THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Consolidated Appellate Case No. 2012-213730
Civil Action No. 2010-CP-46-02326

Juontonio Pinckney, Trustee of the Pinckney Living Trust; Josephine Sciacca; Addie Smith; James and Deborah Barone; Ismael and Valerie Gonzales; and Joe and Sandra Moore.....Appellants,

v.

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

AMENDED FINAL BRIEF OF RESPONDENT STONECREST VILLAS OF TEGA CAY CONDOMINIUM OWNERS ASSOCIATION, INC.

Curtis W. Dowling, S.C. Bar No. 6493
Matthew G. Gerrald, S.C. Bar No. 76236
Barnes, Alford, Stork & Johnson, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, SC 29202
(803) 799-1111

Brett E. Dressler, S.C. Bar No. 77650
Sellers, Hinshaw, Syers, Dortch & Lyons, P.A.
301 South McDowell Street
Suite 410
Charlotte, NC 28204
(704) 377-5050

Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.

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STATEMENT OF THE CASE

The Appellants are unit owners in Stonecrest Villas of Tega Cay, a condominium community in York County. They brought this consolidated action against "Stonecrest Villas of Tega Cay Home Owners Association, Inc." (correctly identified as Stonecrest Villas of Tega Cay Condominium Owners Association, Inc. and referred to herein as "Stonecrest COA"), Fankhauser Property Group, Inc. ("FPG"), Stonecrest Villas of Tega Cay, LLC ("SVTC") and Brock Fankhauser ("Fankhauser") seeking legal and equitable relief for alleged damages and defects resulting primarily from water intrusion. As against FPG, SVTC, and Fankhauser, the Appellants generally allege a failure to construct the Stonecrest Villas of Tega Cay condominium development in a good and workmanlike manner. As against Stonecrest COA, the Appellants generally allege a failure to maintain and repair the community's common elements. The Amended Complaint filed September 16, 2011, which is the Appellants' current active pleading, asserts twelve causes of action against Stonecrest COA: breach of fiduciary duty, breach of contract, breach of contract accompanied by fraudulent acts, fraud and misrepresentation, equitable action for accounting,[1] conversion, civil conspiracy, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, breach of express warranties,[2] and unfair trade practices act violation. (Supp. R. v. 2 p. 579).

On the date that control of Stonecrest COA was transitioned from the developer to the community owners—July 1, 2010—the community's common elements were not in good repair. Stonecrest COA could not afford the cost of making the necessary repairs

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[1] Pursuant to an agreement between counsel, this cause of action was withdrawn.

[2] Stonecrest COA is unclear as to the distinction between the Amended Complaint's tenth cause of action (breach of express warranty) and fourteenth cause of action (breach of express warranties). This brief addresses those causes of action together.

(which was in the millions of dollars) and wished to avoid imposing a large special assessment on the community owners. (Supp. R. v. 3 p. 770, ¶ 4). Accordingly, Stonecrest COA exercised the only other option: sue the community's general contractor and developer. (Supp. R. v. 3 p. 771, ¶ 6). In its Answer, Cross-Claim and Third-Party Complaint, filed August 6, 2010, Stonecrest COA responded to the Plaintiffs' initial Complaint (which had been filed on June 2, 2010) and asserted cross-claims and third-party claims against the general contractor (FPG) and developer (SVTC), as well as Fankhauser (the principal of FPG and SVTC) (collectively, the "Fankhauser Defendants"). (Supp. R. v. 2 p. 551). The cross-claims and third-party claims would later be reasserted in subsequent versions of Stonecrest COA's primary pleading, the most recent of which is entitled "Stonecrest HOA's Answer to Amended Complaint, First Amended Cross-Claim, and Third-Party Complaint," filed October 26, 2011. (Supp. R. v. 3 p. 727).

After several years of litigation, Stonecrest COA ultimately entered into a conditional settlement agreement with the Fankhauser Defendants and various third- and fourth-party defendants for a total recovery of $2.62 million to fund repairs to the common elements. (Supp. R. v. 3 p. 772, ¶ 2). The conditional settlement resolved Stonecrest COA's cross-claims and third-party claims for common elements damages. (Supp. R. v. 3 p. 772, ¶ 2). However, the settlement was contingent upon the Circuit Court ruling that the settlement extinguished the Appellants' claims for the same damages. (Supp. R. v. 3 p. 772, ¶ 2). Accordingly, on or about October 12, 2012, Stonecrest COA filed a motion captioned "COA's Motion for Partial Summary Judgment and Approval for Settlement as to Exterior Damages or, in the alternative, Motion for Dismissal pursuant to 41(a)(2)." (Supp. R. v. 3 p. 828). The motion sought summary judgment or dismissal of all claims seeking compensation for damages to the common

elements on the grounds that the settlement precluded any further recovery of such damages. (Supp. R. v. 3 p. 829).

A hearing was held on Stonecrest COA's motion for partial summary judgment on December 19, 2013 before The Honorable John C. Hayes, III. After considering the pleadings, the evidence, and the arguments of counsel, Judge Hayes granted the motion and signed an Order to that effect dated and entered January 23, 2013 (the "January 23 Order"). (Supp. R. v. 2 p. 372). The January 23 Order approved the settlement, finding it to be reasonable and an exercise of sound business judgment by Stonecrest COA, and dismissed all claims, including those brought by the Appellants, relating to the cost of repairing construction defects in the common elements. (Supp. R. v. 2 p. 381). The Appellants filed a Motion to Alter or Amend the January 23 Order, which Judge Hayes denied via an Order dated February 22, 2013 and entered February 27, 2013 (the "February 22 Order"). (Supp. R. v. 2 p. 383). The Appellants served a Notice of Appeal of the January 23 Order and the February 22 Order on March 25, 2013.

On or about February 27, 2013, Stonecrest COA filed a motion captioned "Defendant Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.'s Motion for Summary Judgment as to Plaintiff's Claims." (Supp. R. v. 3 p. 839). The motion sought summary judgment on all twelve causes of action asserted against Stonecrest COA in the Amended Complaint. (Supp. R. v. 3 p. 840). A hearing on the motion was held on March 20, 2013 before Judge Hayes. After carefully reviewing the record, the briefs submitted by the parties, and the applicable law, and after considering the arguments of counsel, Judge Hayes granted the motion and signed an Order to that effect dated April 5, 2013 and entered April 10, 2013 (the "April 5 Order"). (Supp. R. v. 2 p. 412). The Appellants served a Notice of Appeal of the April 5 Order on May 17, 2013.

ARGUMENTS AS TO JANUARY 23, 2013 ORDER

I. THE APPELLANTS HAVE MISCONSTRUED THE HOLDINGS OF THE JANUARY 23 ORDER AND THE FEBRUARY 22 ORDER.

As an initial matter, Stonecrest COA notes that the Appellants have made several incorrect assertions regarding the holding of the January 23 Order and the February 22 Order. The holding of the January 23 Order is as follows:

> The Court hereby dismisses all claims raised by all parties in this lawsuit for damages to the common-elements, including the cost to repair the exterior envelope of all the buildings, including the cost to repair the exterior envelope of all the buildings including any claims related to the alleged lack of gravel under the pads and the common elements located in the subdivision known as Stonecrest Villas of Tega Cay.

(Supp. R. v. 2 p. 381). The holding of the February 22 Order is as follows:

> Plaintiffs primarily question whether the Court's Order eliminates their claims as it relates to "common-elements pertinent to Plaintiffs' homes." The answer is that the Court's Order does eliminate the Plaintiffs' ability to claim damages for the repair of the common-elements, regardless of whether the common-elements are "pertinent" to their respective units. The whole point of the settlement is to eliminate the possibility that Plaintiffs, or any other Association members for that matter, could seek to hold the Defendants responsible for the cost to repair the common-elements.

(Supp. R. v. 2 p. 384). Contrary to the Appellants' contentions in their brief, the January 23 Order and the February 22 Order did not dismiss any of the Appellants' other real and personal property claims and did not hold that Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (1985), (a) eliminated the owners' ability to pursue injury and property damage to homes where owners filed suit in first priority after a statutory demand to cure, or (b) established that the regime is the real party in interest as to all the building exterior common element damage claims.

The January 23 Order is based on an interpretation of the law based on the restrictions found in the Master Deed and bylaws. Stonecrest COA has considered the Appellants' argument that there is a theory in equity that somehow affects this Court's standard of review. However, Stonecrest COA, like the Circuit Court, cannot ascertain any equitable issues or theories relating to the ultimate question of whether Stonecrest COA can, under these circumstances, exclusively settle claims relating to the exterior envelope of the community's buildings. The January 23 Order specifically stated:

> Plaintiffs claim the COA has "failed to do equity." The undersigned has been unable to understand Plaintiffs' position as to the equity argument.

