THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

ORIGINAL

Appeal from Charleston County
Court of Common Pleas
James C. Williams, Circuit Court Judge

Appellate Case No. 2014-118

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, Sr., 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.

FINAL BRIEF OF RESPONDENT

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1. Whether the Appellant had standing to bring this shareholder derivative suit in his individual capacity?

2. Whether any record evidence reasonably supports the Special Referee's factual findings?

Statement of the Case

The Bristol is a fifty-four unit condominium complex located on the Ashley River in Charleston, South Carolina. See Master Deed; R. at 791. In 2002, Brittlebank Condominiums, LLC, created the Bristol Horizontal Property Regime by filing a Master Deed. Simultaneously, the Bristol Condominium Property Owners Association ("the Association"), the governing body of the Bristol Horizontal Property Regime, was formed as a South Carolina nonprofit corporation pursuant to the South Carolina Nonprofit Corporation Act. See S.C. Code Ann. §§ 33-31-101, et seq.

Under Association bylaws, the Board of Directors is in charge of managing the affairs of the Association. See Bristol By-Laws; R. at 925 - 935. As part of their duties, the Board is required to carry out the following functions: (1) performing the maintenance described in the Master Deed; (2) maintaining the insurance as required by the Master Deed; (3) discharging by payment, if necessary, any lien against the Common Area and assess the cost thereof to the Member or Members responsible for the existence of the lien; and (4) fixing, levying, collecting and enforcing Assessments as set forth in the Master Deed. Id.

Dr. John T. Lucas and Carolyn C. Lucas purchased Unit 313 in the Bristol in 2004. Like all Bristol condo buyers, they bought their condo subject to the conditions in the Master Deed and the Association Bylaws. Around the same the time the Lucases' bought their condo, other homeowners began noticing water intrusion under the windows and doors in their units.

Several homeowners attempted to get the developer, who was still in control of the Board at the time, to fix the issues with the building. Before an

agreement could be reached, owners of four of the units in the Bristol initiated an action against several defendants referred to as the Hangar Lawsuit. The majority of the remaining homeowners continued negotiating with the developer in an effort to resolve the water intrusion issues.

In August of 2006, the Members elected the Board to manage the Association for the first time. Prior to 2006, Brittlebank Condominiums, LLC retained control of the Board through officers of the developer in compliance with the Master Deed. See Master Deed; R. at 791. The newly independent Board formally investigated the construction defects and attempted to reach a settlement with the developer. Because the Association was not able to reach an agreement with the developer on the cost and scope of the necessary repairs to the Bristol, the Association initiated a construction defects lawsuit in early 2007, referred to as the Association Lawsuit. Simultaneously, numerous individual unit owners and members of the Board who were not involved in the Hangar Lawsuit filed a lawsuit against the same defendants referred to as the Landry Lawsuit.

Around the same time as the initiation of the Association lawsuit, the Board formed an insurance committee to review the insurance coverage for the Bristol and discovered that the building's exterior doors and windows were not considered part of the limited common area and, therefore, may not be covered by the Bristol's insurance.[1] Due to the potential insurance coverage issues and

[1] The description of "Units" included "all windows and screens on any screened balcony." See Master Deed, Article 3.2(c); R. at 821-822. Furthermore, Article 8.3, which sets forth the responsibilities of the unit owners, required each owner to "maintain, repair or replace at his own expense all portions of his Unit which may become in need thereof, including the . . . doors, windows, screens [sic]

ambiguity in the Master Deed, the insurance committee consulted with insurance specialists to determine whether the potential issues may result in the denial of an insurance claim should the windows and doors need to be replaced due to catastrophic occurrence, such as a hurricane. The insurance committee then hired insurance agents to review the language in the Master Deed.

