THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

ORIGINAL

James C. Williams, Circuit Court Judge

Appellate Case No. 2014-000118

John T. Lucas, Sr. as Trustee of the John T. Lucas Revocable Trust and Carolyn C. Lucas Revocable Trust, Appellant,

v.

The Bristol Condominium Property Owners Association, Respondent,

and

The Bristol Condominium Property Owners Association, Plaintiff,

v.

John T. Lucas St. as Trustee of the John T. Lucas Revocable Trust Dated November 10, 2004, and Carolyn C. Lucas Revocable Trust Dated November 10, 2004, Defendants/Counterclaim Plaintiffs,

v.

The Bristol Condominium Property Owners Association, Counterclaim Defendant.

# BRIEF OF APPELLANT

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## Statement of the Issue on Appeal

Did the trial court err when it failed to find, as a matter of law, that the various Boards of Directors of the Bristol Property Owners' Association breached their fiduciary duties to members of the Association, including Dr. John Lucas, resulting in damage to him?

## Statement of the Case

The Bristol Condominiums is a 54 unit development on the Ashley River in Charleston, developed by the Beach Company and Gulf Stream Construction. In about 2003, the first unit was sold. Dr. John and Mrs. Carolyn Lucas, hereafter, "Lucas" bought a condominium in the development not long after the development made condominiums available for sale.

On February 9, 2007, the Bristol Property Owners Association, hereafter the "Association," through counsel sued various defendants, alleging defects in the Bristol condominium complex's construction, including leakage around windows and doors in the common areas as well as in individual condominiums. (R. pp. 23-69) A separate lawsuit for individual property damages was also filed, known as the "Landry lawsuit." (R. pp. 70-119). On June 26, 2005, other individual homeowners had filed similar claims in what will be referred to as the Hanger lawsuit. (R. pp. 120-131).

On March 10, 2009, having heard challenges to the Bristol Association's standing to allege various construction defects to the doors and windows in the complex, the Honorable Clifford Newman ruled that, because the Master Deed for the Bristol Horizontal Property Regime provided that the individual unit owners owned and had the duty to maintain the windows, doors, and bathrooms of their individual units, the Association had no duties to maintain these components, and therefore no standing to litigate claims arising from the installation of those components. (R. pp. 1-7). The Association's Board had voted to change the

master deed so that the windows and doors became common property, and voted to make the change to the master deed retroactive to April 17, 2007. (R. pp. 1-7). Judge Newman ruled that the Board could not retroactively change ownership of the windows and doors. (R. pp. 1-7). Judge Newman concluded that the Association had no right to assert claims related to the doors, windows, and bathrooms that were not part of the common area or limited common area. (R. pp. 1-7). Following this ruling, the Association's Board organized a meeting with all condominium owners and encouraged each of them to individually join the lawsuit. (R. pp. 132-138).

On March 13, 2009, the Board forwarded a letter to all homeowners explaining the court's ruling and acknowledged that not all property owners had joined the lawsuit individually. (R. pp. 132-138). Those who had not joined could sign a document assigning their right to sue to the Association, therefore allowing the Board to pursue claims for leaking windows and doors on the homeowners' behalf. (R. pp. 132-138). Lucas never joined the lawsuit, nor did he assign rights to litigate claims arising from leakage or other damage to their windows and doors. (R. pp. 132-138).

The Association's lawsuit, as well as the Hanger suit and the Landry suit, were ultimately settled. However, after payment of costs and fees, there were insufficient funds available to complete the repairs necessitated by the defective construction alleged in the complaints.

Before and following the settlement of the lawsuit, the Board made special assessments on the homeowners for attorneys' fees, litigation costs, and anticipated short falls in repair costs that would not be covered by the proceeds of the settlement. (R. pp. 132-138).

Lucas filed suit against the Association on April 20, 2010, alleging conversion, breach of fiduciary duty, forcible entry and detainer, constructive fraud, fraud and misrepresentation,

negligence, trespass, nuisance, unjust enrichment, and asked for a declaratory judgment and injunctive relief. (R. pp. 132-138). The Association filed a foreclosure action against Lucas on March 25, 2011, based on a condominium lien for unpaid assessments. (R. pp. 139-145). Lucas in turn counterclaimed, alleging that the foreclosure was wrongful and retaliatory.