(Supp. R v. 2 p. 375).

Contrary to the Appellants' assertions, the only stipulated fact relevant to this Court's review of the January 23 Order is that Stonecrest COA is responsible for administering and maintaining the community's common elements. The other two stated "stipulated facts" were not raised or considered by the Circuit Court in entering the January 23 Order. However, Stonecrest COA does agree that J.K. Construction, Inc. v. Western Carolina Regional Sewer Auth., 336 S.C. 162, 519 S.E.2d 561 (2001), cited by the Appellants, is applicable to this matter to the extent it holds that when an appeal "involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts." Id. at 166, 519 S.E.2d at 563.

II. STONECREST COA HAS EXCLUSIVE CONTROL AND AUTHORITY OVER THE COMMON ELEMENTS AND THERE IS NO SUCH ANIMAL AS A "UNIT COMMON ELEMENT."

A. The Horizontal Property Act gives Stonecrest COA authority over the rights of individual unit owners.

As permitted by the Horizontal Property Act, Stonecrest COA is the governing body over the administration of the community. S.C. Code Ann. § 27-31-90 states: "Nothing herein contained shall prohibit any council of co-owners from incorporating pursuant to the laws of South Carolina for the purpose of the administration of the property constituted into a horizontal property regime." Further, if there is such an incorporation, "the percentage of stock ownership of each co-owner in the corporation shall be equal to the percentage of his right to share in the common elements as computed in accordance with the provisions of this chapter." Id. "Property" is defined under the Act to include: "(1) the land whether leasehold or in fee simple and whether or not submerged, (2) the building, all improvements, and structures on the land, in existence or to be constructed, and (3) all easements, rights, and appurtenances belonging thereto." S.C. Code Ann. § 27-31-20(k). The bylaws govern the property and are inserted in the master deed or lease. See S.C. Code Ann. § 27-31-150. Finally, each co-owner must "strictly comply with the bylaws and with the administrative rules and regulations . . . and with the covenants, conditions and restrictions set forth in the Master Deed[.]" See S.C. Code Ann. § 27-31-170. Failure to comply with the restrictions shall be grounds for a civil action maintainable by the board of administration. Id.

B. The Master Deed gives Stonecrest COA authority and control over "Common Elements" and "Limited Common Elements."

The Master Deed of Stonecrest Villas of Tega Cay Horizontal Property Regime (the "Master Deed") was recorded on February 26, 2007. (Supp. R. v. 2 p. 460). The Master Deed sets forth the duties and responsibilities of the owners and Stonecrest COA as they relate to the maintenance and repair of the common elements.

(i) The definition of "Common Elements" in the Master Deed includes the exterior building envelope.

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, as depicted on the Plans and as more particularly described in Section 5.1 of the Master Deed." (Supp. R. v. 2 p. 466). Section 5.1 of the Master Deed defines "Common Elements" to include all portions of the "Condominium" that are not part of the "Units," including without limitation:

(a) The Land.

(b) All Improvements located on the Land outside of the Buildings, including without limitation, landscaped areas, surfaced parking areas, paved roads, sidewalks, curbs and gutters.

(c) All portions of the Buildings located outside of the Units, including without limitation the Limited Common Elements described in Section 5.2 below.

(d) The foundations, roofs, columns, girders, beams, supports, exterior and interior load-bearing walls, floors within and between Units and all other structural elements of the Building.

(e) Any public connections and meters, vaults and manholes for utility services that are not owned by the public utility or municipal agency providing such services.

(f) All tangible personal property required for the operation and maintenance of the Condominium that may be owned by the Association.

(g) The yards, shrubs, exterior lights, signs, mailboxes and storm drainage systems.

(h) The clubhouse, swimming pool, deck and all associated equipment, furniture, accessories and appliances contained therein and/or used for servicing the same.

(Supp. R. v. 2 p. 466).

(ii) Definition of "Limited Common Elements" in the Master Deed.

Section 5.2 of the Master Deed defines "Limited Common Elements" to include the following:

(a) Those portions of any chute, flue, duct, wire, pipe for water or sewer, conduit, bearing wall, bearing column or any other fixture lying partially within and partially outside the designated boundaries of a Unit, but serving exclusively that Unit.

(b) Any shutters, awnings, window boxes, patios and all exterior doors or windows or other fixtures designed to serve a single Unit, but located outside that Unit's boundaries.

(c) Any stoops leading as access to a unit or patio designated to serve a single Unit, but located outside that Unit's boundaries.

(d) Any portions of the heating, ventilating and air conditioning system, whether located inside or outside the designated boundaries of a Unit.

(e) Any driveway which provides access to a Unit.

(Supp. R. v. 2 pp. 466-467).

(iii) The unit owners were conveyed "Units" with undivided interests in the "Common Elements."

The Appellants seem to contend that they were conveyed the portions of the building envelopes that surround their respective "Units." To the contrary, the

Appellants were each conveyed a "Unit" along with an undivided percentage interest in the "Common Elements." Therefore, each owner was granted a percentage ownership in the entire building envelope, not a specific and measureable piece of the building envelope.

An example is the deed to James J. Barone and Deborah Barone from Stonecrest Villas of Tega Cay, LLC, dated September 13, 2007. (Supp. R. v. 2 p. 531). Exhibit A to the Barone deed states the Barones were conveyed the following:

> Being all of apartment/Unit 767, Building 22 of Stonecrest Villas of Tega Cay Horizontal Property Regime, a Condominium, according to the plans of said apartment by Michael J. Fitzpatrick, Registered Architect, State of South Carolina dated 2/16/07 and recorded with the Master Deed. Said apartment/unit of Stonecrest Villas of Tega Cay Horizontal Property Regime is more fully described on a survey entitled "Stonecrest Villas of Tega Cay Condominium, Map 2, Phase 1" prepared by E. Daniel Wooten, PLS dated January 4, 2007 and recorded in the Office of the Clerk of Court for York County in Plat Book D228 at Page 3.
>
> Subject to all of the provisions of the Master Deed thereof dated February 12, 2007 and recorded in the Office of the Clerk of Court for York County in Deed Book 8852 at Page 149 and supplemented in the First Amendment to the Master Deed dated June 26, 2007, and recorded in the Office of the Clerk of Court of York County in Deed Book 9215 at Page 128.
>
> Together with an undivided interest in the common elements and all appurtenances thereto according to said Master Deed and the Grantees assume and agree to observe and perform their obligations under said Master Deed and First Amendment, including but not limited to the payment of assessments for the maintenance and operation of the dwelling and condominium. Subject to the provisions of the By-Laws of Stonecrest Villas of Tega Cay Horizontal Property Regime, and to all other reservations, restrictions and rights of way of record including those as set out on the aforesaid documents.

(Supp. R. v. 2 p. 533).

(iv) The Master Deed requires Stonecrest COA to maintain the "Common Elements" and prohibits owners from altering the "Common Elements" without the written approval of Stonecrest COA.

Section 5.4 of the Master Deed describes the maintenance obligation for the "Common Elements." (Supp. R. v. 2 p. 467). Section 5.4 specifically states that "The Association is responsible for the maintenance and repair of all Common Elements, including the Limited Common Elements." (Supp. R. v. 2 p. 467). The only exception is maintenance and repair caused by misconduct of the owners, the heating and air conditioning systems, and the cleanliness of the "Limited Common Elements." See Master Deed Sections 5.4(a) and (b) (Supp. R. v. 2 p. 467).

Section 8.10 of the Master Deed provides that the owners are not permitted to change or alter the "Common Elements" unless the plans and specifications are submitted and approved by Stonecrest COA in writing. (Supp. R. v. 2 p. 473). Section 8.14 of the Master Deed gives Stonecrest COA the power to promulgate rules and regulations governing the entire property. (Supp. R. v. 2 p. 473).

C. The community's bylaws also give Stonecrest COA sole authority, control over, and the obligation to maintain the "Common Elements."

The bylaws attached as Exhibit F to the Master Deed contain provisions similar to that of the Master Deed. Article V, Section 5.13 of the bylaws states that the powers and duties of the executive board shall include:

(a) Operation, care, upkeep and maintenance of the Common Elements to the extent such operation, care and upkeep and maintenance is not the obligation of the Owners.

* * *

(d) Adoption of the rules and regulations covering the details of the operation, maintenance, repair, replacement, use and modification of the Common Elements.

