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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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Larry B. Hyman, Jr., Circuit Court Judge

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Civil Action No: 2009-CP-22-01655

**Appellate Case No. 2012-213634**

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Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008, and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t/ July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC; Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H. S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998; Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan 1. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters

Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Thomson and Arleen McKeown David T. McGill and Carol G. Mcgill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, Georgia M. Pruitt and Howard C. Covington; Litchfield Captain's and P. Duvall; and Melinda Medina; W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Cooley, the Lois Cooley Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame ..... *Petitioners*,

v.

Shipyard Village Council of Co-Owners, Inc. ..... *Respondent.*

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

v.

Cincinnati Insurance Casualty Insurance Company, Philadelphia Insurance Company, Zurich American Insurance Company, American and Marine Insurance Company, and Illinois National Insurance Company ..... *Third-Party Defendants.*

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**PETITIONERS' PETITION FOR REHEARING**

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## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page**

**Cases**

## STATEMENT OF FACTS

In 1982, the phased condominium development known as Shipyard Village Horizontal Property Regime ("Shipyard Village") was established pursuant to the recording of the Master Deed. The Council was established to administer the affairs of the regime property in accordance with the Bylaws through a Board of Directors ("Board"). Shipyard Village was built in two phases. Phase I consists of Buildings A and B, each has forty (40) units. Buildings A and B were approved for final occupancy in 1982. Phase II consists of Buildings C and D, each contains thirty (30) units, and was completed in 1998.

### Relevant Provisions of the Master Deed and Bylaws that Pertain to the Maintenance, Repair, and Replacement of the Unit Owners' Windows and Sliding Glass Doors

Section 3.6(c) of the Master Deed provides, in part, that each unit's balcony doors, including its frame and the "window glasses, screens, frames, and casings" are part of each unit, rather than part of the common elements. (R. p. 968.) Section 3.7(a) of the Master Deed states that the common elements include the roofs and the buildings' stucco exteriors. (R. p. 969.) Section 6.1 of the Bylaws provides that the manager or the Board shall provide for the maintenance and repair of the common elements. (R. p. 1018.) Section 6.2 of the Bylaws provides the units shall be maintained in good condition and repair by their respective Co-owners. (R. p. 1019.) Section 4.3 of the Master Deed provides "Every Co-owner shall be responsible at his own expense for maintaining, repairing . . . all walls, ceilings and floors of his unit." (R. p. 971.) Section 5.6 of the Master Deed provides that expenses incurred in repairing and replacing the common elements are common expenses "except in the case of the negligence of a Co-owner . . . , and in the event of such negligence, such expenses or a portion thereof may be assessed as an individual assessment pursuant to

the terms of Article XII hereof." (R. p. 974.) Section 12.1 of the Master Deed states that if the regime property is damaged due to "the neglect, willful act or abuse" of a Co-owner, and if insurance proceeds are insufficient to cover the cost of the damage, the deficiency amount "shall be charged to such Co-owner as an individual assessment." (R. p. 992.) Section 6.3 of the Bylaws provides that if "any Co-owner fails to perform the maintenance required by these Bylaws . . . and such failure creates or permits a condition which is hazardous to the life, health, or property, or unreasonable interferes with rights of another Co-owner," the Board "shall . . . cause such maintenance to be performed and charge all reasonable expenses of so doing to such Co-owner by an Individual Assessment." (R. p. 1019.) Section 6.4 of the Bylaws states that all maintenance expenses by the Board are common expenses, except that when the expenses "are necessitated by (1) the failure of a Co-owner to perform the maintenance required by these Bylaws or . . . (2) the willful act, neglect, or abuse of a Co-owner, they shall be charged to such Co-owner as an Individual Assessment." (R. p. 1019.)

Petitioners are owners of fifty (50) of the sixty (60) units in Buildings C and D. This appeal arises out of two cases that were later consolidated: Civil Action No. 2009-CP-22-0152 (invalid window amendment case) filed January 29, 2009, and Civil Action No. 2009-CP-22-01655 (invalid repair and reconstruction assessment case) filed October 7, 2009. Petitioners' main claim against Council, in part, arises out of being improperly and over assessed for construction costs (in excess of $500,000.00) to replace the A and B Co-owners' windows and sliding glass doors, which are their exclusive responsibility pursuant to the Master Deed and Bylaws. (R. p. 2030; p. 1404).

## History of Buildings A and B's Problems with The Leaking Sliding Glass Doors from 1999 to 2010

At the June 15, 1999 Board meeting, the Board discussed and confirmed that the Co-owners were responsible for waterproofing the balcony thresholds and window frames of the units pursuant to Section 3.6 of the Master Deed. Board moved: "To notify all [Co-]owners and inform them that they are responsible for their threshold and window frame on their unit. The Property Manager sent a letter dated August 11, 1999 to all A and B Co-owners stating "Per the Shipyard Village Council of Co-Owners, Inc. Master Deed, the waterproofing of the balcony thresholds and windows are the responsibility of the unit owners." (R. p. 1120; R. p. 4.)

In 2002, Council hired McGee Consulting Associates ("MCA") to investigate and perform testing on the windows in Buildings A and B. The September 27, 2002 Board minutes state in part that:

> Water testing was performed utilizing a hose on some of the windows, and the testing confirmed positive water intrusion. The water testing also confirmed that the water channel[ed] down both sides of the windows, which starts at the top floor windows and works its way to the ground. The water intrusion has caused some of the wood framing to deteriorate due to wood-rot.

Furthermore, the minutes indicate that attorney Ralph McCullough told the Board ***"there were safety issues with respect to the durability of the windows,"*** and recommended pursuing legal action against the responsible parties. (R. p. 1127-A; R. p. 5.)

On October 31, 2002, on behalf of the Board, property manager Kelli A. Diehl ("Diehl") wrote to Co-owner's attorney referencing window leak problems in the Unit B-15. That letter states in part:

I am in receipt of my copy of your letter to Dr. C. Leon Jennings, President of Shipyard Village. You informed me in our phone conversation that this letter was in reference to window leak problems at unit B15.

Please note that the Shipyard Village Council of Co-Owners Master Deed clearly states that windows are the responsibility of the owner, not the association. See section 3.6 in the Master Deed. ***Therefore, I am wondering how you are contending that the leaks are "caused by some failure in a common element of the buildings, the responsibility of which falls upon the regime council."***

The Board is hoping to provide some direction to those owners who have window leak problems; ***but the responsibility to address <u>any</u> window issues clearly lies with the unit owner.*** (emphasis added.) (R. p. 1318; R. pp. 6-7.)

