

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case Number: 2008-CP-46-2158

Brian and Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook, Kala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel, Kathleen Kramer, Robert Loebe, Melanie McDaniel, David Osborne, Celeste Arrowood, Vincent Dionna, Mikel Marcuse, James P. Wheaton, Jr., Joseph Manfredini, Elena Manfredini, David Cox, Jonathan B. Dillard, Eric Wilson, Don and Debbie Neff, Marianna Junda, ..... Respondents,

v.

M.U.I. Carolina Corporation, Kensington Place Owners' Association, Inc., and Regent Carolina Corporation, ..... Defendants,

Of whom, M.U.I. Carolina Corporation and Regent Carolina Corporation are, .....  
.....Appellants.

RETURN TO RESPONDENTS' MOTION TO DISMISS APPEAL OF APPELLANTS  
M.U.I. CAROLINA CORPORATION AND REGENT CAROLINA CORPORATION

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Pursuant to *South Carolina Appellate Court Rules: Rule 240(e), SCACR*, Appellants M.U.I. Carolina Corporation and Regent Carolina Corporation (hereinafter “MUI and Regent”) hereby submit their Return, and memorandum of law in support thereof, to *Respondents’ Motion to Dismiss Appeal, Conduct Rule 269 Inquiry and Refer Matter to Circuit Court for Hearing to Determine Sanctions*<sup>1</sup>, served upon MUI and Regent on February 7, 2014.

### **PROCEDURAL HISTORY**

Respondents/Plaintiffs<sup>2</sup> are the owners of 21 of the total 110 units located in the condominium project known as Kensington Place Horizontal Property Regime (hereinafter “Kensington Place”). Respondents/Plaintiffs brought the underlying action against MUI and Regent, asserting causes of action relating to the construction and maintenance of common elements at Kensington Place. MUI was the developer of Kensington Place and Regent is a corporate relative of MUI. Subsequently, Plaintiffs brought suit against the Kensington Place Owners’ Association, Inc. (hereinafter “POA”) alleging negligent failure to maintain. Thus, Plaintiffs, who are unit owners, were actually adverse to the POA.

Plaintiffs have asserted the following claims against MUI and Regent: (1) breach of fiduciary duty *vis a vis* *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corporation*, 349 S.C. 251, 652 S.E.2d 633 (2002), with respect to the condition of the common elements; (2) breach of the implied warranty of habitability in the sale of the

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<sup>1</sup> Please note that among a number of errors and inaccuracies, the Respondents’ caption incorrectly listed Kensington Place Owners’ Association, Inc. as the Appellant. The proper Appellants are M.U.I. Carolina Corporation and Regent Carolina Corporation, as set forth above and on the Notice of Appeal filed February 3, 2014.

<sup>2</sup> Referred to interchangeably herein as “Respondents/Plaintiffs” or “Plaintiffs.”

units; and (3) negligence in completing construction<sup>3</sup> and in the development, marketing, inspection and management of the Property.

In a cross-claim, the POA also asserted claims against MUI for breach of fiduciary duty and negligence in connection with the condition of the common elements of Kensington Place.

The POA and Plaintiffs, who, as noted, were adverse to one another, independently prosecuted the same claims to recover the very same damages from MUI and Regent (*i.e.*, the cost to repair and/or replace the common elements). For this reason, beginning in 2010, MUI and Regent repeatedly raised as a defense that the Plaintiffs lack standing to assert the claim for common element damages and that Plaintiffs are not the real parties in interest with respect to a claim for common element damages. MUI and Regent's first motion to dismiss, considered as a motion for summary judgment, was denied by the Honorable S. Jackson Kimball in June of 2010 (hereinafter the "Kimball Order"). Judge Kimball found that the trial judge would be in a better position to rule upon the standing issue and deferred the ruling on standing to the trial judge. (Kimball Order at p. 4, ¶ 3, attached hereto as Exhibit A).

Subsequently, in March of 2011, the Honorable John C. Hayes, III (hereinafter "Judge Hayes") heard several motions, including the following:

1. MUI and Regent's renewed motion for partial summary judgment on several grounds, including that: (a) Plaintiffs lack standing to assert any claims for damages arising out of the condition of the common elements; (b) Plaintiffs are not the real party in interest with respect to common

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<sup>3</sup> Construction of Kensington Place was originally commenced by a former developer, not a party to this case, prior to MUI's purchase of the property from the bankruptcy estate of the former developer.

element claims or claims to recover damages for costs to repair common elements of the condominium; and (c) Plaintiffs cannot maintain the action for breach of fiduciary duty *vis a vis Dunes West*, as that claim belongs exclusively to the POA; and,

2. Plaintiffs' motion to dismiss the POA's cross-claims against MUI (for breach of fiduciary duty and negligence in connection with the condition of the common elements) on grounds that the POA lacked standing to assert such cross-claims.

By Order dated April 1, 2011 ("First Hayes Order"), Judge Hayes denied MUI and Regent's motion as it related to Plaintiffs' standing, again deferring a ruling on the issue of standing to the trial judge, and did not rule on the issue of standing or real party in interest. Judge Hayes did, however, grant Plaintiffs' motion to dismiss the POA's cross-claims against MUI. (First Hayes Order, attached hereto as Exhibit B.) Both the POA as well as MUI and Regent filed Motions for Reconsideration under *South Carolina Rules of Civil Procedures: Rule 59, SCRCF*. These motions were denied by Judge Hayes in separate Orders, both dated April 15, 2011. Accordingly, the only issue actually decided by the First Hayes Order, was the dismissal of all claims of the POA against MUI and Regent.

On May 16, 2011, the POA, not MUI or Regent, filed a Notice of Appeal of the First Hayes Order (the Notice of Appeal is attached hereto as Exhibit C), the effect of which was to stay the entire case. After the POA filed the appeal seeking a ruling on the standing/real party in interest issues, MUI and Regent cross-appealed on May 23, 2011. (See Notice of Appeal attached as Exhibit D.)

Importantly, mention of the POA's Notice of Appeal and the Notice itself is missing from Respondents/Plaintiffs' Motion to Dismiss this appeal, presumably because it is not advantageous to Plaintiffs who falsely assert that it was MUI and Regent who filed the prior appeal (Respondents/Plaintiffs' Motion to Dismiss at ¶ 8). This is simply not true.

This Court of Appeals consolidated the POA's appeal and MUI and Regent's cross-appeal, on May 25, 2011. To avoid a ruling on the fundamental issue of standing/real party in interest, Plaintiffs subsequently filed a motion with the Court of Appeals, dated June 3, 2011, to dismiss the cross-appeal of MUI and Regent. MUI and Regent filed a return opposing Plaintiffs' motion to dismiss. This Court of Appeals granted Respondents/Plaintiffs' motion and dismissed MUI and Regent's cross-appeal by an Order, dated August 15, 2011, attached hereto as Exhibit E. The underlying case was subsequently stayed by Judge Alford, Chief Administrative Judge for York County, pending a resolution of the appeal by order dated January 4, 2012 (attached as Exhibit F).

In an unpublished decision dated July 17, 2013, this Court of Appeals affirmed Judge Hayes' decision to dismiss the POA's claims against MUI and Regent. *Pulliam v. MUI, et al*, Appellate Case No. 2011-192247 (S.C. Ct. App. 2011), attached hereto as Exhibit G. Therefore, the claims against MUI and Regent made by the POA (the only real party in interest with respect to, which also had standing to assert a claim for common element damages claims, have now been dismissed, by actions of the Plaintiffs, leaving the only remaining claims against MUI and Regent being those brought by the Plaintiffs, whose only interest in the common elements are as owners of a small minority

of Kensington units.

By late July, 2013, the Plaintiffs' lack of standing and the real party in interest issue had been raised repeatedly by MUI and Regent, but had not been decided. Upon receipt of the referenced Court of Appeals decision, on July 31, 2013, MUI and Regent filed the underlying motion for summary judgment, again contesting the standing of Plaintiffs to assert claims relating to common element damages and asserting that Plaintiffs are not the real parties in interest to that claim. This is and has always been a primary defense to the Plaintiffs' claims and has been continually asserted by MUI and Regent.

On October 15, 2013, the York County Clerk set that motion to be heard on January 14, 2014, by Judge Hayes, who was to be the trial judge. When the motion was set to be heard, there was no scheduling order in place and no date for the trial of the case had been set. Subsequently, on January 7, 2014, the week before the scheduled hearing, the parties had a status conference with Judge Alford. At that time, he set the case for trial on February 4, 2014. The scheduling of the motions and the trial date were completely out of the hands of MUI and Regent.

MUI and Regent submitted an extensive brief in support of this motion and, after oral argument on January 14, 2014, Judge Hayes issued an order, dated January 22, 2014, (filed on January 23, 2014) and, for the first time, ruled on the issue of Plaintiffs' standing. ("Second Hayes Order," attached hereto as Exhibit H). In the Second Hayes Order (prepared entirely by Plaintiffs' counsel), at Page 3, Judge Hayes holds, as a

matter of law, that Plaintiffs have standing to assert claims against MUI and Regent for damages related to the common elements at Kensington<sup>4</sup>.

It should be noted that, whether by oversight or intention, the Second Hayes Order is not attached to Respondents/Plaintiffs' motion to dismiss this appeal. It is referenced and quoted (at a section other than the one ruling finally on Plaintiffs' standing) and purported to be at Exhibit I, but the First Hayes Order is contained at Exhibit I to Plaintiffs' motion. As with the inaccurate factual assertions made by Plaintiffs with respect to an earlier appeal, the language of the Order finally addressing Plaintiffs' standing is not advantageous to Plaintiffs with respect to this Motion to Dismiss.

Because of the adverse, and conclusive, ruling with respect to the defense of lack of standing, MUI and Regent filed the within appeal of the Second Hayes Order. Importantly, (1) Judge Hayes is the trial judge for this case; (2) the question of Plaintiffs' standing is a purely legal one; and (3) Judge Hayes' ruling is a final ruling, striking the defenses of lack of standing and the defense that Plaintiffs are not real parties in interest with respect to common element damages.

### **LEGAL ARGUMENT**

#### **I. THE RULING OF JUDGE HAYES REGARDING STANDING AND REAL PARTY IN INTEREST IS IMMEDIATELY APPEALABLE PURSUANT TO SECTION § 14-3-330(1) & (2)**

The Second Judge Hayes Order is immediately appealable because it clearly decides the merits of the case, establishes the law of the case and strokes defenses asserted by MUI and Regent. Section 14-4-330 provides, in part, as follows:

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<sup>4</sup> Judge Hayes Order, drafted by and for Plaintiffs, does not address the real party in interest issue directly, but finds Plaintiffs to be the real party in interest by implication.

The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal:

(1) *Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from;*

(2) *An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action; (Emphasis added.)*

The Plaintiffs move for dismissal of this appeal on the basis that MUI and Regent have again appealed the denial of a motion for summary judgment. MUI and Regent are mindful that, as noted by the Court of Appeals in its previous order, denials of motions for summary judgment are not appealable. As the Court also noted in that order, at the time of the prior appeal, MUI and Regent contended that Judge Hayes' 2011 Order had effectively stricken the MUI/Regent defenses of lack of standing and real party in interest. In its order, the Court of Appeals noted that it had carefully reviewed Judge Hayes' Order then dismissed the appeal, noting that "an order denying summary judgment does not have the effect of striking any defense, does not establish the law of the case, and 'decides nothing about the merits of case, but simply directs the case shall proceed to trial.'" (Exhibit E, Citing, *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994)).

Unlike the First Hayes Order, the Second Hayes Order does strike defenses of MUI and Regent, does establish the law of the case and does decide, in some respects,

the merits of the case. Thus, the Order is immediately appealable.

Clearly, a primary defense of Plaintiffs' claim has been lack of standing of Plaintiffs with respect to the common elements. This is a legal issue and defense and has been finally determined by Judge Hayes. That ruling is immediately appealable.

The Second Hayes Order also involves the merits and is immediately appealable. To involve the merits, the order must "finally determine some substantial matter forming the whole or part of some cause of action or defense[.]" *Peterkin v. Brigman*, 319 S.C. 367, 461 S.E.2d 809 (1995) (quoting *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993)). See also *Cooke v. Palmetto Health Alliance*, 367 S.C. 167, 624 S.E.2d 439 (Ct.App. 2005), rehearing denied (interlocutory order that rejected hospital's defense was immediately appealable as involving the merits since the order finally determined a substantial matter forming part of hospital's defense); and *McLaughlin v. Strickland*, 279 S.C. 513, 516, 309 S.E.2d 787, 798 (Ct. App. 1983) (an order that effectively forecloses a party from contesting the case on the merits affects a substantial right and is immediately appealable).

To illustrate the effect of the order on the merits, directly at issue in this case is the fact that, by law, Plaintiffs have no obligation or even the right to effect common element repairs. Thus, the Plaintiffs are under no legal obligation to spend any money awarded by the jury for the repairs of the common elements at Kensington and are, in fact, prohibited from doing so. That fact is directly at issue in this case and Judge Hayes ruling greatly negates and probably eliminates that argument, thus concluding the merits of that defense.

Under the law cited above, Judge Hayes' ruling that Plaintiffs have standing is

immediately appealable because: (1) it rejects MUI and Regent's standing and real party in interest defenses; (2) rejection of a defense goes to the merits of the case; and/or (3) denying MUI and Regent's standing defense forecloses MUI and Regent from contesting this case on the merits. Accordingly, Judge Hayes' ruling that Respondents/Plaintiffs have standing is immediately appealable under § 14-3-330(1) & (2)(c) and related case law.

**II. EVEN IF IT IS INTERLOCUTORY, JUDGE HAYES' JANUARY 23, 2014 RULING THAT PLAINTIFF HAS STANDING IS APPEALABLE**

South Carolina courts are prone to address appellate issues even with procedural problems when: (1) utilizing procedure would be futile and/or inadequate; (2) the matter is one of public importance; and (3) to promote judicial economy. *Storm M.H. ex rel. McSwain v. Charleston County Bd. of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (S.C. 2012).

Additionally, in South Carolina: (1) an error of law which will prejudice a party in his or her trial and that goes to the rest of the matter is appealable even if interlocutory, *McLaurin v. Hodges*, 43 S.C. 187, 20 S.E. 991, 992 (S.C. 1895); (2) the issue of standing can be considered on appeal even when not immediately appealable, *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996); and (3) Courts can make an exception and hear a denial of a motion for summary judgment, *Davis v. Lunceford*, 287 S.C. 242, 338 S.E.2d 798 (S.C. 1985) recognized as an exception to the general rule (that denials of motions for summary judgment are not immediately appealable) in *Olson v. Faculty House* 354 S.C. 161, 580 S.E.2d 440 (S.C. 2003) and not overruled or mentioned in *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994). Finally, by

statute, rulings that affect the merits and/or strike a portion of a pleading (i.e. a defense) are immediately appealable. S.C. Code Ann. § 14-3-330 (1976 and Supp. 1994).

Under all of these authorities, Judge Hayes' January 23, 2014 ruling that Respondents/Plaintiffs have standing is reviewable on interlocutory appeal. These legal arguments are addressed, in turn, below.

**A. JUDGE HAYES' RULING IS REVIEWABLE BECAUSE IT WOULD BE FUTILE FOR MUI AND REGENT TO ARGUE IT BEFORE THE TRIAL COURT**

Courts are prone to address appellate issues even when procedural problems exist when utilizing procedure would be futile and/or inadequate. *Storm M.H. ex rel. McSwain v. Charleston County Bd. of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (S.C. 2012) (although there were procedural problems with the appeal, the court chose to address it because, among other things, exhausting administrative issues would have been futile).

In this case, any further attempt by MUI and Regent to assert the defense of standing as real party in interest before Judge Hayes would have been futile as he has issued a ruling concluding that Plaintiffs have standing. As such, this appellate court should consider this appeal to avoid imposing such futility upon MUI and Regent.

Procedure would also have been inadequate as it would have required MUI and Plaintiffs to prepare for, and fund, a two week trial and would have subjected them, wrongfully, to a multi-million dollar verdict which would have been a catastrophic result. Ending a multi-year appeal to correct Judge Hayes' ruling would not have been fair or adequate in any respect. This is particularly so when MUI and Regent have been seeking a ruling on this futile issue literally for years.

**B. IT IS IN THE INTERESTS OF JUDICIAL ECONOMY FOR JUDGE HAYES' RULING TO BE REVIEWED ON APPEAL**

It is a most acceptable practice for courts to address issues on appeal in the interests of judicial economy, even though procedural problems may exist. *See Storm M.H. ex rel. McSwain v. Charleston County Bd. of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (S.C. 2012) (although there were procedural problems with the appeal, the court chose to address it because, among other things, a resolution would promote judicial economy) *citing Cabiness v. Town of James Island*, 393 S.C. 176, 712 S.E.2d 416 (2011) (addressing issues in the interest of judicial economy to supply a sufficient analytical framework for future cases).

In the event this appeal is dismissed, MUI and Regent will appeal Judge Hayes' error of law that Plaintiffs have standing, after the trial is over. This case is a complex construction case that will take a week or more to try, costing all parties involved, including MUI and Regent, substantial time and money and subject them to a potentially catastrophic verdict when the Plaintiffs have no standing to assert the claim. It is in the interests of judicial economy, and fundamental fairness, for this Court to hear this appeal, now, so that all parties can avoid the burden and expense of a protracted trial, which would be avoided if this purely legal issue were correctly decided.<sup>5</sup>

**C. IT IS IN THE PUBLIC INTEREST FOR JUDGE HAYES' RULING TO BE REVIEWED ON THIS APPEAL**

Courts regularly address issues that are otherwise not immediately appealable when they go to a matter that is within the public interest. *Storm M.H. ex rel. McSwain v. Charleston County Bd. of Trustees*, 400 S.C. 478, 487, 735 S.E.2d 492, 497 (S.C. 2012)

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<sup>5</sup> See below the controlling language from the By-Laws and Master Deed, that demonstrate Plaintiffs have no legal standing to bring claims for damages to the common elements.

(although there were procedural problems with the appeal, the court chose to address it because, among other things, a resolution was in the public interest) *citing Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001) (recognizing that an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest).

The issue of whether owners have independent standing to assert claims for condominium common element damages claims is one that is of critical importance and directly affects the public interest. If Judge Hayes ruling is correct, each condominium owner in a condominium project has the right to assert and prosecute claims related to the common elements, even when doing so is contrary to the decision of the HOA and other owners or when such claims are even adverse to the rights of an HOA and all other owners. It essentially renders the South Carolina Horizontal Property Regime Act<sup>6</sup>, as well as the thousands of typical condominium master deeds and by-laws, meaningless in many respects. The entire framework of how maintenance and repairs to common elements are to be made, and who has the right to make them, must be reconsidered and reestablished by the Legislature if Judge Hayes ruling is correct. It is clearly in the public interest for this appellate court to accept this appeal and rule on the issue of Plaintiffs' standing for the benefit of these parties as well as for all other owners of condominiums in South Carolina, the courts and even the Legislature of this State.

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<sup>6</sup> The Horizontal Property Regime Act, § 27-31-150, provides that horizontal property is to be governed by By-Laws, and § 27-31-170, provides that each owner is to strictly comply with the By-Laws.

