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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No: 2009-CP-22-01655

Appellate Case No. 2012-213634

Supreme Court No. 2014-002394

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

Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan 1. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Thomson and Arleen McKeown David T. McGill and Carol G. Mcgill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, Georgia M. Pruitt and Howard C. Covington; Litchfield Captain's and P. Duvall; and Melinda Medina; W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Cooley, the Lois Cooley Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame ..... *Petitioners*,

v.

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

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

v.

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

PETITION FOR A WRIT OF CERTIORARI

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF SOUTH CAROLINA

Petitioners' respectfully petition the Supreme Court to grant a writ of certiorari by which to review the decision of the South Carolina Court of Appeals.

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Counsel for Petitioners certify that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 27, 2014.

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QUESTIONS PRESENTED

I. Did the Court of Appeals err by reversing the trial judge's decision that the business judgment rule did not apply to Council's admittedly "invalid assessment" paid under protest by Petitioners in 2010 and 2011?

II. Did the Court of Appeals err in holding that the business judgment rule applies to any negligence action against Council even in instances where its Board fails to make a business judgment decision or breaches a mandatory duty by its neglectful inaction under the Bylaws and Master Deed?

STATEMENT OF THE CASE

Petitioners are owners of fifty (50) of the sixty (60) units in Buildings C and D which are a part of the Shipyard Village Horizontal Property Regime. This appeal arises out of two cases that were later consolidated: Civil Action No. 2009-CP-22-0152 (invalid window amendment case) filed January 29, 2009, and Civil Action No. 2009-CP-22-01655 (invalid repair and reconstruction assessment case against Petitioners) filed October 7, 2009. Petitioners' main claim against Council, in part, arises out of being improperly and over assessed for construction costs to repair and replace the A and B unit owners' windows and sliding glass doors, which are their exclusive responsibility pursuant to Sections 3.6 and 4.3 of the Master Deed and Section 6.1 of the Bylaws. [R. pp. 164-169; R. p. 1319.]

On May 4, 2012, Petitioners moved for partial summary judgment on the issues of duty and breach for their negligence cause of action. [R. pp. 217-222.] Following a hearing on May 22, the trial judge granted Petitioners' partial summary judgment motion on the issues of duty and breach for their negligence claim. [R. pp. 51-52.]

In opinion filed on June 25, 2014, the Court of Appeals affirmed the trial judge's grant of summary judgment on the existence of a duty to investigate. However, the Court of Appeals reversed the trial judge's decision that the business judgment rule does not apply

and its granting summary judgment on the issue of breach of duty, and remanded the case to the Circuit Court for a trial by jury.

Petitioners' Petition for Rehearing was filed on August 11, 2014, and was denied by Order of the Court of Appeals dated October 27, 2014.

STATEMENT OF FACTS

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

In June 1999, the Board moved to notify all unit owners that they were responsible for waterproofing the balcony thresholds (underneath sliding glass doors) and the window frames of their units pursuant to Section 3.6 of the Master Deed. [R. p. 4; R. p. 1120.] This interpretation is confirmed by 2003 letter, from property manager Diehl to a unit owner in Building A which provides, "***It has been determined that during a hard rain, water flows under the threshold of your sliding glass door and leaks onto the unit below. The sliding doors are the owner's responsibility to maintain and thus, we are requesting that you take action to correct this problem.***" (Emphasis added.) [R. pp.6-7; R.p.1288; R.pp. 1318-1321; R.p. 2395.]

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

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

[R. p. 5; R. p. 1121; R. p. 1127-A.]

In 2003, a letter to the Co-owners from Board President Dr. Jennings confirms that the Board had knowledge of the serious problems associated with the leaking windows/sliding glass doors of the A and B unit owners. Furthermore, Jennings' letter undeniably confirms that the financial responsibility for the maintenance and repair of the windows and sliding glass doors lies with the unit owners and not the Association. Jenning's letter provides in part:

> Dear Co-Owners:
>
> A number of owners reported window problems, including leaks, broken vapor seals and cracked or foggy panes. In an effort to determine if any financial assistance for the repairs was available to the owners, Shipyard Village Council of Co-Owners, Inc. (The "Association") employed a forensic engineer, McGee Consulting Association (MCA"), and Finkel & Altman, L.L.C. (The "Finkel Firm") to investigate, inspect and test the windows in the A and B Shipyard buildings. **During this investigation, the stability of the windows came into question and the Association authorized the Finkel Firm to provide a warning of potential danger to the Co-Owners.** Following the investigation, it was suggested that we consider a law suit against the developer and the contractors who improperly and negligently installed the windows.
>
> After prolonged discussions, additional investigation and consultation, the Board of Directors of the Association (the "Board") does not endorse another law suit on behalf of the Association for the following reasons:
>
> I. Section 3.6 of the Master Deed clearly states that windows, including panes and frames, are part of the unit and therefore the responsibility of the owner, not the Association. **Thus, we believe that it would**

> **be difficult for the Association to maintain a law suit relating to items that are the responsibility of the individual owners.** Nothing in this decision would preclude an individual or group of individuals from initiating a suit if they so desire. (Emphasis added.) [R. pp. 6-9; R. p.1319; R.p.1288.]

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

> While the ***Master Deed makes the windows the responsibility of the individual owners, please remember that each unit owner must obtain written authorization for "any addition, improvement, structural modification or alteration" to a unit. This requirement would include repair of the window frames.*** The Association needs to make sure that the appearance of the units remains consistent. No alteration, modification, painting or repair of the Common Elements is to be undertaken by an individual Co-owner. (Emphasis added.) [R. pp. 8-9; R. p. 1320.]

Nothing was done to address the leaking window and sliding glass door problems until 2006. The windows and sliding glass doors were allowing water to penetrate and damage the individual units and common walls. The Board hired a firm known as Pro-Tec Finishes, Inc.,("Protect") to evaluate the problem and specify a fix. Protect estimated it would cost about $2.48 million to purchase new windows. [R. p. 10; R. p. 1159.] This arrangement would have put the total construction costs of replacing the windows and sliding glass doors in Buildings A and B on individual unit owners in Buildings A and B. [R. p. 968; R.p. 971; R. p. 1019; R.p. 1319.]