Additionally, Board President Dr. C. Leon Jennings ("Jennings")'s (undated) letter to the Co-owners confirms that the Board had knowledge of the serious problems associated with the leaking windows/sliding glass doors in Buildings A and B, and, also, their lack of stability as a potential danger to the Co-owners. Specifically, his letter to the Co-owners provided in pertinent part:

Dear Co-Owners:

Recently, our Property manager, K. A. Diehl & Associates ("KAD"), sent a survey to each owner attempting to discover any problems within the units. A number of owners reported window problems, including leaks, broken vapor seals and cracked or foggy panes. In an effort to determine if any financial assistance for the repairs was available to the owners, Shipyard Village Council of Co-Owners, Inc. (The "Association") employed a forensic engineer, McGee Consulting Association (MCA"), and Finkel & Altman, L.L.C. (The "Finkel Firm") to investigate, inspect and test the windows in the A and B Shipyard buildings. **During this investigation, the stability of the windows came into question and the Association authorized the Finkel Firm to provide a warning of potential danger to the Co-Owners.** Following the investigation, it was suggested that we consider a law suit against the developer and the contractors who improperly and negligently installed the windows.

After prolonged discussions, additional investigation and consultation, the Board of Directors of the Association (the "Board") does not endorse another law suit on behalf of the Association for the following reasons:

I. Section 3.6 of the Master Deed clearly states that windows, including panes and frames, are part of the unit and therefore the responsibility

> of the owner, not the Association. **Thus, we believe that it would be difficult for the Association to maintain a law suit relating to items that are the responsibility of the individual owners.** Nothing in this decision would preclude an individual or group of individuals from initiating a suit if they so desire.

Next, his letter to the Co-owners also points out that each unit owner must obtain written authorization from the Board before repairing or replacing their windows when he states:

> ***While the Master Deed makes the windows the responsibility of the individual owners, please remember that each unit owner must obtain written authorization for "any addition, improvement, structural modification or alteration" to a unit.*** This requirement would include repair of the window frames. The Association needs to make sure that the appearance of the units remains consistent. No alteration, modification, painting or repair of the Common Elements is to be undertaken by an individual Co-owner. ( R. p. 1319.)

The continued discussions in the Board minutes in 2006 regarding leaking windows and sliding glass doors prompted Board to propose the window amendment to the Co-owners to make windows and sliding glass doors the responsibility of the Association. (R. pp. 1152-1160.) The Board received a proposal from Pro-Tec Finishes, Inc. to replace all of the windows and sliding glass doors, in Buildings A and B for a total of $2.48 million (R. p. 1159; R. p. 10.)

The first vote on the proposed window amendment failed to pass at the April 15, 2006 annual meeting of the Co-owners. (R. pp. 114-115.) The amendment failed to receive the required two-thirds (2/3) affirmative vote from the Co-owners to pass. A motion was made to leave the vote open for thirty (30) days to allow those Co-owners who did not vote at the meeting or by proxy, to vote. The motion carried unanimously. (R. p. 1166.) In subsequent discussions with its attorney, the Board decided not to the leave the vote open for 30 days. The Board determined the first vote on the window amendment failed to pass.

(emphasis added.) (R. pp. 114-115.) Thus, "the Board decided to start the amendment process over" again by mailing out a new proxy card enclosed in a letter dated April 24, 2006 to the Co-owners seeking their written consent to adopt the amendment without holding another meeting. (R. pp. 114-115; R. p. 10.) The Board's letter states in part:

> Please note that **the amendment to the master deed did not pass**. The Shipyard Village Master Deed cannot be amended unless 66.66% vote in favor of the amendment. You will note in the minutes of the meeting that a motion was made towards the end of the meeting to leave the vote on the amendment open for 30 days, in order to allow those owners who did not vote, to vote. ***In subsequent discussions with the attorney for Shipyard Village, the Board was advised that it is Questionable whether the vote on the amendment can be "left open."***
>
> ***While the Board is confident that the majority of the owners are in favor of the amendment, the Board has decided not to follow any "questionable" procedures regarding this. Thus, the Board had decided to start the amendment process over.***
>
> . . .
>
> Enclosed please find a **NEW PROXY CARD** for the amendment vote. Please take a minute **NOW** to fill this out and drop it in the mail or fax it to the Management Office at 843-357-9890. The deadline for returning the proxy is May 26, 2006. (emphasis added.) (R. pp. 114-115; R. p. 10.)

But the second proxy vote on the window amendment by mail referendum failed to obtain written consent from one hundred percent (100%) of the Co-owners entitled to vote. Section 1.5 provides, "Any action which may be taken by a vote of the Co-owners may also be taken by written consent to such action signed by all [C]o-owners entitled to vote." (R. p. 1007.) Council admits it failed to obtain unanimous written consent from all the Co-owners on the second vote. (R. p. 921.) Because the second vote occurred without holding a meeting of the Council, the window amendment required the written consent from all the Co-owners entitled to vote to pass. Section 1.3 provides, "Votes can be cast only at meetings of the Council convened in accordance with the By-laws." (R. p. 1006.)

Despite the fact that unanimous written consent was not obtained, Council sent a letter to Co-owners in July 6, 2006 stating window amendment had passed. The letter was silent as to the voting procedure utilized to ratify amendment by the Co-owners. (R. p. 1323; R. pp. 10-11.) However, the recorded window amendment incorrectly represents on page 1 in paragraphs 4 and 5 that it had passed "at [a] special meeting [held on April 15, 2006] by affirmative vote of Co-owners two-thirds of the total interest in the Common Elements pursuant to Article XIV, Section 14.1 of the Master Deed," which is a clear misrepresentation of how the voting procedure occurred on the second proxy vote by mail referendum in April and June of 2006. (emphasis added.) (R. pp.114-115; R. p. 1108.) The recorded window amendment was witnessed by current Board member James C. Poag, Jr.("Poag"), and acknowledged by property manager Vicki Gallagher. (R. pp. 1108-1112.) Additionally, the window amendment recorded on October 16, 2006 only made windows and not sliding glass doors the maintenance responsibility of Council. ( R. p. 1108; R. p. 1109.)

On November 14, 2007, the Board recorded another amendment to correct and clarify the previously recorded window amendment, which omitted adding sliding glass doors to the common elements. (R. pp. 1108-1109.) The Board's clarification and correction amendment was not voted on by Co-owners, and does not correct and clarify the previously recorded window amendment in Deed Book 235 at page 5 was not " adopted by the affirmative vote of the Co-owners" at a special membership meeting held on April 15, 2006. (R. pp. 1113-1118.) Subsequently, the Board's clarification and correction amendment was found to be invalid by the Circuit Court because "it was never submitted to a vote." (R. pp. 699-670; R. pp. 48-49.) The Court ruled as a matter of law that clarification and correction amendment

"does not in and of itself constitute a new amendment or an amendment of the windows amendment." (R. pp. 699-670; R. pp. 48-49.)