**D. JUDGE HAYES' RULING IS IMMEDIATELY APPEALABLE UNDER SOUTH CAROLINA CASE LAW BECAUSE IT IS A CLEAR ERROR OF LAW**

In South Carolina, an error of law which will prejudice a party in his or her trial, and that goes to the rest of the matter, is appealable even if interlocutory. *McLaurin v. Hodges*, 43 S.C. 187, 20 S.E. 991, 992 (S.C. 1895) citing *Capell v. Moses*, 36 S.C. 562, 15 S.E. 711 (S.C. 1892), *Sease v. Dobson*, 34 S.C. 353, 13 S.E. 530 (1892) and *Bank v. Stelling*, 32 S.C. 102, 10 S.E. 766 (S.C. 1890).

As mentioned previously herein, Judge Hayes, in ruling that Plaintiffs have standing in this case, has committed a clear error of law. It is in the interests of justice and judicial economy and in the public interest, for this Court to accept this appeal and correct this clear error of law. A full factual and legal explanation of the exact reasons Respondents/Plaintiffs do not have standing to sue on the common elements is contained in MUI and Regent's Memorandum filed in support of their summary judgment motion, attached hereto as Exhibit I (exhibits excluded). However, the merits of this legal argument go to Respondents/Plaintiffs' demand for dismissal of the appeal and demand for sanctions. Therefore, MUI and Regent have set forth below the clear provisions of the By-Laws and Master Deed that dictate that the Plaintiffs do not have standing to sue for damages to common elements. The clear, black letter language of the By-Laws and Master Deed (hereinafter also referred to as "the binding contractual documents") are not arguable by anyone, Respondents/Plaintiffs included.

Plaintiffs (individual unit owners who constitute a minority group of condo owners) are bound by, and took title to their units subject to the Master Deed and By-Laws that govern the property. *The By-Laws and Master Deed for the property clearly*

*dictate that Plaintiffs shall not and the POA shall make repairs to the common elements.*

The binding contractual documents of the Plaintiffs state:

1. The POA and not the Plaintiffs are responsible for the “Making of repairs, additions and improvements to or alterations of, the property[.]” (By-Laws at Article IV, Section 3(k).)
2. “All maintenance, repair and replacement to the common elements as defined in the Master Deed....shall be made by the Board or its agent[.]” (By-Laws at Article VII, Section 8(c).)
3. “A Co-owner shall make no changes or additions whatsoever to the exterior of the Unit, any stairs or decks appurtenant thereto, or to any of the limited common elements...without prior written approval of the Board.” (By-Laws at Article VII, Section 12(c).)
4. “[N]o owner may change the appearance of the Common Elements or exterior appearance of a Unit, without permission of Declarant [defined in Article IV, Section (m) as MUI and its successors and assigns].” (Master Deed at Article V, Section 8(b).)

Accordingly, based upon the plain language above, it is crystal clear that Plaintiffs do not have standing to bring claims for damages to common elements.

**E. COURTS HAVE ADDRESSED THE ISSUE OF STANDING IN INTERLOCUTORY APPEAL AND HAVE ADDRESSED THE DENIAL OF A MOTION FOR SUMMARY JUDGMENT ON APPEAL**

The South Carolina Supreme Court has analyzed and considered the issue of standing even when the court acknowledged that the issues before it were not

immediately appealable. *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996). Additionally, the Court has also, on at least one occasion, accepted for interlocutory appeal the denial of a motion for summary judgment. *Davis v. Lunceford*, 287 S.C. 242, 338 S.E.2d 798 (S.C. 1985) recognized as an exception to the general rule (that denials of motions for summary judgment are not immediately appealable) in *Olson v. Faculty House* 354 S.C. 161, 580 S.E.2d 440 (S.C. 2003) and not overruled or mentioned in *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379 (1994).

Based upon the facts and law discussed above and below, it is in the best interest of all parties to this appeal that this court make an exception to the general rule (that denials of motions for summary judgment are not immediately appealable) and hear this appeal on the issue of Plaintiffs' standing.<sup>7</sup>

### **III. SANCTIONS ARE NOT PROPER IN THIS INSTANCE**

Respondents/Plaintiffs are seeking sanctions under *South Carolina Appellate Court Rules: Rule 269, SCACR* and *South Carolina Rules of Civil Procedure, Rule 11, SCRCRCP. Rule 269, SCACR* and *Rule 11, SCRCRCP*, with related case law, are discussed, in turn, below.

#### **A. SANCTIONS ARE NOT PROPER UNDER RULE 269, SCACR**

Respondents/Plaintiffs are seeking sanctions under *South Carolina Appellate Court Rules: Rule 269, SCACR*, entitled *Frivolous Appeals, Petitions, Motions or Returns. Rule 269* provides for sanctions for frivolous appeals. However, the rule

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<sup>7</sup> MUI and Regent seek this Court to make an exception to the general rule/precedent that denials of motions for summary judgment are not immediately appealable given the particular facts of this case and the legal theories supporting review of this matter, which are outlined herein.

specifically states: “This Rule does not apply to any matters where counsel is required by law to pursue an appeal...even though the matter may be frivolous.”

As noted above, Judge Hayes’ ruling that Respondents/Plaintiffs have standing (hereafter “the Ruling”) is a final ruling that may be appealed immediately for all of the reasons set forth above.

MUI, Regent and their counsel gave consideration to these facts and all of the law contained herein before determining that this was a proper appeal. Based upon the facts and the law, MUI and Regent have the right to file this appeal and the undersigned counsel has a duty to file this appeal in defense of his clients. Prior to making a ruling on sanctions under *Rule 269*, MUI and Regent urge this court to consider: (1) the position MUI and Regent found themselves in as a result of the inability of MUI or Regent to get a ruling on the issue of Plaintiffs’ standing in the years of litigation which preceded Judge Hayes’ ruling, despite numerous attempts to have the Circuit Court and even the Court of Appeals to decide the issue; (2) the fact that the timing of the motion, Second Hayes Order, and the trial date were out of the hands of MUI and Regent; (3) the consideration given to this matter by MUI, Regent and their counsel, prior to making this appeal; and (4) the collective facts and law herein supporting MUI and Regent’s position.

**B. SANCTIONS ARE NOT PROPER UNDER RULE 11, SCRPC AND RELATED CASE LAW**

Under *South Carolina Rules of Civil Procedure, Rule 11, SCRPC*, the signature of an attorney constitutes a certificate that to the best of his/her “knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay.” A trial court may “impose sanctions on a party, a party’s attorney, or both for filing a

pleading, motion, or other paper to cause delay or when no good grounds exist to support the filing.” *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597, 713 S.E.2d 624, 628 (S.C. 2011). An equitable standard of review of factual findings exists in an action for sanctions. *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 394 S.C. 97, 104, 713 S.E.2d 650, 653 (S.C.App. 2011) citing *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct.App.2004). In an action in equity, “the appellate court has jurisdiction to find facts in accordance with its own view of the preponderance of the evidence.” *Id.*

To the extent Respondents/Plaintiffs argue that the filing of the motion was “interposed for delay,” MUI and Regent note that, in addition to an unfortunately futile, years-long effort to have the standing issue decided, they filed their renewed motion for summary judgment on July 31, 2013, *immediately after* this appellate court affirmed the trial court’s dismissal of the POA’s claims against MUI and Regent (July 17, 2013). At the time MUI and Regent filed their motion for summary judgment (July 31, 2013), no scheduling order was in place and no trial date had been set.

As previously noted, on October 15, 2013, the clerk set oral argument for the motion to be held on January 14, 2014. A week prior to that, on January 7, 2014, the parties had a status conference by telephone, with the Administrative Judge who, at the time, set the trial date for February 3, 2014. The fact that the trial court did not schedule a hearing on MUI and Regent’s motion until January 14, 2014; the fact that the trial court did not issue a ruling on MUI and Regent’s motion until January 22, 2014; and the fact that the trial court set the case for trial on February 3, 2014 are all matters that clearly were not within the control of MUI and Regent. Based on the foregoing, any

argument that the motion and/or this appeal were “interposed for delay” is clearly without merit and has been apparently created by Plaintiffs to argue for sanctions. As the requirements of the rule (“no good ground” and “interposed for delay”) do not apply here, equity dictates that sanctions against MUI and Regent are improper under *Rule 11*.

Based upon all of the foregoing facts and law, MUI and Regent respectfully request this court to deny *Respondents’ Motion to Dismiss Appeal, Conduct Rule 269 Inquiry and Refer Matter to Circuit Court to Determine Sanctions*.

February 18, 2014



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# **EXHIBIT “A”**

STATE OF SOUTH CAROLINA  
COUNTY OF YORK  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NO: 2008CP4602158

**Brian Pulliam vs. MUI Carolina Corporation**

**CHECK ONE:**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a),  
SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other:
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy:  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other: \_\_\_\_\_

**IT IS ORDERED AND ADJUDGED:**  See attached order;  Statement of Judgment by the Court:

**Order**

Dated at York, South Carolina, this 8th day of June, 2010.

Court Reporter:

s/S. Jackson Kimball

**PRESIDING JUDGE - S. JACKSON KIMBALL**

This judgment was entered on the 14th day of June, 2010, and a copy mailed first class this 14th day of June, 2010, to attorneys of record or to parties (when appearing pro se) as follows:

**W. Jefferson Leath Jr. Leath Bouch & Crawford,**  
LLP P.O. Box 59 Charleston, SC 29402

**Robert T. Lyles Jr. Lyles & Lyles, LLC** P.O. Box  
773 Charleston, SC 29402  
**Kenneth R Raynor Templeton & Raynor, PA** 1800  
East Blvd. Charlotte, NC 28203

\_\_\_\_\_  
**ATTORNEY(S) FOR THE PLAINTIFF(S)**

\_\_\_\_\_  
**ATTORNEY(S) FOR THE DEFENDANT(S)**

**David Hamilton**

SCRPC APP-24/FORM 4

\_\_\_\_\_  
David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS

BRIAN AND DEBORAH C. PULLIAM, )  
MONICA BRADSHAW, HELEN K. )  
COOK, KALA CRAIG, VICTOR E. )  
DIRIENZO, CYNTHIA DITURSI, J. )  
SCOTT DREXEL, KATHLEEN KRAMER, )  
ROBERT LOEBE, MELANIE )  
MCDANIEL, JESSICA NEFF, DAVID )  
OSBORNE, CELESTE ARWOOD, )  
VINCENT DIONNA, MIKEL MARCUSE, )  
JAMES P. WHEATON, JR., JOSEPH )  
MANFREDINI, ELENA MANFREDINI, )  
DAVID COX, JONATHAN B. DILLARD, )  
AND ERIC WILSON, INDIVIDUALLY )  
AND ON BEHALF OF ALL OTHER )  
SIMILARLY SITUATED PLAINTIFFS, )

Plaintiff, )

vs. )

M.U.I. CAROLINA CORPORATION, and )  
KENSINGTON PLACE OWNERS' )  
ASSOCIATION, INC., )

Defendant. )

**ORDER**

Case No. 2008CP4602158

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2010 JUN 14 PM 1:34  
DAVID HAMILTON  
C.C.P. & GS  
YORK COUNTY, SC

This matter came before me on May 26, 2010, upon several motions of the parties. Plaintiffs' motions were: to dismiss the counterclaim of Defendant Kensington Place Owners' Association, Inc. ("Kensington"); and, to certify this case as a class action and approve the Pulliam Plaintiffs as class representatives. The motions of Defendant M.U.I. Carolina Corporation ("M.U.I.") were: to dismiss Plaintiff's claims; and, to dismiss Kensington's cross-claim. The motions of Kensington were: to dismiss M.U.I.'s cross-claim; and, for summary judgment as to Defendant Deborah Pulliam, and as to all of Plaintiffs' claims. Representing the parties were: W. Jefferson Leath and Michael S. Seekings, Plaintiffs' attorneys; Kenneth R. Raynor ("Raynor"), attorney for Kensington; and, Robert T. Lyles, attorney for M.U.I.

**BACKGROUND**

Plaintiffs brought this action against MUI and Kensington, asserting causes of action relating



to the construction and maintenance of the condominium project in which each of them owns a unit. Kensington is made a party based on alleged breaches of duty owed by Kensington to Plaintiffs. The alleged breaches are premised upon the actions or inactions of the board of directors of Kensington, the homeowners association of the horizontal property regime ("HPR"). Some of Plaintiffs are on the current board of Kensington.

In defending against Plaintiffs' claims, Kensington, through Raynor, asserted defenses, a counterclaim and a cross-claim against MUI. While denominated a counterclaim against Plaintiffs, the matters pleaded in the counterclaim basically challenges the authority of Plaintiffs to bring this action, and request that any recovery of Plaintiffs be paid to Kensington. The counterclaim is based on the master deed and bylaws of the established HPR governing the relationship between Plaintiffs and Kensington.

As the arguments of counsel and exhibits presented to me went beyond the pleadings and involved argument based on the result of discovery, I have considered all of the motions referenced above, except the motion to certify this matter as a class action, as motions for summary judgment.

#### **STANDARD FOR SUMMARY JUDGMENT**

Summary judgment is appropriate when it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), S.C.R.C.P. In determining whether any triable issue of fact exists, as will preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct.App. 1997). In ruling on a summary judgment motion, the Court should consider the pleadings, depositions, interrogatory answers, admissions, and affidavits in determining whether there is a genuine issue of fact for trial. *See Thomas v. Waters*, 315 S.C. 524, 445 S.E.2d 659 (Ct.App. 1994). "If the evidence favoring the nonmoving party is merely colorable . . . or is not significantly probative, . . . summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 477 U.S., 242, 249-250 (1986).

Summary judgment is appropriate when facts exist on which reasonable minds cannot differ, and it is not appropriate where further inquiry into the facts is desirable to clarify the application of law. It is not, however, sufficient that the nonmoving party seeks to create an inference that is not reasonable, or an issue of fact that is not genuine, in order to avoid summary judgment. *Rothrock v. Copeland*, 305 S.C. 402, 409 S.E.2d 366 (1991). The purpose of summary judgment is to

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expedite disposition of cases that do not require the services of a fact finder. In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose as a matter of law." *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001); *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984); *see, also, Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (standard for summary judgment "mirrors" standard for directed verdict).

### DISCUSSION

**1. Plaintiffs' motion to dismiss the counterclaim of Kensington.**

Based on my construction of the applicable provisions of the master deed and by-laws of Kensington, the motion to dismiss the counterclaim is denied. Homeowner approval is not required for the HOA to prosecute a counterclaim.

**2. Plaintiffs' motion to certify this case as a class action and approve the Pulliam Plaintiffs as class representatives.**

The prerequisites to court approval of a class action are the following:

1) the class must be "so numerous that joinder of all members is impracticable;" 2) there must be "questions of law or fact common to the class;" 3) the "claims or defenses of the representative parties [must be] typical of the claims or defenses of the class;" 4) "the representative parties [must] fairly and adequately protect the interests of the class;" and 5) [353 S.C. 21] "the amount in controversy [must] exceed one hundred dollars for each member of the class." *Gardner v. South Carolina Dept. of Revenue*, 353 S.C. 1, 20-21, 577 S.E.2d 190, 200 (2003), quoting Rule 23(a), South Carolina Rules of Civil Procedure ("SCRCP").

The burden of proving the satisfaction of all these prerequisites is upon the proponent of class certification. *Id.*; *Waller v. Seabrook Island Property Owners Association*, 300 S.C. 465, 388 S.E.2d 799 (1990). "It is imperative the court apply a rigorous analysis to assure the prerequisites of Rule 23(a) have been satisfied." *Waller, supra*, 300 S.C. at 467, 388 S.E.2d at 801.799. Each of the prerequisites must be met in accordance with this standard. *Id.*

The mere fact that the subject matter of litigation will involve a large number of parties does not require class certification. It is also necessary that the named plaintiffs interests not be antagonistic to the rest of the class. *Waller, supra*. This element goes to the issue of whether the representatives of the class can be expected to protect the interests of the whole class, and whether the representatives' claims and defenses are substantially the same as the rest of the class.

In the present case, based on the discovery cited, I am concerned that there is a divergence of opinion among homeowners on the pursuit of this action in the manner that it has been pursued. It is apparent that the named Plaintiffs have attempted to secure the participation of the other owners

  
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by repeated communication of Plaintiffs' activities in pursuit of the claims asserted. However, Plaintiffs are only twenty-two of more than a hundred owners. It is also clear that there is a divergence of opinion as to how to seek redress from M.U.I., the developer, for allegedly failing in its duty to turn over the common elements of the condominium to the HOA.

Further, the collective claims pertaining only to the common elements of the condominium regime are now being pursued by Kensington, the lawful representative of all owners under both the by-laws and by statute. It is apparent that some owners are satisfied with this pursuit.

Therefore, based on the record presented to this point, I find and conclude that Plaintiffs are not entitled to class certification.

**3. Defendant M.U.I.'s motion to dismiss Plaintiffs' claims.**

It is clear that Plaintiffs may have the right to pursue their claims in their own right. Given the complexity of this litigation, I believe that the individual claims asserted by the Plaintiffs should be decided based on a full development of the facts as to each claim, and the defenses applicable to each claim, at trial. Therefore, the motion is denied with exception noted below.

I am mindful that there may be only one recovery for damages pertaining to the common elements of the condominium; however, that issue may be dealt with at trial, in the discretion of the trial judge, by special verdicts and special instructions to the jury.

Notwithstanding the general ruling above, M.U.I. is entitled to summary judgment as to Plaintiffs' claim for unfair trade practices. From the record presented, and applying the requisite summary judgment standard, I find and conclude that Plaintiffs' claims do not present an issue as to either impact on the public interest, or potential for repetition. The dispute in this case is confined to M.U.I.'s duty, and alleged breach thereof, in connection with the circumstances surrounding a single project, and there is no implication of public impact or repetition. Thus, the motion is granted as to the unfair trade practices claim.

**4. Defendant M.U.I.'s motion to dismiss Kensington's cross-claim.**

Kensington is arguably the only appropriate party to pursue M.U.I. for the breaches of duty alleged against M.U.I. as developer in respect to the common elements of the HPR. In any event, as noted above, there can only be one recovery of damages pertaining to the common elements, and that can be dealt with by the trial judge. Therefore, the motion is denied.

**5. Defendant Kensington's motion to dismiss M.U.I.'s cross-claim.**

M.U.I.'s cross-claim is dependent on the development of facts at trial, and the ultimate verdict in the case. Therefore, it would be inappropriate to dismiss the cross-claim at this time, and the motion is denied.

  
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**6. Defendant Kensington's motion for summary judgment as to Defendant Deborah Pulliam, and as to all of Plaintiffs' claims.**

As stated above, given the complexity of this litigation, I believe that all claims should be decided based on a full development of the facts as to each claim, and the defenses applicable to each claim, at trial. Therefore the motion is denied.

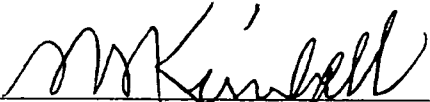
**ORDER**

Based on the discussion herein, the arguments presented, the exhibits submitted for the Court's consideration, and the applicable law, it is ordered as follows:

1. Plaintiffs' motion to dismiss the counterclaim of Kensington is denied.
2. Plaintiffs' motion to certify this case as a class action and to approve the Pulliam Plaintiffs as class representatives is denied.
3. Defendant M.U.I.'s motion to dismiss Plaintiffs' claims is denied.
4. Defendant M.U.I.'s motion to dismiss Kensington's cross-claim is denied.
5. Defendant Kensington's motion to dismiss M.U.I.'s cross-claim is denied.
6. Defendant Kensington's motion for summary judgment as to Defendant Deborah Pulliam, and as to all of Plaintiffs' claims is denied.