After extensive discovery, on June 30, 2011, the Association moved for summary judgment as to Lucas' complaint, alleging that it was entitled to judgment as a matter of law "based on the premise that the Board of the Bristol Condominium Property Owners' Association . . .is protected from all of the Plaintiffs' claims by the Business Judgment Rule." (R. pp. 152-153). The motion was heard on August 16, 2012, by the Honorable J.C. Nicholson, Jr., who ruled from the bench, dismissing Lucas's causes of action for conversion, forcible entry and detainer, constructive fraud, fraud and misrepresentation, trespass, nuisance and unjust enrichment. (R. p. 21). However, Lucas 's claims for negligence and breach of fiduciary duty survived. (R. p. 21). Further, the foreclosure matter continued, as did Lucas's claims for wrongful foreclosure.

Discovery continued, and on May 22 and 23, 2013, the Honorable Jimmy C. Williams, sitting as special referee and without a jury, heard Lucas's remaining claims, including Lucas's claims for wrongful foreclosure. Prior to trial the parties submitted extensive portions of the discovery they had already conducted in lieu of calling live witnesses. At trial, Lucas testified, as did Lona Vest, Jan Landry, and John DeWitt. By order entered July 28, 2013, Judge Williams ruled in favor of the Association on all Lucas's causes of action in his action against the Property Owners' Association. Notice of the entry of judgment was mailed to all parties on August 6, 2012, and Lucas timely moved for reconsideration, and that motion was denied by Order dated

December 2, 2013. Notice of the entry of that Order was received by counsel on December 9, 2013 (mailed on December 3, 2013), and this appeal timely followed.

**Facts**

The Bristol is a fifty-four unit condominium complex located at 3000 Old Bridgeview Lane on the Ashley River in Charleston. The Bristol Horizontal Property Regime was created by Brittlebank Condominiums, LLC and was established by the filing of the regime's Master Deed, on August 26, 2002, with the Register of Deeds for Charleston County. The Property Owners Association, hereafter "Association," was formed as a nonprofit corporation pursuant to the South Carolina Nonprofit Corporation Act, S.C. Code, Ann., §§33-31-101, et. seq., and consists of the owners of units in the regime, referred to as members.

Dr. John T. Lucas and his wife, Carolyn, purchased Unit 313 in 2004. As all other members did, they took title to their unit subject to the terms and conditions of the Master Deed. The Master Deed set forth Bylaws for the Association, and required that the Association elect or select a Board of Directors to carry out the functions required of the Association, including performing maintenance on the co1mnon areas of the regime, insuring the regime's common areas, determining the necessity of assessments, and paying such costs or liens that became due and payable as a result of the operation of the regime.

The Master Deed and Bylaws provided for Brittlebank to appoint a Board until such time as individuals owned the majority of the condominiums in the regime, at which time Brittlebank was to turn over management of the complex to the members. As early as 2004, members noticed water intrusion into their condominiums around doors and windows. Initial efforts to obtain repairs were unsuccessful, and owners of four units filed suit against various construction defendants and the developers in 2005. That matter, styled *Kenneth Hanger, et. al., v. The Beach*

*Company, et. al.,* 2005-CP-1 0-3029, was joined by two additional members and is known as the Hanger lawsuit.

In 2006, Brittlebank ceded control of the regime to the members and the Association elected its first Board in August. Unable to resolve the ongoing water intrusion issues, the Board retained counsel and filed *The Bristol Condominiums Property Owners' Association v. Brittlebank Condominiums, LLC.,* et al., 2007-CP-10-0612. Simultaneously, an additional group of members filed *Janice L. Landry, et al., v. Brittlebank Condominiums, LLC., et al.*, 2007-CP-10-607. Both the Association's lawsuit and the Landry suit sought remediation of t1 1e water intrusion issues that remained unresolved.