In 2006, the Board hired Schneider and Associates, Inc. ("Schneider") to investigate water infiltration problems with Buildings A and B. Schneider found: "[n]umerous windows/sliding doors are leaking rain water into interior areas of the buildings. Water is migrating from the upper story down through the intermediate stories to ground level, causing water damage to the floor/ceiling assemblies, the exterior finishes, and interiors of the outside units of buildings A and B. Damage appears to occur more severely on the corner stacks." (emphasis added.) (R. p. 2397; R. p. 32.)

In 2007, Schneider performed destructive testing on several units and found an "open joint" located directly underneath the sliding glass door's threshold between adjoining hollow core slabs of the balcony and unit, which allowed water to leak into the unit below. R. p. 1171; R. p. 11.) This condition existed underneath every sliding glass door's threshold in Buildings A and B. (emphasis added.) (R. p. 1171; R. pp. 1367-1376.) Also, Council's expert J. Lawrence Elkin, P.E. ("Elkin") agreed with and concurred with Schneider's findings that water was entering an "open joint" underneath the sliding glass doors and leaking into the units below when he said, "***[t]hat that's where the water was going in. It would blow up against the [sliding glass door] and it would go into that joint.***" (emphasis added.) (R. p. 1592.)

A September 18, 2007 e-mail to the Board from Diehl regarding window leaks in Buildings A and B states in part, "***many of these units were leaking previously and because windows were the owner's responsibility, the issue was thrown back at the owners who most ended up doing nothing . . . . Most of you were not on the board to remember but***

*I tried to bring this up after I was here for a while and I got my hand slapped big time by Bobby Warner and some of the board members because this was an owner responsibility."* Her e-mail also states that: "Bobby Warner only did cosmetic stucco repairs to buildings for 20+ years and kept pushing back to the owners – who clearly could not handle [it] and needed help." (emphasis added.) (R. p.1328; R. p. 13.)

In August 2007, the Board hired MEC Engineering Services, Inc.("MEC") to oversee the remainder of the renovations to Buildings A and B after firing Schneider. The Board requested MEC to procure at least three bids from contractors for the repairs.

On April 19, 2008, Board reported at the annual membership meeting Buildings A and B needed extensive repairs. The Board informed that the cost of the repairs and reconstruction would be in the range of $12,000,000 to $13,000,000, depending on the construction budget prepared by MEC Engineering. The proposed special assessment to be charged to the Co-owners was represented by the Board to be in the following range:

- $91,139 to $98,734 for three (3) bedroom Co-owners in Buildings C and D depending on the amount of repair cost for Buildings A and B.
- $96,202.00 to $104,218.00 for four (4) bedroom Co-owners in Buildings C and D depending on the amount of repair cost for Buildings A and B.
- $81,012 to $87,763 for the A and B Co-owners in Buildings A and B depending on the amount of repair cost for Buildings A and B.

Although investigation and testing of Buildings A and B had been ongoing since 2006, this was the first time that the Board divulged the estimated cost of repairs with the Co-owners. (R. pp. 1237-1238; R. p. 13.) After being apprised of the total repair cost that could be assessed against them as a common expense to fix Buildings A and B, a majority of the Petitioners sought advice from an attorney. Petitioners hired an attorney who sent a

letter to the Board asserting that the special assessment was invalid because the 2006 window amendment was not properly adopted and thus the total cost of replacement and repairs of windows and sliding glass was the responsibility of the individual A and B Co-owners. (R. p. 1342; R. pp. 22-23.)

In July 2008, one of the Board's consultants, HICAPS, Inc. ("HICAPS") gave a presentation to the Board about the water intrusion problems in Buildings A and B. HICAPS's inspection found: (1) the ***"window systems are the main source of water intrusion,"*** (2) the "[window system] leaks have allowed water to enter the walls which is causing the wood framing to rot" (3) the "[window systems] also ha[ve] allowed water to get into the concrete which is causing the corrosion" and (4) the ***"[m]oisture is entering the slider [door] unit and showing up at the bottom. The water is entering the concrete [under the sliding glass door unit] and leaking into the units below."*** (emphasis added.)(R. pp. 1367-1376; R. p. 33.)

On January 29, 2009, several C and D Co-owners brought a lawsuit challenging the validity of the 2006 window amendment that made windows and sliding glass doors common elements after negotiations broke down with the Board. (R. pp. 64-85.) Due to Council's concerns about the enforceability of the window amendment, its Board called a special membership meeting on March 21, 2009. (emphasis added.) (R. pp. 64-85.) The third re-vote on the 2006 window amendment and the first vote on the 2009 sliding glass door amendment both failed to obtain required two-thirds (2/3) majority vote from the membership to pass. (R. p. 1279.) The votes on the amendments failed. The windows and sliding glass doors never were considered part of the common elements, therefore, the windows and doors are the responsibility of each Co-owner.

In July 2008, the Board hired Sutton-Kennerly & Associates, Inc. ("SKA") along with Spectrum Engineering Services, Inc. ("Spectrum") to review MEC's reports, proposals, drawings, and bid specifications, and to provide a report to the Board with their findings and recommendations. After reviewing SKA's findings, the Board decided to discontinue MEC's services. ( R. pp. 1243-1245.)

In October 2008, Spectrum at the request of the Council inspected the windows and sliding glass door systems in Buildings A and B. Spectrum found: "severe staining has also occurred where the water is captured in the sliding frame and drips down from unit to unit," and the "[m]ost damage was at the ceiling above the sliding glass door and on the walls adjacent to all windows." (R. p 1772; R. p. 1774; R. pp. 1869-1939; R. pp. 2046-2145.)

In January 2009, the Board directed SKA to perform tests and investigate to determine the full scope of repairs required for Buildings A and B, and to submit a cost estimate for the repairs. After reviewing the findings from SKA's investigative work and considering Spectrum's proposals, the Board hired SKA on February 16, 2009 to draft designs for repairs and solicit bids for the work. (R. pp. 1270-1273.)

In April 2009, Board failed to present the annual budget to Co-owners at their annual membership meeting as required by Sections 1.12 and 5.2 of the Bylaws. The 2010 annual budget was adopted by the Board at special meeting of Board in November 2009 without presenting it to the membership for amendment. (R. pp. 1285-1289; R. p.15.)