AND IT IS SO ORDERED.

June 8, 2010

  
S. Jackson Kimball, Special Circuit Judge  
York County

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# **Exhibit “B”**

Rec'd 4-6-11

STATE OF SOUTH CAROLINA  
COUNTY OF YORK  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NO: 2008CP4602158

**Brian Pulliam vs. MUI Carolina Corporation**

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
  - Rule 12(b), SCRPC;
  - Rule 41(a), SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);
  - Rule 40(j) SCRPC;
  - Other:
- ACTION STRICKEN (CHECK REASON):**
  - Rule 40(j) SCRPC;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_
  - Bankruptcy:

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:

**Order**

Dated at York, South Carolina, this 1st day of April, 2011.

Court Reporter:

s/John C. Hayes, III

**PRESIDING JUDGE - JOHN C. HAYES, III**

This judgment was entered on the 1st day of April, 2011, and a copy mailed first class this 1st day of April, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

**W. Jefferson Leath Jr.** Leath Bouch & Seekings  
LLP P.O. Box 59 Charleston, SC 29402

**Robert T. Lyles Jr.** Lyles & Lyles, LLC P.O. Box  
773 Charleston, SC 29402  
**Kenneth R Raynor** Templeton & Raynor, PA 1800  
East Blvd. Charlotte, NC 28203

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

**David Hamilton**

SCRPC APP-24/FORM 4

\_\_\_\_\_  
David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA )  
COUNTY OF YORK )  
) )  
Brian and Deborah C. Pulliam, )  
Monica Bradshaw, Helen K. Cook, )  
Kala Craig, Victor E. Dirienzo, )  
Cynthia Ditursi, J. Scott Drexel, )  
Kathleen Kramer, Robert Loebe, )  
Melanie McDaniel, Don and Debbie Neff, )  
David Osborne, Celeste Arrowood, )  
Vincent Dionna, Mikel Marcuse, )  
James P. Wheaton, Jr., Joseph Manfredini, )  
Elena Manfredini, David Cox, )  
Jonathan B. Dillard, and Eric Wilson, )  
and Marianna Junda, )  
) )  
Plaintiffs, )  
) )  
vs. )  
) )  
M.U.I. Carolina Corporation, and )  
Kensington Place Owners' )  
Association, Inc., and Regent Carolina )  
Corporation, )  
) )  
Defendants. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2008-CP-46-<sup>2158</sup>~~2158~~

ORDER  
"Catch 22"  
Doc Daneeka<sup>1</sup>

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DAVID HAMILTON  
C.C.C.P. & GS  
YORK COUNTY, SC

*Catch-22, A situation in which a desired outcome is impossible because of inherently illogical rules or conditions. American Heritage College dic-tion-ar-y., 4<sup>th</sup>Ed., 2002, page 227.*

The Court heard arguments on several motions in this matter on March 24, 2011. No court reporter was present. Plaintiffs were represented by W. Jefferson Leath, Jr., Esq. and Michael S. Seekings, Esq.; MUI Corporation (MUI) and Regent Carolina Corporation (Regent) were represented by Robert T. Lyles, Jr., Esq. and Kensington Place Owners' Association, Inc. (KPOA) by Kenneth R. Raynor, Esq.

<sup>1</sup> Catch-22, Joseph Heller, Simon and Schuster (1961).

## Back Ground

Briefly, Plaintiffs are owners of some of the condominiums in Kensington Place a Horizontal Property Regime (HPR). MUI is the developer of Kensington Place and Regent Carolina Corporation (Regent) is a subsidiary of MUI. MUI, as developer, established a property owners association (POA) and controlled same until it transferred the control of the POA to a Board comprised of the Kensington Place owners. The transfer established control and maintenance of the Kensington Place common elements in the Kensington Place POA (KPOA).

Plaintiffs claim that when MUI transferred control of the common areas to KPOA, these common areas were not in good condition, and MUI did not set aside enough funding to put the common areas in good, safe, usable order.

The Court will not elaborate on the struggle within KPOA as to the membership of the board and pursuit of claims regarding the common areas.

In an earlier Order, Judge S. Jackson Kimball, in addressing several motions, set forth this case's background succinctly, thusly<sup>2</sup>:

Plaintiffs brought this action against MUI and Kensington, asserting causes of action relating to the construction and maintenance of the condominium project in which each of them owns a unit. Kensington is made a party based on alleged breaches of duty owed by Kensington to Plaintiffs. The alleged breaches are premised upon the actions or inactions of the board of directors of Kensington, the homeowners association of the Horizontal Property Regime ("HPR"). Some of Plaintiffs are on the current board of Kensington.

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<sup>2</sup> Defendant Regent Carolina Corporation was later added by amendment of the Complaint.

A handwritten signature in black ink, appearing to be 'J. Kimball', is located in the bottom right corner of the page.

**MUI's Motion for Summary Judgment**

MUI argues it is entitled to summary judgment as to Plaintiffs' claims based on Plaintiffs' lack of standing to pursue same.

While the motions before Judge Kimball were motions to dismiss, he treated them as motions for summary judgment since the arguments and exhibits presented went beyond the pleading.

As to MUI's motion, Judge Kimball held:

It is clear that Plaintiffs may have the right to pursue their claims in their own right. Given the complexity of this litigation, I believe that the individual claims asserted by the Plaintiffs should be decided based on a full development of the facts as to each claim, and the defenses applicable to each claim, at trial. Therefore, the motion is denied.

The undersigned finds Judge Kimball's denial of summary judgment to MUI is the law of the case and may not be, in effect, reversed by the Court in ruling on MUI's instant motion.

The undersigned feels compelled to elaborate on MUI's motion as this is the eve of trial. As did Judge Kimball, MUI's motion for summary judgment is denied for the reasons set forth below in addition to Judge Kimball already denying MUI's previous motion for summary judgment. The status of Regent as a proper party is elsewhere discussed. For purposes of this Order, and this Order only, the Court treats Regent as amalgamated with MUI.

First, as observed, this is a complex case and a full record needs to be established.

Second, the undersigned finds the issue presented by MUI as to Plaintiffs' standing and their not being the real party in interest is a novel issue in South Carolina.

All parties rely on Concerned Dunes West Residents, Inc. v. Georgia Pacific Corporation, 349 S.C. 251, 562 S.E.2d 633 (Sup. Ct. 2002) to some extent. (Abbreviate CDWR herein). The

undersigned finds CDWR is dichotomous on the instant issue. In CDWR the Plaintiff was not the Dunes West POA<sup>3</sup>, but rather an incorporated group of Dunes West owners. The owner's posture in CDWR is analogous to that here.

The dichotomy occurs because throughout the Opinion the Court discussed the rights of property owners associations and nowhere addresses the rights of an individual owner, a group of owners, or a legal entity comprised of owners to bring a suit such as that here. The Court simply accepted the parties' posture as plead. That is, the property owners brought suit in their own right. No challenge to the institution of the suit by the owners is mentioned in CDWR.

It should be noted that CDWR is a case in which the Supreme Court answered certified questions from the United States District Court. None of the certified questions raised the standing or real party in interest issue and, therefore, the Supreme Court could not, or at least would not, address questions outside those certified. The Court confined its Opinion to examining three of the five questions certified from the District Court.

The Opinion does not address the CDWR Plaintiffs standing in the body of the Opinion. The sole holding of CDWR is:

The developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair. Failure to do so, subjects the developer to liability for bringing the common areas up to standard. (349 S.C. at 257).

CDWR does not address who may pursue the claim against the developer.<sup>4</sup> In CDWR, it was not the POA, but rather a legal entity composed of individual owners that pursued the claim

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<sup>3</sup> Dunes West is a Planned Unit Development or PUD. Kensington Place is not a PUD, but the Court finds HPRs and PUDs are similar and the holding in CDWR applicable to a HPR.

<sup>4</sup> There is no question, the POA could pursue the instant claim. See Queen's Grant Villas Horizontal Property Regimes I-V. vs. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985).

against the developer. The Plaintiffs in CDWR do not differ significantly from Plaintiffs here other than CDWR's Plaintiffs' corporate formality.

Third, the By-Laws of KPOA (Exhibit "F" to the Master Deed of Kensington Place Horizontal Property Regime) have a section that establishes certain rights in individual members to sue the POA, its officers, or Board under certain circumstances (Article XV of By-Laws). This Article actually does not pertain to Plaintiffs' claims against the developer, MUI, but to claims against the KPOA, its officers or directors. Nothing has been cited to the Court that precludes any owner from seeking redress against the developer for a breach of its duties, as was done in CDWR. The By-Laws do not require owners to first request KPOA to act before proceeding on their own.

It seems fundamental that an individual may seek redress for any property rights they may have. That is not to say that these rights are exclusive to the individual owners. The duty owed by the developer is to the POA (*See* CDWR), and the POA could maintain the action. (*See Queen's Grand Villas Horizontal Property Regimes I-V. vs. Daniel International Corp.*, 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985) and cases cited in CDWR from Florida and California).<sup>5</sup>

The Court should point out that the CDWR Court seems to confine the developer's liability to pay damages solely to the POA (349 S.C. at page 260). As observed by Judge Kimball, there may only be one recovery for damages pertaining to the common elements. CDWR, by implication, establishes the POA as the only entity entitled to recover damages, but the Court need not and indeed cannot make any findings or rulings as to the damages issue at this time. This will most probably require further development if Plaintiffs obtain a verdict. However, the Court would be derelict if it did not point out the CDWR language as to damages.

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<sup>5</sup> Counsel for MUI argues that the POA had the right, by statute and by-laws to represent all condominium owners. The Court cannot find this statutory authorize in Section 27-31-10, *et seq.*, S.C. Code of Laws, 1976, as amended.

This is one of many points of contention. The Court observes that CDWR did not address who could pursue the claim against the developer as it did not have that issue before it. However, the Supreme Court seems to have established who is the beneficiary of any recovery. The Court uses the word "seems" advisedly. Here lies the catch 22. Plaintiffs can sue, but CDWR seems to vest the right of recovery in KPOA.

The issues here are not only complex, as observed by Judge Kimball, but novel. Novel issues should be decided with a full and complete record. Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009). (See also KPOA's Memorandum of March 22, 2011).

KPOA argues Plaintiffs cannot sue it because the Plaintiffs are in effect suing themselves. MUI adopts this argument also. There is a paucity of cases dealing with the relationship and rights of property owners relative to POAs.

In Murphy v. Yacht Cove Homeowners Assoc., 289 S.C. 327, 345 S.E.2d 709 (Sup. Ct. 1986), members of an unincorporated condominium association (husband and wife) sued the POA in tort. The Supreme Court held in Murphy that members of a condominium association could, pursuant to The Horizontal Property Act, sue the Association in contract or tort.

The Murphy Court held that the below language from Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corporation, 286 S.C. 555, 335 S.E.2d 365 (sup. Ct. 1986), "implies that an association can be sued by the unit owners for its failure to discharge its duties," 289 S.C. 368:

We have noted that [s]hould the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements which it maintains it may be liable to the homeowners for its omissions.  
286 S.C. at 556.

The Supreme Court clairvoyantly foresaw the imbroglio extant here. The Murphy Court observed:

While the issues raised by appellant are a source of legitimate concern, it is the function of the Legislature and not this Court to anticipate problems such as the ones envisioned by appellant and enact legislation to deal with them. (289 S.C. at 369).

While the Horizontal Property Act has in part been amended since 1986, the Legislature has not addressed the problems foreseen by the Supreme Court in Murphy. (1999 Act. No. 25; 1999 Act No. 86; and 2006 Act No. 250).

MUI's Motion for Summary Judgment is DENIED.

**Plaintiffs Motion for Partial Summary Judgment as to Liability Against POA**

There exists genuine issues of material fact as to KPOA's liability, if any, and Plaintiffs are not entitled to judgment as a matter of law on this issue.

Plaintiffs have presented the affidavit of Michael R. Parades, PCAM, in support of their motion for partial summary judgment. This affidavit is insufficient to support Plaintiffs' motion. The affidavit relies on a survey of Gary Freeman, AIA, and Repair Estimates by Procon<sup>6</sup>. Such reliance is appropriate under SCREvid 703. However, a witness's reliance on the reports of others does not, per se, establish the correctness or general reliability of the reports. That is to say the expert, Mr. Parades, relies on the accuracy of third party reports. The reports are not presented as sworn affidavits nor have they been subject to scrutiny by cross-examination.

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<sup>6</sup> Plaintiffs' brief also references a Miller Dodson report which was not attached nor mentioned in Mr. Parades affidavit. Of course, a report is just that, nothing else.

Handwritten signature and initials, possibly "JC" and "4/4", with a checkmark.

**Plaintiffs Motion to Substitute Real Party in Interest Defendants**

MUI is, based on a corporate structure chart provided the Court<sup>7</sup>, a subsidiary of one or more other corporate entities. Plaintiffs have moved to add two legal entities they argue are so interrelated with MUI as to be necessary defendants. Plaintiffs argue these two entities are additional real parties in interest based on the theory of amalgamation pursuant to Kincaid v. The Landing Development, 289 SC 89, 344 S.E.2d 869 (Ct. App. 1986). Defendant Regent is one of many entities on the chart and, by earlier Order, has been added since Plaintiffs filed and served the original Complaint.

Plaintiffs' Motion is denied. Without giving the matter short shrift, the Court finds adding additional parties is not necessary for the resolution of Plaintiffs' claims, would delay trial scheduled within two months of this date, would prejudice the current parties as new claims or cross-claims may arise through the addition of parties, extensive and expensive discovery would have to be retreaded, and repairs would be pushed farther in the future, perhaps allowing more deterioration of the common elements and a greater cost to repair.

**Plaintiffs' Motion to Dismiss Cross-Claim of KPOA**

Plaintiffs argue that KPOA lacks standing to pursue the cross-claim. The basis for Plaintiffs' argument is that KPOA does not own the common elements or any part thereof, that KPOA has not obtained the necessary votes to pursue the cross-claim, and that Article XV, as noted above, gives the Plaintiffs the right to pursue this claim as do the laws of this State.

Donald Triplett, President of KPOA, has admitted, under oath, that KPOA has not been authorized to commence or prosecute any action against MUI. (Triplett's deposition, page 65,

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<sup>7</sup> Exhibit "C" to Plaintiffs' Memorandum in Support of their motion to add a statutory cause of action and to add a real party in Interest.

line 12 through page 66, line 6).<sup>8</sup> There is no evidence in any of the record before the Court that KPOA has properly voted to institute the cross-claim or ratified its institution. For this reason, KPOA may not maintain its cross-claim against MUI.

It might be argued that MUI would be the party to challenge the cross-claim<sup>9</sup>. However, Plaintiffs instituted this action and are entitled to have it litigated and resolved with only proper parties at the table. Also, as members of KPOA, Plaintiffs have a right to protect their interests as such and insist that KPOA function according to its by-laws.

The complexity of this case is highlighted by this instant motion. As noted, Judge Kimball, without additional comment, denied MUI's Motion to Dismiss KPOA's cross-claim. This is the law of the case as to MUI and KPOA. In spite of this, Plaintiffs have an independent right to move to dismiss the cross-claim as members of the POA. The Plaintiffs have exercised their independent rights and are entitled to the relief they seek, i.e., dismissal of the cross-claim. This creates a conundrum. KPOA's By-Laws do not address cross-claims in Article XI of the by-laws but does allow counterclaims in proceedings instituted against it. (Article XI (d)). The reason and wisdom in such distinction is not for the Court.

This conundrum is resolved by the undersigned finding (without any real authority to so do) that a subsequent, successful motion by Plaintiffs trumps the denial of MUI's motion by Judge Kimball and KPOA's cross-claim against MUI is dismissed.

As noted, Plaintiffs have a separate and distinct interest in the actions of KPOA. I find Plaintiffs' rights are direct, not tangential as MUI's are.

---

<sup>8</sup> The deposition was taken November 11, 2009.

<sup>9</sup> Judge Kimball has denied MUI's Motion to Dismiss KPOA's cross-claim.



**Plaintiffs Motion to add a cause of action pursuant to  
Section 27-31-430, S.C. Code of Laws, as amended**

Section 27-31-430, South Carolina Code of Laws, 1976, as amended, relates to the conversion of rental units to condominium ownership. This Section requires certain disclosures to be reported to a purchaser. Plaintiffs assert that some Kensington units were rental units prior to their sale as condominium units.

The Plaintiffs' motion to add this cause of action is denied. There is no evidence any of the Plaintiffs purchased any rental unit. The nature of the rental of any units is unclear. Any cause of action under The Unfair Trade Practices Act under Section 27-31-140 would inure only to the purchaser of a particular unit which was a "rental unit."

Also, for the reason set forth as to Plaintiffs' Motion to Substitute Real Party in Interest, addition of a new cause of action would work to the prejudice of Defendants. Specifically, the trial of this case would necessarily be pushed into the future.

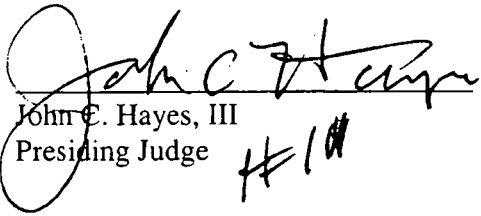
Plaintiffs' motion to add a cause of action pursuant to Section 27-31-430, S.C. Code of Laws, 1976, as amended is denied.

Wherefore:

1. MUI's Motion for Summary Judgment is DENIED, and
2. Plaintiffs Motion for Partial Summary Judgment as to Liability Against KPOA is DENIED, and
3. Plaintiffs' Motion to Substitute Real Party Interest is DENIED, and
4. Plaintiffs' Motion to Dismiss Cross-Claim of KPOA is GRANTED, and
5. Plaintiffs' Motion to Add a Cause of Action (§ 27-31-430) is DENIED.

*JC H #60*

IT IS SO ORDERED.

  
John C. Hayes, III  
Presiding Judge #10

April 1, 2011  
York, South Carolina

**ADDENDUM ATTACHED**

- R. Negligence of Third Party  
(unnecessary as raised by qualified General Denial);  
*See Funderburke v. Johnson*  
253 S.C. 430, 171 S.E.2d 597 (1969)
- S. Acceptance
- T. Economic Loss Rule
- U. Open and Obvious
- V. Counterclaim (MUI Only)

2. Plaintiffs' Reply to MUI's Counterclaim

3. KPOA

- A. Qualified General Denial
- B. Standing (ruled on)
- C. Failure to comply with Rule 23 SCRPC (out)
- D. Counterclaim
  - 1. Breach of Contract by Plaintiffs
- E. Cross-claim against MUI and Regent (ruled on)

4. Plaintiffs Reply To KOPA's Counterclaim

5. Pending Motions

- 1. To exclude Evidence
- 2. To Quash Subpoena

Jc 74 #13

# **Exhibit “C”**

**TEMPLETON & RAYNOR, P.A.**

ATTORNEYS AND COUNSELLORS AT LAW

1800 EAST BOULEVARD  
CHARLOTTE, NORTH CAROLINA 28203  
TELEPHONE 704-344-8500  
FACSIMILE 704-344-8555

THOMAS B. TEMPLETON  
KENNETH R. RAYNOR\*

CLAY A. CAMPBELL\*  
EMILY M. DROSBACK

*\*Also Admitted in South Carolina*

May 16, 2011

The Honorable Kenneth A. Richstad  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

RE: Case No.: 08-CP-46-2158

Brian and Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook, Kala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel, Kathleen Kramer, Robert Loebe, Melanie McDaniel, Jessica Neff, David Osborne, Celeste Arrowood, Vincent Dionna, Mikel Marcuse, James P. Wheaton, Jr., Joseph Manfredini, Elena Manfredini, David Cox, Jonathan B. Dillard, and Eric Wilson, Individually and on Behalf of All Other Similarly Situated Plaintiffs, Respondents,

v.