When the Association elected its first Board, the Board in turn appointed various committees, including an Insurance Committee. That committee reviewed the insurance coverage afforded the commons areas and further determined that the Master Deed defined the limited common areas in the regime to *exclude* exterior windows and doors and further that the Master Deed required individual members to maintain their own windows and doors. The committee determined that the coverage that had been acquired for the regime was not written consistent with the Master Deed's definitions. The committee therefore recommended that this issue be addressed, and the Board determined to amend the Master Deed so that the definition of "limited common areas" was amended to include the exterior windows and doors of individual units. On April 23, 2007, the Board filed the 4th Amendment to the Master Deed, amending the definition of "limited common areas" to include the exterior windows and doors of individual units, effectively taking windows and doors owned by individual unit owners away from them without compensating them for their property.

The Board attempted to make this amendment retroactive so as to enable the Association to represent individual unit owners in the Association's lawsuit against the developers. In response to a motion for summary judgment filed by the developers, the Court ruled, by order dated March 10, 2009, that the amendment could not retroactively change either ownership of or responsibility for maintenance of the exterior windows and doors. The Association therefore did not have standing to litigate construction claims arising from leakage around individual units' windows and doors.

The Board then wrote each unit owner and encouraged each to join the Association lawsuit. Lucas declined, reasoning that since his windows and doors were not leaking, there was no reason for him to do so.

In October of 2009, all three lawsuits settled. The Board appointed a repair committee to obtain competitive bids for the repair of the issues addressed in the litigation. The committee obtained bids from four contractors and four windows manufacturers. The Board selected a contractor, and the committee presented three different repair scenarios to the members. The three repair options were presented to the members of the Association for vote. In conjunction with the repair scenarios, the Board also presented a special assessment for approval, which assessment was intended to cover the shortfall in the funds available from the settlement of the construction litigation so that repairs could be completed.

Lucas consistently opposed the transfer of his windows and doors to the Association. Further, he opposed the construction assessment, reasoning that the litigation should not be settled for an amount that created a shortfall to be covered by the unit owners. He therefore filed his action against the Association April 20, 2010.

## Argument

**I. This court should correct errors of law and should reverse the trial court's findings of fact that are not reasonably supported by the evidence, as this matter was a tort action tried without a jury.**

The claims considered by the trial court in this matter alleged negligence and breach of fiduciary duty by the Association's Board(s) in their management of the construction litigation filed by the Association and by the individual unit owners. These actions clearly arose in tort. An action in tort for damages is an action at law. *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 202, 723 S.E.2d 597, 602 (Ct. App. 2012). [W]hen reviewing an action at law, on appeal of a case tried without a jury, the appellate court's jurisdiction is limited to correction of errors at law, and the appellate court will not disturb the [special referee]'s findings of fact as long as they are reasonably supported by the evidence. *Mazloom v. Mazloom*, 382 S.C. 307, 316, 675 S.E.2d 746, 751 (Ct. App. 2009). In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. The rule is the same whether the judge's findings are made with or without, a reference. The judge's findings are equivalent to a jury's findings in a law action. *Townes Associates, Ltd. v. City of Greenville*, 221 S.E.2d 773, 266 S.C. 81 (1976); cited in *Ritter And Associates, Inc. V. Buchanan Volkswagen, Inc.*, 746 S.E.2d 465 (Ct. App. 2013).

**II. The trial court erred when it failed to find that the Association's Boards breached their fiduciary duty to Lucas by failing to apprise him of matters critical to his ownership of a condominium unit and membership in the Association.**

The trial court correctly found that standards for the conduct of directors of non-profit entities is found at *S. C. Code Ann.* § 33-31-830. However, the court misapplied those standards when it failed to find that the Boards' members breached their fiduciary duty to communicate

pertinent and even critical information to Lucas throughout the course of the construction litigation, and following.

*S. C. Code Ann.* § 33-31-830 requires directors to act:

(a) (1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner the director reasonably believes to be in the best interests of the corporation.

"A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct.App.1987). Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material. *Anthony v. Padmar, Inc.,* 320 S.C. 436, 465 S.E.2d 745 (Ct. App. 1995).

Since the inception of the Board in August of 2006, there have been many complaints about the lack of communication and misdirection from the Board. Cindy Mulcare, who testified by deposition, testified that she was told by the Board that they needed a letter about the Master Deed and was informed it was related to a lawsuit over windows and doors. (R. p. 640, line 9-10). (R. p. 635, line 1-6)."...I think that the Board should realize that they act on our behalf, so it is our property. And then you have...a responsibility to inform the homeowners on a regular basis what is going on...I was not happy with the way we were updated about financial issues."

