

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. Supreme Court

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No: 2009-CP-22-01655

Appellate Case No. 2012-213634

Supreme Court No. 2014-00239

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 I. 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*.

APPENDIX

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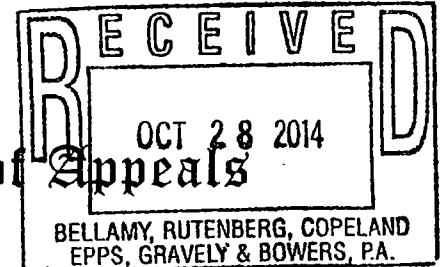
IV. FINAL BRIEFS AND REPLY

Appellant and Respondent's Final Briefs, including the Reply are filed separately.

V. RECORD ON APPEAL

Record on Appeal, Volumes I of V, are filed separately.

The South Carolina Court of Appeals



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 T. 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

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v.

Shipyard Village Council of Co-Owners, Inc., Appellant.

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

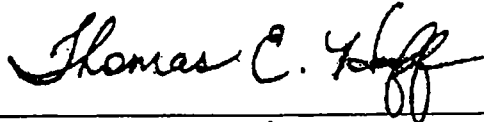
v.

Cincinnati Insurance Company, Travelers Insurance Company, Companion Property & Casualty Insurance Company, Philadelphia Insurance Company, Zurich American Insurance Company, American Guarantee and Liability Ins. Co., St. Paul Fire and Marine Insurance Company, and Illinois National Insurance Company, Third-Party Defendants.

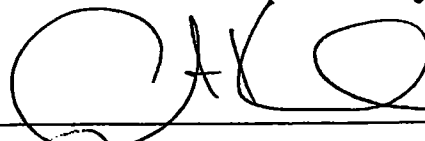
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ORDER

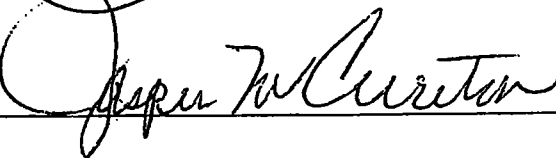
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



A.J.

Columbia, South Carolina

cc:

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Carlyle Richardson Cromer, Esquire

Howell V. Bellamy, Jr., Esquire

Howell Vaught Bellamy, III, Esquire

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PETITIONERS' PETITION FOR REHEARING

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STATEMENT OF FACTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dear Co-Owners:

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

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

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

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

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

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

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

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

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

Please note that the amendment to the master deed did not pass. The Shipyard Village Master Deed cannot be amended unless 66.66% vote in favor of the amendment. You will note in the minutes of the meeting that a motion was made towards the end of the meeting to leave the vote on the amendment open for 30 days, in order to allow those owners who did not vote, to vote. *In subsequent discussions with the attorney for Shipyard Village, the Board was advised that it is Questionable whether the vote on the amendment can be "left open."*

While the Board is confident that the majority of the owners are in favor of the amendment, the Board has decided not to follow any "questionable" procedures regarding this. Thus, the Board had decided to start the amendment process over.

...
Enclosed please find a NEW PROXY CARD for the amendment vote. Please take a minute NOW to fill this out and drop it in the mail or fax it to the Management Office at 843-357-9890. The deadline for returning the proxy is May 26, 2006. (emphasis added.) (R. pp. 114-115; R. p. 10.)

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

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

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

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

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

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

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

I tried to bring this up after I was here for a while and I got my hand slapped big time by Bobby Warner and some of the board members because this was an owner responsibility."