Kensington Place Owners' Association, Inc., Appellant

v.

M.U.I. Carolina Corporation, and Regent Carolina Corporation, Respondents,

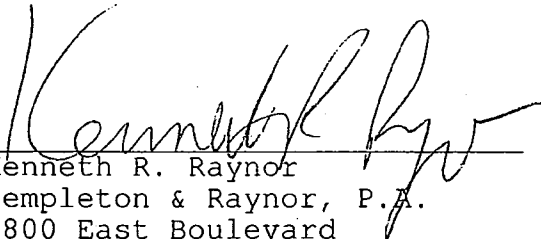
Dear Mr. Richstad:

Enclosed for filing is a Notice of Appeal in the above case. Also enclosed are the following:

1. Proof of Service of the Notice of Appeal on the Respondents.
2. A copy of the Orders which are to be challenged on appeal.
3. A filing fee of \$100.00.

May 16, 2011  
Page -2-

Sincerely,

  
Kenneth R. Raynor  
Templeton & Raynor, P.A.  
1800 East Boulevard  
Charlotte, NC 28203  
Telephone (704) 344-8500  
*Attorney for Appellant*

cc: Robert T. Lyles Jr.  
Attorney for Respondents  
LYLES & LYLES, LLC  
342 E. Bay Street  
Charleston SC 29401

W. Jefferson Leath Jr.  
Attorney for Respondents  
LEATH, BOUCH, CRAWFORD & VON KELLER, LLP  
P.O. Box 59  
Charleston SC 29402

Templeton & Raynor, P.A.  
1800 East Boulevard  
Charlotte, NC 28203

The Honorable Kenneth A. Richstad  
Clerk, South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, SC 29211

**First Class Mail**

248

TEMPLETON & RAYNOR, P.A.  
ATTORNEYS AND COUNSELLORS AT LAW  
OPERATING ACCOUNT  
1800 East Blvd. Charlotte, NC 28203  
704/344-8500

66-1226/530

12078

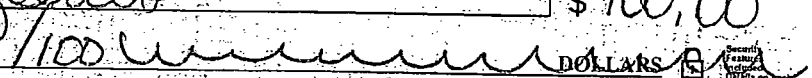
DATE

5-16-11

PAY TO THE  
ORDER OF

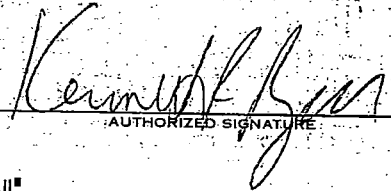
S.C. Court of Appeals

\$ 100.00

One hundred & No/100  DOLLARS

FIRST TRUST BANK  
CHARLOTTE, NC

FOR 10000.0478-ELL

  
AUTHORIZED SIGNATURE



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THIS DOCUMENT CONTAINS INFORMATION THAT IS UNCLASSIFIED BUT WHICH MAY BE SUBJECT TO RESTRICTIONS ON DISSEMINATION

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

CASE NO.: 08-CP-46-2158

Brian and Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook,  
Kala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel,  
Kathleen Kramer, Robert Loebe, Melanie McDaniel, Jessica Neff,  
David Osborne, Celeste Arrowood, Vincent Dionna, Mikel Marcuse,  
James P. Wheaton, Jr., Joseph Manfredini, Elena Manfredini, David  
Cox, Jonathan B. Dillard, and Eric Wilson, Individually and on  
Behalf of All Other Similarly Situated Plaintiffs . Respondents,

v.

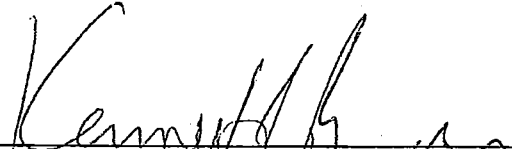
Kensington Place Owners' Association, Inc., . . . . . Appellant,

M.U.I. Carolina Corporation and Regent Carolina Corporation,  
. . . . . Respondents,

NOTICE OF APPEAL

Kensington Place Owners Association, Inc. appeals the Order of the Honorable John C. Hayes, III dated April 1, 2011 dismissing its crossclaim against M.U.I. Carolina Corporation, and the Order of the Honorable John C. Hayes, III dated April 15, 2011 denying Kensington Place Owners Association, Inc.'s Motion for Reconsideration of the April 1, 2011 Order, which was served on April 11, 2011, and filed on April 12, 2011. Copies of said Orders are attached.

May 16, 2011.

  
\_\_\_\_\_  
Kenneth R. Raynor  
Templeton & Raynor, P.A.  
1800 East Boulevard  
Charlotte, NC 28203  
Telephone (704) 344-8500  
S.C. Bar No.: 11654  
S.C. Federal ID No.: 6769  
Attorney for Appellant

**Other Counsel of Record:**

Robert T. Lyles Jr.  
LYLES & LYLES, LLC  
342 E. Bay Street  
Charleston SC 29401

*Attorney for Respondents M.U.I.  
Carolina Corporation and Regent  
Carolina Corporation*

W. Jefferson Leath Jr.  
LEATH, BOUCH, CRAWFORD & VON KELLER, LLP  
P.O. Box 59  
Charleston SC 29402

*Attorney for Respondents Pulliam, Bradshaw,  
Cook, Craig, Dirienzo, Ditursi, Drexel,  
Kramer, Loebe, McDaniel, Neff, Osborne,  
Arrowood, Dionna, Marcuse, Wheaton,  
J. Manfredini, E. Manfredini, Cox,  
Dillard, Wilson*

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF YORK

CASE NO: 2008CP4602158

IN THE COURT OF COMMON PLEAS

Brian Pulliam et al vs. MUI Carolina Corporation et al

CHECK ONE:

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):
  - Rule 12(b), SCRPC;
  - Rule 41(a),
  - SCRPC (Vol. Nonsuit);
  - Rule 43(k), SCRPC (Settled);
  - Other:
- ACTION STRICKEN (CHECK REASON):
  - Rule 40(j) SCRPC;
  - Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
  - Other: \_\_\_\_\_

IT IS ORDERED AND ADJUDGED:  See attached order;  Statement of Judgment by the Court:

ORDER

Dated at York, South Carolina, this 15<sup>th</sup> day of April, 2011.

Court Reporter:

*S/ John C. Hayes, III*

PRESIDING JUDGE - John C. Hayes, III

This judgment was entered on the 19th day of April, 2011, and a copy mailed first class this 19th day of April, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

W. Jefferson Leath Jr.  
Leath Bouch & Seekings LLP  
P.O. Box 59  
Charleston, SC 29402

Robert T. Lyles Jr.  
Lyles & Lyles, LLC  
P.O. Box 773  
Charleston, SC 29402  
Kenneth R Raynor  
Templeton & Raynor, PA  
1800 East Blvd.  
Charlotte, NC 28203

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRPC APP-24/FORM 4

David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
SIXTEENTH JUDICIAL CIRCUIT

C.A. No. 2008-CP-46-2158

Brian and Deborah C. Pulliam, )  
Monica Bradshaw, Helen K. Cook, )  
Kala Craig, Victor E. Dirienzo, )  
Cynthia Ditursi, J. Scott Drexel, )  
Kathleen Kramer, Robert Loebe, )  
Melanie McDaniel, Don and Debbie Neff, )  
David Osborne, Celeste Arrowood, )  
Vincent Dionna, Mikel Marcuse, )  
James P. Wheaton, Jr., Joseph Manfredini, )  
Elena Manfredini, David Cox, )  
Jonathan B. Dillard, and Eric Wilson, )  
and Marianna Junda, )

Plaintiffs, )

vs. )

M.U.I. Carolina Corporation, and )  
Kensington Place Owners' )  
Association, Inc., and Regent Carolina )  
Corporation, )

Defendants. )

ORDER

FILED-RECEIVED  
2011 APR 19 AM 9:32  
DAVID HARRISON  
C.O. CLERK  
YORK COUNTY, SC

Kensington Place Owner's Association, Inc. (KPOA) moves the Court to reconsider its Order in this matter dated April 1, 2011.

As to KPOA's grounds for reconsideration:

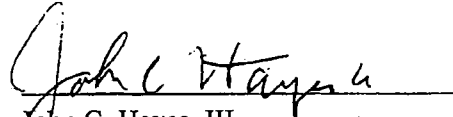
1. The issue of Plaintiffs' standing was dealt with in the April 1, 2011 Order.
- 2 a. Judge Kimball did not rule on the issue addressed in the April 1, 2011 Order vis-à-vis KPOA and Plaintiffs.
- b. See a.
- c. See a.
- d. See the April 1, 2011 Order.

3. The issue of KPOA's liability raised by Plaintiffs' presents genuine issues of material facts.

---

Kensington Place Owner's Association, Inc.'s motion for reconsideration is DENIED.

IT IS SO ORDERED.

  
John C. Hayes, III  
Presiding Judge #2

April 15<sup>th</sup>, 2011  
York, South Carolina

STATE OF SOUTH CAROLINA  
COUNTY OF YORK  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NO: 2008CP4602158

**Brian Pulliam vs. MUI Carolina Corporation**

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a),  
SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other:
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  
 Other: \_\_\_\_\_

IT IS ORDERED AND ADJUDGED:

See attached order;

Statement of Judgment by the Court:

**Order**

Dated at York, South Carolina, this 1st day of April, 2011.

Court Reporter:

s/John C. Hayes, III

**PRESIDING JUDGE - JOHN C. HAYES, III**

This judgment was entered on the 1st day of April, 2011, and a copy mailed first class this 1st day of April, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

**W. Jefferson Leath Jr. Leath Bouch & Seekings**  
LLP P.O. Box 59 Charleston, SC 29402

**Robert T. Lyles Jr. Lyles & Lyles, LLC** P.O. Box  
773 Charleston, SC 29402  
**Kenneth R Raynor Templeton & Raynor, PA** 1800  
East Blvd. Charlotte, NC 28203

\_\_\_\_\_  
ATTORNEY(S) FOR THE PLAINTIFF(S)

\_\_\_\_\_  
ATTORNEY(S) FOR THE DEFENDANT(S)

**David Hamilton**

SCRPC APP-24/FORM 4

\_\_\_\_\_  
David Hamilton - Clerk of Court

STATE OF SOUTH CAROLINA )  
 COUNTY OF YORK )  
 Brian and Deborah C. Pulliam, )  
 Monica Bradshaw, Helen K. Cook, )  
 Kala Craig, Victor E. Dirienzo, )  
 Cynthia Ditursi, J. Scott Drexel, )  
 Kathleen Kramer, Robert Loebe, )  
 Melanie McDaniel, Don and Debbie Neff, )  
 David Osborne, Celeste Arrowood, )  
 Vincent Dionna, Mikel Marcuse, )  
 James P. Wheaton, Jr., Joseph Manfredini, )  
 Elena Manfredini, David Cox, )  
 Jonathan B. Dillard, and Eric Wilson, )  
 and Marianna Junda, )  
 Plaintiffs, )  
 vs. )  
 M.U.I. Carolina Corporation, and )  
 Kensington Place Owners' )  
 Association, Inc., and Regent Carolina )  
 Corporation, )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 SIXTEENTH JUDICIAL CIRCUIT

C.A. No.: 2008-CP-46-<sup>2158</sup>~~2158~~

ORDER  
 "Catch 22"  
 Doc Daneeka<sup>1</sup>

FILED-RECEIVED  
 2011 APR - 1 PH 3:26  
 DAVID HAMILTON  
 C.C.C.P. & SS  
 YORK COUNTY, SC

*Catch-22, A situation in which a desired outcome is impossible because of inherently illogical rules or conditions. American Heritage College dic-tion-ar-y., 4<sup>th</sup>Ed., 2002, page 227.*

The Court heard arguments on several motions in this matter on March 24, 2011. No court reporter was present. Plaintiffs were represented by W. Jefferson Leath, Jr., Esq. and Michael S. Seekings, Esq.; MUI Corporation (MUI) and Regent Carolina Corporation (Regent) were represented by Robert T. Lyles, Jr., Esq. and Kensington Place Owners' Association, Inc. (KPOA) by Kenneth R. Raynor, Esq.

<sup>1</sup> Catch-22, Joseph Heller, Simon and Schuster (1961).



### Back Ground

Briefly, Plaintiffs are owners of some of the condominiums in Kensington Place a Horizontal Property Regime (HPR). MUI is the developer of Kensington Place and Regent Carolina Corporation (Regent) is a subsidiary of MUI. MUI, as developer, established a property owners association (POA) and controlled same until it transferred the control of the POA to a Board comprised of the Kensington Place owners. The transfer established control and maintenance of the Kensington Place common elements in the Kensington Place POA (KPOA).

Plaintiffs claim that when MUI transferred control of the common areas to KPOA, these common areas were not in good condition, and MUI did not set aside enough funding to put the common areas in good, safe, usable order.

The Court will not elaborate on the struggle within KPOA as to the membership of the board and pursuit of claims regarding the common areas.

In an earlier Order, Judge S. Jackson Kimball, in addressing several motions, set forth this case's background succinctly, thusly<sup>2</sup>:

Plaintiffs brought this action against MUI and Kensington, asserting causes of action relating to the construction and maintenance of the condominium project in which each of them owns a unit. Kensington is made a party based on alleged breaches of duty owed by Kensington to Plaintiffs. The alleged breaches are premised upon the actions or inactions of the board of directors of Kensington, the homeowners association of the Horizontal Property Regime ("HPR"). Some of Plaintiffs are on the current board of Kensington.

---

<sup>2</sup> Defendant Regent Carolina Corporation was later added by amendment of the Complaint.

A handwritten signature in black ink, appearing to be 'J. Kimball', is located in the bottom right corner of the page.

**MUI's Motion for Summary Judgment**

MUI argues it is entitled to summary judgment as to Plaintiffs' claims based on Plaintiffs' lack of standing to pursue same.

While the motions before Judge Kimball were motions to dismiss, he treated them as motions for summary judgment since the arguments and exhibits presented went beyond the pleading.

As to MUI's motion, Judge Kimball held:

It is clear that Plaintiffs may have the right to pursue their claims in their own right. Given the complexity of this litigation, I believe that the individual claims asserted by the Plaintiffs should be decided based on a full development of the facts as to each claim, and the defenses applicable to each claim, at trial. Therefore, the motion is denied.

The undersigned finds Judge Kimball's denial of summary judgment to MUI is the law of the case and may not be, in effect, reversed by the Court in ruling on MUI's instant motion.

The undersigned feels compelled to elaborate on MUI's motion as this is the eve of trial. As did Judge Kimball, MUI's motion for summary judgment is denied for the reasons set forth below in addition to Judge Kimball already denying MUI's previous motion for summary judgment. The status of Regent as a proper party is elsewhere discussed. For purposes of this Order, and this Order only, the Court treats Regent as amalgamated with MUI.

First, as observed, this is a complex case and a full record needs to be established.

Second, the undersigned finds the issue presented by MUI as to Plaintiffs' standing and their not being the real party in interest is a novel issue in South Carolina.

All parties rely on Concerned Dunes West Residents, Inc. v. Georgia Pacific Corporation, 349 S.C. 251, 562 S.E.2d 633 (Sup. Ct. 2002) to some extent. (Abbreviate CDWR herein). The

*Je # 3*

undersigned finds CDWR is dichotomous on the instant issue. In CDWR the Plaintiff was not the Dunes West POA<sup>3</sup>, but rather an incorporated group of Dunes West owners. The owner's posture in CDWR is analogous to that here.

The dichotomy occurs because throughout the Opinion the Court discussed the rights of property owners associations and nowhere addresses the rights of an individual owner, a group of owners, or a legal entity comprised of owners to bring a suit such as that here. The Court simply accepted the parties' posture as plead. That is, the property owners brought suit in their own right. No challenge to the institution of the suit by the owners is mentioned in CDWR.

It should be noted that CDWR is a case in which the Supreme Court answered certified questions from the United States District Court. None of the certified questions raised the standing or real party in interest issue and, therefore, the Supreme Court could not, or at least would not, address questions outside those certified. The Court confined its Opinion to examining three of the five questions certified from the District Court.

The Opinion does not address the CDWR Plaintiffs standing in the body of the Opinion. The sole holding of CDWR is:

The developer of a PUD owes a duty to the POA to turn over common areas that are not substandard and that are in good repair. Failure to do so, subjects the developer to liability for bringing the common areas up to standard. (349 S.C. at 257).

CDWR does not address who may pursue the claim against the developer.<sup>4</sup> In CDWR, it was not the POA, but rather a legal entity composed of individual owners that pursued the claim

---

<sup>3</sup> Dunes West is a Planned Unit Development or PUD. Kensington Place is not a PUD, but the Court finds HPRs and PUDs are similar and the holding in CDWR applicable to a HPR.

<sup>4</sup> There is no question, the POA could pursue the instant claim. See Queen's Grant Villas Horizontal Property Regimes I-V. vs. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985).

against the developer. The Plaintiffs in CDWR do not differ significantly from Plaintiffs here other than CDWR's Plaintiffs' corporate formality.

Third, the By-Laws of KPOA (Exhibit "F" to the Master Deed of Kensington Place Horizontal Property Regime) have a section that establishes certain rights in individual members to sue the POA, its officers, or Board under certain circumstances (Article XV of By-Laws). This Article actually does not pertain to Plaintiffs' claims against the developer, MUI, but to claims against the KPOA, its officers or directors. Nothing has been cited to the Court that precludes any owner from seeking redress against the developer for a breach of its duties, as was done in CDWR. The By-Laws do not require owners to first request KPOA to act before proceeding on their own.

It seems fundamental that an individual may seek redress for any property rights they may have. That is not to say that these rights are exclusive to the individual owners. The duty owed by the developer is to the POA (*See* CDWR), and the POA could maintain the action. (*See Queen's Grand Villas Horizontal Property Regimes I-V. vs. Daniel International Corp.*, 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985) and cases cited in CDWR from Florida and California).<sup>5</sup>

The Court should point out that the CDWR Court seems to confine the developer's liability to pay damages solely to the POA (349 S.C. at page 260). As observed by Judge Kimball, there may only be one recovery for damages pertaining to the common elements. CDWR, by implication, establishes the POA as the only entity entitled to recover damages, but the Court need not and indeed cannot make any findings or rulings as to the damages issue at this time. This will most probably require further development if Plaintiffs obtain a verdict. However, the Court would be derelict if it did not point out the CDWR language as to damages.

---

<sup>5</sup> Counsel for MUI argues that the POA had the right, by statute and by-laws to represent all condominium owners. The Court cannot find this statutory authorize in Section 27-31-10, et seq., S.C. Code of Laws, 1976, as amended.