(Supp. R. v. 2 p. 521). Article VIII, Section 8.8 of the bylaws reiterates that:

> Except as is specifically provided in the Master Deed, all maintenance, repairs and replacements to the Common Elements (unless necessitated by the negligence, misuse or neglect of an Owner, in which case such expense shall be charged to and paid by such Owner), shall be made by the Executive Board.

(Supp. R. v. 2 p. 528).

D. The term "Unit Common Element" is not a valid or recognized term.

As demonstrated above, the Master Deed and bylaws have specific definitions and very clear lines of maintenance and authority between the "Unit" and the "Common Elements." There is no such animal as a "unit common element" that would encompass the building envelopes. The Appellants make the following argument/statement at pages 10-11 of their brief without any factual or legal support:

> Appellants do not, as a 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 whom Plaintiffs did not file against.
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> * * *
>
> Appellants respectfully seek reversal of the portion of the 1/23/13 trial court order dismissing Plaintiffs' exterior claims against the developer FPG and Stonecrest LLC as part of the settlement, and restoring Plaintiffs' damage claims against these entities. Distinguished from earlier court analysis under Pulliam v. MUI,[3] appellants assert that the parties' claims for relief were inapposite, separate, distinct and implicated disputed ownership **as to unit common elements, particularly those comprising the building envelope of Plaintiffs' homes.**

(Emphasis added). The Appellants also argue: "Unit exterior envelope common elements are owned by the individual owners, irrespective of the common elements at large." Brief

[3] Pulliam is another state court case presided over by Judge Hayes and referenced in a prior Order entered by Judge Hayes.

of Appellants at 14. Appellants further contend that their building envelopes constitute "unique individual property damage." Id. The Appellants make another statement that "Noteworthy is that plaintiffs did not file suit to *repair* the community common elements, nor the common areas at large. . . . The settlement procured by the COA is for *costs of repair.*" Brief of Appellants at 17 (emphasis in original). Finally, the Appellants make the statements that the Circuit Court "failed to view the common element ownership pertinent to Plaintiffs' building envelopes in a light most favorable to non-movants" and that "the physical common elements comprising a home belong to an owner." Brief of Appellants at 41-42.

The Appellants are simply wrong. The concepts advanced by the Appellants do not exist in the law, the Master Deed, or any other document. There is nothing identified as "common areas at large," "unit common areas," or "common element ownership pertinent to Plaintiff's building envelopes." The definitions are clear. There exist only "Units," "Common Elements," and "Limited Common Elements." The "building envelope" is clearly a "Common Element" and is not assigned to any particular owner or unit. The building envelope is maintained and controlled by Stonecrest COA. The individual owners all have an "undivided interest" in the "Common Elements," which would make it impossible for the Appellants to seek damages or make repairs to the building envelope and only affect his or her "interest." The status of the "Common Elements" and the ownership and control thereof is undisputed. Therefore, there is nothing to view "most favorable to plaintiffs."

III. SOUTH CAROLINA CASE LAW SPECIFICALLY RECOGNIZES THAT ASSOCIATIONS CAN RECOVER DAMAGES FOR COMMON ELEMENTS.

South Carolina courts have held that Stonecrest COA may recover damages for construction defects in common elements of the condominium project. In Queen's Grant, the Supreme Court held:

> A property regime has standing to bring an action for construction defects in common elements that the regime has the duty to maintain. In this case, the master deeds and the by-laws incorporated therein show that the Regime has the obligation to maintain the common elements. Should the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements which it maintains, it may be held liable to the homeowners for its omissions.

286 S.C. at 556, 335 S.E.2d at 366 (citations omitted). In Pope v. Heritage Communities, Inc., 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011), the plaintiff property owners association brought suit against the defendant developers seeking damages for construction defects. The actual condominium owners, Tony and Lynne Pope, brought the action individually and as a class, seeking damages for loss of use of their property during the estimated repair period. A jury returned a verdict for the association in the amount of $43.25 million in actual damages and $250,000 in punitive damages. The jury awarded the owners $250,000 in actual damages and $750,000 in punitive damages.

On appeal, this Court affirmed the trial court's grant of a directed verdict in favor of the association on duty, breach, and proximate cause. Id. at 416, 717 S.E.2d at 771. The only dispute at trial was the amount of damages. The trial court charged the jury: "As to the class action lawsuit . . . you must determine the nature and extent of any damages suffered by the unit owners for the loss of use of the condominiums during any repairs." Id. This Court held that the jury charge was substantially correct.

Another issue on appeal in Pope was the proper certification of the class on the issue of loss of use. This Court upheld the certification because all of the owners, regardless of the manner of their use, would be excluded from the property for four months. Therefore, the claims were typical of claims of all owners. Id. at 422, 717 S.E.2d at 774. No owner was awarded or attempted to recover damages for construction defects to the common elements.

Consistent with Pope, the court in Magnolia North Property Owners' Association, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012), affirmed a jury verdict in favor of a property owners' association in a construction defect action arising out of the construction of a condominium complex. The association filed an action against the defendants alleging defects in the construction of the condominium, including negligence, breach of express warranty, breach of the warranty of workmanlike service, and breach of fiduciary duty. The association asserted damages to the condominium building and common elements. This Court quoted from the case of Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp., 349 S.C. 251, 562 S.E.2d 633 (2002), in which the Supreme Court held:

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

Magnolia North, 397 S.C. at 375-76, 725 S.E.2d at 127 (quoting Concerned Dune West Residents, 349 S.C. at 260, 562 S.E.2d at 638). This Court upheld a verdict for $6.5

million in actual damages and $2 million in punitive damages and held that the estimate for repair costs were properly included.

The Appellants may attempt to rely on Beachwalk Villas Condominium Association, Inc.. v. Richard E. Martin and Associates, 305 S.C. 144, 406 S.E.2d 372 (1991), for their assertion that the owners, rather than Stonecrest COA, may recover damages for the repair and maintenance of the common elements. However, Beachwalk Villas merely confirmed that owners could bring a cause of action. It does not discuss or imply that the damages resulting from such a cause of action could relate to the common elements, instead of the damages that would be personal to the unit owners. Beachwalk Villas is completely consistent with the other cases discussed herein in that it permits a cause of action against an architect even though there is no privity of contract between the architect and the owners.

IV. STONECREST COA'S INTEREST IN THE COMMON ELEMENTS IS SUPERIOR AND COMPLETE BECAUSE STONECREST COA REPRESENTS ALL THE OWNERS AND IS THE ONLY ENTITY THAT CAN MAKE THE NECESSARY REPAIRS TO THE BUILDING ENVELOPE.

Because Stonecrest COA is obligated to maintain and repair the common elements, it is the proper party to pursue claims involving the construction and development of the community's common elements. Stonecrest COA's interest is complete and superior to an individual owner's claims because (1) the individual owner only owns a percentage interest in the common elements; (2) the individual owner, while owning an undivided percentage, is *not* responsible for making repairs to the common elements; and (3) the Master Deed and bylaws legally prevent an individual owner from making repairs to the common elements. The Horizontal Property Act supports the

conclusion that Stonecrest COA is the only party that can obtain a complete recovery for damage to the community's common elements. The language of the Act supports the organized approach to litigation, which is spearheaded by the various regimes pursuant to the regime documents and on behalf of the regime owners/members. This finding is consistent with the number of jurisdictions holding that the condominium association has the right to pursue claims relating to the areas for which it is duty bound to repair. See, e.g., Queens Grant, 286 S.C. at 556, 335 S.E.2d at 366 ("Should the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements which it maintains, it may be liable to the homeowners for its omissions."); Murphy v. Yacht Cove Homeowners Ass'n, 289 S.C. 367, 369, 345 S.E.2d 709, 710 (1986) (same as Queens Grant); Siller v. Hartz Mountain Assocs., 461 A.2d 568, 573 (N.J. 1983) ("So long as [a regime] carries out those functions and duties, the unit owners may not pursue individual claims for damages to or defects in the common elements predicated upon their tenant in common interest."); Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, Inc., 29 A.3d 604, 614 (Md. Ct. App. 2011) ("The duty to maintain, repair and replace the Common Elements, together with the exclusive right to initiate litigation regarding the Common Elements, creates a concomitant obligation on the part of the [COA] to pursue recovery from the [developers] on behalf of appellants for damage to the Common Elements").