In July 2009, Council notified Co-owners that estimated total cost for the repairs to Buildings A and B was $10,944,468. (R. pp.1295-1298.) Council recommended that the repairs be financed through a special assessment. The per-unit assessment amounts for the Co-owners were as follows: $88,398 for Buildings A and B; $64,868 for three-bedroom units

in Buildings C and D; and $68,471 for four-bedroom units in Buildings C and D. (R. pp. 1295-1298.)

Co-owners were informed that a special members' meeting was scheduled for August 1, 2009, to vote on the proposed special assessment. (R. pp. 1293-1294.) The Co-owners did not approve the special assessment at a vote held on August 1, 2009. As a result, Council informed the Co-owners that the repair costs would be incorporated into the 2010 and 2011 annual operating budgets and would be billed monthly to the owners along with their regular assessments. (R. pp. 1299-1300.)

On October 7, 2009, the Petitioners filed a new lawsuit, alleging negligence and gross negligence, negligent/gross negligent misrepresentation, breach of fiduciary duty, and breach of the Master Deed. The pleadings also requested equitable relief by way of a declaratory judgment, temporary injunction and specific performance. Specifically, Petitioners sought relief from Council's per unit assessment against them for repairs to Buildings A and B, which are the responsibility of the A and B Co-owners Petitioners paid their per-unit assessment under protest in 2010 and 2011.

On March 30, 2012, the Petitioners filed a fourth amended complaint seeking judicial dissolution of Council. (R. pp.141-187.)

On May 4, 2012, Petitioners moved for summary judgment or partial summary judgment on their negligence and breach of fiduciary duty causes of action. (R. pp. 217-222.) Following a hearing on May 22, the circuit court granted Petitioners' partial summary judgment motion on the issues of duty and breach for their negligence claim. (R. pp. 51-52.) It determined the Bylaws and Master Deed impose affirmative duties on the Board to enforce, investigate, and correct known violations of the Master Deed, the Bylaws, and South

Carolina Horizontal Property Act. (R. pp.1-40.) The Court further found the Council breached its duty to investigate the substantial evidence in the record that reasonably showed that Co-owners had neglected the maintenance of their leaking windows and sliding glass doors, which allegedly caused damages to the common elements of Buildings A and B. (R. pp 1-40.) The circuit court further determined the Council was precluded from asserting the business judgment rule based on its lack of good faith in enforcing the 2006 window amendment after June 2008, when it admittedly knew the amendment was invalid. (R. pp. 1-40.)

On June 25, 2014, this Court issued a written opinion in the case of Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(S.C. Court of Appeals filed on June 25, 2014) (Davis Adv. Sh. 25 at 30) affirming the circuit court's grant of summary judgment on the existence of a duty to investigate. Additionally, the Court reversed the circuit court's decision that the business judgment rule does not apply and its granting summary judgment on the issue of breach of duty, and remand the case to the circuit court for trial.

## ARGUMENTS

A. The Court misapprehended and erred in finding that a factual issue exists regarding Council's improper use of the business judgment rule to change the prescribed method of assessment under the Master Deed and Bylaws in order to justify its *ultra vires* assessment against Petitioners. The Board lacked good faith in continuing to enforce the *ultra vires* assessment (invalid window amendment) by requiring the Petitioners to pay part of the construction costs to replace the A and B Co-owners' windows and sliding glass doors after the window and door amendments had already been voted down by the Co-owners.

Section 3.6(c) of the Master Deed provides that a unit's balcony doors including its frame and "window glasses, screens, frames, and casings" are part of each unit, rather than

part of the common elements. (R. p. 968.) Section 6.2 of the Bylaws provides units shall be maintained in good condition and repair by its Co-owner. (R. p. 1019.) Section 4.3 of the Master Deed provides "[e]very Co-owner shall be responsible at his own expense for maintaining, repairing . . . all walls, ceilings and floors of his unit." (R. p.971.) Additionally, under this section each Co-owner, not the Council, is responsible at his own expense for maintaining and repairing his unit's balcony doors including its frame and "window glasses, screens, frames, and casings." (R. p.971.)

It is undisputed that the windows and sliding glass doors are still a defined part of each unit, and are not part of the common elements. (R. p. 968.) Council admits that the second re-vote on the 2006 window amendment pursuant to a proxy mail referendum failed to obtain the written consent from one hundred percent (100%) of the Co-owners as required by Section 1.5 of the Bylaws. ( R. p. 921.) The third re-vote on the 2006 window amendment and the first vote on 2009 sliding glass door amendment were voted down at the special members meeting held on March 21, 2009. ( R. p.1279.) "Only 48.31% voted in favor of the amendment[s], meaning the Co-owners were still responsible for the unit windows and doors." Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(S.C. Court of Appeals filed on June 25, 2014) (Davis Adv. Sh. 25 at 35). However, the Petitioners were still common expense assessed[1] for part of the construction costs to remove,

[1]See Council of Dorset Condominium Apartments v. Gordon, 801 A.2d 1 (Del. Supr. Ct. 2002) (Delaware Supreme Court found exterior windows and sliding glass doors were not common elements of the condominium association, and thus could not be considered in a common expense assessment where the condominium declaration's description of a unit included doors leading to patios and balconies, and all windows.)

repair, and replace[2] the A and B Co-owners' windows and sliding glass doors in 2010 and 2011. (R. pp. 1290-1292; R. pp. 15-16; R. pp. 2256-2257.) This *ultra vires* assessment occurred after the window and sliding door amendments were voted down by the Co-owners in 2009, which is substantial evidence of the Board's bad faith. (R. p. 1279.) See Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(Davis Adv. Sh. 25 at 41) ("[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires.* The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones.") (internal quotes and citations omitted.)

Here, the record is uncontroverted that Council improperly used the business judgment rule to ignore its mandatory duty[3] under Sections 3.6, 4.3, and 6.1 of the governing documents to assess the A and B Co-owners for the total construction costs for the removal, repair, and replacement of their windows and sliding glass doors. (R. pp. 2256-2257.) The affidavit of Board Member Doris Bray ("Bray"), filed October 28, 2011, is indisputable

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[2]Petitioners were also improperly assessed for the soft construction costs for the removal, repair, and replacement of the 1,087 new window systems and 80 new sliding glass doors in buildings A and B Soft costs included: (1) General Conditions (includes mobilization, scaffolding, superintendent, site facilities, dumpsters, port-a-johns, etc.), (2) Overhead and Profit (~10%), (3) Engineering Fees for: Design and Contract Administration,(4) Contingency (15% of construction subtotal)(emphasis added.) ( R. 1404, SKA's Repair Budget for Buildings A and B.)

