THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. John C. Hayes, III
Presiding Circuit Court Judge

Appellate Case No. 2012-213730

Juontonio Pinckney, Josephine Sciacca, Addie Smith, James Barone, Deborah Barone, Ismael Gonzalez, Valerie Gonzalez, Joe Moore, and Sandra Moore,
Appellants

Epcon Communities, Inc., Epcon Communities Franchising, Inc., Brock L. Fankhauser, Fankhauser Property Group, Inc., and Stonecrest Villas of Tega Cay Home Owners Association, Inc.,
Respondents

And Fankhauser Property Group, Inc. is also Appellant.

Fankhauser Property Group, Inc., Third Party Plaintiff,

v.

Architectural Alliance, Ltd., Exterior Expressions of North Carolina, Inc., Al-Mega Construction, Inc., Procar, Inc., The Southeastern Group, Inc., Lucas Lawn and Landscape, Inc., and Jose Simenez, Individually and d/b/a M&L Roofing Co., LLC and/or MB Roofing Company, Third Party Defendants.

Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.,
Third Party Plaintiff,

v.

Stonecrest Villas of Tega Cay, LLC and Epcon Communities Franchising, Inc.,
Third Party Defendants.

Exterior Expressions of North Carolina, Inc., Fourth Party Plaintiff,

v.

Marcos Gonzalez, Fourth Party Defendant.

Procar, Inc. and Procar II, Inc., Fourth Party Plaintiffs,

v.

Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Construction Co., Belanos Framing, Inc., Ricardo Hernandez, and Silverio Cortez, Fourth Party Defendants.

Al-Mega Construction, Inc., Fourth Party Plaintiff,

v.

Noe Perez, Juan Abundez Saucedo, and Moisese Chavarra Hernandez, Fourth Party Defendants.

SECOND AMENDED FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

Appellants are twelve (12) homeowners in Stonecrest Villas of Tega Cay, a York County multi-family condominium development. This appeal involves stipulated facts and novel issues of first impression arising from alleged construction defect or design defect claims. Initially, four (4) Plaintiffs brought suit as against Brock L. Fankhauser individually ("BF"), the general contractor Fankhauser Property Group, Inc., (FPG), and the property regime Stonecrest Villas of Tega Cay Owners' Association, Inc., ("COA"). The initial suits are filed

on June 2, 2010 ninety days after service of statutory notice and demand to cure upon *both* the COA and the developer.[1] [R.v.2,pp.338-340; *see also* R.v.5,p.1104 at (1)-(15)]. September 16, 2011 amended consolidated complaint is plaintiff's current active pleading, naming six defendants.

The homes sold to Plaintiffs were constructed and sold during years 2006 to 2010 by Epcon franchisee Stonecrest Villas of Tega Cay, LLC (hereafter "Stonecrest LLC"–developer), also *declarant* under the community master deed. Brock L. Fankhauser ("BF") individually is the owner of Stonecrest, LLC and Fankhauser Property Group, Inc. (hereafter "FPG", general contractor). Fankhauser is the owner and was controlling interest of the COA until the effective date of his resignation, described below. Discovery in the case evidences that the Declarant Control period described in the Master Deed had expired in year 2008. Fankhauser does not resign or transition board control to owners until July 1, 2010. It is not disputed that transition did not occur until *after* Plaintiffs' initial complaints are filed and served. The parties have stipulated to the following facts :

1. The COA entity is responsible for administering and maintaining the community's common elements pursuant to the Master Deed.
2. That Brock L. Fankhauser resigned and transitioned the board on July 1, 2010.
3. That the common elements were not in good repair as of the date of developer's resignation and transition on July 1, 2010.

PROCEDURAL BACKGROUND

Prior to the trial court determinations now on appeal, the trial court issued two (2) rulings following oral arguments, including the August 27, 2012 order referencing the "Catch 22" *Doc Daneeka* order of Pulliam v. MUI Carolina Corporation, et al., case no. 2008-CP-46-2158. The court ordered that the Pulliam order was to be incorporated by reference

insofar as the context permits (sic). [R.v.2, pp.345;346-358]. The dichotomy discussed in said order was the issue of who may bring suit for damages regarding the common elements within a condominium development and who had the right to recover for such damage. The following orders precede the orders now under appellate review.

1. August 27, 2013 order denying COA motion for judgment on the pleadings predicated on standing vs. plaintiffs.

Counsel for COA argued that plaintiffs lacked standing because the COA was singularly responsible for maintaining and administering the common areas pursuant to the master deed and was the only party who could do so. The court denied the COA's motion on August 27, 2013. In conjunction with a motion to approve settlement heard 12/19/2013, the "one recovery" element of the Pulliam circuit ruling is argued by the COA as support for requested dismissal of all claims under Queen's Grant, *supra*, including Plaintiffs' damage claims. The record evidences that the court failed to differentiate between the parties' respective damage claims and viewed them as one set of damage. [R.v.4,p.1096 at 11-15; R.v.5, p.1106, at 1108 at lines 9-18].

2. October 27, 2013 order denying Plaintiffs' motion for summary judgment predicated on standing vs. COA.

Plaintiffs argued their motion for summary judgment, alleging priority equitable standing vs. the association because the COA owned no common elements; it was not first in priority of time to file suit; and the COA lacked standing because Plaintiffs held both legal estate title and were first in time to file notice, claims and suits. Plaintiffs' motion for summary judgment was denied on October 27, 2013. Until January 23, 2013 the court's rulings established that neither party held neither superior nor inferior standing vis-à-vis the

other as to common element damage claims, thus culminating in the standing imbroglio described by the court. "*I'm not happy about it, but that's the way I see it.*" [R.v.4, p.1085 at 8-9]. Oral arguments next occur on December 19, 2013 culminating in the 1/23/2013 order. The order reversed the court's prior rulings dated August 27, 2012 and October 27, 2012. Summary judgment is granted on January 23, 2013. The court's ruling is predicated upon *Queen's Grant Villas Horizontal Property Regimes I-V, v. Daniel International Corp.*, 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985) in dismissing all parties damage claims, including Plaintiffs.

3. January 23, 2013 order approving COA settlement and dismissing all damage claims by granting summary judgment.

By order dated January 23, 2013 the circuit court approved a $2.62 million mediated *conditional* settlement procured by the COA from the developer, general contractor, and various third- and fourth-party subcontractor litigants. As a condition of settlement, the court granted the COA's request to *extinguish* and dismiss *all* parties' claims to common elements implicating exterior building envelopes, save only those issues carved out by footnote (2) of the court's order. [R.v.2,p.372 at fn#2.] The carved out issues involved alleged subsurface, gravel, slab, and soil compaction defects beneath some Plaintiffs' homes. The court viewed the parties respective claims as "jointly held" [5] and one set of damages. [R.v.2,p.374 at 12, fn#3].

4. April 5, 2013 order granting summary judgment predicated upon the business judgment rule.

On April 5, 2013 the circuit court granted summary judgment as to all fifteen of Plaintiffs' causes of action against the association, including breach of fiduciary duty. The court's judgment was predicated on the business judgment rule, S.C. Code Ann. § 33-8-300 as

described in Dockside Ass'n, Inc. v. Detyens, 291 S.C. 214, 217, 352 S.E. 2d 714, 716 (Ct. App. 1987) aff'd, 294 S.C. 86, 362 S.E.2d 874 (1987). Plaintiffs opposed summary judgment by citing § 33-8-300(c) under the facts and documentary evidence, and argued amalgamation between developer Fankhauser and the COA precluded grant of summary judgment. Plaintiffs further argued documented awareness of defects and design issues by the COA and developer precluded summary judgment. [R.v.4,pp.1033-1051]. From the 1/23/2013 and 4/5/2013 orders appellants Pinckney, et al now appeal.

STANDARD OF REVIEW

In a case raising novel questions of law, the appellate court is free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. Article V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and 330 (1976 & Supp. 2005). A case with legal and equitable issues presents a divided scope of review. *Perry v. Heirs at Law & Distributees of Gadsden*, 313 S.C. 296, 437 S.E.2d 174 (Ct. App. 1993). When legal and equitable causes of action are maintained in one suit, each retains its own identity as legal or equitable. *Future Group II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45 (1996). A legal question in an equity case receives review as in law. *Gunter v. Fallaw*, 78 S.C. 457, 59 S.E.2d 70 (1907). This court has previously ruled that it reviews all questions of law de novo. *E.g., Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E. 2d 80, 90 (2008). The instant appeal involves stipulated facts.[1] When an appeal involves stipulated or undisputed facts, and appellate court is free to review whether the trial court properly applied the law to those facts. *WDW Properties v. City of Sumter*, 342 S.C. 6, 535 S.E.2d 631 (2000). In such cases, the appellate court is not required to defer to the trial court's legal conclusions. *J.K. Constr., Inc. v.*

Western Carolina Regional Sewer Auth., 336 S.C. 162, 519 S.E. 2d 561 (2001); *Duke Power Co. v. Laurens Elec. Co-op., Inc.*, 344 S.C. 101, 543 S.E.2d 560 (Ct. App. 2001). To determine whether an action is legal or equitable, this court must look to the action's main purpose as reflected by the nature of the pleadings, evidence, and character of relief sought. *Ex Parte Wheeler v. Estate of Green*, 381 S.C. 548, 673 S.E.2d 836, 839 (Ct. App. 2009). As cited by the circuit court, the Plaintiffs' current active pleading, seeks both *equitable and legal relief.* [R.v.2,p.417 fn#2]. Appellants respectfully assert that because the case *sub judice* raises novel issues and stipulations of fact[1] this court is presented with an equitable review. The court of appeals is free to determine whether the trial court properly applied the law to the facts, has jurisdiction to find stipulated facts in accordance with its own view of the preponderance of the evidence, and jurisdiction to review questions of law presented *de novo.*

ARGUMENT

Appellants respectfully assert the trial court's 1/23/2013 and 4/5/2013 rulings are controlled by errors of law under current South Carolina case authority and in misapplying legal definition of "*accident*" under the court's master deed interpretations of the master deed under facts of the case. Appellants allege error in the trial court's 1/23/2013 ruling by the court failing to view all factual evidence and inferences of ownership, demands to cure, and priority of claims in a light most favorable to Plaintiffs. Appellants respectfully assert the court erroneously ruled that the regime, pursuant to Queen's Grant, *supra* was the real party in interest as to *all* common element damage claims. Appellants respectfully assert trial court error on April 5, 2013 in failing to recognize developer amalgamation, error in statutory

application, and error in interpreting and applying master deed affirmative obligations relevant to a regime that was developer-controlled through the date of July 1, 2010. [1]

Appellants allege that errors occur in misinterpretation of affirmative obligation, rights, and duties of the parties under the master deed. Abuse of discretion occurs in court analysis of statutory law related to notice, demands to cure, and mis-application of the business judgment rule analyzed under restrictive covenants and the authority of Queen's Grant, *supra*. Finally, appellants respectfully assert that the court's definition of "*accident*" as applied to the facts and the COA obligations under section 13.1 of the master deed erroneously resulted in a finding of no casualty where competent evidence demonstrated builder and regime awareness of escalating and progressive injury impacting numerous homes. [2]

Appellants do not, as part of this appeal, seek to vacate the settlement fund to the COA for costs to repair procured from subcontractors. Appellants do not challenge the COA's ability or business judgment in entering into a financial settlement for common areas at large, nor the release of third- and fourth-party litigants[4] whom Plaintiffs did not file suit against. Appellants respectfully assert that the circuit court abused its discretion in dismissing Plaintiffs' damage claims vis-à-vis the developers FPG and Stonecrest, LLC by granting the COA province and power to settle *all* common element exterior envelope claims, and dismissing Plaintiffs' damage claims on 1/23/2013 where a developer/builder controlled regime had abrogated affirmative master deed obligations in the face of casualty.