Her e-mail also states that: "Bobby Warner only did cosmetic stucco repairs to buildings for 20+ years and kept pushing back to the owners – who clearly could not handle [it] and needed help." (emphasis added.) (R. p.1328; R. p. 13.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENTS

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

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

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

It is undisputed that the windows and sliding glass doors are still a defined part of each unit, and are not part of the common elements. (R. p. 968.) Council admits that the second re-vote on the 2006 window amendment pursuant to a proxy mail referendum failed to obtain the written consent from one hundred percent (100%) of the Co-owners as required by Section 1.5 of the Bylaws. (R. p. 921.) The third re-vote on the 2006 window amendment and the first vote on 2009 sliding glass door amendment were voted down at the special members meeting held on March 21, 2009. (R. p.1279.) “Only 48.31% voted in favor of the amendment[s], meaning the Co-owners were still responsible for the unit windows and doors.” Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241(S.C. Court of Appeals filed on June 25, 2014) (Davis Adv. Sh. 25 at 35). However, the Petitioners were still common expense assessed¹ for part of the construction costs to remove,

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

repair, and replace² the A and B Co-owners' windows and sliding glass doors in 2010 and 2011. (R. pp. 1290-1292; R. pp. 15-16; R. pp. 2256-2257.) This *ultra vires* assessment occurred after the window and sliding door amendments were voted down by the Co-owners in 2009, which is substantial evidence of the Board's bad faith. (R. p. 1279.) See Fisher v. Shipyard Village Council of Co-Owners, Inc., Op. No. 5241 (Davis Adv. Sh. 25 at 41) ("[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires*. The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones.") (internal quotes and citations omitted.)

Here, the record is uncontroverted that Council improperly used the business judgment rule to ignore its mandatory duty³ under Sections 3.6, 4.3, and 6.1 of the governing documents to assess the A and B Co-owners for the total construction costs for the removal, repair, and replacement of their windows and sliding glass doors. (R. pp. 2256-2257.) The affidavit of Board Member Doris Bray ("Bray"), filed October 28, 2011, is indisputable

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

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

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

The per unit allocation [for replacement of windows and balcony doors] was based on efforts by the Board to give full force and effect to all relevant provisions of the Master Deed while preserving practicality and equity. In keeping with this effort, and to avoid litigation expenses associated with Plaintiffs' claims about the validity of the Windows and Doors Amendment, we as a Board decided to put the matter before the ownership for another vote in 2009. This alternative vote on the Amendment was not a "legal position" expressed by the Board; it was an attempt to ratify the amendment and therefore resolve the complaints of the ownership. By their votes, the ownership made clear that the amendment did not enjoy a super majority of support so we allocated costs of the replacement windows and doors themselves to the A and B owners. We made our decision based on business judgment, not what might or might not happen in court.

....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The [2006 window] amendment purported to rewrite the definition of Units within the Regime to exclude "the window glasses, screens, frames and casings which are part of the window openings of the Unit" and to designate these items as Limited Common Elements. However, the amendment failed to pass at the only meeting that was held to vote on the matter, the April 15, 2006, annual meeting. Thereafter, the Board and management agent solicited proxies from various members to "re-vote" on the amendment.

No such procedure is authorized in the governing documents or corporate law. The Bylaws, Section 1.4, provides that Owners may vote in person or by proxy at any meeting of the Association, and Section 1.3 provides that votes

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

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

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

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

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

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

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

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

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

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

However, in this case the *“Board did not ask any expert to break out the damages attributable to the alleged failure of the [A and B] Co-owners to maintain their windows and sliding glass doors.”* (Emphasis added.) (R. p. 653; R. p. 34, n. 3.) Furthermore, former Board President Don Johnston (“Johnston”) and current Board Member Bray⁶ confirm that the Board failed to pursue a recovery from any A and B Co-owners as responsible parties when they testified during their depositions as follows:

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

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

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

A. That's correct.

Q. They were never asked to do that?

A. That's correct.

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

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

A. No.

Q. Can you explain why? No.

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

A. Why should we have?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE COURT: Wait a minute, I'm not sure I understand. Could you repeat that right there, I was listening but I just got sort of, I stumbled when you were doing that.

MISS BOAN: The Board, in trying to decide how would we do the assessment, that the amendment is invalid --

THE COURT: All right. (R. p. 816; R. p. 25.)

CONCLUSION

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

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

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

Respectfully submitted,


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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

RECEIVED

AUG 11 2014

SC Court of Appeals

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 I. Mann and Angela M. Mann; Michael Cameron

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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*.