This is one of many points of contention. The Court observes that CDWR did not address who could pursue the claim against the developer as it did not have that issue before it. However, the Supreme Court seems to have established who is the beneficiary of any recovery. The Court uses the word "seems" advisedly. Here lies the catch 22. Plaintiffs can sue, but CDWR seems to vest the right of recovery in KPOA.

The issues here are not only complex, as observed by Judge Kimball, but novel. Novel issues should be decided with a full and complete record. Chastain v. Hiltabidle, 381 S.C. 508, 673 S.E.2d 826 (Ct. App. 2009). (See also KPOA's Memorandum of March 22, 2011).

KPOA argues Plaintiffs cannot sue it because the Plaintiffs are in effect suing themselves. MUI adopts this argument also. There is a paucity of cases dealing with the relationship and rights of property owners relative to POAs.

In Murphy v. Yacht Cove Homeowners Assoc., 289 S.C. 327, 345 S.E.2d 709 (Sup. Ct. 1986), members of an unincorporated condominium association (husband and wife) sued the POA in tort. The Supreme Court held in Murphy that members of a condominium association could, pursuant to The Horizontal Property Act, sue the Association in contract or tort.

The Murphy Court held that the below language from Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corporation, 286 S.C. 555, 335 S.E.2d 365 (sup. Ct. 1986), "implies that an association can be sued by the unit owners for its failure to discharge its duties," 289 S.C. 368:

We have noted that [s]hould the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements which it maintains it may be liable to the homeowners for its omissions.  
286 S.C. at 556.

*Joey #6*

The Supreme Court clairvoyantly foresaw the imbroglio extant here. The Murphy Court observed:

While the issues raised by appellant are a source of legitimate concern, it is the function of the Legislature and not this Court to anticipate problems such as the ones envisioned by appellant and enact legislation to deal with them. (289 S.C. at 369).

While the Horizontal Property Act has in part been amended since 1986, the Legislature has not addressed the problems foreseen by the Supreme Court in Murphy. (1999 Act. No. 25; 1999 Act No. 86; and 2006 Act No. 250).

MUI's Motion for Summary Judgment is DENIED.

**Plaintiffs Motion for Partial Summary Judgment as to Liability Against POA**

There exists genuine issues of material fact as to KPOA's liability, if any, and Plaintiffs are not entitled to judgment as a matter of law on this issue.

Plaintiffs have presented the affidavit of Michael R. Parades, PCAM, in support of their motion for partial summary judgment. This affidavit is insufficient to support Plaintiffs' motion. The affidavit relies on a survey of Gary Freeman, AIA, and Repair Estimates by Procon<sup>6</sup>. Such reliance is appropriate under SCREvid 703. However, a witness's reliance on the reports of others does not, per se, establish the correctness or general reliability of the reports. That is to say the expert, Mr. Parades, relies on the accuracy of third party reports. The reports are not presented as sworn affidavits nor have they been subject to scrutiny by cross-examination.

---

<sup>6</sup> Plaintiffs' brief also references a Miller Dodson report which was not attached nor mentioned in Mr. Parades affidavit. Of course, a report is just that, nothing else.

*Jc 7/14/07*

**Plaintiffs Motion to Substitute Real Party in Interest Defendants**

MUI is, based on a corporate structure chart provided the Court<sup>7</sup>, a subsidiary of one or more other corporate entities. Plaintiffs have moved to add two legal entities they argue are so interrelated with MUI as to be necessary defendants. Plaintiffs argue these two entities are additional real parties in interest based on the theory of amalgamation pursuant to Kincaid v. The Landing Development, 289 SC 89, 344 S.E.2d 869 (Ct. App. 1986). Defendant Regent is one of many entities on the chart and, by earlier Order, has been added since Plaintiffs filed and served the original Complaint.

Plaintiffs' Motion is denied. Without giving the matter short shrift, the Court finds adding additional parties is not necessary for the resolution of Plaintiffs' claims, would delay trial scheduled within two months of this date, would prejudice the current parties as new claims or cross-claims may arise through the addition of parties, extensive and expensive discovery would have to be retreaded, and repairs would be pushed farther in the future, perhaps allowing more deterioration of the common elements and a greater cost to repair.

**Plaintiffs' Motion to Dismiss Cross-Claim of KPOA**

Plaintiffs argue that KPOA lacks standing to pursue the cross-claim. The basis for Plaintiffs' argument is that KPOA does not own the common elements or any part thereof, that KPOA has not obtained the necessary votes to pursue the cross-claim, and that Article XV, as noted above, gives the Plaintiffs the right to pursue this claim as do the laws of this State.

Donald Triplett, President of KPOA, has admitted, under oath, that KPOA has not been authorized to commence or prosecute any action against MUI. (Triplett's deposition, page 65,

<sup>7</sup> Exhibit "C" to Plaintiffs' Memorandum in Support of their motion to add a statutory cause of action and to add a real party in interest.

*JCH AS*

line 12 through page 66, line 6).<sup>8</sup> There is no evidence in any of the record before the Court that KPOA has properly voted to institute the cross-claim or ratified its institution. For this reason, KPOA may not maintain its cross-claim against MUI.

It might be argued that MUI would be the party to challenge the cross-claim<sup>9</sup>. However, Plaintiffs instituted this action and are entitled to have it litigated and resolved with only proper parties at the table. Also, as members of KPOA, Plaintiffs have a right to protect their interests as such and insist that KPOA function according to its by-laws.

The complexity of this case is highlighted by this instant motion. As noted, Judge Kimball, without additional comment, denied MUI's Motion to Dismiss KPOA's cross-claim. This is the law of the case as to MUI and KPOA. In spite of this, Plaintiffs have an independent right to move to dismiss the cross-claim as members of the POA. The Plaintiffs have exercised their independent rights and are entitled to the relief they seek, i.e., dismissal of the cross-claim. This creates a conundrum. KPOA's By-Laws do not address cross-claims in Article XI of the by-laws but does allow counterclaims in proceedings instituted against it. (Article XI (d)). The reason and wisdom in such distinction is not for the Court.

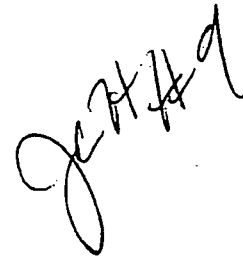
This conundrum is resolved by the undersigned finding (without any real authority to so do) that a subsequent, successful motion by Plaintiffs trumps the denial of MUI's motion by Judge Kimball and KPOA's cross-claim against MUI is dismissed.

As noted, Plaintiffs have a separate and distinct interest in the actions of KPOA. I find Plaintiffs' rights are direct, not tangential as MUI's are.

---

<sup>8</sup> The deposition was taken November 11, 2009.

<sup>9</sup> Judge Kimball has denied MUI's Motion to Dismiss KPOA's cross-claim.



**Plaintiffs Motion to add a cause of action pursuant to  
Section 27-31-430, S.C. Code of Laws, as amended**

Section 27-31-430, South Carolina Code of Laws, 1976, as amended, relates to the conversion of rental units to condominium ownership. This Section requires certain disclosures to be reported to a purchaser. Plaintiffs assert that some Kensington units were rental units prior to their sale as condominium units.

The Plaintiffs' motion to add this cause of action is denied. There is no evidence any of the Plaintiffs purchased any rental unit. The nature of the rental of any units is unclear. Any cause of action under The Unfair Trade Practices Act under Section 27-31-140 would inure only to the purchaser of a particular unit which was a "rental unit."

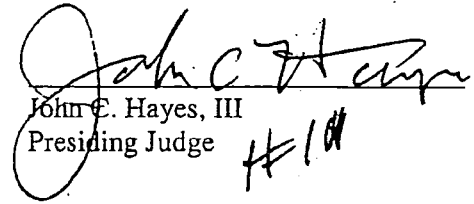
Also, for the reason set forth as to Plaintiffs' Motion to Substitute Real Party in Interest, addition of a new cause of action would work to the prejudice of Defendants. Specifically, the trial of this case would necessarily be pushed into the future.

Plaintiffs' motion to add a cause of action pursuant to Section 27-31-430, S.C. Code of Laws, 1976, as amended is denied.

Wherefore:

1. MUI's Motion for Summary Judgment is DENIED, and
2. Plaintiffs Motion for Partial Summary Judgment as to Liability Against KPOA is DENIED, and
3. Plaintiffs' Motion to Substitute Real Party Interest is DENIED, and
4. Plaintiffs' Motion to Dismiss Cross-Claim of KPOA is GRANTED, and
5. Plaintiffs' Motion to Add a Cause of Action (§ 27-31-430) is DENIED.

IT IS SO ORDERED.

  
John C. Hayes, III  
Presiding Judge #101

April 1, 2011  
York, South Carolina

ADDENDUM ATTACHED

## ADDENDUM

The court has gone through the morass of paperwork in this file in order to determine which pleadings are the operative pleadings and what issues are for trial. The Court begs correction, promptly, if the Court's grasp of the posture of this case as set forth below, is incorrect in any manner.

### Fifth Amended Complaint

1. Defendants:

- A. MUI
- B. KPOA
- C. Regent

2. Causes of Action

- A. First; Breach of Fiduciary Duty as to all Defendants.
- B. Second; Breach of Implied Warranty of Habitability as to MUI and Regent.
- C. Third; Negligence as to all Defendants

### Answers

1. Regent and MUI

- A. Qualified General Denial
- B. 12(b)(6) (handled through summary judgment motions)
- C. Statute of Limitations
- D. Statute of Repose
- E. Laches
- F. Waiver
- G. Accord and Satisfaction
- H. Settlement and Release
- I. Lack of Standing (ruled on)
- J. Set Off
- K. Conditions Precedent
- L. Joinder (out?)
- M. Real party in Interest (ruled on)
- N. Implied Warranties Disclaimed
- O. Failure to Mitigate
- P. Intervening and Superseding Negligence
- Q. Comparative Negligence

*Je H/H/2*

- R. Negligence of Third Party  
(unnecessary as raised by qualified General Denial);  
*See Funderburke v. Johnson*  
253 S.C. 430, 171 S.E.2d 597 (1969)
- S. Acceptance
- T. Economic Loss Rule
- U. Open and Obvious
- V. Counterclaim (MUI Only)

- 2. Plaintiffs' Reply to MUI's Counterclaim
- 3. KPOA
  - A. Qualified General Denial
  - B. Standing (ruled on)
  - C. Failure to comply with Rule 23 SCRPC (out)
  - D. Counterclaim
    - 1. Breach of Contract by Plaintiffs
  - E. Cross-claim against MUI and Regent (ruled on)
- 4. Plaintiffs Reply To KOPA's Counterclaim
- 5. Pending Motions
  - 1. To exclude Evidence
  - 2. To Quash Subpoena

Jc 74 #13

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

**APPEAL FROM YORK COUNTY**  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

CASE NO.: 08-CP-46-2158

Brian and Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook,  
Kala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel,  
Kathleen Kramer, Robert Loebe, Melanie McDaniel, Jessica Neff,  
David Osborne, Celeste Arrowood, Vincent Dionna, Mikel Marcuse,  
James P. Wheaton, Jr., Joseph Manfredini, Elena Manfredini, David  
Cox, Jonathan B. Dillard, and Eric Wilson, Individually and on  
Behalf of All Other Similarly Situated Plaintiffs, Respondents,

v.

Kensington Place Owners' Association, Inc., . . . . . Appellant,

M.U.I. Carolina Corporation and Regent Carolina Corporation,  
. . . . . Respondents,

**PROOF OF SERVICE**

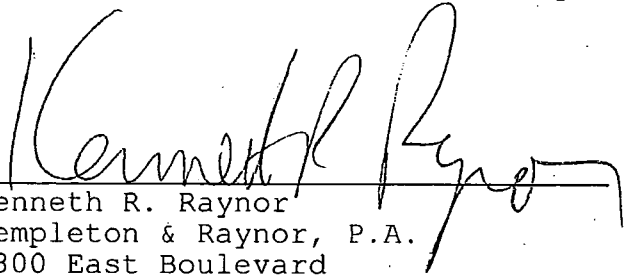
I certify that I have served the Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on May 16, 2011, addressed to the attorneys of record as follows:

Robert T. Lyies Jr.  
LYLES & LYLES, LLC  
342 E. Bay Street  
Charleston SC 29401  
*Attorney for Respondents M.U.I.  
Carolina Corporation and Regent  
Carolina Corporation*

W. Jefferson Leath Jr.  
LEATH, BOUCH, CRAWFORD & VON KELLER, LLP  
P.O. Box 59  
Charleston SC 29402

Attorney for Respondents Brian and Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook, Kala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel, Kathleen Kramer, Robert Loebe, Melanie McDaniel, Jessica Neff, David Osborne, Celeste Arrowood, Vincent Dionna, Mikel Marcuse, James P. Wheaton, Jr., Joseph Manfredini, Elena Manfredini, David Cox, Jonathan B. Dillard, and Eric Wilson, Individually and on Behalf of All Other Similarly Situated Plaintiffs

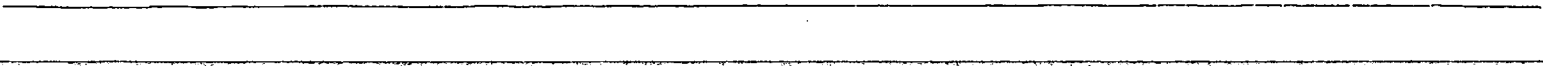
May 16, 2011.



---

Kenneth R. Raynor  
Templeton & Raynor, P.A.  
1800 East Boulevard  
Charlotte, NC 28203  
Telephone (704) 344-8500  
S.C. Bar No.: 11654  
S.C. Federal ID No.: 6769  
*Attorney for Appellant*

# **Exhibit “D”**



THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case No. 2008-CP-46-2158

Brian and Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook, Kala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel, Kathleen Kramer, Robert Loebe, Melanie McDaniel, David Osborne, Celeste Arrowood, Vincent Dionna, Mikel Marcuse, James P. Wheaton, Jr., Joseph Manfredini, Elena Manfredini, David Cox, Jonathan B. Dillard, Eric Wilson, Don and Debbie Neff, Marianna Junda, individually, and on behalf of all other similarly situated Plaintiffs,.....Respondents,

v.

M.U.I. Carolina Corporation, Kensington Place Owners' Association, Inc., and Regent Carolina Corporation .....Defendants,

Of whom, M.U.I. Carolina Corporation and Regent Carolina Corporation .....Appellants,

NOTICE OF APPEAL

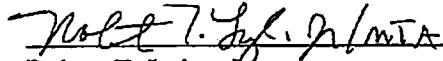
M.U.I. Carolina Corporation and Regent Corporation appeal the order/ruling of the Honorable John C. Hayes, III dated January 22, 2014 (and filed January 23, 2014), in which he ruled, as a matter of law, that Respondents have standing to pursue claims for damages relating to the repair of the common elements, thereby striking Appellants' primary defenses. Appellant received the Order by mail on January 27, 2014.

**RECEIVED**

FEB 03 2014

**SC Court of Appeals**

January 30, 2014



Robert T. Lyles, Jr.

LYLES & LYLES, LLC

342 East Bay Street

Charleston, SC 29401

843-577-7730

[rtl@lylesfirm.com](mailto:rtl@lylesfirm.com)

*Attorney for Appellants, M.U.I. Carolina*

*Corporation and Regent Carolina Corporation*

cc:

All Counsel of Record:

W. Jefferson Leath, Jr., Esquire

Michael S. Seekings, Esquire

Leath, Bouch, & Seekings, LLP

92 Broad Street (29401)

Post Office Box 59

Charleston, S.C. 29402

Fax: 843.937.0606

[jl@leathbouchlaw.com](mailto:jl@leathbouchlaw.com)

[mseekings@leathbouchlaw.com](mailto:mseekings@leathbouchlaw.com)

[cheryl@leathbouchlaw.com](mailto:cheryl@leathbouchlaw.com)

[dcatapano@leathbouchlaw.com](mailto:dcatapano@leathbouchlaw.com)

*Attorneys for Plaintiffs*

Kenneth R. Raynor, Esquire

Templeton & Raynor, P.A.

1800 East Boulevard

Charlotte, N.C. 28203

Fax: 704.344.8555

[ken@templetonraynor.com](mailto:ken@templetonraynor.com)

[shawn@templetonraynor.com](mailto:shawn@templetonraynor.com)

*Attorneys for Kensington Place Owners' Association, Inc.*

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III, Circuit Court Judge

Case Number: 2008-CP-46-2158

Brian and Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook, Kala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel, Kathleen Kramer, Robert Loebe, Melanie McDaniel, David Osborne, Celeste Arrowood, Vincent Dionna, Mikel Marcuse, James P. Wheaton, Jr., Joseph Manfredini, Elena Manfredini, David Cox, Jonathan B. Dillard, Eric Wilson, Don and Debbie Neff, Marianna Junda, individually, and on behalf of all other similarly situated Plaintiffs, ..... Respondents,

v.

M.U.I. Carolina Corporation, Kensington Place Owners' Association, Inc., and Regent Carolina Corporation, ..... Defendants,

Of whom, M.U.I. Carolina Corporation and Regent Carolina Corporation, .. Appellants.

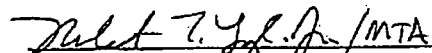
PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents and Defendants by depositing a copy of it in the United States Mail, postage prepaid, on January 30, 2014, addressed to their respective attorney of record: W. Jefferson Leath, Jr., Esquire, Michael S. Seekings, Esquire, Leath, Bouch, & Seekings, LLP, 92 Broad Street (29401), Post Office Box 59, Charleston, South Carolina 29402, and Kenneth R. Raynor, Esquire, Templeton & Raynor, P.A., 1800 East Boulevard, Charlotte, North Carolina 28203.

**RECEIVED**

FEB 03 2014

**SC Court of Appeals**



Robert T. Lyles, Jr., Esquire.

Lyles & Lyles, LLC

342 East Bay Street (29401)

Post Office Box 773

Charleston, South Carolina 29402

(843) 577-7730 / [rtl@lylesfirm.com](mailto:rtl@lylesfirm.com)

S.C. Bar No.: 10299

Federal Id No.: 3029

*Attorney for Appellants*

# **Exhibit "E"**



received  
8-16-11

# The South Carolina Court of Appeals

TANYA A. GEE  
CLERK

V. CLAIRE ALLEN  
DEPUTY CLERK

POST OFFICE BOX 11629  
COLUMBIA, SOUTH CAROLINA 29211  
1015 SUMTER STREET  
COLUMBIA, SOUTH CAROLINA 29201  
TELEPHONE: (803) 734-1890  
FAX: (803) 734-1839  
www.sccourts.org

August 15, 2011

W. Jefferson Leath, Jr., Esquire  
Leath, Bouch & Seekings, LLP  
92 Broad Street  
Charleston, SC 29401

Robert T. Lyles, Jr, Esquire  
Lyles & Lyles, LLC  
P.O. Box 773  
Charleston, SC 29402

Re: Pulliam, B. v. M.U.I. (Kensington)  
2011192247

Dear Counsel:

Enclosed is a copy of an Order of the Court regarding Mr. Leath's Motion in the above case. Please be advised that a Partial Remittitur will be sent in accordance with the South Carolina Appellate Court Rules.