Stonecrest COA is not arguing that the Appellants cannot maintain an action, but simply that unit owners cannot recover damages for which they are not responsible. Stonecrest COA, to the exclusion of all owners, is the only entity with the obligation and authority to repair 100% of the common elements. The owners own a small, undivided

portion of the common elements and do not have the obligation or authority to make repairs to any part of the common elements. The "rights" of Stonecrest COA make it the proper party under the facts of this case to seek a complete recovery for any damages to the common elements caused by the Fankhauser Defendants. As noted in Queens Grant, Stonecrest COA would, in fact, be responsible to the owners if it did not pursue recovery for construction defects. See also Roland v. Heritage Litchfield, Inc., 372 S.C. 161, 167, 641 S.E.2d 465 (Ct. App. 2007) (no evidence right of enforcement was with association and association was not pursuing claims on behalf of the owners).[4]

V. THE APPELLANTS' RELIANCE ON "FIRST IN TIME," "SUPERIOR CLAIM," AND "STATUTORY DEMAND" CONCEPTS IS ERRONEOUS AND INAPPLICABLE IN THIS CONTEXT.

The Appellants argue they should receive some benefit from having been the first to file a lawsuit against the developer. This concept was properly rejected by the Circuit Court because it is inapplicable and ignores the actual procedural history of this case. The Appellants filed suit against the developer and Stonecrest COA. Thereafter, Stonecrest COA filed cross-claims and third-party claims against the Fankhauser Defendants. So long as claims are brought within the applicable statute of limitations, the order in which they are filed has no relevance on the ability to obtain a judgment.

The case relied upon by the Appellants for their "first in time" argument further demonstrates that this concept is inapplicable. Appellants cite to Powers v. Fidelity & Deposit Co. of Maryland, 180 S.C. 501, 186 S.E. 523 (1936), for the proposition that their claims for exterior damages are superior to Stonecrest COA's claims because they filed first. Appellants fail to note that in Powers, the Supreme Court made a

[4] The Defendant in Roland erroneously argued that the condominium association was the "owner" of the common elements and there was no evidence presented regarding the Master Deed or obligations to repair.

determination of which *judgment creditors* had superiority to make a claim under a bond. In the course of its analysis, the court recognized that the key issue was the superiority of the lien, which would establish the order of payment. The court stated:

> Corpus Juris lays down the rule as follows: "Priority in Time: As to both legal and equitable liens, it is a well established rule, in the absence of statutory regulations to the contrary that a lien which is prior in time gives a prior claim and is entitled to satisfaction out of the subject matter it binds, before other subsequent liens binding the same property. Thus as a general rule in equity, if the liens are equal in all other respects the one prior in time will prevail." See 37 C. J, § 40, 328.

186 S.E. at 527. Judgment lien and creditor law is not applicable in this case and the Circuit Court properly recognized that the Appellants' argument is basically "we got to the courthouse first," which presupposes that one must litigate to settle a claim. (Supp. R. v. 2 p. 375).

In the same vein, the Appellants make much of the fact that they made a "statutory demand" on Stonecrest COA to file suit. However, such a "statutory demand" only has meaning if the Appellants seek to bring suit *derivatively in the name of the corporation*, i.e. Stonecrest COA. At no time have the Appellants brought or attempted to bring a derivative action in the name of Stonecrest COA. Therefore, their purported "statutory demand" is not relevant in this context. See Carolina First Corp. v. Whittle, 343 S.C. 176, 187, 539 S.E.2d 402, 408 (Ct. App. 2000). In Whittle, this Court explained that the demand requirement of Rule 23 balances a shareholder's right to assert a derivative claim against a board's decision of whether to invest the resources of the corporation in the pursuit of the corporate wrong. Id. ("Whether a corporation should bring a lawsuit is a business decision, and the directors are, under the laws of every state, responsible for the conduct of the corporation's business, including the decision to litigate.") (quoting RCM Sec. Fund, Inc. v. Stanton, 928 F.2d 1318, 1326 (2d Cir 1991)).

See also Houle v. Low, 556 N.E.2d 51, 57 (Mass. 1990) ("Our cases have long recognized that the question whether a corporation should pursue a given lawsuit involves factors other than the merits of the claim. It is often a question of business policy.").[5]

ARGUMENTS AS TO APRIL 5, 2013 ORDER

I. THE CIRCUIT COURT CORRECTLY HELD THAT STONECREST COA'S CONDUCT WAS REASONABLE AND IS PROTECTED BY THE BUSINESS JUDGMENT RULE.

Though the Amended Complaint spans 36 single-spaced pages and asserts twelve causes of action against Stonecrest COA, the Appellants' theory of liability boils down to this: Stonecrest COA has violated its obligations under the Master Deed and its bylaws to maintain and repair the community's common elements. These allegations are primarily based upon the following sections of the Master Deed:

- The Statement of Purpose, which states, in part: "Declarant has deemed it desirable to create a nonprofit, incorporated owners' association which will be delegated and assigned powers of maintaining and administering the Common Areas and facilities on the Property[.]"(Supp. R. v. 2 p. 461).

- Section 5.4(a), which states, in part: "The Association shall be responsible for the maintenance and repair of all Common Elements, including the Limited Common Elements[.]"(Supp. R. v. 2 p. 467).

- Section 13.1, which states, in part: "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[.]"(Supp. R. v. 2 p. 481).

[5] The Appellants also assert the Circuit Court's holding "ignores equitable principals that aid the vigilant and erroneously permits parties that slumber on their rights priority." This statement, albeit incorrect, is irrelevant to the legal analysis.

In the April 5 Order, the Circuit Court found that Stonecrest COA has not violated these provisions (or other potentially relevant provisions of the Master Deed and bylaws), finding instead that "it is clear from the record that Stonecrest COA acted as quickly and efficiently as possible to pursue and obtain a monetary recovery from the parties it believed were actually responsible for the state of the common elements in order to finance the necessary repairs." (Supp. R. v. 2 p. 418). This finding was based on Stonecrest COA's decision to raise the funds needed to repair the community's common elements not by imposing a large special assessment on all community owners, but by pursuing and, ultimately, recovering a multi-million dollar, settlement from the community's general contractor and developer pursuant to the holding of Concerned Dunes that "developers are held responsible for the condition of the common areas at the time these areas are deeded to the POA." 349 S.C. at 259-60, 562 S.E.2d at 638. (Supp. R. v. 2 pp. 418-419). Accordingly, the Circuit Court held that Stonecrest COA's conduct was "an unquestionably reasonable exercise of corporate discretion" and that it is "protected by the business judgment rule and entitled to judicial deference." (Supp. R. v. 2 p. 422).

The Circuit Court did not err by so holding. It is a well-recognized and long-established principle that courts "will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct. App. 2000) (citations and quotations omitted). See also Dockside Ass'n, Inc. v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) ("[T]he business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a

lack of good faith, fraud, self-dealing or unconscionable conduct."). "[T]he burden of proving good faith is not on the governing board; *the burden of proving a lack of good faith is borne, rather, by those challenging the board's actions.*" Detyens, 294 S.C. at 87, 362 S.E.2d at 874 (emphasis added). However, the Appellants failed to produce any evidence of bad faith on the part of Stonecrest COA.[6] Accordingly, the Circuit Court was correct to hold that Stonecrest COA's decision to abstain from imposing a huge special assessment on the community owners in favor of pursuing and recovering a multi-million dollar settlement is protected by the business judgment rule and entitled to judicial deference. See, e.g., Goddard v. Fairways Dev. Gen. P'ship, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (holding that that a decision by the directors of a

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[6] In fact, the evidence is to the contrary. The following deposition testimony regarding Stonecrest COA's board members is illustrative.

> Q. Do you know Mr. Moscowitz?
>
> A. I know who he is, yes.
>
> Q. Would you know him if you saw him walk in?
>
> A. Absolutely.
>
> Q. And what about Dave Cook?
>
> A. I know Dave Cook.
>
> Q. And Ms. [Paulette] Iadanza?
>
> A. I do.
>
> Q. Do you have any -- well, let me ask you, is this a volunteer position that they have, or are they paid?
>
> A. I would not think they would be paid.
>
> Q. Do you fault any of those three individuals for anything they have done as board members for the HOA?
>
> A. I don't know anything that they've done. I think they're in the middle of a maelstrom, can't escape from it.

(Supp. R. v. 5 p. 1220, l. 10 – p. 1221, l. 3).

homeowners' association not to raise assessments for the purpose of repairing common elements was protected by the business judgment rule). See also Master Deed § 11.3 ("Failure of the Executive Board to exercise its authority under this section [to impose discretionary assessments] shall not be grounds for any action against the Association or the Executive Board[.]") (Supp. R. v. 2 p. 479).