The Board made unilateral decisions on important matters without consulting the homeowners. For example, the Board decided to hire Sutton-Kennerly, an engineering firm, to

take an in-depth look at the Bristol structure. (R. p.650, line 16-20). The homeowners were told by the Association of this decision and were never allowed a vote. (A. p. 1, line 16-20).

Further, when the Board did relay information, there were issues with the way that information was relayed to homeowners. Lona Vest was retained in 2007. On June 28, 2007, Ms. Vest received an email, offered as a trial exhibit, from Jan Landry in which Ms. Landry expressed concern and confusion about how the owners were being updated on what was going on at the Bristol. The Board sent information in different ways, but most important information, with the status of the various lawsuits being a prime example, was disseminated by email. (A. p. 2, line 11-24). The Board and the property manager were in charge of deciding how to communicate with the homeowners. (A. p. 3, line 18-24). Many homeowners were older and did not use the internet, including Lucas. Also, not all information was mailed to those owners who did not live at the Bristol. For example, Ms. Vest testified that meeting minutes would be posted to the website, but only the annual meeting minutes were actually mailed. Lucas did not always receive information that was left at his door, because he did not live in the unit full-time, and as testified, he eventually stopped getting information altogether. In fact, Ms. Vest testified that ". ..there were varying complaints the entire time about communication . . . ." At one point, the Board even apologized for its lack of notice for a Board meeting for October 21, 2008.

The Association further breached its fiduciary duty to commm1icate by holding many Board meetings off campus. Instead of improving communication, the Board required homeowners to notify the Board in advance if they wished to attend any meetings, which the owners complained was inconvenient. Johann Prins, a member of the Association and a former Board member, was "very much in favor" of having Board meetings at the Bristol, but "the former Board had preference to have the Board meetings elsewhere." (R. p.670, line 7-11).

When homeowners did attend meetings, the agenda would not be presented until they arrived- there was no advance notice. (R. p. 671, line 1-9).

Some meetings were closed to homeowners, and these were referred to as "executive sessions." (R. p. 651, lines 20-22). These meetings were about legal matters and personnel. (R. p. 651, line 25- p. 652, line 3). Jan Landry stated that matters regarding attorney-client privilege, grievances, or employee reviews would be discussed in executive session. (A. p.4, lines 1-9). The Board determined which subjects were to be covered in executive session. (R. p. 680, lines 14-21). Lucas testified "...if you look at the minutes there's not much written down [at the beginning of the lawsuit brought by the Bristol]. It was always executive session." Kenneth Hanger, a former homeowner, raised concerns about the Board holding meetings away from the Bristol because "it was a pain to get to and go away." (R. p. 691, line 23- p. 692, line 16). The Board's response, to Hanger's concern, was that "they wanted to get away from the property and...just be away from it." (R. p. 692, line 10-12).

Jan Landry testified that the homeowners should have been made aware of the judge's order that stated the regime did not have standing to bring a suit for the windows and doors, and that they were not generally provided with this information. (A. p.5, line 18-20).

Even when information was requested directly from the Association, the Board failed to respond, breaching its fiduciary duty. Lucas testified that he was unhappy because he was being assessed for expenses for a lawsuit that he never joined. Therefore, he had to pay for a lawsuit that he was not a part of. He retained counsel to write a letter requesting information so that he and other homeowners could get information regarding the construction litigation so that he could be informed before voting. He and other homeowners were not allowed to make an informed vote. At one Board meeting, the letter from his attorney was read by Lucas, asserting

his objections to the special assessment and stipulating his refusal to pay, and Lucas stated that his attorney would be sending the letter to the regime within the week. According to Ms. Vest's and Lucas' deposition testimony, the Board contacted their attorney, Brew Hagood, however, no materials were ever turned over to Lucas' counsel. Lucas further testified at trial that there was absolutely no response. (R. p.451, lines 5-10).