Very truly yours,

*V. Claire Allen, Deputy*  
CLERK

TAG/mpm

cc: Kenneth Ray Raynor, Esquire  
The Honorable David Hamilton

# The South Carolina Court of Appeals

Brian and Deborah C. Pulliam, Monica  
Bradshaw, Helen K. Cook, Kala Craig,  
Victor E. Dirienzo, Cynthia Ditursi, J.  
Scott Drexel, Kathleen Kramer, Robert  
Loebe, Melanie McDaniel, Don and  
Debbie Neff, David Osborne, Celeste  
Arrowood, Vincent Dionna, Mikel  
Marcuse, James P. Wheaton, Jr., Joseph  
Manfredini, Elena Manfredini, David  
Cox, Jonathan B. Dillard, and Eric  
Wilson, and Marianna Junda,

Respondents,

v.

M.U.I. Carolina Corporation, and  
Kensington Place Owners' Association,  
Inc., and Regent Carolina Corporation,

Defendants,

Of whom, M.U.I. Carolina Corporation  
and Regent Carolina Corporation are,

Respondents/Appellants,

And Kensington Place Owners'  
Association, Inc. is the,

Appellant/Respondent.

The Honorable John C. Hayes, III  
York County  
Trial Court Case No. 2008-CP-46-02158

---

## ORDER

---

Respondents have filed a motion to dismiss Respondents/Appellants' appeal from an order of the circuit court denying their motion for summary judgment. In their return to Respondents motion, Respondents/Appellants readily acknowledge that an order denying summary judgment is not generally appealable; however, Respondents/Appellants contend the

circuit court's order is immediately appealable because it effectively struck their defenses of standing and real party in interest. In addition, Respondents/Appellants contend this Court should review the order in the interests of judicial economy and to avoid unnecessary litigation.

After careful review of the order and the parties' filings, we dismiss Respondents/Appellants appeal. As explained in Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994), an order denying summary judgment does not have the effect of striking any defenses, does not establish the law of the case, and "decides nothing about the merits of the case, but simply decides the case should proceed to trial." Furthermore, because an order denying summary judgment is never immediately appealable, even after final judgment, we decline to consider the order in the interests of judicial economy or to avoid unnecessary litigation. See Olson v. Faculty House of Carolina, Inc. 354 S.C. 161, 168, 580 S.E.2d 440, 444 (2003) (reiterating that an order denying summary judgment is never immediately appealable and expressly overruling several cases that allowed for immediate review of an order denying summary judgment, including Tanner v. Florence City-County Bldg. Com'n, 333 S.C. 549, 553-554, 511 S.E.2d 369, 371 (Ct. App. 1999), which considered an order denying summary judgment that was appealed alongside an issue that was immediately appealable).

IT IS SO ORDERED.

H B DeLoach J.

Columbia, South Carolina

cc: Kenneth Ray Raynor, Esquire  
Robert T. Lyles, Jr, Esquire  
W. Jefferson Leath, Jr., Esquire

FILED  
8/15/11

# Exhibit "F"

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF YORK/UNION )

IN THE COURT OF COMMON PLEAS  
08-CP-46-2158

*Brian Pulliam et al*  
Plaintiff

vs.

*MUI Carolina Corporation et al*  
Defendant.

PRE-TRIAL ORDER

Roster #
Trial Window Dates: <i>1st DC in September 2012</i>

Based upon the record of the case and assertions of counsel, I find:

1. The causes of action, defenses, counterclaims, and cross-claims, if any, are:

\_\_\_\_\_

2. Counsel present: For Plaintiff *W. Jefferson Leath Jr.*

For Defendant *Robert T. Lyler Jr.*

*Kenneth R. Raynor* Principal trial counsel will be: [for plaintiff(s)] \_\_\_\_\_

\_\_\_\_\_ [for defendant(s)] \_\_\_\_\_

3. Rule 40 [insist] [waive] [other] \_\_\_\_\_

4. Settlement, Mediation, and Arbitration:

(A) Outstanding offers? \_\_\_\_\_

(B) Counsel suggest arbitration/mediation possible. If yes, possible arbitrators/mediators are: \_\_\_\_\_

(C) Counsel suggest judicial settlement conference may be appropriate. If yes, hearing date is \_\_\_\_\_

(D) Case appropriate for reference to Master. \_\_\_\_\_

(E) Remand to Magistrate. \_\_\_\_\_

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2012 JAN -6 AM 10:31  
DAVID HAMILTON  
C.C.P. & GS  
YORK COUNTY, SC

5. Discovery:

(A) Is discovery complete? If not, what remains? \_\_\_\_\_  
\_\_\_\_\_  
(B) Discovery deadline is \_\_\_\_\_

6. Motions:

(A) Have all been filed? If No, deadline for filing is \_\_\_\_\_  
(B) Pending motions and hearing dates: \_\_\_\_\_  
(C) The following motions were disposed of at Status Conference: \_\_\_\_\_  
\_\_\_\_\_

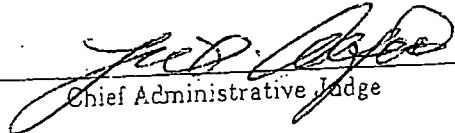
7. Trial:

(A) Anticipated length of trial 1 week  
(B) Is case appropriate for complex case designation? \_\_\_\_\_  
(C) Scheduling problems \_\_\_\_\_  
(D) Special needs: \_\_\_\_\_  
(E) Trial Window \_\_\_\_\_

8. Special issues: \_\_\_\_\_  
\_\_\_\_\_

9. Is additional pre-trial conference needed? If yes, the date is \_\_\_\_\_

Wherefore, it is ordered that the within stated deadlines and dates are hereby approved by the Court as reasonable and any deviation or violation of this Order may subject counsel and the parties to sanctions including costs and attorney's fees.

  
Chief Administrative Judge

DATE: 4/4/12

NOTES

**For Clerk of Court Office Use Only**

This judgment was entered on January 23, 2014, and a copy mailed first class or placed in the appropriate attorney's box on January 23, 2014, to attorneys of record or to parties (when appearing pro se) as follows:

W. Jefferson Leath Jr. PO Box 59 Charleston, SC 29402

ATTORNEY(S) FOR THE PLAINTIFF(S)

Robert T. Lyles Jr. PO Box 773 Charleston, SC 29402  
Kenneth Ray Raynor 1800 East Blvd. Charlotte, NC 28203

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

Court Reporter

David Hamilton - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 )  
 COUNTY OF YORK ) CASE NUMBER: 08-CP-46-2158

BRIAN AND DEBORAH C. PULLIAM, )  
 MONICA BRADSHAW, HELEN K. )  
 COOK, KALA CRAIG, VICTOR E. )  
 DIRIENZO, CYNTHIA DITURSI, J. )  
 SCOTT DREXEL, KATHLEEN KRAMER, )  
 ROBERT LOEBE, MELANIE McDANIEL, )  
 DAVID OSBORNE, CELESTE )  
 ARROWOOD, VINCENT DIONNA, )  
 MIKEL MARCUSE, JAMES P. )  
 WHEATON, JR., JOSEPH MANFREDINI, )  
 ELENA MANFREDINI, DAVID COX, )  
 JONATHAN B. DILLARD, ERIC )  
 WILSON, DON AND DEBBIE NEFF, and )  
 MARIANNA JUNDA, )

Plaintiffs, )

vs. )

M.U.I. CAROLINA CORPORATION, AND )  
 KENSINGTON PLACE OWNERS' )  
 ASSOCIATION, INC., and REGENT )  
 CAROLINA CORPORATION )

Defendants. )

**ORDER ON DEFENDANTS SUMMARY  
 JUDGMENT MOTIONS**

2011 JAN 23 AM 11:07  
 CLERK OF COURT  
 D.C. CP. & GS  
 YORK COUNTY, SC

On April 1, 2011, this Court issued its Order Denying Motions for Summary Judgment filed by Defendants Kensington Place Homeowners Association (“KPOA”), MUI Corporation (“MUI”), and Regent Carolina Corporation (“Regent”). These defendants have now renewed their Motions, and for the reasons stated in the Court’s April 21, 2011 Order, as well as the reasons stated below, the Motions are Denied.

**KPOA’S SUMMARY JUDGMENT MOTIONS**

The KPOA, Inc., again urges the Court to grant it summary judgment on two theories: 1) that a suit by homeowners against the KPOA, Inc., a South Carolina non-profit corporation, is a suit by the plaintiffs against themselves, and 2) that the damages alleged are as a result of activities of

*JCH*

defendants other than KPOA, Inc., or are as a result of original construction defects.

Additionally, KPOA Inc. takes the position that it has judicial immunity by virtue of the governing documents of the regime.

Plaintiffs retained an expert witness, Michael Parades, who has given testimony and submitted an affidavit. Mr. Parades, according to his affidavit, has been qualified in Court in the areas of community association governance, management, and fiduciary duties of Property Owner Associations. Mr. Parades opines in his affidavit that the KPOA, Inc., during the period of developer control of the KPOA was negligent and breached fiduciary duties in failing to investigate the building, failing to have it correctly maintained and repaired, and in failing to adequately fund a repair and replacement reserve fund, as well as permitting the turnover of a defective building. The regime Master Deed and By-Laws place the responsibility of maintenance of the Common Elements in the KPOA, Inc. The KPOA, Inc. has not produced a witness to counter the Parades affidavit and the evidence of record establishes that the Kensington Place Condominiums suffer from some degree due to deterioration, although that degree is in dispute.

This suit is not a suit by owners against each other; rather it is a suit by individuals against a corporate entity. There is no bar to the suit. Additionally, the By-Laws cited by the KPOA, Inc., in support of its immunity claim do not grant immunity to the corporation, but on the contrary, only grant a qualified immunity to individual directors. No individual directors are defendants. This By-Law has no applicability.

To the extent that other defendants may have liability, that does not insulate the KPOA, Inc. for liability for breach of its repair and maintenance obligations under the governing documents, nor for failing to require the developer to turn over the Common Elements in good repair.

Handwritten signature or initials in the bottom right corner of the page.

The Court finds, therefore, that significant genuine issues of material fact exist which would preclude the grant of Summary Judgment in favor of the KPOA, Inc.

**MUI/REGENT SUMMARY JUDGMENT MOTIONS**

Defendants MUI and Regent move for Summary Judgment on five grounds, constituting the same five grounds found in their Jan. 18, 2011 Motion for Summary Judgment, which motion was denied by the Court on April 1, 2011, and reaffirmed on April 15, 2011. This Motion is again denied.

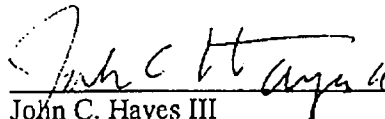
As to the issue of standing to pursue these claims against the developer defendants, this Court, and the South Carolina Court of Appeals has already ruled that these Plaintiffs have standing, and nothing has been advanced by these defendants to alter those rulings.

Regarding Regent and its claims of lack of developer responsibility, evidence has been introduced by Plaintiffs demonstrating a factual question as to the amalgamation of interests between Regent and MUI sufficient to withstand this motion.

As to the claims of lack of fiduciary duty and Statute of Limitations, these matters have been previously denied by this Court's April 1, 2011 Order, and its observations regarding the effect of the decision in Concerned Dunes West Residents, Inc. v. Georgia Pacific Corporation, 563 S.E. 2d 633 (Sup.Ct. 2002).

Based upon the foregoing, prior hearings, and the Court's prior rulings in this matter, the Summary Judgment Motions of the KPOA, Inc., and MUI and Regent, are hereby **DENIED**.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
John C. Hayes III  
Judge Sixteenth Judicial Circuit

H 3

January <sup>ZZPL</sup> 2014  
York, South Carolina

# Exhibit “I”

STATE OF SOUTH CAROLINA )  
)  
COUNTY OF YORK )

IN THE COURT OF COMMON PLEAS  
  
CASE NUMBER: 2008-CP-46-2158

BRIAN AND DEBORAH C. PULLIAM, )  
MONICA BRADSHAW, HELEN K. )  
COOK, KALA CRAIG, VICTOR E. )  
DIRIENZO, CYNTHIA DITURSI, )  
J. SCOTT DREXEL, KATHLEEN )  
KRAMER, ROBERT LOEBE, )  
MELANIE McDANIEL, DAVID )  
OSBORNE, CELESTE ARROWOOD, )  
VINCENT DIONNA, MIKEL MARCUSE, )  
JAMES P. WHEATON, JR., JOSEPH )  
MANFREDINI, ELENA MANFREDINI, )  
DAVID COX, JONATHAN B. DILLARD, )  
ERIC WILSON, DON and DEBBIE NEFF, )  
and MARIANNA JUNDA, individually and )  
on behalf of all other similarly situated )  
Plaintiffs, )

Plaintiffs, )

vs. )

M.U.I. CAROLINA CORPORATION, )  
KENSINGTON PLACE OWNERS' )  
ASSOCIATION, INC., and REGENT )  
CAROLINA CORPORATION, )

Defendants. )

**MUI CAROLINA CORPORATION'S  
AND REGENT CAROLINA  
CORPORATION'S MEMORANDUM  
IN SUPPORT OF THEIR MOTION  
FOR SUMMARY JUDGMENT**

The Defendants, M.U.I. Carolina Corporation ("MUI") and Regent Carolina Corporation ("Regent Carolina") hereby submit this memorandum of law in support of their Motion for Summary Judgment filed on August 5, 2013.

**PROCEDURAL HISTORY**

Plaintiffs have amended the Complaint several times for various reasons, in this case. Plaintiffs' Second Amended Complaint included claims against MUI for breach of fiduciary duty,

breach of the implied warranty of habitability, negligence and violation of the South Carolina Unfair Trade Practices Act (hereinafter "SCUTPA"). On MUI's Motion to Dismiss the SCUTPA claim, this Court issued an Order awarding summary judgment in favor of MUI. (Order of Judge S. Jackson Kimball at p. 5, June 8, 2010). By the same Order, Judge Kimball denied MUI's remaining Motions for Summary Judgments as to Plaintiffs' Claims, including MUI's Motions for Summary Judgment made on the bases of standing and real party in interest. (Id. at p. 4, ¶ 3). In denying those claims, Judge Kimball found:

Given the complexity of this litigation, I believe that the individual claims asserted by the Plaintiffs should be decided based on a full development of the facts as to each claim, and the defenses applicable to each claim, at trial. (Id.)

Plaintiffs' Fifth Amended Complaint added Regent Carolina as a defendant and asserted claims against Regent Carolina identical to the claims Plaintiffs assert against MUI. After the June 8, 2010 Order of this Court and the many amendments to the pleadings, the remaining causes of action against MUI and Regent Carolina are as follows: (1) breach of fiduciary duty, (2) breach of the implied warranty of habitability in the sale of the units and (3) negligence in completing construction and in the development, marketing, inspection, and management of the Project. (Fifth Amended Complaint, attached hereto as Exhibit A).

On January 18, 2011, MUI and Regent moved this Court for Summary Judgment on a number of grounds. In response to this and other Motions of other parties, this Court issued an Order dated April 1, 2011, ruling as follows:

1. Denying MUI's Summary Judgment Motion;
2. Denying Plaintiffs' Motion for Partial Summary Judgment as to KPOA;

3. Denying Plaintiffs' Motion to Substitute Real Party in Interest;
4. *Granting Plaintiffs' Motion to Dismiss KPOA's Cross-Claims Against MUI (and Regent Carolina)*; and
5. Denying Plaintiffs' Motion to Add a Cause of Action.

(Order of Judge John C. Hayes, III at p. 10, April 1, 2011).

In denying MUI's Motion for Summary Judgment as to Plaintiffs, this Court relied solely upon Judge Kimball's Order, quoting the above-referenced section of that Order, in full, and recognizing it as the law of the case. (Id. at p. 3).

Thereafter, MUI and Regent appealed Judge Hayes' Order dismissing their motions for summary judgment. The South Carolina Court of Appeals dismissed MUI and Regent's appeal on the grounds that an order denying summary judgment is never immediately appealable. (Order of South Carolina Court of Appeals, August 15, 2011).

As a result of the orders in this case, the only remaining claims against MUI and Regent Carolina are the claims of Plaintiff-Owners. In light of this Court's dismissal of the KPOA claims and other various findings and rulings contained within this Court's April 1, 2011 Order, MUI and Regent Carolina filed a Motion for Summary Judgment, on August 5, 2013, on the following grounds:

1. All claims asserted by Plaintiffs Deborah Pulliam and Kathleen Kramer are barred by the statute of limitations;
2. Plaintiffs cannot maintain an action to recover for common element claims or damages to common elements as they lack standing to assert the claims in their individual capacity;
3. Neither MUI nor Regent owe a fiduciary duty to any Plaintiff;
4. There is no implied warranty of habitability with respect to Regent Carolina as it was not the seller of any unit; and

5. Regent Carolina owed no duty to any Plaintiff, and therefore, the negligence claim fails as a matter of law.

This Memorandum of Law is filed in support of said Motion.

### **STATEMENT OF FACTS**

The condominium property at issue in this case, Kensington Place Horizontal Property Regime (KPOA) (hereinafter "Project"), is a seven story building, comprised of 110 units, located in Fort Mill, South Carolina. Defendant MUI, developer of the Project, created the condominium regime by recording a Master Deed and By-Laws on September 9, 1996. (Fifth Amended Complaint, ¶ 6, attached hereto as Exhibit A). Under the By-Laws, the KPOA is charged with the obligation and duty to repair and maintain the common elements of the Project (Fifth Amended Complaint, ¶ 7 and By-Laws of KPOA, Art. VII, Section 8, attached hereto as Exhibit A and Exhibit G, respectively).

Pursuant to the Master Deed and By-Laws, the unit owners elected the first homeowner-controlled property association board of directors (hereinafter referred to as "the First Board") in April of 2007. (Minutes of Annual Meeting of KPOA dated April 24, 2007, ¶¶ 1 and 5, attached hereto as Exhibit B). Don Triplett's property management company was hired by the First Board and served as property manager for the Project until the First Board decided to terminate his contract in November of 2007. According to one of the Plaintiffs, Deborah Pulliam, who was elected to the First Board, this board began presenting demands to MUI in an effort to secure their agreement to investigate and correct conditions at the Project. (D. Pulliam Deposition, p.23, l.25-p.25, l.11, attached hereto as Exhibit C).

Thereafter, Mr. Triplett, whose family owns eight units at the Project, called for a special meeting of the KPOA for the purpose of electing a new board of directors (Triplett Deposition, p. 15, ll.14-21; p.56, ll.2-20, attached hereto as Exhibit D). Mr. Triplett was not satisfied with how the First Board was operating, and, he communicated this to other unit owners in an effort to solicit support for a new board. The First Board also communicated their position and their concerns to the unit owners in an effort to solicit support. In February of 2008, a special meeting of the KPOA was held and a new board (hereinafter referred to as "the Replacement Board") was elected. The Replacement Board began negotiations with MUI in an effort to address the condition of the property. However, members of the First Board were not satisfied with the actions being taken by the Replacement Board. (D. Pulliam Deposition, p.64, ll.10-21, Exhibit C).