Ms. Cynthia B. Mulcare, an insurance agent, reported that the Master Deed "reveal[ed] a distinct ambiguity in the language used to describe Property Rights, Section 3.2(c) . . . [and presented] an issue that at a minimum will cause confusion in the event of a claim and might in fact prove to be the cause for a denial of claim." See Def's Ex. 4 to Plaintiff Dr. Lucas's Deposition; R. at 706. Therefore, Ms. Mulcare recommended that this ambiguity be brought to the attention of the Association's legal counsel to resolve the potential coverage issues. Id. Similarly, Harold Campbell, whose office provided a flood insurance policy for the Bristol, wrote a letter suggesting that the Board take action to amend the Master Deed because he was "very concerned that [the] master deed places the windows and door responsibility at the Bristol on the individual unit-owner, as opposed to the Regime." Mr. Campbell recommended that:

> the board take action to correct this very serious error in insurance responsibility imposed by our master deed, before we are hit with an insurance claim. We need to insure as much of the building real property under the regime policy. By doing so, it is my opinion that claim handling will be simplified, it will reduce our overall insurance costs, and the possibility of a unit-owner being in a position of not being able to pay their responsibility to the regime will be greatly minimized.

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window and door hardware, and other items within the Unit." See Master Deed, Article 8.3; R. at 833.

See Def's Ex. 3 to Plaintiff Dr. Lucas's Deposition; R. at 705. Based on Ms. Mulcare and Mr. Campbell's recommendations and pursuant to the authority created by Article 17.2(d) of the Master Deed, the Board voted during the March 15, 2007 Board of Directors meeting to have the Regime's legal counsel review and revise the language in Article 3.2(c) of the Master Deed to make it conform to the Regime's current insurance contracts for the limited common areas.[2] Notice of the proposed amendments was sent to all condo owners by letter dated March 26, 2007, and they were given an opportunity to object to the proposed changes. See Def's Ex. 2 to Plaintiff Dr. Lucas's Deposition; R. at 701-704. No objections were received. The Master Deed was then amended and recorded on April 23, 2007.[3] The changes effectively made the exterior windows and doors part of the limited common areas and removed any perceived responsibility of the homeowners from maintaining the doors and windows.

After the Hangar Lawsuit, Landry Lawsuit, and Association Lawsuit were settled in October 2009, the Board appointed the Bristol Repair Committee to

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[2] Section 17.2(d) addresses necessary amendments to the Master Deed and states that "if any amendment is necessary in the judgment of the Board to cure any ambiguity or to correct or supplement any provisions of the Regime Documents that are defective, missing or inconsistent with any other provisions thereof, . . . then at any time and from time to time the Board may effect an appropriate corrective amendment so long as written objection to such amendment is not received from Members representing at least fifty-one percent (51%) of the total votes of the Association within twenty (20) days after written notice of the proposed amendment is given to all Members." Master Deed, Section 17.2(d); R. at 843-844.

[3] The Master deed was amended, pursuant to Article 17.2(e), to include "a Unit's exterior doors, exterior windows and screens" in the definition of "Limited Common Area." In addition, Articles 3.2 and 8.3 were amended to remove windows, screens and doors from the description of the units and to take away any responsibility of the owners for those components.

review competitive bids, make recommendations for repairs, and determine how to most efficiently use the funds from the settlement for the repair of the Bristol. Based on the repair quotes obtained by the Repair Committee, on November 1, 2009, the Association voted on and formally approved a special construction assessment for the repair of the Bristol pursuant to the requirements in the Master Deed.

Dr. Lucas refused to pay all special assessments associated with the repair of the Bristol, and on April 20, 2010, initiated this action against the Association. Due to his significant arrearages, the Board initiated foreclosure proceedings against Dr. Lucas. Dr. Lucas counterclaimed, alleging that the Board's foreclosure action was an abuse of process. Dr. Lucas's initial action, the Board's foreclosure action, and Dr. Lucas's counterclaims were all consolidated.

On May 22 and 23, 2013, a Special Referee, Hon. James C. Williams, Jr., tried this case. All depositions and their exhibits were introduced into evidence, and additional witnesses testified in person. At the end of the trial, the Special Referee entered judgment in favor of the Board on all counts. This appeal followed.