Another example of the Association's withholding information from homeowners is the failure to disclose that there was an alternative to replacing all the windows and doors. Ms. Vest testified that a treatment was available that would not have been as expensive as replacing all the windows and doors at the Bristol. No witness testified that this alternative was ever presented to the homeowners for a vote. The cost differential between these two alternatives was $400,700 difference in assessment fees, and per unit a $7,420.37 difference. However, the only solution presented to the homeowners was a full window replacement, and then they were to vote yes or no for this solution. (R. p. 684, lines 8-11). It was presented at a meeting, and no discussion was allowed, according to Lucas' testimony. This was true even though only eighty out of four hundred windows at the Bristol had problems. (R. p. 681, line 1-9). The Board members who voted for replacement rather than treatment and repair had construction issues with their condos, and were therefore placed in a conflict position relative to other homeowners who did not. (R. p.679, line 15-18). David Warner stated that, instead of a cheaper approach that would have resulted in a lesser assessment, the Association voted that it was in every homeowner's interest to replace all the windows and then have them assessed at approximately $32,000-$36,000. (R. p. 682, line 20- p.683, line 1).

There was a document entitled "Bristol Construction Defect Litigation Cost Projections" dated February 19, 2008. Hourly and contingency costs were compared. Id. However, the cost

projections were never presented to the homeowners. (R. p. 663, lines 8-11). When asked as to why this wouldn't have been presented to homeowners, Dave Landry stated, "I would anticipate this is early on and the Board probably did keep it to themselves." (R. p.663, lines 8-17).

**III. The trial court erred when it failed to find that the Boards breached their fiduciary duty to Lucas by mishandling common funds to which Lucas was a stakeholder, including insurance proceeds, settlement proceeds and funds collected as regime fees and assessments.**

The evidence also shows that the Boards mishandled funds and failed to manage the financial status of the Bristol properly. The most costly part of the reconstruction of the Bristol was replacing all windows and doors with new ones. David Warner, a former Board President, testified that there was an alternative to full replacement that would have been less costly, but the homeowners were never presented that option. The only solution presented to the homeowners was to vote yes or no on full new window replacement. (R. p.684, lines 8-11). In fact, evidence presented at trial showed that only eighty out of 400 hundred windows at the Bristol had problems and needed to be fixed. (R. p. 681, lines 1-9).

The Beach Company developed the Bristol project. When management was transferred over to the Bristol, the reserve fund was underfunded. (R. p.591, lines 4-7). David Warner, former Board President, testified that the underfunding of the reserve fund has been a continuous problem at the Bristol. (R. 678, lines 12-14). Despite this issue, in order to fund the construction litigation, the Association took loans from the reserve fund and those loans were never paid back. (R. p. 592, lines 10-15). In addition, Jan Landry, a former Board President, testified that money was borrowed from the operating account to pay for the construction litigation and those loans were not paid back either. (R. p. 592, lines 16-23). When Johan Prins, a homeowner, raised a concern at a meeting about the using funds from the reserve account to pay for the lawsuit the response was "the lawsuit will be over in six months or so, and then we have the

money ...and then we can take [a] look at the picture again." (R. p. 668, line 12- p. 669, line 9). (R. p. 669, lines 10-24). At trial, Jan Landry, testified that she believed it was appropriate to borrow money from the reserve fund, but it should be paid back. (R. p. 621, lines 2-22).

During the construction litigation, the Bristol received a refund for overpayment of flood insurance premiums. (R. p. 592-593, lines 24-4). The refund amount was $171,000. (R. 593, lines 9-16). Landry testified at trial that the refund was placed in the reserve account and attempted to evade questions regarding the money being used to fund the litigation. (R. p. 593 line 18- p.594, line 7). However, another former Board President, David Warner, testified that most of that refund was used for construction litigation. (R. p.685, lines 13-15). Ms. Landry also testified that the Board never discussed what to do with the refund with Association members and unit owners. (R. p. 594, lines 11-14).

Various homeowners at the Bristol were plaintiffs, along with the regime, in the three simultaneous lawsuits which were brought to resolve the construction and leakage issues. Money from the Bristol's operating and reserve funds was used to pay the expenses incurred by individual homeowners, and the costs advanced were never refunded to those funds when the individual plaintiffs successfully settled their lawsuits. In fact, the Association's Boards never sought to recover any litigation costs from the members of the Hanger lawsuit. (R. p. 588, line 24- p. 589, line 2) and (R. p. 690, line 2-4). Lona Vest testified that the regime incurred expenses for information used by the Landry and Hanger suits and that the Bristol never sought reimbursement. (R. p.178, line 7- p. 179, line 6).

