of co-owners to comply with the Master Deed, Bylaws, and Regime Act; (b) the requirement of the board of directors to enforce the same; and (c) the requirement of the board to perform repairs if a co-owner's neglect or intentional act damaged another unit or the common elements, and to assess that co-owner for the accompanying cost. Nowhere in these six provisions is there a duty to investigate to determine whether damage to the common elements can be apportioned to individual co-owners. Furthermore, the trial court provided no reasoning in support of its conclusion.

"An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence." *Oblachinski v. Reynolds*, 391 S.C. 557, 561, 706 S.E.2d 844, 845-46 (2011). "Proof of negligence in the air, so to speak, will not do." *Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001) (quoting *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, 99 (N.Y. 1928) (internal quotation marks omitted)). "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) (citation omitted). Whether a duty exists is a determination that is made by the Court. *Id.*

The Master Deed, Bylaws, and Regime Act impose upon Appellant numerous specified duties, and it is these express duties that govern how Appellant is to act. "'[I]n negligence cases, the duty is always the same—to conform to the legal standard of

reasonable conduct in the light of the apparent risk." *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003). The provisions of the Master Deed, Bylaws, and Regime Act circumscribe the "legal standard of reasonable conduct" for the board of directors. The trial court looked at six provisions of these documents and found that they gave rise to a duty, the existence of which is not reasonably inferable from any of the cited terms. The purported "duty to investigate" goes beyond what the documents' express terms require of the board of directors. Accordingly, this Court should reverse the trial court's finding that Appellant had a "duty to investigate."

II.

The trial court erred in determining that Appellant's conduct should not be judged by the business judgment rule.

Even if the trial court properly concluded that Appellant had a "duty to investigate," the trial court incorrectly determined that Appellant's conduct taken in furtherance of this duty is not protected by the business judgment rule. The trial court offered two reasons for this conclusion: (1) the business judgment rule is inapplicable because the Appellant's conduct is governed by the South Carolina Horizontal Property Regime Act ("Regime Act"), the Master Deed, and the Bylaws; and (2) even if the business judgment rule were applicable, Appellant is not afforded the rule's protection because of Appellant's *ultra vires* acts. [R. pp. 18–25.] As shown below, both of the trial court's reasons were erroneous.

(A) The business judgment rule is applicable.

The trial court concluded that because the Regime Act, the Master Deed, and the Bylaws all governed Appellant's conduct, the business judgment rule offers Appellant no

protection. [R. pp. 18–21.] This alone constitutes reversible error. For instance, the case of *Seabrook Island Prop. Owners Ass'n v. Pelzer* involved a dispute between a property owners association and an individual property owner. 292 S.C. 343, 345, 356 S.E.2d 411, 412 (Ct. App. 1987). This Court noted early in the opinion that the association was governed by its bylaws. *Id.* at 345, 356 S.E.2d at 413. Furthermore, the Regime Act, which is codified at S.C. Code Ann. § 27-31-10 *et seq.* (2007), had been enacted by that time. Although *Pelzer* ultimately concluded that the association could not seek protection of the business judgment rule because the association violated restrictive covenants, the Court recognized that the rule "applies to *intra vires* acts of the corporation." *Id.* at 348, 356 S.E.2d at 414. In other words, the Court did not hold that the business judgment rule was inapplicable merely because of the existence of the Regime Act and bylaws.

The case of *Goddard v. Fairways Development General Partnership* provides even more clarity. This Court held as follows: "*In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule'* and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (emphasis added). Furthermore, because every property regime in this state is established pursuant to the Regime Act and must have bylaws and either a master deed or lease as required by S.C. Code Ann. §§ 27-31-100 & -150 (2007), the trial court's conclusion would have the bizarre effect of automatically and conclusively precluding application of the business judgment rule to

every action by a homeowners association, which would run directly afoul of *Pelzer* and *Goddard.*

The cases cited in the trial court's order also do not support the court's conclusion. The trial court cites to *Murphy v. Yacht Cove Homeowners Ass'n*, 289 S.C. 367, 345 S.E.2d 709 (1986), for the proposition that a member of a homeowners association may sue the association in contract or tort. [R. p. 19.] However, Appellant does not challenge the right of Respondents to file a tort action against Appellant. Rather, the issue at hand is whether Appellant may seek protection of the business judgment rule in such a tort action. *Murphy* is silent on this point. The trial court also quotes the rule from *Ortega v. Kingfisher Homeowners Ass'n, Inc.*, 314 S.C. 180, 442 S.E.2d 202 (Ct. App. 1994), that each co-owner must comply with the bylaws and the master deed's administrative rules and regulations. [R. p. 20.] Again, Appellant does not dispute that it has a duty to enforce the provisions of the Master Deed and Bylaws. *Ortega* is silent in the pertinent issue, which is whether the business judgment rule is inoperable merely because the Regime Act, the Master Deed, and the Bylaws impose specified duties on Appellant.

