

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity/Circuit Court Judge

RECEIVED

DEC 13 2012

SC Court of Appeals

Case No. 2009-CP-07-00036

Kenneth C. Arata and Madeleine R. Arata.....Appellants

vs.

Village West Owners' Association, Inc.
d/b/a Village West Horizontal Property Regime.....Respondents

RECORD ON APPEAL

Jack D. Simrill
Simrill Law Firm
Post Office Box 5681
Hilton Head Island, SC 29938
(843) 785-2134
ATTORNEY FOR APPELLANTS

Brian C. Pitts, Esquire
Smoot & Pitts
Post Office Box 23439
Hilton Head Island, SC 28925-3439
(843) 681-3200
ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

	Page
Order of Judge Dukes dated April 5, 2012	1
Order of Judge Dukes dated June 20, 2012	10
Order Denying Petition for Writ of Certiorari dated October 31, 2007	17
South Carolina Court of Appeals Unpublished Opinion No. 2011-UP-360 in Madeleine R. Arata and Kenneth C. Arata, Appellants, v. Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime, Respondent	18
South Carolina Court of Appeals Unpublished Opinion No. 2007-UP-015 in Village West Horizontal Property Regime, Respondent, v. Kenneth C. Arata and Madeleine R. Arata, Appellants	25
Answer and Counterclaim dated March 23, 2009	36
Aratas' Request for Admissions	41
Village West's Response to Request for Admissions	73
Aratas' Rule 60(b) Motion for Relief from Judgment with Madeleine Arata's Q & A attached	78
Aratas' Motion to Reconsider and Amend Judgment	94
Aratas' Motion to Amend Complaint (Pursuant to Rule 15(b))	96
Aratas' Motion for Summary Judgment	98
Aratas' Memorandum in Support of Motion for Summary Judgment	100
Village West's Motion for Summary Judgment	109
Page 6 and 7 of Village West's Memorandum in Support of Motion for Summary Judgment	110
Village West's Motion for Summary Judgment dated March 23, 2012	112

Village West's Memorandum in Support of Motion for Summary Judgment	115
September 13, 2005 Affidavit of Mary Probert	123
Edward E. Bullard letter of August 24, 2007	125
Answers to Defendant's Interrogatories (Question #3, #10, and #14) dated September 29, 2011	126
Transcript of Pages 1 through 113 of March 26, 2012 Hearing	129
Village West's Petition for Award of Attorney's Fees and Costs	242
Village West's Affidavit in Support of Award of Attorney's Fees	244
Certificate of Counsel	250

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

MADELINE R. ARATA AND
KENNETH C. ARATA,

Plaintiffs,

v.)

VILLAGE WEST OWNERS'
ASSOCIATION, INC. D/B/A VILLAGE
WEST HORIZONTAL PROPERTY
REGIME,

Defendant.

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 09-CP-07-00036

ORDER FOR JUDGMENT

2012 APR -9 PM 2:59

CLERK OF COURT

Pursuant to the Standing Order of Reference, the above-entitled matter was referred to the undersigned to rule upon motions and to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

At the hearing on March 26, 2012 I heard and ruled upon cross-motions for summary judgment and conducted the trial of this case. In that connection, testimony was taken, and from the testimony and evidence, I find and conclude as set forth below. I deny both motions for summary judgment. With respect to the motion of the Plaintiffs, Madeline R. Arata and Kenneth C. Arata (collectively "Aratas") they are unable to point to undisputed facts which would establish their claim of extrinsic fraud or that they are not liable for the special assessment they contest. With respect to the motion of the Defendant, Village West Owners' Association, Inc. ("Association") which seeks summary judgment dismissing Aratas' claims, I believe there is a scintilla of evidence sufficient to withstand the motion. Likewise I choose to deny the

Association's motions for a non-suit or directed verdict, choosing instead to decide the case on the facts. I also informed the parties and their counsel that I am holding any claim for attorney's fees in abeyance until after my decisions on the other issues in the case.

FINDINGS OF FACT

1. Village West Horizontal Property Regime is a condominium project on Hilton Head Island comprised of five buildings containing 81 residential units ("Village West").
2. Arata owns a unit in the Spinnaker building at Village West.
3. The Association initiated two lawsuits from 1994 to 1997. The first suit involved construction-related defects in the Spinnaker building. This lawsuit settled for approximately \$300,000. The second lawsuit involved construction-related defects in the other four buildings at Village West. The second lawsuit settled for approximately \$7 million.
4. After settlement of the second lawsuit, the Association imposed a special assessment divided on a pro rata basis between all units within Village West. The purpose of the special assessment was to cover a shortfall in the cost to repair the buildings in Village West after application of the funds received from the construction defect litigation.
5. Arata refused to pay the special assessment, and in 2005 the Association filed suit to foreclose a lien which had been placed against Aratas' apartment ("Arata I").
6. In Arata I the trial court granted summary judgment in favor of the Association. Arata appealed, and in order to stay execution of the order of foreclosure and sale, Arata posted a \$75,000 cash bond. The Court of Appeals affirmed the lower court in an unpublished opinion, and on October 31, 2007 the South Carolina Supreme Court denied Arata's Petition for a Writ of Certiorari.

7. After remittitur, and in accordance with the terms of the bond, the Clerk of Court paid the bond money over to Edward E. Bullard, Esquire, the Attorney who represented the Association in Arata 1.

8. On January 6, 2009 Arata filed this case against the Association attempting to assert the following causes of action concerning the special assessment and bond ("Arata 2").

- a. for relief from the judgment in Arata 1 or to set aside the judgment pursuant to Rule 60, SCRPC;
- b. for fraud¹; and
- c. for an accounting.

9. The Association filed an Answer and Counterclaim. The counterclaim seeks judgment against Arata for the additional attorney's fees and expenses incurred by the Association.

10. Aratas' claim in Arata 2 is that the judgment in Arata 1 should be set aside because the attorney that represented the Association in Arata 1 made false representations and concealed lost records. Arata asserts that this alleged conduct amounted to extrinsic fraud.

11. Specifically, Arata asserts that the Association through its then attorney, Ed

¹The Association filed a motion to dismiss the cause of actions to set aside the judgment and for fraud pursuant to Rule 12(b)(6), SCRPC. On June 15, 2009, the Honorable Marvin H. Dukes, III sitting as a Special Circuit Court Judge for the Beaufort County Court of Common Pleas, dismissed the causes of action seeking to set aside the judgment and for fraud pursuant to Rule 12(b)(6), SCRPC. Arata appealed, and on June 30, 2011 the South Carolina Court of Appeals in an unpublished opinion reversed and remanded the case back to the lower court. In its opinion the Court of Appeals stated: "[w]ithout the Aratas' allegation of extrinsic fraud amounting to fraud on the court, the Regime is clearly entitled to the defense of res judicata, as found by the master".

Bullard, withheld evidence that the reconstruction and repair that occurred in conjunction with the special assessment was in part from damage as a result of Hurricane Floyd, a casualty, and that the construction and repair was to both units and common elements. Based upon this, Arata argues that certain provisions in the Bylaws of the Association require that the cost of repairs not be apportioned on a pro rata basis but rather be paid by the unit owner directly affected by the repair.

12. Arata also asserts that Mr. Bullard falsely represented to the Court in Arata 1 that the repair and reconstruction was not from a casualty and was only to common elements.

13. On August 24, 2007, while Arata 1 was on appeal² Mr. Bullard wrote Arata's attorney, Jack Simrill, advising that he had discovered a box of the Association's records that Mr. Simrill was free to review.

14. Soon after August 24, 2007, Arata and Mr. Simrill examined the documents in the box. They made copies of three (3) documents, which they allege in the Complaint in Arata 2, would have compelled a different outcome in Arata 1 had they know about them then.

15. Arata admits that they engaged in no discovery in Arata 1.

16. The Summons and Complaint in Arata 1 was filed on March 14, 2005, and the Amended Complaint was served on the Aratas on April 11, 2005. Judgment was not granted in Arata 1 until January 25, 2006, which shows that Arata had in excess of eight (8) months to serve discovery requests.

17. With respect to the casualty loss issue, it is undisputed that Hurricane Floyd

²The South Carolina Supreme Court denied Arata's Petition for Writ of Certiorari on October 31, 2007.

passed by Hilton Head Island on September 16, 1999.

18. The special assessment that Arata contests was not imposed until 2004.

19. As explained by Ray Dowling, the Association's property manager at the time, he inspected Village West on September 17, 1999, the day after Hurricane Floyd. Mr. Dowling listed all of the damage he observed in a report. Mr. Dowling indicated that the damage was not extensive, consisting mainly of broken or missing roof tiles, shutters blown off, and damage to the membrane of one of the roofs caused by a decorative false chimney that broke loose and fell on it. All of the Hurricane Floyd damage was repaired within several months and paid for out of the general operating account of the Association. The cost to repair this damage was in the \$6,000.00 range, and there was no special assessment imposed against the owners in Village West. Mr. Dowling's testimony was not refuted or discredited in any way.

20. One of the documents relied on by Arata in support of their claim of extrinsic fraud was a letter from Thomas Carlson, Vice President of Calibogue Construction Company, Inc. to architect, Peter Sherratt dated July 20, 1998. This letter discussed the estimated cost to complete certain repair work in the Clipper Building at Village West.

21. Mr. Carlson testified that his company was hired by Village West to perform forensic investigations and prototype repairs in connection with the second construction defect litigation. His company also made repairs to the Spinnaker Building.

22. At no time did Calibogue Construction Company, Inc. perform any work to repair damage to the buildings at Village West caused by Hurricane Floyd or any other casualty. Mr. Carlson testified that all of his company's work was associated with either the construction defect litigation and/or repairing damage caused by defective construction.

23. Calibogue Construction Company, Inc. did not perform the work at Village West associated with the special assessment in 2004.

24. The proceeds from the settlement of the construction defect litigation were not sufficient to pay the full cost of repairs to the buildings in Village West, so a special assessment was imposed in 2004 to cover the shortfall. The special assessment was not for the purpose of paying for the cost to repair the damage caused by Hurricane Floyd in 1999 or any other casualty, and there is no evidence linking Hurricane Floyd or any other casualty to the special assessment.

25. The construction repair work performed in connection with the special assessment included approximately \$400,000 of work to the Spinnaker Building.

26. Arata asserted that, at a hearing in Arata I Mr. Bullard falsely represented to the Court that there had been no casualty. Since there was no casualty associated with the special assessment which the Association was seeking to collect in Arata I, the alleged representation of Mr. Bullard could not have been false.

27. Likewise, Arata asserted that in an Affidavit filed in Arata I, Mary Probert, a previous President of the Association, falsely swore under oath that there was no casualty. Again, since there was no casualty associated with the special assessment, Ms. Probert's Affidavit could not have been false.³

28. At trial, Arata presented no evidence that the reconstruction and repair work associated with the special assessment was to anything other than common elements.

³At trial the Association moved to exclude Mrs. Probert's Affidavit on the grounds that it there were no allegations concerning the Affidavit in the Complaint, and was, therefore, outside the scope of the pleadings. I now grant this motion, and rule that it would be improper for me to consider Ms. Probert's Affidavit, even though I do not believe it would change the outcome if I did.

29. At trial, Arata did not pursue their accounting cause of action, and presented no evidence with respect to it.

CONCLUSIONS OF LAW

1. I conclude that there was no extrinsic fraud on the part of the Association necessary to support setting aside the judgment in Arata I, and the principle of *res judicata* bars Arata from relief in this case. Extrinsic fraud, the only type of fraud for which a court may grant relief from a judgment, is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Raby Const., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004). Intrinsic fraud, on the other hand, is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003).

2. Absent a discovery request in Arata I, the Association had no affirmative obligation to disclose the documents which Arata seeks to rely upon. The Association did not intentionally conceal any documents, nor did Village West misrepresent anything to the Court in Arata I. "South Carolina's strong policy towards finality of judgments trumps a party's ability to set aside a judgment where, as here the party could have discovered the evidence prior to trial". Bowman v. Bowman 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004); Raby Const., L.L.P., 594 S.E.2d 478 (The alleged failure to disclose computer records which might have shown a different amount owed on a construction project did not constitute extrinsic fraud entitling relief from judgment especially where complaining party could have through diligence discovered the existence of such information during the underlying litigation.) The documents at issue were voluntarily produced by the Association's attorney while Arata I was still pending on appeal.

____ 3. I conclude that Village West did not make any misrepresentations to the Court, nor did it submit a false affidavit in Arata 1. Moreover, perjured testimony is a classic case of intrinsic fraud, not extrinsic fraud. Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951); James F. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE at 485 (2d ed.1996).

4. I conclude that there was no casualty associated with the 2004 special assessment, the repair and reconstruction performed in conjunction with the special assessment was to the common elements at Village West, and the provisions of the Association's Master Deed and Bylaws and the South Carolina Horizontal Property Act authorized apportionment of the construction defect shortfall among all owners in Village West on a pro rata basis. See Article V, Section (e) and Article VII, Section (a) of the Association's Master Deed; Article VII, Section 6(c) of the Association's By-Laws; and Village West Horizontal Property Regime v. Kenneth C. Arata and Madeline R. Arata, S.C. Ct. App. Unpublished Opinion No. 2007-UP-0015. ["The Regime's Master Deed and By-Laws clearly provide for the assessment of all unit owners for construction defects with respect to any of the buildings within the Regime. Additionally, this language complies with statutory law and the general purpose behind horizontal property regimes. See S.C. Code Ann. § 27-31-240 (Supp. 2005) ("The co-owners of the apartments are bound to contribute pro rata . . . toward the expenses of administration and of maintenance and repair of the general common elements")].

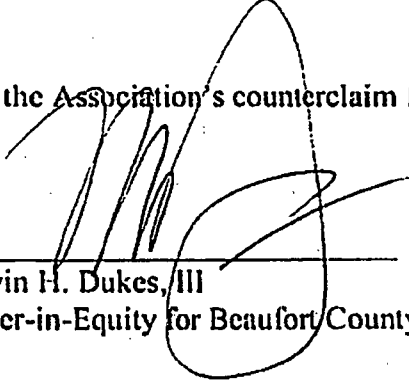
5. I conclude that Arata abandoned their accounting cause of action by not presenting any evidence or pursuing it at trial.

It is, therefore, ORDERED ADJUDGED AND DECREED as follows:

1. Judgment shall be entered in favor of the Association and against Arata

dismissing all of Aratas' claims with prejudice.

2. I will retain jurisdiction to hear and decide the Association's counterclaim for attorney's fees.



Marvin H. Dukes, III
Master-in-Equity for Beaufort County

Beaufort, South Carolina
April 7, 2012

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

MADELINE R. ARATA AND
KENNETH C. ARATA,

Plaintiffs,

v.

VILLAGE WEST OWNERS'
ASSOCIATION, INC. D/B/A VILLAGE
WEST HORIZONTAL PROPERTY
REGIME,

Defendant.

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 09-CP-07-00036

ORDER

2012 JUN 20 PM 3:51
CLERK OF COURT

The above captioned case was tried before me on March 26, 2012, and on April 5, 2012 I issued an Order for Judgment entering judgment in favor of the Defendant, Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime ("Village West") dismissing with prejudice all of the claims of the Plaintiffs, Madeline R. Arata and Kenneth C. Arata (collectively "Arata"). In the Order for Judgment I also held the issue of Village West's entitlement to attorney's fees in abeyance. Thereafter, Village West filed a Petition for Attorney's Fees and Costs supported by affidavit, and Arata filed a Rule 60(b) Motion for Relief from Judgment and a Motion to Amend Complaint, all of which were heard by me on June 13, 2012.

ARATA'S RULE 60(b) MOTION FOR RELIEF FROM JUDGMENT

I deny Arata's Rule 60(b) Motion for Relief from the Judgment for the following reasons. At the hearing, Arata advanced two arguments in support of this Motion. Arata first contended

that I erred in failing to continue the trial as requested "by March 16, 2012 letter" (copy attached as Exhibit "A"). Arata requested a continuance because they did not believe they were going to receive a response to a Request for Admissions served upon Village West less than thirty (30) days prior to the trial date. Village West objected to the continuance because the trial had been continued several times before. Village West agreed to, and did, respond to the Request for Admissions on March 23, 2012. Thus, the basis for Arata's request for a continuance no longer existed. The decision to grant or deny a continuance is a matter within the court's discretion. Graybar Elec. Co. v. Rice, 287 S.C. 518, 339 S.E.2d 883 (Ct. App. 1986). Arata was not prejudiced by going forward.

The next argument advanced by Arata in support of the Rule 60(b) Motion for Relief from Judgment is that Arata were denied due process because I heard cross-motions for summary judgment less than ten (10) days after they were served. Apart from the fact that this issue was not raised by Arata when I heard the motions, and Arata served their Motion for Summary Judgment less than ten (10) days prior to trial, this argument is without merit in that I denied both motions for summary judgment, and proceeded to trial on the merits.

Arata made no other arguments in support of their Rule 60(b) Motion for Relief from Judgment.

ARATA'S MOTION TO AMEND COMPLAINT

On June 7, 2012 Arata served Village West by mail with a Motion to Amend Complaint. Village West agreed to have this Motion heard on less than ten (10) days notice, and at the hearing counsel for Arata agreed that this Motion was rendered moot by my decision on Arata's Rule 60(b) Motion for Relief from Judgment.

**VILLAGE WEST'S COUNTERCLAIM
FOR ATTORNEY'S FEES AND COSTS**

The final matter for me to decide is Village West's counterclaim for attorney's fees and costs which was supported by a Petition for Attorney's Fees and Affidavit of Village West's counsel which itemized the charges and matters upon which time was spent. Upon inquiry, counsel for Arata agreed that Village West's Bylaws provided for the recovery of attorney's fees and costs from Arata in this action. Further, I placed Village West's counsel under oath, and afforded Arata's counsel an opportunity to examine Village West's attorney concerning the fees being sought. Arata's counsel chose not to do so, and indicated that he did not challenge the amount of the fees and costs that were being requested.

Additionally, I make the following findings of fact and conclusions of law with respect to Village West's counterclaim for attorney's fees and costs.

1. Village West possesses those rights, powers and duties as set forth in the Master Deed Establishing Horizontal Property Regime, dated January 30, 1985, and recorded on February 19, 1985 in the Office of the Register of Deeds for Beaufort County in Official Records Book 413 at page 208, and any amendments thereto ("Master Deed").

2. Village West also possesses those rights, powers and duties as set forth in the By-Laws of Village West Horizontal Property Regime and Village West Owners' Association dated January 30, 1985, and recorded on February 19, 1985 in the Office of the Register of Deeds for Beaufort County in Official Records Book 413 at page 208 and any amendments thereto, including, but not limited to, the First Amendment to Bylaws of Village West Horizontal Property Regime, dated November 13, 2007, recorded on November 15, 2007 in the Office of the

Register of Deeds for Beaufort County in Official Records Book 2650 at page 1787, and Second Amended and Restated Bylaws of Village Horizontal Property Regime and Village West Owners' Association, Inc. dated March 11, 2009, recorded on March 27, 2009 in the Office of the Register of Deeds for Beaufort County in Official Records Book 2825 at page 1904 ('By-Laws').

3. Article VII, Section 3 of the Bylaws provides, in part:

"[t]he board shall have the right and duty to attempt to recover such common charges, together with interest, and the expenses, including administrative fees and attorney's fees, in an action to recover same brought against such co-owner, or by foreclosure of the lien on such apartment granted by Section 27-31-210, Code of Laws of South Carolina, 1976".

4. Article VII, Section 13 of the Bylaws provides, in part:

[t]he violation of any rule and regulation adopted by the board or the breach of any bylaws contained herein, or breach of any provision of the master deed, shall give the board the right, in addition to any other rights set forth in these bylaws:...

(b) to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of such breach and to recover the costs of either enforcement, including attorneys fees, and until such expense is recovered, it shall be a lien upon said apartment which shall be collected in the same manner as common expenses.

5. This action is a continuation of Village West's collection of a special assessment imposed against Arata and their apartment, and the contesting of liability for the special assessment by Arata. As such, Arata is liable for the attorney's fees and costs incurred by Village West in this action, including those associated with Arata's previous appeal.

6. The sum of \$28,778.75 is a reasonable fee to allow as attorney's fees for Village West's attorney for services performed and anticipated to be performed in within action through

the date hereof under the terms of the Master Deed and Bylaws, and any amendments thereto.

7. The nature, extent, difficulty of the legal services, and the time and labor devoted to the case are commensurate with the fee requested and awarded, in that Village West's attorney was required to spend in excess of 156.45 hours in preparation of correspondence, pleadings, affidavits and other documents on file with the Court, and was required to prepare for and attend numerous hearings, prepare briefs and other documents with respect to the appeal, and perform such other work as set forth in the Affidavit in Support of Attorney's Fees and Cost filed herein. The time spent was necessary for the protection of Village West's interests, and in order to make a clear and concise presentation of the issues to the Court.

8. Village West's attorney was admitted to the South Carolina Bar in 1987, and since that time has been engaged in private practice. Village West's attorney is presently a partner with the law firm of Smoot & Pitts and spends a significant portion of his practice in civil litigation.

9. Village West's attorney charges \$175.00 per hour which is consistent with the hourly rate customarily charged in this area for similar services.

10. The result accomplished by Village West's attorney was beneficial in that Village West obtained a judgment against Arata as prayed for in its Answer and Counterclaim.

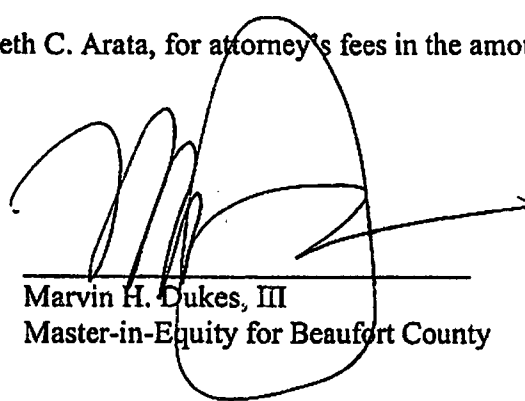
11. I therefore conclude that Village West should have judgment against Arata for attorney's fees of \$28,778.75 and costs of \$983.63.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT:

1. The Rule 60(b) Motion for Relief from Judgment of the Plaintiffs, Madeline R. Arata and Kenneth C. Arata dated April 20, 2012 is denied.
2. The Motion to Amend Complaint of the Plaintiffs, Madeline R. Arata and

Kenneth C. Arata, dated June 7, 2012 is denied.

1. The Defendant, Village West Owners' Association, Inc., is granted judgment against the Plaintiffs, Madeline R. Arata and Kenneth C. Arata, for attorney's fees in the amount of \$28,778.75 and costs of \$983.63.



Marvin H. Dukes, III
Master-in-Equity for Beaufort County

Beaufort, South Carolina
June 10, 2012

COPY



JACK D. SIMRILL

ATTORNEY AT LAW
POST OFFICE BOX 5681
HILTON HEAD ISLAND
SOUTH CAROLINA 29938
TELEPHONE 843-785-2134 FAX 843-671-4733

March 16, 2012

Honorable Marvin H. Dukes, III
Master-In-Equity
P. O. Drawer 1228
Beaufort, SC . 29901

Attn: Ms. Heather R. H. McLeod

**Re: Madeleine R. Arata and Kenneth C. Arata
v. Village West' Association, Inc. d/b/a.
Village West Horizontal Property Regime
Case No. 09-CP-7-00036.**

Dear Heather:

Brian Pitts made available to me a box of records from which I recovered numerous documents relevant to this action and I served a Request for Admissions as to the genuineness of the documents recovered on March 9, 2012. Village West has thirty days to respond, therefore, I respectfully request that the March 26, 2012, 9:30 a.m. hearing which has been scheduled be continued until after April 9, 2012. The box made available at Brian Pitts' office was not the box Sonja Friedman made available to us before it was turned over to Village West, however, it has the documents we found and many more relevant to this action and I do not wish to delay proceedings while searching further for the box that we did not complete our examination of.

By copy of this letter I am notifying all witnesses subpoenaed for the March 26, 2012 hearing are cancelled

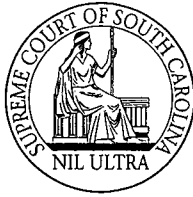
Yours respectfully,

Jack D. Simrill

JDS/vs

c: Brian C. Pitts, Esquire
Mrs. Madeleine R. Arata
Honorable Jerri Ann Roseneau
Sonja N. Friedman, Esquire
James Donohoe, Esquire

EXHIBIT "A" TO ORDER



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA 29211

(803) 734-1080

FAX (803) 734-1499

October 31, 2007

Jack D. Simrill, Esquire
P.O. Box 5681
Hilton Head Island, SC 29938

Re: Village West v. Arata, Kenneth
2005-CP07-00475

RECEIVED
NOV 1 2007

Dear Counsel:

The Court has issued the following Order on your Petition for Writ of Certiorari in the above entitled matter:

“Petition for Writ of
Certiorari Denied.

s/ Jean H. Toal C.J.
For the Court

Justice Donald W. Beatty,
not participating.

October 31, 2007.”

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Madeleine R. Arata and
Kenneth C. Arata, Appellants,

v.

Village West Owners'
Association, Inc. d/b/a Village
West Horizontal Property
Regime, Respondent.

Appeal From Beaufort County
Marvin H. Dukes, Master-in-Equity

Unpublished Opinion No. 2011-UP-360
Submitted April 1, 2011 – Filed June 30, 2011

REVERSED AND REMANDED

Jack D. Simrill, of Hilton Head Island, for
Appellants.

Brian Charles Pitts, of Hilton Head Island, for
Respondent.

PER CURIAM: Madeleine and Kenneth Arata (the Aratas) filed this action against Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime (the Regime) to set aside judgment under Rule 60, SCRCR. The Aratas appealed from the master-in-equity's order granting the Regime's motion to dismiss. We reverse and remand.¹

FACTS²

The Aratas own a unit in the Spinnaker Building in the Regime. In March 2005, the Regime filed a complaint against the Aratas for failure to pay an assessment. The Aratas answered, admitting they did not pay the assessment. However, they averred the Regime's By-Laws prevented the Regime from collecting the assessment. The Aratas requested an accounting of settlement proceeds from a lawsuit involving construction defects in the Spinnaker building, one of the buildings in the Regime.

The Regime moved for summary judgment, explaining it initiated two lawsuits from 1994 to 1997. The first suit involved construction-related defects in the Spinnaker building. This lawsuit settled for \$300,000. The second lawsuit involved construction-related defects in the other four buildings within the Regime. The second lawsuit settled for \$7 million. According to the Regime, the total recovery from these suits did not cover the entire expense of repairing the buildings. As a result, the Regime's board assessed all of the unit owners according to their percentage of ownership in the Regime. The Aratas refused to pay this assessment.

The Aratas opposed the motion for summary judgment, arguing the second lawsuit, relating to defects in all of the Regime's buildings except the Spinnaker building, resulted in a deficiency. The Aratas contended the Regime improperly levied the assessment to cover the deficiency as to those buildings only. Furthermore, they argued the Regime's By-Laws prohibited such an assessment.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

² The background facts are taken from Village West Horizontal Property Regime v. Arata, Op. No. 2007-UP-015 (S.C. Ct. App. filed Jan. 11, 2007), cert. denied, Oct. 31, 2007. We reference that case as "Arata 1."

The circuit court granted summary judgment to the Regime. The Aratas appealed. In an opinion filed January 2007, this court affirmed, finding the Regime's By-Laws and statutory authority permitted a pro-rata assessment. On August 24, 2007, while the Aratas' petition for certiorari to the supreme court was pending, the Regime's attorney notified the Aratas' attorney that he had a box of records relevant to Arata 1 "that once was believed to have been lost." These records were not disclosed during the pendency of the action in the circuit court.

On January 6, 2009, the Aratas filed this action alleging fraud, seeking an accounting, and requesting that the judgment be set aside under Rule 60, SCRCF. The Aratas alleged the Regime's attorney in Arata 1 fraudulently concealed the records. The Regime filed a motion to dismiss under Rule 12(b)(6) or for judgment on the pleadings under Rule 12(c), SCRCF, arguing res judicata prevented the re-litigation of the issues. The master granted the motion, finding res judicata applied.³ This appeal follows.

STANDARD OF REVIEW

An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action pursuant to Rule 12(b)(6) or Rule 12(c), SCRCF. See Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (discussing the standard of review of a motion to dismiss under Rule 12(b)(6), SCRCF); Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006) (discussing the standard of review of a motion for judgment on the pleadings). A ruling on a Rule 12(b)(6) motion must be based solely on the allegations set forth on the face of the complaint. Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). When considering a motion for judgment on the pleadings under Rule 12(c), SCRCF, the court must regard all properly pleaded factual allegations as admitted. Falk v. Sadler, 341 S.C. 281, 286-87, 533 S.E.2d 350, 353 (Ct. App. 2000).

³ The master found the Regime's motion "was not directed at the cause of action for an accounting and it remains unaffected by this Order."

LAW/ANALYSIS

I. Res Judicata

The Aratas argue the master erred in dismissing their complaint based on the doctrine of res judicata. We agree.

"Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Judy v. Judy, Op. No. 26987 (S.C. Sup. Ct. filed June 20, 2011) (Shearouse Adv. Sh. No. 20 at 14, 24) (quoting Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999)). If res judicata applies, a litigant is barred from raising any issues which were or might have been adjudicated in the former suit. Id. To establish res judicata, the defendant must prove three elements: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Id. at 19 (citing Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992)).

Without the Aratas' allegation of extrinsic fraud amounting to fraud on the court, the Regime is clearly entitled to the defense of res judicata, as found by the master. The doctrine of res judicata, however, does not bar collateral attack of a judgment based on extrinsic fraud. Aaron, 381 S.C. at 592-93, 674 S.E.2d at 486. Our supreme court reiterated the rule that extrinsic fraud is necessary to set aside a judgment based on fraud in Chewning v. Ford Motor Company, 354 S.C. 72, 80, 579 S.E.2d 605, 610 (2003). The court explained the difference between intrinsic and extrinsic fraud:

Extrinsic fraud is "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action."

Intrinsic fraud, on the other hand, is fraud which was presented and considered in the trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud.

Id. at 81, 579 S.E.2d at 610 (quoting Hilton Head Ctr. of S.C. v. Pub. Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). Perjury by a party or a witness, use of forged documents, or failure to disclose documents by a party or witness are examples of intrinsic fraud. Id.; Raby Constr., L.L.P. v. Orr, 358 S.C. 10, 21 n.5, 594 S.E.2d 478, 483 n.5 (2004). However, the subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud amounting to fraud on the court. Chewning, 354 S.C. at 82-84, 579 S.E.2d at 610-11. Any claim of fraud on the court must be accompanied by particularized allegations. Id. at 86, 579 S.E.2d at 613.

Here, the Aratas allege the Regime's then attorney made fraudulent representations and concealed the lost records. In their complaint, the Aratas allege the Regime's attorney "had a box of records crammed in a banker's box . . . which had not been disclosed" The Aratas further maintain the attorney, "[b]oth in the prosecution of the case in the lower court and on appeal in the Court of Appeals," made representations that were "false, material, known to have been false when made, [and] made with the intention that it be acted upon by the Aratas" The trial court found these were not allegations of extrinsic fraud. The court stated: "This is not a case where an attorney embarked on a scheme to either suborn perjury or intentionally conceal[] documents, which, as the Supreme Court indicated in Chewning . . . would constitute extrinsic fraud."

With the greatest respect for the learned master's conclusion, we find the Aratas' complaint does allege extrinsic fraud amounting to fraud on the court. Thus, res judicata does not bar collateral attack of the Arata 1 judgment. Accordingly, we reverse the master's grant of the motion to dismiss based on res judicata.

II. Timeliness of Motion to Set Aside Judgment

The Regime argues this court should affirm the master's order on the additional sustaining ground that the motion for relief from judgment was not made within the one-year time limit required under Rule 60(b), SCRCF. We disagree.

Rule 60(b), SCRCF, reads: "On motion . . . the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud, misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied" Rule 60(b), SCRCF. The rule continues, stating: "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken." *Id.* Rule 60(b) also provides: "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court." *Id.*

The Aratas did not file this action until January 6, 2009, well beyond the one-year time required under Rule 60(b)(1)-(3). The Aratas, however, argue their action is timely because it is based on the authority granted in Rule 60(b) allowing an independent action, not subject to the one-year limitation, for fraud on the court, or under the authority in Rule 60 to hear an independent action for exceptional circumstances warranting equitable relief. *See Mr. T. v. Ms. T.*, 378 S.C. 127, 135, 662 S.E.2d 413, 417 (Ct. App. 2008) (stating Rule 60 permits these two potential independent attacks on a judgment). Our supreme court has explained that while in most circumstances there is a time limitation on a party seeking to reopen a final judgment, there is no limit when a party seeks to set aside a judgment due to fraud on the court. *Chewning*, 354 S.C. at 80, 579 S.E.2d at 609-10.

We find the action to set aside the Arata 1 judgment was timely filed because it alleged fraud on the court. Therefore, it was not subject to the one-year time limitation of Rule 60(b)(3), SCRCF.

III. Other Issues

The Aratas argue numerous other issues including the merits of their allegations of fraud, damages, and attorney's fees. We find the appeal of these issues to be premature and, therefore, remand them to the master. See Widman v. Widman, 348 S.C. 97, 125, 557 S.E.2d 693, 708 (Ct. App. 2001) (finding an issue on appeal premature and remanding to the family court).

CONCLUSION

We reverse the master's order granting the Regime's motion to dismiss and remand for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

HUFF, SHORT and PIEPER, JJ., concur.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 239(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Village West Horizontal Property Regime Respondent,

v.

Kenneth C. Arata and Madeleine R. Aratan Appellants.

Appeal From Beaufort County
Jackson V. Gregory, Circuit Court Judge

Unpublished Opinion No. 2007-UP-015
Submitted January 1, 2007 – Filed January 11, 2007

AFFIRMED

Jack D. Simrill, of Hilton Head Island, for Appellants.

Edward E. Bullard and Sonja N. Friedman, of Hilton Head Island, for Respondent.

PER CURIAM: In this lien foreclosure action, Kenneth C. and Madeleine R. Arata (the Aratas) appeal the circuit court's order granting Village West Horizontal Property Regime (Regime) summary judgment. We affirm.¹

FACTS

The Aratas own Unit 6 in Phase 3 of the Village West Horizontal Property Regime. Unit 6 is located in the Spinnaker building, one of five buildings within the Regime. In March 2005, the Regime filed a complaint against the Aratas for failure to pay an assessment. In addition, the Regime filed a lis pendens against Unit 6.

On March 21, 2005, the Regime filed an amended complaint, asserting a lien against Unit 6 and asking the circuit court to foreclose on the lien. The Aratas answered, admitting they did not pay the assessment. However, they averred the Regime's By-Laws prevented the Regime from collecting the assessment. Furthermore, the Aratas counterclaimed for slander of title. Subsequently, the Aratas moved to amend their answer to assert a counterclaim for an accounting of settlement proceeds from a lawsuit involving construction defects in the Spinnaker building.²

The Regime moved for summary judgment, attaching a memorandum and several exhibits. The Regime explained it initiated two lawsuits from 1994 to 1997. The first suit involved construction-related defects in the Spinnaker building. This lawsuit settled for \$300,000. The second lawsuit involved construction-related defects in the other four buildings within the Regime. The second lawsuit settled for \$7 million.³

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

² The record does not reveal whether the circuit court heard or ruled upon this motion.

³ Although the facts alleged in the Regime's memorandum are not supported by admissible evidence, the Aratas alleged the same scenario in their appellate brief. Moreover, as will be shown, these facts are immaterial to the circuit court's decision.

According to the Regime, the total recovery from these suits did not cover the entire expense of repairing the buildings. As a result, the Regime's board assessed all of the unit owners according to their percentage of ownership in the Regime. The Aratas refused to pay this assessment. After the Regime filed the present foreclosure action, the Aratas sought a temporary injunction to stop the Regime's repair of the buildings. This request was denied.

The Aratas filed a motion in opposition to summary judgment. They argued the second lawsuit, relating to defects in all of the Regime's buildings except the Spinnaker building, resulted in a deficiency. Consequently, the Aratas contended, the Regime improperly levied the assessment to cover the deficiency as to those buildings only. Furthermore, they reiterated their position that the Regime's By-Laws prohibited such an assessment.

After a hearing, the circuit court granted summary judgment to the Regime and ordered foreclosure of the lien. The Aratas moved for reconsideration, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the circuit court under Rule 56(c), SCRPC: summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006); Bennett v. Investors Title Ins. Co., 370 S.C. 578, ___, 635 S.E.2d 649, 654-55 (Ct. App. 2006). In determining whether any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party. Law v. S.C. Dep't of Corrs., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998). If triable issues exist, those issues must go the jury. Mulherin-Howell v. Cobb, 362 S.C. 588, 595, 608 S.E.2d 587, 591 (Ct. App. 2005).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; Law, 368 S.C. at 434, 629 S.E.2d at 648; BPS, Inc. v. Worthy, 362 S.C. 319, 325, 608 S.E.2d 155, 159 (Ct. App. 2005). On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below. Sloan v. Friends of Hunley, Inc., 369 S.C. 20, 25, 630 S.E.2d 474, 477 (2006); see also Schmidt v. Courtney, 357 S.C. 310, 317, 592 S.E.2d 326, 330 (Ct. App. 2003) (stating that all ambiguities, conclusions, and inferences arising from the evidence must be construed strongly against the moving party).

When further inquiry into the facts of the case is desirable to clarify application of the law, summary judgment is not appropriate. Gadson v. Hembree, 364 S.C. 316, 320, 613 S.E.2d 533, 535 (2005); Miller v. Blumenthal Mills, Inc., 365 S.C. 204, 220, 616 S.E.2d 722, 729 (Ct. App. 2005). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. Nelson v. Charleston County Parks & Recreation Comm'n, 362 S.C. 1, 5, 605 S.E.2d 744, 746 (Ct. App. 2004). However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005); Ellis v. Davidson, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. Jones v. State Farm Mut. Auto. Ins. Co., 364 S.C. 222, 228, 612 S.E.2d 719, 722 (Ct. App. 2005). The moving party may discharge the burden of demonstrating the absence of a genuine issue of material fact by pointing out the absence of evidence to support the nonmoving party's case. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the

pleadings. Bennett v. Investors Title Ins. Co., 370 S.C. 561, ___, 635 S.E.2d 660, 665 (Ct. App. 2006). Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife, 363 S.C. at 214, 609 S.E.2d at 568.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 393, 593 S.E.2d 183, 186 (Ct. App. 2004). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004); B & B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270, 603 S.E.2d 629, 631 (Ct. App. 2004).

DISCUSSION

I. The By-Laws

The Aratas contend the circuit court erred in holding that the Regime's By-Laws did not prohibit the assessment. Alternatively, they maintain the By-Laws are ambiguous. In response, the Regime argues both the By-Laws and statutory authority compel the construction defects be repaired through a pro rata assessment. We agree with the Regime.