Appellants respectfully seek reversal of the portion of the 1/23/2013 trial court order dismissing Plaintiffs' exterior claims as against the developer FPG and Stonecrest, LLC as part of the settlement, and restoring of Plaintiffs' damage claims against these entities.

Distinguished from earlier court analysis under Pulliam v. MUI, appellants assert that the parties' claims for relief were inapposite, separate, distinct, and implicate disputed ownership as to unit common elements, particularly those comprising the building envelope of Plaintiffs' homes. At issue in this case has been the concept of equitable standing, and the novel concepts of which party may claim damage and/or injury to property in a multi-family development where both the Plaintiffs and regime brought claims in the same case.

In reviewing concepts related to equitable priority, standing, and "*first in time*" principals, the circuit court construed Plaintiffs' claims as "*we got to the courthouse first*" (sic) and "*This argument presupposes that one must litigate to settle a claim.*(sic)" [R.v.2,p.400 ¶4, at 2]. The court failed to consider, in a light most favorable to Plaintiffs, that initial suits occur *only after* the developer and the developer-controlled COA board failed to respond to statutory demands to cure. The case at bar involves *progressive* injury affecting Plaintiffs' homes and related common elements under a master deed.[2] Appellants allege that the court erroneously misconstrues the respective parties' damage claims as "*jointly-held*"[5] and identical, and thus seeking *identical* relief in dismissing Plaintiffs' damage cases and ignoring fiduciary obligations of the COA under restrictive covenants.

In-depth trial court analysis addressed the relief sought in all Plaintiffs' causes of action. The court cites that relief sought by the twelve owners would be *personal* (sic) *to the Plaintiffs*. [R.v.2,p.402, ¶2; Id., p.405 fn#7]. The court misinterpreted the differences in relief being sought by the respective parties, and misconstrued duties and affirmative obligations of the court. While analyzing equitable standing issues and rights to pursue damage, the circuit court notes: "*A fair reading of Plaintiffs' Complaint establishes that in no instance . . . do Plaintiffs seek any general relief which would inure to the benefit of SCVTC generally or be*

available to the COA or other individual homeowners to remediate the alleged defects to the common areas." [R.v.2, ¶4 at 1]. The court misconstrued that these obligations would fall not to the Plaintiffs, but to the regime, irrespective of board control. In erroneously viewing facts most favorably to the movant, the court's orders go on to note: "*The Plaintiffs do not seek recovery of funds to affect repairs to the common elements*" and "*not recovery on behalf of the owners of all the Stonecrest Villas condominiums*". [R.v.2, p.415 at ¶(5); *see also* Id.,p.403 at¶(1).] The court nevertheless dismisses all Plaintiffs' claims on 1/23/2013 as part of the COA sought extinguishment and dismissal. [Id.,p.406 at ¶(3)].

Further illustration included the following inquiries by the trial judge to Plaintiffs: "How can your twelve *do anything to assist* .... to have anything done to their own units *let alone* contract to have something done by a contractor *for the entire development* ?" [R.v.5,p.1318 at 14-21.] The "Master Deed of Stonecrest Villas of Tega Cay Horizontal Property Regime," was recorded on February 12, 2007 in Book 08852 at Page 149 of the York County Registry (hereinafter "Master Deed"). [R.v.2,p.403¶(1)]. It is expressly cited by the trial court's order of January 23, 2013. The business judgment rule is cited 4/5/2013 by reference as applicable within the January 23, 2013 order, compounding the errors. [R.v.2,p.415 ¶(2) at 1]. At no place is the business judgment rule cited in the court's analysis of 1/23/2013. The trial court rulings ignore that on June 2, 2010 four (4) suits were filed with York County naming as primary defendants Brock L. Fankhauser, ("BF") Fankhauser Property Group ("FPG") and Stonecrest Villas of Tega Cay Owners' Association, Inc.("COA"). [3] Procedurally, the COA answered and filed its counterclaims and cross claims on August 6, 2010 after Fankhauser's resignation. This occurred thirty six (36) days after builder transistion. It occurs approximately 184 days after Plaintiff Pinckney's (and others) statutory notice and demands

to cure served upon both developer and the COA pursuant to S. C. Code Ann. §40-59-820, *et seq*. As amended and consolidated, the Plaintiffs' September 16, 2011 suit named twelve (12) Plaintiff owners, all of whom purchased homes from years 2007 to 2010 that later experience water penetration and damage.

The April 5, 2013 the trial court order granted summary judgment to the COA dismissing all Plaintiffs' causes of action as against the regime. The circuit court cited the business judgment rule as implicated in both the 1/23/2013 and 4/5/2013 orders, but did not expressly link express dismissal of Plaintiffs' claims, explaining that the first order on appeal dealt *strictly* with Stonecrest COA's *settlement of pending litigation (sic)*. [R.v.2,p.415¶2, 1-5.] Appellants respectfully assert that the trial court abused its discretion and erred as a matter of law in dismissing Plaintiffs' damage claims. On 1/23/2013 the court misconstrues them as identical to the COA's under Queen's Grant and Pulliam. In granting summary judgment in the January 23, 2013 order, the court does so erroneously viewing all facts and inferences related to common element damage viewed most favorably to the moving party. The court's ruling ignores the inapposite property damage claims and claims for relief sought by Plaintiffs, and failed to consider legal estate ownership of units under a "*jointly-held*" analysis. [5]

Appellants allege error in the circuit court's January 23, 2013 dismissal of Plaintiffs' damage claims involving their homes' building envelopes as part of COA request for *extinguishment.* The court cited it's ruling to be predicated on the inherent power to manage litigation and approve settlements, and not express reliance upon Rule 56 or Rule 41(a)(2). [R.v.2,p.398 at 1-2]. Appellants respectfully assert the Plaintiffs' and COA common element damage claims were erroneously viewed as singularly one and the same, or identical.

[R.v.4,p.1096 at 13-16]. The settlement memorandum of record evidences, however, that the COA-procured settlement is for *cost of repair* of the common elements. [R.v.2,p.379 at 7; See also, R.v.3,p.801¶(4)]. Using the standard of Rule 56, the court goes on grant the motion approving settlement, while simultaneously dismissing *all* claims by *all* parties for damages to common elements. The court's order specifically extinguished claims related to *exterior building envelopes*, despite the COA entity holding no ownership to these unit common elements. Unit exterior envelope common elements are owned by the individual Plaintiff owners, irrespective of the common areas at large. [R.v.2,p.456; Id., p.462 at §1.6]; *see also*, [R.v.2,p.466 at 5.1].

Appellants respectfully assert that when the circuit court granted summary on January 23, 2013 it failed to view the evidence and all reasonable inferences of unit ownership and injury to Plaintiffs' real and personal property in a light most favorable to Plaintiffs. Viewing the evidence in a light most favorable to the nonmoving party, there existed competent record evidence tending to establish material elements of causation and injury that, in fact, Plaintiffs' building envelopes constituted unique individual property damage. Appellants argued unsuccessfully that such damage would include slab distress due to alleged lack of gravel and defective soil compaction issues "carved out" by the court's January 23, 2013 order, first pleaded by Plaintiffs. [R.v.2,p.372,fn#2; *see also*, R.v.3,p.718,¶(5), (a)-(m)]

Prior orders of the court establish that the individual Plaintiffs and the COA litigated issues of equitable priorities and standing *vis-à-vis* the other with respect to damage claims brought by both in the case. Both parties cited restrictive covenants in support of their arguments and the authority of Queen's Grant. By order dated August 27, 2012 the court denied the COA's motion for judgment on the pleadings, which had alleged priority standing

over the twelve plaintiffs. By subsequent order dated October 15, 2012 the court likewise denied plaintiffs' motion for summary judgment as against the COA entity based on equitable arguments of notice, first to file, and unit ownership. The court denied bifurcating the respective parties' damage cases.

Standing issues were heard a third time at oral argument on December 19, 2013, coupled with a COA request to extinguish claims via dismissal and approve settlement. The 1/23/2013 order effectively reversed prior rulings of the trial court premised on the restrictive covenants and Queen's Grant. The court's ruling under the authority of Queens Grant effectively eliminated owners' ability to claim property damage where an association *ultimately does so*, irrespective of ownership, filing priority, or where the regime failed to act in the face of over two years of water intrusion problems.