In 2006, the Board attempted to amend the ByLaws, to designate the windows and sliding glass doors as "common elements". [R. pp. 1155.] If successful, this would have spread the burden for the total construction costs to repair Buildings A and B (windows and sliding glass doors) to include unit owners of Buildings C and D.

The first vote on the proposed window amendment failed to pass at the April 15, 2006 annual meeting of the unit owners. [R. p. 10; R. pp. 114-115.] The second vote by proxy failed because written consent was not obtained from all the Co-owners entitled to vote as required by Section 1.5 of the Bylaws. [R. pp. 918-921.] Nor was a meeting held by Council on the re-vote as required by 3.1 of the Bylaws. [R. p. 918.]

Despite the fact that unanimous written consent was not obtained, Council sent a letter to all unit owners in July 6, 2006 misrepresenting that the window amendment had passed. The letter was silent as to the voting procedure utilized to adopt the amendment by the unit owners. [R. p. 116; R. p1323; R. pp. 10-11.] Additionally, the recorded window amendment misrepresents that it had passed ***"at [a] special meeting [held on April 15, 2006] by affirmative vote of Co-owners two-thirds of the total interest in the Common Elements pursuant to Article XIV, Section 14.1 of the Master Deed,"*** which is clearly not true since second proxy vote by mail referendum ***occurred during month of May of 2006***. (Emphasis added.) [R. pp. 118-119; R. pp. 1108-1109; R. pp. 114-115.]

In 2006, the Board hired Schneider and Associates, Inc. ("Mr. Schneider, AIA") to investigate water infiltration problems with Buildings A and B. Mr. Schneider, AIA found: "***[n]umerous windows/sliding doors are leaking rain water into interior areas of the buildings***. Water is migrating from the upper story down through the intermediate stories to ground level, ***causing water damage to the floor/ceiling assemblies, the exterior finishes, and interiors of the outside units of buildings A and B***. Damage appears to occur more severely on the corner stacks." (Emphasis added.) [R. pp. 32-33; R. p. 2397.] In 2007, Mr.

Schneider, AIA[1] performed destructive testing on several units and found an ***"open joint" located directly underneath the sliding glass doors' threshold between adjoining hollow core slabs of the balcony and unit***, which allowed water to leak into the unit below. [R. p. 11; R. p. 1171; R. pp. 2398-2399] This condition ***existed underneath every sliding glass doors' threshold in Buildings A and B***. (Emphasis added.) [R. p. 1171; R. pp. 1367-1376.]

On April 19, 2008, the Board reported at the annual members meeting that Buildings A and B needed extensive repairs, and furthermore that all unit owner's windows and sliding glass doors need to be removed and replaced. [R. pp. 13-14; R. pp. 1237-1238.]

In May of 2008, Petitioners hired an attorney. He sent a letter dated June 8, 2008 to the Board asserting that the proposed special repair assessment was invalid because the 2006 window amendment was not properly adopted under Sections 1.3, 1.4, and 1.5 of the Bylaws, and therefore the total cost of replacement and repairs of windows and sliding glass was the individual responsibility of the A and B unit owners. [R. pp. 22-23; R. pp. 1342-1345.]

On January 29, 2009, the majority of C and D Co-owners brought a lawsuit challenging the validity of the 2006 window amendment after negotiations broke down with the Board. [R. pp. 69-85.] Due to Council's concerns about the enforceability of the window amendment, its Board called a special members meeting on March 21, 2009. (Emphasis added.) [R. pp. 1275-1279.] The third re-vote on the 2006 window amendment and the first vote on the 2009 sliding glass door amendment both failed to obtain required two-thirds (2/3) majority vote from the membership to pass. [R. p. 1283, ¶ VIII.]

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[1]Kenneth Schneider, AIA, opined that Shipyard's Bylaws affirmatively required the Board to make timely and necessary repairs to common areas, and the Board's inaction was not authorized and was a breach of its duty. [R. . pp. 1550-1557; R. pp. 1538-1543.]

In 2009, the Board's proposed special assessment was voted down by unit owners at a special members meeting held on August 1, 2009. [R. p. 2268.] As a result, Council informed the unit owners that the repair costs would be incorporated into the 2010 and 2011 annual operating budgets and would be billed monthly to the owners along with their regular assessments. [R. p. 2268.]

Not surprisingly, unit owners of Buildings C and D objected to the "invalid [window amendment] assessment." [R. pp. 22-25; R. p. 816, lines 11-24.] Petitioners took the position that not only should they not be charged with the cost of fixing the A and B unit owners' windows and sliding glass doors, but A and B unit owners should bear some responsibility of repairing the common walls and private balconies because this damage was due in part to their negligence. [R. pp. 6-7; R. pp. 12-13; R. pp 30-33; R.p. 1773, ¶ 6]

During the pendency of the first lawsuit the Board partially relented. It agreed to absolve C and D unit owners from any hard costs associated with the purchase of the windows and sliding glass doors for Buildings A and B. [R. p. 1291; R. p 1296, ¶ 1.] However, the Board made no effort to determine how much of the damage to the common walls and private balconies in Buildings A and B was due to the A and B unit owners' failure to properly maintain and repair their windows and sliding glass doors. [R. pp. 33-34.]

On October 7, 2009, the Petitioners filed a new lawsuit, alleging negligence and gross negligence, negligent/gross negligent misrepresentation, breach of fiduciary duty, and breach of the Master Deed and Bylaws. Specifically, Petitioners sought relief from Council's per unit assessment against them for repairs to Buildings A and B, which are the responsibility of the A and B Co-owners. [R. pp 141-188.]