The operative documents that govern a horizontal property regime constitute a contract between the association and its individual members. Swanson v. Parkway Estates Townhouse Ass'n, 567 N.W.2d 767, 768 (Minn. App. 1997); see also Reyhani v. Stone Creek Cove Condo. II Horiz'l Prop. Regime, 329 S.C. 206, 211-13, 494 S.E.2d 465, 468-69 (Ct. App. 1997) (applying principles of contract law to interpret the operative documents of a horizontal property regime); Houck v. Rivers, 316 S.C. 414, 416, 450 S.E.2d 106, 108 (Ct. App. 1994) (interpreting provisions of a master deed using contract law). The interpretation of a clear and unambiguous agreement is a question of law for the court. Pearson v. Church of God, 325 S.C. 45, 54, 478 S.E.2d 849, 853 (1996); Stribling v. Stribling, 369 S.C. 400, ___, 632 S.E.2d 291, 293 (Ct. App. 2006).

In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. D.A. Davis Constr. Co., Inc. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984); Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004); see also Brady v. Brady, 222 S.C. 242, 246, 72 S.E.2d 193, 195 (1952) ("Agreements should be liberally construed so as to give them effect and carry out the intention of the parties."). The parties' intention should first be determined from the language of the contract. Schulmeyer v. State Farm Fire & Cas. Co., 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003); Gilbert v. Miller, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003); Goode v. St. Stephens United Methodist Church, 329 S.C. 433, 445, 494 S.E.2d 827, 833 (Ct. App. 1997); see also Bruce v. Blalock, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962) ("It is axiomatic that the intent and purport of a written contract or agreement has to be gathered from the contents of the entire agreement and not from any particular clause or provision thereof.").

In general, if the contract is unambiguous, clear, and explicit, it must be construed according to the terms the parties have used, and the terms are to be taken and understood in their plain, ordinary, and popular sense. Ingram v. Kasey's Assocs., 340 S.C. 98, 110, 531 S.E.2d 287, 293 (2000); Jordan v. Sec. Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993); see also Superior Auto. Ins. Co. v. Maners, 261 S.C. 257, 263, 199 S.E.2d 719, 722 (1973) ("[T]o ascertain the intention of an instrument resort is first to be had to its language, and if such is perfectly plain and capable of legal construction, such language determines the force and effect of the instrument."). When an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it. Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001). The court must enforce an unambiguous contract according to its terms, regardless of the contract's wisdom or folly, or the parties' failure to guard their rights carefully. McPherson v. J. E. Sirrine & Co., 206 S.C. 183, 206, 33 S.E.2d 501, 510 (1945); Ellie, 358 S.C. at 93-94, 594 S.E.2d at 493.

Article IX of the Regime's By-Laws provides, in pertinent part:

ARTICLE IX

RECONSTRUCTION AND REPAIR

In the event of casualty loss or damage to the Property, the [Regime's] Board of Directors shall be responsible for applying the proceeds of all casualty insurance to the repair or reconstruction of the Property in accordance with the provisions of this ARTICLE IX. Reconstruction or repair shall be mandatory unless two-thirds or more of the Property is destroyed or substantially damaged. If two-thirds or more of the Property is destroyed or substantially damaged, reconstruction shall not be mandatory If less than two-thirds of the Property is destroyed or substantially damaged, then such Property shall be repaired in the following manner:

...

(3) If the insurance proceeds paid to the Board are insufficient to cover the cost of reconstruction, the deficiency shall be paid as a special assessment by the Unit Owners whose units are being reconstructed or repaired in proportion to the damage done to their respective Units.

(4) The insurance proceeds received by the Board . . . and any special assessments collected to cover a deficiency in insurance shall constitute a construction fund from which the Board . . . shall disburse payment of the costs of reconstruction and repair. The first disbursements from the construction fund shall be insurance proceeds; and if there is a balance in the fund after payment of all costs of reconstruction and repair, it shall be distributed to the Unit Owners who paid special assessments in

proportion to their payments. Any balance remaining after such distribution shall be retained by the Association.

Moreover, Article X of the Regime's By-Laws reads, in relevant part:

ARTICLE X

INSURANCE TRUST

In the event of casualty loss to the Property, all insurance proceeds indemnifying the loss or damage shall be paid jointly to the Board of Directors as Insurance Trustee The Board of Directors, acting as Insurance Trustee, shall receive and hold all insurance proceeds in trust for the purposes stated in this ARTICLE X, and for the benefit of the Association, the Unit Owners, and their respective mortgagees in the following share:

...

(2) Insurance proceeds paid on account of loss or damage to less than all of the Units, when the damage is restored, shall be held for the benefit of Unit Owners of the damaged Units . . . in proportion to the costs of repairing each damaged unit.

The Aratas argue these provisions provide the proper procedures to collect and use funds obtained from the above-referenced lawsuits. Moreover, they assert the Regime could not assess unit owners in the Spinnaker building to pay for reconstruction and repair costs with respect to the other buildings in the Regime. To support their argument, they specifically reference Article IX's language referring to "casualty loss or damage to the Property" and the fact that the adjective "casualty" is omitted from later references to loss and insurance within Article IX.

Initially, we hold Articles IX and X of the Regime's By-Laws have no application to the present case. A contract is read as a whole document so that one may not, by pointing out a single sentence or clause, create an ambiguity. S. Atl. Fin. Servs., Inc. v. Middleton, 356 S.C. 444, 447, 590 S.E.2d 27, 29 (2003); see also Yarborough v. Phoenix Mut. Life Ins. Co., 266 S.C. 584, 592, 225 S.E.2d 344, 349 (1976) ("That construction will be adopted which will give effect to the whole instrument and to each of its various parts and provisions, if it is reasonable to do so."); J.T.M. Co., Inc. v. Vane, 283 S.C. 512, 516, 323 S.E.2d 794, 796 (Ct. App. 1984) ("In determining the intent and purport of a contract, a court should not look solely to one clause read in isolation from the rest of the document; rather, it should consider the contents of the whole instrument.").

In this case, the opening paragraph of Article IX refers to "casualty loss or damage to the Property . . ." and "the proceeds of all casualty insurance." The remainder of Article IX guides the board in how to apply these insurance proceeds and what procedure to follow if the proceeds are deficient. The clear, unambiguous intent of this provision is to provide the board guidance in the event of a casualty loss or damage caused by a casualty.

Moreover, we agree with the Regime that other provisions within the Regime's Master Deed and By-Laws specifically allow the assessment. Article V, Section (e) of the Master Deed reads, in relevant part:

The obligations of all Unit owners with regard to assessments for common expenses and the maintenance and repair of the individual Units shall be as provided in the By-Laws of the [Regime]

Article VII, Section 6(c) of the Regime's By-Laws provides, in pertinent part:

All maintenance, repair and replacement to the common elements as defined in the Master Deed, the painting and decorating of the exterior doors and exterior window sash and the washing of exterior glass shall be made by the [Regime's] Board [of

Directors] . . . and shall be charged to the Unit Owners as a common expense

Article VIII, Section (a) of the Master Deed defines the Regime's common elements, which include "the foundations, roofs, perimeter walls, walls and partitions separating units, [and] load-bearing floors"

The Regime's Master Deed and By-Laws clearly provide for the assessment of all unit owners for construction defects with respect to any of the buildings within the Regime. Additionally, this language complies with statutory law and the general purpose behind horizontal property regimes. See S.C. Code Ann. § 27-31-240 (Supp. 2005) ("The co-owners of the apartments are bound to contribute pro rata . . . toward the expenses of administration and of maintenance and repair of the general common elements."); Sterling Village Condo., Inc. v. Breitenbach, 251 So.2d 685, 688 (Fla. App. 1971) ("Every man may justly consider his home his castle and himself as the king thereof; nonetheless his sovereign fiat to use his property as he pleases must yield, at least in degree, where ownership is in common or cooperation with others.").

II. Other Issues

The Aratas contend several material issues of fact exist about the proceeds from settlement of the above-referenced lawsuits. Furthermore, they maintain the issue of whether the assessment would be used to pay for repair to buildings other than the Spinnaker buildings is a genuine issue of material fact for a jury. Additionally, they assert the circuit court prematurely granted summary judgment because little discovery had taken place and their motion to amend was still pending. Based on our conclusion that the Regime's Master Deed and By-Laws unambiguously allow such an assessment, we need not address these issues.

CONCLUSION

We hold the Regime's assessment complied with its operative documents. Moreover, we find the Regime followed the procedure required by statute and the general considerations behind horizontal property regimes

with respect to the assessment in this case. Further, these conclusions render it unnecessary for this court to address the Aratas' remaining contentions. Accordingly, the circuit court's order is

AFFIRMED.

ANDERSON, HUFF, and BEATTY, JJ., concur.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NUMBER: 09-CP-07-00036
	)	
MADELINE R. ARATA AND	)	
KENNETH C. ARATA,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	ANSWER AND COUNTERCLAIM
	)	
VILLAGE WEST HORIZONTAL	)	
PROPERTY REGIME,	)	
	)	
Defendant.	)	
	)	

The Defendant, Village West Horizontal Property Regime ("Village West"), as its Answer and Counterclaim, would show unto the Court as follows:

FOR A FIRST DEFENSE

1. Village West denies each and every allegation of the Complaint unless hereafter specifically admitted, qualified or explained.
2. Village West admits the allegations of paragraphs 1, 3, 26 and 27.
3. With respect to the allegations of paragraph 2, Village West admits that the Aratas are the owners of Unit 6 in the Spinnaker Building, and that the Spinnaker Building was not part of the lawsuit that was settled for \$7,200,500.00 Further responding, Village West would show that the Spinnaker Building was involved in a previous and separate construction defect case that was resolved, and the settlement proceeds from both lawsuits were used to defray a portion of the cost of repairs to all buildings in the regime, and which resulted in a special assessment against all units within the regime.

4. Village West is without sufficient information to form a belief as to the allegations of paragraphs 4, 10, 11, 18, 19, 21 and 28, and demands strict proof thereof.

5. With respect to the allegations of paragraph 5, Village West would show that on or about February 28, 2005 it filed a lien against Unit 6 in the amount of \$6,294.00 for an unpaid special assessment to cover a portion of the cost to make repairs to common elements of the entire regime. All allegations inconsistent with this are denied.

6. With respect to the allegations of paragraph 6, Village West would show that on March 14, 2005 it filed a Complaint against the Aratas' in the Beaufort County Court of Common Pleas, which Complaint was later amended; which resulted in an Order Granting Summary Judgment and Foreclosure and Sale ("Judgment"), which Judgment was affirmed on appeal. Village West craves reference to the pleadings, opinion of the South Carolina Court of Appeals and final Judgment. Any allegations inconsistent therewith are denied.

7. Village West denies the allegations of paragraphs 7, 12, 20, 22, 23, 24 and 29.

8. With respect to the allegations of paragraph 8, Village West admits that Judge Gregory issued the Judgment on January 16, 2006, but would show that the Judgment speaks for itself, and any allegations inconsistent with its terms are denied.

9. With respect to the allegations of paragraph 9, Village West admits that the Court of Appeals issued its opinion on January 11, 2007, which affirmed the Judgment; and admits that the opinion contains the quoted language, which is language contained in Village West's then applicable Bylaws. Further, responding Village West denies that the quoted language is the Court of Appeals' "ruling", but rather that such is language in the Bylaws upon which the Court of Appeal in part relied in affirming the Trial Court.

10. With respect to the allegations of paragraphs 13 and 14, Village West admits that the referenced articles of the then applicable Bylaws contain, among other language, the quoted language. Village West denies that such provisions are applicable to the assessment which resulted in the Judgment.

11. With respect to the allegations of paragraph 15, Village West admits that the referenced statute contains, in part, the quoted language. Village West denies that the statute is applicable to the assessment which resulted in the Judgment; and, in any event, provides that provisions in the Bylaws would control.

12. With respect to the allegations of paragraphs 17 and 25, Village West re-alleges its responses to the allegations re-alleged in paragraphs 17 and 25.

FOR A SECOND DEFENSE

13. Village West re-alleges each and every allegation of the preceding paragraphs as fully as if repeated herein.

14. Each of the Plaintiffs' denominated causes of action fail to state facts sufficient to constitute causes of action as a matter of law and should be dismissed with prejudice.

FOR A THIRD DEFENSE

15. Village West re-alleges each and every allegation of the preceding paragraphs as fully as if repeated herein.

16. The cost and expense which resulted in a deficiency, special assessment, and amount owed by the Aratas under the Judgment was for damage to the common elements of the regime, and in accordance with the applicable provisions of the Bylaws and the Horizontal Property Act were shared by all owners within the regime in accordance with their percentage

interests.

FOR A FOURTH DEFENSE

17. Village West re-alleges each and every allegation of the preceding paragraphs as fully as if repeated herein.

18. Hurricane Floyd occurred in the year 1999.

19. The construction defect litigation referred to in the Complaint was settled in the year 2002.

20. The damage listed on Exhibit A to the Complaint which presumably was caused by Hurricane Floyd is damage to the common elements of Village West and not to any individual units.

21. The repairs undertaken by Village West which resulted in the special assessment and the Judgment where the result of damage to the common elements as a result of defective construction.

22. Article VII, Section 6(c) of the then existing Bylaws provide as follows:

[a]ll maintenance, repair and replacement to the common elements as defined in the Master Deed, the painting and decorating of the exterior doors and exterior window sash and the washing of exterior glass shall be made by the Board or its agent and shall be charged to all Unit Owners as a common expense, excepting to the extent that the same may be necessitated by the negligence, misuse or neglect of the Unit Owner, in which such case the expense shall be charged to such Unit Owner.

FOR A FIFTH DEFENSE AND BY WAY OF COUNTERCLAIM

23. Village West re-alleges each and every allegation of the preceding paragraphs as fully as if repeated herein.

24. Article VII, Section 4 of the Bylaws provides in pertinent part that in the event an

owner defaults in the payment of a common charge that such owner shall be obligated to pay a late charge of 1.5% per month, together with all expenses including attorney's fees incurred by Village West.

25. Article VII, Section 13 of the Bylaws provides in pertinent part that in the event of a violation or breach of the Bylaws, Village West shall be:

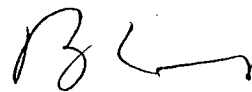
entitled to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any such breach and to recover the cost of such enforcement, including attorney's fees, and until such expense is recovered it shall be a lien upon said unit which lien shall be inferior to all prior Mortgages.

26. The Aratas' are liable for all expenses and attorney's fees incurred by Village West in Civil Action 05-CP-07-475, and in this action which is a continuing action to collect common charges.

WHEREFORE, the Defendant, Village West Horizontal Property Regime, prays that the Complaint be dismissed with prejudice; that it be granted judgment against the Plaintiffs, Madeleine R. Arata and Kenneth C. Arata, on the Counterclaim for all expenses, costs and attorney's fees incurred by Village West Horizontal Property Regime in this action and Civil Action 05-CP-07-475; and for such other and further relief as the Court deems just.

SMOOT & PITTS

By:



Brian C. Pitts, #10468
Attorneys for the Defendant,
Village West Horizontal
Property Regime
P. O. Box 23439
Hilton Head Island, SC 29925

March ²³____, 2009

) IN THE COURT OF COMMON PLEAS
) THE FOURTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 09-CP-07-00036

)

))

)

)

REQUEST FOR ADMISSIONS

)
)
)
)

)

TO:: BRIAN C. PITTS OF SMOOT & PITTS, ATTORNEYS FOR THE DEFENDANT:

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, the plaintiff requests defendants to admit the truth of the following matters including the genuineness of the following documents within the scope of Rule 26(b):

1. The box of records made available to Plaintiff's counsel for inspection and copying on February 29, 2012 at the office of Smoot & Pitts in response to a January 31, 2012 request in Case No. 09-CP-07-00036, was not the box of records that Sonja Friedman indicated were delivered to Village West; it was Village West Archives #33250.

2. July 20, 1998 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc. to Peter E. Sherratt, AIA, The Sherratt Company with Sherratt Company drawings of front elevation, side elevation, rear side and rear of the

Units listed in Carlson letter attached, copies of which are served herewith, are genuine.

3. August 12, 1998 Village West Partial Scope of Repair Work And Preliminary Forensic Investigation Units 30, 32, 36, 40, 46, 48, 54 of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc., a copy of which is served herewith, is genuine.

4. April 14, 1999 Letter of Transmittal, 4/14/99 Request for Payment #3 of Calibogue Construction Company, Inc., with Application and Certificate For Payment, Continuation Sheet, Application for Payment Number 3, Total to Date Thru 3/28/99 pages 1 through 4 attached, recovered from Village West Archives #33250, copies of which are served herewith, are genuine.

5. April 24, 1999 Letter of Thomas J. Carlson, Vice President of to Mr David Kilgus with note on front "Payments to Sherratt" 17,597, 14000, 7250, 1,587 or 8, Carlson 843 449 1354" with Calibogue Construction Company, Inc. Budget Cost Projection Forecast, Total to Date Thru 4/18/99 pages 1 through 4, attached, copies of which are served herewith, are genuine.

6. May 11, 1999 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc. to Peter E. Sherratt, AIA, The Sherratt Company with (6) photographs proposed repairs, copies of which are served herewith, are genuine

7. SPM DEFENDER, INC. September 17, 1999 Damage Control Incident Report of Ray Dowling with detailed list of Damage in Village West H. O. A. Hilton Head Island Hurriane Floyed Damage Report attached, recovered from Village West Archives #33250, copies of which are served herewith, are genuine.

8. Village West Owners Association Board of Directors Meeting Minutes,

September 28, 1999, of Mary Probert, Secretary with September 28, 1999 6:30 PM Call to Order attached, copies of which are served herewith, are genuine.

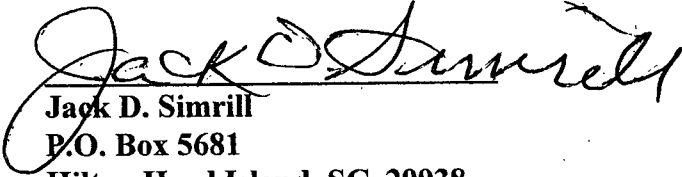
9. September 13, 2005 Affidavit of Mary Probert in Village West Horizontal Property Regime vs. Kenneth C. Arata and Madeleine R. Arata , Case No 05-CP-07-475 sworn to before Edward E. Bullard, Notary Public, a copy of which is served herewith, is genuine.

10 August 2, 2011 letter from Jerri Ann Roseneau to Jack D. Simrill enclosing February 3, 2006 letter of Edward E. Bullard to Hon. Elizabeth Smith; \$25,000 check of Jack D. Simrill to Elizabeth M. Smith, Clerk of Court; March 2, 2006 letter from Kelly A. Ryden of Law Office of Edward E. Bullard to Elizabeth M. Smith; Acknowledgment of Receipt of Undertaking and Cash Bond and Cashier's Check for \$50,000.00; March 2, 2006 Undertaking and Cash Bond; Liberty Savings Bank check for \$50,000.00 payable to the Order of Jack D. Simrill endorsed Payable to the Order of Edward E. Bullard, Pay to Elizabeth M. Smith, Edward E. Bullard; November 7, 2007 Check from Elizabeth M. Smith to Law Office of Edward E. Bullard for \$77,659.36, copies of which are served herewith, are genuine.

11. October 3, 2005 Law Office of Edward E. Bullard's Notice and Motion for Summary Judgment in on page 11 of the Record on Appeal in Civil Action No. 07-CP-07-475 and pages 6 and 7 of the Memorandum In Support of Motion for Summary Judgment of Office of Edward E. Bullard's on pages 17 and 18 of said Record on Appeal, copies of which are served herewith, are genuine.

12. Edward E. Bullard's testimony or statement to the Court in the March 7,

2006 Hearing on Page 9, lines 6 and 7 of page 52 of the of the Record on Appeal in Civil Action No. 07-CP-07-474 "Now, there has not been a casualty loss" and the exchange between the Court and Bullard at lines response at lines 10 through 13: "The Court: Casualty being a fire, flood or whatever?" "Mr. Bullard: That's correct. It was not a fire, flood or anything like that happened. Okay?" copies of which are served herewith, are genuine.


Jack D. Simrill
P.O. Box 5681
Hilton Head Island, SC 29938
(803) 785-2134
Attorney for the Plaintiffs

March 7, 2012



Calibogue Construction Company, Inc.

GENERAL CONTRACTOR
P.O. BOX 1027 JOHNS ISLAND, SOUTH CAROLINA 29457
TELEPHONE (843) 762-9600 FAX (843) 762-0230

VIA FAX & US MAIL

July 20, 1998

Mr. Peter E. Sherratt, AIA
The Sherratt Company
P. O. Box 5786
Hilton Head Island, South Carolina 29938

**RE: GOVERNOR'S HARBOUR
VILLAGE WEST AT SKULL CREEK, HILTON HEAD ISLAND, SC
CLIPPER BUILDING REMEDIATION PRELIMINARY BUDGET**

Dear Peter:

We have reviewed the Clipper Building remediation repair work as outlined on your 6/30/98 one (1) page sketch for Governor's Harbour. The exterior wall cladding (stucco) replacement proposed scope of work is the 1st and 2nd floor of the side elevation of Units #32 and #40 and the gable rear elevation of Units #30, #38, #46 and #54. The scope of remediation repairs also includes overlaying the rear screened porch deck to provide positive slope and waterproofing the screened porch deck of Unit #48. The scope also included EIFS corner repairs to the front of Units #32 and #40 at the intersection with the front walkways.

Our preliminary estimate for removing and replacing stucco, windows and sheathing is \$92,700.00, including scaffolding, water barrier, flashing and head and sill buildouts.

This estimate does not include repairs to wall framing components, insulation and interior drywall. This estimate does include interior painting of the new windows and interior trim and adjacent walls.

As the exact scope of work related to consequential damage to the wall system is not known at this time, we propose to perform the above work based upon a Cost of the Work plus 10% Overhead and 10% Profit in accordance with conventional AIA Contract terms.

Please feel free to give me a call if you have any questions or comments.

Very truly yours,

Thomas J. Carlson, Vice President
TJC/mg

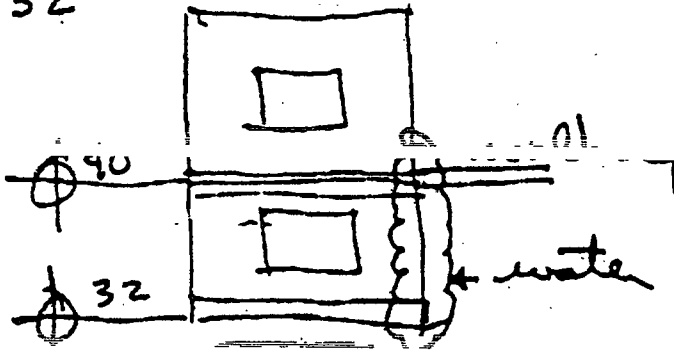
102 WAPPOO CREEK DRIVE #9-C CHARLESTON, SC 29412
SPECIALIZING IN WIND AND ROT RESISTANT CONSTRUCTION

Peter Edwin Sherratt, A.I.A.
THE SHERRATT COMPANY

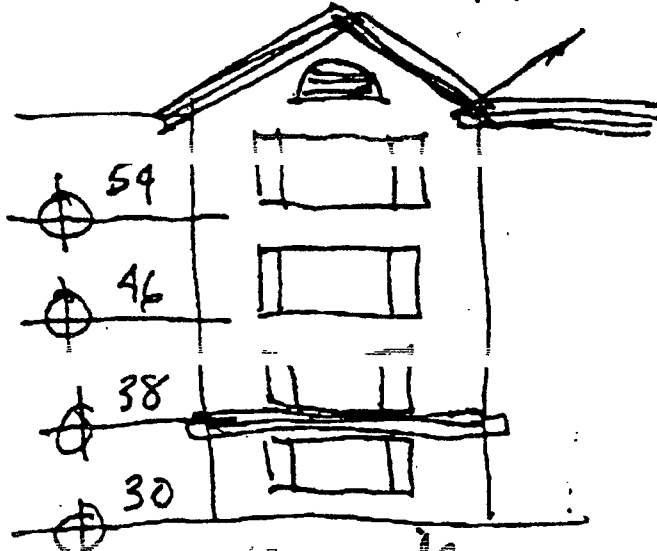
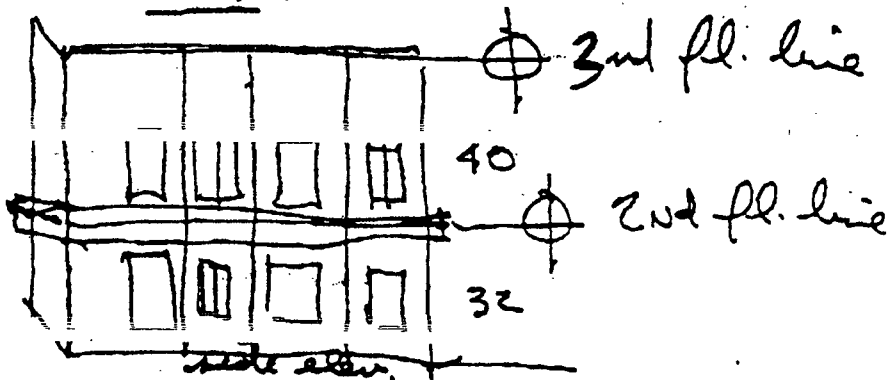
ARCHITECTURAL CONSULTANTS
 P.O. BOX 2709
 Hilton Head Island, SC 29938
 803-686-8565 FAX 803-686-6626
 e-mail: sherratt@hargray.com

JOB Governors Harbor
 SHEET NO @ Vulture Albion
 CALCULATED BY @ Skull Creek
 CHECKED BY _____ DATE _____
 SCALE Rev'd 6/30/98

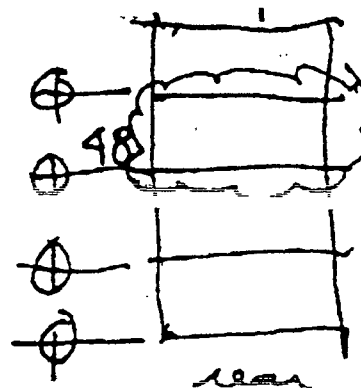
AD
 32



Front Elevation



#48 ^{near} porch slope



**VILLAGE WEST
PARTIAL SCOPE OF REPAIR WORK
AND
PRELIMINARY FORENSIC INVESTIGATION
UNITS 30, 32, 38, 40, 46, 48, 54**

1. Units 32 and 40: Water leaks

Investigate and implement repairs at the intersection of the contiguous walkways and the heated walls on the front of the building. The work may include removal of a portion of the walkway wall.

2. Units 32 and 40: Termite infestation and water leaks

Investigate and implement repairs in the side of the building. The work will include interior repair work and the replacement of eight (8) windows.

3. Units 30, 38, 46, 54: Water leaks

Investigate and implement repairs on the rear of the building. The work will include the replacement of four (4) window systems (12 window units), interior repairs, and attic louver replacement.

4. Unit 48: Porch leaks

Investigate and implement repairs on the porch floor to provide a proper slope to the floor and install a waterproof traffic topping to the surface.

The work at all the affected areas will also include the removal of the stucco system (EIFS) and the replacement with a new system of conventional stucco.

Plans depicting the exact repair details and specifications will be produced when authorization to proceed is given. These plans will be amended if required as the building is opened up. The forensic investigation work will coincide with the repair process and be documented in a report format suitable for litigation purposes.

August 12, 1998

The cost to implement the required work and prepare the repair plans and specifications is estimated to be ninety thousand (\$90,000.00) to one hundred ten thousand (\$110,000.00) dollars.

The cost to conduct the forensic investigation at the areas of the repair work through the production of the preliminary report is estimated to be ten thousand (\$10,000.00) to fifteen thousand (\$15,000.00) dollars

August 12, 1998



**Calibogue
Construction Co., Inc.**

General Contractor
P.O. Box 1027
JOHNS ISLAND, SC 29457

(803) 768-4667

Page No.

of

Pages

LETTER OF TRANSMITTAL

TO

Mr. Peter E. Sherratt, AIA
The Sherratt Company
P. O. Box 5786
Hilton Head Island, SC 29938-5786

JOB NUMBER

#9812

DATE

4/14/99

ATTENTION

Mr. Peter E. Sherratt, AIA

RE:

Village West @ Governor's Harbor
Hilton Head Island, SC
Request for Payment

WE ARE SENDING YOU

☒ Attached

☐ Under separate cover via

the following items.

☐ Shop drawings

☐ Prints

☐ Plans

☐ Specifications

☐ Samples

☐ Copy of letter

☐ Change order

☒ Other:

COPIES	DATE	NUMBER	DESCRIPTION
1	4/14/99		Request for Payment #3

THESE ARE TRANSMITTED as checked below:

☒ For approval

☐ Approved as submitted

☐ Resubmit ☐ copies for approval

☐ For your use

☐ Approved as noted

☐ Submit ☐ copies for distribution

☐ As requested

☐ Returned for corrections

☐ Return ☐ corrected prints

☐ For review and comment

☐ Other

☐ FOR BIDS DUE/DATE:

☐ PRINTS RETURNED AFTER LOAN TO US

REMARKS

COPY TO Ray Dowling/SPM Defender, Inc.
If enclosures are not as noted, please notify us at once.

SIGNED

K. Zekel

TO OWNER:

Village West Owners Association
c/o SPM Defender
85 Folly Field Road, Hilton Head Isl, SC

PROJECT:

Village West at Governor's Harbor
Hilton Head Plantation
Hilton Head Island, SC

APPLICATION NO.: 3
PERIOD TO: 3/28/99
PROJECT NOS.: 19812

Distribution to:

☐ OWNER
☐ ARCHITECT
☐ CONTRACTOR
☐
☐

FROM CONTRACTOR:

Calibogue Construction Co., Inc.
P. O. Box 1027, Johns Island, SC 29457

VIA ARCHITECT:

The Sherratt Company
P. O. Box 5786, Hilton Head Island, SC 29938

CONTRACT DATE: 3/1/99

CONTRACT FOR: Clipper Building Remediation Repair Work

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contract. Continuation Sheet, AIA Document G703, is attached.

1. ORIGINAL CONTRACT ~~XXX~~ BUDGET \$ 92,700
2. Net change by Change Orders \$ 0
3. CONTRACT ~~XXX~~ TO DATE (Line 1 ± 2) \$ 92,700
4. TOTAL COMPLETED & STORED TO DATE \$ 53,357
(Column G on G703)
5. RETAINAGE:
- a. _____% of Completed Work \$ _____
(Columns D + E on G703)
- b. _____% of Stored Material \$ _____
(Column F on G703)
- Total Retainage (Line 5a + 5b or
Total in Column I of G703) \$ _____
6. TOTAL EARNED LESS RETAINAGE \$ 53,357
(Line 4 less Line 5 Total)
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT
(Line 6 from prior Certificate) \$ 23,830
8. CURRENT PAYMENT DUE \$ 29,527
Estimated
9. BALANCE TO FINISH, INCLUDING RETAINAGE
(Line 3 less Line 6) \$ 39,343

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner	0	0
Total approved this Month	0	0
TOTALS	0	0
NET CHANGES by Change Order	0	

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

CONTRACTOR: Calibogue Construction Co., Inc.

By: Thomas J. Carlson Date: 4/12/99
Thomas J. Carlson, Vice Pres.
State of: South Carolina
County of: Charleston
Subscribed and sworn to before
me this 12th day of April 1999

Notary Public: Mary H. Goldiner
My Commission expires: Dec 14, 2004

ARCHITECT'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising this application, the Architect certifies to the Owner that, to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED \$ _____

(Attach explanation if amount certified differs from the amount applied for. Initial all figures on this Application and on the Continuation Sheet that are changed to conform to the amount certified.)

ARCHITECT:

By: _____ Date: _____

This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.



CONTINUATION SHEET

AIA Document G702, APPLICATION AND CERTIFICATE FOR PAYMENT, containing Contractor's signed Certification is attached.

APPLICATION NUMBER: 3

APPLICATION DATE: April 12, 1999

PERIOD TO: March 28, 1999

ARCHITECT'S PROJECT: Village West at Governor's Harbor

In tabulations below, amounts are stated to the nearest dollar.

A	B	C	D	E	F	G	H	I	
ITEM NO.	DESCRIPTION OF WORK	SCHEDULED BUDGET	WORK COMPLETED		MATERIALS PRESENTLY STORED (NOT IN D OR E)	TOTAL COMPLETED AND STORED TO DATE (D + E + F)	% (G / C)	ESTIMATED BALANCE TO FINISH (C-G)	
			FROM PREVIOUS APPLICATION (D + E)	THIS PERIOD					
DIV									
1	General Conditions	10520	5187	2652	0	7839	75%	2681	
2	Demolition	3600	2277	1597	0	3874	108%	-274	
3	Scaffolding	2600	2214	2419	0	4633	178%	-2033	
4	Exterior Wall System Repair	32792	0	16493	0	16493	50%	16299	
5	Window Replacement	20100	10016	1242	0	11258	56%	8842	
6	Miscellaneous Repairs	7000	0	0	0	0	0%	7000	
	DIVISION SUBTOTAL	76612	19694	24403	0	44097	58%	32515	
	CONTRACTOR'S FEE	16088	4136	5124	0	9260	58%	6828	
	TOTALS FROM PAGE 1	92700	23830	29527	0	53357	58%	39343	

CALIBOGUE CONSTRUCTION COMPANY, INC.
 JOB #9812 - VILLAGE WEST AT GOVERNOR'S HARBOUR
 COST ACCOUNTING SUMMARY

APPLICATION FOR PAYMENT #3
 TOTALS TO DATE THRU 3/28/99

P 1 OF 4
 FILE NAME: GH-328.TTD
 FILE DATE: 4/12/99

FILE: GH-328.TTD

VILLAGE WEST AT GOVERNOR'S HARBOUR - HILTON HEAD PLANTATION, HILTON HEAD ISLAND, SC
 CONTRACT COST CODES DIVISIONS

	LABOR BILLING TOTALS TO DATE	MATERIALS BILLING TOTALS TO DATE	EQUIPMENT BILLING TOTALS TO DATE	SUBCONTR BILLING TOTALS TO DATE	3/28/99 BILLING TOTALS TO DATE	7/20/98 BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF EST. BUDGET
DIV.#1 - GENERAL CONDITIONS/PROJECT								
DIV.#1-A - PROJECT GENERAL CONDITIONS	3898	3023	401	0	7322	3820	1458	23%
DIV.#1-B - JOB SITE OFFICE EXPENSE	0	424	0	0	424	1300	876	33%
DIV.#1-C - PROJECT EQUIPMENT EXPENSE	0	23	68	0	94	400	306	23%
DIV.#1 - GENERAL CONDITIONS/PROJECT	3898	3475	467	0	7839	10520	2681	139%
DIV.#2 - DEMOLITION	3811	0	0	504	3874	3800	-874	108%
DIV.#3 - SCAFFOLDING	2514	36	3023	0	4233	1500	-2033	178%
DIV.#4 - EXTERIOR WALL SYSTEM REPAIR	11347	3187	10	0	16493	12792	16297	30%
DIV.#5 - WINDOW REPLACEMENT	1242	10016	0	0	11258	20100	2843	68%
DIV.#6 - MISCELLANEOUS REPAIRS	0	0	0	0	0	1000	1000	0%
DIVISION #1-6 TOTALS TO DATE	22211	18733	2496	504	44077	78612	32515	58%
CONTRACTOR'S FEE TOTALS TO DATE					9250	10438	8623	58%
REQUEST FOR PAYMENTS TOTALS TO DATE					33827	12700	35840	58%

CALIBOGUE CONSTRUCTION COMPANY, INC.
 JOB #9812 - VILLAGE WEST AT GOVERNOR'S HARBOUR
 COST ACCOUNTING SUMMARY

APPLICATION FOR PAYMENT #3
 FOR PERIOD ENDING: 3/28/99

P 2 OF 4
 FILE NAME: GH-RFP3.SUM
 FILE DATE: 4/12/99

FILE: GH-RFP3.SUM

COST		RFP #3	RFP #3	RFP #3	RFP #3	RFP #3	
CODE	DIV.#1-A - GENERAL CONDITIONS	LABOR	MATERIALS	EQUIPMENT	SUBCONTR	ALLO	NOTES:
		BILLING	BILLING	BILLING	BILLING	BILLING	
		TOTALS	TOTALS	TOTALS	TOTALS	TOTALS	
01001	MOBILIZATION/DEMOLITION EXPENSE	293	0	0	0	293	
01002	PROJECT MANAGEMENT EXPENSE	1462	0	0	0	1462	
01003	BUILDING PERMITS & LICENSES/FEE	0	200	0	0	200	
01004	GAS & OIL EXPENSE (NON-EQUIPMENT)	0	0	0	0	0	
01005	PHONE EXPENSE	0	0	0	0	0	
01006	TEMPORARY POWER (N.I.C.-BY OWNER)	0	0	0	0	0	
01007	TEMPORARY WATER (N.I.C.-BY OWNER)	0	0	0	0	0	
01008	TEMPORARY FACILITIES	0	65	0	0	65	
01009	GENERAL LIABILITY INSURANCE	0	0	0	0	0	
01010	GENERAL CONSTRUCTION CLEANUP	0	0	0	0	0	ALLO GEN LIABILITY INS.
01011	SAFETY & SECURITY	0	13	0	0	13	
01012	FINAL CLEANING/WINDOW CLEANING	0	0	0	0	0	
01013	PROJECT DOCUMENTATION/FILM/PROCESSING	0	97	0	0	97	
01014	HILTON HEAD PLANTATION DEPOSIT (REFUNDABLE)	0	0	0	0	0	
01015	PROJECT CLOSEOUT	0	0	0	0	0	
01016	ITTS ACCOUNT	0	0	0	-0	0	
DIVISION 1-A - GENERAL CONDITION TOTALS		1754	381	0	0	2135	

COST		RFP #3	RFP #3	RFP #3	RFP #3	RFP #3	
CODE	DIV.1-B - JOBSITE TRAILER EXPENSE	LABOR	MATERIALS	EQUIPMENT	SUBCONTR	ALLO	NOTES:
		BILLING	BILLING	BILLING	BILLING	BILLING	
		TOTALS	TOTALS	TOTALS	TOTALS	TOTALS	
01031	JOBSITE STORAGE TRAILER EXPENSE	0	241	0	0	241	
01032	TRAILER MOBILIZATION & MOVEOUT	0	134	0	0	134	
01033	OPEN	0	0	0	0	0	
DIVISION #1-B JOBSITE TRAILER EXPENSE		0	424	0	0	424	

COST		RFP #3	RFP #3	RFP #3	RFP #3	RFP #3	
CODE	DIV.1-C - GENERAL EQUIPMENT EXPENSE	LABOR	MATERIALS	EQUIPMENT	SUBCONTR	ALLO	NOTES:
		BILLING	BILLING	BILLING	BILLING	BILLING	
		TOTALS	TOTALS	TOTALS	TOTALS	TOTALS	
01051	PICKUP TRUCK TRAVEL EXPENSE *	0	0	0	0	0	
01052	EQUIPMENT RENTAL EXPENSE	0	0	56	0	56	
01053	LADDERS/SCHORING/CONSUMABLE TOOL EXPENSE	0	28	0	0	28	
DIV.#1-C - GENERAL EQUIPMENT EXPENSE		0	28	56	0	94	

* INCIDENTAL TO LABOR BILLING RATES

JOB #9812 - VILLAGE WEST AT GOVERNOR'S MANSOUR
COST ACCOUNTING SUMMARY

TOTALS TO DATE THRU 3/28/99

FILE NAME: GH-328.TTD

FILE DATE: 4/12/99

COST		LABOR	MATERIALS	EQUIPMENT	SUBCONTR	3/28/99		BUDGET	COST TO
CODE	DIVISION #2 - DEMOLITION	BILLING	BILLING	BILLING	BILLING	BILLING	7/20/98	BALANCE	DATE %
		TOTALS	TOTALS	TOTALS	TOTALS	TOTALS	BUDGET	TO	OF EST.
		TO DATE	TO DATE	TO DATE	TO DATE	TO DATE	SCHEDULE	COMPLETE	BUDGET
02001	EIFS DEMOLITION	3016	0	0	0	3016	3000	-16	101%
02002	EIFS DUMPSTER EXPENSE	0	0	0	0	0	600	600	0%
02003	FORENSIC INVESTIGATION	195	0	0	684	859	0	-859	N/A
	DIV.#2 - DEMOLITION	3211	0	0	684	3874	3600	-274	108%
COST		LABOR	MATERIALS	EQUIPMENT	SUBCONTR	3/28/99		BUDGET	COST TO
CODE	DIVISION #3 - SCAFFOLDING	BILLING	BILLING	BILLING	BILLING	BILLING	7/20/98	BALANCE	DATE %
		TOTALS	TOTALS	TOTALS	TOTALS	TOTALS	BUDGET	TO	OF EST.
		TO DATE	TO DATE	TO DATE	TO DATE	TO DATE	SCHEDULE	COMPLETE	BUDGET
03001	SCAFFOLDING EXPENSE	2514	96	8023	0	4833	2600	-2033	178%
03002		0	0	0	0	0	0	0	0%
	DIV.#3 - SCAFFOLDING	2514	96	8023	0	4833	2600	-2033	178%
COST		LABOR	MATERIALS	EQUIPMENT	SUBCONTR	3/28/99		BUDGET	COST TO
CODE	DIVISION #4 - EXTERIOR WALL SYSTEM REPAIR	BILLING	BILLING	BILLING	BILLING	BILLING	7/20/98	BALANCE	DATE %
		TOTALS	TOTALS	TOTALS	TOTALS	TOTALS	BUDGET	TO	OF EST.
		TO DATE	TO DATE	TO DATE	TO DATE	TO DATE	SCHEDULE	COMPLETE	BUDGET
04001	RETAIN STUD WALL SYSTEM REPAIR (M.I.C.)	6508	3409	0	0	12945	0	-12945	N/A
04002	TERMITE REPAIRS (M.I.C.)	0	0	0	0	0	0	0	N/A
04003	DEMS SENSS GOLF GREENTHINE ALMA & MABLE	1788	713	0	0	2479	2400	-79	103%
04004	SLUG FELT/PAS WATER SHIELDER	710	403	0	0	1113	1500	385	74%
04005	WEEP FLASHING & WINDOW FLASHING	0	0	0	0	0	1729	1729	0%
04006	STUCCO REPLACEMENT	0	148	0	0	148	1600	1452	1%
04007	STUCCO BUILDOUT/BANDS REPAIR	0	0	0	0	0	400	400	0%
04008	SEALANT	0	0	0	0	0	1178	1178	0%
04009	EIFS/STUCCO INTERSECTION DETAILING	0	592	0	0	592	2400	1808	0%
04010	ELASTOMERIC COATING	0	0	0	0	0	2400	2400	0%
04011	OVERHEAD PORTAL REPAIR (M.I.C.)	253	237	10	0	500	0	-500	N/A
	DIV.#4 - EXTERIOR WALL SYSTEM REPAIR	11347	5137	10	0	16493	32792	16299	50%
COST		LABOR	MATERIALS	EQUIPMENT	SUBCONTR	3/28/99		BUDGET	COST TO
CODE	DIV.#5 - WINDOW REPLACEMENT	BILLING	BILLING	BILLING	BILLING	BILLING	7/20/98	BALANCE	DATE %
		TOTALS	TOTALS	TOTALS	TOTALS	TOTALS	BUDGET	TO	OF EST.
		TO DATE	TO DATE	TO DATE	TO DATE	TO DATE	SCHEDULE	COMPLETE	BUDGET
05001	WINDOW REPLACEMENT MATERIALS	0	10015	0	0	10015	10500	484	95%
05002	WINDOW REPLACEMENT LABOR	1242	0	0	0	1242	3600	2358	34%
05003	INTERIOR TRIM	0	0	0	0	0	1200	1200	0%
05004	WINDOW & INTERIOR PAINTING	0	0	0	0	0	4800	4800	0%
	DIV.#5 - WINDOW REPLACEMENT	1242	10015	0	0	11257	20100	8842	56%

WILLIAMS CONSTRUCTION COMPANY, INC.