As part of the January 23, 2013 order the court dismissed *all* Plaintiffs' claims to common elements comprising their building envelopes finding that it was within the *province* and *power* of the association to settle the claims; [R.v.2,p.380 ¶15] yet, the court attempted to extricate and preserve Plaintiffs' right to continued pursuit of the *personal* claims asserted in their amended consolidated complaint. The ruling erroneously cited that the Order of January 23, 2013 *does not affect* (sic) the individual claims Plaintiffs have set forth in their Complaint for *direct damage to themselves or their individual units(sic).* [R.v.2,p.380 fn#7; Id.,p.382,¶2.] The court failed to view in a light most favorable to Plaintiffs that said damages were de facto injury to Plaintiffs' real and personal properties. Id. In dismissing Plaintiffs causes of action on 4/5/2013, the circuit court failed to view all evidence and inferences of years of deteriorations to the owners' homes, including their building envelope "common elements" in a light most favorable to Plaintiffs.[2] Appellants respectfully allege the

circuit court erred by failure to recognize that the claims personal to Plaintiffs and their units were *de facto* injury and damage to their homes' common elements. The Plaintiffs' claims involve damaged envelopes comprised of common and limited common elements, including interior and personal property damages. The court errs in comingling the parties inapposite damage claims as jointly-held pursuant to the earlier Pulliam order, and by viewing the evidence and all inferences in a light most favorable to the movant party under SCRCP 56 and the authority of Queen's Grant, supra.

I. The trial court abused its discretion in dismissing Plaintiffs damage claims by erroneously ruling that *Queens Grant Villas Horizontal Property Regimes I-V, v. Daniel International Corp.*, 286 S.C. 555, 335 S.E.2d 265 (Sup. Ct. 1985) established the regime as the real party in interest as to unit exterior damage claims.

The trial court's rulings appear, at first blush, to establish that the Plaintiffs' claims pertinent to their homes as preserved inviolated. [R.v.2,p.380,fn#7;p.382 ¶2]. However, the court clarifies in a subsequent order dated February 27 2013 that: "The answer is the Court's order *does* eliminate (sic) the Plaintiffs' ability to claim damages for repair of the common-elements, regardless of whether the common-elements are "*pertinent*" to their respective units. [Id.,p.384, lines 4-5.] Ignoring the Plaintiffs were first in priority to file suit, the court goes on to state: "The whole point of the settlement was to *eliminate the possibility that the Plaintiffs*, or any other association members for that matter, *could seek to hold the defendant(s) (sic) responsible for the costs to repair the common-elements*." [Id., p.384 at 4-6]. In so holding, appellants respectfully assert that the trial court erred in extending the holding of *Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corporation, 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1986)* to rule as a matter of law that

damage suits necessitated by regime inaction, brought by individual owners, should be dismissed regardless of filing priority, as long as the Association *ultimately pursues a claim.* [R.v.5,p.1316, lines 7-10]. The court effectively deprived owners of protections afforded by Queen's Grant. The court's ruling erroneously established that the regime was the real party in interest as to *all* exterior unit damage claims. The holding ignores equitable principals that aid the vigilant, and erroneously permits parties that slumber on their rights priority. As argued by COA counsel before the court on 12/19/2012 in reference to Queen's Grant: "I'm suggesting that the language *effectively eliminates* an owners ability to pursue a claim on exterior damages for *so long as (sic)* the association is pursuing that claim...". [Id.] In so extending Queen's Grant, the court fails to view *years* of progressive damage and injury to homes in a light most favorable to Plaintiffs [2] under both orders of dismissal dated January 23, 2013 and April 10, 2013. [R.v.2,p.419, fn#4].

Appellants assert that the circuit court erred as a matter of law by dismissing claims for injury to property of the Plaintiffs' homes exacerbated by COA inaction where competent evidence showed awareness of casualty *and* alleged defective design and/or construction defects. [R.v.4,p.1031-1051, ¶(2)]. Appellants assert it was an abuse of discretion to co-mingle damages and grant exclusivity or superiority to the COA party under the law, including the right to settle claims involving Plaintiffs' individual damages against the developer entities FPG and Stonecrest, LLC. Noteworthy is that plaintiffs did not file suit *to repair* the community common elements, nor the common areas at large. Plaintiffs filed suit over damaged real and personal property impacting their homes. [R.v.2,p.544 (1)-(4)]. The settlement procured by the COA is for *costs of repair*. Appellants respectfully assert error where the trial court adopts as a matter of law the damage theory of the defendant COA in

paragraph (3) of the 1/23/2013 order. [R.v.2,p.379, ¶(3), ¶(4)].The court failed to view competent evidence of alleged design defects and causation per footnote #2 of the 1/23/2013 Order related to injury to Plaintiffs' homes. [R.v.3,p.674¶(15),(a)-(j).] Appellants respectfully assert the court erred by finding erroneously that the Plaintiffs' damages were *water intrusion*, ignoring progressive deterioration and alleged latent design flaw to otherwise non-defective original construction. Un-workmanlike flaws are manifested, most prominently, by years of water intrusion.[2] Plaintiffs' prayer for relief requested special damages related specifically to their homes. [R.v.2,p.544, ¶(4)].

Prior to ruling upon Plaintiffs' Rule 60 Motion to Alter or Amend, The court had failed to *differentiate* between common areas at large and those common elements comprising building envelopes. The court, in analyzing "*jointly held*" [5] claims, misconstrues that Plaintiffs' inapposite claims for damage were the "*[f]ew holding the remaining homeowners hostage . . . [T]he few who cannot affect any repair to the common elements the maintenance of which* is charged to the COA." [R.v.2,p.401, ¶(3)]. Appellants allege abuse of discretion where the court found as law that the respective damage sought by both parties was identical, or that Plaintiffs had erred by filing suit for personal relief versus relief calculating to benefit the community at large. The parties have long stipulated that the master deed obligations fall to the regime.[1] The inquiry under the facts of this case, becomes, what provisions within the four corners of a complex master deed were controlling under the facts ? The duty of ultimate repair, or duties related to *casualty* per section 13.1. Appellants respectfully assert that the trial court erroneously viewed, in a light most favorable to the regime, that no casualty existed. [R.v.2,p.417 fn#2].

In grappling with equitable standing and priority of claims, the court analyzed damage claims, rights and duties within the context of the restrictive covenants, erroneously holding that both parties had pursued *costs for repair* under Queen's Grant . "How do you come down on those – *the balancing of those equities* ? Use the term *equity*. Obviously you don't do math, you don't say twelve as to seventy-two or twelve as to eighty-four, you don't do that. But how does the court look at the equity between two people with standing *and one set of damages (sic)* as to who can control when its resolved ? *I mean it's got to be somebody.* [R.v.4,p.1096, at 15-16]. The court's ruling erodes condominium owners' protections under restrictive covenants, Queen's Grant and Pulliam where a regime fails to vigilantly protect owners' interests in multi-family developments manifesting wide spread progressive damages.

II. The trial court erred by ruling as a matter of law that Queens Grant Villas Horizontal Property Regimes I-V, v. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985) eliminated owners' ability to pursue property damage to their homes where owners filed suit first in priority after proper statutory demand to cure.

EQUITABLE STANDING

Priority and standing disputes are illustrated by oral argument transcripts and two prior trial court orders in year 2012. The court's prior rulings dated September 27, 2012 and October 15, 2012 established, through January 23, 2013, that neither party had *superior* nor *inferior* standing vis-à-vis the other with respect to common element damage claims. [R.v.2,p.374 ¶(2)]. Both the COA and Plaintiffs advanced equitable arguments premised upon the master deed and Queen's Grant, primarily. Plaintiffs argued they owned legal estate to their units and owned at large common elements as undivided joint tenants. Plaintiffs further argued that the COA entity owned no common elements. Rather, the COA owned

merely a contractual duty to repair under the master deed and promptly restore in the event of casualty, which was abrogated due to developer amalgamation. Plaintiffs also argued they were first in priority of time to give statutory notice and first in priority of time to file suit on June 2, 2010. [R.v.5,p.1319, at 20-25].

The COA argued that it held the *exclusive* right to repair common elements under the master deed, and therefore Plaintiffs lacked standing. In reference to the authority of Queens Grant. "*We have the contractual duty to repair this.*" [R.v.5, p.1315 at 10-12]. COA counsel argued "I'm suggesting that the language *effectively eliminates* an owners ability to pursue a claim on exterior damages *for so long as* the association is pursuing that claim *which here we are*...."[R.v.5,p.1316 at 7-10]. The court failed to view most favorably to Plaintiffs that the COA did not file suit until after Plaintiffs file and serve four initial lawsuits against the builder and COA. At the relevant time, the builder is the controlling interest of the board.[R.v.5,p.1320 at 2-10].

Despite affirmatively recognizing two years [2] of notice and awareness of water intrusion, the court fails to view casualty and section 13.1 of the master deed's affirmative obligations in a light most favorable to Plaintiffs. The court's ruling under the authority of Queen's Grant stripped owners of the protections afforded by South Carolina law where a regime abrogates its affirmative obligations under a master deed. The circuit court on April 5, 2013 resorted to the business judgment rule to grant summary judgment and dismiss all claims of the Plaintiffs. It occurs after exclusivity and superiority is erroneously granted to the COA on 1/23/2013 where *all* damage claims implicating *all* building envelopes is *extinguished* and *dismissed.* All fifteen of Plaintiff's claims against the COA, inclusive of claims for breach of fiduciary duty, are subsequently dismissed on April 5, 2013. In so doing, the court failed to

view COA inaction under master deed affirmative obligations in a light most favorable to Plaintiffs by adopting erroneous definitions of "accident" as applied to the facts of the case. [R.v.2,p.417, fn#2].

The record evidences that the trial court grappled with equitable priorities described as the '*standing improglio*" for months prior to January 23, 2013, failing to distinguish de facto property damage from costs of repair damage. South Carolina Code Ann. § 33-8-300 is relied upon in granting summary judgment on April 5, 2013 and cited by the court in reference as applicable to the January 23, 2013 order dismissing Plaintiffs' damage claims. The court acknowledges that [W]hile the business judgment rule is implicated in both the Order on appeal and the instant order, at issue are *two distinct* business judgments. [R.v.2,p.415,¶(2) at 2.] The grant of relief under both orders premised on the business judgment rule arises from months of equitable standing litigation argued before the court related to common elements, the master deed, Queen's Grant and by reference the incorporated context of Pulliam. Referencing the prior Pulliam order, and having *sua sponte* recognized amalgamation theory in this case, the court erroneously failed to view builder / COA amalgamation in a light most favorable to the Plaintiffs in granting summary judgment on April 5, 2013. [*see* Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc., 397 S.C. 348, 725 S.C. 2d 112 (S.Ct. 2012) as cited by 3/8/12 trial court order re: Defendants' motions to dismiss vs. Plaintiffs] [R.v.2,p.387,¶(2)].