[3]See Murphy v. Yacht Cove Homeowners Ass'n, 289 S.C. 367, 345 S.E.2d 709 (1986), where the Supreme Court of South Carolina held "that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association[,]" for the failure to discharge its duties under the Master Deed and Bylaws. Id. at 369, 345 S.E.2d at 710. In Murphy, the Court reasoned that, "since the association can sue a member for failure to adhere to the bylaws, rules, and regulations, a member necessarily can sue the association for this same failure." Id. at 369, 345 S.E.2d at 710.

evidence of Council's use of the business judgment rule to change the method of assessment (after both amendments had failed to pass) to make Petitioners partly responsible for the construction costs to replace the A and B Co-owners' windows and balcony doors, when she states:

> The per unit allocation [for replacement of windows and balcony doors] was based on efforts by the Board to give full force and effect to all relevant provisions of the Master Deed while preserving practicality and equity. In keeping with this effort, and to avoid litigation expenses associated with Plaintiffs' claims about the validity of the Windows and Doors Amendment, we as a Board decided to put the matter before the ownership for another vote in 2009. This alternative vote on the Amendment was not a "legal position" expressed by the Board; it was an attempt to ratify the amendment and therefore resolve the complaints of the ownership. By their votes, the ownership made clear that the amendment did not enjoy a super majority of support so we allocated costs of the replacement windows and doors themselves to the A and B owners. ***We made our decision based on business judgment, not what might or might not happen in court***.
>
> . . . .
>
> [T]he Board decided the most that could be attributed to the building A and B Unit Owners was the actual costs of the windows and doors. ***To attribute any more of the repair costs, including the "soft" project costs, to the Building A and B Units Owners, would have been an exercise of bad business judgment and, in my opinion wrong***. (emphasis added) (R. pp. 2256-2257.)

Council's *ultra vires* assessment of the Petitioners cannot be defended on the grounds that it is a reasonable alternative under the business judgment. See Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(S.C. Court of Appeals filed on June 25, 2014) (Davis Adv. Sh. 25 at 41) (citations omitted.) (A homeowners association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative);Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987) (This Court found that the association's flat fee system of charges violated the fixed rate requirement under Article III,

Section 1, of the Bylaws and could not be defended on the grounds that it was a reasonable alternative under the business judgment rule.) (citations omitted.)

For the foregoing reasons, Petitioners contend no factual issue exists regarding Council's improper use of the business judgment rule to change the method of assessment under the Master Deed and Bylaws to justify its *ultra vires* assessment against the Petitioners part of the construction costs to remove, repair, and replace the A and B Co-owners' windows and sliding glass doors.

Petitioners further contend that Council's continued enforcement of the window amendment after 2008, is uncontroverted evidence of its Board's bad faith for several reasons. First, Council admits the first vote on the window amendment on April 15, 2006 failed to receive the required two-thirds (2/3) affirmative vote from the Co-owners to pass. (emphasis added.) (R. pp. 114-115; R. pp. 918-921.) Second, Council admits the second re-vote on the amendment by proxy occurred without a meeting at which a vote could have been taken, and all Co-owners did not consent in writing to adopt the window amendment. (R. pp. 918-921.) Third, Council admits Sections 1.3 of the Bylaws, which provides that votes may only be cast at meetings, and 1.5 of the Bylaws, which provides "Any action which may be taken by a vote of the Co-owners may also be taken by written consent to such action signed by all Co-owners entitled to vote" are the only two voting procedures permitted in the governing documents for amending the Master Deed. (R. pp. 1006-1007.)

Accordingly, the only conclusion that can be reached by this Court, based upon Council's admissions above is that window amendment was not properly adopted at membership meeting in April 15, 2006, or by a proxy vote after April 24, 2006, which leaves the glasses, screens, frames, casings and sliding glass doors as part of each unit, not common

elements, and the responsibility for their repair and replacement with the A and B Co-owners. (R. pp. 1006-1007.)

Additionally, Petitioners contend that Council's misrepresentations that window amendment was voted on at ***"special meeting held on April 15, 2006"*** and ***"adopted by affirmative vote of the Co-owners of two-thirds of the total interest in the Common Elements"*** are not minor mistakes or scriveners errors but evidence of an intent to mislead the truth regarding the validity of the window amendment. For example, the Board's clarification and correction amendment filed 394 days later on November 14, 2007 does not "***correct and clarify***" that the window amendment was never ***"adopted by the affirmative vote of the Co-owners"*** at a ***"special membership meeting held on April 15, 2006."*** (R. pp. 1113-1118.) For the record it is important to note that both the window and clarification and correction amendments were witnessed by current Board member Poag and acknowledged by Council's property manager Diehl. (R. pp. 1108-1118.)

Lastly, the ultimate proof of Council's bad faith as it relates to the direct and indirect misrepresentations contained in the window and clarification amendments, in conjunction with the Board's meeting minutes, is that they caused this Court to misapprehend, overlook, and error in finding in its Opinion that: (1) ***"[t]he Council decided to leave voting open for thirty days to allow the Co-owners who did not vote at the meeting or by proxy to vote"*** and (2) ***Because 80% of the Co-owners voted in favor of the amendment after leaving the voting open, the Board believed the amendment had passed."*** Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(Davis Adv. Sh. 25 at 34.)

With regard to the first referenced factual statement in the Opinion, the record is uncontroverted that the Board decided not to leave the vote open for 30 days "so non-voting

Co-owners could vote." (emphasis added.) (R. pp. 114-115.) Board found that the first vote on the window amendment failed, and decided to start the amendment process over again by mailing out a new proxy card enclosed in a letter dated April 24, 2006 to the Co-owners seeking their written consent to adopt the amendment without another meeting. (R. pp. 114-115.) For these reasons, the first factual statement referenced in the Opinion is not true. (R. pp. 918-921.)

The first part of the second factual statement referenced in the Opinion, which states that ***"80% of the Co-owners voted in favor of the amendment"***[4] refers only to the second proxy vote, not the first vote on the amendment for the reasons previously discussed above. (R. pp. 918-921.) This statement made by former Board President Don Johnston ("Johnston") only confirms that the proxy vote without meeting failed to obtain written consent from one hundred percent (100%) of the Co-owners entitled to vote. (R. pp. 114-115; R. pp. 918-92; R. 1279.), which means the window amendment is invalid.

The second part of the second factual statement in the Opinion, which states ***"after leaving the voting open, the Board believed the amendment had passed,"***[5] is not true based upon Council's April 24, 2006 letter to the Co-owners indicating that "**the amendment to the master deed did not pass.**" (R. pp. 114-115.) Also, Council admits in responding to Plaintiffs' discovery request in September 24, 2009, ***"that the proposed amendment was considered and voted on at the membership meeting in April 2006. The amendment did***

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[4]Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(Davis Adv. Sh. 25 at 34.)