In their brief, the Appellants make two arguments against the Circuit Court's application of the business judgment rule. First, the Appellants argue the Circuit Court failed to properly consider the alleged "amalgamation" of Stonecrest COA and the Fankhauser Defendants prior to the transition of Stonecrest COA to community control on July 1, 2010, citing S.C. Code Ann. § 33-8-300(c). In essence, they seek to transform Stonecrest COA into another Fankhauser Defendant based on the alleged pre-transition conduct of one of its former officers, Brock Fankhauser. However, Section 33-8-300(c) does not support a recovery against Stonecrest COA. It concerns the good faith obligations of individual directors of for-profit corporations. Assuming the Appellants intended to reference a similar provision in the Nonprofit Corporation Act, S.C. Code Ann. § 33-31-842(c), that section likewise concerns the good faith obligations of individual officers, not the corporate entity. See, e.g., S.C. Code Ann. § 33-31-842(e) (establishing a statute of limitations for actions against "an officer"). Moreover, the Appellants have not brought a cause of action for the alleged violation of either section. And in any event, Mr. Fankhauser and his corporate entities are already Defendants in this action. The Appellants have not established—and cannot establish—any legal basis for their attempt to reach into the pockets of their fellow community owners (who

collectively make up Stonecrest COA) based on the alleged pre-transition conduct of parties against whom they already have pending claims.

The Appellants' second argument against the application of the business judgment rule is that the Circuit Court employed the incorrect definition of the word "accident" in defining the term "casualty" as it is used in Section 13.1 of the Master Deed. The Appellants have long made the misguided argument that Section 13.1, which requires Stonecrest COA to restore and replace buildings damaged or destroyed by "fire or other casualty," to repair construction defects in the common elements. However, it clearly does nothing of the sort. The Appellants can cite no authority indicating that the term "casualty," which is typically used in the insurance context, encompasses construction defects. As the Supreme Court of the United States has opined, "[a]n accident or casualty, according to common understanding, . . . may be properly said to occur *by chance* and unexpectedly." Chicago, St. L. & N.O.R. Co. v. Pullman S. Car Co., 139 U.S. 79, 86 (1891) (emphasis added). Construction defects do not happen by chance. Moreover, rules of construction dictate that the general term "casualty" in the phrase "fire or other casualty" should be interpreted in light of the specific term "fire." Cf. Sheppard v. City of Orangeburg, 314 S.C. 240, 243, 442 S.E.2d 601, 603 (1994) ("When the Legislature uses words of particular and specific meaning followed by general words, the general words are construed to embrace only persons or things of the same general kind or class as those enumerated."). Accordingly, the term "casualty," as it is used in Section 13.1 of the Master Deed, must be construed to refer to hailstorms, high winds, lightning strikes, earthquakes, etc., and not to construction defects.

Even if Section 13.1 did impose an obligation on Stonecrest COA to repair construction defects in the common elements—it does not—the fact remains, as previously discussed, that there were only two ways for Stonecrest COA to finance the necessary repairs: impose a large special assessment on the community owners or pursue a recovery from the Fankhauser Defendants. Choosing the latter was, as the Circuit Court correctly ruled, "an unquestionably reasonable exercise of corporate discretion" and should not be second-guessed by the courts.

Accordingly, the Circuit Court correctly applied the business judgment rule and the April 5 Order should be affirmed.

II. ADDITIONAL GROUNDS EXIST FOR SUSTAINING THE APRIL 5 ORDER.

Even though the business judgment rule requires the affirmance of the April 5 Order, there are several other reasons why it should be affirmed. See Rule 208(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)."); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (holding that "a respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling").

A. The Circuit Court's ruling that the Appellants have not properly pled and cannot establish the elements of their causes of action as against Stonecrest COA is the law of the case.

In the April 5 Order, the Circuit Court found that Stonecrest COA is entitled to summary judgment on two separate and independent grounds. In Section I of the April 5

Order, the Circuit Court found that Stonecrest COA is entitled to summary judgment based on the business judgment rule. (Supp. R. v. 2 pp. 417-422). The Appellants have challenged that ruling on appeal. However, the Appellants have not challenged Section II of the April 5 Order, in which the Circuit Court found that Stonecrest COA is entitled to summary judgment due the Appellants' failure to properly plead and establish their causes of action as against Stonecrest COA. (Supp. R. v. 2 pp. 422-439). None of the Appellants' "Questions Presented" address that aspect of the April 5 Order and there is no argument in their brief against that aspect of the April 5 Order. Accordingly, Section II of the April 5 Order is the law of the case. Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); Burris v. Propst Lumber & Logging, Inc., 396 S.C. 85, 96, 719 S.E.2d 695, 701 (Ct. App. 2011) ("[T]his specific point is not listed in the Statement of Issues on Appeal. Therefore, the court need not address it."); Allen v. Pinnacle Healthcare Sys., LLC, 394 S.C. 268, 277, 715 S.E.2d 362, 367 (Ct. App. 2011) ("[T]his issue was not included in Appellant's sole statement of the issue on appeal. Therefore, we need not address this argument on the merits."); Austin v. Specialty Transp. Servs., Inc., 358 S.C. 298, 320, 594 S.E.2d 867, 878 (Ct. App. 2004) ("A portion of a judgment that is not appealed presents no issue for determination by the reviewing court and constitutes, rightly or wrongly, the law of the case."); State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003) ("No point will be considered which is not set forth in the statement of issues on appeal."); Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 398, 593 S.E.2d 183, 189 (Ct. App. 2004) ("Any unappealed portion of the trial court's judgment is the law of the case, and must therefore be affirmed."); Matter of Morrison, 321 S.C. 370,

372, 468 S.E.2d 651, 652 n.2 (1996) ("This ruling is the law of the case since it is not contested on appeal."); Nat'l Grange Mut. Ins. Co. v. Firemen's Ins. Co. of Newark, N.J., 310 S.C. 116, 121, 425 S.E.2d 754, 758 n.5 (Ct. App. 1992) ("The unappealed portion of a lower court's judgment presents no issue for review by this court and becomes the law of the case."). Because Section II of the April 5 Order is the law of the case, and because it found Stonecrest COA is entitled to summary judgment even absent application of the business judgment rule, summary judgment for Stonecrest COA must be affirmed regardless of how the Court rules on Section I of the April 5 Order.

B. The Appellants have not properly pled and cannot establish the elements of their causes of action as against Stonecrest COA.

The Appellants' failure to properly plead and/or establish their causes of action is a further additional sustaining ground. As shown below, each and every cause of action asserted in the Amended Complaint is legally deficient and/or clearly unsupported by record evidence.[7]

(i) Breach of Fiduciary Duty (third cause of action).

"To establish a claim for breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant." RFT Mgmt. Co. v. Tinsley & Adams L.L.P., 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012). The Appellants have not properly pled and cannot establish these elements as against Stonecrest COA.

[7] Because the Appellants filed suit as individuals rather than as a class, each individual Appellant must personally establish every element of every cause of cause of action asserted in the Amended Complaint.

Throughout this case, the Appellants have asserted that Stonecrest COA owes them a fiduciary duty to repair the community's common elements on demand and without regard to whether Stonecrest COA has the financial resources to do so. However, a fiduciary relationship is unique and exists only "when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." Ellis v. Davidson, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004). Moreover, the defendant in a breach of fiduciary duty case must have "actually accepted or induced the confidence placed in him" because "a fiduciary relationship cannot be established by the unilateral action of one party." Steele v. Victory Sav. Bank, 295 S.C. 290, 295, 368 S.E.2d 91, 94 (Ct. App. 1988). In this case, the Amended Complaint's breach of fiduciary duty cause of action does not allege the Appellants placed *any* trust in Stonecrest COA, much less *special* trust, nor does it allege that Stonecrest COA accepted or induced any confidence the Appellants may have placed in it. Nevertheless, even if the Amended Complaint properly alleged the existence of a fiduciary relationship, the Appellants could not satisfy their burden of proof because no South Carolina court has ever found that a homeowners' association owes a fiduciary duty to its members.[8] Cf. O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 632 (1992) ("We have never imposed the high standard of fiduciary duty on planned community organizations[.]"). Moreover, the record in this case, which is extensive, is wholly devoid of any evidence that the Appellants placed special trust in Stonecrest COA or that Stonecrest COA accepted or

[8] The only fiduciary duty even potentially recognized in the homeowners' association context is a duty to assess. In Goddard, the court implied the existence of a duty to assess to make repairs to maintain common areas but found that, in light of the owners' desire to keep assessments low, the decision by the association's directors not to raise assessments was protected by the business judgment rule. 310 S.C. at 414, 426 S.E.2d at 832. In this case, the Appellants have not pled a failure to assess.

induced any such trust. Moreover, as in Goddard, even if Stonecrest COA owes a fiduciary duty to the Appellants, it has not violated that duty by declining to impose a large special assessment on its members and instead electing to pursue settlement of its claims against the Fankhauser Defendants.