In grappling with the priority arguments, the court on January 23, 2013 erroneously viewed costs of repair versus de facto individual property damage in a light most favorable to the moving COA party. The error is illustrated by the following inquiry: "But how does the court look at the equity between two people with standing and *one set of damages (sic)* as to

who can control when it's resolved ? "I mean, *its got to be somebody.*" [R.v.4,p.1096 at 13-16]. "I'm very concerned about and hope that the courts will – *in case I have another one of these cases* – will give us some more guidance." [Id. at lines 16-18.]

Appellants respectfully assert that the trial abused its discretion in failing to differentiate that Plaintiffs' claims were different from COA claims for "*costs of repair*"; e.g., Plaintiffs' claims were for *de facto* injury and property damage to their homes. Whether comprised of common elements or limited common elements, under the master deed responsibility in the event of casualty belongs specifically the association.[1] In the case *sub judice*, the court noted awareness of over two years of progressive water intrusion[2], yet fails to view causation and ongoing progressive injury in a light most favorable to Plaintiffs in dismissing all fifteen Plaintiff causes of action against the regime on 4/5/2013.[R.v.2,p.419,fn#2]; [R.v.2,p.440].

The court erred by construing the damage claims as identical in grappling with "jointly-held" rights of owners versus the regime within the standing quagmire: "*[t]he standing issue continues to vex the Court and the parties to this litigation.*" "Admittedly, this may, and here does, create a *tug of war* between claimants who both have a legitimate interest in the proper resolution of the *jointly-held claim* (sic) or *claims".* [R.v.2,p. 374 ¶2 at 2; ¶3 at 2]. In error, the court failed to view competent evidence of injury to individual real and personal property, including progressive deteriorations, in a light most favorable to the nonmovants in granting summary judgment under both orders. The court likewise failed to view ownership of units in a light most favorable to Plaintiffs under Rule 56 and the provisions of the master deed, [R.v.4,p.1094 at 23-25; p.1095 at 8-16] discussed below.

On April 5, 2013 the business judgment rule is expressly adopted. The COA through counsel argued its applicability via Dockside Ass'n, Inc. v. Detyens, 294 S.C. 86, 362 S.E.2d

874 (1987). It is cited by the court to grant the COA summary judgment, after dismissing Plaintiffs' claims as within the control and provice of the COA who "*has the power to settle the claims*". [R.v.2,p.380 at (15)]. On 4/5/2013 the business judgment rule, despite documentary evidence of self-dealing and bad faith proffered by Plaintiffs [R.v.4,p.1046-1051] is adopted to extricate the court from the equitable standing dilemma. [R.v.2,p.417, I lines 1-5]. It occurs compounding January 23, 2013 errors construing the parties' claims as singular, identical, or the same. [R.v.4,p.1096 at 13-15]. In subsequent orders, court erroneously interprets and applies the statutory business judgment rule in a light most favorable to the moving party ignoring subsection (c) of the § 33-8-300 (Supp. 1999), cited by Plaintiffs. The trial court ignored documented evidence of water intrusion awareness, self-dealing, and bad faith by Fankhauser while in control of the board. [R.v.4, p.1046-1051].

Appellants respectfully assert that the court neglected to view in a light most favorable to Plaintiffs documented *awareness* of design issues, progressing damage claims, inaction, and master deed casualty obligation in a light most favorable to Plaintiffs in granting summary judgment on April 5, 2013. Exhibits admitted by Plaintiffs included forensic studies evidencing the severity and possible causes of water intrusion are addressed specifically to the developer-controlled COA, three times, prior to resignation. [R.v.4, p.1031-1032; p.1046; p.1060]. Plaintiffs expressly cited § 33-8-300 (c) of the business judgment rule and amalgamation in opposition to arguments advanced by the COA. Appellants respectfully assert that the court failed to construe the documented evidence and all reasonable inferences of developer bad faith and amalgamation in a light most favorable to Plaintiffs in granting summary judgment on 4/5/2013. Said evidence included two prior forensic evaluations, one performed specifically for Brock L. Fankhauser and FPG. [Id.,p.1033]. The documents also

included a South Carolina attorney opinion warning against transition, expressly citing existing problems plaguing Stonecrest, and detailing fiduciary duties owed by the developer. [Id.,p.1046-1047]. Each document addressed to the attention of the controlling interest of the board, Fankhauser, prior to his resignation July 1, 2010.

In prior orders, the court *sua sponte* recognized amalgamation in the case at bar as between Fankhauser, his corporate entities, and other companies. [R.v.2,p.387 ¶2; p.491 fn#2].The court's recognition extended to the franchisor Epcon, not owned by Brock Fankhauser. In granting summary judgment, however, the court expressly declines to recognize amalgamated developer control of the regime despite years of water intrusion awareness and escalating numbers of homes affected. The court fails to view inferences involving developer amalgamated control in a light most favorable to Plaintiffs in granting summary judgment on April 5, 2013. The court's earlier March 8, 2013 orders reflected that under Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.C. 2d 112 (S. Ct. 2012) the court viewed Magnolia and the cases cited therein "seem to establish the theory of amalgamation is a theory underpinned by the facts supporting the theory....*Here, Plaintiffs have alleged sufficient facts regarding their theory of amalgamation to support the Court's reliance on the theory in addressing the motions herein.*" [R.v.2,p.387, ¶(2)]. Appellants respectfully assert that the court failed to view all evidence and inferences involving COA abrogation of master deed obligations while under Fankhauser control in a light most favorable to Plaintiffs in granting summary judgment under the 4/5/2013 order. This occurred after the circuit court expressly recognized and applied amalgamation in the case related to Fankhauser's "*menagerie*" of corporate entities and *awareness* of water intrusions.[2] Despite the myriad of corporate entities involved, at the

core is Brock L. Fankhauser, controlling officer of the COA through July 1, 2010.[1] The regime's articles reflect Fankhauser as owner. Oddly, that the entity is to have no members. [R.v.2,p.514 at 4(b)]. The court expressly cites in prior orders that "*The record is clear that Brock Fankhauser's menagerie of entities knew of water intrusion problems as early as the late spring or summer of 2008.*" [R.v.2,p.419,fn#4]. BF is the incorporator of the COA entity. [R.v.2, p.514]. Through the date of his resignation, he was the controlling officer with awareness and superior knowledge. [R.v.4,p.1031;p.1033; p.1046;p.1051 ¶2; p.1060] The Controlling officer Fankhauser had documents evidencing the severity of defects leading to progressive water intrusions as early as December 19, 2009. [R.v.4, p.1031]. The record in this case evidences developer and Epcon failure to address non-water structural issues regarding concrete floor slabs as early as year 2007. In frustration, the Gonzalez family reaches out to the developer's father, Philip Fankhauser, of Epcon Communities, Inc. and Epcon Communities Franchising, Inc. The developer and controlling interest of the regime, via community wide 9/4/2008 email, later addresses water intrusion and design issues as follows: [R.v.4,p.1051 ¶2].

> "The fact of the matter is our homes are not designed to prevent rainwater intrusion during extreme rainfalls (e.g., sideways rain at 2" per hour)."

The court's rulings failed to view the evidence and all inferences of amalgamation, *casualty* and COA failures to act in a light most favorable to Plaintiffs. The COA, through Fankhauser individually, had written legal opinions and forensic reports directly addressing, specifically, *existing* common element damage, water intrusions, impending lawsuits, and fiduciary duties owed by a developer as early as January 14, 2010. [Id.,p.1031;1033; See also p. 1046-1047.] The letter expressly cited Goddard v. Fairways Dev. Gen. Partnership, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993). Both the developer and COA are served

Pinckney's statutory notice and demand to cure in February, 2010. Initial lawsuits by four Plaintiffs follow and are filed June 2, 2010. The developer and COA jointly conduct *test case deconstructive repairs* at the homes of soon-to-be board member Iadanza despite claims filed with insurance carriers. [R.v.4,p.1028, ¶2]. The court's ruling presupposes, without any support, that legal action by the COA while under developer control, *however unlikely*, was an impossibility. [R.v.2,p.419, ¶2 at 1-4]. Amalgamated control is arguably recognized by the Court, yet not viewed most favorably to Plaintiffs. Instead, erroneously viewing all facts and inferences in a light most favorable to the movant, the court held "Stonecrest elected to pursue a recovery against the community's general contractor and developer, *and it did so swiftly (sic)*...just 36 days after the *transition to owner control*..." [R.v.2,p.418 ¶2]. The court fails to view in a light most favorable to owners over two (2) years of progressive water intrusion problems, documented awareness of construction defects, and subsurface defects in a light most favorable to the Plaintiffs. [R.v.2,p.419,fn#2; see also R.v.4,p.1031;1033].

The court's interpretation and application of the business judgment rule in this case arises out of the dilemma of equitable standing and priority of claims under Queen's Grant. The business judgment rule under Detyens, supra, is utilized to extricate the court from the standing imbroglio. Appellants respectfully assert that error of law occurs in misconstruing the parties' claim or claims as "*one set of damages*" (sic) [R.v.4,p.1096 at 13-16]. The business judgment rule is expressly cited by the court's April 5, 2013 order, yet it is not expressly cited in the January 23, 2013 order. The court nevertheless analyzes, in depth, the business judgment of the *post-transitioned* board in considering settlement and "*extinguishment*" of claims at the request of the COA defendant party on 1/23/2013.

The relief sought by the COA is an adjudication on the merits and *dismissal* of Plaintiffs' claims based on equitable superiority under Queen's Grant and the duty of repair cited in reference to the master deed. The court's subsequent April 5, 2013 order rules that the court is precluded-- *and in fact the court abstains entirely from*-- review of business decisions of a builder-dominated COA board. The application of the business judgment rule to the facts differs substantially in the April 5, 2013 order from that of the January 23, 2013 order, cited by reference on 4/5/2013. Appellants respectfully assert the circuit court erred by viewing stipulated facts, evidence, and inferences in a light most favorable to the moving party in dismissing all Plaintiffs' claims on 4/5/2013.