Argument

This Court should affirm the Special Referee's order denying Appellant, Dr. Lucas, any relief. This Court has jurisdiction to freely correct a Special Referee's errors of law on appeal. MicroClean Technology, Inc. v. EnviroFix, Inc., 404 S.C. 207, 217, 744 S.E.2d 210, 216 (Ct. App. 2013). In contrast, this Court must affirm the factual findings of the Special Referee unless no evidence

reasonably supports those findings. Jones v. Leagan, 384 S.C. 1, 12, 681 S.E.2d 6, 12 (Ct. App. 2009). As trier of fact, the special referee is charged with assessing the credibility, persuasiveness, and weight of the evidence presented. Evatt v. Campbell, 234 S.C. 1, 6, 106 S.E.2d 447, 451 (1959). As such, "it is not the place of [the Court of Appeals] to substitute its own view as to the facts." Jones, 384 S.C. at 13, 681 S.E.2d at 12 (citing United Farm Agency v. Malanuk, 284 S.C. 382, 385, 325 S.E.2d 544, 546 (1985)).

All of Plaintiffs' claims except one should have been brought as derivative claims rather than as individual claims. The Plaintiffs thus lack standing to pursue any of his claims except his claim for "bad faith foreclosure". Nevertheless, the Record contains ample evidence to support the Special Referee's findings that the Defendants acted properly to protect the interests of the Association by initiating, prosecuting, and settling litigation over construction defects and then repairing the defects. Further, the Defendants took all actions pursuant to their duly constituted authority, with proper notice given to members of the Association, including the Plaintiffs. The Plaintiffs refused to pay assessments, so foreclosure was proper.

I. The Appellant lacks standing to bring a majority of his claims.[4]

[4] This Court can affirm the Special Referee's judgment for any ground appearing in the record on appeal. S.C. R. App. Pro. 220(c). The Board made this argument in its trial brief, before trial, and after the plaintiff presented his case in chief. The Special Referee, however, expressly withheld judgment on this ground and proceeded to the merits. Judge Williams' Final Order at 3; R. at 10. Regardless, this Court can properly affirm on this basis because this ground appears in the record on appeal.

The Appellant lacks standing to make his claims, except for his claim that the Board foreclosed upon him in bad faith. "A fundamental prerequisite to institute an action is the requirement that the plaintiff have standing." Sloan v. Schl. Dist. of Greenville County, 342 S.C. 515, 518, 537 S.E.2d 299, 301 (Ct. App. 2000) (citing Blandon v. Coleman, 285 S.C. 472, 330 S.E.2d 298 (1985)). "No justiciable controversy is presented unless the plaintiff has standing to maintain the action." Brock v. Bennett, 313 S.C. 513, 519, 443 S.E.2d 409, 413 (Ct. App. 1994) "Once it is determined a plaintiff has no standing to prosecute, the court must dismiss the action." Id. "To have standing, a party must have a personal stake in the subject matter of a lawsuit. In South Carolina, a party must also be the real party in interest." Bailey v. Bailey, 312 S.C. 454, 458, 441 S.E.2d 325, 327 (1994) (internal quotation marks omitted).

Here, the Appellant lacks standing to bring claims on behalf of the Members of the Association. In the absence of a special direct relationship, a board of a corporation does not owe a fiduciary duty to specific shareholders; rather, duties are owed collectively to shareholders through the corporation:

> As a general rule, the fiduciary duties owed to shareholders of a corporation by directors and officers is owed to shareholders collectively and not individually. Even where a statute expressly recognizes the fiduciary duty of officers and directors not only to the corporation but also to its shareholders, the latter, for example, have only a right to bring a derivative suit, not a direct suit, for violation of the duty.

See 18B Am. Jur. 2d, Corporations § 1462 (2011) (emphasis added). Thus, it is a "well-established general rule" that shareholders do not have standing to bring direct claims for wrongs that diminish the value of their shares in a corporation.

Barger v. McCoy Hillard Parks, 346 N.C. 650, 488 S.E.2d 215, 219 (1997). Thus, a "[s]hareholder's suit is derivative if the gravamen of his complaint is an injury to the corporation and not to the individual interest of the shareholder." Brown v. Stewart, 348 S.C. 33, 557 S.E.2d 676, 686 (Ct. App. 2001).

The Appellant's grievances are general and could be — and therefore must be —brought in a derivative action. A majority of his claims are not unique to him, and therefore, he lacks standing to bring them. This Court should, therefore, dismiss all of his claims, except his claim that the Association foreclosed upon him in bad faith, for lack of standing.