In June of 2008, a minority group of unit owners comprised of members of the First Board and their supporters,<sup>1</sup> initiated this action to prosecute claims against MUI in connection with the condition of the property. Current Plaintiffs are individual unit owners who constitute a minority group of owners (22 out of 110 total units). Plaintiffs seek to recover from MUI and Regent Carolina in connection with the condition of the common elements and property in general. (Fifth Amended Complaint, ¶¶ 20, 23, and 27.) Discovery responses provided by the Plaintiffs, collectively and individually, also detail various conditions within their individual units for which they seek to recover damages. (Plaintiffs' Answers to Defendants' Supplemental Interrogatories dated February 20, 2009; Plaintiffs' Supplemental Answers to Defendants' Supplemental

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<sup>1</sup> The original Complaint, filed on June 4, 2008 against M.U.I. only, included the following named Plaintiffs: Brian and Deborah C. Pulliam, Monica Bradshaw, Helen K. Cook, Kala Craig, Victor E. Dirienzo, Cynthia Ditursi, J. Scott Drexel, Kathleen Kramer, Robert Loebe, Melanie McDaniel, Jessica Neff, and David Osborne.

Interrogatories dated July 13, 2009; and the Answers to Interrogatories of KPOA provided by the individual plaintiffs and dated January 13, 2010; collectively attached hereto as Exhibit E).

### **SUMMARY JUDGMENT STANDARD**

A party is entitled to summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Rule 56(c), SCRCP*. “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *Dawkins v. Fields*, 354 S.C. 58, 68, 580 S.E.2d 433, 438 (2003). Summary judgment is proper where, after sufficient time for discovery, a party fails to make a sufficient showing on an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the defendant establishes an entitlement of judgment as a matter of law, the court must grant summary judgment unless the plaintiff comes forward with evidence giving rise to a genuine issue of material fact. *Humana Hospital-Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 637 (1991).

While the moving party has the initial responsibility of demonstrating the absence of a genuine issue of material fact, this responsibility may be discharged, with respect to an issue upon which the nonmoving party bears the burden of proof, by pointing out to the court the absence of evidence to support the nonmoving party’s claim. *Richardson v. The State Record Co., Inc.*, 330 S.C. 562, 499 S.E.2d 824 (Ct. App. 1998). The moving party is not required to support its motion with materials negating the opponent’s claim. *Id.*; see *Milligan v. Liberty Life Ins. Co.*, 313 S.C. 478, 443 S.E.2d 381 (1994) (where the record is devoid of any allegation or evidence tending to

show that there is a material fact in issue, the moving party is entitled to judgment as a matter of law).

A party will not be permitted to manufacture a genuine issue of material fact to survive a motion for summary judgment. *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970 (4th Cir. 1990); See e.g., *Thompkins v. Festival Centere Group, I*, 306 S.C. 193, 194, 410 S.E.2d 593, 594 (Ct. App. 1991) (it is not sufficient that the non-moving party create an inference which is not reasonable or an issue of fact that is not genuine), *Shuppe v. Settle*, 315 S.C. 510, 516-17, 445 S.E.2d 651, 655 (Ct. App. 1994) (conclusory statements as to the ultimate issue in a case are not sufficient to create a genuine issue of fact). The non-moving party must come forward with “significantly probative” evidence to withstand the summary judgment motion. *First National Bank of Arizona v. Cities Service Company*, 391 U.S. 253, 290 (1968). A party’s response to a motion for summary judgment “must set forth specific facts, admissible in evidence, showing there is a genuine issue for trial.” *Moody v. McLellan*, 295 S.C. 157, 163, 367 S.E.2d 499, 452-53, (1988).

### ARGUMENT

#### **I. ALL CLAIMS ASSERTED BY PLAINTIFFS PULLIAM AND KRAMER ARE BARRED BY THE STATUTE OF LIMITATIONS**

The claims asserted by Plaintiffs Deborah Pulliam and Kathleen Kramer are barred by the statute of limitations. Under South Carolina law, the Plaintiffs were required to file the instant lawsuit within three years after the alleged injury was discovered or may have been discovered through the exercise of reasonable care by the unit owner. S.C. Code Ann. § 15-3-530 and *Smith v. Smith*, 291 S.C. 420, 426, 354 S.E.2d 36, 40 (1987).

Discovery has revealed that these Plaintiffs were aware, as many as 10 to 12 years prior to filing the claim, of many of the conditions for which they now seek to recover from MUI and Regent Carolina. Ms. Kramer testified during her deposition that she seeks to recover damages for the condition of the building and for issues with the windows in her unit as result of "severe condensation" which causes water to run down the windows "causing mold" (Deposition of K. Kramer, p.26, ll.2-16, attached hereto as Exhibit F). According to Ms. Kramer, the mold is the result of window problems and "flooding" which she attributes to the property manager's error in connecting her refrigerator in 1998. (Id., p.38, ll.4-20). With respect to the condensation issue at windows in her unit, Ms. Kramer has been aware of this issue since she moved in to the unit in 1998:

Q: [W]hen did you first notice the problems with the window condensation causing problems with your unit?

A: Oh, I've had them since the beginning.

Q: The beginning like since you moved in?

A: Yes.

Q: And you moved in when, '96?

A: I'm sorry, I have to think. '98.

(Deposition of K. Kramer, p.53, ll.16-23).

Ms. Kramer's testimony establishes that she was aware of the alleged window and mold issues within her unit since 1998. The lawsuit was not filed against MUI until June 4, 2008, and claims were not asserted against Regent Carolina until July of 2010. Accordingly, Ms. Kramer's claims related to the windows and mold in her unit are untimely and MUI and Regent Carolina are entitled to judgment as a matter of law.

Likewise, Deborah Pulliam became aware, approximately 10 years prior to filing this claim, of many of the conditions of which she now complains, including window and door issues, mold and moisture damage in units and common areas, and elevator and HVAC issues. Ms. Pulliam testified that a group of owners, including herself, contacted the property manager sometime in the late 90's—about certain conditions of the building, including mold in units and common areas, moisture damage, and issues with the elevators and windows (all of which are at issue in the present litigation) (Deposition of D. Pulliam, p.94, l.16 - p.98, l.24; p.100, l.13 - p.101, l.4; p.102, l.18 - p. 103, l.1, attached hereto as Exhibit C). She testified that, at the meeting, the group of owners asked the property manager to have a professional assess the mold and remediate. (Deposition of D. Pulliam, p.105, ll.4-7). The issue of condensation on the windows and patio doors, and the fact that water was running down the windows, was also raised at the meeting. (Id., p.112, ll.4-18). According to Ms. Pulliam's own testimony, she made her concerns about the mold known during the meeting to the property manager, Don Triplett, and Bill Athey, who was a representative of the management of Kensington Place. Of critical importance, at that time, Mr. Athey indicated that MUI was not willing to take any action to address the owners' concerns. (Id., p.156, l.14 - p. 157, l.5).

The following testimony further demonstrates she was aware of moisture problems and issues with windows and patio doors at least as early as the late 1990's:

Q: [I]n the late 1990's, which I understand was before you closed, did you believe for any reason you had a moisture problem at the Kensington project?

A: Yes.

Q: And what led you to believe that you had a moisture problem at the Kensington project?

A: We had trouble with our window and the patio doors with large amounts of condensation literally running down the windows. We knew there were moisture problems, clearly moisture problems on the upper levels.

(Id., p.111 l.24 - p.112, l.10).

Ms. Pulliam purchased her unit in 1999, after having lived in it for three years (Id., p.108, l.21 - p.109, l.9). When Ms. Pulliam was asked during her deposition if she observed anything after closing that led her to believe she did not get what she bargained for, she answered “yes” and explained that when her HVAC broke in approximately 2001, she expected it would have lasted longer. (Id., p.113, l.10 - p.115, l.1).

The totality of Ms. Pulliam’s testimony establishes that she was on notice of potential claims against MUI and Regent Carolina for damages related to the mold and moisture damage within the units and common areas, windows, patio doors, elevator, and HVAC more than three years before the lawsuit was filed. Accordingly, Ms. Pulliam’s claims for damages related to mold and moisture, windows, patio doors, elevators and HVAC are barred by the statute of limitations, and MUI and Regent Carolina are entitled to judgment as a matter of law on these claims.

**II. AS PLAINTIFFS ARE NOT REAL PARTIES IN INTEREST AND HAVE NO CONSTITUTIONAL STANDING THEY HAVE NO LEGAL RIGHT TO MAINTAIN THIS LAWSUIT; THE ISSUES OF PLAINTIFFS’ LACK OF STANDING AND LACK OF STATUS AS REAL PARTIES IN INTEREST ARE AVAILABLE NOW FOR THIS COURT’S REVIEW**

A. *The Issues of Standing and Real Party in Interest Have Not Yet Been Decided by the Court and Are Available Now for this Court’s Review*

Although this Court has issued two Orders discussing the issues of Plaintiffs’ standing and real party in interest status, it has yet to decide these issues, in either Order. By its first Order on

these issues, this Court found that the trial judge would be in a better position to rule upon the motions and deferred ruling on these issues. (Order of Judge S. Jackson Kimball at p. 4, ¶ 3 June 8, 2010). By its second Order on these issues, this Court, quoting language from the first Order, again deferred ruling to the trial judge. (Order of Judge John C. Hayes, III at p. 3, April 1, 2011). On appeal, the Court of Appeals deemed these rulings, in essence, interlocutory and not final. (Order of South Carolina Court of Appeals, August 15, 2011). (An interlocutory order may be reconsidered and corrected by the court before entering a final order. *Shirley's Iron Works, Inc. v. City of Union*, 743 S.E.2d 778, 785 (S.C. 2013).) Accordingly, it is clear that these issues have not yet been decided by this Court and are available for review, by the Court, at this time.

*B. The Law of the Case Doctrine Does Not Apply to this Court's June 8, 2010 Order*

This Court's April 1, 2011 Order stated that Judge Kimball's June 8, 2010 Order, deferring a ruling on the issues of standing and real party in interest, was the law of the case. Under the law of the case doctrine, an unappealed ruling is the law of the case and requires affirming. *Shirley's Iron Works* at 785 (S.C. 2013) citing *Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund*, 389 S.C. 422, 434, 699 S.E.2d 687, 691 (2010). However, the law of the case doctrine does not apply where there is no ruling on an issue. *Charleston County Assessor v. LMP Properties, Inc.*, 743 S.E.2d 88, 91 403 S.C. 194, 201 (S.C. App. 2013). The doctrine only applies to an order or ruling which finally determines a substantial right. *Shirley's Iron Works* at 785 citing *Weil v. Weil*, 288 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989). An interlocutory order is not the law of the case. *Shirley's Iron Works* at 785.

Based upon the law cited above, it is clear that the law of the case doctrine does not apply to

this Court's prior orders on the standing and real party in interest issues. Foremost, there has been no ruling or final determination on these issues; the Court merely deferred ruling to the trial judge. Second, the Court of Appeals issued an Order finding, in essence, that this Courts' rulings on these issues were interlocutory in nature. Given the foregoing, the law of the case doctrine does not apply to these issues, and, they are available to this Court for review, at this time.

*C. Plaintiffs Are Not The Real Parties In Interest, On Common Element Damage Claims*

Plaintiffs are individual unit owners who constitute a minority group of owners, owning 22 out of 110 total units. Plaintiffs are bound by the Master Deed and By-Laws that govern the property. The By-Laws for the property dictate that the Board is responsible for repairs to the common elements. The By-Laws state:

Article IV. BOARD OF DIRECTORS

Section 3. SPECIFIC POWERS AND DUTIES. In addition to the general powers and duties referenced above, duties imposed by these By-Laws, or by resolutions of the Association, the Board shall be responsible for the following:

- (k) Making of repairs, additions and improvements to or alterations of, the property.....in accordance with the other provisions of these By-Laws[.]

Article VII. OBLIGATION OF THE CO-OWNERS.

Section 8. MAINTENANCE AND REPAIR.

- (c) All maintenance, repair and replacement to the common elements as defined in the Master Deed...shall be made by the Board or its agent[.]

The By-Laws further dictate that individual co-owners shall not make any changes to the exterior of the units, *i.e.* the common elements.

Article VII. OBLIGATION OF THE CO-OWNERS.

Section 12. USE OF UNITS – INTERNAL OR EXTERNAL CHANGES

- (c) A Co-owner shall make no changes or additions whatsoever to the exterior of

the Unit, any stairs or decks appurtenant thereto, or to any of the limited common elements....without prior written approval of the Board.

(By-Laws, attached hereto as Exhibit G).

Additionally, the Master Deed denies individual owners the right to change the appearance of common elements. The Master Deed states:

Article V. DESCRIPTION OF UNITS, USE; REPAIRS.

Section 8. ALTERATION IN THE UNITS.

- (b) [N]o Owner may change the appearance of the Common Elements or exterior appearance of a Unit, without permission of Declarant [defined in Article IV., Section (m) as MUI and its successors and assigns].

(Master Deed, attached hereto as Exhibit H).

Accordingly, the contractual documents governing the property dictate that: (1) the KPOA, and only the KPOA, has the right to make repairs to the common elements; and (2) the Plaintiffs shall not make any changes or additions to the exterior of their units or change the appearance (i.e., make repairs) to the common elements.

Every civil action must be prosecuted in the name of the real party in interest. *SCRCP, Rule 17(a)*. “Generally, a party must be a real party in interest to the litigation to have standing.” *Bank of America, NA v. Draper*, 746 S.E.2d 478 (S.C. App. 2013) citing *Hill v. S.C. Dep’t of Health & Envtl. Control*, 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010). “A real party in interest for purposes of standing is a party with a real, material or substantial interest in the outcome of the litigation.” *Id.* “As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation.” *Ex part Morris*, 624 S.E.2d 649, 652, 367 S.C. 56, 62 (S.C. 2006). “[T]he real party in interest is considered to be that person who can discharge the claim on which such suit is brought

and not necessarily the person ultimately entitled to the benefit of the recovery.” *Childs v. Philpot*, 487 S.W.2d 637 (Ark. 1972); *See also, L.R. Property Management, Inc. v. Grebe*, 627 P.2d 864 (N.M. 1981) (real party in interest is one in a position to discharge defendant from the liability being asserted) and *Com. Dept. of Transp. v. Pennsylvania Power & Light Co.*, 383 A.2d 1314 (P.A.1978) (real party in interest must be in such command of the action as to be legally entitled to completely discharge the liability of the defendant).

Plaintiffs, individual unit owners who constitute a minority group of owners, cannot discharge MUI from the liability being asserted, because they do not even have the legal authority or right to bring this action for common element damages. Nothing in these Plaintiffs’ contractual documents or South Carolina law provide these Plaintiffs with the authority or right to maintain an action for damages to common elements. To the contrary, the By-Laws and the Master Deed make it clear that only the KPOA has the right to repair common element damages. *See* Master Deed and By-Laws as quoted above. Additionally, South Carolina law is clear that the property owners’ association and not individual owners have the right to bring an action for common element damages. S.C. Code Ann. § 27-31-10, *et. seq.* (1976, as amended) (§ 27-31-250 provides that repairs to the building must be made by “the council of co-owners” which is defined by § 27-31-10 as a majority or 51% of owners).

Moreover, the case of *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corporation*, 349 S.C. 251, 256, 562 S.E.2d 633, 636 (2002) (hereinafter referred to as *Dunes West*), also provides guidance on these matters. In discussing the *Dunes West* case and applying it to the case at bar, this Court stated that the *Dunes West* case (identified by the Court as the *CDWR* case)

“seems to confine the developer’s liability to pay damages solely to the POA.” (Judge Hayes’ April 1, 2011 Order at p. 5 citing *Dunes West* at page 260). In the same Order, the Court went on to state that *Dunes West* “...seems to vest the right of recovery in KPOA.” (Id. at p. 6). As additional support, this Court’s Order of June 8, 2010 states that the KPOA is “the lawful representative of owners under both the by-laws and by statute[.]” (Judge Kimball’s June 8, 2010 Order at p. 4).

Finally, even if Plaintiffs had some legal right to bring the instant action, they still could not “completely discharge” MUI from liability for all common element damages because they do not represent all of the owners at the Project. Accordingly, MUI and Regent Carolina are entitled to Summary Judgment, as a matter of law, on the grounds that Plaintiffs are not the real party in interest, in this case. As the claims of the real party in interest, KPOA, have been dismissed against MUI and Regent Carolina, there are no further claims against these Defendants, and, a complete dismissal of this case against MUI and Regent Carolina is warranted.

*D. Plaintiffs Lack Standing to Bring Common Element Damage Claims*

The provisions of the By-Laws and Master Deed and the law cited above in Section II. C. are incorporated herein to this standing legal argument, in full:

1. Legal Elements of Standing

Standing is a fundamental requirement for bringing an action. *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 644 S.E.2d 58 (S.C. 2007). The Supreme Court of South Carolina has recognized that a party may acquire standing in one of three ways: (1) by statute; (2) by meeting the requirements of constitutional standing; or (3) the public importance exception. *ATC South Carolina v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (S.C. 2008). There is no statute or public

importance exception that provides Plaintiffs with standing, in this case. Therefore, Plaintiffs must prove constitutional standing.

The South Carolina Supreme Court, relying upon the landmark constitutional standing case, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-61, 112 S.Ct. 2130, 2136 (1992), has set forth the three elements of constitutional standing, as follows:

First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly...trace[able] to the challenged action of the defendant, and not...the result [of] the independent action of some third party not before the court.' Third, it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.' *Sea Pines Assoc. for Protection of Wildlife, Inc. v. S.C. Dept. of Natural Resources and Community Services Assoc., Inc.*, 345 S.C. 594, 550 S.E.2d 287, 291 (2001) *citing Lujan*.

Thus, Plaintiffs, in this case, must prove: (1) they suffered an actual injury in-fact (defined by the Court as an invasion of a "*legally protected injury*"); (2) the Defendants caused that injury; *and* (3) that a favorable decision by this Court will redress Plaintiffs' injury. These three elements of standing and the reasons the Plaintiffs cannot prove them, are set forth below.

## 2. Legal Elements of Standing Applied to Plaintiffs

As stated and supported above, Plaintiffs do not have any legal right to maintain an action for common element damages. By contract and law, the KPOA and the KPOA alone had the right to maintain an action for common element damages. *See* Master Deed and By-Laws as quoted above; S.C. Code Ann. § 27-31-10, *et. seq.* (1976, as amended); and *Dunes West*. Therefore, Plaintiffs do not have any legal injury and/or legally protected interest, in this case. As such, they fail to meet the first element of constitutional standing.

Given that Plaintiffs do not have any legally protected interest, it is axiomatic that Defendants have not caused any *legal* injuries of the Plaintiffs. Therefore, Plaintiffs cannot prove a causal connection, the second element of constitutional standing.

The third element of constitutional standing requires the Court to find that it is likely that a favorable decision by the Court, for the Plaintiffs, would redress the Plaintiffs' injury. If this Court awarded Plaintiffs damages on their claims, they would have no authority, obligation or legal right to actually make repairs to the common elements, for which they recovered damages. Since Plaintiffs have no legal right or authority to make repairs to the common elements, it is certain that they would be unable to make those repairs and redress the injury for which they have sued.

Furthermore, as Plaintiffs are under no obligation by contract or law to make repairs to the common elements, it is merely speculative that they would use any monies recovered to redress the injuries for which they have sued. *See Lujan* at 561, 112 S.Ct. at 2136-37 (finding it must be likely and not merely speculative that the injury will be redressed by a favorable decision of the Court). Accordingly, Plaintiffs fail to meet the third element of constitutional standing, a likelihood that any damages recovered would redress their injuries.