The supreme court in South Carolina has made clear that the business judgment rule is not absolute. The rule will not apply if the directors have engaged in self-dealing, fraud, or other unconscionable conduct. *See* Dockside Ass'n, Inc. v. Detyens, 294 S.C. 86, 362 S.E.2d 874 (1987)(business judgment rule precludes judicial review of actions taken by corporate governing board absent showing of lack of good faith, fraud, self-dealing or unconscionable conduct)(citing *Papalexiou v. Tower West Condominium*, 401 A.2d 280 (N.J. Super. Ct. Ch. Div. 1979). At minimum, Plaintiffs had adduced evidence of self dealing and unconscionable conduct as illustrated by documents attached as Exhibits #1(a)-(g) of their memorandum opposing summary judgment; [R.v.4,p.1027-1051] said conduct by the controlling interest occurs subsequent to claims and studies are commenced thru FPG's carrier and the carrier for the regime:

> ... "Remember, the only reason that *we* (emphasis) are contemplating a scope of repair *different than the one proposed by my insurance carrier* (emphasis) is that said scope may be *impossible to achieve* – both logistically and financially (sic)". [R.v.4,p.1028].

Oral argument transcripts in the case reveals that counsel for all parties searched, *to no avail*, for controlling South Carolina authority which would guide the circuit court with regard to the equitable standing dilemma to bridge the gap between Goddard, supra, Concerned Dunes West Residents, Inc.v. Georgia Pacific Corporation, 349 S.C. 251, 562 S.E.2d 633 (Sup. Ct. 2002) and Queen's Grant Villas Horizontal Property Regimes I-IV, vs. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985). CDWR was cited by reference in the trial court's year 2008 order of Pulliam v. MUI Carolina Corporation case no. 2008-CP-46-2326. In denying judgment on the pleadings requested by the COA, the court's September 27, 2012 order addressed the parties' standing to claim damages as to common elements. The court does so for a second time on October 27, 2012 denying Plaintiffs summary judgment based on ownership standing and filing priority. The standing argument is raised for the *third* time on December 19, 2012 in oral argument as the COA sought court-approval of settlement with various Defendants, third and fourth parties and, ultimately, dismissal of all Plaintiffs' damage claims against the general contractor and developer.

As erroneously argued by the COA on 12/19/2013 in support of settlement and dismissal: "*This does not implicate or attack the standing issue that you've already ruled upon (sic)*". COA counsel accurately summarized the proceedings to date: "*I do want to point out as a matter of procedure that I raised the standing issue I think initially through a motion for judgment on the pleadings. The plaintiffs then raised the standing issue on the motion for summary judgment. You of course had ruled that both parties have standing to assert essentially the same damages. That obviously raises some contention*". [R.v.4,p.1085 lines 1-7]. In reply, the court acknowledges: "*I'm not happy about it, but that's the way I see it.*"

Id. Appellants assert, respectfully, that error enters the court's analysis at this stage. While the business judgment rule is not expressly cited for the argument, the novel fix-all for the standing dilemma is argued by COA counsel as follows, and erroneously adopted by the court.

"What I am proposing is that if the COA has settled the case (sic), which it has *subject to your ruling*, then that ***ought to extinguish*** the exterior damage *claim (sic) as a matter of law*." [R.v.4,p.1086, lines 13-15]. In reference to the Pulliam order of 2008, COA Counsel further argued in reference to subcontractors and primary defendants: "And if all these defendants would *prefer to do business (sic)* with the COA, presumably because the COA is the one with the *contractual obligation* to repair all these units, and presumably in your prior order you had said that *only one recovery (sic) can be had*, and that recovery inures to the benefit of the COA, then it just makes good common sense that the COA ought to be able to settle it." "But of course, in the process we need a ruling from you that says the settlement *extinguishes* the exterior damage claim (sic)." [Id.,p.1086 lines 23-24; p.1087, lines 4-6]. The business judgment rule is impliedly implicated, albeit not expressly cited. Queen's Grant, however, is expressly relied upon.

In reference to Queens Grant, supra, the court erroneously adopted as law COA argument that "the language effectively *eliminates* an owners ability to pursue a claim on exterior damages *for so long as* the association is pursuing that claim*(sic)* .... The novelty is openly recognized by COA Counsel: *[A]dmittedly, that's a novel argument and I don't know if it's a position that you necessarily have to adopt*." [R.v.5,p.1316, lines 11-12]. "[U]ltimately *as long as the money (sic) goes to the Association, I'm okay with that.* (sic)" [Id. at 17]. Under

the trial court's holding of 1/23/2013 the COA is erroneously ceded as the real party in interest as to all damage claims.

In prior argument and briefing, Plaintiffs were *equally unable* to articulate controlling authority, other than reference to Queen's Grant and Goddard. Plaintiffs argued as guidance the case of *Powers v. Fidelity & Deposit Co. of Maryland, et al*, 180 S.C. 501, 186 S.E. 523 (1936) [R.v.3,p.790] and principals of Pomeroy's Equity Jurisprudence, vol. 2, §602. [Id.,p.785,¶s(2)-(3)] In opposition, Plaintiffs advanced the long-standing proposition of South Carolina equity law that as among successive equitable estates or interests, where there exists no special claim, advantage, or superiority in any one over the others, the *order of time* controls. [Id.]; see also [R.v.4,p.1319, lines 21-22]. Plaintiffs filed initial lawsuits in this case June 2, 2010. At oral argument on 12/19/2013, Plaintiff counsel advised the court of statutory demands to cure by Plaintiff Pinckney, and others: "*..they were on notice in February of 2010 under the Notice to Cure statute and the statute, and a letter both, told them what to do. And so when we talk about this right, we're suing the builder also for damages.* They abrogated [*aggregated* (sic)] that right, they had ample opportunities. [R.v.5, p.1317 at 24-25.] In fact they've known, and I think we've established that here this morning, since as far back as 2008…". [Id.,p.1318, lines 3-7]. The circuit court later construed Plaintiffs' claims as "*we got to the courthouse first*" (sic) and "*This argument presupposes that one must litigate to settle a claim.*" [R.v.2, p.400 at ¶4]. The trial court goes on to compare the necessity of repair of the entire development ignoring individual claims for injury to Plaintiffs' real and personal properties: "*How can your twelve do anything to assist ....let alone contract to have something done by a contractor for the entire development* ?" [R.v.5,p.1318 at 18-23].

The trial court failed to view notice and that the COA, not plaintiffs, "[h]ave an obligation under the master deed to effect prompt repair and they've aggregated (sic) that duty." [R.v.5, p.1318,lines 18-21). The court failed to view awareness and notice in a light most favorable to Plaintiffs. As argued on record by Plaintiffs: "[*Y*]*ou've got to look at notice, a nonprofit notice, the shareholder notice.* At that point the law *triggers a duty* and *even then* they didn't act." [R.v.5,p.1320. at 2-4]. As cited by defense counsel, what leads the court into the standing dilemma is cited by COA Counsel: "[*W*]*hat prompted this was a demand for policy limits from the plaintiffs for unspecified damages*" [R.v.5, p.1318 lines 17-19].

The trial court ultimately issues orders denying relief sought under both parties' standing arguments. However, it reverses the status quo through its ruling on January 23, 2013 dismissing Plaintiffs' individual damage claims as an *extinguishment condition* sought by the regime. The ruling effectively rendered an adjudication on the merits affecting substantial rights. Appellants respectfully assert the trial court erred by failing to view evidence of legal estate, priority of notice, claims, and filing priority in a light most favorable to Plaintiffs. Appellants respectfully assert the trial court erred in failing to differentiate between the type of damages being sought by the respective claims of the Plaintiffs and the COA. In granting summary judgment, the court failed to view de facto injury and damage sustained by Plaintiffs including, but not limited to, the cost to repair damage *caused by* defective work vs. damages for *costs to repair common elements* sought by the COA. In Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co., 395 S.C. 40, 717, S.E.2d 589 (2011) the supreme court of South Carolina has held "the difference between a claim for the costs of repairing or removing defective work, which is not a claim for property damage, and a claim for the costs of repairing damage caused by defective work, *which is* a

claim for "property damage". Id. While discussed in the context of insurance coverage, this court's May 8, 2013 decision in Pulliam v. Travelers Indemnity Company, reinforces the concept and is analogous to the case at bar as it defines damage and injury.

In arguing ownership of disputed common elements affecting / comprising the building envelope of Plaintiffs' homes, specifically, Plaintiffs argued "The COA has *no interest, zero, none* as to ownership. They have [R.v.5,p.1317 lines 17-19] an obligation under the master deed to effect prompt repair and they've abrogated that duty". Defense counsel confirmed: "[w]e have the *contractual responsibility* to repair this." [R.v.5, p.1315 lines 10-11]. Both parties cited the master deed in support of their respective positions. Despite documented awareness of *systemic* errors [R.v.4,p.1060] and increasing water penetration affecting homes, the developer-controlled COA ignored Pinckney and others' year 2010 statutory notices and demand to cure, occurring after months of abrogating affirmative master deed obligation in the face of escalating casualty. [R.v.5,p.1208, at 8-15].

III. The trial court erred by failing to recognize casualty under the facts under erroneous definition of "*accident*" related to master deed affirmative obligations of the regime.

Under the master deed, the COA entity is vested with the *duty* and *power* to administer and maintain the common elements. [R.v.2,p.461 ¶2]. More specifically, the COA is responsible for prompt restoration in the event of *casualty*. [R.v.2,p.481 §13.1]. The language of the master deed is denoted by the word "*shall*" Per Section 13.1 of the Master Deed. [Id.] Appellants respectfully allege error where the trial court employed erroneous definition of "casualty" or "*accident*' and failed to view evidence of known progressive injuries affecting Plaintiffs' homes in a light most favorable to owners under master deed. [R.v.2,p.417, fn#2]. The ruling is controlled by error of law, both in mis-defining "accident"

and in failing to recognize affirmative obligations of the COA where casualty. Master Deed, section 13.1. Instead, the duty and necessity of repair is singularly focused upon by the trial court within the four corners of the restrictive covenants, ignoring affirmative obligations of Master Deed section 13.1. The necessity of whom must repair the community vs. neglect of affirmative obligation is weighed by the court in a light most favorably to the movant in granting summary judgment. [R.v.5,p.1318 at 17-21].