[5]Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(Davis Adv. Sh. 25 at 34.

***not pass at the meeting and was re-voted on, but a meeting was not called for the second vote."*** (R. p. 920, ¶ Answer to question 7, Defendant's Answers to the Plaintiffs' Request for Admissions.) Accordingly, for these reasons the second factual statement referenced in the Opinion is not true. (R. pp. 114-115.)

Clearly, the Board did not have a good faith basis "to believe the window amendment had passed" because the voting was not left open on the first vote, which Council knows is true. (R. pp. 114-115.) See Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc. 379 S.C. 31, 43, 664 S.E.2d 83, 88 - 89 (Ct. App. 2008)(Bad faith is defined as "[t]he opposite of good faith, generally implying or involving actual or constructive fraud, or ***a design to deceive or mislead another***, or a neglect or refusal to [fulfill] some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.) Furthermore, at the hearing on May 21-22, 2012, Council's attorney admitted on the record that "***when the Board received Jeff King's letter [dated June 9, 2008] and they are faced with, 'What do we do, this amendment is not valid,' that is what they're considering....***" (Tr. of Hr'g, dated May 21-22, 2012, p. 30, lines 1-14). However, Council's Board continued to assert the validity of the window amendment even after receiving the letter from Petitioners' Counsel in June of 2008, which provides in part:

> The [2006 window] amendment purported to rewrite the definition of Units within the Regime to exclude "the window glasses, screens, frames and casings which are part of the window openings of the Unit" and to designate these items as Limited Common Elements. However, the amendment failed to pass at the only meeting that was held to vote on the matter, the April 15, 2006, annual meeting. Thereafter, the Board and management agent solicited proxies from various members to "re-vote" on the amendment.
>
> No such procedure is authorized in the governing documents or corporate law. The Bylaws, Section 1.4, provides that Owners may vote in person or by proxy at any meeting of the Association, and Section 1.3 provides that votes

> may only be cast at meetings. The only procedure for taking action without a meeting is set forth in Section 1.5, which states that "Any action which may be taken by a vote of the Co-owners may also be taken by written consent to such action signed by all Co-owners entitled to vote, or, in the case of units owned by two or more Co-owners, by the designated voting member." All Co-owners did not consent in writing to adopt the 2006 Amendment, and no meeting was held at which a vote could have been taken. The end result is that the 2006 Amendment was not properly adopted, leaving the window glasses, screens, frames, casings and sliding glass doors as part of each Unit, not common elements, and therefore replacement or repair is the responsibility of each individual owner. (9 June 2008 letter from Jeff King Esq. to Board, R. pp. 1341-1345; Order, R. pp. 22-23)(emphasis added.)

For the above reasons, Petitioners contend no factual issue exists regarding Council's bad faith in continuing to enforce window amendment after it knew the amendment was invalid in 2008.

B. The Court misapprehended and erred in finding that a factual issue exists regarding Council's improper use of the business judgment rule to change the method of assessment under Sections 6.3 and 6.4 of the Bylaws and the common law to justify its deviation from these mandatory duties by not pursuing a recovery from the A and B Co-owners who are one of the responsible parties for damages to the common elements and individual units in Buildings A and B.

In response to Council's contention that the circuit court erred in granting summary judgment on the issue of duty to investigate, this Court found that ***"the duties created by the Bylaws and South Carolina law . . . support a duty to investigate who is responsible for damage to the common elements."*** Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(S.C. Court of Appeals filed on June 25, 2014) (Davis Adv. Sh. 25 at 38). Furthermore, this Court pointed out ***" for Council to be able to perform its duty to try to recover from the responsible parties, it must first find out who caused the problem."*** Id; Queen's Grant Villas Horizontal Prop. Regimes I–V v. Daniel Int'l Corp., 286 S.C. 555, 556, 335 S.E.2d 365, 366 (1985) (When master deeds and bylaws show a homeowner's

association has the obligation to maintain the common elements, the association has a duty to pursue a recovery for any alleged construction defects in the common elements.)

The record reflects that A and B Co-owners are solely responsible for the maintenance and repair of their windows and sliding glass doors pursuant to the Master Deed and Bylaws. (R. p. 968; R. p. 971; R. p. 1018.) Additionally, Board's property manager "sent a letter dated August 11, 1999, to all Co-owners in Buildings A and B stating ***'the waterproofing of the balcony thresholds and windows are the responsibility of the unit owners.'"*** Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(S.C. Court of Appeals filed on June 25, 2014) (Davis Adv. Sh. 25 at 32.) This interpretation is confirmed by the March 28, 2003 letter, from property manager Diehl to a unit owner in Building A regarding her leaking sliding glass door, which states, "***It has been determined that during a hard rain, water flows under the threshold of your sliding glass door and leaks onto the unit below. The sliding doors are the owner's responsibility to maintain and thus, we are requesting that you take action to correct this problem.***" (R. p. 132; R. p. 7.)

The findings from Council's experts/consultants, Schneider, HICAPS, Spectrum, and Elkin confirmed that the lack of caulking or sealing between the sliding glass door thresholds and the concrete balcony slabs was allowing the water to leak into the interior of Buildings A and B and damage the individual units and the common elements. (R. p. 2397; R. p. 32; R. pp. 1367-1376; R. p. 3; R. p. 2397; R. p. 32; R. p. 1592.) Specifically, Schneider found the ***"sliding doors are leaking rain water into interior areas of the buildings,"*** based upon the ***"separation of caulking from the 'sill' and separation of caulking from the expansion joint between the exterior floor/ceiling assemblies and the interior floor ceiling***

***assemblies."*** (emphasis added.) (R. p. 2397; R. p. 32.) Further, Spectrum found that the ***"damage has occurred in all units due to wind driven rain bypassing the slider seals and entering all units,"*** (R. p. 1773.)

Lastly, Council's property manager Diehl confirms in a e-mail to Board members that "***many of these units were leaking . . . the issue was thrown back at the owners who most ended up doing nothing.***" (R. p.1328; R. p. 13.)

Clearly, the A and B Co-owners are proper parties to seek a recovery for damages to the common elements and the individual units due to the lack of proper waterproofing and/or sealing between their sliding glass door thresholds and the concrete balcony slabs in Buildings A and B. (R. p. 1773.) See Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(Davis Adv. Sh. 25 at 39) (This Court found ***"Council is responsible for pursuing any responsible parties, whether they are Co-owners or contractors or the developer"*** for damages to the common elements).