**IV. The trial court erred when it failed to find that the Association's Boards fraudulently failed to disclose pertinent information to its members, including Lucas, or negligently misrepresented pertinent facts.**

The elements of fraud in South Carolina are:

§ 18-2 Fraud - Elements

(1) a representation;

(2) falsity of the representation;

(3) materiality of the representation;

(4) the speaker's knowledge of its falsity or a reckless disregard for the truth or falsity;

(5) the speaker's intent that the representation be acted upon by the person hearing the representation;

(6) the hearer's ignorance of its falsity;

(7) the hearer's reliance on its truth;

(8) the hearer's right to rely thereon; and

(9) the hearer's consequent and proximate injury.

Ralph King Anderson, Jr., *South Carolina Requests to Charge, Civil.* 2002.

Fraud can occur in South Carolina when a party fails to disclose material information that it is bound to disclose. *Pruitt v. Morrow*, 288 S.C. 298, 342 S.E.2d 400 (1986). As already suggested, the Association's Boards failed to disclose the homeowners' Association's lack of standing to make various claims for damages prior to the abortive attempt to amend the Master Deed and to coerce homeowners into joining the various lawsuits. The Association was aware of Judge Newman 's ruling, that fact certainly was material to homeowners' decisions to participate in the various lawsuits, and the decision whether to participate obviously impacted all the homeowners, including Lucas.

Further, it appears that the homeowners were never made aware of true nature of the insurance issue that led the Board to its unilateral amendment of the Master Deed.

Cindy Mulcare, an insurance agent for Wachovia (at the time), became involved at the Bristol during 2007. (R. p.632, lines 20-25). She was approached by the Board about the ownership of the doors and windows. (R. p. 633, line 8- p. 634, line19). She stated that this could be a problem because "it's hard for the insurance company to wrap their arms around what exactly is covered and what is not covered unless it's specific in the master deed and then our policy follows that."(R. p.636, line 5-14). The Board then asked her to write a letter about the ambiguities in the Master Deed and bylaws. (R. p. 639, line 13-p.640, line 3), (R. p.640, lines 9-10). Mulcare's letter to the Bristol Property Owners Association begins, "You have requested that I review the Master Deed of The Bristol Property Owners Association and attempt to ascertain if the language used to describe Property Rights and descriptions of units ...conforms to coverage in the insurance contracts ...." (R. p.894). In a letter to the owners at the Bristol, the Board stated that "our insurers have written to us recommending the Board immediately act to correct this definition in the Master Deed," and "the Board voted to amend the Master Deed and change the definition of the windows and doors from individual property to limited common property."(R. 895). However, the letter from Cindy Mulcare did not specifically address the doors and windows issue-it only stated that there was ambiguity as to what would be the responsibility of the unit owners. (R. p. 641, line 13- p. 642, line 10).

Harold Campbell, an insurance agent who lived at the Bristol, also stated that his understanding was that the change to the Master Deed for the windows and doors was because of the judge's order, because "the lawsuit. ..would not have worked unless there were 54 lawsuits for each unit, which made it. . .harder to work for the Association. And that's why the master deed was amended to allow us to be collective in our attempt to seek the repairs with the lawsuit." (R. p. 697, lines 13-20). Campbell, a State Farm agent who served on the insurance

committee, thought the letter from Mulcare to the Board about the deed was confusing in general. (R. p. 698, lines 16-18). He stated that the insurance report given by Charles DeRose at the Board meeting on March 15 linked Cindy Mulcare' s letter to window and door coverage, but her letter never actually mentioned windows and doors. (R. p. 699, line 19-24). Mulcare stated that someone on the Board had a problem with the owners owning their windows and doors, and was going to present this to the owners. (R. p. 637, line 18- p. 638, line 3). Ample evidence of the Board's fraud, both by omission and commission, was therefore presented through deposition and trial testimony. The trial court erred in finding or concluding otherwise. Further, negligent misrepresentation is proven by the evidence outlined above.