The language of the master deed is unambiguous. It is not permissive. [R.v.2,p.481, §13.1 line 2]. Any ambiguity would be construed as against the declarant, should it exist. Appellants assert that the court failed to view evidence and inferences involving developer and COA abrogation of duty in the face of progressive casualty in a light most favorable to the twelve owners. In erroneously viewing facts and inferences in a light most favorable to the COA, by contrast, the court finds as fact that Stonecrest COA elected to pursue a recovery against the parties it believed were responsible, "[*a]nd did so swiftly*... just 36 days after *transition to owner control*..." [R.v.2,p.419, ¶2]. The circuit court failed to view evidence and inferences of two years of amalgamated developer / COA awareness of progressive injurious inaction in a light most favorable to the Plaintiff owners[2]. In adopting business judgments by a *new* board, the court further acknowledges the COA claims for damage were " *based on the condition of the common elements at the time of transition ... asserted well within the statute of limitations*". [R.v.2, p.419, ¶2 lines 11-12]. The court nevertheless failed to view in a light most favorable to Plaintiffs the COA inaction, Plaintiffs' filing priority, all ignored in the face of awareness of systemic defects, casualty, and master deed section 13.1. Under the trial court's definition of accident applied within the context of Queen's Grant, vigilance can never be triggered in cases of developer conflict and control.

Owners are deprived of their only recourse, self help through resort to the courts. More importantly, without any evidence, the court's ruling presupposes within the facts of the case at bar that legal action by the COA entity was an impossibility while under builder control. If, at law, the COA is vested as the real property in interest under Queen's Grant, then multifamily dwelling owners have no recourse to protect what is arguably the largest investment of their lifetime, their homes.

IV. The court erred by failing to consider amalgamation and the business judgments of a developer-controlled board most favorably to Plaintiffs in granting summary judgment on April 5, 2013.

In the April 5, 2013 order, the trial court abstains from any scrutiny of *pre*-July 1, 2010 business judgments of the COA board under Fankhauser-dominated control. However, in-depth scrutiny of *post*-July 1, 2010 business judgments of the governing board occurs within the preceding 1/23/2013 order. The court cites Queen's Grant, including recognizing that "Queen's Grant goes farther than establishing the property regime's right to pursue claims related to the common elements, *but also holds the regime itself may be liable to the homeowners for its failure to seek recovery in instances involving allegations of alleged construction defects in common areas.* [R.v.2,p.401, ¶2]. Defense counsel, during argument, cautions the court against engaging in scrutiny of the governing board's judgment cited to support dismissal and settlement: "*[I] would caution the court into opening the door into an inquiry into whether it's a good settlement or not.*" [R.v.4,p.1087,lines19-21]. The court, nevertheless, *thoroughly* examines the business judgment of the post transitioned COA board in relation to the settlement and dismissal of Plaintiffs' damage claims, ultimately dismissing all Plaintiffs on 04/15/2013 claims in the wake of the court's preceding 1/23/2013 order. The court's reasoning is cited as follows:

"Failure of the COA to accept *a viable and well thought out settlement* would subject the COA to a suit by the non-plaintiff homeowners for such failure." [R.v.2, p.401 ¶2, 8-10]. Ultimately, the court clarified on February 27, 2013 "The *whole point (sic)* of the settlement was to eliminate the *possibility that the Plaintiffs*, or any other association members for that matter, *could seek to hold the defendant(s) (sic) responsible for the costs to repair the common-elements*." [R.v.2,p.401 at 12-13]. The court effectively adopts as law arguments advanced by the COA under Queen's Grant that "[t]the language effectively *eliminates* an owners ability to pursue a claim on exterior damages", erroneously ceding the COA entity as the real party in interest even with regard to Plaintiffs' individual exterior damage claims. The court fails to view in a light most favorable to Plaintiffs developer amalgamation, Plaintiffs' statutory demands to cure, and complaints filed and served June 2, 2010 in a light most favorable to the twelve owners, subsumed by the ultimate necessity to fund long-needed repairs, erroneously viewed as one set of damage. [R.v.4,p.1096 at 13-14].

In stark contrast from the 1/23/2013 order's analysis, however, the court's 4/5/2013 order decisively *abstains entirely* from review of business judgments of a developer-controlled board. [R.v.5,p.1208, lines 8-15]; *see also* [Id.,p.1210 at 6-11].The court fails to view these judgments in light of awareness of escalating water intrusion damage claims. [R.v.4,p.1030;1033].The court failed to view documentary evidence of years of COA inaction in the face of growing casualties most favorable to Plaintiffs. Under the court's ruling, builder bad faith and self-dealing is ignored. The documentary evidence produced of record in this case establishes developer knowledge that '*[T]he fact of the matter is our homes are not designed to prevent rainwater intrusion during extreme rainfalls (e.g., sideways rain at 2" per hour)*". Further, "*the reason we* (emphasis) are considering a scope

of repair different than that proposed by my insurance carrier is that said scope may be *impossible to achieve, both logistically and financially*". The court errs in failing to view evidence and inferences of bad faith and self-dealing in a light most favorable to Plaintiffs in applying the statutory business judgment rule weighed against affirmative master deed obligation. [R.v.2,p.481; §13.1, Master Deed]. The court dismissed Plaintiffs' damage claims entirely as against the COA entity on 4/5/2013, ignoring fiduciary duties in the face of advanced and complex construction defects.

The court expressly ruled on 4/5/2013 that it ***will not review*** the business judgment of a corporate board. [R.v.2,p.421,¶2]. *"[T]he court's default position must be to defer to the decisions of a corporate board unless the challenging parties can produce evidence of bad faith.*" Id. The court's ruling effectively abstained from analysis of the *pre*-July 1, 2010 scrutiny of business judgments. Yet, in paragraph (14) the court engaged in polar opposite scrutiny related to the *post* July 1, 2010 directors' judgments.[R.v.2,p.417, I through fn#2].

"[T]he court finds the Board's reasoning and its conclusions . . . "*to be an exercise of sound business judgment under the circumstances.*" [R.v.2,p.420,at ¶14]. Appellants respectfully allege error where the trial judge engaged in inapposite scrutiny of business judgment of the COA governing board during water intrusion years 2008 to 2010, failing to view conflicts and builder amalgamation in a light most favorable to the Plaintiffs as the nonmoving parties. The court fails to view documented evidence of awareness (and notice) in a light most favorable to Plaintiffs. [R.v.4, pp.1027-1051, exhibits #1(a) through #1(g)].

While omitting reference of subsumed dismissals the court erroneously describes the January 23 decision as follows: "*The order on appeal deals with Stonecrest COA's settlement of pending litigation*". [R.v.2,p.415, ¶2]. In reference to the April 5, 2013 Order the court

acknowledges that it "*[a]ddresses alleged conduct by the Stonecrest COA board from its creation until institution of the instant lawsuit.*" [R.v.2, p.415, ¶2]. The court expressly recognized that, at issue were *two* (2) distinct business judgments. One pertained to review of the judgments of a board comprised of builder-appointed owners. One abstained entirely from review of developer-amalgamated judgments, *after* awareness and statutory demand to cure. Appellants respectfully assert the trial court rulings are controlled by compounding errors of law and abuse of discretion, culminating in the 4/5/2013 order granting summary judgment to the regime and dismissing all Plaintiffs causes of action.

At 12/19/2012 oral arguments, Plaintiff counsel advised the court of the statutory notice by Pinckney and others to the COA and builder: "*We put them on notice under the statute which is what the law requires us to do. It was actually hand delivered to the builder in Matthews, North Carolina. The COA at that time got notice too by registered mail.*" [R.v.4,pp.1027-1051]. Attached under Exhibit #1(a) through Exhibit 1(g) of Plaintiffs memorandum of 3/20/2013 were no less than three documented reports addressed to the developer, Fankhauser, all of which were delivered/received *prior to* statutory demands to cure served by Pinckney, and others. [R.v.4, pp.1027-1051]. The documents and reports are all dated prior to 6/2/2010 lawsuits being filed and served. The trial court erroneously declines to view the documents and amalgamation in a light most favorable to Plaintiffs in granting summary judgment on 4/5/2013. The court failed to view all evidence and inferences of amalgamated control and conflict most favorable to Plaintiffs, effectively ignoring developer controlled COA inaction in the face of scores of homes being impacted by water intrusion. Did the circuit court err by failing to expressly recognize casualty ? A May 15, 2012 affidavit filed in the record of Ansel Edgar Hardin, III, York County tax

appraiser, confirmed that at least sixty-five (65) of (89) condominium site inspections occurred specifically over owner water intrusion complaints in years 2010 and 2011 where property values were contested by owners. [5/15/12 Hardin affidavit, ¶ (3) and (19)]. The numbers factually represent over half of the community; they demonstrate wide-spread continuous or repeated exposure to substantially the same general harmful conditions and property damage resulting from faulty workmanship, exclusive of the faulty workmanship itself. S.C. Code Ann. § 38-61-70 (May 17, 2011). The trial court consults neither the statutory definition, nor case authorities, but cites dictionary definition of "accident" in review of the facts within the 4/5/2013 analysis and order. In so doing, section 13.1 of the master deed is not reviewed most favorably to the non-movants. Nor can casualty be triggered under the master deed to protect owners, leaving only the repair obligation of the COA because there is no "accident" [R.v.2,p.417, fn#2] and no "contract" in the *legal sense*. [Id.,p.425, ¶2, lines 4-5]. Hence, there can be no affirmative duty to protect owners and their homes. The trial court determinations, respectfully, send the wrong message particularly in the context of multifamily dwellings.

At oral argument on 3/20/2013 Plaintiffs produced forensic studies detailing COA and builder awareness of the severity of construction defects, and its likely causes stemming from design problems. At least one (1) attorney opinion advised the developer of fiduciary duties pertinent to tendering common areas in good repair relative to transition to owner control. [R.v.4, p.1046-1047]. In opposition to COA oral arguments occurring 12/19/2012, Plaintiffs produced competent evidence of design error as testified to by FPG's own expert Marshal Clark, AIA. [R.v.3,p.674].The court failed to view causal facts and inferences of latent design error or construction defect in Plaintiffs' favor in dismissing Plaintiffs' individual

claims as part of granting costs of repair settlement to the COA. In essence, the court adopts legally and factually the damage theory and conclusions of the COA in the face of genuine material facts viewed, erroneously, in favor of the moving party. [R.v.2,p.404, ¶'s (3),(4); *but see also* Id.,p.397 fn#2]. More importantly, the court's ruling erroneously ceded the COA as the real party in interest with respect to *all* damage claims under the facts, inclusive of Plaintiffs'. The court does so despite recognizing unit ownership via deed. In re-instating two Plaintiffs who were earlier dismissed, the court expressly recognized their estate ownership. [R.v.2,p.445-456]. In expressly recognizing the COA held no ownership of common areas, the court held: "Plaintiffs third argument is that the COA cannot settle *their* claims as the COA owns no legal title in the Stonecrest Villas of Tega Cay's common areas. *While this is true* plaintiffs clearly recognize the COA has an obligation to maintain the common areas, and in fact, Plaintiffs have sued the COA for failure to maintain the common areas." [Id.,p.400, ¶5, lines 3-5]. The court, viewing the obligation of repair without reference to section 13.1 of the Master Deed, fails to view casualty in a light most favorable to Plaintiffs as the nonmoving parties under SCRCP 56. [Id.,p.417,fn#2].