The trial court also erred in stripping Appellant of protection under the business judgment rule because its analysis focused on an incorrect duty. The trial court found "that [Appellant's] Board is affirmatively required to maintain, and repair the regime's property. . . . [B]ecause the duty to maintain and repair the regime property is mandatory and fell upon [Appellant's] Board pursuant to its Bylaws, it is not discretionary, and, therefore, not subject to the Business Judgment Rule." [R. pp. 19, 21.] The trial court

found that the duty to maintain and repair arose from Section 5.6[3] of the Master Deed and Sections 6.1[4] and 7.3[5] of the Bylaws. [R. pp. 19–20.]

However, the duty that the trial court concluded Appellant breached 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. [R. pp. 39–40.] This duty is distinct from the duty to maintain and repair the regime property. Even if the trial court correctly concluded that the duty to maintain and repair is not subject to the business judgment rule because it is a non-discretionary duty, the trial court erred in extending this determination to the "duty to investigate." In other words, the trial court's order apparently holds that because Appellant's actions when fulfilling (or failing to fulfill) its duty to maintain and repair the common elements are not protected under the business judgment rule, Appellant's actions regarding its duty to investigate similarly cannot be viewed under the lens of the rule. Appellant contends the trial court is incorrect.

First, the trial court's order lacks legal basis for its conclusion that an HOA board of directors is automatically barred from asserting protection under the business judgment rule concerning fulfillment of an express duty. Appellate courts in this state have never recognized any scenarios where, from the outset, the business judgment rule is precluded from applying to decisions by corporate management. Rather, all *intra vires* actions taken by a corporate board are entitled to the rule's protection. *Goddard* enunciated this

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[3] Section 5.6 of the Master Deed states, in part, "Except as specifically provided herein, the maintenance, repair, replacement, management, operation, and use of the Common Elements and Limited Common Elements shall be the responsibility of the Board." [R. p. 974.]

[4] Section 6.1 of the Bylaws provides, "The Manager or the Board of Directors shall provide for the maintenance, repair, and replacement of the Common Elements." [R. p. 1018.]

[5] Section 7.3 of the Bylaws states, in part, "The Board of Directors shall enforce the terms of the Act, the Master Deed, and these Bylaws and the Regulations promulgated pursuant hereto by taking prompt and appropriate action to correct any violations." [R. p. 1021.]

principle in holding that "[i]n a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Goddard*, 310 S.C. at 414, 426 S.E.2d at 832.[6]

Second, even if the trial court correctly found that the business judgment rule affords no protection to directors' conduct when performing duties enumerated in the Master Deed and Bylaws, no authority exists for extending this holding to discretionary duties that are not found in these documents. The "duty to investigate" is one such duty. The trial court itself even seems to recognize that this is not an enumerated duty: it determined this duty's existence only after conglomerating six sections of the Master Deed and Bylaws. Discretionary authority is precisely to what the business judgment rule is intended to apply—especially in cases involving the exercise of business judgment by a nonprofit corporation, such as Appellant. As this Court has previously stated,

> [a] court should be reluctant to question action taken *intra vires* by the governing board of a non-profit corporation. This is especially true where the action taken by the governing board of a non-profit corporation requires the board's business judgment. In such instances, the governing board is entitled to have the validity of its *intra vires* action tested by the "business judgment" rule. Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith.

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[6] *See also Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 606 n.32, 541 S.E.2d 257, 268 n.32 (2001) ("The Business Judgment Rule immunizes management from liability in corporate transactions undertaken by management where there is a reasonable basis to indicate the transaction was made in good faith."); *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) ("We now uphold the Court of Appeals' determination that the business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, self dealing or unconscionable conduct.").

Dockside Ass'n, Inc. v. Detyens, 291 S.C. 214, 216-17, 352 S.E.2d 714, 716 (Ct. App. 1987) (citation omitted), *aff'd*, 294 S.C. 86, 362 S.E.2d 874 (1987).