II. Record evidence supports the Special Referee's factual findings.

A. Record evidence supports the Special Referee's factual finding that the the Board communicated with its members sufficiently.

The Appellant argues that the Special Referee erred by finding that the Board sufficiently communicated with its members. Specifically, the Appellant argues that the evidence at trial indicates that the Board failed to sufficiently communicate with the Members by: (1) failing to inform its members about important financial and litigation issues; (2) using inconsistent means to communicate to the Members; and (3) having Association meetings off-site. App. Br. at 7-12.[5] Because the Appellant only challenges the Special Referee's factual findings, this Court should reject this argument if there is any record evidence that reasonably supports the Special Referee's contrary factual findings.

[5] Dr. Lucas concedes that the Special Referee applied the correct legal standard. App. Br. at 7 ("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.").

First, there are various letters in the record from the Board to Association Members. See generally Def's Exhibits to Dr. Lucas Deposition; R. at 700-791. These letters discuss the litigation and the financial issues surrounding the litigation and construction defects. Id. Further, there is evidence that these communications were sent out in various formats:

> We had a newsletter, and we had a website, and we put information under the door. We mailed. We e-mailed. We called. We had meetings. I think we went back and did an assessment of the types of communication that were done during when I was on the board, and it was numerous, really, really numerous.

May 22, 2013 Tr. Transcr. at 210:23-25, 211:1-4; R. at 379-380. There is also evidence that the Appellant received various communications. Id. at 47:2-25; 48:7-14, 55:17-19, 56:8-10;138:9-25, 139:1; R. at 432, 433, 440, 441, 523, 524. There is, therefore, record evidence that reasonably supports the Special Referee's factual finding that the Association communicated with the Appellant and all Members about the litigation and financial issues related to the litigation. This is enough to reject the Appellant's argument to the contrary.

Second, there is record evidence that the Appellant received or could have received the Association communications in different formats — mail, email, and websites. May 22, 2013 Tr. Transcr. 47:2-25 (admitting he received communications slipped under his condo door); R. at 432; 48:7-14, 55:17-19, 56:8-10 (admitting he received some the Association communications in the mail); R. at 433, 440, 441; 138:9-25, 139:1 (admitting he knew about the Association website and he has a computer with an internet connection); R. at 523, 524. There is, therefore, record evidence that the use of different types of

communications did not keep the Appellant from receiving the Board's communications. This is enough to reject the Appellant's argument to the contrary.

Finally, there is record evidence that having the Association meetings off-site improved the Members' ability to attend those meetings. The Board decided to hold the Association meetings off-site because the room on-site was open to common-traffic, it lacked a conference table, and it had no tele-conferencing ability. May 22, 2013 Tr. Transcr. at 230-231; R. at 615-616. The Board decided to move the meetings about half a mile off-site. Id. The new location had ample seating, a conference table, and tele-conferencing capabilities. Id. Thus, the Appellant could attend the Association meetings from his residence in Greenville via telephone because the Board moved the Association meetings off-site. May 22, Tr. Transcr. at 232; R. at 617. There is, therefore, record evidence that off-site the Association meetings helped the Board communicate with the Members. This is enough to reject the Appellant's argument to the contrary.

B. Record evidence supports the Special Referee's factual finding that the Board properly handled common funds.

The Appellant next argues that the Special Referee erred by finding that the Association satisfied its fiduciary duty by properly handling common funds. The Appellant specifically alleges that the record shows that the Association mishandled common funds by: (1) using the reserve fund to pay litigation costs; (2) putting a flood insurance refund into the reserve fund; and (3) not seeking reimbursement for litigation costs that benefitted third-party plaintiffs. App. Br. at 12-13. Again, if there is any evidence in the record that reasonably supports

the Special Referee's contrary factual findings, this Court should reject these arguments.

First, the Board did not mishandle the reserve fund by using it to pay litigation costs. As a threshold matter, the Board set up a separate litigation fund, though the litigation fund did borrow from the reserve fund. May 22, 2013 Tr. Transcript at 209:1-7; R. at 594. The Board decided to use reserve funds to pay for litigation because a reserve fund is intended to be a set aside for repairs and, so, the Board decided to use such funds to acquire monies through litigation for all of the necessary repairs the building required. May 23, 2013 Tr. Transcr. at 16-18; R. at 185-187. Further, this falls within the duties of the Board under the Master Deed. There is, therefore, record evidence that the Board properly used the reserve fund to litigate. This is enough to reject the Appellant's argument to the contrary.