The court grants dismissal, failing to view facts and evidence of ownership, notices, demands, and claim priorities in a light most favorable to Plaintiffs. The initial Plaintiffs filed suit June 2, 2010 and not September 19, 2011. The court grants the COA summary judgment on April 5, 2013 failing to consider developer amalgamation and *documented awareness* of severity of defects and casualty. [R.v.4,p.1034-1042].The notices are sent from, or received by, the developer-controlled COA board Brock L. Fankhauser, individually. [Id.] The court fails to consider COA knowledge by and thru Fankhauser illustrated by communications

from the builder attached as Exhibit 1(a) through Exhibit #1(g) of Plaintiffs' reply memorandum opposing summary judgment. [Id., pp.1037-1051].

Plaintiffs argued on March 20, 2013 that this knowledge and awareness coupled with amalgamation, viewed in a light most favorable to Plaintiffs, precluded grant of summary judgment and dismissal of all claims. While expressly citing the authority of Queen's Grant in the preceding 1/23/2013 ruling, the court notes: "*Queen's Grant goes farther than establishing the property regime's right to pursue claims related to the common elements, but also holds the regime itself may be liable to the homeowners for its failure to seek recovery in instances involving allegations of alleged construction defects in common areas*". The court's ruling under Queen's Grant failed to view progressive property damage claims brought first, under statutory notice, by owners attempting to protect their homes and investments. The ruling ignores that suits file June 2, 2010 *only after* the developer and developer-controlled COA ignore statutory demands to cure. The 4/5/2013 order supplants business judgment in place of, or in addition to, erroneous application of Queen's Grant, supra, to extricate the court from the vexing standing imbroglio.

Viewing the master deed section 13.1 in a light most favorable to the movant, the court's definition and application of "accident" is likewise applied in a light most favorable to the association, not the plaintiffs. It occurs despite competent evidence existing to show progressive injury and damage claims and failure to act by a developer-controlled COA. The courts analysis fails to consider the COA failed to protect common elements and building envelopes under unfettered developer business judgment and conflict. Irrespective of the master deed *affirmative* obligations, under the court's analysis a developer-controlled board is free to determine whether casualty is, or isn't, implicated in the community within the

confines its own master deed. Decisions and governance decision is made pursuant to developer interests, and not that of home owners.

The court cites provisions of the master deed, inclusive of Section 13.1 [R.v.2,p.417], yet the court errs by failing to view in a light most favorable to the twelve owners continuous or repeated exposure to substantially the same *systemic* [R.v.4,p.1060] defects and water intrusion as "casualty". Developer awareness of water intrusion is noted by the court, factually, as early as year 2008. [R.v.2,p.419,fn#2]. The court fails to view COA awareness of water intrusion, through Fankhauser, in relation to the affirmative obligations of the master deed section 13.1 addressing casualty. Under the court's holding, no *affirmative* duty can be triggered because no casualty is implicated as "accident" is misdefined by the court. [Id. at 417, fn#2]. Moreover, because the court rules that the master deed and bylaws do not constitute contracts *in the legal sense (sic)*, [R.v.2,p.425, ¶2 at 3-4] there can be no corresponding duty owed to owners' and their properties. Under the court's application of Queen's Grant the COA entity becomes the real party in interest as to *all* damage claims capable of evading it own affirmative obligations under restrictive covenants. Vigilance, duty, and master deed affirmative obligation are subsumed, if not suppressed entirely, by unfettered builder control, conflict, and business judgments viewed erroneously in a light most favorable to the movant.

V. The circuit court erred by dismissing Plaintiffs' claims implicating individually-owned real and personal property damage by misconstruing "common elements" under the master deed under a jointly-held analysis.

Appellants respectfully assert the circuit court erred by failing to view common element ownership pertinent to Plaintiffs' building envelopes in a light most favorable to the non-movants in granting summary judgment. The court failed to differentiate contractual duty and

repair obligations under the master deed construing costs of repair to be one set of damage. [R.v.4, p.1096 at 14-15]. The court failed to differentiate between common areas at large under the master deed, and disputed common comprising Plaintiffs' building envelopes to their homes. Article I, Section 1.6 of the Master Deed defines "*Common Elements*" to mean and refer to "all portions of the Condominium *other* than the Units (sic), [emphasis] as depicted on the Plans and as more particularly described in Section 5.1 of the Master Deed." The master deed goes on to incorporate, as Exhibits, visual depictions of unit exteriors and interiors. [R.v.2,pp.494-509]. The provisions of the master deed that the court takes judicial notice of in paragraph (2) page (7) of the 1/23/13 order expressly identifies common elements that are components of the building envelopes purchased by Plaintiffs as homes. Both the master deed and the Plaintiffs' deeds cite individual ownership of unit common elements. [R.v.2, pp.446-459]. The COA owns no common elements, only contractual obligations under the master deed. Even were the court to view the COA as made up of its collective residents, the physical common elements comprising a home belong to owner. [Id.] The court recognizes such in substitution of parties premised on title ownership, but fails to recognize such in a light most favorable to Plaintiffs in granting summary judgment dismissal on 1/23/2013. [R.v.2,p.451;454]. By contrast, the circuit court dismisses claims under erroneous analysis establishing, as a matter law, that the language of Queen's Grant effectively eliminates owners' ability to claim damage to their real and personal property under the facts.

Respondent has long sought to persuade the courts to adopt the circuit court's prior rulings in the "Catch 22 *Doc Daneeka*" order of the circuit court from case no. 2008-CP-46-2158 *Pulliam v. M.U.I*, which Judge Hayes cites by reference in the court's 8/27/2012 order;

e.g., "*[A]s observed by Judge Kimball, there may only be one recovery for damages pertaining to common elements.*" [R.v.2, p. 351, ¶(4)]. It is here that controlling legal error again manifests itself. By citing the case "insofar as the context permits", the rulings were unclear as to whether the court was citing amalgamation principals who could claim common element damage. The Pulliam case was later decided on appeal by this court on May 8, 2013 on different grounds in Op No. 5130 (S.C.Ct. App., filed May 8, 2013) (Shearouse Adv. Sh. No 21 at 4). While analyzed in the context of D&O insurance coverage and construction defects, this court, however, ruled that allegations alleging breach of fiduciary duty are not excluded in construction defect claims. Like this case and Crossman II, the case at bar involves physical injury which suggests the property (homes and common elements) may not have been not defective at the outset, but initially proper and injured thereafter. The inquiry becomes whether casualty was truly implicated under the facts and master deed in view of the sheer number of residences and common areas impacted by alleged construction defects (of varying types) [6] manifesting water intrusion and injury to real and personal property of the owners. Appellants respectfully assert that the circuit court erred by failing to recognize widespread casualty under the facts where, ultimately, record evidence exists to show sixty-five (65) of eighty-nine (89) homes impacted. [R.v.3, p.774, ¶(9), lines 10-12].

The core inquiry becomes why, if the Appellants do not object to nor seek to vacate the court-ordered settlement fund of 1/23/2013, does the regime allege Plaintiffs' damage claims to be the "*same*", "*identical*" and thus allegedly barred pursuant to Queen's Grant, *supra* and Pulliam, *supra*. The answer can be found by looking to the articles of incorporation for the COA regime and the amalgamated control that existed between Fankhauser and the COA through, *at minimum*, July 1, 2010. [R.v.2,p.515 at 4(b)]. The court failed to view these

documented/stipulated facts in a light most favorable to Plaintiffs in granting summary judgment. The court erred by failing to view these factors in a light most favorable to Plaintiffs in applying the business judgment rule. The court erred upon adopting the view that Plaintiffs' claims for property damage were jointly held, the "*same*", or one set of damage. [R.v.4,p.1096, 13-15]. Abuse of discretion occurs in viewing the owners' claims were not calculated to benefit the Stonecrest community at large, or were the few *holding the majority hostage*. [R.v.4,p.1096 at 4-5; see also R.v.2,p.376, ¶3].

By contrast to respondent characterizations of damages, Plaintiffs asserted causes of action for property damage to their homes implicating the building envelope of their residences, including breach of fiduciary duty claims as against the regime. [R.v.5,p.1208, lines 8-15].The common elements comprising the Plaintiffs' homes are de facto property damage as individually owned, irrespective of repair costs sought by the COA. The injury occurs due to alleged design and construction defects and COA abrogation of affirmative obligations where casualty. Even if not viewed as a casualty, progressive deterioration occurs for years during COA abrogation of affirmative repair duties under Fankhauser control.[2] The obligation of repair is solely the responsibility of the COA, irrespective of board control, under restrictive covenants. Section 13.1 of the master deed, however, where "casualty", the language is unambiguous. It is denoted by *affirmative* language *shall* that the court fails to view in a light most favorable to the non-moving Plaintiffs:

> "In the event of damage to or destruction of any Building as a result of fire or other casualty, the Association ***shall*** arrange for the ***prompt restoration and replacement*** of the damaged or destroyed building[.]" [R.v.2,p.481, §13.1]

The court erroneously views the duty of repair versus casualty in a light most favorable to the movant under the business judgment rule analysis of 4/5/2013 and Queen's Grant on

1/23/2013. The court erroneously finds that Plaintiffs filed suit for COA failure to repair homes "*on demand*". [R.v.2,p.423 at 5-6] by parties "who got to the courthouse first". [Id.,p.400, ¶(4) at 1-2]. The court erroneously adopts non-statutory legal definitions of "*accident*" [Id.,p.417, fn#2] and fails to view the affirmative language of the master deed in a light most favorable to Plaintiffs in dismissing *both* Plaintiffs' property damage claims and Plaintiffs' causes of action vis-à-vis the COA entity.