OCCUPATION FOR CONSTRUCTION

JOB #9812 - VILLAGE WEST AT GOVERNOR'S HARBOUR

FILE NAME: GH-329.TTD

COST ACCOUNTING SUMMARY

TOTALS TO DATE THRU 3/28/99

FILE DATE: 4/12/99

COST CODE	DIV. #6 - MISCELLANEOUS REPAIRS	LABOR	MATERIALS	EQUIPMENT	SUBCONTR	3/28/99	BUDGET	COST TO
		TOTALS TO DATE	TOTALS TO DATE	TOTALS TO DATE	TOTALS TO DATE	TOTALS TO DATE	BUDGET TO SCHEDULE COMPLETE	DATE # OF EST. BUDGET
06001	UNIT #48 SCREEN PORCH SLOPE REPAIR	0	0	0	0	0	4000	4000
06002	UNIT #32/#42 CORNER REPAIRS	0	0	0	0	0	3000	3000
DIV. #6 - MISCELLANEOUS REPAIRS		0	0	0	0	0	7000	7000



Calibogue Construction Co

GENERAL CONTRACTOR
P.O. BOX 1027 HILTON HEAD ISLAND, SOUTH CAROLINA
TELEPHONE (843) 752-9600 FAX (843) 7

Payments to
Sherratt 17,597
14,000
7,250
1,500

April 24, 1999

Mr. David Kilgus
#2 Governor's Harbor
Hilton Head Island, South Carolina 29926

Carlson

RE: VILLAGE WEST AT GOVERNOR'S HARBOR
HILTON HEAD ISLAND, SOUTH CAROLINA
CLIPPER BUILDING REMEDIATION WORK
BUDGET PROJECTION

843 449 1354

Dear Mr. Kilgus:

Pursuant to your request I have enclosed herewith a four (4) page copy of our budget update for the additional work authorized by the regime Board on February 23, 1999. This projection is based upon work performed to date and information known at this time and is subject to revision as additional information becomes available.

I will be happy to meet with you at your convenience to discuss the details of this projection.

Very truly yours,

Thomas J. Carlson

Thomas J. Carlson, Project Manager
TJC/mg

Enclosure

cc: Peter E. Sherratt, AIA/The Sherratt Company
John Bomar/Project Supt.
Tom Finn, Esq./Mullen Law Firm

102 WAPPOO CREEK DRIVE #9-C CHARLESTON, SC 29412
SPECIALIZING IN WIND AND ROT RESISTANT CONSTRUCTION

FILE: GH-PROJ.418

VILLAGE WEST AT GOVERNOR'S HARBOR - HILTON HEAD PLANTATION, HILTON HEAD ISLAND, SC
 CONTRACT COST CODES DIVISIONS

	(A)	(B)	(C)	(D)	(E)	(F)	(G)
	4/18/99 COST TOTALS TO DATE	3/1/99 CONTRACT BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF 3/1/99 BUDGET	ESTIMATED BALANCE TO COMPLETE	(E + A) 4/23/99 PROJECTED BUDGET TARGET	(F - B) 4/23/99 BUDGET VARIANCE
DIV.#1 - GENERAL CONDITIONS/PROJECT							
DIV.#1-A - PROJECT GENERAL CONDITIONS	8036	8820	784	91%	7664	15700	6880
DIV.#1-B - JOB SITE OFFICE EXPENSE	425	1300	875	33%	875	1300	0
DIV.#1-C - PROJECT EQUIPMENT EXPENSE	94	400	306	24%	406	500	100
DIV.#1 - GENERAL CONDITIONS/PROJECT	8555	10520	1965	147%	8945	17500	6980
DIV.#2 - DEMOLITION/FORENSIC	3963	3600	-363	110%	741	4704	1104
DIV.#3 - SCAFFOLDING	4633	2600	-2033	178%	3367	8000	5400
DIV.#4 - EXTERIOR WALL SYSTEM REPAIR	27533	32792	5259	84%	45967	73500	40708
DIV.#5 - WINDOW REPLACEMENT	15506	20100	4594	77%	18510	34016	13916
DIV.#6 - MISCELLANEOUS REPAIRS	0	7000	7000	0%	7000	7000	0
DIV.#7 - DRYWALL & INSULATION	2262	0	-2262	N/A	4238	6500	6500
DIV.#8 - ELECTRICAL REPAIRS	0	0	0	N/A	1500	1500	1500
DIVISION #1-8 TOTALS TO DATE	62452	76612	14160	82%	90268	152720	76108
CONTRACTOR'S FEE TOTALS TO DATE	13115	16088	2973	82%	18956	32071	15983
GOVERNOR'S HARBOR COST TOTALS TO DATE	75567	92700	17133	82%	109224	184791	92091

NOTES:

- A. 4/23/99 PROJECT TARGET BUDGET (COLUMN F) IS BASED UPON INFORMATION KNOWN AT THIS TIME AND IS SUBJECT TO REVISION AS ADDITIONAL INFORMATION BECOMES AVAILABLE.
- B. ADDITIONAL WORK AUTHORIZED IN MARCH, 1999 INCLUDES BUT IS NOT LIMITED TO THE FOLLOWING ITEMS WHICH WERE NOT PART OF THE SCOPE OF WORK INCLUDED IN OUR 7/28/98 PROPOSAL TO THE SHERRATT COMPANY (EXHIBIT #2 OF CONTRACT):
 1. 3RD AND 4TH FLOOR REPAIRS TO SIDE ELEVATION OF CLIPPER BUILDING NOT INCLUDED IN CONTRACT SCOPE OF WORK.
 2. EXTERIOR WALL METAL STUC FRAMING REPAIRS TO SIDE ELEVATION INCLUDING REPLACEMENT OF CORRODED METAL FRAMING COMPONENTS AND SUPPLEMENTAL REINFORCEMENT OF EXISTING WALL FRAMING.
 3. REMOVAL AND REPLACEMENT OF EXISTING METAL STUD WALL FRAMING ON REAR ELEVATION FOR FOUR (4) FLOORS.
 4. REMOVAL AND REPLACEMENT OF HALF-CIRCLE LOUVER ON REAR ELEVATION.
 5. INTERIOR REPAIRS DUE TO EXTERIOR WALL METAL STUD REPAIR AND/OR REPLACEMENT INCLUDING INSULATION, DRYWALL AND INTERIOR TRIM AND PAINTING NOT INCLUDED IN CONTRACT SCOPE OF WORK.
 6. ADDITIONAL WINDOWS, STUCCO, SHEATHING, FLASHING, INTERIOR REPAIRS, ETC. FOR 3RD & 4TH FLOOR OF CLIPPER BUILDING SIDE ELEVATION.
 7. INCREASED GENERAL CONDITIONS AND EQUIPMENT COSTS FOR INCREASED SCOPE OF WORK AND APPROXIMATE SIXTY (60) DAY EXTENSION IN SCHEDULE FOR ADDITIONAL WORK.
 8. ELECTRICAL REPAIRS REQUIRED FOR METAL STUD EXTERIOR WALL REPAIRS.

FILE: GH-PROJ.418

COST CODE	(A) 4/18/99 COST TOTALS TO DATE	(B) 3/1/99 CONTRACT BUDGET SCHEDULE	(C) BUDGET BALANCE TO COMPLETE	(D) COST TO DATE % OF 3/1/99 BUDGET	(E) ESTIMATED BALANCE TO COMPLETE	(F) (E + A) 4/23/99 PROJECTED BUDGET TARGET	(G) (F - B) 4/23/99 BUDGET VARIANCE
DIV. #1-A - GENERAL CONDITIONS							
01001 MOBILIZATION/DEMILITIZATION EXPENSE	1214	1000	-214	121%	586	1800	800
01002 PROJECT MANAGEMENT EXPENSE	3285	4470	1185	73%	3715	7000	2530
01003 PERMITS/LICENSES/FEES	2102	400	-1702	526%	298	2400	2000
01004 GAS & OIL EXPENSE (NON-EQUIPMENT)	125	200	75	63%	175	300	100
01005 PHONE EXPENSE	0	500	500	0%	700	700	200
01006 TEMPORARY POWER (N.I.C.-BY OWNER)	0	0	0	N/A	0	0	0
01007 TEMPORARY WATER (N.I.C.-BY OWNER)	0	0	0	N/A	0	0	0
01008 TEMPORARY FACILITIES	141	250	109	56%	209	350	100
01009 GENERAL LIABILITY INSURANCE	0	750	750	0%	1250	1250	500
01010 GENERAL CONSTRUCTION CLEANUP	0	200	200	0%	300	300	100
01011 SAFETY & SECURITY	18	100	82	18%	82	100	0
01012 FINAL CLEANING/WINDOW CLEANING	0	500	500	0%	750	750	250
01013 PROJECT DOCUMENTATION/FILM/PROCESSING	151	250	99	60%	199	350	100
01014 HILTON HEAD PLANTATION DEPOSIT (REFUNDABLE)	1000	0	-1000	N/A	-1000	0	0
01015 PROJECT CLOSEDOUT	0	200	200	0%	400	400	200
01016 ITTB ACCOUNT	0	0	0	N/A	0	0	0
DIVISION 1-A - GENERAL CONDITION TOTALS	8036	8820	784	91%	7664	15700	6880

COST CODE	4/18/99 COST TOTALS TO DATE	3/1/99 CONTRACT BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF 3/1/99 BUDGET	ESTIMATED BALANCE TO COMPLETE	4/23/99 PROJECTED BUDGET TARGET	4/23/99 BUDGET VARIANCE
DIV. 1-B - JOBSITE TRAILER EXPENSE							
01031 JOBSITE STORAGE TRAILER EXPENSE	241	1000	759	24%	759	1000	0
01032 TRAILER MOBILIZATION & MOVEDOUT	184	300	116	61%	116	300	0
01033 OPEN	0	0	0	N/A	0	0	0
DIVISION #1-B JOBSITE TRAILER EXPENSE	425	1300	875	33%	875	1300	0

COST CODE	4/18/99 COST TOTALS TO DATE	3/1/99 CONTRACT BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF 3/1/99 BUDGET	ESTIMATED BALANCE TO COMPLETE	4/23/99 PROJECTED BUDGET TARGET	4/23/99 BUDGET VARIANCE
DIV. 1-C - GENERAL EQUIPMENT EXPENSE							
01051 PICKUP TRUCK/TRAVEL EXPENSE *	0	0	0	N/A	0	0	0
01052 EQUIPMENT RENTAL EXPENSE	66	200	134	33%	184	250	50
01053 CONSUMABLE TOOL EXPENSE	28	200	172	14%	222	250	50
DIV. #1-C - GENERAL EQUIPMENT EXPENSE	94	400	306	24%	406	500	100

* INCIDENTAL TO LABOR BILLING RATES

COST CODE	DIVISION #2 - DEMOLITION/FORENSIC	4/18/99 COST TOTALS TO DATE	3/1/99 CONTRACT BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF 3/1/99 BUDGET	ESTIMATED BALANCE TO COMPLETE	4/23/99 PROJECTED BUDGET TARGET	4/23/99 BUDGET VARIANCE
02001	EIFS DEMOLITION	3104	3000	-104	103%	0	3104	104
02002	EIFS DUMPSTER EXPENSE	0	600	600	0%	600	600	0
02003	FORENSIC & TERMITE INVESTIGATION	859	0	-859	N/A	141	1000	1000
DIV.#2 - DEMOLITION/FORENSIC		3963	3600	-363	110%	741	4704	1104

COST CODE	DIVISION #3 - SCAFFOLDING	4/18/99 COST TOTALS TO DATE	3/1/99 CONTRACT BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF 3/1/99 BUDGET	ESTIMATED BALANCE TO COMPLETE	4/23/99 PROJECTED BUDGET TARGET	4/23/99 BUDGET VARIANCE
03001	SCAFFOLDING EXPENSE	4633	2600	-2033	178%	3367	8000	5400
03002		0	0	0	0%	0	0	0
DIV.#3 - SCAFFOLDING		4633	2600	-2033	178%	3367	8000	5400

COST CODE	DIVISION #4 - EXTERIOR WALL SYSTEM REPAIR	4/18/99 COST TOTALS TO DATE	3/1/99 CONTRACT BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF 3/1/99 BUDGET	ESTIMATED BALANCE TO COMPLETE	4/23/99 PROJECTED BUDGET TARGET	4/23/99 BUDGET VARIANCE
04001	METAL STUD WALL SYSTEM REPAIRS (N.I.C.)	19405	0	-19405	N/A	3595	23000	23000
04002	TERMITE REPAIRS (N.I.C.)	381	0	-381	N/A	119	500	500
04003	DIENS GLASS GOLD SHEATHING (LAB & MATLS)	4803	2400	-2403	200%	1197	6000	3600
04004	BLDG FELT/PAB WATER BARRIER	1328	1500	172	89%	1672	3000	1500
04005	WEEP FLASHING & WINDOW FLASHING	74	1720	1646	4%	2126	2200	480
04006	STUCCO REPLACEMENT	142	16800	16658	1%	22258	22400	5600
04007	STUCCO BUILDOUT/BANDS (EIFS)	0	4400	4400	0%	6000	6000	1600
04008	SEALANT	0	1172	1172	0%	1500	1500	328
04009	EIFS/STUCCO INTERSECTION DETAILING	734	2400	1666	31%	2466	3200	800
04010	ELASTOMERIC COATING	0	2400	2400	0%	3200	3200	800
04011	CORNER COLUMNS/SLAB ON REPAIR (N.I.C.)	666	0	-666	N/A	1834	2500	2500
DIV.#4 - EXTERIOR WALL SYSTEM REPAIR		27533	32792	5259	84%	45967	73500	40708

COST CODE	DIV.#5 - WINDOW/LOUVER REPLACEMENT	4/18/99 COST TOTALS TO DATE	3/1/99 CONTRACT BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF 3/1/99 BUDGET	ESTIMATED BALANCE TO COMPLETE	4/23/99 PROJECTED BUDGET TARGET	4/23/99 BUDGET VARIANCE
05001	WINDOW REPLACEMENT MATERIALS	10016	10500	484	95%	5000	15016	4516
05002	WINDOW REPLACEMENT LABOR	2908	3600	692	81%	1592	4500	900
05003	INTERIOR TRIM	2427	1200	-1227	202%	2073	4500	3300
05004	WINDOW & INTERIOR PAINTING	155	4800	4645	3%	7845	8000	3200
05005	LOUVER REPLACEMENT	0	0	0	N/A	2000	2000	2000
DIV.#5 - WINDOW REPLACEMENT		15506	20100	4594	77%	18510	34016	13916

COST CODE	4/18/99 COST TOTALS TO DATE	3/1/99 CONTRACT BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF 3/1/99 BUDGET	ESTIMATED BALANCE TO COMPLETE	4/23/99 PROJECTED BUDGET TARGET	4/23/99 BUDGET VARIANCE
DIV.#6 - MISCELLANEOUS REPAIRS							
06001 UNIT #48 SCREEN PORCH SLOPE REPAIR	0	4000	4000	0%	4000	4000	0
06002 UNIT #32/#42 CORNER REPAIRS	0	3000	3000	0%	3000	3000	0
DIV.#6 - MISCELLANEOUS REPAIRS	0	7000	7000	0%	7000	7000	0

COST CODE	4/18/99 COST TOTALS TO DATE	3/1/99 CONTRACT BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF 3/1/99 BUDGET	ESTIMATED BALANCE TO COMPLETE	4/23/99 PROJECTED BUDGET TARGET	4/23/99 BUDGET VARIANCE
DIV.#7 - DRYWALL & INSULATION							
07001 D/W DEMO & REPAIR-OCEAN SIDE (N.I.C.)	1154	0	-1154	N/A	3846	5000	5000
07002 D/W DEMO & REPAIR-SIDE ELEVATION (N.I.C.)	1108	0	-1108	N/A	392	1500	1500
DIV.#7 - DRYWALL & INSULATION	2262	0	-2262	N/A	4238	6500	6500

COST CODE	4/18/99 COST TOTALS TO DATE	3/1/99 CONTRACT BUDGET SCHEDULE	BUDGET BALANCE TO COMPLETE	COST TO DATE % OF 3/1/99 BUDGET	ESTIMATED BALANCE TO COMPLETE	4/23/99 PROJECTED BUDGET TARGET	4/23/99 BUDGET VARIANCE
DIV.#8 - ELECTRICAL REPAIRS							
08001 ELECTRICAL SUBCONTRACTOR (N.I.C.)	0	0	0	N/A	1500	1500	1500
08002 OPEN	0	0	0	N/A	0	0	0
DIV.#8 - ELECTRICAL REPAIRS	0	0	0	N/A	1500	1500	1500



Calibogue Construction Company, Inc.

GENERAL CONTRACTOR
P.O. BOX 1027 JOHNS ISLAND, SOUTH CAROLINA 29457
TELEPHONE (843) 762-9600 FAX (843) 762-0230

May 11, 1999

Mr. Peter E. Sherratt, AIA
The Sherratt Company
P. O. Box 5786
Hilton Head Island, South Carolina 29938

**RE: VILLAGE WEST AT GOVERNOR'S HARBOR
CLIPPER BUILDING EXTERIOR WALL SYSTEM
SUPPLEMENTAL REPAIR CLARIFICATION**

Dear Peter:

This letter confirms our jobsite meetings in March regarding revisions to the exterior wall system repair specifications contained in your Governor's Harbor plan, dated 2/9/99, Sheet 1 of 1. I have enclosed herewith six (6) photographs of the repairs to illustrate the narrative of the text of this letter.

As reviewed on site, the exterior wall cladding system had severe water intrusion problems resulting in total detachment of the EIF System which was adhesively attached to gypsum sheathing. The gypsum sheathing was totally deteriorated and the metal wall system components were corroded due to the water intrusion problems. Some of the metal studs on the side elevation were corroded to the extent that they required replacement (See Photo #1). The metal stud replacement work on the side elevation required demolition of interior drywall and trim in order to replace the corroded metal studs (See Photo #2).

The side elevation repairs were modified due to the existing wall system layout which did not allow room for the plan requirements for three (3) 20-gauge studs at the sides of each window.

The following is an abbreviated outline of the repair modifications for the Clipper Building side elevation:

- 20 Gauge straps were installed at 12" o.c. vertically between the studs at the sides of the windows to reinforce the metal wall system (See Photo #3).

Mr. Peter E. Sherratt, AIA

RE: VILLAGE WEST @ GOV. HARBOR-SUPPLEMENTAL REPAIR CLARIFICATIONS

May 11, 1999

Page 2 of 2

- Clip angles were installed at the heads and sills to the new 20-gauge studs which replace the corroded studs (See Photo #4).
- An additional 20-gauge track with one (1) leg on the outside face was installed at the sill (See Photo #5) and the head (See Photo #6) of the side elevation repairs with fasteners to the existing head and sill at 8" o.c.
- Existing studs that were left in place had corrosion removed and the outside flange painted.

The rear elevation metal stud wall system required total removal and replacement in order to comply with the specifications of your 2/9/99 plans.

The concrete corner columns were not furred out and the gyp sheathing and EIFS floated (without attachment) at the outside corners. In accordance with your field direction, pressure treated furring strips were installed within the limits of our repair scope. New sheathing was attached to the furring strips.

The concrete floor slabs were indented from the vertical plane of the metal wall system's outside face. This cavity was filled with STO Overhead Repair Mortar.

As previously authorized, the scope of work on the side elevation was increased to include the 3rd and 4th floors due to the water intrusion's consequential damage to the exterior wall system's components.

Please feel free to give me a call if you have any questions or comments regarding these issues.

Very truly yours,



Thomas J. Carlson, Project Manager
TJC/mg

Enclosures

cc: John Bomar/Project Supt.
Ray Dowling/SPM Defender
✓ Dave Kilgus/Village West Board of Directors



Corroded metal stud removed from existing exterior wall framing - Photo 1 of 6



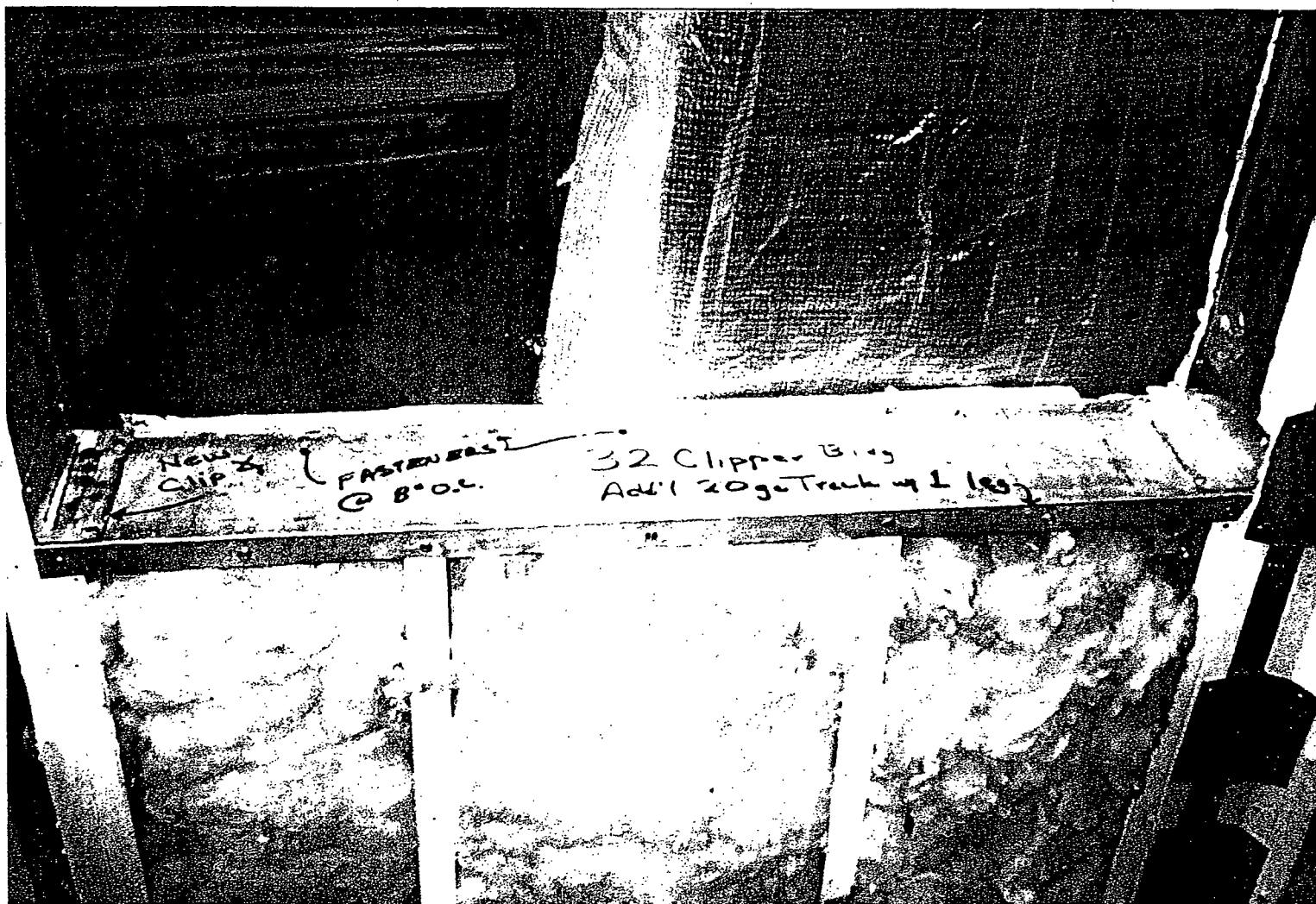
Interior demolition required for exterior wall metal stud repairs and reinforcement - Photo 2 of 6



20 ga straps between metal studs in lieu of additional studs (inadequate room)- Photo 3 of 6



New 20 ga studs, new 20 ga track w/ 1 leg at head and sill - Photo 4 of 6



New 20 ga reinforcing track at head and sill and new clip angle at king studs - Photo 5 of 6



New 20 ga reinforcing track at head and sill and new clip angle at king studs - Photo 6 of 6

DAMAGE CONTROL INCIDENT REPORT

RAY DOWLING
Inspector Name

Village West HOA
Property Name
843-681-3309
Phone Number

9-17-99
Date

List all noted damage:

Village West on Hilton Head Island consist of 81 condos.
4 Four story buildings and one THREE story buildings. All of the
buildings were effected by High WINDS from Hurricane Floyd.
All of the buildings have "SPANISH STYLE" TERRACOTTA TILE ROOFS.
THE High WINDS caused many of these Tiles to blow off of
THE ROOF and break. A DECORATIVE False chimney was also
tern loose by high WINDS and Damaged the Rubber membrane on
the flat part of the roof when it fell. A few window shutters
were also blown off the buildings and a couple of small
tree were up-rooted.

A ^{MORE} ~~more~~ Detailed List of Damage is enclosed with this
Letter.

NOTE:

As soon as possible upon damage conclusions send copy to your corporate office supervisor and retain original in Resort Director possession.

VILLAGE WEST H.O.A.
HILTON HEAD ISLAND, SC

HURRICANE "FLOYD" DAMAGE REPORT

SPINNAKER BUILDING:

Missing or broken roof tiles on ridge, west side of blg. above unit #14.
Missing or broken roof tiles on ridge, south side of blg. above unit #18
Missing or broken roof tiles on ridge, north side of blg. above unit #18
Missing or broken roof tiles on ridge, north side of blg. near elevator
Missing or broken roof tiles on ridge, north side of blg. above stair well near #18
Missing or broken roof tiles on ridge, north side of blg. above unit #14
Drier Vent slats missing, north side of blg. second floor, unit #12

CLIPPER BUILDING:

Missing or broken roof tiles on ridge, north west side of blg. above unit #50
Window shutters blown off and broken, south side of blg. fourth floor, unit #56
Window shutters blown off and broken, north side of blg. third floor, unit #42
Window shutters loose and hanging from wall, north side of blg. fourth and second floors, units #50 and #34

SCHOONER BUILDING:

Window shutters blown off and broken, east side of blg. unit #81 one loose, one missing
Window shutters blown off and broken, east side of blg. unit #65 one loose, one missing
Window shutter loose and hanging, east side of blg. unit #73
Screened in porch unit #57, framed wall for screen and half glass blown in at bottom by high winds, torn loose at wall and slab.
One wax myrtle tree up rooted at back door of unit #57
Missing or broken roof tiles on edge of roof, north west side above units #83 and #85
Decorative metal chimney above unit #83 was torn loose and fell on flat roof, High winds pulled screws loose from roof mount and rolled chimney frame across tile roof and then dropped eight feet on to flat rubber roof gouging several holes in rubber membrane.
There was no obvious water damage to unit #83 at time of inspection.

GALLEON BUILDING:

Window screen at unit #109 bent from wind, north side, third floor.
Large wax myrtle tree split and broke in front of Galleon Blg lobby.

FLAGSHIP BUILDING:

Edge roof tiles missing or broken at north side of blg. above unit #165
Missing or broken roof tiles on ridge, east side, above unit #159

Village West Owners Association
Board of Directors Meeting Minutes
September 28, 1999

The meeting was called to order at 6:30 PM at the Spring Lake Pavilion. Present were directors Baroni, Kilgus, Kimball, Miller and Probert. Also present were Ray Dowling of SPM/Defender and owner Jane Jones.

Minutes of the August 24, 1999 meeting were approved.

The August financial report was reviewed and approved after several questions and comments. It was noted that the \$7,500 recovery from Steve DiSimone was not reflected in the bank balances but had just been transferred and would show in the next statement. Two items which SPM/Defender had charged in error to Village West had not been reimbursed but should be corrected this month. These amounts were \$1,700 and \$325.

Ray Dowling gave the management report:

A hurricane damage report has been compiled and submitted to our insurance company. (A copy has been given to all directors.)

The project of laying new sod will begin within a week.

Additional patio stones have been received and installation has begun.

It was decided that the damage to the porch of unit #57 should be reviewed by the insurance adjuster before a decision is made as to how the cost of repairs is to be apportioned.

Roof tiles are to be replaced by the Williams Company, apparently the only company available for this type of work in the area.

Work around the Spinnaker Building for termite control needs to be reviewed to be sure everything is on track as required. Trenching and filling with stones around certain areas of the Spinnaker Building is also to be reviewed.

Spinnaker roof work will begin as soon as weather permits.

Work on the Flagship Building "stack" will begin as soon as the windows are received; approximately 3-5 weeks.

The question of moving the large contractor's storage unit around to the side of the Flagship Building was raised. The cost would be prohibitive; possibly \$2,000+.

Artistic Landscaping has been engaged on a trial basis for cleaning service.

Cement work around Spinnaker still needs to be done.

Doug Kimball reported that a number of owners had complained about the condition of hallway carpeting. It was agreed to bring this to the annual meeting as an additional project for 2000. This would make it necessary to increase the 2000 capital assessment accordingly.

Mary Probert, Secretary

Village West Owners Association

Board of Directors Meeting Agenda

September 28, 1999

6:30 PM

OK
Long
Bob

Pay

Jane Jones

1. Call to order

2. Attendance

2(a) Question from owners

3. Approval of minutes of August 24, 1999 *approved*

4. Financial report *approved*

5. Management report

6. Old business: Status of work beginning on - Spinnaker roof
Flagship wall section

1 Laying sod

1 Patio blocks

Termite treatment work at Spinnaker

Billing of third assessment for 1999

1 Board of Directors vacancy

7. Other business: Annual meeting, October 16 10-15

Other

8. Adjournment 1

Correct around Spinnaker

Questions previously

1. Grading around Spinnaker to be done

2. What about curtain drain

3. Has Orkin done necessary work

4. Refuse closets

garitorial cleaning

Artistic Landscaping

on a trial basis

will do refuse room
70/mo.

Sod going in wh. 9/27

Stone in for patio

Damage report rec'd

Chimney to be fixed

Tiles to be replaced,
all building (william)

Unit #57 Pouch

Damage. Let ins. co.
inspect.

#69

Mark Baroni → appointed 9/21/99
to fill Hakermon

Don't move

Moving storage unit
would cost \$2,500

Yes moving sand

Move scaffolding

Refunds of miscellaneous

items 1700

325

nothing to
added
200 list

Defendant.

RESPONSE TO REQUEST FOR ADMISSIONS

RESPONSE: Village West is unable to admit or deny. As indicated on numerous occasions, when this firm took over the representation of Village West in late 2007, a box supposedly containing Village West records was transferred to this office from Mr. Bullard's office. While

the box of records was initially at Smoot & Pitts its contents were never reviewed by the undersigned. This box of records remained at this office for several years until it was transferred to Village West. When Mr. Simrill requested to review the box of records, the one that he reviewed on February 29, 2012 is the one that was returned to Smoot & Pitts by Village West. It should be pointed out that the documents that Mr. Simrill copied after looking at a box of records in Mr. Bullard's office, are contained in the box Mr. Simrill looked at on February 29, 2012. Further, on numerous occasions Village West has offered to allow the Plaintiffs to review and inspect any of its non-privileged records.

2. July 20, 1991 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc. to Peter E. Sherratt, AIA, The Sherratt Company with Sherratt Company drawings of front elevation, side, elevation, rear side and rear of the Units listed in Carlson letter attached, copies of which are served herewith, are genuine.
RESPONSE: Admitted.

3. August 12, 1998 Village West Partial Scope of Repair Work And Preliminary Forensic Investigation Units 30, 32, 36, 40, 46, 48, 54 of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc., a copy of which is served herewith, is genuine.
RESPONSE: Denied. This document does not indicated on its face who it was prepared by.

4. April 14, 1999 Letter of Transmittal, 4/14/99 Request for Payment #3 of Calibogue Construction Company, Inc., with Application and Certificate For Payment, Continuation Sheet, Application for Payment Number 3, Total to Date Thru 3/28/99 pages 1 through 4 attached, recovered from Village West Archives #33250, copies of which are served herewith, are genuine.

RESPONSE: Admitted.

5. April 24, 1999 Letter of Thomas J. Carlson, Vice President of to Mr David Kilgus with note on front "Payments to Sherratt" 17,597, 14001[], 7250, 1,587 or 8, Carlson 8434491354" with Calibogue Construction Company, Inc. Budget Cost Projection Forecast, Total to Date Thru 4/18/99 pages 1 through 4, attached, copies of which are served herewith, are genuine.

RESPONSE: Admitted.

6. May 11, 1999 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc. to Peter E. Sherratt, AIA, The Sherratt Company with (6) photographs proposed repairs, copies of which are served herewith, are genuine.

RESPONSE: Admitted.

7. SPM DEFENDER, INC. September 17, 1999 Damage Control Incident Report of Ray Dowling with detailed list of Damage in Village West H. O. A. Hilton Head Island Hurricane Floyd Damage Report attached, recovered from Village West Archives #33250, copies of which are served herewith, are genuine.

RESPONSE: Admitted.

8. Village West Owners Association Board of Directors Meeting Minutes, September 28, 1999, of Mary Probert, Secretary with September 28, 1999 6:30 PM Call to Order attached, copies of which are served herewith, are genuine.

RESPONSE: Admitted as to the first page, but not the second page which is called "Board of Directors Meeting Agenda. The second page has many handwritten notes, and it is not clear who made these notes.

9. September 13, 2005 Affidavit of Mary Probert in Village West Horizontal Property Regime vs. Kenneth C. Arata and Madeleine R. Arata, Case No 05475 sworn to before Edward E. Bullard, Notary Public, a copy of which is served herewith, is genuine.

RESPONSE: Denied in that the document on its face is not complete as Article IX of subpart (3) of the bylaws is not attached as stated in paragraph 7.