The 2010 and 2011 annual budgets were not presented to the unit owners for review and amendment as required by Sections 5.2 and 5.3 of the Bylaws. [R. pp 24-25; R. p. 1299.] Petitioners were denied the opportunity to challenge the "invalid [window amendment] assessment" against them for repair costs by the Board. [R. p. 24.] However, Petitioners unlike Council complied with their affirmative duties under the Master Deed and Bylaws and paid their per-unit assessment under protest to Council in 2010 and 2011.

On May 4, 2012, Petitioners moved for partial summary judgment on their negligence and breach of fiduciary duty causes of action. [R. pp. 217-222.] Following a hearing on May 22, 2012, the trial judge granted Petitioners' partial summary judgment motion on the issues of duty and breach for their negligence claim. [R. pp. 51-52.] The trial judge determined the Bylaws and Master Deed impose affirmative duties on the Board to enforce, investigate, and correct known violations of the Master Deed, the Bylaws, and South Carolina Horizontal Property Act. [R. pp.1-40.] The trial judge further found the Council breached its duty to investigate the substantial evidence in the record that clearly showed A and B unit owners had neglected the maintenance of their leaking windows and sliding glass doors. [R. pp 25-40.] The trial judge determined the Council was precluded from asserting protection under the business judgment rule based upon its inaction, *ultra vires* conduct, bad faith, and failure to exercise reasonable care in discharging its required duties under Bylaws. [R. pp. 21-25; R. pp. 38-39; R. p. 40, ¶ 5.]

SCOPE OF APPELLATE REVIEW IN CIVIL CASES

Rule 56(d), SCRCP, *Case Not Fully Adjudicated on Motion*, provides, "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and

the evidence before it and by ***interrogating counsel***, shall if practicable ascertain ***what material facts exist without substantial controversy*** . . . . It may thereupon make an order specifying the facts that appear without substantial controversy . . . and directing such further proceedings in the action as are just." Rule 56(d), SCRCP; Hartman v. Jensen's, Inc. 277 S.C. 501, 502, 289 S.E.2d 648, 648 (1982)(An action in negligence is at law and the trial judge's findings of fact will be upheld unless without evidentiary support); See Jean Hoefer Toal, *et al.*, Appellate Practice in South Carolina, 183 (2d ed. 2002). As a general rule, appellate courts will be bound by the factual findings of a lower court made in response to motions preliminary to trial "where there has been conflicting evidence or ***where the findings are supported by evidence and not clearly wrong or controlled by error of law. Such has been the practice of this Court.***" City of Chester v. Addison, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981) (citations omitted.) (Emphasis added); See Jean Hoefer Toal, *et al.*, Appellate Practice in South Carolina, 196 (2d ed. 2002).

ARGUMENT

I.

The Court of Appeals erred by reversing the trial judge's decision that the business judgment rule did not apply to Council's admittedly "invalid [window amendment] assessment" that was paid under protest by Petitioners in 2010 and 2011.

In the instant case, the trial judge found that the "evidence in the record . . . at the hearing on May 21–22, 2012, clearly established that [Council's governing board's] lack of good faith, inaction, and *ultra vires* acts regarding its invalid assessment" were outside the protection of the business judgment rule:

(A) The Court of Appeals' erred by misapprehending and reversing the following findings of fact of the trial judge: (1) that the window amendment assessment was invalid, and (2) that Council had acted in bad

faith by continuing to enforce an admittedly "invalid assessment" against the Petitioners for repair costs.

The trial judge found that "***[Council] was precluded from asserting the business judgment rule . . . based [upon] its lack of good faith in continuing to enforc[e] the 2006 Window Amendment . . . when it admittedly knew the amendment was invalid and unenforceable in June 2008.***" (Emphasis added.) [R. p. 23.] The record and trial judge's finding of fact support this conclusion for several reasons. First, Council has admitted the first vote on the window amendment that occurred on April 15, 2006 ***failed to receive the required two-thirds (2/3) affirmative vote from the unit owners to pass***. (Emphasis added.) [R. pp. 114-115; R. pp. 918-921.] Second, Council has admitted the second re-vote on the window amendment by proxy occurred without a meeting, and all unit owners did not consent in writing to adopt the amendment as required by Section 1.5 of Bylaws.[2] [R. pp. 918-921.] Third, Council has admitted the third re-vote on the 2006 window amendment and the first vote on 2009 sliding glass door amendment were voted down at the special members meeting held on March 21, 2009. [R. p.1283, ¶ v VIII.] More specifically, the Court of Appeals found that ***"[o]nly 48.31 % voted in favor of the amendment[s] sic, meaning the [unit] owners were still responsible for the unit windows and sliding doors."*** Fisher v. Shipyard Village Council of Co-Owners, Inc., 409 S.C. 164, 175, 760 S.E.2d 121, 127 (Ct. App. 2014) (Emphasis added.)

However, even after the third re-vote on the 2006 window amendment and the first vote on 2009 sliding glass door amendment were voted down, Council still continued to

[2]Section 1.3 of the Bylaws, which provides that votes may only be cast at meetings, and Section 1.5 of the Bylaws, which provides "[a]ny action which may be taken by a vote of the unit owners may also be taken by written consent to such action signed by all [unit] owners entitled to vote" are the only two voting procedures permitted in the governing documents for amending the Master Deed and Bylaws. [R. pp. 1006-1007.]

assert the validity of both amendments. [R. pp. 665-672.] For example, at the motion hearing held on December 9, 2011, Council's attorney argued in opposition to Petitioner's summary judgment motion regarding the invalidity and unenforceability of the 2006 window and 2007 clarification and correction amendments as a matter of law. [R. pp. 665-672; R. p.1279.] It was not until the motion hearing held on May 21, 2012, that Council's attorney admitted to the trial judge Council was aware the window amendment was invalid upon receiving the June 9, 2008 letter from attorney Jeff King, which provides in part:

> The [2006 window] amendment purported to rewrite the definition of Units within the Regime to exclude "the window glasses, screens, frames and casings which are part of the window openings of the Unit" and to designate these items as Limited Common Elements. However, the amendment failed to pass at the only meeting that was held to vote on the matter, the April 15, 2006, annual meeting. Thereafter, the Board and management agent solicited proxies from various members to "re-vote" on the amendment.
>
> . . .
>
> All Co-owners did not consent in writing to adopt the 2006 Amendment, and no meeting was held at which a vote could have been taken. ***The end result is that the 2006 Amendment was not properly adopted, leaving the window glasses, screens, frames, casings and sliding glass doors as part of each Unit, not common elements, and therefore replacement or repair is the responsibility of each individual owner.*** (Emphasis added.) [9 June 2008 letter from Jeff King Esq. to Board, R. pp. 1341-1345; Order, R. pp. 22-23.]