Because the operation of the business judgment rule is not defeated merely because of the existence of the Master Deed, the Bylaws, and the Regime Act, the inquiry can now turn to whether Appellant's actions are protected by the rule.

(B) Appellant's actions were *intra vires* and protected under the business judgment rule.

The trial court also found that even if Appellant's conduct is to be evaluated in light of the business judgment rule, Appellant's board of directors "had acted without authority, without good faith, and inaction by failing to discharge its affirmative duties under its Master Deed and Bylaws," meaning that Appellant's actions were subject to judicial review. [R. p. 21.] The trial court cited two purportedly *ultra vires* actions by the board that evidenced Appellant's "lack of due or reasonable care [and] lack of good faith": (1) the enactment and enforcement of the 2006 amendment designating windows and balcony doors as part of the common elements, and (2) the board's failure "to place its adopted annual budgets on the annual agenda for presentation to the Co-owners at their Annual Members' Meetings in 2009 and 2010." [R. p. 21, 24.]

Regarding the passage of 2006 amendment, the trial court found that this was an *ultra vires* act because it violated Sections 1.3 and 1.5 of the Bylaws. [Order p. 21.] Section 1.3 states that "[v]otes can be cast only at meetings of the [Association] convened in accordance with the Bylaws," and Section 1.5 provides that if co-owners desire to take action outside of a meeting, it must "be taken by written consent to such action signed by all Co-owners entitled to vote." [R. pp. 1006–07.] The trial court seemed to conclude that Appellant's acceptance of proxy votes outside of a meeting violated Section 1.3, and

that under Section 1.5, Appellant would have been required to obtain unanimous written consent from the co-owners to adopt the amendment outside of a meeting. Even if the enactment of the amendment violated the Bylaws, this action was merely a mistake rather than an act taken in bad faith.[7] Further, even assuming the enactment was done in bad faith, the specific duty that the trial court found to be breached was the "duty to investigate," which is unrelated to the voting procedures outlined in the Bylaws. Merely because a homeowners association's board purportedly violated one section of its bylaws does not mean that every other action taken by that board is unprotected by the business judgment rule.

The trial court also found that Appellant's lack of good faith was evidenced by its decision to continue enforcing the amendment even when the board "knew" it was invalid. The court pointed to a June 2008 letter to the board of directors from attorney Jeff King. Mr. King opined in the letter that the amendment was invalid because it contravened the Bylaws. [R. p. 22–23.] Notably, Mr. King was not Appellant's attorney; he was hired by some of the Respondents and was merely issuing an opinion on a subject. [R. p. 851, line 11–p. 852, line 6.] Merely because the board received an unsolicited letter from an attorney does not mean that the board's failure to follow any advice in that letter constituted bad faith. The trial court also cited a July 2009 letter from the property manager to the co-owners and a purported admission from Appellant's counsel as evidence of Appellant's bad faith in continuing to enforce the amendment. [R. p. 22–23.] However, the letter merely states that a forthcoming court ruling may impact the structure

[7] Bad faith is defined as "[t]he opposite of good faith, generally implying or involving actual or constructive fraud, or a design to deceive or mislead another, or a neglect or refusal to [fulfill] some duty or some contractual obligation, *not prompted by an honest mistake as to one's rights or duties*, but by some interested or sinister motive." *Estate of Carr v. Circle S. Enters.*, 379 S.C. 31, 42-43, 664 S.E.2d 83, 88-89 (Ct. App. 2008) (emphasis added).

of the proposed assessment, and the supposed "admission" was merely an acknowledgment that the board had received the letter and was on notice of attorney King's opinion. [R. p. 22–23.] Additionally, evidence exists from which the jury could conclude that the board acted in good faith regarding the enforcement of the amendment—specifically, the fact that the board, in response to concerns raised by co-owners, conducted a re-vote on the amendment in 2009.

Regarding the board's failure to place the annual budgets on the agenda at the annual members' meetings in 2009 and 2010, the trial court found this was an *ultra vires* act in contravention of the Bylaws and Master Deed, which require the board to do so. [R. p. 24–25.] This was error; an *ultra vires* act is an unauthorized act, while the purported failure to place budgets on agendas constitutes inaction. Regardless, even if the trial court is correct on this point, the same issue as above is present: breach of one or more express provisions of the Master Deed and Bylaws does not mean that the board of directors is stripped of protection under the business judgment rule for every other action, especially actions taken in relation to unrelated, discretionary duties such as the "duty to investigate."