10. August 2, 2011 letter from Jerri Ann Roseneau to Jack D. Simrill enclosing February 3, 2006 letter of Edward E. Bullard to Hon. Elizabeth Smith; \$25,000 check of Jack D. Simrill to Elizabeth M. Smith, Clerk of Court; March 2, 2006 letter from Kelly A. Ryden of Law Office of Edward E. Bullard to Elizabeth M. Smith; Acknowledgment of Receipt of Undertaking and Cash Bond and Cashier's Check for \$50,000.00; March 2, 2006 Undertaking and Cash Bond; Liberty Savings Bank check for \$50,000.00 payable to the Order of Jack D. Simrill endorsed Payable to the Order of Edward E. Bullard, Pay to Elizabeth M. Smith, Edward E. Bullard; November 7, 2007 Check from Elizabeth M. Smith to Law Office of Edward E. Bullard for \$77,659.36, copies of which are served herewith, are genuine.

RESPONSE: Admitted as to the August 2, 2011 letter from Jerri Ann Roseneau to Jack D. Simrill

11. October 3, 2005 Law Office of Edward E. Bullard's Notice and Motion for Summary Judgment in on page 11 of the Record on Appeal in Civil Action No. 07475 and pages 6 and 7 of the Memorandum In Support of Motion for Summary Judgment of Office of Edward E. Bullard's on pages 17 and 18 of said Record on Appeal, copies of which are served herewith, are genuine.

RESPONSE: Admitted as to the Notice of Motion and Motion for Summary Judgment, but

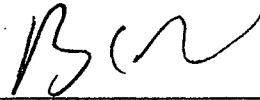
denied as to the other two documents as they are not complete documents.

12. Edward K Bullard's testimony or statement to the Court in the March 7, 2006 Hearing on Page 9, lines 6 and 7 of page 52 of the of the Record on Appeal in Civil Action No. 07-CP-07-474 "Now, there has not been a casualty loss" and the exchange between the Court and Bullard at lines response at lines 10 through 13: "The Court: Casualty being a fire, flood or whatever?" "Mr. Bullard: That's correct. It was not a fire, flood or anything like that happened. Okay?" copies of which are served herewith, are genuine.

RESPONSE: Denied in that no such document is attached to the Request for Admissions, and because the Plaintiffs are asking Village West to admit to the genuineness of testimony which is not proper.

SMOOT & PITTS

By:



Brian C. Pitts
Attorneys for Defendants,
Village West Owner's Association, Inc. d/b/a
Village West Horizontal Property Regime
P.O. Drawer 23439
Hilton Head Island, SC 29925
(843) 681-3200

March 23, 2012

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 09-CP-07-00036

)

)

)

;

)

)

)

)

)

)

extrinsic fraud amounting to fraud on the court. Thus res judicata does not bar collateral attack of the Arata 1 judgment. Accordingly we reverse the master's grant of the motion to dismiss based on res judicata."

In addition to the master's reversible error in failing to find that the documents acknowledged as genuine in response to Aratas' Requests for Admissions numbers 2, 4, 5, 6, 7, 8, 10 and offered and received into evidence establish fraud amounting to fraud on the court and damages, this motion is made upon the grounds of (1) the Master in Equity's denying Aratas' request for a continuance of the March 26, 2012 hearing by March 16, 2012 letter, (2) his denial of due process by hearing and deciding cross motions for summary judgment served in violation of Rule 56(c) which provides: "(t)he motion shall be served at least 10 days before the time fixed for the hearing" (by the Aratas', served seven days before the time fixed for hearing and by Village West's counsel, served three days before the time fixed for the hearing), (3) his denial of Aratas' motion for summary judgment, (4) his denying Aratas the opportunity to serve affidavits not later than two days prior to the hearing as provided by Rule 56(c), (5) his refusal to allow Aratas' counsel to question Madeleine Arata under oath in lieu of affidavits from questions drafted late Sunday evening, March 25, 2012, by Aratas' counsel which he could not fax to her in affidavit form prior to the March 26, 2012 hearing due to a defective facsimile machine. The drafted questions preceded by a request to submit corrected copies of drafted pleading, is attached hereto as Exhibit 1. Due to treatment by her physician in Connecticut for two heels fractured in a fall from a ladder in November, 2011, she was unable to meet with her counsel to prepare for the Monday March 26, 2012 hearing until the Friday afternoon before the Monday hearing requiring long hours preparing together on

Friday, Saturday and by telephone Sunday March 25, 2012, the day before the hearing.

ARGUMENT

1. The Aratas are the owners of Unit #6 of Village West Horizontal Property Regime in the Spinnaker Building which is not one of the buildings for which an action against the contractor and architect of the in Village West Horizontal Property Regime for negligent design and construction of the Property was brought and settled for Seven Million Two Thousand Five Hundred and No/100 (\$7,200,500.00) Dollars and the deficiency or shortfall in the amount recovered by Village West in said action was for repair or reconstruction of only the Clipper, Schooner Galleon and Flagship buildings.

2. There was no evidence of or claim by the Aratas in Case No. 05-CP-07-475 of a loss or damage from a hurricane or other casualty, however, an examination of the records in storage box labeled "Village West Archives #33250", made available for inspection by Village West, instead of a box of records previously made available for an inspection which was not completed, disclosed a SPM DEFENDER, INC., September 17, 1999 Damage Control Incident Report of Ray Dowling with a detailed list of Damage in Village West H. O. A. Hilton Head Island Hurricane "Floyd" Damage Report which Village West admitted in response to a Request for Admission was genuine.

3. Article IX of the By-Laws of Village West provides in pertinent part:

RECONSTRUCTION AND REPAIR

"In the event of a casualty loss or damage to the Property, the Board of Directors shall be responsible for applying the proceeds of all a casualty insurance to the repair or reconstruction of the property in accordance with the provisions of this Article IX..."

Subsection (1) provides in pertinent part: "Any reconstruction or repair must follow

substantially the original plans and specifications of the Property unless the Unit Owners holding seventy-five percent (75%) or more of the total interest in Common Elements and their mortgagees, if any, vote to adopt different plans and specifications and all Owners whose Units are being reconstructed or repaired unanimously consent to the adoption of different plans and specifications. ...”

Subsection (2) provides in pertinent part: “The Board of Directors shall promptly obtain estimates of the cost required to restore the damaged property to its condition before the casualty occurred. ...”

Subsection (3) provides in pertinent part: “If the insurance proceed paid to the Board are insufficient to cover the cost of reconstruction, the deficiency shall be paid as a special assessment by the Unit Owners whose units are being reconstructed or repaired in proportion to the damage done to their respective units.”

Article X of the By-Laws of Village West provides in pertinent part:

INSURANCE TRUST

“In the event of a casualty loss or damage to the Property, all insurance proceeds indemnifying the loss or damage shall be paid jointly to the Board of Directors as Insurance Trustee and to any mortgagee holding mortgages on five or more Units. The Board of Directors, acting as Insurance Trustee, shall receive and hold all insurance proceeds in trust for the purposes stated in this ARTICLE X, and for the benefit of the Association, the Unit Owners, and their respective mortgagees in the following share:”

Subsection (1) “Insurance proceeds paid on account of loss or damage to the Common Elements only shall be held in the same proportion as the undivided interests in the Common Elements which are appurtenant to each Unit.” (Inapplicable)

Subsection (2) “Insurance proceeds paid on account of loss or damage to less that all of the Units, when the damage is to be restored, shall be held for the benefit of the Unit Owners of the damaged Units and their respective Mortgagees in proportion to the cost of repairing each damaged Unit.”

Paragraphs 26 and 27 of the Findings of Fact of the April 5, 2012 Order For Judgment that

“(s)ince the re was no casualty associated with the special assessment which the Association was seeking to collect in Arata 1, the alleged representation of Mr. Bullard could not have been false” and that “(s)ince there was no casualty was associated with the special assessment Mrs.

Probert's affidavit could not have been false"are specious and manifestly without support in record of this case in that both said, respectively, "There has not been a casualty loss" and "There has been no casualty loss" and neither falsely represented or falsely swore that"there was no casualty associated with- he special assessment" and nothing in Article IX of the By-Laws quoted above requires a casualty to be associated with a special assessment. Mary Probert committed perjury for which she can be criminally prosecuted. As to representations by Messrs. Bullard and James D. Donohoe, associate of the firm the Law Office of Edward E. Bullard, if Village West's attorneys did not have knowledge of the falsity or intend to deceive, it would have been constructive fraud arising from a breach of fiduciary duty Village West owed to the Aratas, however,. *State ex rel Daniel v. Strong*, 185 S.C. 27, 192 S.E.2d 671(1937). *Designer Showrooms v. Kelley*, 304 S.C. 478, 405 S.E.2d 671(1937). The 2004 special assessment became necessary because of a shortfall of proceeds recovered for repair and reconstruction of only the four buildings of the regime in an action in which the Spinnaker building was not involved, however, the management report of Ray Dowling to directors Baroni, Kilgus, Kimball, Miller and Probert in the minutes of an August 24, 1999 meeting reported in the September 24, 1999 report of the Village West Owners Association Board of Directors Meeting Minutes was "A hurricane damage report as been compiled and submitted to our insurance company (A copy has been given to all directors)." Ray Dowling testified that he abandoned receiving insurance proceeds and that the Village West paid the amount of the hurricane damage which is the equivalent of an assessment against the Unit owners of Village West Owners' Association, Inc. d/b/a Village West Owners' Association, Inc. d/b/a Village West Horizontal Property, Regime. RECONSTRUCTION AND REPAIR s Opinion No. 2011-UP -360-360 Subsection (3),

above, provides “If the insurance proceeds paid to the Board are insufficient to cover the cost of reconstruction , the deficiency shall be paid as a special assessment by the Unit Owners whose units are being reconstructed or repaired in proportion to the damage done to their respective units”, and S. C. Code Ann§ 27-31-260 (2008) of the South Carolina Horizontal Property Act entitled Sharing Expenses in Case of Fire or Other Disaster provides: “Where the property is not insured or where the insurance indemnity is insufficient to cover the cost of reconstruction, *the rebuilding costs shall be paid by all the co-owners directly affected by the damage* in proportion to the value of their respective apartments...” The damages from the Hurricane “Floyd” casualty were paid for by owners. Moreover, repair and reconstruction was to both the owners Units and to the common elements due to defective construction and a casualty irrespective of the size of the cost of each.

4. The \$300,000.00 settlement in the 1994 lawsuit referred to in paragraph 3 of the Findings of Fact in the Order of Judge Dukes was for construction-related defects in the Spinnaker building, however, the construction-related defects settlement in the second lawsuit referred to in paragraph 4 of the Conclusions in the Dukes’ Order was to both the owner’s Units and to the common elements in the Clipper, Schooner, Galleon and Flagship buildings, therefore, S.C. Code Ann- §27-31-240 (Sup. 2005) (“The co-owners of the apartments are bound to contribute pro rata....toward the expenses of administration and of maintenance and repair of the *common elements*”)(Emphasis added) does not apply. Instead, the controlling statute is S.C. Code Ann. §27-31-260 (2007) “Where the property is not insured or the insurance indemnity is insufficient to cover the cost of reconstruction, the rebuilding costs shall be paid by

all the co-owners *directly affected by the damage¹* in proportion to the value of their respective apartments, or as may be provided by the bylaws; and if any one or more of those composing the majority shall refuse to make such payments, the majority may proceed with the reconstruction at the expense of all co-owners benefitted thereby...")(Emphasis added)

5. An examination of the records in storage box labeled "Village West Archives #33250", made available for inspection by Village West, instead of a box of records previously made available for an inspection which was not completed, disclosed a SPM DEFENDER, INC., September 17, 1999 Damage Control Incident Report of Ray Dowling with detailed list of Damage in Village West H. O. A. Hilton Head Island Hurricane Floyd Damage Report which Village West admitted was genuine. The September 17, 1999 SPM DEFENDER, INC. Damage Control Incident Report of Ray Dowling with detailed list of Damage in Village West H. O. A., Hurricane Floyd Damage Report provides:

List all noted damages

Village West on Hilton Head Island consist of 81 condos, 4 four story buildings and one three story buildings. All of the buildings were effected by High Winds from Hurricane Floyd. All of the buildings have "Spanish Style" Terra Cotta Tile Roofs. The High Winds caused many of these Tiles to blow off of The Roof and break. A Decorative False Chimney was also torn loose by high winds and Damaged the Rubber Membrane on the Flat part of the Roof when it fell. A few window shutters were also blown off the buildings and a couple of small tree were up-rooted.

A more Detailed List of Damages is enclued (sic) with this Letter Hurricane "Floyd" Damage Report is attached showing damage to Spinnaker, Clipper, Schooner Galleon ship buildings."

6. After having attended the September 28, 1999 Village West Owners' Association Board of Directors Meeting at which the Hurricane "Floyd" Damage Report was submitted and

¹The co-owners of Units in the Clipper, Schooner, Galleon and Flagship buildings.

recorded in the minutes by Mary Probert, Secretary, on September 13th 2005, Mary Probert, as elected director and president of Village West, having knowledge that the first part of paragraph 8 was false, swore in an Affidavit taken by Edward E. Bullard:

"There has been no casualty and no casualty insurance proceeds have been paid to the association"

An October 5, 2005 Motion for Summary Judgment of Law Office of Edward E. Bullard, signed by James D. Donohoe, associate of the firm, also states on page 6:

There was no casualty here. Therefor there was no casualty loss or casualty damage and there "are no casualty insurance proceeds."

The false statements that there has been no casualty, casualty loss or casualty damage were not intrinsic fraud, described by the Court of Appeals in Opinion No. 2011-UP-360 as "fraud which was presented and considered at trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating fraud" They were extrinsic fraud, "fraud that induces a person not to present a case or deprives a person of the opportunity to be heard"and, because the fraud prevented the person from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action. In Arata 1, there were denials by Judge Gregory, Village West's counsel and Mary Probert but no evidence of a casualty or claim of a casualty by anyone. *Bryan v. Bryan*, 220 S.C. 164, 66 S.E. 609 (1951) cited for the rule that perjured testimony is a classic case of intrinsic fraud, not extrinsic fraud does not stand for the proposition for which it is cited. It is not necessary to go any further in the language at the second line of the second column of page 610: "Generally speaking, in order to secure equitable relief, it must appear that the fraud was extrinsic or collateral to the question examined and determined in the action in which the judgment was

rendered; intrinsic fraud is not sufficient for equitable relief” which is the same as stated in Court of Appeals Opinion No. 2011-UP-260.

7. Paragraph 8 in Mary Probert’s September 13, 2005 affidavit “There has been no casualty...” was false and known to have been false when she swore to the same. The first item in the management report of Ray Dowling to directors Baroni, Kilgus, Kimball, Miller and Probert in the minutes of an August 24, 1999 meeting reported in the September 24, 1999 report of the Village West Owners Association Board of Directors Meeting Minutes was “A hurricane damage report as been compiled and submitted to our insurance company (A copy has been given to all directors .)” During the years after she took the minutes of the August 24, 1999 meeting reported in the Village West Board of Directors Meeting Minutes, September 28, 1999, she became an elected director and president of Village West and had access to all Village West Board of Directors Meeting Minutes contained in the Village West Archives throughout all those years. Mary Probert’s September 13, 2005 affidavit, which Master in Equity Marvin H. Dukes, III ruled was improper to consider, is on page 103 of the Record on Appeal in Case No. 05-CP-07-475, notice of which both counsel and the Master in Equity are charged. Moreover, paragraph 24 of the Complaint in the instant action which reads: “Village West, acting through its duly authorized agent, fraudulently concealed from the Aratas and the Court that the reconstruction and repair to the Clipper, Schooner, Galleon and Flagship buildings was to reconstruct and repair damage from Hurricane Floyd as well as from defective construction of the Units and the Common Elements appurtenant to the Units” was sufficient to identify Mary Probert as the author of her September 13, 2005 affidavit.

8. The July 20, 1998 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc.'s letter to Peter E. Sherratt, AIA, giving an estimate of the cost of repairs including interior painting of the new windows and interior trim and adjacent walls, and his testimony concerning repairs to owners' Units conclusively establishes repairs to be made to the Units as well as to the common elements. The size of the settlement of the claim against the contractor and architect of the Clipper, Schooner, Galleon and Flagship buildings in Village West Horizontal Property Regime for Seven Million Two Hundred Thousand Five Hundred and No/100 (\$7,200,000.00) Dollars for negligent design and construction of the Property and the preliminary estimate of Thomas J. Carlson of Calibogue Construction Company, Inc. of Ninety Two Thousand Seven Hundred (\$92,700.00) Dollars for removing and replacing stucco, windows and sheathing including scaffolding, water barrier, flashing and head and sill barriers of cladding of Units # 30, #32, # 38, #40, #46, #48, and #54 belies any claim of Village West that repairs and reconstruction were only to the common elements in the initial repair and reconstruction as well as the repair and reconstruction with the deficiency assessment funds.

The Court of Appeals in its June 30, 2011 Opinion No. 2011-UP-360 reversed the June 15, 2009 order of the master granting the Village West 's motion to dismiss, finding that "the Arata's complaint does allege fraud amounting to fraud on the court" and remanded to the master for further proceedings on the issues of fraud, damages and attorneys' fees alleged and sought in Aratas' Complaint. On remand, from a storage box labeled "Village West Archives #33250", made available for inspection by Village West, the Aratas recovered the following documents having attachments admitted as genuine in response to Aratas' Requests for Admissions numbers 2, 4, 5, 6, 7, 8, 10 and offered and received into evidence as proof of fraud amounting to fraud on

the court and damages:

- 2. July 20, 1998 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc.'s letter to Peter E. Sherratt, AIA, giving an estimate of the cost of repairs repairs to be made to the Units as well as to the common elements...(Paragraph 8, above);**
- 4. April 14, 1999 letter of Transmittal, 41499 Request for Payment #3 of Calibogue Construction Company Inc., etc....**
- 5. April 24, 1999 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc.'s letter to Mr. David Kilgus with notes on front "Payments to Sherratt"...**
- 6. May 11, 1999 letter of Thomas J. Carlson, Vice President of Calibogue Company, Inc.'s letter to Peter E. Sherratt, AIA, the Sherratt Company with (6) photographs proposed repairs...**
- 7. September 17, 1999 SPM DEFENDER, INC. Damage Control Incident Report of Ray Dowling with detailed list of Damage in Village West H. O. A., Hurricane Floyd Damage Report... (Paragraph 5 above)**
- 8. Minutes of an August 24, 1999 meeting reported in the September 24, 1999 report of the Village West Owners Association Board of Directors Meeting Minutes... (Paragraph 7 above)**
- 9. September 13, 2005 Affidavit of Mary Probert as president and director of Village West in Village West Property Regime v. Kenneth C. Arata and Madeleine R. Arata, Case. No.05-CP-07-475, on page 34 of the Record on Appeal, also without Article IX of subpart (3) of the bylaws attached.**
- 10. August 2, 2011 letter from Jerri Ann Roseneau to Jack D. Simrill enclosing all documents related to the \$75,000.00 bond filed by the Aratas in Case No.05-CP-07-475...**
- 11. October 3, 2005 Law Office of Edward E. Bullard's Notice and Motion for Summary Judgment in Case No.05-CP-07-475...**
- 12. Edward E. Bullard's testimony or statement to the Court in the March 7, 2006 hearing on Page 9, lines 6 and 7 of page 52 of the Record on Appeal in Civil Action No. 07-CP-07-474, "(n)ow, there has been no casualty loss , etc**

Responses 2, 4, 5, and 6 establish by the required preponderance of the evidence that the initial reconstruction repairs as well as those by assessments for the deficiency were to the Units as well as the common elements, which is denied by Village West. Responses to 7, 8, 9, 11 and 12 establish by the required preponderance of the evidence a casualty in the form of Hurricane "Floyd" and extrinsic fraud of Mary Probert, as elected director and president and of Village West, and fraud of Village West's attorneys amounting to fraud on the Court. Response 10 establishes a measure of initial attorneys fees to which Aratas are entitled which was paid to Edward E. Bullard in Case No. 0 5-CP-07-475 and Responses 11 and 12 establish.

Concerning footnote 3 to the April 5, 2012 Order of the Honorable Marvin H. Dukes, III, that it would be improper to consider Mary Probert's Affidavit because it was outside the pleadings, the deficiency in the pleadings as to Mary Proberts Affidavit can be corrected by a motion to amend the Complaint to conform to the evidence. The same is true as to the after discovered April 14, 1999 letter of Transmittal; April 24, 1999 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc. to Mr. David Kilgus; Mayd 11, 1999 letter of Thomas J. Carlson, Vice President of Calibogue Company, Inc.'s to Peter E. Sherratt, AIA, the Sherratt Company; September 17, 1999 SPM DEFENDER, INC. Damage Control Incident Report of Ray Dowling; Minutes of an August 24, 1999 meeting reported in the September 24, 1999 report of the Village West Owners Association Board of Directors Meeting Minutes; the October 3, 2005 Law Office of Edward E. Bullard's Notice and Motion for Summary Judgment in Case No. 05-CP-07-475, and Edward E. Bullard's testimony or statement to the Court in the March 7, 2006 hearing on Page 9, lines 6 and 7 of page 52 of the Record on Appeal in Civil Action No. 07-CP-07-474.

This motion is made upon the grounds of the foregoing and that the Order for Judgment ignores the mandate of Article IX (2) of the By-Laws of Village West that, in the event of a casualty, “(t)he Board of Directors shall promptly obtain estimates of the cost required to restore the damaged property to its condition before the casualty occurred” and Article IX “...the Board of Directors shall be responsible for applying the proceeds of all a casualty insurance to the repair or reconstruction of the property in accordance with the provisions of this ‘Article IX.’”

The Complaint alleges and the facts establish extrinsic fraud amounting to fraud on the the Court. The Arata judgment and the April 5, 2012 Order of the Honorable Marvin H. Dukes, III, in favor of Village West and against Arata dismissing all of Aratas’ claims with prejudice should be set aside and judgment granted to the plaintiff for \$75,000.00 plus interest at the prevailing rate to date together with attorney’s fee earned in Arata 1 and in the instant action.

Respectfully submitted

 **Jack D. Simrill
P.O. Box 5681
Hilton Head Island, SC 29938
(843) 785-2134
Attorney for the Plaintiffs**

April 20, 2012

Testimony of Madeleine Arata
Case No. 09-CP-09-00036

Before going into the testimony, Plaintiff Arata's Memorandum in Support of Motion for Summary Judgment contained several errors which were called to my attention when proof read by Madeleine Arata. Arata's apartment is shown as apartment 106 rather than 06 on pages 1 and 2 due to an improper correction made by "spell checker" and the names of the plaintiffs are incorrectly shown as Madeliene C. Arata and Kenneth R. Arata rather than Madeliene R. Arata and Kenneth C. Arata due to a drafting error. I have corrected copies of pages 1 and 2 for the court and Mr. Pitts to be substituted for the copy filed with the Clerk of Court, if your honor permits.

1. State your name for the record.
2. I hand you a copy of the Complaint in Case No. 09-CP-09-00036 in which you and your husband, Kenneth C. Arata, are plaintiffs and Village West is defendant. Are you and the owners of Unit 6 in the Spinnaker Bldg. of Village West Owner's Association?
3. This action was commenced in December 2008 and dismissed on June 15, 2009 from which you appealed, is that correct?
4. I hand you a copy of a August 24, 2007 letter from Bullard and Friedman to Jack D. Simrill, Brian Dennison, Douglas Baxter and Stacy Kennedy advising each of them to review the records and to cover, for copy costs, any documents wished to have to use in their respective cases and ask if you are familiar with it ?

Offer into evidence. If objected to, hold for Friedman to I.D.\

5. Article IX of the By-Laws of Village West provides "In the event of a casualty loss or damage to the property, the Board of Directors shall be responsible for applying the proceeds of all a casualty insurance to the repair or reconstruction of the property in accordance with the provisions of this "Article IX" and subsection (2) says: "The Board of Directors shall promptly obtain estimates of the cost required to restore the damaged property to its condition before the casualty occurred." Mary Probert, as elected director and president of Village West in an Affidavit sworn to before Notary Public Edward E. Bullard on September 12, 2005 reported on page 103 of the Record on Appeal in Case No. 06-CP-07-475 , swore "There has been no casualty and no casualty loss has been paid to the association" I hand you a copy of this affidavit which is Exhibit 3 to Aratas' Memorandum in Support of Motion for Summary Judgment and ask you to identify it and publish the affidavit.

Offer into evidence.

- 6 I hand you a copy of pages 6 and 7 of a Memorandum in Support of Motion for Summary Judgment of the Law Office of Edward E. Bullard wherein Law Office of Edward E. Bullard "...there was no casualty loss or casualty damage..." and ask you to identify and publish the pages beginning at "In the event of a casualty loss or damage to the Property in the last paragraph of page 6 and ending at the end of the first paragraph of page 7.**

Offer into evidence.

- 7. I hand you a copy of page 9 of the Transcript of Record in Case No 05-CP-07-475 which I ask you to identify and publish lines 6 through 12.**

Offer into evidence.

- 8. I hand you the SPM DEFENDER, INC. September 17, 1999 Damage Control Incident Report of Ray Dowling with detailed list of Damage in Village West H. O. A. Hilton Head Island Hurricane Floyd Damage Report, Exhibit 1 to the Aratas' Memorandum in Support of Motion for Summary Judgment and ask you to identify and publish both pages.**

Offer into evidence.

- 9. I hand you the September 28, 1999 Village West Owners' Association Board of Directors Meeting, the minutes of which were recorded by Mary Probert, Secretary. and ask you to identify and publish it and publish as much as is legible and pertinent on the Board of Directors Meeting Agenda attached agenda.**

Offer into evidence

- 10. I hand you a four page document which I ask you to identify. (Event Summary, National Weather Summary, Raleigh, N.C. Hurricane Floyd)**

Offer into evidence pursuant to Rule 803 Hearsay Exceptions/Availability of Declarant Immaterial

- 11. I hand you a July 20, 1998 letter from from Thomas J. Carlson to Peter E. Sherratt proposing work on Units 30, 32, 36, 40, 46, 48, 54 and August 12, 1998 Village West Partial Scope of Repair Work Preliminary Forensic Investigation Units 30, 32, 36, 40, 46, 48, 54 and ask you to identify and publish the July 30, 1998 letter**

Offer into evidence

12. I hand you May 11, 1999 letter from Thomas J. Carlson to Peter E. Sherratt concerning work on inside of Units with photograph of work being done on interior of Unit.

Offer into evidence

13. I hand you an Application and Certificate For Payment from Calibogue Construction Co. Inc. to Village West , 3/1/99 Contract Budget to date \$92,000.00.
14. Offer June 30, 2011 Opinion No. 2011-UP-360 into evidence
15. I hand you four numbered pages containing a list of items and a single page which is not numbered which I ask you to identify. (Time record in Case 05-CP-07-475). Are you seeking attorneys in this action for fees for effort and time recorded from March 17, 2005 to March 23, 2007 and for December 17, 2008 to August 3, 2011 in this action?

Offer into evidence Curriculum Vitae of Jack D. Simrill

16. I hand you a letter from Jerri Ann Roseneau e-mailed to jdsimrill@aol.com with note "Delivered by Hand 11-7-07" containing the following enclosures: check from Elizabeth Smith to Law Office of Edward Bullard for \$77, 659.36; Acknowledgement of Receipt of Undertaking and Cash Bond And Cashier's check for \$50,000.00; Palmetto State Bank deposit slips for \$25,000.00 and \$50,000.00 dated February 16, 2006 and March 27, 2006, respectively; February 3, 2006 letter to Hon. Elizabeth Smith; check #1234 for \$25,000.00 of Jack D. Simrill to Elizabeth E. Smith, Clerk of Court; March 2, 2006 letter to Hon. Elizabeth Smith from Kelly A Ryden of Law Office of Edward Bullard; Undertaking and Cash Bond of the Madeleine R. Arata and Kenneth C. Arata to Village West Horizontal Regime clocked on 6 Mar -6 PM 2:30; Liberty Bank check #4486231447 for \$50,000.00 payable to the order of Jack D. Simrill, and ask you if you are familiar with the letter and the enclosures?

Offer into evidence in bulk.

17. Can you explain what the check from Elizabeth Smith to Law Office of Edward Bullard for \$77, 659.36 represents?

) IN THE COURT OF COMMON PLEAS
) THE FOURTEENTH JUDICIAL CIRCUIT
) CASE NUMBER: 09-CP-07-00036

)

)

)

;

;

)

)

)

)

)

Jack D. Simrill
P.O. Box 5681
Hilton Head Island, SC 29938
(843) 785-2123
Attorney for ther Plaintffs

April 20. 3012

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 09-CP-07-00036

i

1

)

)

)

)

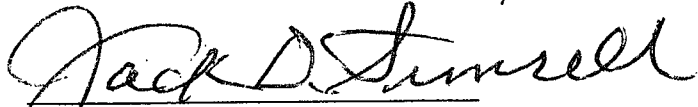
;

2

—

10 and 11 of Plaintiffs' Request for Admissions. This motion is made upon the ground that the presentation of the merits of the action will be subserved thereby.

Respectfully submitted,

A handwritten signature in cursive script, reading "Jack D. Simrill". The signature is written in dark ink and is positioned above a horizontal line.

Jack D. Simrill

P.O. Box 5681

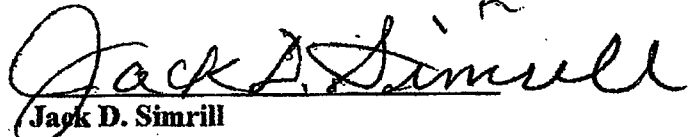
Hilton Head Island, SC 29938

(843) 785-2134

Attorney for the Plaintiffs

June 7, 2012

that there are no genuine issues of material fact and Plaintiff is entitled to judgment as a matter of law.



Jack D. Simrill

P. O. Box 5681

Hilton Head Island, SC 29938

(843) 785-2134

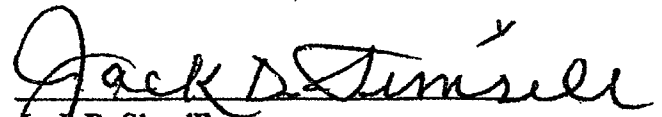
Attorney for the Plaintiffs

March 16, 2012

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on the defendant, Village West Owners Association Inc., d/b/a Village West Horizontal Property Regime. postage prepaid on March 19, 2012 addressed to its counsel as follows:

Brian C. Pitts, Esquire
Smoot & Pitts
P. O. Drawer 23439
Hilton Head Island, SC 29925-1439



Jack D. Simrill

P. O. Box 5681

(843) 785-2134

Hilton Head Island, S. C. 29938

Attorney for the Plaintiffs

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NUMBER: 09-CP-07-00036
	)	
MADELEINE R. ARATA AND	)	
KENNETH C. ARATA	)	
	)	
Plaintiffs,	)	
	)	
	)	
vs.	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR SUMMARY JUDGMENT
VILLAGE WEST OWNERS'	)	
ASSOCIATION, INC., d/b/a	)	
VILLAGE WEST HORIZONTAL	)	
PROPERTY REGIME,	)	
	)	
Defendant.	)	
	)	

Plaintiffs, Madeleine C. Arata and Kenneth R. Arata, in support of their motion for summary judgment, respectfully submit the following:

STATEMENT OF FACTS

Madeleine R. Arata and Kenneth C. Arata (hereinafter "Arata") owners of Apartment 6 of the Spinnaker Building by deed recorded April 2, 1996 in the Office of the Register of Deeds for Beaufort County South Carolina in Deed Book 847 at page 593 are plaintiffs and Village West Horizontal Property Regime, (hereinafter Village West)a condominium associations organized under and existing pursuant to South Carolina Nonprofit Corporation Act S.C. Code §33-31-100 *et seq.* and South Carolina Horizontal Property Act S.C. Code §27-31-10 *et seq.* is defendant in this action which was commenced by service of the Summons and Complaint on the defendant on or about December 17,

2008.

HISTORY OF THE PROCEEDINGS

In Case No. 05-CP-07-475 Village West sued "Arata" for Nine Thousand Six Hundred and Fifty Nine (\$9,659.00) Dollars due for assessments against the owners of Apartment 6 to be used to maintain the common elements of the Regime as alleged in paragraphs 5 of the Complaint and Amended Complaint of Law Office of Edward E. Bullard signed by Sonja N. Friedman. Edward E. Bullard, likewise, said in the second paragraph of page 2 of a Supplement to Memorandum Support of Motion for Summary Judgment and his Argument on page 3 in that a calendar year 2005 reconstruction assessment would be used for major construction of the common elements of all five buildings. Edward E. Bullard also stated or testified on page 6, lines 11 through 16 of the Transcript of Record in No. 05-CP-07-475 " there is a dispute with regard to the effect of one element of the contract, and that is Section 9, Paragraph 3 of the By Laws, which refers to the use of proceeds from casualty insurance. Well there has been no casualty. A casualty is basically a fire, a hurricane, wind damage or something like that." On the basis of the Complaints and memoranda in support of Village West's motion for summary judgment, Judge Jackson V. Gregory granted summary judgment for Unpaid Assessment of \$34,475.00 plus interest as of January 1, 2006 and attorney's fees amounting in total to \$51,604.79. Upon filing an appropriate bond, Arata appealed and the Court of Appeals affirmed.

More than eighteen (18) months after Arata's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment filed in Case No. 05-CP-07-475 was denied and

summary judgment was granted against Arata by Judge Gregory, from which Arata appealed, Village West's then attorney, Edward E. Bullard, notified the Plaintiffs' attorney that they had in their possession records crammed in a banker's box relevant to the pending suit. Arata and her attorney, Jack D. Simrill, examined and removed from the box made available to them the Hurricane "Floyd" Damage Report, a letter from Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc. to Mr. Peter E. Sherratt, AIA, of the Sherratt Company and the Village West Partial Scope of Repair Work and Preliminary Forensic Investigation on Units, 30, 32, 38, 40, 46, 48, 54.

On the basis of the Hurricane "Floyd" Damage Report, a letter from Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc. to Mr. Peter E. Sherratt, AIA, of the Sherratt Company and the Village West Partial Scope of Repair Work and Preliminary Forensic Investigation on Units, 30, 32, 38, 40, 46, 48, 54, Arata commenced action against Village West on or about December 17, 2008 for relief from judgment granted in Case No. 05-CP-07-475, for extrinsic fraud amounting to fraud on the court, seeking actual and punitive and exemplary damages and an accounting.

By Order dated June 15, 2009, Master and Equity/Special Circuit Court Judge, Marvin H. Dukes, III dismissed Arata's claim against Village West to set aside the January 15, 2006 judgment of Judge Gregory in Case No. 05-CP-07-475 with prejudice pursuant to Rules 12(b)(6) and 12(c), SCRAP, from which Arata appealed. By Unpublished Opinion No. 2011-UP- 360, filed June 20, 2011, the Court of Appeals reversed, finding that the Arata' complaint does allege extrinsic fraud amounting to fraud on the court, remanded for further proceedings on the merits of Arata's allegations of fraud, damages and attorney's

fees.

Madeleine C. Arata and her attorney, Jack D. Simrill, did not have time to complete examination of the box of records at Bullard and Friedman's office and thereafter requested Village West's attorney Brian C. Pitts to make them available for further examination. In response to Arata's request, on February 29, 2012 a box was produced in the conference room of Smoot and Pitts, however, the box was not the box of records that Sonja Friedman indicated were delivered to Village West; it was Village West Archives, Box #33250.

ARGUMENT

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Hunt v Happy Value Ltd. Partnership*, 315 S.C. 428, 434 S.E.2d 285 (Ct. App. 1993); *Cunningham ex rel. Grice v. Helping Hands, Inc.*, 352 S.C. 485, 575 S.E.2d 549 (2003); Rule 56(c) SCRPC.

The Court of Appeals found that the Arata complaint does allege extrinsic fraud amounting to fraud on the court; that res judicata does not bar collateral attack of the Arata judgment and remanded for further proceedings on the issues of damages and attorney's fees.

The documents recovered from the Village West Archives, which conclusively establish the merits of Arata's allegations of fraud, damages and attorney's fees, also establish that the repairs completed by Calibogue Construction were both to the owner's units and the common elements of Village West Horizontal Property Regime for which it was paid.

Addressing the issues of the allegations of fraud, the SPM DEFENDER, INC. September 17, 1999 Damage Control Incident Report of Ray Dowling with detailed list of

Damage in Village West H. O. A. Hilton Head Island Hurricane Floyd Damage Report, copies of which are submitted as Exhibit 1, was reported to Village West Owners Association directors, Baroni, Kilgus, Miller and Probert at a September 28, 1999 Village West Owners' Association Board of Directors Meeting, the minutes of which were recorded by Mary Probert, Secretary, along with the "Call to order notes, copies of which are submitted herewith as Exhibit 2. Having knowledge of the September 17, 1999 Damage Control Incident Report of Ray Dowling, Mary Probert, as elected director and president of Village West, in an Affidavit sworn to before Notary Public Edward E. Bullard on September, 13. 2005, said "There has been no casualty loss and no casualty loss has been paid." a copy of which are submitted herewith as Exhibit 3. This conclusively establishes extrinsic fraud amounting to fraud on the court by Village West.

Quoting from Article IX of the bylaws on page 6 of a Memorandum in Support of Motion for Summary Judgment, the Law Office of Edward E. Bullard says on page 6 and 7:

In the event of a casualty loss or damage to the Property

*** * * ***

(3) If the insurance proceed paid to the Board are insufficient to cover the cost of reconstruction the deficiency shall be paid as a special assessment by the Unit Owners where units are being reconstructed or repaired in proportion to the damage done to the respective units"

Bylaws, Article IX(3) Exhibit I attached hereto.

"...there was no casualty loss or casualty damage..."a copy of which is submitted herewith as Exhibit 4.

Having represented Village West for a number of years, the Law Office of Edward E.

Bullard had access to construction documents including the SPM DEFENDER, INC. September 17, 1999 Damage Control Incident Report of Ray Dowling with detailed list of Damage in Village West H. O. A. Hilton Head Island Hurricane Floyd Damage Report (Exhibit 1) and Edward E. Bullard's testimony or statement to the Court in the March 7, 2006 Hearing on Page 9, lines 6 and 7 of page 52 of the of the Record on Appeal in Civil Action No. 07-CP-07-474 "Now, there has not been a casualty loss" and the exchange between the Court and Bullard at lines at lines 10 through 13: "The Court: Casualty being a fire, flood or whatever?" "Mr. Bullard: That's correct. It was not a fire, flood or anything like that happened. Okay?" a copy of which is submitted herewith as Exhibit 5.