The COA entity, not individual owner litigants, is charged with the affirmative duties in the event of casualty. Under the trial court's interpretation, where casualty there exists neither diligence nor vigilance mandated upon either the COA or its developer. Irrespective of ongoing progressive deterioration "*so long as*" the COA ultimately pursues the same claim filing priority is rendered moot and the court's ruling effectively suppresses multifamily unit owners' ability to resort to the courts under Queens' Grant because they are not the real party in interest as to damage claims, even those impacting their homes. Under the narrow interpretation adopted as law by the circuit court, restorative action were accident or casualty is never triggered under the guise and absolute of unfettered business judgment. In cases of prolonged developer control and conflict, the court's application of Queen's Grant strips implied protections afforded to multifamily unit owners. The rulings convey the wrong message as a matter of public policy. The rulings effectively nullify affirmative obligations in restrictive covenants, the terms of which no owners were able to negotiate the terms of. If for no other reason, the same are nullified and voidable, because they are not contracts in the legal sense. [R.v.2,p.425, ¶2, lines 4-5].

In reviewing the master deed, the court opines that "[F]ire is not an issue in this case. Neither is any other '*casualty*", which is defined as an "*accident*". The court cites Black's

Law Dictionary and The American Heritage College Dictionary. [R.v.2,p.417,fn#2]. Appellants respectfully assert that the trial court's legal determinations regarding developer and COA obligation under section 13.1 of the master deed are controlled by errors of law, including failure to view the master deed as a legal contract. The court's ruling effectively ignores inaction after notice and demands to cure by Plaintiffs under S.C. Code Ann. §40-59-840.The rulings neglect to view most favorably to Plaintiffs that, but for the filing of Plaintiffs' initial suits, builder resignation likely would not have occurred. The initial suits in this case are not filed until 90 days after statutory notice to cure is served. The notice is sent to *both* the developer and the COA. [R.v.5,p.1317, 24-25]. The notice is ignored by both, arguably due to conflict and amalgamated conduct either ignored entirely by the court or erroneously viewed in a light most favorable to the movant. The court failed to view competent material evidence, documents, and factual inferences of over 184 days of notice of impending suits, two years of progressive water problems, and conflicting builder control in a light most favorable to Plaintiffs in granting summary judgments. Error occurs where the trial court adopts an improper definition of accident in relation to the master deed's mandate regarding casualty. [R.v.2,p.417, fn#2; *see also* Id., p. 481 §13.1.] In error, the court ignores competent evidence and inferences that a developer controlled COA have long abrogated its duty, power, and affirmative obligations under the master deed, especially section 13.1. Prior factual findings of the court establish that homes have been exposed to the same general or harmful conditions of water intrusion for approximately two years.[2] [R.v.2,p.417, fn#2].

The April 5, 2013 ruling of the trial court grants summary judgment while failing to view the evidence and all factual inferences of fiduciary obligation [R.v.5,p.1208 at 8-15] in a light most favorable to Plaintiffs where the COA (*under developer control*) is aware of no less

than two (2) forensic studies, and at least one (1) attorney legal opinion illustrating fiduciary duty. [R.v.4, p. 1046-1047] Unlike the preceding January 23, 2013 court order, the trial judge on April 5, 2013 *abstains* from any inquiry of developer controlled judgments granting dismissal of all Plaintiffs' claims against the COA entity, including allegations of breach of fiduciary duty by the regime. [R.v.5,p. 1208, lines 8-15]; see also [R.v.4,p.1060; p.1069 lines 5-21]. The court's ruling fails to view evidence and inferences of amalgamated control and COA awareness of progressive deteriorations in a light most favorable to Plaintiffs under the master deed. Appellants assert error where competent evidence, viewed in a light most favorable to the non-movants, exhibits casualty and *pre* July 1, 2010 COA failure to timely pursue restorative action (or litigation) in the face of this awareness. [R.v.4,p.1049; p. 1060; p. 1079, ¶(3) & ¶(4)]. Appellants respectfully assert error by the court in failing to recognize amalgamation combined with COA abrogation of duties, power, and affirmative obligation under the master deed section 13.1 where *accident* is mis-defined and erroneously applied to the facts by the trial court. The same are erroneously viewed under Rule 56 SCRCP in a light most favorable to the movant under controlling errors of law and abuse of discretion related to interpretations under the master deed.

CONCLUSION AND PRAYER FOR RELIEF

Appellants respectfully assert that the circuit court erred as a matter of law in dismissing Plaintiffs' common element damage claims on 1/23/2013 by failing to view evidence of unit ownership, individual property damage, developer amalgamation, casualty, and master deed affirmative obligations in a light most favorable to the Plaintiffs. Appellants further allege that the trial court's holdings are controlled by error of law in interpreting and applying statutory and case law definitions related to business judgments within the context

of casualty and affirmative duty imposed upon the regime by master deed. The court's rulings of law related to equitable standing and Queen's Grant misconstrue Plaintiffs' claims for damage, filed first in priority, as identical to that of the association's. The ruling erroneously establishes the COA as the real party in interest as to all damage claims where Plaintiffs' injury claims for damage to their homes are distinct, separate, and inapposite from the COA's recovery for costs of repair.

Appellants respectfully seek reversal of the trial court's rulings dated January 23, 2013 and April 5, 2013, respectively and remand for trial.

Respectfully submitted June 30, 2014.

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1 Stipulations of Record in This Case: (1) Brock L. Fankhauser resigned control and transitioned the COA executive board on July 1, 2010; (2) The common elements were not in good repair as of the date of the builder's transition; (3) The COA entity is responsible for administering and maintaining the common elements of the condominium under the community's master deed.

2 The trial court previously found: "*The record is clear that Brock L. Fankhauser's menagerie of entities knew of water intrusion problems as early as the late spring or summer of 2008*". [R.v.2,p.419, fn#2].

3 On June 2, 2010 four Plaintiffs [Pinckney, Smith, Barone and Sciacca] filed suit as against Brock L. Fankhauser, FPG and Stonecrest "HOA".Through consent amendments, designations, and consolidation the 9/16/20111 amended consolidated

complaint is Plaintiff's current active pleading filed on behalf of twelve (12) owners and naming the following six (6) parties as Defendants: Epcon Communities, Inc.; Epcon Communities Franchising, Inc; Brock L. Fankhauser; Fankhauser Property Group, Inc.; Stonecrest Villas of Tega Cay, LLC (declarant/developer) and Stonecrest Villas of Tega Cay Owners' Association, Inc. ("COA"). [R.v.2,p.339-340].

4 The circuit court characterizes the 1/23/2013 order on appeal as dealing with Stonecrest COA's settlement of pending litigation (sic). [R.v.2,p.415,¶2]. Appellants assert error in the circuit court dismissal of Plaintiffs' individual claims for damage as against the general contractor (FPG) and developer (Stonecrest, LLC) as an extinguishment precondition of settlement requested by the regime; e.g., that the trial court's dismissal prejudiced Plaintiffs' right to prove causation and damages and denied Plaintiffs a fair trial on the issue of damage to their homes.

5 "*The court is not sure this is the legally technical phrase to use to describe the instant situation, but it is the best that it could do.*" [R.v.2, p.399, fn #3].

6 On April 9, 2013, following the 4/5/2013 Court Order, the COA files secondary lawsuits in case no. 2013CP461194 involving alleged defects in subsurface soils and grading conditions against the general contractor (FPG), developer (Stonecrest, LLC) and the year 2006 soils engineering firm, pursuing defects "carved out" by footnote #2 of the 1/23/2013 order. [R.v.2,p.397,fn#2]. Appellants allege error where the circuit court failed to view these damage issues in a light most favorable to Plaintiffs, including impact to their individual building envelopes and slabs.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. John C. Hayes, III
Presiding Circuit Court Judge

Appellate Case No. 2012-213730

Juontonio Pinckney, Josephine Sciacca, Addie Smith, James Barone, Deborah Barone, Ismael Gonzalez, Valerie Gonzalez, Joe Moore, and Sandra Moore,
Appellants

Epcon Communities, Inc., Epcon Communities Franchising, Inc., Brock L. Fankhauser, Fankhauser Property Group, Inc., and Stonecrest Villas of Tega Cay Home Owners Association, Inc.,
Respondents

And Fankhauser Property Group, Inc. is also Appellant.

Fankhauser Property Group, Inc., Third Party Plaintiff,

v.

Architectural Alliance, Ltd., Exterior Expressions of North Carolina, Inc., Al-Mega Construction, Inc., Procar, Inc., The Southeastern Group, Inc., Lucas Lawn and Landscape, Inc., and Jose Simenez, Individually and d/b/a M&L Roofing Co., LLC and/or MB Roofing Company, Third Party Defendants.

Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.
Third Party Plaintiff,

v.

Stonecrest Villas of Tega Cay, LLC and Epcon Communities Franchasing, Inc.,
Third Party Defendants.

Exterior Expressions of North Carolina, Inc., Fourth Party Plaintiff.

v.

Marcos Gonzalez, Fourth Party Defendant.

Procar, Inc. and Procar II, Inc., Fourth Party Plaintiffs,

v.

Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Constructions Co., Belanos Framing, Inc., Ricardo Hernandez, and Silverto Cortez, Fourth Party Defendants.

Al-Mega Construction, Inc., Fourth Party Plaintiff,

v.

Noe Perez, Juan Abundez Saucedo, and Moisese Chavarra Hernandez, Fourth Party Defendants.

PROOF OF SERVICE

Pursuant to the June 19, 2014 Order of the Court of Appeals, Counsel for Appellants here certifies that a copy of the Second Amended Final Brief of Appellants in full compliance with Rule 211(b), SCACR was served on the below listed counsel by the means indicated on June 27, 2014.

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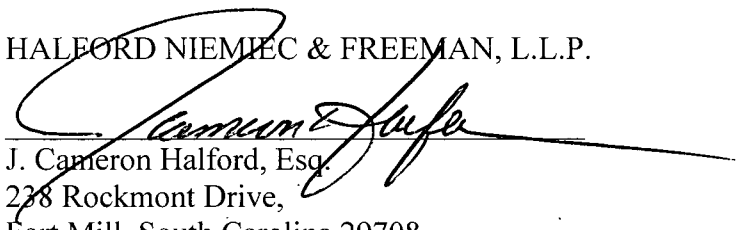
Respectfully submitted,

HALFORD NIEMIEC & FREEMAN, L.L.P.



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