However, in this case the ***"Board did not ask any expert to break out the damages attributable to the alleged failure of the [A and B] Co-owners to maintain their windows and sliding glass doors."*** (Emphasis added.) (R. p. 653; R. p. 34, n. 3.) Furthermore, former Board President Don Johnston ("Johnston") and current Board Member Bray[6] confirm that the Board failed to pursue a recovery from any A and B Co-owners as responsible parties when they testified during their depositions as follows:

> Q. Okay. That's fair. In any case, at the point -- Sutton-Kennerly was not asked or requested, in their assessment of all the damages, to break out what damages, if any, they attributed to the leaks around the windows and doors

[6] Johnston and Bray served on the board when SKA's repair budget for Buildings A and B was adopted as part of the 2010 and 2011 Annual Operating Budgets.

that may have gotten into the common elements, as to whether unit owners in A and B should be responsible for that collateral damage.

A. That's correct.

Q. They were never asked to do that?

A. That's correct.

(R. p. 1495, lines 12-22.)

Q. Did the board -- let me back up for a second. When the board got Sutton-Kennerly's estimated cost of repair for Buildings A and B in the amount of $11 million, did the board undertake to do any investigation to find out to what extent the A and B unit owners had been negligent regarding the maintenance repair of their units?

A. No.

Q. Can you explain why? No.

Q. Why didn't they undertake that responsibility to do that?
A. Why should we have?

(R. p. 1663, line 20-p. 1664, line 7.)

Here, no factual issue exists that Council deviated from its mandatory duties under Sections 6.3 and 6.4 of the Master Deed and the common law by failing to investigate and pursue a recovery from any of A and B Co-owners who were already known as responsible parties for damages to the common elements and the individual units. (R. p. 1773;R. p. 2397; R. p. 32.) This is evidenced by the affidavit of Board Member Bray, when she says, "***[t]o attribute any more of the repair costs . . . to the Building A and B Units Owners, would have been an exercise of bad business judgment.***" (emphasis added) (R. pp. 2256-2257.) See Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241 (Davis Adv. Sh. 25 at 32) (This Court found that ***"if the Bylaws and Master Deed***

***specified how duties should be performed, the business judgment rule would not allow council to deviate from those simply because what they did was reasonable."***)

Council cannot argue its failure to discharge its duties to investigate and pursue a recovery from any A and B Co-owner was reasonable under the circumstances because no conflicting evidence exists in the record that the lack of waterproofing of sliding glass doors did not allow water to enter into the interior of Buildings A and B and not cause damage to its common elements and the individuals units. (R. p. 2397; R. p. 32; R. pp. 1367-1376; R. p. 3; R. p. 2397; R. p. 32; R. p. 1592. Consequently, Council's decision not to pursue a recovery from A and B Co-owners changed the method of assessment and violates this Court's holding in Seabrook Island Prop. Owners Ass'n v. Pelzer, at 347-348, 356 S.E.2d at 414, which provides the business judgment rule does not permit Council to change the method of assessment specified in the governing documents. Id. at 347-348, 356 S.E.2d at 414. (R. pp. 2256-2257.)

For these reasons, Petitioners contend no factual issue exists regarding Council's improper use of the business judgment rule to deviate from its mandatory duties under Sections 6.3 and 6.4 of the Bylaws and the common law to investigate and pursue a recovery from the A and B Co-owners who are one of the major responsible parties for damages to the common elements and individual units. Council changed the method of assessment by failing to investigate and pursue a recovery from the A and B Co-owners.

C. The Court misapprehended and erred in finding that a factual issue exists regarding Council's improper use of the business judgment rule to change the method of assessment under Sections 1.12, 5.2, and 5.3 of the Bylaws to justify its deviation from these mandatory duties by not presenting the adopted annual budgets to the Co-owners at their annual membership meetings in 2009 and 2010 or at another scheduled special meeting of the Co-owners.

Section 1.12 provides "[t]he order of business at all meetings of the Co-owners shall be . . . Presentation of budgets." (R. p. 1009.) Section 5.2 provides "The Board of Directors shall prepare, adopt and present . . . to the Co-owners at their annual meeting an annual budget (the Budget) for the Regime for the next fiscal year. The Budget as adopted by the Board of Directors shall set forth with particularity the anticipated Common Expenses for the fiscal year together with the amount of reasonable reserves for payment of future Common Expenses and contingencies." (R. p. 1017.)

Current Board member Bray admits that the annual budget for 2010 was not placed on the annual agenda by the Board for presentation to the Co-owners at their annual membership meetings held on April 4, 2009 as required by Sections 1.12 and 5.2 of the Bylaws. (R. pp. 1625-1626; R. pp. 25-26.) The minutes for the April 4, 2009 annual membership also confirm that the 2010 annual budget was not presented to the Co-owners. (R. pp. 1285-1289; R. pp. 25-26.) Bray further admits that the annual budget for 2010 was adopted at the end of 2009 without holding a meeting to allow the Co-owners to review, object, or amend it. (R. pp.1625-1626.) The minutes indicate the annual budget for 2010 was adopted at special Board meeting in November 2009. ( R. pp. 1299-1300.) Further, the adopted annual budget for 2011 was not placed on the annual agenda by the Board for presentation to the Co-owners at their annual meeting in 2010. ( R. pp. 25-26.)

Board's failure to discharge its mandatory duties under Sections of 1.12 and 5.2 of the Bylaws unduly prejudiced the Petitioners' rights to timely challenge, object, and/or amend the admittedly invalid budgetary assessments for 2010 and 2011, which required them to pay part of the construction costs for the removal, repair, and replacement of 1,087

windows and 80 sliding glass doors. ( R. p. 816; R. pp. 24-25.) Specifically, Article V, § 5.3 of the Bylaws provides "***The Budget, as adopted by the Board may be amended upon the motion and affirmative vote of Co-owners two-thirds (2/3) of the Percentage Interest in the Common Elements.***" ( R. p. 1016.) (emphasis added.)

Furthermore, at the hearing on May 21–22, 2012, Council admits on the record that, "the [budgetary] assessment as rendered by the Board ... is an '*ultra vires* act' that should be afforded [protection] under the business judgment rule...." (R. p. 795.) However, Council's assertion of protection under the business judgment rule is without merit and contrary to the law of this state. See Fisher v. Shipyard Village Council of Co-Owners, Inc.,Op. No. 5241(Davis Adv. Sh. 25 at 41) See also Baumann v. Long Cove Club Owners Ass'n, Inc., 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008) (A corporation can only exercise the powers granted to it by law, its charter or articles of incorporation, and any Bylaws made pursuant thereto.) (citing Lovering v. Seabrook Island Prop. Owners Ass'n, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986), aff'd as modified on other grounds, 291 S.C. 201, 352 S.E.2d 707 (1987), overruled on other grounds by S. C. Code Ann. § 33-31-302); "Acts beyond the scope of a corporation's powers as defined by law or its charter are ultra vires." Lovering, 289 S.C. at 82, 344 S.E.2d at 865; see also Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 605, 538 S.E.2d 15, 28 (Ct. App. 2000) (The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones).