The SPM DEFENDER, INC. September 17, 1999 Damage Control Incident Report of Ray Dowling with detailed list of Damage in Village West H. O. A. Hilton Head Island Hurricane Floyd Damage Report, (Exhibit 1), which was reported to Village West Owners Association directors, Baroni, Kilgus, Miller and Probert at a September 28, 1999 Village West Owners' Association Board of Directors Meeting, the minutes of which were recorded by Mary Probert, Secretary prove that paragraph 8 of the September, 13. 2005 Affidavit of Mary Probert sworn to before Notary Public Edward E. Bullard in which she said "There has been no casualty loss ..." was false, material, known to have been false when made. As to Village West 's attorneys, Bullard and Friedman, who had access to The SPM DEFENDER, INC. September 17, 1999 Damage Control Incident Report and were Village West's attorneys when repair and reconstruction both to the Units and the common elements of the Clipper, Schooner, Galleon and Flagship buildings, was done, their knowledge of the falsity of their statements can be presumed but are not established as clearly as with Village West's director and president

of the association. If Village West or its attorneys did not have knowledge of the falsity or intend to deceive, it would have been constructive fraud. The fraud appearing in the record in this case was constructive fraud arising from a breach of a fiduciary duty Village West owed to the Aratas. Article IV, Section 2 and 3 (a) through (l) of the By-Law of Village West Horizontal Property Regime sets forth the responsibilities of the Board of Directors to the Association of Co-owner, thereby creating a fiduciary relationship to the co-owners. "A breach of a legal or equitable duty, irrespective of moral guilt or the tortfeasor, is a constructive fraud in the eyes of the law. An intent to deceive is an essential element of 'actual fraud' but neither dishonesty of purpose nor intent to deceive is an essential element of 'constructive fraud' and the presence or absence of such an intent distinguishes actual fraud from constructive fraud. Green v. Brown, 199 S.C. 218, 19 S.E. 2d 114 (1942). Moreover, constructive fraud has the same legal effect as actual fraud. State ex rel Daniel v. Strong, 185 S.C. 27, 192 S.E.2d 671 (1937)." Designer Showrooms, Inc. v. Kelley, 304 S.C. 478; 405 S.E.2d 417 (1991).

Attached hereto and incorporated by reference are documents submitted proving the allegations of paragraphs 4 and 11 of the Arata Complaint and Exhibits B and C thereto that the repairs made were to the owner's units as well as to the common elements:

July 20, 1998 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc. to Peter E. Sherratt, AIA, The Sherratt Company a copy of which is submitted herewith as Exhibit 6.

August 12, 1998 Village West Partial Scope of Repair Work And Preliminary Forensic Investigation Units 30, 32, 36, 40, 46, 48, 54 of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc., a copy of which is submitted herewith as Exhibit 7.

April 24, 1999 Letter of Thomas J. Carlson, Vice President of to Mr David Kilgus with note on front "Payments to Sherratt" a copy of which is submitted herewith as Exhibit 8.

Application and Certificate For Payment, Continuation Sheet, Application for Payment Number 3, Total to Date Thru 3/28/99 a copy of which is submitted herewith as Exhibit 9.

May 11, 1999 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc. to Peter E. Sherratt, AIA, The Sherratt Company with photograph of proposed repairs to the interior of an owner's Unit, a copy of which is submitted herewith as Exhibit 10.

Addressing the issues of damages are the August 2, 2011 letter of Clerk of Court Jerri Ann Roseneau with attachments (a) through(e), including checks totaling \$75,000.00 as cash bond and check from Elizabeth M. Smith Clerk of Court to Law Office of Edward E. Bullard for \$77, 659.36 a copy of which is submitted herewith as Exhibit 11 representing interest from the date of filing bond to November 7, 2007 plus interest to date as the measure of damages arising out of Case No. 05-CP-07-475.

CONCLUSION

The foregoing conclusively establishes repairs to both the common elements and the owners' units and extrinsic fraud amounting to fraud on the court entitling the plaintiffs to actual and punitive and exemplary damages for which the plaintiff(s) have plead. One the basis of the egregious actions of the president and director of Village West and the other member of its board of directors who were present and participated in the September 28, 1999 Village West Owners Association Board of Directors September 28, 1999 September 28, 1999 Meeting, the Aratas are entitled to actual damages in the amount of \$77,659.3 plus interest to date, the amount Arata is out of pocket for the bond required in the appeal from the adverse decision

which the Court of Appeals in Unpublished Opinion No. 2011-UP- 360 , filed June 20, 1011, reversed and remanded, plus interest to date and punitive and exemplary damages as provided in S.C. Code Ann. §§15-32-510, 15-32-520 and 15-32-530.



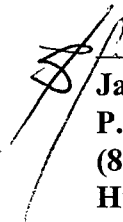
Jack D. Simrill
P.O. Box 5681
Hilton Head Island, SC 29938
(803) 785-2134
Attorney for the Plaintiffs

March 16, 2012

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on the defendant, Village West Owners Association Inc., d/b/a Village West Horizontal Property Regime. postage prepaid on March 19, 2012 addressed to its counsel as follows:

Brian C. Pitts, Esquire
Smoot & Pitts
P. O. Drawer 23439
Hilton Head Island, SC 29925-1439



Jack D. Simrill
P. O. Box 5681
(843) 785-2134
Hilton Head Island, S. C. 29938
Attorney for the Plaintiffs

Secondly, and more importantly, the settlement proceeds from the two lawsuits are not "insurance proceeds" within the meaning of Article IX of the bylaws.

The relevant terms of the Master Deed and bylaws constitute a contract, the construction and enforcement of which is a question of law properly disposed of on summary judgment. Hansen v. rel. Hansen v. United Services Auto Ass'n, 350 S.C. 62, 565 S.E.2d 114 (S.C. App 2002). The bylaws of Village West are set forth in Exhibit H to the Master Deed of Village West and as such constitute covenants in the master deed. Rules applicable to the construction of contracts are applicable to the construction of covenants in a deed. Harrington v. Blackston 319 S.C. 1, 450 S.E.2d 309 (S.C. App. 1995); Houck v. Rivers 316 S.C. 414, 450 S.E.2d 106 (S.C. App. 1994). If a contract is unambiguous, clear and explicit, it must be construed according to its terms which are to be understood in their plain, ordinary and popular sense. Ingram v. Kasey's Associates, 340 S.C. 531 S.E.2d 287 (S.C. 2000)

Article IX of the bylaws covers the use of insurance proceeds to reconstruct or repair damage to buildings caused by a casualty loss covered by casualty insurance. A copy of entire Article IX is attached hereto as Exhibit I. The relevant terms of Article IX relied upon by Arata, namely Article IX(3), are clear and unambiguous:

"In the event of a casualty loss or damage to the Property

* * * *

- (3) If the insurance proceeds paid to the Board are insufficient to cover the cost of reconstruction, the deficiency shall be paid as a special assessment by the Unit Owners whose units are being reconstructed or repaired in proportion to the damage done to their respective Units."

Bylaws, Article IX(3), Exhibit I attached hereto.

100/6

There was no casualty here. Therefore, there was no casualty loss or casualty damage and there are no casualty insurance proceeds. See paragraphs 7 - 9, Probert affidavit, Exhibit F hereto.

"Casualty" is defined as an "accident; event due to sudden, unexpected or unusual cause; event not to be foreseen or guarded against; inevitable accident; misfortune or mishap: that which comes by chance or without design." Black's Law Dictionary, Revised Fourth Edition 1968. Clearly, construction defects are not caused by a casualty. Such defects are caused by the intentional or negligent acts or omissions of persons or entities responsible for the construction work, not by any casualty event. Article IX of the bylaws simply has no application whatsoever to the settlement proceeds from either of the two construction defect lawsuits. Arata's contrary assertions are clearly without merit and therefore Arata's sole defense must fail as a matter of law.

Arata's counterclaim

Arata's counterclaim for slander of title is based on the allegation that the lis pendens was falsely and maliciously filed. The filing of a lis pendens cannot form the basis of an action for slander of title in South Carolina. ("We find the filing of a lis pendens is *ABSOLUTELY* privileged in South Carolina. The filing of a lis pendens enjoys the absolute privilege accorded to judicial proceedings. Because the recording of a lis pendens is specifically authorized by statute and has no existence separate and apart from the litigation of which it gives notice, the filing of a lis pendens *CANNOT* form the basis of an action for slander of title.") Pond Place Partners, Inc. v. Poole 351 S.C. 1, 567 S.E.2d 881 (S.C. App. 2002). Accordingly, Arata's counterclaim is clearly without merit and must fail as a matter of law.

18

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

MADELINE R. ARATA AND
KENNETH C. ARATA,)

Plaintiffs,)

v.)

VILLAGE WEST OWNERS'
ASSOCIATION, INC. D/B/A VILLAGE
WEST HORIZONTAL PROPERTY
REGIME,)

Defendant.)

IN THE COURT OF COMMON PLEAS
THE FOURTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 09-CP-07-00036NOTICE OF MOTION AND MOTION
FOR SUMMARY JUDGMENTTO: THE PLAINTIFFS, MADELINE R. ARATA AND KENNETH C. ARATA, AND
THEIR ATTORNEY JACK D. SIMRILL, ESQ.

PLEASE TAKE NOTICE that the Defendant, Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime ("Village West"), by and through its undersigned attorneys, will move before the Honorable Marvin H. Dukes, III, Master In Equity/Special Circuit Judge, at the Beaufort County Courthouse, Government Center, 102 Ribaut Road Beaufort, South Carolina, 29901, at 10.00 a.m. on the tenth day after service hereof, or at such other time and place as is convenient to both Court and counsel, for an Order pursuant to Rule 56, SCRPC, granting Village West summary judgment in that there is no genuine issue as to any material fact as to the causes of action alleged in the Complaint and Village West is entitled to judgment as a matter of law.

As grounds for this Motion Village West would show as follows:

1. Based upon the undisputed evidence the Plaintiffs are unable to make a prima facie case for extrinsic fraud, which the South Carolina Court of Appeals held was a prerequisite for

potential relief from the prior judgment. Among other things, the Plaintiffs admit that they did not engage in any discovery in the 2005 case which resulted in the judgment for a special assessment which they seek to set aside in this case. The Summons and Complaint in the 2005 case was filed on March 14, 2005, and the Amended Complaint was served on the Aratas on April 11, 2005. Judgment was not granted in the 2005 case until January 25, 2006, which shows that the Aratas had in excess of eight (8) months to serve discovery requests. Further, as a matter of law Ed Bullard, Village West's then attorney, had no affirmative obligation to disclose the documents the Aratas attempt to rely on to show they do not owe the special assessment, absent a discovery request. It is also undisputed that Ed Bullard voluntarily disclosed the existence of the box of documents.

2. It is undisputed that the cost to repair damages to the buildings at Village West which resulted in the special assessment were the result of defective construction and not a casualty as claimed by the Aratas. The only casualty to which the Aratas point is damage caused by Hurricane Floyd which occurred on September 16, 1999. It is undisputed that this damage was repaired shortly after the storm. It is also undisputed that the special assessment was imposed in 2004 after the

construction defect litigation was settled and it was determined that there would be a shortfall in covering the cost to make the necessary repairs for the defective construction.

SMOOT & PITTS

By: BCR

Brian C. Pitts
Attorneys for the Plaintiff,
Village West Owners' Association, Inc.
d/b/a Village West Horizontal
Property Regime
P.O. Drawer 23439
Hilton Head Island, SC 29925
(843) 681-3200

March 23, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NUMBER: 09-CP-07-00036
	)	
MADELINE R. ARATA AND	)	
KENNETH C. ARATA,	)	
	)	
Plaintiffs,	)	
	)	MEMORANDUM OF LAW IN
v.	)	SUPPORT OF MOTION FOR
	)	SUMMARY JUDGMENT
VILLAGE WEST OWNERS'	)	
ASSOCIATION, INC. D/B/A VILLAGE	)	
WEST HORIZONTAL PROPERTY	)	
REGIME,	)	
	)	
Defendant.	)	
	)	

STATEMENT OF THE CASE

Village West Horizontal Property Regime is a condominium project on Hilton Head Island comprised of 81 residential units ("Village West"). In 2005, the Respondent, Village West Owners' Association, Inc. ("Association") sued the Appellants, Kenneth C. Arata and Madeline R. Arata (collectively "Arata") to foreclose a lien filed to collect a special assessment imposed on a pro rata basis against all units within Village West ("Arata 1"). In Arata 1 the trial court granted summary judgment in favor of the Association. Arata appealed, and in order to stay execution of the order of foreclosure and sale, Arata posted a \$75,000 cash bond. The Court of Appeals affirmed the lower court in an unpublished opinion, and on October 31, 2007 the South Carolina Supreme Court denied Arata's Petition for a Writ of Certiorari. After remittitur, and in accordance with the terms of the bond, the Clerk of Court paid the bond money over to Edward E. Bullard, Esquire, the Attorney who represented the Association in Arata 1.

On January 6, 2009 Arata filed the instant case against the Association attempting to assert the following causes of action concerning the special assessment and bond ("Arata 2"):

1. for relief from judgment or to set aside the judgment pursuant to Rule 60, SCRPC;
2. for fraud; and
3. for an accounting.

The Association filed a motion to dismiss the cause of actions to set aside the judgment and for fraud pursuant to Rule 12(b)(6), SCRPC. The Association also filed an answer and counterclaim. The counterclaim seeks judgment against Arata for the attorney's fees and expenses incurred by the Association in Arata 2, and to the extent necessary, those incurred in Arata 1.

On June 15, 2009, the Honorable Marvin H. Dukes, III sitting as a Special Circuit Court Judge for the Beaufort County Court of Common Pleas, dismissed the causes of action seeking to set aside the judgment under Rule 60, SCRPC and for fraud pursuant to Rule 12(b)(6), SCRPC. Arata appealed, and on June 30, 2011 the South Carolina Court of Appeals in an unpublished opinion reversed and remanded the case back to the lower court.

FACTS

In this case Arata seeks to have the prior judgment set aside based upon extrinsic fraud. The claim is that Village West's attorney in Arata 1 made false representations and concealed lost records. The Complaint alleges that the Association through its attorney withheld evidence that the reconstruction and repair was in part from damage as a result of Hurricane Floyd, a casualty, and that the construction and repair was to both units and common elements. The complaint also alleges that Mr. Bullard falsely represented to the Court in Arata 1 that the repair

and reconstruction was not from a casualty and was only to common elements.

It is undisputed that Arata engaged in no discovery in Arata 1. The Court file also shows that the Summons and Complaint in Arata 1 was filed on March 14, 2005, and the Amended Complaint was served on the Aratas on April 11, 2005. Judgment was not granted in Arata 1 until January 25, 2006, which shows that the Arata 1 had in excess of eight (8) months to serve discovery requests. With respect to the casualty loss issue, it is undisputed that Hurricane Floyd passed by Hilton Head Island on September 16, 1999. The special assessment that Arata continues to contest was not imposed until 2004. All of the damage caused by Hurricane Floyd was repaired shortly after the storm and paid for out of the general operating funds of the Association. Further, Arata can point to no evidence that the reconstruction and repair work performed after resolution of the construction defect litigation was to anything other than common elements.

In Arata 1 the Court of Appeals stated that both the Association and Arata agreed that the Association had settled two lawsuits “involving construction related defects”. The ensuing special assessment imposed by the Association on a pro rata basis against all units in Village West was to cover the shortfall which occurred when the settlement proceeds from the two lawsuit were insufficient to pay for all of the necessary repairs to the buildings within Village West. The special assessment was imposed on a pro rata basis. The Court of Appeals in Arata 1 said this was proper because:

1. Article V, Section (e) of the Association’s Master Deed provides that “[t]he obligations of all Unit owners with regard to assessments for common expenses and the maintenance and repair of the individual Units shall be as provided in the By-laws...”;

2. Article VII, Section 6(c) of the By-Laws provides that “[a]ll maintenance, repair and replacement to the common elements as defined in the Master Deed, the painting and decorating of the exterior doors and exterior window sash and the washing of exterior glass shall be made by the Board... and shall be charged to the Unit Owners as a common expense...”; and

3. Article VII, Section (a) of the Master Deed defines Village West’s common elements to include “the foundation, roofs, perimeter walls, walls and partitions separating units, [and] load bearing floors...”.

Arata alleges and argues that other provisions in the Association’s By-Laws provide the proper framework to collect and apply the money obtained from settlement of the construction defect lawsuits.

The first is Article IX, which provides in pertinent part:

ARTICLE IX

RECONSTRUCTION AND REPAIR

In the event of casualty loss or damage to the Property, the Association’s Board of Directors shall be responsible for the proceeds of all casualty insurance to the repair or reconstruction of the Property in accordance with the provisions of this ARTICLE IX. Reconstruction or repair shall be mandatory unless two-thirds or more of the Property is destroyed or substantially damaged. If two-thirds or more of the Property is destroyed or substantially damaged, reconstruction shall not be mandatory ... If less than two-thirds of the Property is destroyed or substantially damaged, then such Property shall be repaired in the following manner:

...

(3) If the insurance proceeds paid to the Board are insufficient to cover the cost of reconstruction, the deficiency shall be paid as a special assessment by the Unit Owners whose units are being reconstructed or repaired in proportion to the damage done to their respective Units.

(4) The insurance proceeds received by the Board ... and any special assessments collected to cover a deficiency in insurance shall constitute a construction fund from which the Board ... shall disburse payment of the costs of reconstruction and

repair. The first disbursements from the construction fund shall be insurance proceeds; and if there is a balance in the fund after payment of all costs of reconstruction and repair, it shall be distributed to the Unit Owners who paid special assessments in proportion to their payments. Any balance remaining after such distribution shall be retained by the Association.

(R. pp. 81-83)

The second is Article X, which provides in relevant part:

ARTICLE X

INSURANCE TRUST

In the event of casualty loss to the Property, all insurance proceeds indemnifying the loss or damage shall be paid jointly to the Board of Directors as Insurance Trustee The Board of Directors, acting as Insurance Trustee, shall receive and hold all insurance proceeds in trust for the purposes stated in this ARTICLE X, and for the benefit of the Association, the Unit Owners, and their respective mortgagees in the following share:

(2) Insurance proceeds paid on account of loss or damage to less than all of the Units, when the damage is restored, shall be held for the benefit of Unit Owners of the damaged Units ... in proportion to the costs of repairing each damaged unit.

(R. p. 83)

Further, Arata alleges that three (3) documents voluntarily disclosed by the Association's previous attorney, provide sufficient basis to open or set aside the final judgment in Arata as the alleged failure to previously disclose them demonstrates extrinsic fraud perpetrated by the Association.

DISCUSSION

Court of Appeals wrote in its opinion in this case: "[w]ithout the Aratas' allegation of extrinsic fraud amounting to fraud on the court, the Regime is clearly entitled to the defense of re judicata, as found by the master". Accordingly, if Arata cannot prove extrinsic fraud, Arata is

not entitled to relief. Arata is unable to prove extrinsic fraud, because, among other things, Arata failed to engage in any discovery in Arata 1, and absent a discovery request, the Association had no obligation to disclose the documents which Arata now wants to rely on. As pointed out above, Arata had in excess of eight (8) months to serve discovery requests, but chose not to do so.

“South Carolina’s strong policy towards finality of judgments trumps a party’s ability to set aside a judgment where, as here the party could have discovered the evidence prior to trial”. Bowman v. Bowman 357 S.C. 146, 591 S.E.2d 654 (Ct. App. 2004). With respect to Arata’s claim to set aside the Arata 1 judgment for fraud, it is well settled in South Carolina that proof of extrinsic fraud is required. Aaron v. Mahl, 381 S.C.585, 674 S.E.2d 482 (2009); Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003). The Aratas allege in Arata 2 that the result in Arata 1 was procured by fraud by reason of the Association’s failure to voluntarily disclose three documents.

While the general rule of *res judicata* and collateral estoppel may not apply where extrinsic fraud has been practiced to procure the judgment, allegations that a party failed to disclose documents generally amount to intrinsic fraud. Aaron, 674 S.E.2d 482 (Alleged delay or failure to previously produce collection agreement during course of litigation did not amount to extrinsic fraud.); Chewning 579 S.E.2d 605) (“The subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud.”).

Extrinsic fraud, the only type of fraud for which a court may grant relief from a judgment, is fraud that induces a person not to present a case or deprives a person of the opportunity to be

heard. See Raby Const., L.L.P. v. Orr, 358 S.C. 10, 594 S.E.2d 478 (2004) (The alleged failure to disclose computer records which might have shown a different amount owed on a construction project did not constitute extrinsic fraud entitling relief from judgment especially where complaining party could have through diligence discovered the existence of such information during the underlying litigation.) It is undeniable that the documents, which Arata without basis assert were improperly withheld, and which form the basis for Arata's assertion that Association committed extrinsic fraud, were voluntarily produced by the Association while Arata 1 was still pending on appeal, and Arata conducted no discovery in Arata 1.

Intrinsic fraud, on the other hand, is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating the fraud. Chewning, 579 S.E.2d 605. The classic case of intrinsic fraud is perjured testimony or presenting forged documents at trial. Bryan v. Bryan, 220 S.C. 164, 66 S.E.2d 609 (1951); James F. Flanagan, SOUTH CAROLINA CIVIL PROCEDURE at 485 (2d ed.1996). Allegations that a party failed to disclose documents also generally amount to intrinsic, rather than extrinsic, fraud. Chewning, 579 S.E.2d 605. Relief may be granted for extrinsic but not intrinsic fraud on the theory that the latter deceptions should be discovered during the litigation itself, and to permit such relief undermines the stability of all judgments. Mr. G v. Mrs. G, 20 S.C. 305, 465 S.E.2d 101 (Ct.App. 1995); see also Bryan, 66 S.E.2d at 609 ("relief from a judgment is denied in cases of intrinsic fraud, on the theory that an issue which has been tried and passed upon in the original action should not be retried in an action for equitable relief against the judgment".)

Furthermore, when considering whether to grant relief from final judgments, "a court must balance the interest of finality against the need to provide a fair and just resolution of the

dispute.” Chewning, 579 S.E.2d 605. South Carolina’s appellate courts have a longstanding policy towards preserving final judgments and have recognized that important benefits are achieved by the preservation of final judgments. Id.; Raby Const., L.L.P. 594 S.E.2d 478.

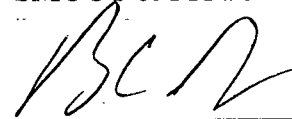
CONCLUSION.

Arata should be denied relief because Arata is unable to prove extrinsic fraud. Further, the casualty Arata points to in an attempt to get under other provisions in the Bylaws, was not connected or related to the special assessment that was imposed after resolution of the construction defect litigations, and there is no evidence that work was performed on anything other than the common elements.

Respectfully submitted.

SMOOT & PITTS

By:



Brian C. Pitts
15C Lafayette Place
P.O. Drawer 23439
Hilton Head Island, SC 29925-3439
(843) 681-3200
Attorneys for Respondent,
Village West Owners’ Association, Inc.
d/b/a Village West Horizontal Property
Regime

March 26, 2012

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

VILLAGE WEST HORIZONTAL
PROPERTY REGIME,

Plaintiff,

vs.

KENNETH C. ARATA AND
MADELEINE R. ARATA,

Defendants.

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 05-CP-07-475

AFFIDAVIT
OF
MARY PROBERT

BEAUFORT COUNTY
CLERK OF COURT
BEAUFORT, S.C.

2006 SEP 15 PM 2:31

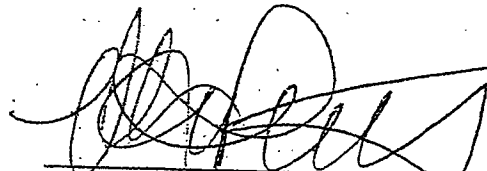
COMES NOW the affiant, and after being duly sworn, deposes and says as follows:

1. I am an adult, a citizen and resident of Beaufort County, South Carolina, an elected director of the plaintiff condominium, and serve as the president of that association.
2. That in the exercise of the duties of the office to which I was elected I participated with the other elected directors in resolving to include in the annual assessment for calendar year 2005 a specific sum to be collected proportionately from all owners for the purpose of effecting repairs on all of the buildings in the regime.
3. That notice of the amount due from each owner which included the due dates for the payment of installments was given to each owner in writing.
4. That the defendants refused to pay the first installment when due and after a second notice which was also refused by the defendants, the collection of the proportionate sum due from the defendants was referred to counsel for the association.
5. When payment was not forthcoming from the defendants the commencement of suit to collect the defendants' proportionate share was authorized by the directors and thereafter

commenced.

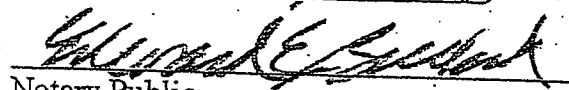
6. That in its answer to the complaint defendants asserted that the plaintiff had not complied with Article IX subpart (3) of the association bylaws and therefore lacked the authority to make an assessment against the defendant for repairing the association buildings.
7. That Article IX subpart (3) of the bylaws (a copy of which is attached) deals with reconstruction after a casualty loss where the proceeds of insurance are not sufficient to make the necessary repairs.
8. There has been no casualty loss and no casualty insurance proceeds have been paid to the association.
9. That the funds to affect the repairs to all five buildings include net settlement proceeds and proportionate assessments from all owners.

Further the affiant sayeth not.



Mary Probert

Sworn to before me
This 13th day of September, 2005.


Notary Public
My Commission Expires: 4/24/15

EEB/ce

BULLARD and FRIEDMAN, P. A.

ATTORNEYS AT LAW

Mailing Address:

Post Office Drawer 21784

Hilton Head Island, South Carolina 29925

EDWARD E. BULLARD*
SONJA N. FRIEDMAN◊Telephone: (843) 689-2525
Facsimile: (843) 689-3535*Also Licensed in California
◊Also Licensed in Connecticut and New Yorkceb@bullardfriedman.com
snf@bullardfriedman.com

August 24, 2007

VIA FACSIMILE ONLYJack D. Simrill, Esquire
671-4733Brian Dennison, Esquire
912/233-0811Douglas Baxter, Esquire
843/448-1533Stacey Canaday, Esquire
524-1463Re: Village West HPR v. Arata/Dodson

Dear Jack, Doug, Brian and Stacey:

We have possession of a box of records for Village West HPR that once was believed to have been lost. Our cursory review indicates that there are records which have relevance to the several suits involved between the regime and the Aratas and Ms. Dodson. You are each invited to review these records in our office and to cover, for copy costs, any documents that you wish to have to use in your respective cases. We further advise Mr. Simrill that to the extent these are documents which are relevant to the pending suit in which we represent opposing parties, we will offer into evidence such documents as the court will consider relevant.

For the benefit of all, the records are in one bankers box which is crammed as full as can be. Please arrange a time with Kelly to inspect the records.

With kind regards, I remain

Sincerely,

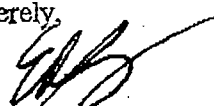

Edward E. BullardEEB/kr
Cc: VWHPR

Exhibit D

71

DELIVERY AND APPOINTMENTS: 8 LAFAYETTE PLACE, SUITE 101, HILTON HEAD ISLAND, SOUTH CAROLINA 29926

ANSWERS TO DEFENDANT'S INTERROGATORIES
(QUESTIONS #3, #10 AND #14)

3. For each person known to the Plaintiff or counsel to be a witness concerning the facts of this case, set forth a sufficient summary to inform the other party of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: The witnesses known to the Plaintiff or counsel to be witnesses concerning the facts of this case are: 1) Madeleine R. Arata, the Plaintiff, 2) Thomas J. Carlson, VP of Calibogue Construction, 3) Sonya Friedman, attorney, 4) James Donahoe. Each witness was present during the events and circumstances during and after the casualty damages of the Village West building structures caused by Hurricane Floyd. In addition, there are statements contained on pages #6 and #7 of the Memorandum in Support of the Motion For Summary Judgment in the Record on Appeal submitted by James Donahoe.

10. Identity any other person or entity, if any, you believe may be liable to the Plaintiffs for the matters set forth in the Complaint and the basis of the person(s) liability.

ANSWER: None.

14. Identify each person or entity who, since 1990, you have sued, or threatened to sue you, or asserted a claim against. For each matter identified, also identify the nature of the suit, threatened suit, or claim, the name of the attorney who represented you and any other person in the suit or threatened suit and the final disposition of it.

ANSWER: 1) Kenneth and Madeleine Arata vs. Jenny Wallpaper/ Jenny Ouzts
Magistrate Court, Case No. 0000383
Dismissed on 5-30-2000

Complaint for defective workmanship. The Defendant, Jenny Ouzts, relocated to parts unknown before the trial. Plaintiffs, pro se.

- 2) Village West Owners' Association vs. Madeleine R. Arata and Madeleine Dodson
Civil Action, Case No. 00-CP-07-997
Filed on 6-23-00

\$352.00 for landscaping materials and Temporary Restraining Order. Plaintiffs' attorney, Gregory Alford. Defendants' attorney, Harold McCormick.

- 3) Village West Owners' Association vs. Madeleine R. Arata and Madeleine Dodson
Civil Action, Case No. 00-CP-07-997
Settled on 8-30-2001

Mediation Agreement and Dismissal of Temporary Restraining Order. All matters resolved between the parties and Court dismissal of Restraining Order. Plaintiffs' attorney, Gregory Alford. Defendants' attorney, William Clark.

- 4) Village West Owners' Association vs. Madeleine R. Arata and Madeleine Dodson
Civil Action, Case No. 00-CP-07-997
Filed on 9-10-2002

Plaintiffs' Motion To Enforce Settlement Agreement and Defendants' Return To Notice Of Motion, And Motion To Enforce Agreement. Court found both parties at fault, and the matter was closed. Plaintiffs' attorney, Gregory Alford. Defendants' attorney, William Clark.

- 5) Madeleine R. Arata and Madeleine Dodson vs. Village West Owners' Association, Inc., and Mary Probert, Individually and as President of Village West Owners' Association, Inc.
Civil Action, Case No. 04-CP-07-112
Filed on 6-16-2004

Actual and punitive damages incurred by the Plaintiffs as a result of years of numerous acts of harassment perpetrated by Mary Probert with the assistance of the Village West Board of Directors, property management, and other employed contractors. Plaintiffs' attorney, Jack D. Simrill. Defendants' attorney, Erin D. Dean.

- 6) Village West HPR against Arata #6
Civil Action, Notice and Certificate of Lien
Filed on 2-22-2005

Property Lien filed on Plaintiffs property for the first month's late payment of scheduled assessment fees. Plaintiffs' attorney, Edward Bullard. Defendants' attorney, Jack Simrill.

- 7) Madeleine R. Arata and Kenneth C. Arata vs. Village West HPR, Village West Owners' Association, Inc., Mary Probert, Individually and as President of the Board of Directors of Village West Owners' Association, Inc., and Douglas Kimball, David Kilgus, Robert Miller, Robert Armour, Judy Simes, and Robert Spinnazzola, Individually and as Board of Directors of Village West Owners' Association
Civil Action, Case No. 05-CP-07-475

Filed on 5-10-2005

Plaintiffs' complaint against the Village West Board of Directors for damages resulting from negligence of Fiduciary Duty, Bad Faith, and Malice. Plaintiffs' attorney, Jack Simrill. Defendants' attorney, Edward Bullard.

- 8) Village West Horizontal Property Regime A/K/A Village West Owners' Association, Inc. vs. Madeleine Jean Dodson and Kenneth C. Arata
Civil Action, Case No. 05-CP-07-1753
Filed on 9-15-2005

Plaintiffs' complaint that Defendants conducted unauthorized modifications of the Defendant, Mrs. Dodson's villa porch. In addition, the Plaintiffs filed a mechanic's lien on Mrs. Dodson's property.

- 9) Madeleine R. Arata, Kenneth C. Arata and Madeleine Dodson vs. Village West HPR a/k/a Village West Owners' Association, Mary Probert, Cinda Seamon, Robert Miller, Jayne Williams and Laurette Doscher, Individually and As Members of the Board of Directors of Village West HPR
Civil Action, Case No. 07-CP- 00294
Filed on 2-2-2007

Plaintiffs' counterclaim to Defendants complaint in Case No. 05-CP-07-1753. Both cases settled by the parties on 3-4-2008. Plaintiffs' attorney, Jack Simrill. Defendants' attorney, David Dennison.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

COPY

MADELINE R. ARATA and KENNETH C. ARATA,

Plaintiffs,

vs.

CASE NO. 2009-CP-07-036

VILLAGE WEST OWNER'S ASSOCIATION, d/b/a VILLAGE WEST
HORIZONTAL PROPERTY REGIME,

Defendant.

HEARING BEFORE: HONORABLE MARVIN H. DUKES

DATE: March 26, 2012

TIME: 10:27 AM

LOCATION: Beaufort County Courthouse
102 Ribault Road, Room 212
Bluffton, SC

REPORTED BY: LORA L. McDANIEL,
Registered Professional Reporter

A. WILLIAM ROBERTS, JR. & ASSOCIATES

Fast, Accurate & Friendly

Charleston, SC	Hilton Head, SC	Myrtle Beach, SC
(843) 722-8414	(843) 785-3263	(843) 839-3376

Columbia, SC	Greenville, SC	Charlotte, NC
(803) 731-5224	(864) 234-7030	(704) 573-3919

1 APPEARANCES:

2 ATTORNEYS FOR THE PLAINTIFF
3 MADELINE R. and KENNETH C. ARATA:

4 LAW OFFICE OF JACK D. SIMRILL
5 BY: JACK D. SIMRILL
6 7 Lawton Road
7 Hilton Head, SC 29928
8 (843) 785-2134

9 ATTORNEYS FOR THE DEFENDANT
10 VILLAGE WEST HORIZONTAL PROPERTY REGIME:

11 SMOOT, PITTS, ELLIOTT & BIEL
12 BY: BRIAN PITTS
13 15-C Lafayette Place
14 Hilton Head, SC 29925
15 (843) 681-3200
16 brianpitts@speblaw.net

17 (INDEX AT REAR OF TRANSCRIPT)
18
19
20
21
22
23
24
25

1 THE COURT: Good morning, everyone. We're
2 here in 09-CP-07-00036, which is Arata versus Village
3 West. Could I get appearances for the record.
4 Mr. Pitts, starting with you, working your way around
5 this way please.

6 MR. PITTS: Brian Pitts, attorney for the
7 Defendant.

8 MS. NEBBIA: Carolyn Nebbia, president,
9 Village West.

10 MS. STEVENSON: Colette Stevenson,
11 treasurer, Village West.

12 MR. SIMRILL: Jack Simrill, attorney for
13 the Plaintiffs.

14 MS. DODSON: I'm Madeline Dodson. So what
15 now? That's who I am.

16 THE COURT: That's fine, Ms. Dodson. Ms.
17 Arata.

18 MS. ARATA: Madeline Arata, Plaintiff.

19 THE COURT: Thank you all very much. Last
20 week I had a telephone conference with the attorneys
21 in which we discussed a pair of summary judgment
22 motions, both of which I understand the parties have
23 filed. Both of which I've read. Both of which the
24 parties, I understand, agree to shorten time on as
25 both were filed prior to the notice requirement or

4

1 such that they could not be heard except by consent;
2 is that correct?

3 MR. PITTS: Yes, sir.

4 MR. SIMRILL: Yes, sir.

5 THE COURT: Mr. Simrill, yours was filed
6 first. So if there's nothing else anyone would like
7 to take up beforehand, we can certainly begin with
8 argument of those motions.

9 MR. SIMRILL: Before we get into that,
10 Your Honor, I had my client, Madeline Arata had a
11 little mishap. She fell and broke both of her ankles
12 and has been away in Connecticut since November.

13 And she came back and proofread the
14 memorandum for the first time. And she came across
15 and brought to my attention two errors in that
16 memorandum. One of them had to do with the spelling
17 of Madeline. I had Madeline C. Arata and Kenneth R.
18 Arata. That was backwards. It's Madeline R. Arata
19 and Kenneth C.

20 The other was the apartment shown in the
21 memorandum in support of the motion of summary
22 judgement indicated apartment 106. That was due to a
23 spell checker error. It just corrected that without
24 my catching it.

25 And I have prepared two pages of the

1 memorandum in support of summary judgment corrected.

2 I would ask the court to submit these.

3 I'm only concerned about this because, if
4 there's an appeal, I would like to have the record
5 corrected because, in previous appeals, there had
6 been some rather gross errors like this that didn't
7 bother them, but it bothers me.

8 THE COURT: I certainly have no objection.
9 Essentially the two corrections -- and this is the
10 memorandum. I guess that brings me to my question I
11 should've started with.

12 MR. SIMRILL: I have a copy for Counsel
13 and The Court.

14 THE COURT: Thank you very much. Has this
15 actually now been, the motion for summary judgment,
16 you've taken care of everything with the clerk of
17 court?

18 MR. SIMRILL: Yes, I have a copy of that.

19 THE COURT: I believe you. I was just
20 trying to make sure we have it all straight.

21 MR. SIMRILL: I made an extra copy. I
22 have it filed with the court.

23 THE COURT: No worries. I just want to
24 make sure we had all that taken care of before we
25 started.

6

1 Mr. Simrill, if there's nothing further
2 before we begin, I'll certainly give you, depending
3 on the outcome of this, everyone the opportunity for
4 an opening in the trial depending on how far we get
5 with this. We don't necessarily need that unless you
6 would like to give it to me.

7 MR. SIMRILL: Your Honor, I think the
8 opening has been covered substantially in the
9 memoranda that's been filed in this action. I think
10 The Court has a copy. Counsel has a copy of the
11 memorandum that has been corrected or will be
12 corrected by these corrections. I would stand on the
13 memorandum and the motion for summary judgement and
14 the memorandum that has been filed with respect to
15 the motion for summary judgement.

16 I would like to go ahead and question
17 witnesses or witness, the only really that witness we
18 have here. I do not believe the other witnesses have
19 been subpoenaed have been cancelled. I don't think
20 it's necessary for any other witness.

21 I think we have -- Madeline Arata is the
22 witness here this morning that I intend to question
23 her. I don't believe I have any other witnesses in
24 connection with the motion for summary judgment. If
25 I may proceed.

1 THE COURT: Let me ask you this. Was it
2 your intent to call witnesses for your motion for
3 summary judgement?

4 MR. SIMRILL: I think the record is
5 complete. I want to get in the record all the
6 documents in support of the motion for summary
7 judgement.

8 THE COURT: The motion for summary
9 judgment that I received a copy of and I understand
10 we had the issues with the filing, et cetera, had
11 attached to it an affidavit of Mary Probert and had a
12 number.

13 MR. SIMRILL: There's a number of them
14 that I wanted to question the witness about, get in
15 more detail about it.

16 THE COURT: Let me get Mr. Pitts' take on
17 that.

18 MR. PITTS: I'm not sure that would be
19 appropriate. I thought we were going to argue the
20 motions for summary judgment first and then,
21 depending on your ruling, go forward with the trial.

22 THE COURT: That was my understanding of
23 our scheduling we agreed on the telephone. We would
24 have the motion for summary judgment, yours first,
25 and then Mr. Pitts; then we would proceed.

8

1 MR. SIMRILL: Well, then I would have to
2 read the attachments to the motion for summary
3 judgment myself. I was planning to have the witness
4 do that.

5 THE COURT: You don't necessarily have to
6 read them verbatim. Why don't you do this. I'm not
7 going to tell you how to argue a motion for summary
8 judgment. Please proceed. You're first. Go ahead,
9 sir.

10 MR. SIMRILL: In other words, you're going
11 to allow me to proceed reading the attachments for
12 the motion for summary judgement. I wanted them in
13 the record. I wanted to have them stated in the
14 record. They are attached to the motion for summary
15 judgment.