Council's Board, after receiving this letter, stated, ***"What do we do, this amendment is not valid."*** (Emphasis added.) [R. p. 22; R. p. 732, lines 1–14.] The acknowledgment of the window amendment's invalidity in 2008 is further supported by another admission from Council's attorney to the trial judge at the motion hearing held on May 21, 2012:

> **MISS BOAN**: The Board discussed what will we do with this assessment, how do we treat this A and B in light of the fact the **assessment is invalid and the windows and doors are now the responsibility of A and B unit owners**, how do we assess for that, knowing that, and the Board, knowing that and knowing what the other --

> **THE COURT**: Wait a minute, I'm not sure I understand. Could you repeat that right there, I was listening but I just got sort of, I stumbled when you were doing that.
>
> **MISS BOAN**: **The Board, in trying to decide <u>how would we do the assessment, that the amendment is invalid</u>** .] (Emphasis added.) [R. p. 816, lines 1- 25; R. pp. 22-25.]

Accordingly, the Court of Appeals' decision to apply the business judgment rule to Council's ***admittedly "invalid [window amendment] assessment"*** against the Petitioners for repair and replacement costs for windows and doors should be reversed. (Emphasis added.) [R. pp. 23-25; R. p.816, lines 1-25.] See <u>Dockside Ass'n v. Detyens</u>, 291 S.C. 214, 217, 352 S.E.2d 714, 717 (Ct. App.1987) (Co-owners challenging Board's decision making ***must establish by preponderance of the evidence that the Board lacked good faith***) (Emphasis added); <u>See also</u> <u>Youmans v. Youmans</u>, 128 S.C. 31,121S.E.2d 674 (1924) (Whether a party acted in ***good faith or in bad faith is a question of fact***) (Emphasis added.)

(B) The trial judge correctly found that unit owners of Buildings A and B were solely responsible for the maintenance and repair costs of their window and sliding glass door systems instead of the Petitioners.

The trial judge found "***the evidence in the record is uncontroverted that Co-owners of Buildings A and B were solely responsible for the maintenance and repair [costs] of their window and sliding glass door systems pursuant to §§ 3.6[3] and 4.3[4] of the Master Deed, and § 6.1[5] of the Bylaws***." (Emphasis added.) [R. p. 31; R. pp. 4-9; R. p. 1288; R.

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[3]Section 3.6(c) provides that the windows and sliding glass doors are considered part of each unit, rather than the common elements. [R. p. 968.]

[4]Section 4.3 provides in part, that "[e]very Co-owner <u>shall be responsible at his own expense</u> for maintaining, repairing and decorating all walls, ceilings and floors of his unit." [R. p. 971.]

[5]Section 6.1 of the Bylaws provides that the "units shall be maintained in good condition and repair by respective owner." [R. p. 1019.]

p. 1319.] However, Council's contention that the A and B unit owners were assessed ***"in accordance with the pre-2006 amendment (and current) version of Section[s] 3.6 and [4.3] of the Master Deed[6], which makes each unit owner responsible [at his own expense] for the repair costs of his or her windows and sliding glass doors,"*** is not a true statement for the reasons discussed below. (Enphasis added.) [Appellant (Council)'s Return, p. 2.]

First, the A and B unit owners were only assessed $1,760,000, which is less than the required amount of actual("hard") costs needed to purchase of their windows and sliding glass doors and does not include any soft costs. [R. pp. 730-733; R. pp. 2256-2257.] This amount was confirmed during motion hearing for partial summary judgment held on May 21, 2012, during the interrogation of Council's attorney by the trial judge.[7]

Second, Sutton-Kennerly & Associates ("SKA")'s construction budget for repairing Buildings A and B indicates the actual("hard") costs of the new windows and sliding glass doors was $2, 459,000. (Emphasis added.) [R. p.1292.] Therefore, the record clearly establishes that Petitioners were still improperly assessed for part of the construction costs for the repair and replacement of the A and B unit owner's windows and sliding glass doors.

---

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

[7] THE COURT: ***I understand that but tell me how did you come up with the number, how much did [A and B Co-owners] pay extra? Wasn't about [$]10,000.***

MISS BOAN: ***[$]22,000*** [each for the cost of the windows and doors]. (Emphasis added.) [R. p. 733.]

The Council asserts that "[t]he assessment amount for units in Buildings A and B was higher because it included the hard costs of their windows and sliding glass doors, which were being replaced. [R. p.733]" [Final Brief of Appellant, p. 9.]

This fact is further confirmed by the affidavit of Board Member Doris Bray ("Bray"), filed October 28, 2011, when she states:

> [T]he Board decided the most that could be attributed to the building A and B Unit Owners was the ***actual costs*** of the window and doors. To attribute any more of the ***repair costs, including the "softs" project costs***, to the Building A and B Units Owners, ***would have been an exercise of bad business judgment and, in my opinion wrong***. (Emphasis added.) [Bray Aff., R. pp. 2256-2257, ¶ 11.]

Council's invalid assessment of the Petitioners for the "***repair costs, including the "soft" project costs,"*** to replace the A and B unit owners' windows and sliding glass doors based upon an "invalid [window] amendment" cannot be defended on the grounds that it is a reasonable alternative under the business judgment rule. The window amendment was voted down on three separate occasions by the unit owners between 2006 and 2009. So the total repair and replacement costs of windows and sliding glass doors was the sole financial responsibility of the A and B Co-owners. See Fisher v. Shipyard Village Council of Co-Owners, Inc., at 409 S.C. at 181, S.E.2d at130. (A homeowners' association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative) (citations omitted); Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987) (Court of Appeals found that the association's flat fee system of charges violated the fixed rate requirement under Article III, Section 1, of the Bylaws and could not be defended on the grounds that it was a reasonable alternative under the business judgment rule.) (citations omitted.)