Second, the Board properly handled the flood insurance refund by putting it into the reserve fund. When it was received, upon advice of counsel, the Board decided to put a flood insurance refund into the reserve fund rather than disperse it to the Members for the following reasons:

> It was put into the capital reserve, and let me say why it wasn't given back to the homeowners. We were advised by counsel that whoever paid the money would be entitled to the money, and at that particular time, when you calculated who paid those premiums, it was the beach company had paid a fair share of those premiums. And the board was told if they gave the money back to the homeowners, that we would have to pay that money back to The Beach Company. And given the fact that we had just entered the litigation with The Beach Company, the board felt it prudent to put the money in the capital reserve fund instead of paying money back, because they would be then giving more money back to the beach company.

May 23, 2013 Tr. Transcr. at 148: 8-22; R. at 317. Further, when the Board received the flood insurance refund, it placed it in the reserve fund, not the litigation fund. May 22, 2013 Tr. Transcript at 209:1-7; R. at 594. There is, therefore, record evidence that the Board properly put the flood insurance refund into the reserve fund. This is enough to reject the Appellant's argument to the contrary.

Finally, the Board did not mishandle the reserve fund by not seeking reimbursement for the litigation costs that benefitted plaintiffs in the Landry and Hanger Lawsuits. The Board had a good reasonable explanation for not seeking reimbursement:

> One was that the attorneys viewed the Landry suit as a helpful hand in the regime suit. In other words, they could offer a more full release to the defendants in the fact that they represented 40 out of 54 of the homeowners. Their original intent was hopefully to represent all of the homeowners. The six that had already brought a suit with -- Hanger, obviously didn't join, but all of the homeowners were invited to join the Landry suit. We had the six in the Hanger suit who did not join, and then we had eight who elected not to join at all. Two of the eight were actually developer related. One was The Beach Company, because they still retained a unit, and one was Dr. Darby, who also owned a unit but is related to The Beach Company. So that's one provision of the Landry suit. The second issue was that when we settled the suit, there were funds allocated for expenses that were sued for in the Landry suit, and all of the money rolled into our repairs. The regime did the interior repair work that we received funds for in the suit. So basically, the Landry people didn't get any money back.

May 23, 2013 Tr. Transcr at 10-11; R. at 179-180. There is, therefore, record evidence that the Board properly chose not to seek reimbursement for paying legal fees that benefitted the plaintiffs in the Landry and Hanger suits. This is enough to reject the Appellant's argument to the contrary.

C. Record evidence supports the Special Referee's factual finding that the the Board did not engage in fraud or negligent misrepresentation

The Appellant argues that the Special Referee erred by finding that the Board failed to disclose certain facts fraudulently or negligently. Specifically, the Appellant argues that the Board fraudulently failed to disclose or negligently misrepresented: (1) its lack of standing to make claims for damages related to the doors and windows and (2) the "true nature" of the "insurance issue" described in Ms. Mulcare's letter. App. Br. at 14-17. Again, these arguments should be rejected if any evidence reasonably supports the Special Referee's contrary factual finding that the Association reasonably disclosed both of these issues.

First, record evidence supports the Special Referee's finding that the Board did not fraudulently or negligently misrepresent its lack of standing to seek damages for the windows and doors. After or shortly before the Association Lawsuit was filed, the Board formed an insurance committee. The insurance committee discovered that the Association did not own the windows and doors; this would mean that the Association could not acquire insurance over them. The Association then took steps to amend the master deed to take ownership of the doors and windows. The Association notified all property owners of this, and there were no objections. Thereafter, the ownership of the doors and windows became an issue in litigation; Judge Newman would eventually hold that the Association could not recover damages for the doors and windows. Upon advice of counsel, the Board notified the property owners of this and then sought an assignment of the individual owners' claims over their windows and doors to

allow the Association to recover damages for them during its suit. May 23, 2013 Tr. Transcr. at 131-140; R. at 300-309. As the issue of the ownership of the doors and windows developed, the Board informed the property owners every step of the way and acted accordingly. There is, therefore, record evidence that the Association did not fraudulently fail to disclose or negligently misrepresent its standing to seek damages for the windows and doors because the standing issue was only discovered after the suit was filed. This is enough to reject the Appellant's argument to the contrary.