16 I don't want to drag things out. I did go
17 to some length in setting this up so that they could
18 be explained more fully by the witness.

19 THE COURT: Let me inquire. Maybe I
20 misunderstood what was filed. I received a package
21 that I have before me; again, not stamped for reasons
22 that we discussed, dated March 19, 2012. In that
23 package is an unfiled motion for summary judgment and
24 notice of motion, a memorandum in support of motion
25 for summary judgment to which I understand you have

1 today amended with regard to a couple of charges.

2 MR. SIMRILL: All right.

3 THE COURT: I have listed as exhibit 1 a
4 damage control incident report, which consists
5 apparently, of two pages perhaps.

6 I have listed as exhibit 2, Village West
7 Owners Association Minutes.

8 Exhibit 3, which is two pages, exhibit 3
9 is an affidavit of Marry Probert, which consists of
10 two pages.

11 Exhibit 4 appears to be two pages of a
12 portion of a pleading of some sort.

13 Exhibit 5 is one page of a transcript.

14 Exhibit 6 is a Calibogue Construction
15 Company, Incorporated letter to Mr. Peter Sherratt
16 consisting of one page.

17 Exhibit 7 is a Village West partial scope
18 of repair work consisting of two pages.

19 Exhibit 8 is a Calibogue Construction
20 Company letter with what appears to be a note across
21 the front of the cover. It's dated April 24, 1999.
22 That's exhibit 8.

23 Exhibit 9 is an application and
24 certificate for payment.

25 Exhibit 10 is another letter dated May 11,

10

1 1999 Calibogue Construction, two pages. Maybe it's
2 three pages. There's a photograph.

3 Exhibit 11, letter from the office of
4 clerk of court consisting of two pages -- five pages.
5 Actually, the balance of the documents apparently are
6 exhibit 11 and purport to at least include certain
7 letters and checks that have something to do with a
8 bond and checks associated therewith.

9 That is the package that I received for
10 this morning's summary judgment motion.

11 MR. SIMRILL: What prompted my feeling
12 that I needed a witness on this is Mr. Pitts objected
13 to my request for admissions on several counts and I
14 felt that this -- that the testimony of the witness
15 was necessary to correct those objections to the
16 request for admissions, which the memorandum in
17 support of summary judgment was based upon that.

18 I would feel that from what you've quoted,
19 I don't believe that's necessary. Everything
20 apparently is admitted in his Answer to the Request
21 For Admissions, except I think two items. I thought
22 we had to address that. That was the purpose of the
23 testimony that I intended to clarify, any objections
24 that Mr. Pitts has or Village West has to the Request
25 for Admissions or the attachment to the motion in

1 support -- memorandum in support of motion for
2 summary judgment. I would be happy to stand on them
3 as they are if there's no objection to any of them.

4 THE COURT: Let's do this. I understood
5 we were going to hear motions for summary judgment.
6 I guess the question will be: Is there a scintilla
7 of material fact? Is there a reason to go ahead and
8 have testimony in this case?

9 With regard to your motion for summary
10 judgment, Mr. Simrill, I'm happy to hear from you on
11 it.

12 MR. SIMRILL: Well, I think as I said,
13 it's stated in the -- about as completely as I could
14 state it in the memorandum of support of summary
15 judgment, which I could go over point by point, but I
16 have submitted this to counsel and to the Court. I'm
17 happy to stand on it as is. I don't want to take up
18 unnecessary time with the Court.

19 THE COURT: We've got all day.

20 MR. SIMRILL: Well, I point out in
21 argument that summary judgment is appropriate when
22 there's clearly no genuine issue of material fact and
23 the moving party is entitled to a judgment as a
24 matter of law in support of that. Cited two cases in
25 the written argument. I don't think they need to be

12

1 cited again. Hunt versus Happy Valley Limited
2 Partnership. Cunningham versus Rice -- Cunningham ex
3 rae Grace versus Helping Hands, Inc.

4 And Rule 56(c) is South Carolina Rules of
5 civil procedure.

6 In the appeal to the Court of Appeals, the
7 Court of Appeals found that the Complaint properly
8 alleged extrinsic fraud, amounting to a fraud on the
9 court. And that res judicata does not bar collateral
10 attack of the Arata judgment and remanded for further
11 proceedings on the issue of damages and attorney's
12 fees.

13 On that, addressing the issues of
14 allegations of fraud are the SPM Defendants, Inc.,
15 September 17, 1999, damage control incident report of
16 Ray Dowling with a detailed list of damage in the
17 Village West Hilton Head Island hurricane-flood
18 damage book, that along with the affidavit of Mary
19 Probert, the elected director and president of
20 Village West, is what this motion for summary
21 judgment primarily is based upon.

22 In her affidavit, Mary Probert, on behalf
23 of Village West said there's been no casualty loss
24 and no casualty loss has been paid to the
25 association.

1 Taking up the first part of that, there's
2 no casualty loss, what I just referred to, the SPM
3 Defendant, Inc., September 19, 1999, damage control
4 incident report of Ray Dowling details, spells out
5 and details a Hurricane Floyd, which is a casualty
6 and is so specified in the minutes or rather in the
7 damage control incident report. It is spelled out
8 clearly as a hurricane, which is a casualty. And it
9 has the Hurricane Floyd damage report attached, which
10 shows the damage done by that report.

11 And based upon that, we think this clearly
12 establishes, on behalf of Village West, extrinsic
13 fraud, which is fraud upon the court. That along
14 with her affidavit there was no casualty is the proof
15 that establishes a casualty, which was denied, and I
16 think it clearly not only shows a false statement by
17 Mary Probert which is actually -- she could be
18 indicted for. It meets the requirement of proving
19 extrinsic fraud and fraud upon the court.

20 That basically is primarily the basis of
21 this motion for summary judgment. It conclusively
22 establishes extrinsic fraud by Village West.

23 The memorandum in support of the motion
24 for Summary Judgment also alleges the statements by
25 Ed Bullard. I will go to that exact language where

14

1 he indicated that there was no casualty. And the
2 damage to the property was solely to the common
3 elements, both of which have been proven to be false
4 by the documents that are submitted in support of the
5 memorandum in support of summary judgment. The
6 damages as shown in the documents, letters filed by,
7 I think, July 20, 1998, letter of Thomas Carlson,
8 vice-president of Calibogue Construction Company,
9 Inc. to Peter Sherratt. It lists damages to --(well,
10 I'll quote a line from this: Preliminary estimate
11 for removing as damaged done or work needed to be
12 done, preliminary estimate for removing and replacing
13 stucco window and sheathing is \$92,700, including
14 scaffolding, water flashing, head and sill build up.

15 THE COURT: Tell me where you are in the
16 package.

17 MR. SIMRILL: That is exhibit number 6.
18 And it points out repair to exterior wall cladding,
19 stucco replacement scope of the first and second
20 floor with a side elevation of units 32 and 40 and
21 rear elevation. The scope of remediation repairs
22 also includes overlaying the rear screen porch deck
23 by positive slope and waterproofing.

24 Anyway, to be more specific as to the
25 damage repaired, which was not merely to the common

1 elements, I go to exhibit number 7, which is attached
2 to the letter that I was reading from, July 28, 1998
3 letter of Carlson to Sherratt. The attachment is
4 Village West partial scope of repair work and
5 preliminary forensics investigation.

6 If I read number one, investigate and
7 implement repairs to the intersection of contiguous
8 walkways and heated walls on the front of building.
9 Work may include removal of a portion of the walkway
10 wall.

11 More specifically, paragraph two, units 32
12 and 40, termite infestation and water leaks.
13 Investigate and implement repairs in the side of the
14 building. Work will include interior repair work and
15 the replacement of eight windows.

16 Number three, units 30, 38, 46 and 54
17 water leaks. Investigate and implement repairs on
18 the rear building. Work will include the replacement
19 of four window systems, 12 window units, interior
20 repairs and attic louvre replacement. I think that's
21 enough to clearly establish repairs to the units
22 themselves and not merely to the common elements.

23 As to the allegations concerning the false
24 representations or the false statements by Bullard in
25 which he said there has been no casualty loss and no

16

1 casualty loss has been paid to the association,
2 that's on page five of the memorandum. If Village
3 West or attorneys, I think clearly we don't have
4 specific knowledge that they knew that what they said
5 was false.

6 Going on to page seven, the first
7 paragraph: If Village West or its attorneys did not
8 have knowledge of the falsity or intent to deceive,
9 it would've been constructive fraud. The fraud
10 appearing on the record in this case was constructive
11 fraud arising from a breach of fiduciary duty owed to
12 the Aratas. I quote the article of the bylaws with
13 respect to that.

14 And I go on to add in this: An intent to
15 deceive is an essential element of actual fraud,
16 neither dishonesty of purpose nor intent to deceive
17 is an essential element of fraud -- excuse me --
18 essential element of constructive fraud. And the
19 presence or absence of such an intent distinguishes
20 actual fraud from constructive fraud.

21 Moreover, and I cite Green versus Brown,
22 the cite is in there, 199 S.C. 219, 119 S.C.2d 114,
23 (1942). Moreover constructive fraud has the same
24 legal effect as actual fraud. Citing State versus
25 Daniel versus Strong. 185 S.C. 27, 192 S.C.2d 671,

1 (1937).

2 In conclusion, before conclusively
3 establishing repairs both to the common elements and
4 the owners' units an extrinsic fraud amounting to
5 fraud on the court, entitling the Plaintiffs to
6 actual and punitive and exemplary damages for which
7 the Plaintiffs have pled.

8 I point out the basis of the egregious
9 action of the president and the other members of the
10 board of directors to be present and participate in
11 September 28, 1999 Village West owners association
12 board of directors, September-28, 1999 meeting, the
13 Aratas would be entitled to actual damages in the
14 amount of \$77,659.3, which I think is a minor error.
15 Probably 30 cents. Plus interest to date.

16 The amount Arata is out-of-pocket for the
17 bond required for the fee and the adverse decision
18 which the Court of Appeals, in unpublished opinion
19 number 2011-UP-365, June 20, 2011, reversed and
20 remanded, plus interest to date and punitive and
21 exemplary damages as provided in South Carolina Code
22 Annotated, Section 15-32-510, Section 15-32-520 and
23 15-32-530. Those sections were enacted, I believe,
24 only recently in 2011, I believe.

25 I think that substantially states the

18

1 Plaintiff's case. We feel that Plaintiff has proven
2 conclusively entitlement to summary judgment on the
3 basis of these facts and allegations.

4 THE COURT: Thank you, sir. Mr. Pitts,
5 happy to hear from you, sir.

6 MR. PITTS: Your Honor, I'm not sure if we
7 need to go back and summarize the history of the
8 case.

9 THE COURT: Feel free to. Please go
10 ahead.

11 MR. PITTS: Originally, in 2005, Village
12 West brought a lawsuit against the Aratas to recover
13 \$34,000 special assessment, which was imposed after
14 construction defect litigation settled.

15 And then, based upon the cost to make
16 repairs, there was a shortfall, which was ordered in
17 a pro rata special assessment that they didn't want
18 to pay. Judge Gregory granted summary judgement in
19 favor of Village West. And it was appealed to the
20 Supreme Court.

21 In connection with that case, they posted
22 a \$75,000 bond, which I think on its face said that,
23 if Village West prevailed, it would be immediately
24 paid over to Village West.

25 On appeal, the Court of Appeals affirmed

1 Judge Gregory, and the Supreme Court denied cert.
2 The case came back down.

3 This is the first Arata case. And
4 Mr. Bullard wrote the clerk a letter, and the clerk
5 paid \$75,000 over to Mr. Bullard, who subsequently
6 paid at least a portion of the Village West monies
7 minus attorney's fees and things.

8 After that, in 2009, the Aratas brought
9 the second suit concerning the special assessment.
10 And what they alleged in the suit was that
11 Mr. Bullard had not disclosed, while the suit was
12 pending, the existence of a box of documents that
13 they then had a chance to look at the box of
14 documents, and there were some records in there that
15 they say would've compelled a different result.

16 And they alleged in this case we're here
17 on today extrinsic fraud as a basis for relief. You
18 granted our motion to dismiss based upon res
19 judicata. They appealed it to the Court of Appeals.
20 And the Court of Appeals reversed and said they had
21 at least alleged a cause of action for extrinsic
22 fraud. In fact, Court of Appeals wrote and said:
23 Without the Aratas' allegations of extrinsic fraud
24 amounting to fraud on the court, the regime is
25 clearly entitled to the defense of res judicata as

20

1 found by the master.

2 It's our position now that the facts have
3 come out, clearly, they can't make out a case for
4 extrinsic fraud. And those facts are undisputed.

5 First point I want to make is that, of three things
6 Mr. Simrill is talking about today; the affidavit of
7 Mary Probert and the false statements of Ed Bullard.

8 I object to The Court's consideration of
9 any of those things. I guess what he's trying to
10 argue now, those are perjured statements, which I
11 don't agree with; that's what he's arguing. They're
12 not contained in the pleadings of this matter. I
13 move to have The Court not consider those based upon
14 the fact that they're outside the scope of the
15 pleadings. The pleading only allege facts concerning
16 the failure to disclose the box, the alleged failure
17 to disclose the box.

18 The other point I'd like to make
19 evidentiary, the statement in the transcript they
20 point to of Ed Bullard. I think consideration of
21 that violates -- I move to have you not consider it
22 additionally on the grounds that it violates the Dead
23 Man Statute. Mr. Bullard is obviously not here.

24 MR. SIMRILL: I'm sorry, I did not hear
25 that. Violates what?

1 MR. PITTS:: The Dead Man Statute.
2 Getting now to the specifics of his argument, as best
3 I can figure, he's arguing that these documents
4 concerning Hurricane Floyd somehow suggest there's
5 been a casualty, which in their mind and as they
6 argued, they think would allow them to go under
7 certain provisions in the bylaws, which would compel
8 a different result. It wouldn't be a pro rata in
9 their mind, a pro rata imposition of the special
10 assessment.

11 The problem with that is it's undisputed,
12 several things; one, the special assessments we're
13 talking about was imposed in 2004. Hurricane Floyd
14 was September 16, 1999. The affidavit of Mr. Dowling
15 I've submitted says that he was the property manager
16 at that time for Village West. He prepared the
17 inspection report and the damage list. And he says
18 he coordinated the repairs and that all the repairs
19 were made. They were not made with a special
20 assessment back then. They were just paid in the
21 normal course of business out of their general
22 operating fund.

23 There's an account ledger that shows some
24 payments. There's also a letter there where he's
25 asking a building -- a roofing company to come do the

22

1 roof repairs. As a matter of fact, it just doesn't
2 tie up the fact that they say there was a casualty
3 with Hurricane Floyd. That has nothing to do with
4 the special assessment.

5 It's undisputed the special assessment was
6 imposed only as a result of a shortfall from the
7 second construction defect litigation. That's the
8 point I would make there. And that's what I had to
9 say with respect to his motion for summary judgment.

10 The other thing I'd point out, we filed an
11 affidavit from Tom Carlson, Calibogue Construction,
12 which says that he was employed by Village West in
13 connection with construction litigation, defect
14 litigation to do forensic examination, forensic and
15 proto-type repairs as well as other repairs on the
16 buildings that had to do with that that litigation
17 and that at no time he did any repairs for casualty
18 loss for Hurricane Floyd. Again, that was done in
19 connection with the construction defect litigation
20 and has nothing to do with the settlement of the
21 construction defect litigation.

22 That shortfall and the undisputed
23 testimony that the construction work was done by a
24 different construction company called Rice Cleveland
25 out of Greenville, South Carolina as well as they had

1 a direct contract with Metalcrafts which did the
2 roofs. It's undisputed they were the folks that did
3 the work there and that Mr. Carlson's firm had
4 nothing to do with the special assessment and
5 construction work done in conjunction with that
6 special assessment.

7 That's my points I'd like to make with
8 respect to his motion for summary judgment.

9 THE COURT: All right. You're welcome to
10 continue on into yours, if you like.

11 MR. PITTS: Our motion for summary
12 judgment is based upon primarily two things. As I
13 pointed out, the Court of Appeals said, without the
14 allegation of extrinsic fraud, the regime is clearly
15 entitled to the defense of res judicata found by the
16 master.

17 Our position is based upon the undisputed
18 facts in this case, and the law, there's no way they
19 can make out a case for extrinsic fraud. Extrinsic
20 fraud is the only type of fraud for which a court may
21 grant relief from a judgement. It is fraud that
22 induces a person not to present a case or to apprise
23 a person of the opportunity to be heard.

24 The case law is clear that, in the
25 underlying litigation we're now referring to, Arata

24

1 one, they would've had the opportunity to discover
2 the allege fraud, then they're not entitled to relief
3 from the judgement. And this is a case of Bowman
4 versus Bowman cited in the memorandum: South
5 Carolina's strong policy towards finality of
6 judgements trumps a party's ability to set aside
7 judgement whereas here the party could discover the
8 evidence prior to trial.

9 In Aaron versus Mull case, Supreme Court
10 case: Alleged delay or failure to produce collection
11 agreement during the course of litigation did not
12 amount to extrinsic fraud.

13 Raby Construction versus Orr: The alleged
14 failure to disclose computer records, which might've
15 shown a different amount owed on a construction
16 project did not constitute extrinsic fraud,
17 especially where complaining party could've, through
18 diligence, discovered the existence of such
19 information during the underlying litigation.

20 In Arata one, it is undisputed, they've
21 admitted it in the Response to Request for
22 Admissions. Ms. Arata has admitted in her deposition
23 testimony there was no discovery done in Arata one.

24 It's also undisputed, and The Court can
25 take judicial notice of the court file in that case,

1 that in Arata one, the summons and Amended Complaint
2 were filed on March 14, 2005. The Amended Complaint
3 was served on the Aratas on April 11, 2005.

4 Judge Gregory did not grant judgement
5 until January 25, 2006, in excess of eight months.
6 That would've been the period of time they could've
7 done discovery, and they didn't do it.

8 So that's the basis for our motion for
9 summary judgment on extrinsic fraud.

10 The other ground has to do with the
11 allegation of the casualty. I explained we filed
12 affidavits that clearly show and it's undisputed that
13 the casualty they want to point to, Hurricane Floyd,
14 was in 1999. All of that damage was repaired. And
15 there's no link or connection whatsoever between that
16 and the 2004 special assessment after settlement of a
17 construction defect litigation. That's based upon
18 Mr. Dowling's affidavit. It says everything was
19 repaired. And it's based upon Mr. Carlson's
20 affidavit as well. That's our argument on that
21 ground.

22 THE COURT: Anything else on your motion?

23 MR. PITTS: No, sir.

24 THE COURT: Mr. Simrill, any response?

25 MR. SIMRILL: In response to his argument

26

1 in connection with Plaintiff's motion, he said that
2 the repairs were made shortly after the Hurricane
3 Floyd. I would point to the Village West Owners'
4 Association board of minutes meeting of September
5 28th -- actually, minutes of an August 24, 1999
6 meeting. The minutes are dated September 28, 1999,
7 in which it says Ray Dowling gave management a
8 report: A hurricane damage report has been compiled
9 and submitted to our insurance company.

10 There's nothing in here to indicate the
11 amount of damages. There's nothing to indicate that
12 a claim was filed. We don't have anything to show
13 that any money -- I think they say 50 percent of it.
14 There was something that was submitted to indicate
15 something about how payment was to be made, which was
16 charged against the general funds of Village West,
17 which is from -- which was arrived at from
18 contributions from all the members. The same as an
19 assessment, direct assessment that came out of the
20 general funds. That would come out of the pocket of
21 every owner in Village West.

22 I just want to point out specifically that
23 no amount of damages are shown anywhere with respect
24 to repair of the Hurricane Floyd damage. And I think
25 that leaves us with nothing to establish anything

1 based upon the damage control incident report which
2 clearly sets out a casualty which has been denied by
3 both Mary Probert and Bullard.

4 As far as the Dead Man Statute, we don't
5 have to rely solely on Bullard's testimony since he's
6 dead. We have the same thing from -- or even more so
7 from Mary Probert.

8 Going on to his motion for summary
9 judgment, arguing that the Defendant in Arata one, I
10 think this is referred to, could've discovered
11 evidence prior to the trial, in the face of Probert's
12 sworn affidavit, which was in evidence in that case,
13 if there was no casualty, then they would be misled
14 as to thinking there was no reason for going further.

15 A sworn affidavit, which we have
16 determined to be false now, led the Defendant in
17 Arata one not to seek discovery and ended up having
18 to rely on what Probert said, believing it to be the
19 truth. That is their excuse for not seeking
20 discovery on that point even though they made an
21 extensive argument in their appeal that the damage
22 was done and repair could've been established as
23 being from a casualty based on the allegations of the
24 pleadings. We were not sustained in that. I think
25 the opinion of the Court of Appeals in that case

1 certainly didn't take into consideration -- it took
2 into consideration there was no allegation anywhere
3 in the record or any evidence of a casualty.

4 I think clearly there's no merit to
5 Village West's motion for summary judgment. We think
6 the motion for summary judgment is made as
7 substantiated completely by the testimony or by the
8 allegations related to Mary Probert and Ray Dowling's
9 damage control incident report and the minutes of the
10 board of directors meeting of August 24, 1996 of
11 which Mary Probert was secretary and prepared the
12 minutes to the meeting.

13 We think Plaintiffs' case in case number
14 09-CP-07-036 is made out, and summary judgment should
15 be granted on the basis of the motion and the
16 memorandum in support of the motion.

17 THE COURT: I'm going to take both motions
18 under advisement.

19 MR. PITTS: May I make one statement?

20 THE COURT: Sure, I'm sorry.

21 MR. PITTS: With respect to the Probert
22 affidavit he talks about, again, it's outside the
23 scope of the pleadings. There's nothing about
24 perjury alleged in the Complaint. It all concerns
25 this box of records.

1 The other point is it's not false. He
2 keeps saying they've proven it's false.

3 MR. SIMRILL: Excuse me, your Honor, there
4 was a cough behind me. I missed the last part of
5 what he said.

6 THE COURT: Maybe it might be time to
7 close that door. Whoever is closest to that door,
8 push that wedge out. I appreciate that. And the
9 phone rang in the middle of your statement.

10 MR. SIMRILL: I'm sorry, I didn't mean to
11 interrupt.

12 THE COURT: No, that's all right. If you
13 can't hear, you can't hear. I sit down there and
14 oftentimes I can't hear because of that door. Go
15 ahead, Mr. Pitts.

16 MR. PITTS: The Probert affidavit, they're
17 suggesting it was false because there was a casualty.
18 There was no casualty at the time of the 2004 special
19 assessment. It has nothing to do with Hurricane
20 Floyd four-and-a-half, five years earlier, which all
21 was paid for. And it's all undisputed. So there's
22 nothing false about the affidavit at all or the
23 statement by Mr. Bullard, if he said it, that there
24 was no casualty. It's absolutely true as relates to
25 the special assessment, and it's undisputed.

30

1 One other thing, Mr. Bullard, absent the
2 discovery request, had no obligation to disclose any
3 records in the first case. He actually did
4 voluntarily, while the case was still on appeal,
5 write Mr. Simrill -- there was other litigation
6 pending -- as well as some other lawyers and say:
7 I've got this box of records, you guys can come look
8 at it, if you want to look at it.

9 THE COURT: Mr. Simrill, what about that?
10 Did Mr. Bullard have any obligation that you're aware
11 of?

12 MR. SIMRILL: No, he didn't. We
13 appreciate his kindness. And apparently he had been
14 through the records himself and didn't find them. We
15 certainly found something in them.

16 THE COURT: As I understand the cause of
17 action brought by the Plaintiff, causes of action,
18 one is for accounting, which nobody has addressed;
19 that may not be an issue. I don't know. We can deal
20 with that at the appropriate time.

21 The issues that relate to the allegation
22 of the fraud, in the pleadings, those deal with this
23 box. Is that correct? You're answering
24 affirmatively?

25 MR. SIMRILL: The action is for concealing

1 matters like he alleged there was no casualty in the
2 record. He alleged that now. And there was a
3 casualty.

4 This business about -- I don't think
5 Probert, having prepared the minutes to a meeting
6 pertaining to a casualty in 1998 or '99, could be
7 excused from remembering a casualty in 2005 because
8 she gave the affidavit in 2005 that there was no
9 casualty in 1999 or 1998 and '99. She prepared the
10 minutes of meeting pertaining to a casualty.

11 I don't think that time lapse would excuse
12 her -- her memory would excuse her from perjury. I
13 think that is a criminal offense. I'm not too sure,
14 go back to your question about, if you would let me
15 know what was bothering you right there a moment ago.
16 You mentioned something about --

17 THE COURT: Let me ask you this. You, of
18 course, had an opportunity, Mr. Simrill, to review
19 the affidavits of Tom Carlson and Ray Dowling, which
20 are part of Defendant's motions today. Is there
21 anything in your record that conflicts with their
22 sworn testimony in these affidavits?

23 MR. SIMRILL: Anything in my records that
24 conflict with their testimony in the affidavits?

25 THE COURT: Is there any material issue of

32

1 fact in dispute but that these were two different
2 events which seems to be what Ray Dowling's, and I
3 guess also Tom Carlson's, affidavits say.

4 MR. SIMRILL: Thomas Carlson's affidavit
5 has nothing to do with casualty that I see anything.

6 THE COURT: I think that's correct.

7 MR. SIMRILL: Certainly Mary Probert's
8 affidavit of 2005 has to do with the casualty that
9 she had full knowledge of by having taken the minutes
10 of a meeting which reported the casualty and that it
11 had been reported to the insurance company, which
12 happens to be false because -- if it was, there's no
13 evidence submitted of a claim. There's no evidence
14 submitted of the amount of damages.

15 THE COURT: Do you have any evidence from
16 the insurance company to back that up?

17 MR. SIMRILL: No. I don't have evidence
18 of something that a claim is not there. I have
19 evidence of the damages that were done, which is
20 attached to the statement of Ray Dowling about the
21 casualty. About Hurricane Floyd.

22 He goes into detail about the damages done
23 but there's no value put on the cost of repairing,
24 and there's no evidence that anything was ever
25 submitted to the insurance company, but there is a

1 statement in the minutes of the meeting that Mary
2 Probert prepared that it was submitted to an
3 insurance company. There is no evidence of that. We
4 don't have the amount of it.

5 We certainly know that the damages were
6 specifically outlined and detailed and attached to
7 the report of Ray Dowling.

8 THE COURT: Take that -- I'm trying to
9 figure out whether or not there are material issues
10 of fact. Take that as true for a moment. Ray
11 Dowling, in his affidavit, says that there was a 1999
12 Hurricane Floyd, which I guess we all remember.
13 There were certain damages. And they were paid out
14 of the general operating account. And there was no
15 special assessment. That was a casualty loss that
16 began and ended, according to his affidavit, and was
17 over.

18 And the issue with regard to the
19 construction litigation was an entirely different
20 matter, seems to be what his affidavit says. Thomas
21 Carlson's affidavit -- again, y'all certainly had
22 more time to look at these than I have. Please
23 correct me if I'm wrong. He appears to deal with the
24 construction repairs.

25 MR. SIMRILL: Your Honor, I didn't mean to

34

1 interrupt you. If you read the allegations of the
2 Complaint and Amended Complaint in here, this is
3 brought on everything. There's nothing different
4 about what happened as far as Hurricane Floyd and the
5 other thing. They're combined together in the
6 Complaint here. I think the Court of Appeals
7 addressed that.

8 THE COURT: What do you mean combined
9 together? Maybe I'm missing something.

10 MR. SIMRILL: The Complaint, if you go
11 with the Complaint, it alleges the needed repairs
12 that were corrected in Hurricane Floyd. I'm looking
13 at paragraph ten which says: Village West notified
14 Plaintiff they have a box of records crammed in
15 banker's boxes relative to case number 475 case,
16 which had not been disclosed during the pendency of
17 the action in low court. These records included
18 Village West HOA, homeowner's association Hurricane
19 Floyd damage report, which is attached hereto, a
20 letter from Carlson to Peter Sherratt giving
21 preliminary estimate of cost to repair Clipper
22 building.

23 In one paragraph, it covers both Hurricane
24 Floyd and the \$92,700 damages. I don't see the point
25 Your Honor is making here.

1 THE COURT: I wasn't trying to make a
2 point. I was just asking a question. As I
3 understand the underlying case, the underlying case,
4 y'all correct me if I'm wrong, was for a special
5 assessment that was put in place to pay the balance
6 of the amount due after the construction litigation.
7 As I understand the underlying case, I'm happy to be
8 corrected -- again, you've lived with this for years,
9 I've dealt with it for short spans of time with great
10 spans of time between them -- the underlying case and
11 the judgment was not associated with Hurricane Floyd.
12 If I need to be readjusted on that, please tell me.

13 MR. SIMRILL: It was concealed from
14 everybody. It was concealed from everybody in
15 connection with the first action that Hurricane Floyd
16 had taken place. That was part of what was
17 concealed.

18 THE COURT: Okay.

19 MR. SIMRILL: Talking about this special
20 assessment, that's the problem we're concerned with.
21 The Spinnaker building was not involved in the
22 construction yet the special assessment, because of a
23 deficiency in the amount to correct four buildings,
24 was made against the Spinnaker building owners also,
25 which had nothing to do with the action in which

36

1 there was a shortfall in the recovery.

2 It was just -- they just went to Spinnaker,
3 building and assessed these people for an appropriate
4 share, an equal share with everyone else for
5 something that did not pertain to the Spinnaker
6 building.

7 THE COURT: You're talking about the
8 casualty, the hurricane.

9 MR. SIMRILL: Yeah -- no, I'm talking
10 about the damages that were repaired in the Spinnaker
11 building. It also would have to include the cost of
12 the repairs to the Spinnaker building and other
13 buildings done by Hurricane Floyd.

14 When something is paid out of the general
15 fund, that's an assessment against all of the owners.
16 It puts us in the same category as everything else
17 even though it's not the same assessment. I don't
18 see how you can separate that.

19 THE COURT: I don't know whether it can be
20 separated or not. Here's my question. I have an
21 affidavit in here somewhere that says that there was
22 a 1998 storm event. I guess it was '98, Hurricane
23 Floyd.

24 MR. PITTS: '99.

25 THE COURT: I'm sorry. There were damages

1 associated with Hurricane Floyd, and there's a list
2 of what the damages are.

3 MR. SIMRILL: Right.

4 THE COURT: The affidavit, at least as I
5 understand, let me know if I misunderstand it, I
6 think I'm talking about the affidavit of Mr. Dowling
7 in here. Mr. Dowling states and there's some
8 attachments, he made a list of things that were
9 associated with Hurricane Floyd, that he got those
10 repaired and that there was no special assessment.
11 In fact, paragraph five of his affidavit says the
12 bills for the cost to repair the damage caused by
13 Hurricane Floyd were paid out of the general
14 operating account of Village West Owner's
15 Association, and there were no special assessments to
16 the property owners to cover the cost of these
17 repairs. That's paragraph five of his affidavit,
18 that there was no special assessment.

19 It has a number of attachments on here and
20 describes, I guess -- in fact, there's some copies of
21 what I presume were checks, for instance, to the
22 shutter repair people, et cetera.

23 With regard to Hurricane Floyd, there is
24 the affidavit of Ray Dowling that asserts there was
25 no special assessment on this or any other property

38

1 as a result of Hurricane Floyd. Is there any
2 evidence to the contrary?

3 MR. SIMRILL: What I want to know, if
4 there was no special assessment, who paid for this?
5 Who paid for it? Village West has no independent
6 income except from the unit owners. Who paid the
7 damages to the buildings as a result of Hurricane
8 Floyd?

9 THE COURT: That's a question. I don't
10 know if it's evidence. Let me do this. Mr. Pitts, I
11 haven't given an opportunity to answer any of this.
12 I apologize.

13 MR. SIMRILL: One further thing I want to
14 point out. The money from the action against the
15 builder of the Spinnaker building, close to \$300,000
16 was recovered. And Mrs. Arata, who was there, knows
17 this. And the record will show that the money that
18 was recovered, close to \$300,000 that was recovered,
19 it was recorded by the Court of Appeals as 300,000.
20 I think it is maybe \$290,000. The money from that
21 was used, from the Spinnaker building was used on the
22 repairs that were made to the other four buildings in
23 Village West. That's a matter of record.

24 And then they got up a an assessment
25 against all of the owners, including Spinnaker, for

1 the repairs as a result of the shortfall in the
2 second action against different builders of the four
3 other buildings. This has all been -- I mean, we're
4 talking about money that has been obtained from the
5 owners. And the manner in which it was obtained I
6 think is irrelevant to the purpose -- to the actions
7 that's before Your Honor.

8 It all comes from the money -- the repairs
9 had to have come from the owners of the units. And
10 even though, in connection with Hurricane Floyd,
11 Mr. Dowling says that he submitted a claim to the
12 insurance company, but there's no evidence in the
13 record anywhere of that claim having been filed or
14 the amount of the claim.

15 Instead, the evidence is from him that it
16 was paid out of the general funds, which is the same
17 as an assessment against the owners. I can't see
18 where that would be significant. We have here in
19 this case repairs to the building for defective
20 construction. We have Hurricane Floyd, all of which
21 were paid for out of funds obtained from owners
22 either by the special assessment. The assessment
23 against the Spinnaker building people, who had
24 nothing to do with the deficiency in the recovery in
25 the action on behalf of all of the four other

40

1 buildings.

2 THE COURT: Let me ask a quick question so
3 I can follow your line of reasoning here. The case
4 that was before Judge Gregory many, many years ago,
5 was that for failure to pay a special assessment?
6 Wasn't that what that case was about?

7 MR. PITTS: Absolutely.

8 THE COURT: It was about failure to pay
9 the special assessment associated with the
10 construction litigation; is that not right?

11 MR. SIMRILL: That's right, on the four
12 buildings other than the Spinnaker building.

13 THE COURT: I guess perhaps I'm
14 misunderstanding.

15 MR. SIMRILL: That's where they went
16 astray right there. They had a deficiency and the
17 need of funds to reconstruct or repair the four
18 buildings other than the Spinnaker building. There's
19 where they went wrong. They made the assessment
20 against --

21 THE COURT: I guess I'm trying to figure
22 out the relevance of the Hurricane Floyd issue. Is
23 it then accurate to say there was no special
24 assessment over Hurricane Floyd?

25 MR. SIMRILL: Not in the form of a special

1 assessment. They certainly got the funds from the
2 unit owners.

3 THE COURT: The lawsuit in front of Judge
4 Gregory was about a special assessment?

5 MR. SIMRILL: He quoted -- if you look at
6 the decision by Judge Gregory, you will see in a
7 paragraph there that there was no casualty. That was
8 raised somehow in that action. And there's a
9 statement from him there was no casualty. And there
10 happens to have been a casualty at the time of the
11 decision.

12 MR. PITTS: Your Honor.

13 THE COURT: Yes, sir.

14 MR. PITTS: Mrs. Arata in her deposition
15 admits that the special assessment was a result of
16 the shortfall in the construction defect litigation;
17 it's an undisputed fact. It's also found in a fact
18 in both Court of Appeals opinions. It's not a
19 dispute.

20 MR. SIMRILL: Wait a minute.

21 MR. PITTS: Mr. Simrill keeps talking
22 about the Spinnaker building not included in the
23 repair work. The Spinnaker building was not part of
24 the second construction defect litigation. It had a
25 previous case.

1 But in the special assessment, there was
2 absolutely, and it's admitted again by Mrs. Arata in
3 her deposition, of a bunch of work done to that
4 building. The whole list she admits to in her
5 deposition.

6 THE COURT: Let's do this. There may very
7 well be much more than a scintilla of material fact
8 somewhere in all of this. Nevertheless, I'm not
9 going to deny anything right now. I'm going to take
10 them under advisement while we proceed with the
11 trial. Does anyone need a break before we begin?

12 MR. PITTS: If we could for a few minutes.

13 THE COURT: Let's take a break and launch
14 right into it.

15 (A recess transpired from 11:35 a.m. until
16 11:41 a.m.)

17 THE COURT: Anything before we start
18 again? Mr. Simrill, call your first witness, please,
19 sir.

20 MR. SIMRILL: Madeline Arata.

21 THE COURT: Madeline Arata, face opposite
22 the court reporter. Before you sit down, let me get
23 you to raise your right hand.

24 MADELINE ARATA

25 being first duly sworn, testified as follows:

1 THE COURT: Please have a seat. State
2 your whole name for the record and your address,
3 please.

4 THE WITNESS: My name is Madeline Rose
5 Arata. My address is number six Governor's Harbor,
6 Hilton Head Island, South Carolina 29926.

7 THE COURT: Thank you. Please answer any
8 questions your attorney may have.

9 THE WITNESS: All right.

10 DIRECT EXAMINATION

11 BY MR. SIMRILL:

12 Q. You've already stated your name for the
13 record. In what capacity are you in this lawsuit?

14 A. I'm the Plaintiff.

15 Q. You are one of the owners of apartment six
16 in Village West Horizontal Property Regime?

17 A. Yes, I am.

18 Q. I'm going to refer to that as Village
19 West, not the full name of it. When did you first
20 move into apartment six of the Hilton Head Village
21 West?

22 A. In 1996.

23 Q. And are you familiar with all the
24 proceedings that took place with regard to the
25 lawsuit by Village West against the builder of the

44

1 Spinnaker building?

2 A. Yes.

3 Q. Who was the builder in that?

4 A. We never -- the homeowners were never
5 given the name of the builder. We had no idea.

6 Q. As a result of that --

7 THE COURT: Mr. Simrill, just a quick
8 question. Is Ms. Arata in the Spinnaker building?
9 How many buildings are there? Which one is she in?

10 MR. SIMRILL: She's in the Spinnaker
11 building. I mentioned apartment six. I meant to say
12 Spinnaker Building.

13 THE COURT: Got it.

14 BY MR. SIMRILL:

15 Q. What was the outcome of the lawsuit
16 against the builder of the Spinnaker building in that
17 lawsuit? What was the year and the date of the suit
18 and the year and the recovery in that?

19 A. I believe the lawsuit, the Spinnaker
20 building lawsuit settled, I believe, it was 1999. I
21 can't give you the exact dates.

22 Q. Do the best you can with dates.

23 A. That's when it was settled. And the
24 Spinnaker building was awarded \$290,000 in that
25 settlement against the contractor builder.

1 Q. What was the disposition of that money?
2 What happened to the recovery?

3 A. Shortly after -- Hurricane Floyd occurred
4 in 1999 as well. The list of repairs that were
5 filed, according to what I just found out from Ray
6 Dowling and Thomas Carlson of Calibogue Construction,
7 there were statements made by board of directors at
8 homeowner meetings stating that they were short on
9 funds to do repairs, and they were going to take out
10 a loan from NationsBank. I believe it was
11 NationsBank; a short loan.

12 And as they were making payments on that
13 loan, simultaneously, the Spinnaker building lawsuit
14 was settled. And they were going to take the revenue
15 from that settlement to pay off the loan and make the
16 repairs.