To recover in a negligent misrepresentation action, Lucas must prove: (1) the Board made a false representation to him; (2) Members of the Board had a pecuniary interest in making the statement; (3) Members of the Board owed a duty of care to see that truthful information was communicated to Lucas; (4) Board members breached that duty by failing to exercise due care; (5) Lucas justifiably relied on the representation; and (6) Lucas suffered a pecuniary loss as a direct and proximate result of his reliance upon the representation. *Tomlinson v. Mixon*, 626 S.E.2d 43, 367 S.C. 467 (S.C. App. 2006).

As already set forth, members of the Association's Boards failed to disclose various information to the members of the Association, and silence, when there is a duty to disclose can constitute a false representation. *Pruitt*, above. That information included but was not limited to the Association's lack of standing, Judge Newman's ruling, the true nature of the insurance issue, and the potential for repair rather than replacement of the defective exterior windows. Members of the Boards stood to gain by their failures to disclose because the participation of other parties in the litigation spread the cost and improved the likelihood of success. As already addressed, as

fiduciaries, the members of the Boards owed a duty to inform members of pertinent information, which duty they breached by their failures to disclose, which were, if not intentional, at least negligent. Had the Board members disclosed this information to Lucas his decision making would have certainly been different in that he would probably have initiated efforts to have his windows repaired at his own expense, would likely have sought counsel earlier, and would have reconsidered his insurance coverage.

## V. The trial court erred when it found that the Board's decision to foreclose on Lucas was appropriate and not wrongful and retaliatory.

The law governing the Association's right to foreclose is the Horizontal Property Act, specifically:

§ 27-31-210. Lien for unpaid assessments; right of mortgage or purchaser acquiring title at foreclosure sale.

(a) All sums assessed by the administrator, or the board of administration, or other form of administration specified in the bylaws, but unpaid, for the share of common expenses chargeable to any apartment shall constitute a lien on such apartment prior to all other liens except only (i) tax liens on the apartment in favor of any assessing unit, and (ii) mortgage and other liens, duly recorded, encumbering the apartment. Such lien may be foreclosed by suit by the administrator, or the board of administration, or other form of administration specified in the bylaws, acting on behalf of the council of co-owners, in like manner as a mortgage of real property. In any such foreclosure the apartment owner shall be required to pay a reasonable rental for the apartment after the commencement of the foreclosure action and the plaintiff in such foreclosure shall be entitled to the appointment of the receiver to collect such rents. The administrator, or the board of administration, or other form of administration specified in the bylaws, acting on behalf of the council of co-owners, shall have the power to bid in the apartment at foreclosure sale and to acquire and hold, lease, mortgage and convey the same. ***Suit to recover a money judgment for unpaid common expenses may be maintainable without instituting foreclosure proceedings***. (emphasis added).

The Association therefore had a clear remedy to allow resolution of the dispute with Lucas that was less draconian than foreclosure. The evidence showed Lucas was timely in all payments owed to the Association except those which he disputed. See Trial Exhibit 48. In fact, the foreclosure action details the disputed payments and reflects that Lucas had paid regular

regime fees in the amount of $28,093.75, capital reserved contributions of $4,496.25, insurance assessments of $8,726.98, and late fees of $14, 104.08. He had specifically disputed $42,354.90, which dispute led to the foreclosure.

At the time of the foreclosure filed against Lucas, there were eight other condominium owners with outstanding balances for assessments and fees. Lucas was the only homeowner against whom the Association filed an action. (R. p. 220, line 8-16, R. p. 221, line 1-6). Of course, Lucas was the only homeowner that had filed suit disputing the special assessments and the amount the Association claimed he owed.

By the time of trial, the Association had filed another foreclosure action. Still, only two actions had been filed against the nine homeowners with outstanding balances. (R. p.221, line 1-6). The foreclosure action against Lucas was filed with the Association's full knowledge of the disputed claim. (R. p.221, line 7-13). Lucas's payments, totaling $55,421.06 for the time period during which the Association alleged an arrearage had accrued, demonstrated Lucas's ability to pay. There was therefore no legal or business reason to foreclose on Lucas and the evidence clearly supports Lucas's claim that the foreclosure action was a willful abuse of process.