(ii) Breach of Contract (fourth cause of action)

In a breach of contract action, "the burden [is] upon the [plaintiff] to prove the contract, its breach, and the damages caused by such breach." Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). The Appellants have not properly pled and cannot establish these elements as against Stonecrest COA.

The only contract referenced in the breach of contract cause of action is the Franchise Agreement between Epcon Communities Franchising, Inc. and Fankhauser Property Group, Inc. (Supp. R. v. 3 p. 700, ¶ 1). The Appellants allege they are intended third-party beneficiaries of that agreement. (Supp. R. v. 3 p. 700, ¶ 2). Even if that were true, Stonecrest COA was not a party to the franchise agreement and cannot be held liable for its alleged breach.

To the extent the Appellants claim that either the community's Master Deed or Stonecrest COA's bylaws constitute a "contract" between them and Stonecrest COA, Stonecrest COA first notes that the Amended Complaint does not so allege. Secondly, neither the Master Deed nor the bylaws are "contracts" in the legal sense. "The necessary elements of a contract are an offer, acceptance, and valuable consideration." Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 406, 581 S.E.2d 161, 166 (2003). Neither document contains an "offer"[9] by Stonecrest COA which was accepted by the Appellants

[9] "A valid offer identifies the bargained for exchange and creates a power of acceptance in the offeree." Id. at 406, 581 S.E.2d at 166 (citations and quotations omitted).

(or vice versa). Rather, the Master Deed simply "creat[ed] and establish[ed] the horizontal property regime," S.C. Code Ann. § 27-31-100, while the bylaws are merely a governing document setting forth how Stonecrest COA is to be regulated and managed. S.C. Code Ann. § 33-31-206. Moreover, because both documents are statutorily mandated, and because they imposed obligations on Stonecrest COA before any of the Appellants purchased their units, they are not supported by valuable consideration. See, e.g., McLeod v. Sandy Island Corp., 265 S.C. 1, 11, 216 S.E.2d 746, 750 (1975) ("The authorities are clear that an agreement to do that which one is already legally bound to do is not sufficient consideration to support a contract."). Thirdly, to the extent either document can be considered a "contract," neither can be the basis for a breach of contract cause of action against Stonecrest COA because neither document is signed by or on behalf of Stonecrest COA. See S.C. Code Ann. § 32-3-10.

Even if the Master Deed or the bylaws could be the basis for a breach of contract claim by the Plaintiffs against Stonecrest COA, there is no record evidence that Stonecrest COA has violated those documents. Stonecrest COA did the only thing it reasonably could do in the circumstances: pursue and obtain a monetary recovery from the Fankhauser Defendants. Its decision to do so is protected by the business judgment rule.

(iii) Breach of Contract Accompanied by Fraudulent Acts (fifth cause of action)

"In order to recover for breach of contract accompanied by a fraudulent act, a plaintiff must establish: (1) a breach of contract; (2) that the breach was accomplished with a fraudulent intention, and (3) that the breach was accompanied by a fraudulent act." Minter v. GOCT, Inc., 322 S.C. 525, 529-30, 473 S.E.2d 67, 70 (Ct. App. 1996). The

Appellants have not properly pled and cannot establish these elements as against Stonecrest COA.

"Having a contract is a prerequisite to proving breach of contract accompanied by a fraudulent act." Armstrong v. Collins, 366 S.C. 204, 223, 621 S.E.2d 368, 377 (Ct. App. 2005). Accordingly, because there was no contract between the Appellants and Stonecrest COA, this cause of action fails at the outset for the reasons set forth above.

Even if a contract existed between the Appellants and Stonecrest COA, the Appellants cannot prevail on this cause of action because they have not alleged and cannot establish the requisite fraudulent intent on the part of Stonecrest COA or a fraudulent act accompanying the alleged breach. Critically, the alleged fraudulent act must be "separate and distinct from the act(s) constituting the breach," Smith v. Canal Ins. Co., 275 S.C. 256, 260, 269 S.E.2d 348, 350 (1980), and must relate "to the breaching of the contract and not merely to its making." Ball v. Canadian Am. Express Co., 314 S.C. 272, 276, 442 S.E.2d 620, 623 (Ct. App. 1994). Yet the Amended Complaint merely recites a number of alleged acts—most of which did not involve Stonecrest COA—that occurred prior to the Appellants' purchases of their units. Moreover, as in Minter, there is "no evidence of an independent fraudulent act which accompanied the [alleged] breach." 322 S.C. at 530, 473 S.E.2d at 70.

(iv) Fraud and Misrepresentation (sixth cause of action)

To prove fraud, a plaintiff must show: "(1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the

hearer's consequent and proximate injury." Robertson v. First Union Nat'l Bank, 350 S.C. 339, 347-48, 565 S.E.2d 309, 313-14 (Ct. App. 2002) (citations and quotations omitted). All nine elements must be established by "clear, cogent, and convincing evidence[.]" Id. at 348, 565 S.E.2d at 314 (citations and quotations omitted). The Appellants have not properly pled and cannot establish these elements as against Stonecrest COA, much less by "clear, cogent, and convincing evidence."

The first defect in the Appellants' fraud cause of action is that the elements are not pled with the particularity required by Rule 9(b), SCRCP. That rule provides, in pertinent part: "In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." However, the Amended Complaint does not specifically allege any fraudulent representations allegedly made by Stonecrest COA. Rule 9(b) clearly contemplates specific, particular allegations regarding what was said (or not said) and by whom. The Appellants' failure to specify the particular misrepresentations made by Stonecrest COA which allegedly rise to the level of fraud is fatal to this cause of action.

The second defect in this cause of action is that there is no evidence in the record, to say nothing of "clear and convincing evidence," that Stonecrest COA made *any* material representation to the Appellants, much less with knowledge of the representation's falsity. "To be actionable, the representation must relate to a present or pre-existing fact and be false when made. Representations based on statements as to future events or unfulfilled promises are not usually actionable." Sauner, 354 S.C. at 408, 581 S.E.2d at 167 (internal citations and quotations omitted). Yet the Appellants cannot point to any statement (or nondisclosure) made by Stonecrest COA that Stonecrest COA

knew was false at the time it was made. Stonecrest COA was not the seller of the Plaintiffs' units and thus had no duty of disclosure. To the extent the Appellants assert Stonecrest COA has fraudulently failed to maintain the common elements, they have conflated breach of contract with fraud. "[M]ere breach of contract does not constitute fraud." Adams v. G.J. Creel & Sons, Inc., 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995).

(v) Conversion (eighth cause of action)

"Conversion is the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of the condition or the exclusion of the owner's rights. To establish the tort of conversion, it is essential that the plaintiff establish either title to or right to the possession of the personal property." Regions Bank v. Schmauch, 354 S.C. 648, 667, 582 S.E.2d 432, 442 (Ct. App. 2003) (citations and quotations omitted). "To prevail in an action for conversion, the plaintiff must prove either title or right to possession of the property at the time of the alleged conversion." Richardson's Rests., Inc. v. Nat'l Bank of S.C., 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct. App. 1991). The Appellants have not properly pled and cannot establish these elements as against Stonecrest COA.

This cause of action is apparently based on alleged "overpayments" by Stonecrest COA to the so-called "master association." However, there is no record evidence of any intentional overpayments. Stonecrest COA board member Lou Moscowitz testified that Stonecrest COA was previously over-invoiced by the master association. (Supp. R. v. 5 p. 1233, l. 5-8). As a result, Stonecrest COA has, for the past several years, been withholding payments to the master association until the issue is resolved. (Supp. R. v. 5 p. 1232, l. 21 – p. 1233, l. 2). The dispute may eventually be settled via litigation, but

any recovery will belong to Stonecrest COA, not the Plaintiffs. See Ward v. Griffin, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988) (holding that where misconduct results in a loss to a corporation rather than any particular stockholder, the cause of action belongs to the corporation). Moreover, conversion cannot arise where there is only a disputed claim and not an unquestionable and immediate right to payment. Owens v. Zippy Mart of S.C., Inc., 268 S.C. 383, 386, 234 S.E.2d 217, 218 (1977).