(C) The Court of Appeals' erred by reversing the trial judge's findings of fact that Council's 2010 and 2011 budgetary repair assessments were ultra vires

actions and outside the scope and protection of the business judgment rule.

The trial judge found that "***[Council]'s knowing[] fail[ure] to place the adopted annual budgets on the agenda for presentation to the Co-owners at their Annual Members' Meetings in 2009 and 2010, respectively, was an ultra vires act because it violated the affirmative requirements of §§ 1.12[8], 5.2[9], and 5.3[10] of the Bylaws***." (Emphasis added.) [R. p. 24, ¶ 2.] Further, the trial judge found that Council's failure to discharge its duties under these sections unduly prejudiced the Petitioners/unit owners' rights to timely challenge, object, and/or amend the ***admittedly invalid budgetary repair assessments for 2010 and 2011.*** (Emphasis added.) [R. pp. 24-25; R. p. 816, lines 2-25.] Furthermore, at the hearing on May 21–22, 2012, Council's attorney admitted on the record that, "***the [budgetary] assessment as rendered by the board ... is an 'ultra vires act' that should be afforded [protection] under the business judgment rule. ...***" (Emphasis added.) [R. p. 25; R. p. 795, lines 13-17.] However, the trial judge found Council's attorney's assertion of protection under the business judgment rule was without merit and contrary to the law of this state. [R. pp. 24-25.]

In the instant case, Council asserts the trial judge's ruling was error. Specifically, Council contends that ***"an ultra vires act is an unauthorized act***, while the . . . failure to

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[8]Section 1.12 provides "[t]he order of business at all meetings of the Co-owners ***shall be*** . . . presentation of budgets." [R. p. 1009.]

[9]Section 5.2 provides "The Board of Directors ***shall prepare, adopt and present*** . . . ***to the Co-owners at their annual meeting an annual budget (the Budget) for the Regime for the next fiscal year.***" (Emphasis added.) [R. p. 1017.]

[10]Article V, § 5.3 of the Bylaws provides "***The Budget, as adopted by the Board may be amended upon the motion and affirmative vote of' Co-owners two-thirds (2/3) of the Percentage Interest in the Common Elements.***" (Emphasis added.) [R. p. 1016.]

place" and present the annual budgets to the Petitioners/ unit owners for amendment in 2010 and 2011 "***constitutes inaction***." [Final Brief of Appellant, p. 21, ¶ 2.] Council further argues, "even if the trial court is correct on this point . . . breach of one or more expressed provisions of the Master Deed and Bylaws does not mean that the Board is stripped of protection under the business judgment rule for every other action. . . . In other words, ***even if the Appellant improperly continued to enforce the 2006 amendment and failed to present annual budgets***, it was error for the trial court to find that these actions stripped [Council] of all protection under the business judgment rule for all other actions." (Emphasis added.) [Final Brief of Appellant, p. 21, ¶ 2 and 3.]

However, Council's argument is misplaced for several reasons. First, the Board's inaction by failing to present its 2010 and 2011 budgetary repair assessments to Petitioners for review and amendment ***was not authorized under Sections 1.12, 5.2, and 5.3 of the Bylaws and was a material breach of its mandatory duties***. This fact coupled with Council's extreme bad faith by simultaneously requiring the Petitioners to pay repair costs pursuant to an ***admittedly "invalid [window amendment] assessment" in 2010 and 2011*** speaks for itself. (Emphasis added.) [R. pp. 24-25; R. p. 816.] Second, it is irrelevant whether the business judgment rule applies to any other action of Council because the ***only relevant action*** in this lawsuit concerns Council's ***admittedly "invalid [window amendment] assessment"*** against Petitioners for repair costs, which the trial judge found was an invalid assessment. (Emphasis added) [R. pp. 21-25; Final Brief of Appellant, p. 21.] All of Councils' admitted breaches of affirmative duties and inaction under the Bylaws are not authorized, and therefore are not afforded protection under the business judgment rule. [R. p. 21, ¶ 3; Final Brief of Appellant, p. 21, ¶ 2 and 3.]

II.

The Court of Appeals erred by applying the business judgment rule to any negligence claim against Council. This heightened standard of care requiring proof of Council's bad faith conflicts with prior decisions of the South Carolina Supreme Court where Council may be liable for its neglectful inaction.

This expanded application of the business judgment rule will cause it to be erroneously applied in instances such as this where Council has failed to make a business judgment decision or is liable to the Petitioners/unit owners for its inaction and omissions under the Bylaws.

(A) Business judgment rule is only triggered by Council's business judgment decision.

Only when Council's governing board makes a business judgment decision is the application of the business judgment rule triggered under the South Carolina Common law.[11] See Dockside Ass'n 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.")(citations omitted) (Emphasis added); See also Goddard v. Fairways Development General Partnership, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App.1993)("In a dispute between the directors of a homeowners association and aggrieved homeowners, the ***conduct of the directors*** should be judged by the "business judgment rule" and absent a showing of bad faith, dishonesty, or incompetence, the ***judgment of the directors*** will not be set aside by judicial action.")

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[11] Petitioners can find no South Carolina cases where the ***business judgment rule*** has ever been applied in situations where Council's governing board has not made a business judgment decision or where by neglectful inaction has failed to discharge its affirmative duties under its Master Deed and Bylaws.