Further, in its action, the Association claimed $15,990.78 in interim collection costs as well as $3,500.00 in attorneys' fees. Lona Vest, property manager for the Association, testified when questioned by the Court that attorneys' fees and costs for the foreclosure matter were paid along the way. (R. p. 211, line 3-7 and p. 213, line 18-21). Vest further testified that the amount being claimed as owed in the foreclosure action was incorrect and an incorrect calculation. (R. p. 214, lines 6-9). The amount that the Association claimed Lucas owed also included a 10 to 15 percent collection fee added for legal services, which Vest acknowledged was incorrect. (R.

p.214, lines 6-9). In fact, Ms. Vest testified that there was not any support for the amounts listed as owed in the foreclosure complaint. (R. p. 210, lines 6-8).

Foreclosure counsel elected not to attend the trial. Counsel did, however, submit a memorandum in support of the Association's position. In that memorandum, Lona Vest was identified as the sole witness who could or would substantiate the charges owed. (R. p. 202, lines 13-18). Therefore, even if the foreclosure action is viable, which Lucas denies, the calculations used to determine the amount owed were blatantly incorrect as evidenced by the contradicted testimony of the property manager, Lona Vest.

**VI. The trial court erred when it failed to find that Lucas suffered damages as a result of the Board's mismanagement of the construction litigation and resolution of that litigation, and as a result of the Board's failure to inform members of alternatives to the costly assessments levied.**

As a result of the Boards' actions and inactions, Lucas incurred the following damages:

a. They have been forced to pay more than their fair share of various assessments as a result of the Association's negligent failure to prorate assessments;

b. They did not receive their share of the insurance refund recovered by Ms. Vest, which was $3,185.19.

c. They have been forced to pay additional assessments in the amount of $10,223.32 for litigation fees and costs.

d. They have been forced to pay about $23,000 for the cost of replacing their windows and doors, even though they believe that neither, in their case, were defective;

e. They are entitled to $26,300.45, representing their 1/54°1 share of the funds paid by the Association to Rosen Rosen & Hagood towards attorney fees and costs that benefited the individuals in the Landry and Hanger lawsuits;

f. Collection fees and costs were awarded against them in the Association's foreclosure action, which was wrongful.

**Conclusion**

The Bristol Property Owners' Association elected Boards of Directors who were charged by statute with the fiduciary responsibility to advise members of the Association and to manage funds entrusted to them appropriately. The Boards charged with managing the Association's litigation against the developer and contractors who built the Bristol failed to manage the litigation and to inform members appropriately. As a result, Lucas was forced to pay special assessments and to defend a wrongful foreclosure action. The trial court erred when it failed to find that the Association's Boards breached their responsibilities to the members of the Association.

Respectfully submitted,

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June 13, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

James C. Williams, Circuit Court Judge

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Appellate Case No. 2014-000118

---

John T. Lucas, Sr. as Trustee of the John T. Lucas Revocable Trust and Carolyn C. Lucas Revocable Trust, Appellant,

v.

The Bristol Condominium Property Owners Association, Respondent,

and

The Bristol Condominium Property Owners Association, Plaintiff,

v.

John T. Lucas St. as Trustee of the John T. Lucas Revocable Trust Dated November 10, 2004, and Carolyn C. Lucas Revocable Trust Dated November 10, 2004, Defendants/Counterclaim Plaintiffs,

v.

The Bristol Condominium Property Owners Association, Counterclaim Defendant.

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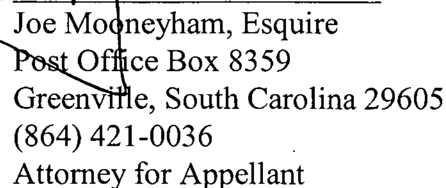
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.



June 13, 2014

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PROOF OF SERVICE

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I certify that I have served the Brief of Appellant on The Bristol Condominium Property Owners Association by United States Postal Service, postage prepaid, on June 16, 2014, addressed to its attorneys of record, David B. Wheeler and Joseph T. Belton, Post Office Box 22828, Charleston, South Carolina 29413 and K. Michael Barfield and M. Dawes Cook, Post Office Drawer H, Charleston, South Carolina 29402.

(Signature on separate page)

June 16, 2014

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