This cause of action suffers from further deficiencies. First, there is no record evidence that Stonecrest COA took property to which the Appellants had either title or right and converted it to its own use. Second, in order to recover, each individual Appellant must establish a specific, identifiable fund that Stonecrest COA is obligated to deliver to him or her. See, e.g., Richardson's Rests., 304 S.C. at 294, 403 S.E.2d at 672 ("There can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff."). No Appellant has done so. Third, because all funds obtained by Stonecrest COA from the Appellants were pursuant to Stonecrest COA's authority to levy and collect assessments from the community owners, this cause of action must fail because "conversion is a wrongful act" which "cannot arise from the exercise of a legal right." Castell v. Stephenson Fin. Co., 244 S.C. 45, 51, 135 S.E.2d 311, 313 (1964). Fourth, because Stonecrest COA lawfully collected assessments from the Appellants, a demand by the Appellants for the return of specified funds and a refusal by Stonecrest COA were required to transform Stonecrest COA's possession of the funds into a potentially wrongful act. See, e.g., Roberts v. James, 158 S.E. 689, 691 (S.C. 1931) ("[P]ossession must first be transformed into a wrongful one by a refusal to surrender the property. Hence, demand and refusal are necessary for the maintenance of

trover in all cases in which the defendant was rightfully in possession."). The Appellants have never made such a demand.

(vi) Civil Conspiracy (ninth cause of action)

"The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages." Pye v. Estate of Fox, 369 S.C. 555, 566-67, 633 S.E.2d 505, 511 (2006). "The 'essential consideration' in civil conspiracy is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." Id. at 567, 633 S.E.2d at 511 (citations and quotations omitted). "In order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." Id. (citations and quotations omitted). The Appellants have not properly pled and cannot establish these elements as against Stonecrest COA.

"In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint[.]" Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115-16, 682 S.E.2d 871, 875 (Ct. App. 2009). "[T]he failure to properly plead such acts will merit the dismissal of the claim." Id. at 116, 682 S.E.2d at 875. However, as set forth below, the Appellants' civil conspiracy claim does little more than reallege the acts complained of in the other causes of action.

- Paragraph 1 of the civil conspiracy claim (Supp. R. v. 3 p. 712) contains boilerplate language incorporating prior allegations.

- The allegation in paragraph 2 of the civil conspiracy claim (Supp. R. v. 3 p. 712) that Brock Fankhauser engaged in unauthorized private loans is also found at Supp. R. v. 3 p. 695, ¶ 19; Supp. R. v. 3 p. 696, ¶ 22(k); Supp. R. v. 3 p. 697, ¶ 6; Supp. R. v. 3 p. 699, ¶ 9; Supp. R. v. 3 p. 702, ¶4(k); Supp. R. v. 3 p. 709, ¶¶ 25 and 30; Supp. R. v. 3 p. 710, ¶ 2; Supp. R. v. 3 p. 711, ¶ 8; Supp. R. v. 3 p. 720, ¶ 13(c); and Supp. R. v. 3 p. 723, ¶ 8(c) and (e).

- The allegation in paragraph 3 (Supp. R. v. 3 p. 712) of the civil conspiracy claim that the Defendants depleted Stonecrest COA's reserves is also found at Supp. R. v. 3 p. 699, ¶ 13; Supp. R. v. 3 p. 710, ¶ 4; and Supp. R. v. 3 p. 711, ¶ 6.

- The allegation in paragraph 4 (Supp. R. v. 3 p. 712) of the civil conspiracy claim that the Defendants utilized assessments for improper purposes is also found at Supp. R. v. 3 p. 699, ¶ 12; Supp. R. v. 3 p. 709, ¶ 25; Supp. R. v. 3 p. 710, ¶¶ 2 and 4; Supp. R. v. 3 p. 711, ¶ 4; Supp. R. v. 3 p. 720, ¶ 13(c); and Supp. R. v. 3 p. 723, ¶ 8(e).

- The allegation in paragraph 5 (Supp. R. v. 3 p. 712) of the civil conspiracy claim that Stonecrest COA failed to make repairs is also found at Supp. R. v. 3 p. 696, ¶ 22(g); Supp. R. v. 3 p. 699, ¶¶ 14-15; Supp. R. v. 3 p. 701, ¶ 4(c); Supp. R. v. 3 p. 702, ¶ 4(i); Supp. R. v. 3 p. 704, ¶ 10; Supp. R. v. 3 p. 705, ¶ 22; Supp. R. v. 3 p. 709, ¶ 24; Supp. R. v. 3 p. 711, ¶ 5; Supp. R. v. 3 p. 716, ¶ 6; and Supp. R. v. 3 p. 720, ¶ 12.

- The allegation in paragraph 6 (Supp. R. v. 3 p. 712) of the civil conspiracy claim that the Defendants have mismanaged reserves and assessments is also found at Supp. R. v. 3 p. 696, ¶ 22(i); Supp. R. v. 3 p. 700, ¶ 21; Supp. R. v. 3 p. 710, ¶ 31; and Supp. R. v. 3 p. 711, ¶ 6.

- The allegation in paragraph 7 (Supp. R. v. 3 p. 712) of the civil conspiracy claim that Brock Fankhauser repaired certain homes but not others is also found at Supp. R. v. 3 p. 698, ¶6; Supp. R. v. 3 p. 699, ¶¶ 16-17; Supp. R. v. 3 p. 700, ¶ 19; Supp. R. v. 3 p. 702, ¶ 4(h) and (j); Supp. R. v. 3 p. 704, ¶ 12; Supp. R. v. 3 p. 705, ¶ 22; and Supp. R. v. 3 p. 721, ¶ 13(h).

- Paragraphs 8-11 (Supp. R. v. 3 p. 712-13) of the civil conspiracy claim are conclusory statements of the elements of the cause of action.

Because the civil conspiracy cause of action is merely a repackaging of the allegations asserted in other causes of action with a new bow on top labeled "conspiracy," the Appellants, like the plaintiff in Kuznik, are "not entitled to maintain [their] conspiracy cause of action." 342 S.C. at 611, 538 S.E.2d at 31. "Where the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong." Id. at 610, 538 S.E.2d at 31 (quoting Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981)). See also Peoples Fed. Sav. & Loan Ass'n of S.C. v. Res. Planning Corp., 358 S.C. 460, 476, 596 S.E.2d 51, 59 (2004) ("A plaintiff cannot recover damages for a particular act or wrong and likewise recover on a conspiracy to do the act or wrong.").

The Amended Complaint also does not properly allege—and there is no record evidence establishing—special damages resulting from the alleged conspiracy. "A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff thereby causing him *special damage*." Future Group, II v. Nationsbank, 324 S.C. 89, 100, 478 S.E.2d 45, 50 (1996) (emphasis added). Damages resulting from civil conspiracy are called "special" because they must result from the combination/conspiracy above and beyond the damages which result from the underlying acts. See, e.g., Pye, 369 S.C. at 568, 633 S.E.2d at 511 ("Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action."). See also Hackworth, 385 S.C. at 117, 682 S.E.2d at 875 ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim

should be dismissed."). Though paragraph 9 of the civil conspiracy claim (Supp. R. v. 3 p. 712) contains the conclusory allegation that the Appellants "have incurred special damages," it does not specify what those damages are or how they resulted from the alleged conspiracy as opposed to the alleged underlying acts. Moreover, there is no evidence in the record establishing that the Appellants suffered damages specifically as a result of the alleged conspiracy. There is likewise no record evidence that Stonecrest COA combined with anyone else "for the purpose of injuring" the Appellants. The Appellants simply cannot establish that Stonecrest COA intended to cause them harm.

(vii) Breach of Express Warranty (tenth and fourteenth causes of action)[10]

In order to recover for breach of an express warranty, a plaintiff must prove three elements: (1) the existence of the warranty; (2) a breach of the warranty by the failure of the goods to conform to the warranted description; and (3) damages proximately caused by the breach. First State Sav. & Loan v. Phelps, 299 S.C. 441, 448, 385 S.E.2d 821, 825 (1989). The Appellants cannot establish the existence of an express warranty given by Stonecrest COA.

S.C. Code Ann. § 36-2-313 sets forth how express warranties are created. It states: "Express warranties *by the seller* are created as follows . . . ." S.C. Code Ann. § 36-2-313(1) (emphasis added). Stonecrest COA cannot possibly have given an express warranty under this section because it was not the "seller" of the Appellants' units. The term "seller" means "a person who sells or contracts to sell goods." S.C. Code Ann. § 36-2-103(1)(d). Stonecrest COA did not sell or contract to sell "goods"[11] to the Appellants

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[10] See note 2, *supra*.

[11] The term "goods" is defined as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be

and there is no record evidence to the contrary. The only party in this case which could even potentially have given an express warranty is the developer, Stonecrest Villas of Tega Cay, LLC.