In light of the cases discussed above, it is clear that the business judgment does not shield Council from its negligent inaction and omissions regarding the maintenance, repair, and replacement of the common elements. Decision making is required. This requirement is also consistent with the common law of other jurisdictions like Delaware, and New Jersey. See Aronson v. Lewis, 473 A. 2d. 805, 813 (Del. Ch. 1984), overruled on other grounds by Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (***The business judgment rule "has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act.***") (Emphasis added); In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 748 (Del. Ch. 2005), aff'd 906 A.2d 27 (Del. 2006) ("Furthermore, ***in instances where directors have not exercised business judgment***, that is, in the event of director ***inaction***, ***the protections of the business judgment rule do not apply***")(Emphasis added); See, *e.g.*, Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981)(***Neglectful inaction is not protected by the rule***) (Emphasis added.)

The trial judge found that Council's governing board's "inaction" and "failure to exercise reasonable care in discharging its mandatory duties under the Bylaws" regarding the maintenance, repair, and replacement of the common elements precluded Council from asserting protection under the business judgment rule. [R. p. 21; R. p. 40, ¶ 5.] Specifically, the trial judge determined that ***"the Board ha[d] not undertaken timely and proper maintenance and repair [of the common elements and individual units] as they are required to do"*** [R. p.13.] which is supported by the record and the following factual findings:

- "Council's governing Board, past and present, ***had actual notice that the Co-owners' windows and sliding glass doors had been leaking water into***

Buildings A and B since 1983 evidenced by [its] meeting minutes from 1983 to 2010." (Emphasis added.) [R. pp. 31-32.]

- "Co-owners of Buildings A and B were ***solely responsible for the maintenance and repair of their window and sliding glass door systems pursuant to §§ 3.6 and 4.3 of the Master Deed, and § 6.1 of the Bylaws***." (Emphasis added.) [R. p. 31.]

- "A September 18, 2007, e-mail to the Board from Mrs. Diehl [Property Manager] regarding window leaks in Buildings A and B stated in pertinent part, "***many of these units were leaking previously and because windows were the owners's responsibility, the issue was thrown back at the owners who most ended up doing nothing***...." (Emphasis added.) [R. p. 13.]

- "[Council]'s consultants and/or experts ***had already determined that the Co-owners' leaking windows and sliding glass doors were causing damage to the common elements of Buildings A and B contrary to the [Council]'s reported denials of causation from the windows*** . . . ."[12] (Emphasis added.) [R. pp. 32-33.]

- Council's attorney admitted that, "[i]t is undisputed that the [Council]'s Board did not ask any expert to break out the damages attributable to the alleged failure of a Co-owners to maintain their windows and sliding glass doors[,]" in its response to Plaintiffs Rule 59(e) Motion."[13] [R. pp. 33-34.]

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[12]For example, on July 25, 2006, Mr. Schneider, AIA, performed an inspection of Buildings A and B at the request of [Council's board]. His inspection found damage to the common elements caused in part from the Co-owners' leaking windows and sliding glass doors." [R. pp. 32-33.]

[13]Former Board President Don Johnston ("Johnston") and current Board Member Bray confirm this admission when they testified during their depositions as follows:

Q. Okay. That's fair. In any case, at the point -- Sutton-Kennerly was not asked or requested, in their assessment of all the damages, to break out what damages, if any, they attributed to the leaks around the windows and doors that may have gotten into the common elements, as to whether unit owners in A and B should be responsible for that collateral damage.

A. That's correct.

Q. They were never asked to do that?

A. ***That's correct.***

[R. p. 1495, lines 12-22:Depostion of Johnston.] (Emphasis added.)

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

A. No.

- "§§ 9.4, 12.1, and 16.2 of the Master Deed, and §§ 6.3,[14] 6.4,[15] and 7.3[16] of the Bylaws,[and the common law] ***impose affirmative obligations on Council's governing Board***, including, but not limited to: (1) ***a duty enforce the terms of the Act, the Master Deed and these Bylaws by taking prompt and appropriate action to correct any violations***; and, additionally, (2) ***a duty to investigate***, . . . when presented with evidence which would show or reasonably show that an individual Unit Owner's neglect in maintaining his or her Unit has resulted in damage to the common elements . . ., [and] ***to determine whether or not it would be appropriate to individually assess the defaulting Unit Owner for the damage***." (Emphasis added.) [R. pp. 26-41.]

Here, Council deviated from its mandatory duties under Sections 6.3, 6.4, and 7.1 of the Bylaws and the common law by failing to investigate and pursue a recovery from any of A and B unit owners who were already known as responsible parties for damages to the common elements and the individual units. [R. P. 32; R. p. 1773; R. p. 2397.] See Fisher v. Shipyard Village Council of Co-Owners, Inc., at 409 S.C. at 178, 760 S.E.2d at 129. (The

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Q. Can you explain why -No?

Q. Why didn't they undertake that responsibility to do that?

A. ***Why should we have.***

[R. p. 1663, line 20-p. 1664, line 7; R. pp. 33-40: Deposition of Bray.] (Emphasis added.)

[14]Article VI, § 6.3 of the Bylaws, Default by Co-owner, provides in pertinent part:

> In the event that any Co-owner fails to perform the maintenance required by him by these Bylaws or by any lawful Regulation, **and such failure creates or permits a condition which is hazardous to life, health, or property, or which unreasonably interferes with the right of another Co-owner**, ... the Board of Directors ***SHALL***, ... cause such maintenance to be performed and charge all reasonable expenses of so doing to such Co-owner by an Individual Assessment." (Emphasis added.) [R. p. 28.]

[15]Article VI, § 6.4 of the Bylaws, Expenses, provides in pertinent part:

> The expenses of all maintenance, repair, and replacement provided by the Manager or the Board of Directors, ... shall be Common Expenses, except that when such expenses ... are necessitated by (1) the failure of a Co-owner to perform the maintenance required by these Bylaws or by any lawful Regulation or (2) the willful act, neglect, or abuse of a Co-owner, they ***SHALL*** be charged to such Co-owner as an **Individual Assessment**. (Emphasis added.) [R. p. 28.]