In other words, even if Appellant improperly continued to enforce the 2006 amendment and failed to present annual budgets, it was error for the trial court to find that these actions stripped Appellant of all protection under the business judgment rule for all of its other actions. Lack of good faith in relation to the exercise of one duty cannot be imputed to the exercise of a separate duty, in order to preclude the rule's application to that other duty. Accordingly, the trial court committed reversible error in

finding that Appellant's actions are not entitled to protection under the business judgment rule.

(C) Application of the business judgment rule to Appellant's actions requires the reversal of the trial court's grant of summary judgment to Respondents.

The business judgment rule immunizes a board of directors from liability if the board acted in good faith. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 606 n.32, 541 S.E.2d 257, 268 n.32 (2001). As discussed above, the trial court erred in concluding Appellant lacked good faith when acting pursuant to its duty to investigate, which means Appellant is, in fact, entitled to have its conduct viewed under the lens of the business judgment rule. Accordingly, this Court's inquiry needs to proceed no further. The trial court substituted its judgment for the reasonable business judgment of Appellant's board of directors, which constitutes reversible error: "In a dispute between the directors of a homeowners association and aggrieved homeowners, the conduct of the directors should be judged by the 'business judgment rule' and absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors *will not* be set aside by judicial action." *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (emphasis added). Accordingly, the trial court erred in engaging in judicial review of Appellant's actions taken in furtherance of its duty.

III.

The trial court erred in determining that Appellant breached a duty to Respondents.

Even if the trial court was correct in stripping Appellant of protection under the business judgment rule, the trial court erred in finding, as a matter of law, that Appellant

breached its duty. Absent business judgment rule protection, Appellant's conduct would be evaluated under the standard of basic negligence. Applying this standard demonstrates that ample evidence exists from which a jury could conclude Appellant satisfied its "duty to investigate" and exercised due care in doing so.

Generally, whether a duty was breached is a question of fact for the jury. *See Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct. App. 2010). A trial court should not grant summary judgment on the question of breach if any triable issues of material fact exist.

(A) The information Appellant obtained regarding the sources of the water intrusion create genuine issues of material fact for consideration by a jury.

The trial court incorrectly found that Appellant breached its duty to investigate. Specifically, the trial court ignored the "mere scintilla" standard when granting summary judgment to Respondents on the issue of breach. Substantial evidence in the record shows that Appellant did, in fact, initiate an investigation into what (or who) was responsible for the water leaking into Buildings A and B.

Indeed, much of this evidence demonstrates that the leaks were due to failures in the common elements rather than co-owner neglect. For instance, Keystone Construction studied the window leak issue in 2003 and concluded that the water was leaking through the stucco and also found that non-existent window flashing was part of the problem. [R. p. 2148.] Because window flashing is not the responsibility of individual unit owners, Keystone's conclusions did not indicate to the board that co-owner negligence was causing damage to the buildings.

In 2005, Ben Morrow replaced his windows after experiencing water intrusion problems, but the new windows still leaked. [R. p. 1141.] He hired an architect and an engineer, who opined that water was migrating through the exterior wall and that replacing the windows would not solve the issue. [R. pp. 1149, 2152, 2270.] The site maintenance supervisor found that stucco cracks and sealant joint failures could be causing the problems. [R. pp. 1145, 2152.] A jury could conclude that this information, in combination with the other reports received by the board, gave the board a good faith basis to conclude that the water intrusion in Buildings A and B resulted from common element failures rather than co-owner neglect. Further, a jury could reasonably infer that the board acted within its scope in not attempting to apportion negligence where it believed none existed.

Schneider, after performing destructive testing, determined in 2007 that leaks, which were occurring at "stacks" of units, were caused by the spandrel's insufficient vertical dimension. [R. p. 1325.] The spandrel is part of the exterior wall. Schneider also found that enlarging the spandrel would allow space for separate flashing assemblies. [R. pp. 1325–26.] The window system consists of many components that are not part of the "unit" as defined in Section 3.6(c) of the Master Deed, including the spandrel and the flashing. [R. p. 968.] Considering this evidence in the light most favorable to Appellant establishes that problems with these non-unit components—*i.e.*, the common elements—were causing the water intrusion issues.