17 As far as the homeowners of the Spinnaker
18 building, as little as they were aware, the bulk of
19 that money, the \$290,000 went towards repairs of the
20 other four buildings, not the Spinnaker building per
21 se. I believe the only thing that the Spinnaker
22 building would've had repairs done was part of the
23 lists that were given. And if I'm not mistaken, that
24 was for the damage to the roofs mostly caused by the
25 hurricane. Now -- I'm sorry.

46

1 Q. You got around to what I was going to ask
2 you. What effect did the hurricane have on the
3 needed repairs to the buildings in Village West?

4 A. Hurricane Floyd enhanced the obvious
5 defectiveness of the construction of the buildings.
6 According to the list, the damages from the hurricane
7 at that moment that were investigated was a list with
8 future diagnostics to be done at a later date. Also,
9 as homeowners in the other four buildings as well,
10 were starting to make complaints of water leakage and
11 the like.

12 Q. As far as the Spinnaker building is
13 concerned, what assessments were made, special
14 assessments? What did you pay for out of -- from
15 that time on? That's about in -- I believe you said
16 1994 forward. What assessments did you have and for
17 what purposes were they to the Spinnaker building?

18 A. I believe it was around 1999 that the
19 architect working for Village West had -- he did
20 forensic, some forensics on specific -- he put
21 together a priority list of needed repairs of various
22 aspects of the buildings. And, again, the board of
23 directors at a meeting spoke about assessing us to
24 complete this priority list. That was back then.
25 That was the first of any type of assessment that

1 I've ever been aware of.

2 Q. When did you get notice of the action
3 against the builders of the four buildings in Village
4 West?

5 A. Could you repeat that.

6 Q. When did you first get notice that an
7 action had been filed for the repairs to the other
8 four buildings?

9 A. It was simultaneous. It was approximately
10 very close to the ending of the Spinnaker building
11 lawsuit. Then the other four buildings, the second
12 lawsuit began shortly thereafter. I would say -- I
13 want to say in the Year 2000. It was either 1999,
14 2000 is when the second litigation began, I believe.
15 And it went on for a couple years.

16 Q. What buildings were involved in that to be
17 repaired in the lawsuit? What buildings were
18 involved in that?

19 A. That second litigation involved the
20 Clipper building, Schooner building, Galleon building
21 and Flagship building.

22 Q. Did the lawsuit have anything to do with
23 the Spinnaker building?

24 A. No, the Spinnaker building was deleted
25 from that.

1 Q. What happened next between the owners of
2 the Spinnaker building and Village West as regards
3 that action? In other words, what if anything --
4 what's the next step? I believe there was a
5 shortfall in that action that you learned of?

6 A. Yes, there was.

7 Q. What happened after the action was brought
8 and ended with a shortfall? What happened with
9 regard to Village West and the owners of the
10 Spinnaker building?

11 A. Due to the shortfall, approximately \$2
12 million, the homeowners were all assessed equally
13 including the Spinnaker building for that shortfall.

14 Q. When did you first receive a notice of an
15 assessment and for how much?

16 A. I believe it was 2004 you had the option
17 that --

18 Q. I have a copy of the Complaint here. You
19 can refer to it if you need that. That Complaint was
20 brought on your behalf.

21 MR. SIMRILL: Any objection to that?

22 MR. PITTS: Objection to her referring to
23 the pleadings to testify.

24 THE COURT: Are you just trying to find a
25 date?

1 MR. SIMRILL: A date.

2 THE COURT: Is that what you're looking
3 for? Perhaps the parties can stipulate. Is there
4 any dispute of the assessment associated with the
5 litigation? The shortfall litigation occurred. Is
6 there any dispute to the amount and all that?

7 Do any of you have the monies handy? We
8 can stipulate to that.

9 BY MR. SIMRILL:

10 Q. How much was your first assessment?

11 A. The total sum of the assessments,
12 individual assessments of each homeowner was \$34,475
13 for three-bedroom units. And 29,000 and change
14 for --

15 Q. What amount were you sued for?

16 A. \$34,475.

17 Q. What was your response to that lawsuit?

18 A. Objected to it. The Spinnaker building
19 was not expected to receive any repairs that the
20 other four buildings were going to receive as a
21 result of that suit. The fact that Spinnaker
22 building had already had its own lawsuit. And the
23 reserve from that -- you know, I would be giving how
24 I felt about it. Am I allowed to do that here today?

25 Q. Yes.

50

1 A. The Spinnaker building lawsuit ended.
2 That money, as far as I'm concerned, should've been
3 placed in a capital reserve for the Spinnaker
4 building alone. They were already going to be in
5 progress with the second litigation for the other
6 four buildings to make the needed temporary repairs
7 that they were going to make prior to that. They
8 already were taking out a loan from the bank. Once
9 they completed the second litigation, they could've
10 paid off that loan and left the Spinnaker building
11 funds where they were, specifically because that
12 second litigation only involved the four buildings in
13 the first place.

14 There would not have been a shortfall that
15 would've affected and would've resulted in an
16 assessment if it had only been for the four
17 buildings. And they did not include the Spinnaker
18 building down the road. I believe they reluctantly
19 allotted \$500,000 for the Spinnaker building, which
20 they did not do that much repair to begin with. They
21 did less than that.

22 We did not believe, and I am not alone in
23 this, that all the homeowners in the Spinnaker
24 building should not have been assessed in that second
25 litigation. It should've fallen on the four

1 buildings, the owners of the four buildings who are
2 party to that suit.

3 Q. You appealed the decision of the judge in
4 that case; is that right?

5 A. Yes.

6 Q. What was the outcome of that?

7 A. We were denied.

8 Q. Subsequent to that, did you have occasion
9 to be notified by Mr. Bullard's office that the box
10 of records that were thought to have been lost and
11 you were offered the opportunity to review the
12 records?

13 A. Mr. Bullard notified us of the existence
14 of the box 18 months after we lost the case.

15 Q. That case was on appeal and had been
16 denied at that time?

17 A. That's correct.

18 Q. As a result of that notification, what did
19 you do with me?

20 A. We went to review the box.

21 Q. In that box, what records -- do you know
22 what records you found?

23 A. At that time, we found the existence of
24 Hurricane Floyd, along with the damage reports that
25 were submitted. That was in the initial viewing.

52

1 Q. I believe you found three documents?

2 A. Correct.

3 Q. One of which was the damages to Hurricane
4 Floyd?

5 A. Correct.

6 Q. And I believe the other was a letter to
7 Sherratt from I forgot whom.

8 A. From Tom Carlson. Vice president of
9 Calibogue Construction.

10 Q. And there was an attachment or a second
11 letter there with the --

12 A. Yes.

13 Q. -- with the repairs related to the letter
14 of Mr. Carlson?

15 A. Correct.

16 Q. On the basis of that, you filed case
17 number -- you filed suit against Village West in case
18 number 09-CP-07-0036; is that right?

19 A. Correct.

20 Q. Alleging that there was a casualty that
21 had been denied by judge -- the judge in the case
22 that had been -- I think Arata number one is what
23 it's being referred to.

24 MR. PITTS: Your Honor, I've got to
25 object. He is leading the witness right now.

1 THE COURT: Try not to lead, if you would,
2 Mr. Simrill.

3 BY MR. SIMRILL:

4 Q. What was the basis of your appeal?

5 A. The second appeal?

6 Q. Yes.

7 A. It involved the Hurricane Floyd casualty,
8 which initiated and amplified the conditions of the
9 buildings' defectiveness. It also brought to light
10 that the board of directors had not filed for
11 insurance.

12 Q. Why don't I just ask you. I'm asking you
13 to identify this and offer it into evidence.

14 A. This is an Amended Complaint, a jury
15 matter.

16 Q. This is the case you're talking about?

17 A. Case number 09-CP-07-0036.

18 MR. PITTS: To put that into evidence,
19 pleadings can't go into evidence in this case.
20 Possibly from another case.

21 THE COURT: That's the '09 case. This
22 case.

23 MR. PITTS: Yes.

24 THE COURT: I'll sustain that.

25 MR. SIMRILL: She's having some trouble

54

1 with what was involved in the case. This is the
2 pleadings itself. I don't have to put it into
3 evidence. I can ask her to refer to it. She still
4 would have to look at it.

5 THE COURT: That's today's case. I was
6 under the understanding for a moment she was on the
7 case before Judge Gregory.

8 MR. SIMRILL: I'll just go ahead. I felt
9 it certainly would save a lot of time, Your Honor.

10 THE COURT: That's all right. Go ahead.

11 BY MR. SIMRILL:

12 Q. What were the issues in the case that were
13 not resolved in the first action pertaining to the
14 common elements and the unit themselves and casualty?

15 A. It became evident that to us, that as I
16 was stating before, that the board of directors after
17 the hurricane, we saw that they -- it was stated that
18 an insurance claim was going to be filed for the
19 damages as a result of Hurricane Floyd. And a copy
20 of that was given to each one of the board of
21 directors at that time.

22 It also showed that, in fact, the board of
23 directors never did file that insurance claim. It
24 was a \$2 million policy that we had coverage for
25 casualty damage. And they never filed the claim.

1 And as a result of that, there was a deficiency in
2 the funds to do repairs. And they went to many
3 different avenues to obtain the funds to make repairs
4 because they never filed the insurance claim.

5 Then it also became evident that, after
6 neglecting to file the insurance claim, they decided
7 to say there was no casualty ever. There was no
8 casualty damage. There was no casualty. I was there
9 during Hurricane Floyd. I know for a fact there was
10 casualty.

11 Q. What was the decision of Judge Dukes on
12 the Complaint in this action?

13 It was dismissed?

14 A. Yes, it was.

15 Q. For failing to state a cause of action?

16 A. That's correct, it was.

17 Q. That was appealed some four years ago to
18 the Court of Appeals; is that correct?

19 A. That's correct.

20 Q. And the Court of Appeals reversed and
21 remanded for taking the testimony that we're taking
22 right now; isn't that correct?

23 A. That's correct.

24 Q. And that's where we are now; right?

25 A. That's correct.

56

1 MR. SIMRILL: I think that brings us to
2 date, Your Honor.

3 THE COURT: Okay. Is that all the
4 questions you have of this witness?

5 MR. SIMRILL: That's all the questions I
6 have at this time.

7 THE COURT: Mr. Pitts.

8 MR. PITTS: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. PITTS:

11 Q. Ms. Arata, the fraud you alleged in the
12 Complaint was that Mr. Bullard didn't disclose the
13 box of documents; isn't that right?

14 A. That's correct.

15 Q. There's no other allegations; that's the
16 sole allegation with respect to fraud?

17 A. At that time.

18 Q. That's what's in the Complaint; right?

19 A. Yeah. Well, yes. Mr. Bullard, and as the
20 information came to light, it appeared that a second
21 individual was also quoted as stating that there was
22 no casualty when, in fact, there was. That was Mary
23 Probert.

24 MR. PITTS: I object to that and move to
25 strike. That's outside the pleadings.

1 THE COURT: Just answer the question.

2 THE WITNESS: I'm sorry.

3 BY MR. PITTS:

4 Q. In the 2005 case, what I'll call Arata
5 one, you admit you didn't do any discovery in that
6 case; isn't that right?

7 A. We were not privy to discovery at that
8 time.

9 Q. Question is: You admit that you did not
10 do any discovery?

11 A. No, we did not.

12 Q. I'm going to hand you a document and ask
13 you if you can identify that.

14 A. This is a civil action, 05-CP-07-475.

15 Q. Is that the summons and Amended Complaint?

16 A. This is order granting summary judgment.

17 Q. I handed you the wrong thing.

18 A. Judgment of foreclosure.

19 Q. I meant to hand you that. Can you
20 identify this.

21 A. That was a nice reminder. This is same
22 docket number. This is civil action summons.

23 Village West Horizontal Property Regime versus

24 Kenneth C. Arata and Madeline R. Arata, and Amended

25 Complaint in the same matter.

1 Q. Do you recognize that?

2 A. Yes, I do.

3 Q. It was served on you?

4 A. Yes, it was.

5 Q. What day is it dated?

6 A. It is dated March 14th of 2005.

7 Q. That's the date it was clocked in?

8 A. Yes.

9 Q. Was it served on you around that time?

10 A. I'm going to have to say -- I don't know
11 exactly when it was served upon me. I can only
12 assume it was within the time frame of that.

13 MR. PITTS: Your Honor, I point out that
14 the court file shows it was served on April 15th.
15 And The Court can take judicial notice of facts and
16 other court files. I'd like to move this into
17 evidence.

18 THE COURT: All right. Without objection.

19 (DFT. EXH. 1, Amended Complaint and
20 Summons, was marked for identification and received
21 into evidence.)

22 BY MR. PITTS:

23 Q. I'm going to hand you another document and
24 ask you if you can identify that.

25 A. The same civil action. Order granting

1 summary judgement for foreclosure and sale.

2 Q. That's the final order in the 2005 case
3 from Judge Gregory.

4 A. Yes, it is.

5 Q. What date is that dated?

6 A. This is dated January 16, 2006.

7 Q. And you agree with me, during that period
8 of time after the filing of the Amended Complaint, or
9 the granting of the order of judgment, you did no
10 discovery between those dates?

11 A. Mr. Pitts, we did not voluntarily not do
12 discovery. We weren't given an opportunity to do
13 discovery. We were placed as the losers in the case
14 and, therefore, there was nothing else to do.

15 Q. Order granting summary judgment isn't
16 until January 2006; isn't that right?

17 A. I'm not privy to the legal -- the specific
18 legalities of time frames for discoveries or
19 discoveries or anything of that sort. I can't answer
20 that question.

21 I get something like this in the mail, and
22 I see a judgement for foreclosure on my property.
23 I'm having a breakdown because my property is going
24 to be foreclosed on me. I am not thinking, gee, why
25 don't I go do discovery. I wouldn't even know how to

60

1 do that.

2 Q. The final order is in January of 2006; is
3 that right?

4 A. Yes.

5 Q. And before that time, after service of the
6 Complaint, Amended Complaint, you did not do
7 discovery?

8 A. I wouldn't know how to do discovery. No,
9 of course not. What would I be doing discovery on?
10 I don't even know.

11 Q. You didn't do it, though?

12 A. No, we didn't, absolutely.

13 THE COURT: Let me ask you, Mr. Simrill.
14 Who was the attorney in the '05 case?

15 MR. SIMRILL: I was the attorney.

16 THE COURT: Rather than go into this at
17 length, is it stipulated there was no discovery
18 in the '05 case?

19 MR. SIMRILL: We so stipulate.

20 MR. PITTS: Deposition answer and their
21 Response to our Request to Admit.

22 THE COURT: No one asserts that there was
23 discovery.

24 MR. SIMRILL: No one is asserting that.
25 We stipulate there was no discovery done. We have a

1 reason for that.

2 THE COURT: You can proceed, Mr. Pitts. I
3 think that sort of establishes without question
4 there's no discovery by the Plaintiff or by the
5 Defendant in the underlying case.

6 BY MR. PITTS:

7 Q. You've been involved with Village West in
8 a total of eight lawsuits; is that right?

9 A. I don't know if it's eight. I thought it
10 was five.

11 Q. Maybe I counted wrong. Do you remember
12 answering your interrogatories?

13 A. Some of it, yes.

14 MR. PITTS: Your Honor, previously in this
15 action we had to file a motion to compel where you
16 required Mr. Simrill to supplement some answers to
17 interrogatories. When he did it, he sent two pages
18 unsigned. But at Ms. Arata's deposition they
19 actually signed under oath those pieces of paper.
20 It's attached to the original deposition. Can I open
21 this?

22 THE COURT: Yes, go ahead. Identify the
23 depositions.

24 Mr. Pitts, if you could identify just for
25 the record that deposition you just opened.

1 MR. PITTS: Actually, there's two volumes
2 of her deposition. And I think the document I'm
3 looking for is in the second. It's dated volume two,
4 deposition of Madeline R. Arata, taken 29th day of
5 September, 2011.

6 MR. SIMRILL: That's volume two. You just
7 opened volume one.

8 MR. PITTS: Yes, sir, which was taken on
9 16th day of September of 2011.

10 BY MR. PITTS:

11 Q. I'm going to hand you what was marked as
12 Defendant's Exhibit 8 to your deposition of September
13 29, 2011. Do you recognize that?

14 A. Yes, I do.

15 Q. On the back it's signed by you under oath?

16 A. Yes.

17 Q. It says: The foregoing answers are true
18 of my own knowledge except those upon information and
19 belief she believes them to be true?

20 A. Correct.

21 Q. And the question here, number 14, is
22 identify litigation lawsuits. And you have nine
23 cases listed. First one doesn't have anything to do
24 with Village West; is that right?

25 A. That was for wallpaper. Yeah. Well,

1 wallpapering a bathroom at our unit. So yes.

2 Q. Village West was not a party to that
3 lawsuit, though; is that correct?

4 A. No, not at all.

5 Q. The rest of them as I look at it, correct
6 me if I'm wrong, I might have missed something. Two,
7 three, four, five.

8 MR. SIMRILL: I object to any other
9 lawsuit other than the lawsuit that's before this
10 Court here. What's the purpose of this?

11 MR. PITTS: Are all cases involving
12 Village West.

13 THE COURT: Hold on one second. Respond
14 to the objection.

15 MR. PITTS: It shows her bias and
16 hostility towards Village West. I'm obviously
17 entitled to go into bias on cross-examination.

18 THE COURT: Go ahead. I'll allow some of
19 it.

20 BY MR. PITTS:

21 Q. There's a total of eight other cases; is
22 that right?

23 A. No, no. It's not eight cases.

24 Q. Maybe I looked at it wrong.

25 A. I'm the Defendant in this one.

1 Q. Right, I said parties; not that you sued.

2 A. Village West sued me. You want to
3 distinguish.

4 Q. The ones you have either been a Plaintiff
5 or Defendant in Village West.

6 A. Let me see. Okay. Yeah. Yes, but it's
7 not eight different cases. These are -- I don't know
8 how to explain it. They're the same issue, listed
9 here three times. Same case.

10 Q. Different case numbers.

11 A. Three are the same.

12 Q. It's down to five?

13 A. That's right. It was five.

14 Q. Got you.

15 MR. PITTS: I would like to move that into
16 evidence.

17 (DFT. EXH. 2, Answers to Defendant's
18 Interrogatories and depositions, was marked for
19 identification and received into evidence.)

20 THE COURT: Defendant's 2, without
21 objection.

22 BY MR. PITTS:

23 Q. You agree, don't you, Ms. Arata, that the
24 \$34,000 special assessment resulted from a shortfall
25 after settlement of the second construction defect

1 litigation?

2 A. Correct.

3 Q. You agree that the construction work that
4 was performed in connection with the shortfall in the
5 settlement of the second construction defect work was
6 performed by construction company called Rice
7 Cleveland?

8 A. That's correct.

9 Q. And then there was a separate direct
10 contract for the roof with a company called
11 Metalcrafts?

12 A. Correct.

13 Q. And you agree that this construction by
14 Rice Cleveland and Metalcrafts was done in 2004,
15 2005?

16 A. Correct.

17 Q. You agree that Hurricane Floyd was in
18 1999?

19 A. Correct.

20 Q. Also, the reason you didn't want to pay
21 the special assessment was you say, one, the board
22 did not disclose crucial documents; is that right?

23 A. That's correct.

24 Q. You didn't like how the board was handling
25 the construction defect litigation?

66

1 A. I myself as well as all other homeowners
2 that complained about it, yes. That was a general
3 complaint.

4 Q. That's one of the reasons you didn't want
5 to pay the special assessment?

6 A. One of the many, yes.

7 Q. The third reason was that the Spinnaker
8 building wasn't included in the second construction
9 defect lawsuit?

10 A. Correct.

11 Q. Those are the reasons you provided me
12 during your deposition; is that right?

13 A. That's correct.

14 Q. You agree with me, don't you, that Rice
15 Cleveland in connection with the shortfall from the
16 construction defect litigation and the special
17 assessment did approximately \$400,000 of work to the
18 Spinnaker building; is that right?

19 A. That's right.

20 Q. That work included new gutters?

21 A. Yes.

22 Q. New carpet in the hallways?

23 A. Upper floors, yes.

24 Q. New railings?

25 A. Yes.

1 Q. Floor coatings on the first floor?

2 A. Yes.

3 Q. And painting of the exterior?

4 A. Correct.

5 Q. Now, the box that you went to look at with
6 Mr. Simrill, I think you said that was 18 months
7 after your first case with Arata was over?

8 A. Correct.

9 Q. I think you said that was around August
10 24, 2007?

11 A. I don't have the exact date in my head at
12 the moment.

13 Q. You got a letter from --

14 A. Yes, that's correct.

15 Q. I'm going to hand you what's previously
16 marked as Defendant's Exhibit 1 to your deposition.
17 Do you recall that?

18 A. Yes.

19 Q. Is that the letter from Mr. Bullard to
20 Mr. Simrill and other attorneys telling them about
21 the box of records?

22 A. That's correct.

23 Q. And it's dated August 24, 2007?

24 A. It is.

25 MR. PITTS: I would like to move that into

68

1 evidence.

2 THE COURT: All right. Mr. Simrill, any
3 objection?

4 MR. SIMRILL: No objection.

5 (DFT. EXH. 3, Letter dated 8-24-07, was
6 marked for identification and received into
7 evidence.)

8 BY MR. PITTS:

9 Q. You went and looked at the box of records
10 near the time that letter was sent.

11 A. Yes, we did.

12 Q. And that was actually while your case was
13 pending in the Court of Appeals; is that right?

14 A. Yes.

15 Q. The case wasn't over.

16 A. No. The second appeal. The first case
17 was over. The first was over. This was going into
18 the second. It was 18 months after the first appeal
19 was denied.

20 Q. I'm going to hand you a document. Have
21 you ever seen that?

22 A. Yes.

23 Q. What is that?

24 A. That is the Supreme Court of South
25 Carolina issuing the Order on our petition for writ

1 of certiori in the above matter, 2005-CP-07-00475,
2 Petition for Writ of certiori denied.

3 Q. It's dated October 31, 2007?

4 A. That's correct.

5 Q. When you went to look at the records in
6 August of 2007, your case was still pending on
7 appeal; is that right?

8 A. Now, I'm starting to get a little weary.
9 We were denied this. This was still -- yeah. So
10 this was going on. We lost the judgment in this
11 court. It had gone into appeals. And that time
12 frame is when.

13 Q. Are you trying to say, when you looked at
14 the records for Mr. Bullard, 18 months after Judge
15 Gregory ruled?

16 A. Yes, after the court here.

17 Q. Your case was still pending on appeal?

18 A. On appeal, right.

19 (DFT. EXH. 4, Letter dated 10-31-07, was
20 marked for identification and received into
21 evidence.)

22 BY MR. PITTS:

23 Q. With respect to the master deed and bylaws
24 of Village West, you have no idea which provisions in
25 the bylaws you're relying on in support of your

70

1 position; isn't that right?

2 A. In the bylaws, I don't know the exact
3 section, the definition of casualty loss and the
4 responsibility -- the fiduciary responsibility of the
5 board of directors with regards to shortfalls and
6 proceeds which will -- I can state verbatim what it
7 states. I know it's in there. I've seen it.

8 MR. PITTS: That's all the questions I
9 have.

10 THE COURT: Mr. Simrill, any questions of
11 this witness?

12 REDIRECT EXAMINATION

13 BY MR. SIMRILL:

14 Q. Ms. Arata, would you explain to me the
15 number of different lawsuits that Mr. Pitts asked you
16 about, the number of cases, would you tell me which
17 ones were against you and which ones were by you?

18 A. I don't have it in front of me, the list.
19 I could tell you which one. Does anybody have it?

20 Number two, number three, and number four,
21 I am the Defendant, Village West is the Plaintiff.

22 Q. Three against you you're saying?

23 A. Three against so far. And then the other,
24 there's four against. Five against. It's five
25 against and three we're the Plaintiffs.

1 Q. Could you explain the nature of the three
2 by you.

3 A. The first one here is myself and my
4 mother, Madeline Dodson, who lives at 26 Governor's
5 Harbor. This is both of us against Village West and
6 Mary Probert, individually.

7 Q. What was the outcome of that?

8 A. It was thrown -- this case was thrown down
9 from this court to Bluffton magistrate, and she
10 dismissed. I mean, she just dismissed the whole
11 thing.

12 Q. Go ahead.

13 A. Then the next is Madeline Arata and
14 Kenneth Arata versus Village West, Mary Probert,
15 individually, and as president of the board of
16 directors of Village West, along with the rest of the
17 board and association. We are the plaintiffs in
18 that.

19 Q. What was the decision? What was the
20 outcome of that case?

21 A. We lost. I mean, we didn't get anywhere
22 with this. This was dismissed as well. This is case
23 475. This was the initial case.

24 Q. The last one.

25 A. Madeline Arata and Kenneth Arata and

1 Madeline Dodson versus -- yes, this was the
2 counterclaim on the suit that Village West filed
3 against myself, my husband and my mother regarding
4 Mrs. Dodson's porch. They placed the mechanic's lien
5 on the property, and we counterclaimed. This was
6 settled.

7 Q. It was settled in your favor, wasn't it?

8 A. This was settled in our favor. And it was
9 settled without the court's assistance.

10 Q. Do you know how much you received in
11 settlement of that case?

12 A. The mechanic's lien, it was \$25,000
13 mechanic's lien placed on my mother's property. I
14 retrieved that with interest as well as Mr. Simrill's
15 attorney's fees of \$16,000. That's that.

16 Q. You testified in answer to Mr. Pitts that,
17 as to the fact that you did no discovery in Arata one
18 we'll call it.

19 A. Arata one? Yes.

20 Q. I hand you a document here and ask you if
21 you can identify that.

22 A. This is a civil action 05-CP-07-475. This
23 is the affidavit of Mary Probert.

24 MR. PITTS: Your Honor, this is one of the
25 documents I object to as being outside the scope of

1 the pleadings. The only thing alleged in the
2 pleadings has to do with Mr. Bullard not disclosing a
3 box of documents. I don't feel it's proper to allow
4 testimony to come in on this issue. They haven't
5 amended. I wanted to get tried by implied consent.

6 MR. SIMRILL: He opened the door by
7 alleging there was no discovery. This is to explain
8 why there's no discovery. Perfectly proper, I
9 submit, Your Honor.

10 THE COURT: The purpose is not as an
11 additional allegation regarding the statements of Ms.
12 Probert, rather as an explanation of why no discovery
13 was conducted?

14 MR. SIMRILL: Yes, absolutely on that
15 basis.

16 THE COURT: I'll allow it.

17 BY MR. SIMRILL:

18 Q. Here's a statement, which has been
19 identified in the motion of summary judgment, as a
20 document of Bullard.

21 THE COURT: Do we want to make the probate
22 matter an exhibit?

23 (PLF. EXH. 1, Affidavit of Mary Probert,
24 was marked for identification and received into
25 evidence.)

74

1 BY MR. SIMRILL:

2 Q. I hand you a document which is from
3 Bullard and Freeman, identified in the motion for
4 summary judgement from Bullard and Freeman. Ask you
5 to identify that.

6 A. Yes.

7 MR. PITTS: Your Honor, I object to that
8 because it doesn't look to be a complete document.
9 As well as on the other ground it's outside the scope
10 of the pleadings.

11 THE COURT: What is this? Is this part of
12 a pleading?

13 MR. SIMRILL: It's a part of a very
14 lengthy -- it's in the record. This is part of the
15 record. What is the young man's name?

16 THE WITNESS: James Donahoe.

17 MR. SIMRILL: James Donahoe. This is
18 memorandum in support of summary judgement in Arata
19 one.

20 THE COURT: I understand the questioning
21 is why didn't you do any discovery before the summary
22 judgment.

23 MR. SIMRILL: Yes.

24 THE COURT: This is a memorandum
25 associated with the summary judgment. At that point,

1 does it really matter? By the time the memorandum in
2 support of the summary judgment was made available --

3 MR. SIMRILL: Summary judgement, this is
4 in Arata one.

5 THE COURT: I understand. Maybe I
6 misunderstood the question. I thought the question
7 was designed to elicit an explanation for the lack of
8 discovery in Arata one. Of course you had the
9 Probert affidavit. I'm still exactly not sure why
10 that stopped being discovery.

11 Then we've got these two pages of what is
12 asserted to be a memorandum in support of the summary
13 judgment that, I guess, was ultimately successful
14 before Judge Gregory.

15 MR. SIMRILL: I frankly can't put my hand
16 on the full documents, so I don't know exactly.
17 Anyway, I'll just withhold that.

18 THE COURT: All right.

19 BY MR. SIMRILL:

20 Q. The document that's just been exhibit 1,
21 the document was an affidavit that there was no
22 affidavit containing paragraph number eight, that
23 there has been no casualty loss and no casualty
24 insurance proceeds have been paid. That was in
25 exhibit number 1 that you just identified.

1 Having a sworn statement from Mary Probert
2 which, if false, would subject her to prosecution of
3 perjury. On the basis of that, rather ridiculous to
4 go into discovery.

5 MR. PITTS: Objection. Is this a
6 question?

7 THE COURT: Just turn it into a question,
8 if you would.

9 BY MR. SIMRILL:

10 Q. You did not go into discovery before the
11 decision by the judge in Arata one; is that correct?

12 A. That's correct.

13 Q. You had information that there was no
14 casualty from a sworn affidavit --

15 A. Going by that, yes.

16 Q. -- of someone who was either at that time
17 or later the president of Village West; right?

18 A. Correct.

19 Q. I have nothing further on that.

20 Just one moment.

21 Going back to the testimony where
22 Mr. Pitts handed you documents showing -- or he read
23 to you documents showing I think in the neighborhood
24 of \$500,000 worth of work done on the Spinnaker
25 building. What did that -- did that have anything to

1 do with the shortfall of the four other buildings?
2 In other words, there was work done on four buildings
3 and there was shortfall of a certain amount that they
4 assessed.

5 MR. PITTS: Object; he's leading.

6 THE COURT: Try not to lead, please,
7 Mr. Simrill.

8 MR. SIMRILL: Excuse me?

9 THE COURT: Please don't lead the witness.

10 BY MR. SIMRILL:

11 Q. What did the roughly \$500,000 that
12 Mr. Pitts mentioned as work having been done, what
13 did it have to do with shortfall, if anything? The
14 shortfall in the case with reference to the four
15 other buildings?

16 A. The actual \$400,000 that was used for the
17 Spinnaker building was part of the proceeds from the
18 litigation settlement for the other four buildings
19 which the Spinnaker building was not included in.
20 That \$400,000 was part of that \$7 million, netted \$4
21 million settlement. \$7 million and change was the
22 settlement from that litigation for the four
23 buildings, not the Spinnaker building included.

24 Q. What buildings were involved in the four
25 buildings?

1 A. The Flagship building, Galleon building,
2 Schooner building and Clipper building.

3 Q. Was the Spinnaker building involved in
4 that at all?

5 A. No, they were not party to that suit.

6 Q. This \$500,000 or roughly that amount had
7 nothing to do with the shortfall in that lawsuit. In
8 other words, it was not supposed to be any part of
9 that, was it?

10 A. Spinnaker building shouldn't have been --
11 I'm saying, as if it's my opinion.

12 MR. PITTS: Object to speculation.

13 THE COURT: Let me inquire. Maybe I
14 missed something here. Are the individual buildings
15 that are owned by owner's association.

16 MR. PITTS: All five are in the property
17 association.

18 THE COURT: All five as part of one
19 property owner's association.

20 MR. PITTS: Phased construction.

21 THE COURT: This is different structures;
22 under the same umbrella.

23 MR. PITTS: Spinnaker was hard coat
24 stucco; the other four were EIFS.

25 MR. SIMRILL: In this case different --

1 THE WITNESS: Different builders.

2 MR. SIMRILL: -- contractor for each
3 building. That makes the big difference.

4 THE WITNESS: The four buildings were
5 built in 1983 by one builder. In 1984, the Spinnaker
6 building was built by a different builder.

7 MR. SIMRILL: That's what I was trying to
8 say.

9 THE COURT: All five of them were Village
10 West?

11 THE WITNESS: Now they are. They weren't
12 originally..

13 MR. SIMRILL: I have nothing further.

14 RECROSS-EXAMINATION

15 BY MR. PITTS:

16 Q. The affidavit of Mary Probert, which is
17 Plaintiff's Exhibit 1, is notarized as of September
18 13, 2005?

19 A. Yes.

20 Q. You couldn't have relied on it prior to
21 that date?

22 A. I don't understand the question.

23 Q. You say you relied on this in part for the
24 reason not to do discovery?

25 A. This was part of our -- there was never

80

1 mention of Hurricane Floyd or casualty damage by Mary
2 Probert or any other member of the board of
3 directors. The homeowners had no clue whatsoever
4 about that.

5 Q. My question is: Prior to September 13,
6 2005, the date of Mary Probert --

7 A. Prior to it, yes.

8 Q. -- you couldn't have relied on this
9 document to form any opinion about whether or not to
10 do discovery?

11 A. Rely on it? We did not do discovery
12 because the board of directors never discussed the
13 hurricane or casualty damage or filing for insurance.
14 They never made the homeowners aware of the event at
15 all.

16 Q. It didn't have anything to do with this
17 affidavit?

18 A. What didn't have anything to do with it?

19 Q. The failure to do discovery?

20 A. We did not fail to do discovery. We did
21 not choose not to do discovery. The fact that there
22 was never a mention about Hurricane Floyd damages or
23 the intent of the board of directors to file a claim
24 and for Ray Dowling, property manager, to submit a
25 damage report, the homeowner's were completely

1 unaware of that. It was never brought out to the
2 public.

3 We did not know that they had gone -- and
4 what they should have done, which is to file for
5 insurance so that we could be covered for the
6 damages. We had no idea whatsoever. It was secrecy
7 and nondisclosure. That's all it was ever.

8 MR. PITTS: That's all I have.

9 THE WITNESS: That's it.

10 THE COURT: Mr. Simrill, any redirect on
11 those?

12 MR. SIMRILL: Pardon?

13 THE COURT: Anything else?

14 MR. SIMRILL: Just one moment.

15 I have nothing further of this witness.

16 THE COURT: Nothing further?

17 MR. SIMRILL: That's right.

18 THE COURT: Thank you very much,
19 Ms. Arata. It's 12:45 or so. Perhaps we should
20 break for lunch and come back, finish your case up.

21 How many more witnesses do you have?

22 MR. SIMRILL: I don't think we have any
23 further witnesses.

24 MR. PITTS: I have three. They're real
25 quick. It's up to you, obviously.

82

1 THE COURT: Let's go ahead and eat. Then
2 we'll come back and let you rest, if that's your
3 choice, Mr. Simrill. Then move ahead.

4 It's hard to get out of here and eat and
5 get back any sooner than an hour. If yours are
6 fairly short, that should give us plenty of time.
7 About 1:45, if that works for everybody.

8 (A recess transpired from 12:40 p.m. until
9 1:55 p.m.)

10 THE COURT: Back on the record after a
11 lunch break. And Mr. Simrill, anything else from
12 you, sir?

13 MR. SIMRILL: I'm not going to presume
14 anything at this time. I have some records I have
15 submitted in a brief to you, my costs and expenses
16 back in the last action that I would be seeking in
17 damages. I would wait and see your ruling before I
18 submit that.

19 THE COURT: Let's talk about that for a
20 second. Ordinarily what I do and some other people
21 do as well, if the case concludes such that costs,
22 fees, expenses are appropriate on either side,
23 ordinarily what we would do is have a follow-up
24 hearing and deal with those issues.

25 MR. SIMRILL: Nobody knows what the full

1 amount is going to be. That satisfies me.

2 THE COURT: If y'all agree to that, we
3 will simply agree to hold the record open at the
4 conclusion of today for that purpose.

5 MR. SIMRILL: Thank you, appreciate it.

6 THE COURT: Other than that, anything
7 else, Mr. Simrill?

8 MR. SIMRILL: Nothing further.

9 THE COURT: Plaintiff rests?

10 MR. SIMRILL: Yes.

11 MR. PITTS: Your Honor, I make a motion
12 for involuntary nonsuit directed verdict. Couple of
13 things. There's no evidence of extrinsic fraud.
14 They admitted no discovery was done. They just can't
15 make out a prima facie case for extrinsic fraud,
16 which the Court of Appeals said is a prerequisite of
17 even having a shot at recovering in this case.

18 Further, with respect to the casualty
19 argument, they argued that it's clear that the
20 Hurricane Floyd casualty in 1999, all of that was
21 repaired and there's no connection between that and
22 the special assessment in 2004.

23 The other thing I point out that may be
24 fatal is that their applicable master deed and bylaws
25 are not in evidence, not put into evidence in the

84

1 case. That would be my grounds for involuntary
2 nonsuit.

3 THE COURT: Mr. Simrill, happy to hear
4 from you, sir.

5 MR. SIMRILL: In response to that, I just
6 feel that certainly the evidence is here
7 concerning -- there's no question that a hurricane
8 affecting the property -- it would affect certain
9 parts of the property; would certainly affect and
10 make the extent of repairs needed more so than they
11 would. In other words, you can't separate Hurricane
12 Floyd from the existing repairs because that -- it
13 would put stress on those repairs. And they're one
14 and the same.

15 I'm afraid I don't follow his argument,
16 the remainder of his argument. I think there's a
17 case made for extrinsic fraud and a fraud upon the
18 court, and I think it's clear. I think between the
19 affidavit of Mary Probert and the evidence that
20 she -- the meeting that she took the minutes of in
21 which the casualty was reported by Mr. Dowling. And
22 she took the minutes of that meeting. I think
23 compared to that, that's fraud. And by not reporting
24 that would be a fraud upon the court, which is what
25 the Court of Appeals felt that the allegations of the

1 Complaint sufficiently set forth. I just take issue
2 with him on that.

3 And I think we need to go forward with
4 their case. I would take issue with him.

5 THE COURT: Let's have a full record.

6 MR. SIMRILL: Unless The Court has any
7 question about it.

8 THE COURT: I think what I'll do, I'll
9 take this one under advisement as well. Let's go
10 ahead and get a full record and get it all out there.
11 Call your first witness.

12 MR. PITTS: I'll call Ray Dowling.

13 THE COURT: Mr. Dowling, if I can get you
14 to raise your right hand.

15 RAYMOND T. DOWLING
16 being first duly sworn, testified as follows:

17 THE COURT: Please have a seat. State
18 your whole name and address for the record.

19 THE WITNESS: Raymond Thomas Dowling, ten
20 Sugaree Drive, Bluffton 29910.

21 DIRECT EXAMINATION

22 BY MR. PITTS:

23 Q. Mr. Dowling, what do you do for a living?

24 A. Regime and property manager.

25 Q. What's the name of your company?

1 A. Dowling Agency.

2 Q. At any point in time did you manage
3 Village West?

4 A. Yes.

5 Q. What company did you work for then?

6 A. SPM Defender.

7 Q. And you were the person primarily
8 responsible for Village West?

9 A. Correct.

10 Q. I'm going to hand you -- were you managing
11 Village West at the time of Hurricane Floyd?

12 A. Yes.

13 Q. I'm going to hand you a document. Do you
14 recognize that?

15 A. Yes.

16 Q. What is that?

17 A. It's an incident report after Hurricane
18 Floyd for damage on Village West property.

19 Q. Did you prepare that?

20 A. Yes.

21 Q. Did you do the inspection -- did you write
22 this out at the time you did your inspection?

23 A. More or less. I would have, you know,
24 gone from building to building inspecting each roof
25 with a recorder; then went back and sat down and

1 wrote it.