[16]Article VII, § 7.3 of the Bylaws, Enforcement, provides in pertinent part:

> The Board of Directors ***SHALL*** enforce the terms of the Act, the Master Deed, and these Bylaws and the Regulations promulgated pursuant hereto ***by taking prompt and appropriate action to correct any violations***. (Emphasis added.) [R. p. 29.]

Court of Appeals ruled that "the duties created by the Bylaws and South Carolina law . . . support a duty to investigate who is responsible for damage to the common elements. . . . For Council to be able to perform its duty to try to recover from the responsible parties, it must first find out who caused the problem"). Additionally, Council admits ***"the requirement of the board to perform repairs if a co-owner's neglect . . . damaged another unit or the common elements, and to assess that co-owner for the accompanying cost.***" (Emphasis added.) [Final Brief of Appellant, p. 13.] Accordingly, the Court of Appeals erred by applying the business judgment rule where Council admittedly had failed to investigate and assess the A and B unit owners as responsible parties for their damage to the private balconies, common walls, and the individual units as required under Sections 6.3, 6.4, and 7.3 of the Bylaws and the State common law. [R. pp. 33-39.]

(B) Court of Appeals' ruling erroneously applies the business judgment rule to Council's neglectful inaction and omissions under the Master Deed and Bylaws.

The Court of Appeals ruled that ***"any investigation would be looked at under the business judgment rule to determine if the council met its duty"*** under the Master Deed and Bylaws. 409 S.C. at 181, 760 S. E. 2d at 131. This ruling erroneously expands the application of the business judgment rule to any negligence action against Council. This heightened standard of care requiring proof of Council's bad faith conflicts with prior decisions of this Court where Council may be liable to homeowners for its neglectful inaction under the Master Deed and Bylaws. See Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (1985)(This Court found "***[s]hould 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." Id. at 556, 335 S.E.2d at 366.) (Emphasis added); Murphy v. Yacht Cove Homeowners Ass'n., Id at 367, 345 S.E.2d 709 (1986)(This Court held "***that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association***" for failure to discharge its duties under the Master Deed and Bylaws. Id. at 369, 345 S.E.2d at 710) (Emphasis added.) In Murphy, this Court reasoned that "***since the association can sue a member for failure to adhere to the bylaws, rules, and regulations, a member necessarily can sue the association for this same failure.***" Id. at 369, 345 S.E.2d at 710 (Emphasis added); Equally persuasive, the case of Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, Inc., 201 Md. App. 186, 29 A.3d 604 (Md. App. 2011) is factually almost identical to this case. In Greenstein, condominium unit owners brought an action against the condominium association, alleging negligence based upon the following grounds: (1) in failing to timely investigate water leakage into the individual units and buildings in the condominium regime. (2) in failing to file a lawsuit against the developer of the Condominium Questar within the statute of limitations. Id. at 187-189, 29 A.3d at 614-615. The Circuit Court granted the Association's motion for summary judgment. Unit owners appealed. Id. The Maryland Court of Special Appeals reversed the judgment of the Circuit Court based on the reasoning that the association, which has the affirmative obligation to maintain and repair the common elements and the exclusive right to bring suit thereon, has the "*duty to pursue a recovery for any alleged construction defects in the common elements which [the association] maintains.*" Id. Its authority is augmented by the fact that Court of Special Appeals' ruling is supported by this Court's holdings in Queen's Grant Villas

Horizontal Property Regimes I-V, at 555, 335 S.E.2d at 365, and Murphy,[17] at 369, 345 S.E.2d at 71. Relying on this Court's holdings, the Court of Special Appeals held that ***"the individual unit owners have a cause of action against the association when the association breaches that duty by failing to pursue the claim altogether or to negligently pursue such claim.***" Id. at 204, 29 A.3d at 605-606. (Emphasis added.)

However, this novel and additional requirement imposed by the Court of Appeals of having to prove Council's bad faith,[18] (while at the same time investigating if Council has met its duties under the Master Deed and Bylaws), effectively changes the standard of care mandated by this Court under Queen's Grant Villas Horizontal Property Regimes I-V, and Murphy. A standard of care penalizing only Council's gross negligence would virtually eliminate any accountability to the Petitioners/unit owners for Council's inaction, leaving it to do as it pleases, unfettered by any other shackles. This unauthorized ruling implicitly overturns this Court's decisions in Queen's Grant Villas Horizontal Property Regimes I-V, Murphy, and Dockside Ass'n. See S.C. Const. Art. V., § 9; State v. Cheeks, 400 S.C. 329,342, 733 S. E. 2d 611, 618 (Ct. App. 2014) (Court of Appeals ***lacks authority to rule***

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[17]The Supreme Court of North Dakota, relying on the case of Murphy v. Yacht Cove Homeowners Ass'n, at 367, 345 S.E.2d at 710 as authority for the legal proposition that "Courts have allowed unit owners to sue a condominium association for ... negligence relating to upkeep and maintenance of common areas[,]" Id. at 247. In Agassiz West Condominium Ass'n, Court held "***that Agassiz's bylaws affirmatively require[d] the board to make repairs to common areas, and under the business-judgment rule and the trial court's findings, the board's inaction was not authorized and was a breach of its duty***." Id. (Emphasis added) (compare citing Schoninger v. Yardarm Beach Homeowners Ass'n, Inc., 134 A.D.2d 1, 523 N.Y.S.2d 523, 529 (N.Y. App. Div. 01987) (board's choice between two plans for repair of common area and implementation of one plan governed by business-judgment rule)).

[18]See Estate of Carr ex rel. Bolton v. Circle S Enterprises, Inc. 379 S.C. 31, 43, 664 S.E.2d 83, 88- 89 (Ct. App. 2008)(Bad faith is defined as "[t]he opposite of good faith, generally implying or involving actual or constructive fraud, or ***a design to deceive or mislead another***, or a neglect or refusal to [fulfill] some duty or some contractual obligation, ***not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive***.) (Emphasis added.)

against prior published precedent from the South Carolina Supreme Court, but is bound by the decisions of the Supreme Court) (Emphasis added.)