When HICAPS gave its presentation to the board in July 2008, it opined that the concrete exteriors of Buildings A and B had experienced water and salt intrusion. [R. p. 1350.] HICAPS also informed the board that the building envelopes were not weather-

tight and were allowing water to enter the structures. [R. p. 1350.] A jury could conclude that the board considered this report and reasonably made an informed decision that damage to the common elements could not be apportioned to individual unit owners.

Spectrum's 2008 report found numerous "failures" in Buildings A and B, listed in the following order: roof failure, façade failure, edge beam failure, soffit failure, concrete failure, expansion joint failure, horizontal surface failure, HVAC anchorage failure, and windows and doors. [R. pp. 2247–48.] Spectrum found that rainwater was penetrating the roof, the stucco, lanai slabs, floor beams, and hollow core slabs. Importantly, Appellant received this report in November 2008, the very point in time it was in the process of obtaining a final identification of the deficient conditions so that the appropriate remediation method could be selected. Of the nine "failures" listed above, only one—"windows and doors"—implicated the units themselves rather than the common elements, and the only problem identified with the windows and doors was the "poor to nonexistent flashing," which is not part of the units as defined in Section 3.6(c) of the Master Deed and, thus, not the responsibility of co-owners. [R. p. 2248.] A jury could infer from this evidence that the board of directors acted in a reasonably prudent manner when determining that co-owner neglect was not responsible for damage to the common elements.

As can be seen, by the time the board hired SKA to perform the repair work in 2009, it had received numerous reports from multiple professionals about the source of the water intrusion problems. By that time, Appellant had already spent approximately $576,000 on "engineering firm's [sic] costs, testing, attorney input, etc." [R. p. 1280.] In reviewing a grant of summary judgment, the Court is required not only to view the

evidence in the light most favorable to the non-movant, but also to view all inferences from the evidence in the same manner. Applying that standard here, a jury could examine the evidence and reasonably infer that (1) Appellant performed an extensive investigation into the sources of the water penetration, and (2) given the information Appellant had received by the time it hired SKA, Appellant believed that any further testing or investigation would not be conclusive and would be unduly expensive. Further, merely because windows and doors were leaking does not mean that co-owners were negligent, and a jury could infer from the evidence that co-owner neglect was not to blame for the water penetration.

(B) The reports and affidavits of Appellant's experts create genuine issues of material fact for consideration by a jury.

Appellant's expert, J. Lawrence Elkin, P.E., visited the site in November 2010 while the repair work was occurring and inspected the buildings as they were de-clad, including the windows and balcony doors that were being removed as well as the stucco. [R. p. 2147.] In his affidavit, he opined that Appellant's board of directors "was faced with a systemic failure of the building system. . . . [W]indows are not independent of the stucco wall system, but are instead part of the building enclosure. Transitions must be interfaced properly, detailed with flashing and sealants to prevent the intrusion of water." [R. pp. 2166–67.] Elkin further stated as follows:

> [L]eaks occurred throughout various units at different times, but these leaks were not limited to windows and sliding glass doors. On the contrary, leaks were attributed to the roof, the stucco, HVAC equipment, and other factors. As further noted in paragraph 11 of my report, for example, there are contradictory records as to the source of the leaks. . . .
>
> Simply put, windows and doors in the A and B Buildings cannot be viewed independently. They are part of an integrated building enclosure system which all parties agreed was in dire need of repair. The cost of

repairs attendant to the replacement of windows and doors cannot be neatly or mathematically calculated for purposes of allocation.

[R. p. 2167.] Elkin also prepared a report, which discusses these issues in greater detail:

> Windows, once installed, cannot be considered independent of the opaque wall areas. They both work as part of a larger system called the building enclosure. . . .
>
> Windows transition to walls at an interface. This interface must be properly detailed with flashings and sealants to prevent the intrusion of water. In addition, windows are not intended to be watertight under all conditions; therefore, the flashings must collect and redirect that water back to the exterior. . . .
>
> I visited the site in 2010 and observed the windows and doors that were removed. Most of the aluminum frames exhibited corrosion from contact with stucco or concrete. The windows were designed to be attached with nail flanges which extended over the face of the exterior sheathing and were covered with stucco. Removing and replacing this type of window cannot be accomplished without damaging the stucco. . . .
>
> There is no evidence indicating that the BOD failed to enforce the provisions of the Master Deed requiring Unit Owners in Buildings A & B to maintain, repair and replace certain aspects of their units. Rather[,] the record clearly shows that individual unit owners were notified of needed repairs and violations. . . .
>
> The need for the $11,000,000 assessment is more directly associated with the fact that the facility is located ocean front and was constructed nearly 30 years ago. . . . My experience is that similarly aged and located properties undergo major rehabilitations every 25 to 30 years. . . .
>
> The records do reflect that leaks occurred from time to time in various units. These leaks were attributed to the roof, windows, stucco, sliding glass doors, fenestration in neighboring units, HVAC equipment, water heaters, kitchen fixtures, bathroom fixtures and laundry equipment. Each of these conditions, when reported to the board, was referred to the property manager or site maintenance supervisor for further investigation. When needed, the board notified owners of the need to repair or maintain fixtures and equipment. The BOD also undertook to repair the roofs and secure roof-top HVAC equipment to resolve leak issues. . . .

> The records show that qualified construction professionals were providing guidance to the BOD as early as 1993 and a professional property manager was engaged from the inception of the HOA.

[R. pp. 2151–52, 2154–56.]

The report of Gary Bradham, Appellant's expert in the areas of property management, HOA governance, and fiduciary services, also creates a genuine issue of material fact. Bradham noted that Appellant's board of directors "had enlisted the assistance of technical experts and consultants in every aspect of the management and upkeep of the buildings. . . . [F]rom day one, the [board of directors] hired and relied on the advice of a Professional Property Management company over the years." [R. p. 2194.] Bradham testified that he "didn't find any time where the board had something put in front of them and did nothing." [R. p. 2244, lines 5–6.]

Bradham further opined that Appellant has flexibility and discretion in the discharge of its duties, especially given restraints on what the board of directors can accomplish unilaterally:

> The Acts, the Master Deed, and the Bylaws outline the basic Standards of Care required by the Boards. But, the standards of duty for the Board and its Directors are not "right and/or wrong" standards of responsibility and duty. They require some interpretation by the BOD.
>
> . . . [T]he standard to maintain, protect and enhance the common property of [Shipyard Village], while outlined in the governing directives, allowed flexibility to the Boards to make decisions on how to proceed. . . . The record shows the Boards used the information available at the time to make what they felt was the best decision. . . .
>
> If there was an unlimited pot of money, any decision would have been easy and one might start with the strictest solution . . . . But in the case of property management, the amount of resources available comes from the Co-owners . . . . In the case of [Shipyard Village], the final decision concerning the amount of money to be collected rests with the Co-owners through the affirmative vote of 2/3rds of the percent of ownership interest and drives the final decision as to how much the Co-owners will pay. . . .

. . . .

> From my review of the record and the thousands of pages of information in the files, they show that at no time did the board act outside of its scope. Instead[,] it always relied on technical experts with whom they had hired and feedback from the membership to guide its decision process and final actions.

[R. pp. 2195–97.]

The trial court erred in granting summary judgment to Respondents when faced with this evidence. For instance, in *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 656 S.E.2d 20 (2008), the plaintiff brought a negligence claim against his employer, the defendant, for injuries sustained while working on a railroad track owned by the defendant. *Id.* at 40-41, 656 S.E.2d at 21. The defendant moved for summary judgment, and the plaintiff presented affidavits from two experts. *Id.* at 43-45, 656 S.E.2d at 23-24. The trial court granted the defendant's motion. *Id.* at 45-46, 656 S.E.2d at 24. The Court of Appeals reversed, finding that the plaintiff had established genuine factual issues; the Supreme Court agreed. *Id.* at 46, 656 S.E.2d at 24-25. Regarding the experts' affidavits, the Supreme Court held as follows:

> Arguably, both experts made a few assumptions that are not explicitly supported by [the plaintiff's] deposition testimony. . . .
>
> Nonetheless, the evidence must be construed in the light most favorable to [the plaintiff]. . . .
>
> This Court has plainly stated that even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. . . . Obviously, the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, but that simply establishes that summary judgment is not appropriate in this case.

Id. at 53-54, 656 S.E.2d at 28-29.