Here, the business judgment rule can not be applied to protect Council's *ultra vires* conduct from judicial review. No factual issue exists in the record regarding the Council's *ultra vires* assessment (invalid window and door amendments) against the

Petitioners in conjunction with its Board's failure to discharge its duties Sections 1.12, 5.2, and 5.3 of the Bylaws. (R. pp. 1285-1289; R. pp. 25-26.) This is evidenced by the following admission from Council:

> **MISS BOAN**: The Board discussed what will we do with this assessment, **how do we treat this A and B in light of the fact the assessment is invalid and the windows and doors are now the responsibility of A and B unit owners,** how do we assess for that, knowing that, and the Board, knowing that and knowing what the other --
>
> **THE COURT**: Wait a minute, I'm not sure I understand. Could you repeat that right there, I was listening but I just got sort of, I stumbled when you were doing that.
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> **MISS BOAN**: **The Board, in trying to decide how would we do the assessment, that the amendment is invalid --**
>
> **THE COURT**: All right. (R. p. 816; R. p. 25.)

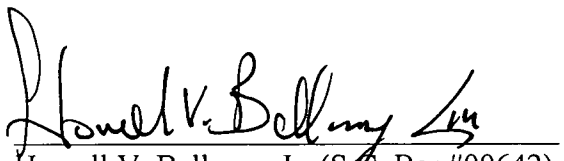
## CONCLUSION

Petitioners respectfully submit that the Court misapprehended and erred in determining: (1) that a factual issue exists regarding Council's improper use of the business judgment rule to change method of assessment under the Master Deed and Bylaws in order to justify its *ultra vires* assessment against Petitioners for part of the construction costs to remove, repair, and replace A and B Co-owners' windows and sliding glass doors; (2) that a factual issue exists regarding Council's bad faith conduct in continuing to enforce window amendment after 2008; (3) that a factual issue exists regarding Council's improper use of the business judgment rule to deviate from its mandatory duties under Sections 6.3 and 6.4 of the Bylaws and the common law to investigate and pursue a recovery from the A and B Co-owners who are one of the responsible parties for the damages to the common elements and

individual units; and (4) that a factual issue exists regarding Council's improper use of the business judgment rule to deviate from its mandatory duties under Sections 1.12, 5.2, and 5.3 of the Bylaws by failing to present the adopted annual budgets to the Petitioners at their annual meetings in 2009 and 2010 or at another scheduled meeting of the Co-owners.

For the reasons discussed above, Petitioners respectfully request that the Court reconsider its Opinion via either a rehearing, or by modifying or amending its opinion to provide that Council's Board's unauthorized acts and omissions preclude the application of the business judgment rule to Petitioners' claims for improper and over assessment for construction costs to remove, repair, and replace the A and B Co-owners' windows and sliding glass doors, which are their exclusive responsibility pursuant to the Master Deed and Bylaws.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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Larry B. Hyman, Jr., Circuit Court Judge

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Civil Action No: 2009-CP-22-01655

**Appellate Case No. 2012-213634**

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Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008, and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t/ July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC; Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H. S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998; Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan 1. Mann and Angela M. Mann; Michael Cameron

Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Thomson and Arleen McKeown David T. McGill and Carol G. Mcgill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, Georgia M. Pruitt and Howard C. Covington; Litchfield Captain's and P. Duvall; and Melinda Medina; W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Cooley, the Lois Cooley Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame ..... *Petitioners*,

v.

Shipyard Village Council of Co-Owners, Inc. ..... *Respondent.*

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

v.

Cincinnati Insurance Casualty Insurance Company, Philadelphia Insurance Company, Zurich American Insurance Company, American and Marine Insurance Company, and Illinois National Insurance Company ..... *Third-Party Defendants.*

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**PROOF OF SERVICE**

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I certify that I have served copies of the **Petitioner's Petition for Rehearing** in the above-captioned appeal on the following individuals by United Stated Mail, with sufficient first-class postage affixed, addressed as follows:

Carlyle R. Cromer
Turner Padget Graham & Laney, PA
P. O. Box 2116
Myrtle Beach, SC 29578
*Attorney for Respondent*

****Signature Page Follows****

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1000 29th Avenue North
Myrtle Beach, SC 29577
(843) 448-2400
*Attorneys for Petitioners*

Myrtle Beach, South Carolina
August 11, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

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Larry B. Hyman, Jr., Circuit Court Judge

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Civil Action No: 2009-CP-22-01655

**Appellate Case No. 2012-213634**

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Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008, and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t/ July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC; Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H. S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998; Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan 1. Mann and Angela M. Mann; Michael Cameron

Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Thomson and Arleen McKeown David T. McGill and Carol G. Mcgill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, Georgia M. Pruitt and Howard C. Covington; Litchfield Captain's and P. Duvall; and Melinda Medina; W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Cooley, the Lois Cooley Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame ..... *Petitioners*,

v.

Shipyard Village Council of Co-Owners, Inc. ..... *Respondent.*

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

v.

Cincinnati Insurance Casualty Insurance Company, Philadelphia Insurance Company, Zurich American Insurance Company, American and Marine Insurance Company, and Illinois National Insurance Company ..... *Third-Party Defendants.*

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****Signature Page Follows****

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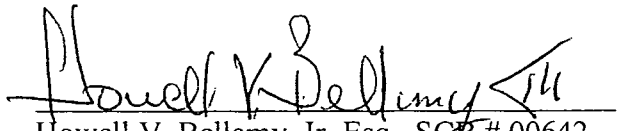

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August 11, 2014



The Honorable Jenny Kitchings
Clerk of Court
South Carolina Court of Appeals
P. O. Box 11629
Columbia, S. C. 29211

Re: Richard A. Fisher vs Shipyard Village Council of Co-Owners, Inc.
Appellant Case Number: 2012-213634

Dear Ms. Kitchings:

Forwarded herewith please find enclosed original and six (6) copies of the Petition for Re-hearing regarding the above captioned matter and Proof of Service of same.

I have also enclosed an additional copy of the Proof of Service. Please kindly clock and return a copy of the Proof of Service to me in the self-addressed, stamped envelope I have provided for your convenience.

I am enclosing our check for the filing fee of $25.00, check number 059818 dated August 7, 2014 made payable to South Carolina Court of Appeals.

With kindest regards, I remain

Sincerely,

BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.

Howell V. Bellamy, III

HVBIII:lh
cc:
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