CONCLUSION

The Court of Appeals' opinion should be reversed, and trial judge's findings of fact and decision should be re-affirmed regarding the inapplicability of the business judgment rule to Council's "invalid [window] assessment" against Petitioners for the windows and sliding glass doors' repair costs. The relief requested is supported by the following uncontroverted evidence in the record:

- In 2003, the Council instructed the unit owners that they were totally responsibility for all maintenance and repair costs regarding their windows and sliding glass doors instead of the Association. [R. p. 6-9; R. p. 1319.];
- Window amendment did not pass after three failed votes between 2006 and 2009 as admitted by Council. [R. p. 114 ; R. p. 816; R. p. 1283, ¶ VIII.];
- Council has taken no action to void the admittedly "invalid [window] amendment" filed in 2007 in the Georgetown County Clerks' Office;
- Special repair assessment (pursuant to invalid window amendment) was voted down by the unit owners on August 1, 2009. [R. p. 2268.];
- 2010 and 2011 annual budgets were not authorized repair assessments under Sections 1.12, 5.2, and 5.3 of the Bylaws. [R. p. 24, ¶ 2];
- A and B unit owners are still responsible for all construction costs ("Hard and soft") relating to the repair and replacement of their windows and sliding glass doors. [R. p. 3; R. p. 1319; Appellant (Council)'s Return, p. 2];
- Council knowingly chose not fully assess the A and B Co-owners for all construction costs relating to the repair and replacement of their failed windows and sliding glass doors. A and B Co-owners were only assessed for part of the construction costs based upon the business judgment rule. [Bray Aff., R. pp. 2255-2257, ¶ ¶ 11 and 12];
- Council has no right to change the method of assessment set out in the Master Deed and Bylaws (after the window amendment had failed to pass) by not collecting all construction costs for the replacement of the windows and

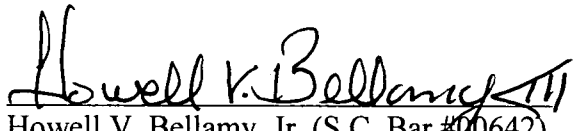
sliding glass doors from A and B unit owners instead of C and D unit owners; and

- Council claims that the business judgment rule gives it the right to assess the C and D unit owners for part of the construction costs is misplaced when such a decision is *ultra vires* because it changes the method of assessment. [Bray Aff., R. pp. 2255-2257, ¶ ¶ 11 and 12.]

Simply put, the Board cannot use the business judgment rule like a sword to strike down mandatory requirements under the Master Deed and Bylaws in order not to have to assess the A and B unit owners for their total construction costs relating to the repair and replacement of their windows and sliding glass doors and their damages to the common elements, while at the same time using the business judgment rule like a shield to protect the Board from its admitted inaction and breaches of duties under the Bylaws, bad faith, and other unauthorized conduct regarding its invalid assessment. The Council's application of the business judgment rule as a sword and then as a shield violates the doctrine of preclusion against inconsistent positions under South Carolina law. [R. pp. 2256-2257, ¶ 11 and 12.]

For all reasons described herein, the Petitioners respectfully ask the Supreme Court to grant its writ of certiorari to review the decision of the South Carolina Court of Appeals.

Respectfully submitted,



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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No: 2009-CP-22-01655

Appellate Case No. 2012-213634

Supreme Court No. 2014-002394

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

LLC, and SGS Beach Partners, LLC; Morgan 1. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Thomson and Arleen McKeown David T. McGill and Carol G. Mcgill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, Georgia M. Pruitt and Howard C. Covington; Litchfield Captain's and P. Duvall; and Melinda Medina; W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Cooley, the Lois Cooley Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame ..... *Petitioners*,

v.

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

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

v.

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

PETITIONERS' RULE 243(d) CERTIFICATION

The undersigned attorney for Petitioners certifies, pursuant to Rule 243(d), SCACR, that a copy of the Appendix and Petition For A Writ of Certiorari were served on attorney for Respondent Shipyard Village Counsel of Co-Owners, Inc.

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appellate Case No. 2012-213634

Supreme Court No. 2014-002394

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

LLC, and SGS Beach Partners, LLC; Morgan 1. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Thomson and Arleen McKeown David T. McGill and Carol G. Mcgill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, Georgia M. Pruitt and Howard C. Covington; Litchfield Captain's and P. Duvall; and Melinda Medina; W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Cooley, the Lois Cooley Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame ..... *Petitioners*,

v.

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

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

v.

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

PROOF OF SERVICE

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

Carlyle R. Cromer
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P. O. Box 2116
Myrtle Beach, SC 29578
Attorney for Appellant

****Signature Page Follows****

R. Wayne Byrd
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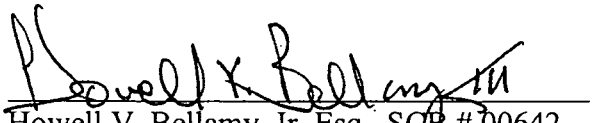
Attorney for Appellant



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December 8, 2014

The State of South Carolina
In the Supreme Court
Daniel E. Shearouse
Clerk of Court
1231 Gervais Street
Columbia, S. C. 29201

Re: Richard A. Fisher v. Shipyard Village Council of Co-Owners, Inc.,
Appellate Case No. 2012-213634
Supreme Court No. 2014-002394

Dear Mr. Shearouse:

Forwarded herewith please find enclosed original and one (1) copy of the Petition for a Writ of Certiorari and Appendix regarding the above captioned matter and Proof of Service of same.

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

With kindest regards, I remain

Sincerely,

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

Howell V. Bellamy, III

HVBIII:lh
Enclosure
cc:
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The Supreme Court of South Carolina

Howell V. Bellamy, III

12/08/2014

RECEIPT #74415

Case No:	2014-002394
Case Short Title:	Richard A. Fisher v. Shipyard Village Council
Event:	
Fee Type:	Case Initiation Fee
Amount:	$100.00
Payment Type:	Cash
Reference No:	
Check/Money Order Date:	
Comments:	Richard Fisher v. Shipyard Village