Similarly, in the case at hand, the reports and affidavits of Appellant's experts, along with all arising inferences, established a factual issue on the question of breach. A jury could infer that the board always responded to information it received about property conditions requiring attention or repair—that is, the board always investigated every report it received about problematic conditions. This evidence also demonstrates that Appellant's board received a breadth of conflicting information about the causes of the leaks and that it considered all of that information when choosing how to proceed under the Bylaws and Master Deed. Further, a jury could infer that, given the lack of any conclusive evidence that co-owner neglect damaged the common elements, the board exercised reasonable care in not attempting to apportion the damage to individual co-owners. When confronted with the evidence in the experts' reports and affidavits, the trial court committed reversible error in ruling, as a matter of law, that Appellant breached its duty.

(C) Testimony of individual board members creates genuine issues of material fact for consideration by a jury.

The testimony of board members created issues of fact on the question of breach. Board member Doris Bray stated the following in her affidavit:

> Based on my ownership in Building B and my involvement as a board member, I believe that it is impossible to determine if the water intrusion and leaks in the Buildings were primarily caused by the windows and sliding glass doors or by design and/or construction deficiencies originating with the Common Elements of the Buildings and by the Buildings' constant exposure to salt air and water as oceanfront properties.
>
> It would be unfair, unreasonable and contrary to the best interests of [Appellant] to have "individually assessed" the A and B Building Unit Owners for water intrusion that may not have resulted from any lack of maintenance of windows and sliding glass doors by owners, but rather from original design and/or construction defects of the Common Elements . . . .

> . . . As previously stated, there is no conclusive evidence that the Building A and B Co-Owners were negligent, nor is there any conclusive evidence that all Building A and B windows and/or doors were leaking. There was[,] however, no question that the building envelope system had to be repaired, the majority of which [Respondents] agree is a Common Expense. Considering that the work to the Common Elements was a necessity and the lack of conclusive evidence that leaky windows were the culprit in every Unit, or even any Unit, the Board was faced with uncertainty as to how to treat the costs associated with the windows and doors. . . .
>
> The per unit allocation was based on efforts by the Board to give full force and effect to all relevant provisions of the Master Deed while preserving practicality and equity. . . .
>
> . . . [T]he Board decided the most that could be attributed to Building A and B Unit Owners was the actual costs of the windows and doors. To attribute any more of the repair costs, including the "soft" project costs, to Building A and B Unit Co-Owners, would have been an exercise of bad business judgment and, in my opinion, wrong.
>
> [R. pp. 2254–57.]

Board member Don Johnston testified in his deposition that "the information provided by [SKA] was such that the corrosion throughout the building is not the end result of any one item. It was made clear that from Day One, the buildings absorbed corrosives, and that leaks found throughout—corrosion found throughout the building could come from anywhere." [R. p. 2266, lines 2–8.]

Bray's affidavit and Johnston's testimony were sufficient to create a jury question. This evidence, plus the reasonable inferences to be drawn therefrom, establish that the board considered whether to assess Building A and B co-owners for a portion of the damage to the common elements. The evidence further establishes that given the reports the board received, a jury could conclude it exercised reasonable care in choosing its course of action. Finally, a jury could reasonably infer from the evidence that the

board would not have incurred the time and expense of asking SKA to apportion the damage to individual co-owners if the board believed it already had the answer.

(D) Viewing the foregoing evidence in the light most favorable to Appellant, the trial court erred in holding as a matter of law that Appellant breached its duty.

The evidence discussed above constitutes far more than a mere scintilla of evidence that Appellant did not breach its duty. A look back at the duty at issue here is instructive; in the conclusion of the trial court's order, the duty is expressed as "a duty to investigate when presented with evidence which would . . . reasonably show that an individual Unit Owner's neglect in maintaining his or her Unit has resulted in damage to the common elements . . . . That is, [Appellant] through its Board, upon receiving such information, would be required to initiate some investigation to determine whether or not it would be appropriate to individually assess the defaulting Unit Owner for the damage." [R. pp. 39–40.] The trial court held Appellant "breached its duty to investigate . . . when it failed to determine: (a) first, whether or not the water intrusion damage to the common elements . . . was the fault of a particular Unit Owner or a particular group of Unit Owners; and (b) second, whether or not other non-defaulting co-owners were entitled to a rebate by individual assessment from the A and B Unit Owners who had caused the problem." [R. p. 40.]

Contrary to the trial court's holding, a jury could infer that Appellant never received information that would "reasonably show that [a co-owner's] neglect in maintaining his or her Unit resulted in damage to the common elements." Appellant received reports that Buildings A and B were leaking, including some reports that the windows and balcony doors leaked, but these reports did not indicate that the leaks were

attributable to co-owner neglect. Substantial evidence exists from which a jury could determine that none of the reports received by Appellant's board established that negligent maintenance caused the water damage.