(viii) Breach of Implied Warranty of Merchantability (eleventh cause of action)

S.C. Code Ann. § 36-2-314(1) sets forth how an implied warranty of merchantability is given. It states: "[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind." The Appellants cannot establish the existence of such a warranty given by Stonecrest COA.

As previously discussed, Stonecrest COA is not and was not a "seller" of "goods," and thus it could not possibly have given an implied warranty of merchantability. Moreover, Section 36-2-314(1) contains the additional requirement that, for this warranty to be implied, the "seller" must also be a "merchant." A "merchant" is "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill." S.C. Code Ann. § 36-2-104(1). It goes without saying that Stonecrest COA does not fall under this definition either.

To the extent the Appellants maintain this cause of action was intended to assert a claim for breach of the implied warranty of workmanlike service, such a cause of action

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paid, investment securities (Title 36, Chapter 8) and things in action. 'Goods' also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (§ 36-2-107)." S.C. Code Ann. § 36-2-105(1). This definition does not apply to real property, and thus Article 2 of the Uniform Commercial Code is wholly inapplicable in this case regardless of who the seller was.

is likewise inapplicable to Stonecrest COA. An implied warranty of workmanlike service provides that "in constructing a home, a builder warrants that the home is fit for its intended use as a dwelling, that the home was constructed in a workmanlike manner, and that the home is free of latent defects." Fields v. J. Haynes Waters Builders, Inc., 376 S.C. 545, 561, 658 S.E.2d 80, 88-89 (2008). Stonecrest COA is an owners' association, not a "builder" and it did not "construct" the Appellants' units, and there is no record evidence tending to show otherwise. Stonecrest COA did not give—indeed, it could not have given—a warranty of workmanlike service and thus cannot be held liable for a breach of such a warranty.

(ix) Breach of Implied Warranty of Fitness for a Particular Purpose (twelfth cause of action)

S.C. Code Ann. § 36-2-315 governs implied warranties of fitness for a particular purpose. It states: "Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section (§ 36-2-316) an implied warranty that the goods shall be fit for such purpose." Once again, the Appellants cannot establish the existence of such a warranty given by Stonecrest COA because Stonecrest COA is not and was not a "seller" of "goods" and could not possibly have given such a warranty.

(x) Unfair Trade Practices Act Violation (fifteenth cause of action)

In order to prevail in an action for violation of the SCUTPA, a plaintiff must prove three elements: "(1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected the public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s)." RFT Mgmt., 399 S.C. at 337, 732 S.E.2d at 174 (citations and

quotations omitted). The Appellants cannot establish these elements as against Stonecrest COA.

The first element is derived from S.C. Code Ann. § 39-5-20(a), which provides: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." However, there is no record evidence that Stonecrest COA engaged in "trade or commerce" with the Appellants, much less that it employed unfair or deceptive practices in the conduct thereof. "Trade or commerce is defined as 'the advertising, offering for sale, sale or distribution of any services and any property . . . and any other . . . thing of value[.]" Foggie v. CSX Transp., Inc., 315 S.C. 17, 24, 431 S.E.2d 587, 591 (1993) (quoting S.C. Code Ann. § 39-5-10(b)). The Appellants have not established—and cannot establish—that Stonecrest COA advertised, offered to sell, sold, or distributed any services, property, or other thing of value to them. The reason is simple: Stonecrest COA merely serves as a community administrator pursuant to governing documents which were put in place before the Appellants ever purchased their units. See, e.g., Ward v. Glover, 2006 WL 3707893 at *8 (Me. Super. Ct. 2006) (interpreting the identical definition of "trade or commerce" in Maine's UCC and holding that a condominium association did not provide "products or services" but rather that it was a "non-profit organization that runs a condominium"). Accordingly, it cannot be held liable under the SCUTPA.

Moreover, the Appellants cannot establish that any alleged "unlawful trade practice" committed by Stonecrest COA had an "adverse impact on the public interest." "To be actionable under the Unfair Trade Practices Act, an unfair or deceptive act or practice must have an impact upon the public interest. The act is not available to redress a private wrong where the public interest is unaffected." Columbia E. Assocs. v. Bi-Lo, Inc., 299 S.C. 515, 522, 386 S.E.2d 259, 263 (Ct. App. 1989). Predictably, the Amended

Complaint, like so many other complaints filed in South Carolina these days, contains rote allegations that the Defendants' alleged actions affect the public interest because they are "capable of repetition." However, it contains no factual allegations supporting those conclusory assertions and the record contains no evidence supporting them. An adverse effect on the public must be established with specific facts showing that "members of the public were adversely affected by the unfair conduct or that they were likely to be[.]" Jefferies v. Phillips, 316 S.C. 523, 527, 451 S.E.2d 21, 23 (Ct. App. 1994) (citations and quotations omitted). Otherwise, "all we are left with is a speculative claim of adverse public impact and that will not suffice for a recovery under the [SC]UTPA." Id. (citations and quotations omitted). But the Amended Complaint's SCUTPA cause of action is nothing more than a rehashing of the allegations of its other causes of action with a SCUTPA label applied. This cannot support a recovery under the SCUTPA. See, e.g., Columbia E. Assocs., 299 S.C. at 522, 386 S.E.2d at 263 ("[A] deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the Unfair Trade Practices Act.").

The fact is that Stonecrest COA is a private, non-profit entity in which only community owners are members. Nothing it does affects the public at large. Its alleged conduct, even if repeated, cannot possibly affect anyone other than its own members. If Stonecrest COA were never to repair the common elements, no one outside the community would notice or care. Clearly, the allegations against Stonecrest COA are of private, intracorporate wrongs which do not affect the public interest. See, e.g., Bessinger v. Food Lion, Inc., 305 F.Supp.2d 574, 581 (D.S.C. 2003) ("[C]onduct that affects only the parties to the transaction and not the public interest provides no basis for a SCUTPA claim."); Jefferies, 316 S.C. at 527, 451 S.E.2d at 23 ("[C]onduct which only affects the parties to the transaction provides no basis for a [SC]UTPA claim.").

CONCLUSION

For the reasons explained herein, the Circuit Court committed no error in issuing the January 23 Order, the February 22 Order, or the April 5 Order. Accordingly, the Respondent, Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., respectfully requests that this Court affirm all three Orders.

Curtis W. Dowling, S.C. Bar No. 6493
Matthew G. Gerrald, S.C. Bar No. 76236
Barnes, Alford, Stork & Johnson, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, SC 29202
(803) 799-1111

May 14, 2014

Brett E. Dressler, S.C. Bar No. 77650
Sellers, Hinshaw, Syers, Dortch & Lyons, P.A.
301 South McDowell Street
Suite 410
Charlotte, NC 28204
(704) 377-5050

Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.

JOINDER BY CO-RESPONDENTS

Pursuant to Rule 208(b)(6), SCACR, the parties indicated below join in this brief as to the section entitled "Arguments as to January 23, 2013 Order."

Morgan S. Templeton, Esquire
Graham P. Powell, Esquire
Wall Templeton & Haldrup, P.A.
145 King Street, Suite 302
Post Office Box 1200
Charleston, SC 29402
(843) 923-9500
Attorneys for Brock L. Fankhauser, Fankhauser Property Group, Inc., and Stonecrest Villas of Tega Cay, LLC

Michael B.T. Wilkes, Esquire
J. Derham Cole, Jr., Esquire
Wilkes Law Firm, P.A.
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
(864) 591-1113
Attorneys for Epcon Communities, Inc. and Epcon Communities Franchising, Inc.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable John C. Hayes, III, Circuit Court Judge

Consolidated Appellate Case No. 2012-213730
Civil Action No. 2010-CP-46-02326

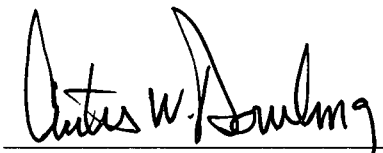
Juontonio Pinckney, Trustee of the Pinckney Living Trust; Josephine Sciacca; Addie Smith; James and Deborah Barone; Ismael and Valerie Gonzales; and Joe and Sandra Moore.....Appellants,

v.

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

CERTIFICATE OF COUNSEL

I, the undersigned attorney with Barnes, Alford, Stork & Johnson, LLP, do hereby certify that the enclosed **AMENDED FINAL BRIEF OF RESPONDENT STONECREST VILLAS OF TEGA CAY CONDOMINIUM OWNERS ASSOCIATION, INC.** complies with Rule 211(b), SCACR.



Curtis W. Dowling, S.C. Bar No. 6493
Barnes, Alford, Stork & Johnson, LLP
1613 Main Street (29201)
Post Office Box 8448
Columbia, SC 29202
(803) 799-1111
Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.

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