Second, record evidence supports the Special Referee's factual finding that the Board informed the property owners of the true nature of the issues surrounding the insurance the windows and doors. Ms. Mulcare discovered the insurance issues related to the windows and doors. May 23, 2013 Tr. Transcr. at 135-137; R. at 304-306. The insurance committee asked her to write a letter, and in turn, the Board wrote a letter to the property owners. Id. To the extent the letter is unclear on the insurance issues, the testimony is clear about why the Board sought ownership of all of the windows and doors. Id. There is, therefore, record evidence that the Board did not fraudulently fail to disclose or negligently misrepresent the insurance issues related to the windows and doors. This is enough to reject the Appellant's argument to the contrary.

D. Record evidence supports the Special Referee's factual finding that the Board's foreclosure action was not an abuse of process.

The Appellant argues that the Special Referee erred by finding that the Board did not institute the foreclosure action against the Appellant in bad faith. Specifically, the Appellant argues that, because the Association was not required

to foreclose on the Appellant and the Association did not foreclose on other property owners with arrearages, the Special Referee erred in finding the Board did not file the foreclosure in bad faith. Again, any record evidence that shows the Association acted in good faith in filing its foreclosure against the Appellant is sufficient to defeat this argument.

Record evidence supports the Special Referee's finding that the Board did not foreclose on the Appellant in bad faith. First, the Appellant admits he owed arrearages on his regime fees. May 22, 2013 Tr. Transcr. at 81:15; R. at 466. Second, the Association has procedures it uses to collect arrearages, and on occasion, it files foreclosures on delinquent property owners. May 23, 2013 Tr. Transcr. at 95-98; R. at 264-267. Third, there is no evidence that the Board targeted the Appellant for foreclosure. Rather, when asked directly, the Board adamantly denied that it targeted the Appellant. Id. at 98:13-15; R. at 267. Further, the Board explained why the Association did not foreclose on other property owners who were also in owed arrearages at the same time the Appellant's unpaid bills were accruing. Id. at 95-98; R. at 264-267. There is, therefore, record evidence that the Board did not foreclose on the Appellant in bad faith. This is enough to reject the Appellant's argument to the contrary. For these reasons,[6] this Court should affirm the Special Referee's judgment.

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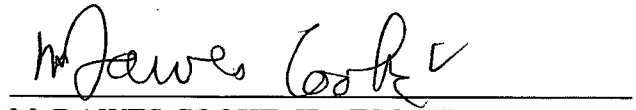
[6] Dr. Lucas also argues that the Special Referee erred by finding that Dr. Lucas suffered no damages from the Board's management of the construction litigation and assessment decisions. App. Br. at 19-20. Because the Special Referee's decision on the merits of these arguments is correct and reasonably supported by record evidence as explained throughout this brief, the Special Referee's conclusions that Dr. Lucas suffered no damages must be upheld. Simply said, because Dr. Lucas has failed to show that the Special Referee erred legally or

Conclusion

The Appellant's attempt to re-state his view of the facts of this case is insufficient to sustain his appeal because all of the Special Referee's factual findings are reasonably supported by record evidence. For these reasons, this Court should affirm the Special Referee's judgment.

Respectfully submitted,



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June 17, 2014

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factually on the merits of his claims, the Special Referee's concomitant decision finds Dr. Lucas suffered no legally cognizable damages logically follows and requires no further rebuttal.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR.

Respectfully submitted,

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June 17, 2014

CERTIFICATE OF SERVICE

I, the undersigned, an employee with the law firm of Barnwell Whaley Patterson & Helms, LLC, attorneys for Respondent, The Bristol Condominium Property Owners' Association, do hereby certify that on this date I served the foregoing Final Brief of Respondent, dated June 17, 2014, by personally depositing a copy of same in the United States Mail, postage pre-paid, addressed to the parties indicated below:

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