2 Q. Did you do it the day after Hurricane
3 Floyd?

4 A. As soon as I got back to the island on a
5 mandatory evacuation, yes.

6 Q. It's dated November 17, 1999.

7 A. I agree with that.

8 MR. PITTS: I'd like to move this into
9 evidence.

10 (DFT. EXH. 5, Incident Report dated
11 9-17-99, was marked for identification and received
12 into evidence.)

13 BY MR. PITTS:

14 Q. I'm going to hand you another document.
15 Do you recognize that?

16 A. Yes.

17 Q. What is that?

18 A. A more formal explanation of the damages
19 witnessed.

20 Q. Did you prepare that?

21 A. Yes.

22 Q. You prepared that subsequent to the other
23 damage report?

24 A. Correct.

25 MR. PITTS: I'll move that into evidence.

1 MR. SIMRILL: Let me see that.

2 (DFT. EXH. 6, Damage report, was marked
3 for identification and received into evidence.)

4 THE COURT: Without objection.

5 BY MR. PITTS:

6 Q. Defendant's Exhibit 5 and 6, does that
7 contain the complete list of damages you observed
8 from Hurricane Floyd?

9 A. Absolutely.

10 Q. Did you coordinate the repairs to Village
11 West property as a result of Hurricane Floyd?

12 A. Yes.

13 Q. Can you tell us what you did in that
14 regard.

15 A. Would've contacted roofing companies and
16 gutter companies to get estimates regarding the
17 damage; would've given them this report and said:
18 This is what I need repaired as the scope of work.

19 Q. Did you subsequently contract people to do
20 the repairs?

21 A. Correct, yes.

22 Q. I'm going to hand you a copy of a
23 document. Do you recognize that?

24 A. Yes.

25 Q. What is that?

1 A. It's an agreement for repair work.

2 Q. Is that your letter to Atlantic Coast
3 Specialists to do roof work on the tile and roof
4 repair?

5 A. Correct, yes.

6 MR. PITTS: I'd like to move that into
7 evidence.

8 THE COURT: No objection.

9 (DFT. EXH. 7, Letter dated 11-18-99, was
10 marked for identification and received into
11 evidence.)

12 MR. SIMRILL: No objection. I have a copy
13 right here.

14 BY MR. PITTS:

15 Q. Did Atlantic Coast Specialists do that
16 work?

17 A. As best my recollection, yes.

18 Q. Did Village West pay for the work?

19 A. Yes.

20 Q. Did they pay for it out of their general
21 operating fund?

22 A. Yes.

23 Q. There was no special assessment?

24 A. Correct.

25 Q. Do you remember how much that roof work

90

1 was, in general?

2 A. No, I do not. It was probably at least
3 under \$5,000. There wasn't that much. I couldn't be
4 for certain.

5 Q. It wasn't a huge, huge bill?

6 A. Correct.

7 Q. I'm going to hand you another document.
8 Do you recognize that?

9 A. Yes.

10 Q. What is that?

11 A. It's a general ledger for expenses for
12 Village West.

13 Q. For October 1, '99 through October 31,
14 '99?

15 A. For the month of October, correct.

16 Q. Does it show bills being paid for
17 Hurricane Floyd damage?

18 A. Yes, it does.

19 Q. What are those?

20 A. L&H Insulation. That was the gutter
21 company, metal fabricators that we used to repair the
22 chimney. And Carter Construction, repairs to
23 shutters and damage by Hurricane Floyd.

24 Q. That was \$825 and \$250?

25 A. Correct.

1 MR. PITTS: I would like to move that into
2 evidence.

3 (DFT. EXH. 8, General ledger, was marked
4 for identification and received into evidence.)

5 BY MR. PITTS:

6 Q. Were all the repairs for Hurricane Floyd
7 paid out of Village West general operating funds?

8 A. Yes.

9 Q. There was no special assessment?

10 A. Correct.

11 Q. Was that work shortly after Hurricane
12 Floyd?

13 A. Within a few months, correct.

14 MR. PITTS: That's all the questions I
15 have. Thank you.

16 CROSS-EXAMINATION

17 BY MR. SIMRILL:

18 Q. Mr. Dowling, there are two items here. Is
19 that the total amount of the bill. Is that all the
20 bills that you incurred and paid?

21 A. The October general ledger.

22 Q. October 1, 1999 to October 31, '99, you
23 have two items checked. Is that the total amount of
24 what was done and paid for?

25 A. Yes. Yes, that's all.

1 Q. It was only done by two different
2 agencies. This is complete payment of everything?

3 A. I believe so. I don't know whether -- it
4 says shutter damage. It doesn't say roof repair. I
5 don't recall whether we replaced any of the tiles or
6 not or we just noted that they were broken.

7 Q. You can't say positively this is
8 everything?

9 A. Correct. I don't recall if we did the
10 tiles or not.

11 MR. SIMRILL: Thank you.

12 REDIRECT EXAMINATION

13 BY MR. PITTS:

14 Q. Mr. Dowling, Defendant's Exhibit 7,
15 Atlantic Coast Specialist references tile and flat
16 roof repair; is that right?

17 A. Correct, yes. We must've hired them to do
18 it. It must be on the November general ledger or
19 December general ledger. It wouldn't have been paid
20 until the work was completed.

21 Q. This is dated November; is that right?

22 A. Correct.

23 Q. You're saying in November 50 percent
24 deposit, balance paid on completion?

25 A. Correct.

1 Q. You have the roof repairs. And what's on
2 Defendant's Exhibit 8, does that in your mind
3 constitute all of the Hurricane Floyd --

4 A. Yes.

5 Q. -- damages?

6 A. Yes, it does.

7 MR. SIMRILL: One other thing -- excuse
8 me. Are you through?

9 MR. PITTS: Yes.

10 RECROSS-EXAMINATION

11 BY MR. SIMRILL:

12 Q. You attended the minutes of the meeting,
13 Village West meeting where Mary Probert took the
14 minutes of the meeting --

15 A. Likely.

16 Q. In the minutes of that meeting that Mary
17 Probert took, I can't seem to locate it right now,
18 there was a -- there was a statement in her minutes.
19 I'll do the best I can from memory right now.
20 Statement in there that you filed a claim with the
21 insurance company.

22 A. We reported the damages to the insurance
23 company. I think the board had determined that it
24 wasn't worth making a claim for the deductible. The
25 repairs could be handled out of their general fund or

1 their capital fund.

2 Q. You attended the meeting where she took
3 the minutes, did you not?

4 A. Yes.

5 Q. What you're telling me, that's not
6 included in the minutes of that meeting?

7 A. We notified -- correct. We notified the
8 insurance company of our damage. And then
9 subsequently --

10 Q. No claim was ever filed?

11 A. Correct. We just wanted to make duly
12 note, if there was some latent damage that we weren't
13 aware of due to some of the roof issues, that we
14 could go back to the insurance company for that.

15 Q. What was your reason for not filing a
16 claim with the insurance company since they were
17 there to take care of such things?

18 A. The expense was not worth the claim, the
19 deductible would've not -- having excessive claims on
20 your account with them would've driven our cost up.
21 We were concerned about our insurance premiums going
22 up with filing a claim. And that this claim was not
23 worth.

24 Q. You didn't know that until after the
25 meeting at that time?

1 A. Correct. You know, you got to wait for
2 rain to show up. Okay, was that rain heavy enough?
3 Did anybody get any leaks? Nothing is really showing
4 up. Let's take care of this problem ourselves and
5 not file a claim on it.

6 Q. When was the meeting as regards -- in
7 regard to when you filed your SPM report?

8 A. I don't know.

9 Q. Your report is September 19, '99. And
10 September 28, 17th to the 28th, that's when the
11 minutes of the meeting were drafted by Mary Probert.

12 MR. SIMRILL: I have nothing further.
13 Thank you.

14 MR. PITTS: Nothing.

15 Can Mr. Dowling be excused?

16 THE COURT: Any objection?

17 MR. SIMRILL: I have no objection.

18 (The witness exited the room.)

19 THE COURT: Call your next witness.

20 MR. PITTS: Next witness I call is Thomas
21 J. Carlson.

22 THOMAS J. CARLSON
23 being first duly sworn, testified as follows:

24 THE COURT: Please have a seat. First,
25 your whole name and address, if you would.

1 THE WITNESS: Thomas James Carlson, 646
2 Pawley, P-A-W-L-E-Y, Road, Mount Pleasant, South
3 Carolina 29464.

4 DIRECT EXAMINATION

5 BY MR. PITTS:

6 Q. Mr. Carlson, what do you do for a living?

7 A. I'm president of Calibogue Construction
8 Company, who's a general contractor, licensed in
9 South Carolina, North Carolina.

10 Q. Does Calibogue Construction do
11 construction work in this area?

12 A. We do.

13 Q. Beaufort County, Hilton Head?

14 A. Yes, sir, the company was founded in
15 Beaufort County 28 years ago.

16 Q. What is Calibogue Construction's
17 connection with Village West?

18 A. Calibogue Construction was hired to do
19 what we termed prototype repairs on four of the five
20 buildings at Village West. And I also did forensic
21 work.

22 Q. On four of those five buildings?

23 A. On four of the five buildings, correct,
24 during the second lawsuit.

25 Q. You were hired by the Plaintiffs, Village

1 West, in that case for purposes of that litigation?

2 A. Correct.

3 Q. Did you do work at Village West on the
4 Spinnaker building?

5 A. We did.

6 Q. I'm going to hand you a document and ask
7 you if you can identify that.

8 A. I can. That's a chronology of the repair
9 work that we did at Village West dated April 25,
10 2005.

11 Q. In general, lists all the work you've done
12 at Village West?

13 A. Correct, it listed each item by -- we
14 assigned job numbers to each contract. So it's
15 divided out by job number.

16 Q. Two of the five job numbers are for
17 Spinnaker building; is that right?

18 A. That's correct.

19 Q. That's job number 200206 for \$109,000?

20 A. Correct.

21 Q. And what was that work for?

22 A. That was for exterior wall repairs and
23 window replacement on the number eight, the number
24 ten and the number 14 stacks or units.

25 Q. Job number S2268, what was that?

98

1 A. That's where we did some build-out repairs
2 to the front entry and some sheathing repairs. It
3 was a small job.

4 Q. And Spinnaker building was, for the most
5 part, a hard-coat stucco system?

6 A. It was a conventional Portland cement
7 plaster, stucco system, yes.

8 Q. Except for the EIFS --

9 A. Build-out. Accent dams.

10 MR. PITTS: I would like to move this
11 document into evidence.

12 THE COURT: Without objection.

13 MR. SIMRILL: No objection, I have a copy
14 here.

15 (DFT. EXH. 9, Chronology of repair work,
16 was marked for identification and received into
17 evidence.)

18 MR. PITTS: Can we stop for a minute.

19 (A recess transpired from 2:16 p.m. until
20 2:17 p.m.)

21 BY MR. PITTS:

22 Q. Did any of the work you did at Village
23 West have anything to do with Hurricane Floyd or any
24 other casualty?

25 A. No.

1 Q. It was all for what you call prototype
2 work for the litigation?

3 A. Correct.

4 Q. Forensics examination?

5 A. Correct.

6 Q. And in addition to work you did on
7 Spinnaker?

8 A. Correct.

9 Q. Have you done any work at Village West
10 after the resolution of the second construction
11 defect case?

12 A. No.

13 Q. Village West hired another contractor to
14 do that work?

15 A. They did.

16 MR. PITTS: That's all the questions I
17 have. Thank you.

18 CROSS-EXAMINATION

19 BY MR. SIMRILL:

20 Q. Mr. Carlson, in your letter to Peter
21 Sherratt, you indicate that the estimates you gave
22 him included repairs to wall framing components,
23 insulation and interior drywall. This estimate does
24 include interior painting of the new windows and
25 interior trim and adjacent walls.

100

1 What I'm asking you, you made a proposal
2 with regard to not only the common elements but the
3 units themselves; is that right? This is work to be
4 done inside units.

5 A. We did some work inside the units.

6 Q. That's all I wanted to know.

7 MR. PITTS: Let him answer the question.

8 THE COURT: You can continue answering, if
9 you want to.

10 THE WITNESS: Thank you. There were
11 entire walls or studs replaced. So in order to
12 replace the stud, you had to replace the drywall.

13 BY MR. SIMRILL:

14 Q. That's what I had in mind.

15 You submitted an affidavit to Mr. Pitts in
16 which you said that, after the second defective
17 construction case that involved four of the five
18 buildings, that Village West was resolved, my company
19 was not hired by Village West to complete all of the
20 repairs that were needed.

21 Do you know why you weren't required to do
22 the remainder of it? Did they give you any
23 explanation of that?

24 A. We actually declined to bid.

25 Q. It was your decision?

1 A. It was Calibogue's decision. It was mine
2 personally.

3 MR. SIMRILL: Thank you. No further
4 questions.

5 THE COURT: Anything else?

6 REDIRECT EXAMINATION

7 BY MR. PITTS:

8 Q. You mentioned having to replace drywall
9 when you had to get into the studs?

10 A. Correct.

11 Q. Is the drywall wallboard part of a wall
12 system?

13 A. Yes, sir, it's part of the exterior wall
14 assembly.

15 Q. You did no work after settlement of the
16 second defect litigation?

17 A. Correct.

18 Q. You don't know specifically what work was
19 done there, do you?

20 A. I do not.

21 MR. PITTS: That's all I have.

22 THE COURT: Anything else, Mr. Simrill?

23 MR. SIMRILL: Nothing else.

24 THE COURT: All right. I have no
25 questions. Thank you, sir.

102

1 MR. PITTS: Can Mr. Carlson be excused?

2 THE COURT: Any objection, Mr. Simrill?

3 MR. SIMRILL: No.

4 (The witness exited the room.)

5 MR. PITTS: Next witness I call is Colette
6 Stevenson.

7 COLETTE A. STEVENSON

8 being first duly sworn, testified as follows:

9 THE COURT: Please have a seat. State
10 your whole name.

11 THE WITNESS: Colette Acuff Stevenson, 69
12 Governor's Harbor, Hilton Head Island, South Carolina
13 29126.

14 DIRECT EXAMINATION

15 BY MR. PITTS:

16 Q. You live at Village West?

17 A. I do.

18 Q. You own a condominium there?

19 A. I do.

20 Q. Did you own the condominium at the time of
21 the second construction defect litigation?

22 A. We did.

23 Q. I'm going to hand you a document and ask
24 you if you recognize that.

25 A. Yes.

1 Q. What is that?

2 A. This is a letter that was sent to the
3 homeowners explaining what our fees were going to be
4 for the assessment, how we were to pay it back and
5 requiring our signatures.

6 Q. Did that actually set forth the amount of
7 the special assessment for the shortfall after
8 settlement of the second --

9 A. Correct.

10 Q. -- construction defect case?

11 A. Yes.

12 MR. PITTS: I would like to move that into
13 evidence.

14 MR. SIMRILL: No objection.

15 (DFT. EXH. 10, Memo dated 12-6-04, was
16 marked for identification and received into
17 evidence.)

18 BY MR. PITTS:

19 Q. The special assessment was for the purpose
20 of covering the shortfall for the work to be done by
21 Rice Cleveland and Metalcrafts?

22 A. Correct.

23 MR. PITTS: That's all the questions I
24 have. Thank you.

25 CROSS-EXAMINATION

104

1 BY MR. SIMRILL:

2 Q. You live in the Schooner building?

3 A. Yes.

4 Q. That's one of the four buildings that the
5 work was done on?

6 A. Yes.

7 MR. SIMRILL: Thank you.

8 MR. PITTS: That's all our witnesses.
9 That's our case in defense.

10 (The witness exited the stand.)

11 THE COURT: Happy to hear any closing.
12 Start with the Plaintiff.

13 MR. SIMRILL: Your Honor, I think I have
14 submitted a brief. I'm not used to sitting.

15 THE COURT: Whatever makes you
16 comfortable; sit, stand, whatever you like.

17 MR. SIMRILL: I think I have submitted a
18 brief to Your Honor, and I've submitted argument here
19 today. And the memorandum in support of motion for
20 summary judgment covers about everything I would say.
21 I think that I've covered it repeatedly, and I would
22 just submit what I have and stand on what I have
23 submitted to Your Honor already.

24 THE COURT: Mr. Pitts, happy to hear from
25 you, sir.

1 MR. PITTS: Yes, sir. Again, we would
2 make a motion for an involuntarily nonsuit and
3 directed verdict. In terms of closing statement, we
4 point out first of all that the Court of Appeals
5 said, absent an allegation of extrinsic fraud, the
6 principles of res judicata clearly apply. It's our
7 position that they have not been able to establish
8 any kind of extrinsic fraud based upon the definition
9 of that by our appellate courts.

10 Specifically, they say that there's no
11 extrinsic fraud where the matter at issue could've
12 been found out about through discovery in the case.
13 And that's clearly what happened here. The case was
14 filed, first case, Arata one, was filed March 2005.
15 It wasn't dismissed until, by Judge Gregory, or
16 summary judgement granted until January, late January
17 of 2006.

18 Based upon the date of service of the
19 Amended Complaint, there was an excess of eight
20 months for them to have engaged in some kind of
21 discovery, and they admitted that they did not do
22 that.

23 I think it was also admitted by
24 Mr. Simrill, absent a discovery request, Mr. Bullard
25 had no obligation to produce any documents of Village

106

1 West. In fact, when they were produced, he did it
2 voluntarily himself. There's no fraudulent
3 concealment of any kind based upon the undisputed
4 facts.

5 And also point out that, with respect to
6 their argument that a casualty existed and somehow
7 brought the assessment issue under different
8 provisions in the bylaws, one, they have not put the
9 bylaws into evidence or the master deed into evidence
10 in this case. The casualty is undisputed. They talk
11 about only one, Hurricane Floyd. That was in 1999.

12 The testimony is undisputed that all the
13 work from that casualty was repaired at probably a
14 cost around \$6,000 and that there was no special
15 assessment. That was in late 1999.

16 The special assessment, it's undisputed,
17 resulted from a shortfall after second construction
18 defect litigation occurred. That's in 2004. There's
19 just no connection or basis for claiming any kind of
20 casualty with respect to the special assessment.

21 The other issue raised by the pleadings
22 had to do with the fact that maybe a different
23 allocation of the shortfall should've been because
24 there was work done on property other than the common
25 elements. I would point out there's been absolutely

1 no evidence of that presented by the Plaintiff in
2 this case. For those reasons, I'd say we're entitled
3 to judgement as a matter of law based upon the
4 undisputed facts. That's it.

5 THE COURT: Thank you, sir.

6 MR. SIMRILL: May I respond?

7 THE COURT: Yes, sir.

8 MR. SIMRILL: The first cause of action
9 may be setting -- in the Complaint, may be just a
10 cause of action for fraudulent concealment as he has
11 argued. Second cause of action in here is for fraud
12 and deceit: Both in the prosecution of the case,
13 Edward Bullard, agent, represented that the repair
14 construction was to correct damage only to the common
15 elements and not from a casualty.

16 And the first part of the Complaint, the
17 first cause of action may be for concealment. Second
18 is for active fraudulent misrepresentations by not
19 only the attorney but by -- it's by the attorneys in
20 here. The case is based on fraudulent concealment
21 and fraudulent representations by Village West, duly
22 authorized agents, acting within the scope of their
23 agency. That's my response; this is not strictly for
24 fraudulent concealment but for active fraudulent
25 misrepresentation.

108

1 THE COURT: Anything else from anyone?

2 MR. PITTS: The only point I would make
3 with respect to that, Court of Appeals opinion says,
4 it's alleged extrinsic fraud. That would be the only
5 possible basis to open up the judgment.

6 THE COURT: So I have under advisement
7 cross summary judgment motions, which I think most
8 likely I will deny because of the scintilla rule.

9 I have involuntary nonsuit, directed
10 verdict motion from the Defendant. And, of course,
11 we've taken, I believe, all the testimony in this
12 case; is that correct? Both parties rest. We've had
13 closings.

14 I listened carefully to the Plaintiff's
15 case. And there is clearly the belief that there
16 were falsehoods coming from the side of the
17 Defendant. I certainly didn't hear any proof of
18 anything false. I mean, the fact is the evidence
19 could easily be read that these were two independent
20 events.

21 As a matter of fact, that's what
22 Mr. Dowling testified to. That the 1999 storm event
23 was paid for out of general funds! This assessment
24 that ultimately led to this lawsuit, this special
25 assessment came from -- had nothing to do with the

1 storm. I'm not even sure if the issues that are
2 asserted to be false are false. In fact, there's
3 significant evidence that those letters or the
4 affidavits of Ms. Probert and all that is, in fact,
5 true.

6 As regards to the box, I just don't
7 believe that the Plaintiff has proven their case that
8 there was fraud of any kind. There was no discovery.
9 There's no attempt to conceal anything that I've
10 heard any evidence of or any compelling evidence of.
11 Voluntarily, Village West's attorney turned this box
12 over. And in the absence of a discovery request,
13 complying with nonexistent discovery, I don't believe
14 is fraud, particularly under these circumstances.

15 I heard nothing about the accounting
16 issue. I guess that was either abandoned or has been
17 settled. I don't know whether or not that's an issue
18 or not. For purposes today, I guess it's not an
19 issue. I'll deny that.

20 I'm going to rule for the Defendant in
21 this case and ask Mr. Pitts to please draft an order
22 denying the motions and ruling on the case in chief.
23 Please run that by Mr. Simrill first so he can get a
24 look at it.

25 Anything else from any party?

110

1 MR. PITTS: With respect to the accounting
2 cause of action, can I put in the order that it's no
3 longer an active cause of action? The accounting.
4 You're not pursuing that anymore, are you? We
5 produced everything that there was. You've never
6 asked her anything more on the accounting.

7 MR. SIMRILL: I'd have to look at it and
8 see about that. I don't know. As far as I'm
9 concerned, that was left out of everything that's
10 before the court here.

11 MR. PITTS: I understand that. I was just
12 going to do some housekeeping in the order.

13 THE COURT: There's no evidence as to the
14 accounting. I assumed y'all resolved that in some
15 form or fashion.

16 MR. PITTS: With respect to claim for
17 attorney's fees, take it up at a later date?

18 THE COURT: Draft that order, open it up,
19 and see what we can do. If y'all can agree on
20 whatever that is, great. If you can't, we'll set it
21 for a hearing. Thank you all very much.

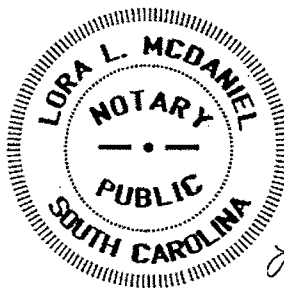
22 (The hearing was concluded at 2:35 p.m.)
23
24
25

1 CERTIFICATE OF REPORTER
2

3 I, Lora McDaniel, Registered Professional
4 Reporter and Notary Public for the State of South
5 Carolina at Large, do hereby certify that the
6 foregoing transcript is a true, accurate, and
7 complete record.

8 I further certify that I am neither related
9 to, nor counsel for, any party to the cause pending
10 or interested in the events thereof.

11 Witness my hand, I have hereunto affixed my
12 official seal this 30th day of May, 2012 at
13 Charleston, Charleston County, South Carolina.
14
15
16
17
18



23 Lora L. McDaniel,
24 My Commission expires:
25 September 18, 2016

I N D E X

Page

DIRECT CROSS REDIRECT RECROSS

WITNESS/EXAMINATION

MADELINE ARATA

BY MR. SIMRILL	43	--	70	--
----------------	----	----	----	----

BY MR. PITTS	--	56	--	79
--------------	----	----	----	----

RAY DOWLING

BY MR. PITTS	85	--	92	--
--------------	----	----	----	----

BY MR. SIMRILL	--	91	--	93
----------------	----	----	----	----

THOMAS CARLSON

BY MR. PITTS	96	--	101	--
--------------	----	----	-----	----

BY MR. SIMRILL	--	99	--	--
----------------	----	----	----	----

COLETTE STEVENSON

BY MR. PITTS	102	--	--	--
--------------	-----	----	----	----

BY MR. SIMRILL	--	103	--	--
----------------	----	-----	----	----

E X H I B I T S

Page/Line

DFT. EXH. 1, Amended Complaint and Summons	58	19
--	----	----

DFT. EXH. 2, Answers to Defendant's		
-------------------------------------	--	--

Interrogatories and depositions	64	17
---------------------------------	----	----

DFT. EXH. 3, Letter dated 8-24-07	68	5
-----------------------------------	----	---

DFT. EXH. 4, Letter dated 10-31-07	69	19
------------------------------------	----	----

DFT. EXH. 5, Incident Report dated 9-17-99	87	10
--	----	----

1	DFT. EXH. 6, Damage report	88	2
2	DFT. EXH. 7, Letter dated 11-18-99	89	9
3	DFT. EXH. 8, General ledger	91	3
4	DFT. EXH. 9, Chronology of repair work	98	15
5	DFT. EXH. 10, Memo dated 12-6-04	103	15
6			
7	PLF. EXH. 1, Affidavit of Mary Probert	73	23
8			
9			

(All exhibits retained by Honorable Dukes.)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NUMBER: 09-CP-07-03198
	)	
INTERNATIONAL SALES AND	)	
MARKETING GROUP,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	PETITION FOR THE AWARD OF
	)	ATTORNEY'S FEES AND COSTS
VILLAGE WEST OWNERS'	)	FOR THE PLAINTIFF'S ATTORNEY
ASSOCIATION, INC. D/B/A VILLAGE	)	
WEST HORIZONTAL PROPERTY	)	
REGIME,	)	
	)	
Defendant.	)	
	)	

TO THE MASTER IN EQUITY FOR BEAUFORT COUNTY; AND THE PLAINTIFFS,
INTERNATIONAL SALES AND MARKETING GROUP:

The Defendant, Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime ("Village West"), hereby moves that attorney's fees and costs be awarded to its attorneys in this matter pursuant to the provisions contained in the Master Deed Establishing Horizontal Property Regime, recorded on February 12, 1985 in the Office of the Register of Deeds for Beaufort County in Official Records Book 413 at page 208, and any amendments thereto ("Master Deed") and By-Laws of Village West Horizontal Property Regime and Village West Owners' Association dated April 2, 1973 and recorded on April 4, 1973 in the Office of the Register of Deeds for Beaufort County in Deed Book 208 at page 296 ("By-Laws").

That because of the nature of the litigation, the amount of money involved, the time expended by Village West's attorneys in research, preparation of documents, the travel, and in view of the results obtained, Village West believes attorneys' fees of \$3,981.25 and costs of \$75.00 should be

awarded in this matter.

The Master Deed and Bylaws provide that the Plaintiff shall pay costs and reasonable attorney's fees incurred by Village West in the collection of past-due Assessments.

Village West, in its Answer and Counterclaim against the Plaintiff, alleges in Paragraphs 29, 30 and 31 that it is entitled to all expenses, including court costs, and reasonable attorney's fees. In its prayer for relief, Village West prays for attorney's fees and the costs and disbursements of the within action.

That a detailed listing of the services performed by attorneys for Village West together with expenses incurred is attached to the Affidavit in Support of Fees attached hereto as Exhibit "A" and made a part hereof.

WHEREFORE, Village West prays that it be awarded attorney's fees of \$3,981.25 and costs of \$75.00 in this matter.

SMOOT & PITTS

By: 

Brian C. Pitts
Attorney for the Defendants,
Village West Owners' Association, Inc. d/b/a
Village West Horizontal Property Regime
P. O. Drawer 23439
Hilton Head Island, South Carolina 29925
(843) 681-3200

April 11, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NUMBER: 09-CP-07-03198
	)	
INTERNATIONAL SALES AND	)	
MARKETING GROUP,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	AFFIDAVIT IN SUPPORT OF AWARD
	)	OF ATTORNEY'S FEES AND COSTS
VILLAGE WEST OWNERS'	)	FOR THE PLAINTIFF'S ATTORNEY
ASSOCIATION, INC. D/B/A VILLAGE	)	
WEST HORIZONTAL PROPERTY	)	
REGIME,	)	
	)	
Defendant.	)	
	)	

PERSONALLY appeared before me Brian C. Pitts, Attorney at Law, who being duly sworn, deposes and says that:

1. He is the attorney for the Defendant, Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime ("Village West").
2. He is a partner with the law firm of Smoot & Pitts, was admitted to the South Carolina Bar in 1987 and spends a significant portion of his practice in civil litigation.
3. He is a member of The South Carolina Bar Association.
4. He has represented Village West, in the proceedings which have been pending before the Court in connection with defending a complaint, obtaining Summary Judgment and obtaining a Order of Judgment for authorized charges, costs and reasonable attorney's fees.
5. He incorporates herein Rule 1.5 of Rule 407 of the South Carolina Appellate Court Rules, which contains the Canons of Ethics concerning the setting of attorney's fees.

6. He further calls the attention of the Court to the plethora of case law decisions by the Supreme Court of South Carolina concerning the factors and criteria which should be considered in the setting of attorney's fees.

7. He relies upon the discretion of this Court in the determination of the amount of fees, based, among other things, upon the Court's file herein and the Court's knowledge of the litigation between these parties, which reflects the nature of the services rendered, the time necessarily expended, the result accomplished, and the other factors which are set forth in the Canons of Ethics and the case law decisions of this State.

8. He is informed and believes during this case the time spent as set forth more fully hereinafter was necessary to the protection of this client's interests and in order to make a concise and clear presentation of the issues to the Court.

9. He states to the Court that to date 13.75 hours have necessarily been expended by the firm in the preparation for the proceedings between the parties, such time in accordance with the time and expense records as reflected on Schedule "1" attached hereto and incorporated by reference herein. The firm charges \$175.00 per hour for the time of Brian C. Pitts.

10. The foregoing time and expenditures have been computed as of April 11, 2012.

11. He states to the Court that it is anticipated that approximately 9 hours will be expended until the conclusion of this matter. A good faith estimate of anticipated future expenses is attached hereto at Schedule "2".

12. He states to the Court that to date \$50.00 in costs have been incurred in this matter, and that he anticipates an additional \$25.00 in costs will be incurred

13. Based not only upon the time necessarily devoted to this cause, but also upon the

other criteria which have been held to be relevant in the setting of attorney's fees, and costs, the undersigned, on behalf of his client, requests that this Court review the file herein, together with this Affidavit, and grant judgment in favor of the undersigned's client against the Plaintiffs, International Sales and Marketing Group, in the sum which may be determined by the Court to be reasonable attorney's fees, and costs.

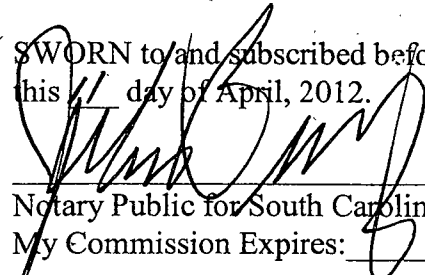
FURTHER AFFIANT SAYETH NOT.

SMOOT & PITTS

By: 

Brian C. Pitts
Attorneys for the Defendants,
Village West Owners' Association, Inc. d/b/a
Village West Horizontal Property Regime
P.O. Drawer 23439
Hilton Head Island, SC 29925-3439
(843) 681-3200

SWORN to and subscribed before me
this 11 day of April, 2012.


Notary Public for South Carolina
My Commission Expires: 5-19-2018

JOHN C. BURIELY
NOTARY PUBLIC, SOUTH CAROLINA
MY COMMISSION EXPIRES: 5-19-2018

SMOOT & PITTS
P. O. DRAWER 23439
HILTON HEAD ISLAND, SOUTH CAROLINA 29925
(843) 681-3200
(843) 681-3204 (FAX)

VILLAGE WEST OWNERS' ASSOC., INC.
ATTN: REGINA YOUNG
C/O ALLIED MANAGEMENT GROUP
240 CUMBERLAND DRIVE
LEXINGTON SC 29072

RE: CA #2011-CP-07-3198

* indicates work-in-process

Client #: 3455

File #: 11-314

As of Date: 04/12/2012

Last Billed 10/31/2011

DATE	TKPR	DESCRIPTION OF SERVICES RENDERED	TIME	AMOUNT
08/22/2011	BCP	PREPARATION OF ANSWER AND COURT CLAIM, INTEROGATORIES, REQUEST FOR PRODUCTION, CERTIFICATE OF SERVICE, CORRESPONDENCE TO CLERK, ETC.	5.00	875.00
09/03/2011	BCP	PREPARATION OF ANSWER AND COUNTER CLAIM TO AMENDED COMPLAINT, CERTIFICATE OF SERVICE, CORRESPONDENCE TO CLERK, CORRESPONDENCE TO SIMRILL	1.30	227.50
10/11/2011	BCP	CORRESPONDENCE TO CLERK AND CORRESPONDENCE TO SIMRILL	.25	43.75
* 04/06/2012	BCP	PREPARATION OF RESPONSE TO REQUEST FOR ADMISSIONS AND CORRESPONDENCE TO SIMRILL.	1.25	218.75
* 04/09/2012	BCP	PREPARATION OF CORRESPONDENCE TO CLERK OF COURT - CERTIFICATE OF SERVICE.	.25	43.75
* 04/09/2012	BCP	PREPARATION OF MOTION FOR SUMMARY JUDGMENT.	1.20	210.00
* 04/11/2012	BCP	PREPARATION OF CORRESPONDENCE TO CLERK OF COURT, MOTION SLIP, CERTIFICATE OF SERVICE AND CORRESPONDENCE TO SIMRILL.	.75	131.25
* 04/11/2012	BCP	PREPARATION OF CORRESPONDENCE TO CLERK OF COURT, MOTION SLIP, CERTIFICATE OF SERVICE AND CORRESPONDENCE TO SIMRILL.	.75	131.25
* 04/11/2012	BCP	PREPARATION OF PETITION FOR AWARD OF FEES AND COSTS FOR DEFENDANTS ATTORNEY.	.50	87.50
* 04/11/2012	BCP	PREPARATION OF AFFIDVIT IN SUPPORT OF AWARD OF FEES AND COSTS FOR DEFENDANTS ATTORNEY.	.75	131.25

ATTN: REGINA YOUNG
File #: 11-314

Page#: 2

** DRAFT **

* indicates work-in-process

* 04/11/2012 BCP	PREPARATION OF GOOD FAITH ESTIMATE	.25	43.75
* 04/11/2012 BCP	PREPARATION OF ORDER FOR JUDGMENT AND FORM FOR JUDGMENT.	1.00	175.00
* 04/11/2012 BCP	PREPARATION OF CERTIFICATE OF SERVICE, MOTION SLIP AND CORRESPONDENCE TO CLERK OF COURT	.50	87.50
TOTAL SERVICES RENDERED:		13.75	\$2,406.25

TIMEKEEPER SUMMARY:

BCP - BRIAN C. PITTS

13.75 HRS @ \$ 175.00/HR = 2,406.25

Totals	13.75	\$2,406.25
---------------	--------------	-------------------

* 04/11/2012	MOTION FEE FOR SUMMARY JUDGMENT	25.00
* 04/11/2012	MOTION FEE FOR PETITION FOR FEES AND COSTS FOR DEFENDANTS ATTORNEY.	25.00
TOTAL COSTS ADVANCED:		\$50.00
11/16/2011	Payment Received - Thank You	227.50
02/01/2012	Payment Received - Thank You	43.75
02/01/2012	Payment Received - Thank You	875.00

TOTAL PAYMENTS RECEIVED: \$1,146.25

PREVIOUS BALANCE: 0.00

CURRENT CHARGES: 2,456.25

LESS PAYMENTS: 1,146.25

TOTAL AMOUNT DUE: \$1,310.00

PLEASE DISREGARD ANY AMOUNTS FOR WHICH
PAYMENT HAS ALREADY BEEN MADE. THANK YOU.

GOOD FAITH ESTIMATE OF ADDITIONAL COSTS AND EXPENSES
PLAINTIFF'S COUNSEL ANTICIPATES IN CONNECTION WITH COMPLETING THE
WITHIN ACTION

- Attendance at hearing in Beaufort; Preparation of Order for Judgment, Certificate of Service, etc.; miscellaneous phone calls, correspondence, etc. to Court, Defendants, Client, Clerk of Court, etc.

9 Hrs.

Total of Estimated Attorney's Fees:	\$1,575.00
--	-------------------

Total of Estimated Costs (execution):	25.00
--	--------------

TOTAL OF BOTH ACTUAL AND ESTIMATED ATTORNEY'S FEES, COSTS & EXPENSES	<u>\$4,056.25</u>
---	--------------------------

Schedule "2" to Affidavit

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity/ Circuit Court Judge

Case No. 2009-CP-07-00036

RECEIVED

DEC 13 2012

SC Court of Appeals

Kenneth C. Arata and Madeleine R. Arata.....Appellants,

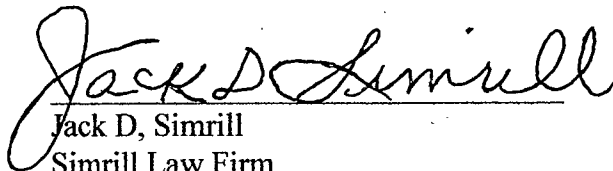
v.

Village West Owners' Association, Inc.

d/b/a Village West Horizontal Property Regime.....Respondent.

CERTIFICATE OF COUNSEL

I hereby certify that the Record on Appeal includes all material proposed by
Appellants and Respondent to be included in the Appeal and no other material.


Jack D. Simrill

Simrill Law Firm

Post Office Box 5681

Hilton Head Island, SC 29938

(843) 785-2134

ATTORNEY FOR APPELLANTS

December 4, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity/Circuit Court Judge

Case No. 2009-CP-07-00036

Madeline R. Arata and Kenneth C. Arata.....Appellants,

v.

Village West Owners' Association, Inc.
d/b/a Village West Horizontal Property Regime.....Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2012, a copy of the Appellants' Record on Appeal to include the Respondent's Designation of Matter in the above captioned action was served on the Respondent, Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime, by hand delivery in the manner prescribed by the applicable rules of Civil Procedure addressed to its counsel as follows:

Brian C. Pitts, Esquire
Smoot & Pitts
15C Lafayette Place
P.O. Drawer 23439
Hilton Head Island, SC 29925-3439



Jack D. Simrill

Jack D. Simrill
Simrill Law Firm
5 Pine Field Road
Hilton Head Island, SC 29926-2013
(843) 415-5293
ATTORNEY FOR APPELLANTS

December 6, 2012