Even if the information received by the board could be construed to indicate that the negligence of unit owners was causing water damage to the common elements, Appellant did, in fact, initiate an investigation to determine whether any of the damage to the common elements could be attributed to individual co-owners. In the years preceding the initiation of this lawsuit, Appellant hired numerous engineers and other professionals to investigate the water intrusion issues. The information Appellant received from Keystone, Schneider, HICAPS, Spectrum, the architect and the engineer hired by Ben Morrow, and site maintenance supervisor Bennett, indicated that the leak issues were attributable to various components of the common elements. Additionally, Appellant's expert Larry Bradham reviewed the evidence and opined that the board of directors always acted within its scope of authority. Appellant's expert Larry Elkin confirmed the information that the board had received from other professionals, which was that the water penetration was the result of a failure of multiple components of the building envelope system. A jury could reasonably determine that the central purpose of Appellant's actions was to find the source of the leaks and to ascertain the best course of remedial conduct—in other words, to determine whether co-owner neglect was to blame and whether to assess the offending co-owners.

Further, Appellant's decision not to engage in costly testing in an attempt specifically to apportion common element damage did not constitute a breach of Appellant's duty. A jury could infer that as a result of the board's investigation, it made

a reasonable, prudent decision that allocating any particular segment of damage to any particular unit owner would have been (1) a waste of time and resources, given the conflicting reports, and (2) impossible to do even if co-owner negligence was to blame. By the time the board selected SKA to perform the repairs, Appellant had already spent almost $600,000 on investigative expenses. [R. p. 1280.] A jury could infer from this fact that further testing would not have been conclusive.

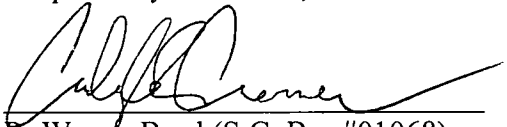
More important, Appellant's expert Elkin visited the site while the work was occurring and observed the original conditions of the buildings, including the stucco, the windows, and the doors. [R. p. 2147.] Elkin opined that "[t]he cost of repairs attendant to the replacement of windows and doors cannot be neatly or mathematically calculated for purposes of allocation." [R. p. 2167.] Elkin's site inspection confirms what Appellant's board of directors already knew from the numerous reports and voluminous information it reviewed: attributing any given portion of the damage to the common elements to any particular unit would have been impossible. Additionally, even if a portion of the moisture damage in the common elements could have been identified as having been caused by leakage from a particular window or balcony door, no evidence existed to show that any leaks manifesting at the windows and doors were due to unit owner neglect. The standard imposed by the Master Deed and Bylaws is negligence, not strict liability; in the absence of an intentional act or neglect, the mere fact that a co-owner's windows and doors leaked does not subject that co-owner to liability.

In light of the foregoing, the trial court erred in determining, as a matter of law, that Appellant breached a duty owed to Respondents.

CONCLUSION

Appellant respectfully submits that the trial court erred in determining (1) that Appellant had a duty to investigate to determine whether to assess individual co-owners for damage to the common elements; (2) that Appellant's actions taken in furtherance of its duty are not entitled to protection under the business judgment rule; and (3) that Appellant breached its duty. For the reasons discussed above, Appellant respectfully requests that this Court reverse the trial court's order and remand this case for trial.

Respectfully submitted,



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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.

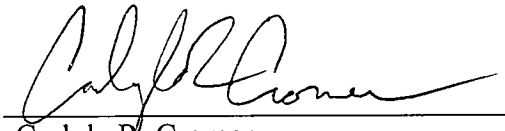
Shipyard Village Council of Co-Owners, Inc., ... Third-Party Plaintiff,

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.

APPELLANT'S RULE 211 CERTIFICATION

The undersigned, attorney for Appellant Shipyard Village Council of Co-Owners, Inc., certifies, pursuant to Rule 211, SCACR, that Appellant's Final Brief complies with Rule 211(b), SCACR.



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PROOF OF SERVICE OF FINAL BRIEF OF APPELLANT

I certify that I have served the Final Brief of Appellant on the Respondents via hand-delivery, on August 8, 2013, to their attorneys of record at the address listed below.

[Signature page to follow.]

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