It should also be reinforced that Plaintiffs have no right to effect repairs, even if they are awarded money and are so inclined. The regime documents referenced above make that clear. The Plaintiffs recognize this which is why, for more than four years, there have been discussions about what would happen if the Plaintiffs do, in fact win an award. This is an issue which is still in doubt as reflected in the recent correspondence between counsel for the POA and counsel for Plaintiffs attached as Exhibit I. As the Court can see, the POA contemplates the awarded sums being

deposited into the POA despite the fact that the POA has no claim. Thus the POA and Plaintiffs are, in essence, contemplating presenting the jury with purely fictional claim in which the jury is asked to award money to parties who will then provide it to an adverse party. None of this makes sense and the Court should not be party to it.

3. Plaintiffs' Reliance on Article XV of the Master Deed is Improper

To support their claim that Plaintiffs have a right to bring this action, Plaintiffs rely upon Article XV of the Master Deed:

MISCELLANEOUS MATTERS. Section 1. ENFORCEMENT. In the event of a violation or breach of any of the affirmative obligations, duties and responsibilities of the Association, its officers or its Board of Directors as set forth herein and/or in the Master Deed for Kensington Place Horizontal Property Regime, the Association or the members, or any of them jointly or severally, shall have the right to proceed at law or in equity to seek redress, compel compliance or to prevent the violation or breach of any obligation, duty, or responsibility." (Master Deed at Article XV).

(Plaintiffs' Memorandum in Support of Its Motion to Dismiss Cross-Claim of POA, Inc., at p. 2, January 21, 2011).

As, this Court's Order notes, discussing Article XV states: "This Article actually does not pertain to Plaintiffs' claims against the developer, MUI, but to claims against the KPOA, its officers or directors." (Judge Hayes Order at p. 5, April 1, 2011). The provision governs enforcement against the association of the obligations in the Master Deed. Accordingly, Article XV does not provide Plaintiffs with the legal right or authority to bring this action.

4. Plaintiffs Reliance on *Roland v. Litchfield* is Misplaced

Plaintiffs contend that the South Carolina Court of Appeals' decision in *Roland v. Litchfield*, 372 S.C. 161, 641 S.E.2d 465 (Ct. App. 2007) "stands for the proposition that the homeowners, as owners of Common Elements have standing to pursue defect claims, in contrast to the Homeowners'

Association, which does not own the property.” (Plaintiffs’ Memorandum in Support of its Motion to Dismiss Cross-Claim of POA, Inc., pp.2-3.) Contrary to Plaintiffs’ assertion, the Court of Appeals in *Roland* did not address the standing issue.

In *Roland*, plaintiffs were the owners of 11 condominium units in a development comprised of more than 80 units. Following the discovery of mold in the firewalls that separated the units, plaintiffs sued the developer and general contractor, alleging breach of the implied warranty of habitability, breach of the implied warranty of workmanlike service, breach of express warranty, and negligence. The trial court granted summary judgment to plaintiffs on the issue of liability, and, defendants appealed. Although the defendants in *Roland* had moved for summary judgment as to plaintiffs’ standing to allege injury to the common elements, that motion was denied by the trial court, and, *the defendants did not appeal this ruling*. Accordingly, the Court of Appeals made no findings as to standing.

In its opinion discussing ownership of the common elements, the Court of Appeals was simply addressing defendants’ argument on liability, that the association owned the common elements. The Court of Appeals disagreed and affirmed summary judgment for plaintiffs, referring to a Master’s Deed provision stating that the owners of each unit own an undivided interest in the common elements. *Roland* addressed the issue of ownership, not standing. As this Court can see, for the numerous reasons delineated above, *Roland* is not only *not* controlling on the issue of standing, as Plaintiffs suggest, but it is inapplicable. The *Roland* Court did not even address a standing argument.

5. Plaintiffs Admit and Argue That They Own Only An “Undivided Interest” in the Common Elements

Plaintiffs argue standing based upon the Master Deed which provides that “the owners own undivided interests in the Common Elements.” (Plaintiffs’ Memorandum in Support of Its Motion to Dismiss Cross-Claim of POA, Inc., at p. 2, January 21, 2011). An *undivided* interest does not confer a legal right or authority for individual unit owners to sue for damages to the *common* elements. “Undivided” is defined as “existing as a whole, not in separate parts.” *Cambridge Academic Content Dictionary*, (Cambridge University Press 2013). Therefore, an **undivided interest** is one that exists as a whole, not in separate parts. Plaintiffs’ ownership interest in the common elements exists *only in relation to all of the other unit owners*, much like tenancy in common or joint tenancy. As such, Plaintiffs have no legal right to sue, *individually*, on an “*undivided interest*” in *common elements*.

6. Property Association Has Exclusive Right to Sue Developer in Other Jurisdictions

A number of courts have ruled that a property owners’ association has exclusive standing to bring the case against the developer. One court reasoned that individual owners do not have such standing because common areas are owned jointly by all owners. *See, e.g. Siller v. Hartz Mountain Associates*, 93 N.J. 370, 461 A.2d 568 (1983) (association has exclusive standing to sue developer for construction defects in common elements and unit owners lacked standing to seek restraining order to prevent settlement between developer and the association); *Caprer v. Nussbaum*, 36 A.D.3d 176, 205 (N.Y. 2006) (a unit owner may not sue individually to protect his or her interests in the common elements); *Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, Inc.*, 29 A.3d 605 (Md. App. 2011) (exclusive right to bring a case regarding the common elements is vested in the board); *Poulet v. H.F.O., LLC*, 353 Ill.App.3d 82 (2004) (association has exclusive

standing to assert claims against the developer for mishandling of the association's funds); and *Board of Directors of Kennelly Square Condominium Ass'n v. MOB Ventures, LLC*, 359 Ill.App.3d 991, 836 N.E.2d 115 (2005) (association has exclusive standing to bring claim for trespass to a common element; individual owners lacked standing to bring claim because alleged trespass concerned common areas owned jointly by all owners).

South Carolina courts have not specifically addressed an "exclusive right to sue" argument. However, as mentioned previously, this Court's Order provides that *Dunes West*, a South Carolina case, "seems to confine the developer's liability to pay damages solely to the POA." (Judge Hayes' April 1, 2011 Order at p. 5 citing *Dunes West* at page 260). Furthermore, South Carolina courts have made it clear that the property association is the entity with the standing and legal duty to sue for defects to the common elements. *Queen's Grant Villas Horizontal Property Regimes v. Daniel Int'l Corp.*, 286 S.C. 555, 335 S.E.2d 365 (1985). Taking guidance from these South Carolina cases, the cases from other jurisdictions, and in accord with Plaintiffs' contractual documents, the Court should find that it is the association alone and not these Plaintiffs who have the right to sue on the common elements.

*E. Plaintiffs' Appropriate Action is as to KPOA, Not MUI and Regent Carolina*

As stated herein, Plaintiffs have no standing to bring the present action against MUI and Regent Carolina. The focus of their lawsuit should be against the KPOA for its failures, if any. By contract and law, it is the KPOA that can provide Plaintiffs with a remedy and not MUI or Regent Carolina. As stated herein, Article XV of the Masters Deed provides Plaintiffs with the right to bring an enforcement action against the KPOA. (Masters Deed at Article XV, Section 1). Furthermore,

South Carolina law provides that the property association is the proper party for Plaintiffs to sue, in a case such as this. *Murphy v. Yacht Cove Homeowners Ass'n*, 289 S.C. 367, 369, 345 S.E.2d 709, 710 (1986) (Should the property association not uphold its duty to maintain, it may be liable to the homeowners for its omissions).

*F. The Issues of Standing and Real Party in Interest are Legal Issues that Should be Decided by the Court Now*

The issues of whether Plaintiffs-Owners have standing and are the real parties in interest to this lawsuit are issues that are purely legal in nature and are ripe to be decided by the Court. See *Roundtree Villa v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2nd 46 (1984). The only evidence bearing on these issues are the legal documents of Plaintiffs (the By-Laws and Master Deed) cited herein. As explained, these documents plainly demonstrate that Plaintiffs do not have legal standing to bring this case and are not the real party in interest, in this case. Not only are there no facts in dispute, on these issues, there are no facts relevant to these issues. As there are no relevant question of facts to these issues, and the legally binding contract documents (the By-Laws and the Master Deed) prevent Plaintiffs from bringing this action, MUI and Regent Carolina are entitled to Summary Judgment.

**III. PLAINTIFFS CANNOT MAINTAIN THE CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY AGAINST MUI OR REGENT CAROLINA AS NEITHER DEFENDANT OWED A FIDUCIARY DUTY TO ANY PLAINTIFF**

Plaintiffs have asserted a claim against MUI and Regent Carolina for breach of fiduciary. The Supreme Court of South Carolina recognized that a developer has a fiduciary duty to a property owners' association, in *Concerned Dunes West Residents v. Georgia Pacific Corp.*, 562 S.E.2d 633

(S.C. 2002). In *Dunes West*, relying in large part on *Goddard v. Fairway Dev.*, 426 S.E.2d 828

(S.C.App. 1993), the Court held:

[t]he developer has a fiduciary *duty to the POA* to transfer common areas that are in good repair; if the developer transfers substandard common areas, the developer must, at the time of transfer, provide the POA with the funds necessary to bring the common areas up to a standard of reasonably good repair. The developer who breaches this duty, by transferring common areas that are not in reasonably good repair and without the funds necessary to bring the common areas up to standard, is liable *to the POA* for all damages proximately flowing from the breach, including damages for the continued deterioration of these areas [emphasis added].

*Dunes West*, at 260, 562 S.E.2d at 638.

A. *A Developer Has a Fiduciary Duty to an Association Not Individual Owners*

The Supreme Court of South Carolina, in *Dunes West*, recognized a duty owed by a developer to a property owners' association in a planned unit development. The Court, however, *did not* recognize a fiduciary duty by the developer to individual unit owners. In the case at bar, Plaintiffs, as individual unit owners, are attempting to ascribe to themselves the fiduciary duty the developer, MUI, owed to the association, KPOA. However, South Carolina Courts have not recognized such a duty. Therefore, as a matter of law, Plaintiffs cannot maintain a fiduciary duty claim against MUI.

B. *Regent Carolina Was Not The Developer, Thus Owes No Fiduciary Duties*

The fiduciary duty claim, *vis a vis Dunes West*, fails as a matter of law with respect to Regent Carolina, which was not the developer of the Project. The fiduciary duty recognized in *Dunes West* was owed by the *developer*. The fiduciary relationship, if any, existed only between MUI—whom Plaintiffs correctly allege was the developer of the Project—and KPOA. Plaintiffs have not alleged

that Regent Carolina was the developer. Instead, in an attempt to impose “developer liability” on Regent Carolina, Plaintiffs allege:

That at all times relevant hereto regarding the management and turnover of the Kensington common elements to the present homeowners, Regent Carolina Corporation and MUI acted as the developer, acted to amalgamate corporate interests, entities, and activities so as to blur any legal distinction between the corporations and their activities, and otherwise acted as a joint enterprise to pursue a common purpose. Officers of all corporations acted as agents of the others, took direction from superiors at other corporations, and held themselves out as agents of one another in pursuit of the joint enterprise[.]

(Fifth Amended Complaint, ¶ 5).

Plaintiffs advance the amalgamation of interests theory without factual support, seeking to impose liability on Regent Carolina, notwithstanding the fact that it was not the developer of the Project or the seller of any unit. The facts of this case do not support application of any of these theories now advanced by the Plaintiffs.

The Court of Appeals of South Carolina has recognized the amalgamation of interests theory, in limited circumstances, as a mechanism for holding a corporate relative of a developer corporation responsible for negligent construction. In *Kincaid v. Landing Development, Corp.*, 289 S.C. 89, 96, 344 S.E.2d 869, 874 (Ct.App. 1986), homeowners brought an action for negligent construction and breach of warranty against a property development corporation (“Developer”), a separate entity that contracted with Developer for sales and marketing of the project (“Sales Agent”) and the corporation responsible for construction (“Builder”). Sales Agent appealed the trial court’s denial of its motion for a directed verdict on the grounds that he was merely the sales and marketing agent and was not responsible for construction of the project. The Court of Appeals affirmed the trial court’s ruling

that the evidence revealed “an amalgamation of corporate interests, entities, and activities so as to blur the legal distinction between the corporations and their activities.” *Id.*

The facts of *Kincaid* establish that the distinction between the activities and interests of Developer, Sales Agent and Builder, from the Plaintiff’s perspective, was blurred. During development and construction, plaintiffs received a letter from Sales Agent indicating that Sales Agent was the developer and that its vice president would handle all construction questions. Further, plaintiffs received a letter bearing letter head of Sales Agent which included the notation “A Development, Construction, Sales, and Property Management Company.” *Id.* These facts, importantly, show that the conduct of Sales Agent, the party sought to be held jointly responsible, was such that Plaintiff was unable to distinguish the acts and interests of Sales Agent from those of Developer or Builder.

Application of the “amalgamation of interests theory” recognized in *Kincaid* was recently discussed in the Court of Appeals’ opinion in *Mid-South Management Co. Inc. v. Sherwood Development Corp.*, 374 S.C. 588, 604-05, 649 S.E.2d 135, 144-45 (Ct. App. 2007). In *Mid-South*, the Appellant sought to hold parent companies of its co-joint venturer, Sherwood, liable for a judgment entered against Sherwood. The court found *Kincaid* inapplicable to the facts before it, stating: “In *Kincaid*, this court found sibling companies jointly liable for negligent construction. *Kincaid* was not a situation in which one company owed a judgment and the court imposed liability upon the parent company or a shareholder.” *Id.* The court found that “even if the *Kincaid* amalgamation of interest theory could be used to find a shareholder liable for debts of a corporation, we find appellants failed to present sufficient evidence to find Sherwood’s parent companies liable

for its judgment.” *Id.*, 374 S.C. at 605, 649 S.E.2d at 145. In reaching its conclusion, the court noted the absence of evidence that appellant could confuse Sherwood with its parent companies. Importantly, the evidence demonstrated that appellant dealt only with Sherwood and not with the parent companies. *Id.*

In light of the principles outlined by *Kincaid* and *Mid-South*, to establish a fiduciary duty of Regent Carolina on the amalgamation of interests theory, Plaintiffs are required to prove that Regent Carolina’s involvement in the Project was such that the Plaintiffs were confused as to the distinction between Regent Carolina and MUI. Plaintiffs have not alleged any facts which would support a finding that they were confused as to the distinction between MUI and Regent Carolina. Absent such evidence, Plaintiffs cannot maintain the fiduciary duty claim against Regent Carolina and Regent Carolina is entitled to judgment as a matter of law.

#### **IV. PLAINTIFFS’ IMPLIED WARRANTY OF HABITABILITY CLAIM AGAINST REGENT CAROLINA FAILS BECAUSE REGENT CAROLINA WAS NOT THE SELLER OF ANY UNITS**

The implied warranty of habitability attaches to the seller only, upon the sale of a new home. Under South Carolina law, the *seller* of a new residence impliedly warrants that the residence is habitable. *See Arvai v. Shaw*, 289 S.C. 161, 345 S.E.2d 715 (1986). The implied warranty springs from the *sale* of a new residence. *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008) (citing *Kennedy v. Columbia Lumber & Mfg Co., Inc.*, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989)); *Kirkman v. Parex, Inc.*, 369 S.C. 477, 483 n.2, 632 S.E.2d 854, 857 n.2 (2006). The implied warranty of habitability “arises solely out of the sale of the home.” *Smith*, 377 S.C. at 422, 661 S.E.2d at 71.

Plaintiffs have correctly alleged that MUI was the developer of the Project. (Fifth Amended Complaint, Para. 2). MUI was the undisputed seller of the units, and, Plaintiffs have not alleged that Regent Carolina sold any unit to any Plaintiff. Instead, in effort to impose “developer liability” on Regent Carolina, Plaintiffs advance the “amalgamation of interests” theory, discussed in Section III. B. above. As discussed therein, Plaintiffs have not presented any facts to support application of the amalgamation of interests theory, in this case.

Plaintiffs also have not presented facts to support a finding that Regent Carolina was involved in the sale of any unit. Absent such a showing, there are no issues of material fact and Regent Carolina is entitled to judgment as a matter of law as to Plaintiffs’ claim for breach of the warranty of habitability.

**V. PLAINTIFFS’ NEGLIGENCE ACTION AS TO REGENT CAROLINA FAILS AS REGENT CAROLINA OWED PLAINTIFFS NO LEGAL DUTIES**

In order to maintain a negligence action against Regent Carolina, Plaintiffs must demonstrate that (1) Regent Carolina owed a duty of care to the Plaintiffs; (2) Regent Carolina breached that duty by a negligent act or omission; (3) said breach was the actual and proximate cause of Plaintiffs’ injuries; and (4) Plaintiff suffered actual injuries or damages. *See Moore v. Weinberg*, 383 S.C. 583, 588, 681 S.E.2d 875, 878 (2009).

Plaintiffs have alleged *generally* that Regent Carolina was negligent in failing to perform the following functions: prevent building defects, properly manage and maintain the property, establish and fund adequate reserves, establish an adequate depreciation schedule, fund known repairs, maintain the property in reasonably good condition at the time of turnover to the homeowners, adequately inspect the property, advise homeowners of the developers’ conflicts of interest while in

control of the board and provide for independent representation of non-developer homeowners as to board and property management and maintenance. (Fifth Amended Complaint, ¶ 25). *However, Plaintiffs have not alleged that Regent Carolina owed Plaintiffs any legal duty.* Moreover, there are no facts or evidence to support that Regent Carolina owed Plaintiffs any legal duty. Accordingly, Regent Carolina is entitled to judgment, as a matter of law, on Plaintiffs' negligence cause of action.

### CONCLUSION

For the reasons outlined above, the Motion for Summary Judgment of MUI and Regent Carolina should be granted. Upon such a grant of Summary Judgment, there being no further claims against these Defendants, they herein request a complete dismissal from this case.

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1/13, 2014

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February 18, 2014  
**VIA FEDERAL EXPRESS**

The Honorable Jenny Abbott Kitchings, Clerk  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, S.C. 29211

Re: *Brian and Deborah C. Pulliam, et al. vs. M.U.I. Carolina Corporation, et al.*  
York County Case Number: 2014-000218

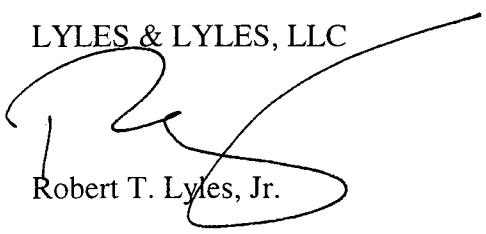
Dear Ms. Kitchings:

Enclosed herein please find the original and seven (7) copies of the Return to Respondent's Motion to Dismiss the Appeal of Appellants M.U.I. Carolina Corporation and Regent Carolina Corporation for filing, with regard to the above-referenced matter. Kindly file the original and return a stamped copy of the Return to Motion in the self-addressed envelope, provided for your convenience.

Thank you, and with kindest regards, I remain

Very truly yours,

LYLES & LYLES, LLC



Robert T. Lyles, Jr.

RTL/kl

Enclosures

cc: Via electronic mail:  
Clerk, York County Court of Common Pleas  
W. Jefferson Leath, Esquire  
Michael S. Seekings, Esquire  
Kenneth R. Raynor, Esquire  
Marty Probst, Esquire

**RECEIVED**

FEB 19 2014

**SC Court of Appeals**