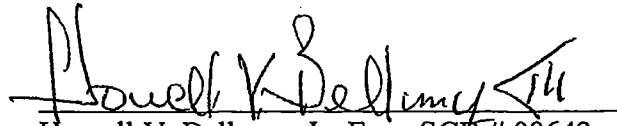
PROOF OF SERVICE

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

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August 11, 2014

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court Of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

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v.

Shipyard Village Council of Co-Owners, Inc., ...Appellant.

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

v.

Cincinnati Insurance Company, Travelers Insurance Company, Companion Property & Casualty Insurance Company, Philadelphia Insurance Company, Zurich American Insurance Company, American Guarantee and Liability Ins. Co., St. Paul Fire and Marine Insurance Company, and Illinois National Insurance Company, ... Third-Party Defendants.

RETURN TO PETITIONERS' PETITION FOR REHEARING

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The Appellant respectfully submits this Return in opposition to Petitioners' Petition for Rehearing.

ARGUMENT

I. The Court correctly ruled that the business judgment rule applies to all actions except for *ultra vires* ones.

Petitioners misapprehend the Court's ruling on the business judgment rule. Specifically, Petitioners argue that the Court erroneously ruled that a factual issue exists regarding Appellant's "improper use of the business judgment rule" to (1) impose unauthorized assessments on Petitioners for a portion of the costs of replacing the windows and balcony doors in Buildings A and B, (2) fail to pursue a recovery from the co-owners in Buildings A and B for damage to the common elements allegedly caused by their neglect, and (3) fail to present the annual budgets to the co-owners at the annual members meetings in 2009 and 2010.

This Court, however, issued no such ruling. The relevant portion of the Court's ruling is as follows:

The circuit court erred in finding the business judgment rule did not apply because the Master Deed, Bylaws, and the Act applied instead. The business judgment rule applies to actions allowed by the Master Deed, Bylaws, and Act, *intra vires* acts. The rule does not extend to actions not allowed by the Master Deed, Bylaws, and Act, *ultra vires* acts. The circuit court also erred in finding that because [Appellant] committed two acts it found to be *ultra vires*, the business judgment rule did not apply to any of its actions. The rule would apply to all of its actions except for *ultra vires* ones. As discussed above, the Master Deed and Bylaws did create a duty in [Appellant] to investigate. Therefore, any investigation would be looked at under the business judgment rule to determine if [Appellant] met its duty.

Thus, contrary to Petitioners' contention, this Court did not determine that a "factual issue" existed on the three specific items referenced by Petitioners above.

Rather, the Court outlined, *as a matter of law*, when the business judgment rule applies. Furthermore, even if the Court had ruled that a factual issue exists regarding the three arguments now raised by Petitioners, an examination of those three arguments reveals that each must fail.

- (A) Appellant did not “improperly use the business judgment rule” to impose an *ultra vires* assessment on Petitioners for a portion of the costs of replacing the windows and balcony doors in Buildings A and B.

Petitioners argue that Appellant imposed an unauthorized assessment on them to pay for the cost of the new windows and balcony doors in Buildings A and B, which violated Sections 3.6 and 4.3 of the Master Deed and Section 6.1 of the Bylaws. Section 3.6(c) states that the windows and balcony doors are considered part of each individual unit, rather than the common elements. Section 4.3 states that each co-owner is responsible for maintaining and repairing his or her unit. Section 6.1 provides that the manager or the board of directors is responsible for the maintenance and repair of the common elements.

At the outset, it should be noted that the co-owners in Buildings A and B paid for the cost of their new windows and balcony doors; Petitioners, all of whom are co-owners in Buildings C and D, were not assessed for those items. [R. pp. 733, 2257.] Contrary to Petitioners’ assertion, Appellant *did not* continue to enforce the 2006 window amendment when it assessed for the A & B repair project. This was made clear in the Board’s letter to the co-owners dated July 8, 2009:

The calculations above [demonstrating the per-unit assessment amounts] assume that the expense of the windows and sliding glass doors *will be borne by the homeowners in building[s] A&B*. Currently the Association has moved forward with a Summary Judgment as a means for resolving the civil action [challenging the 2006 window amendment] filed by C & D owners. . . . *If the ruling comes back that all unit owners are responsible*

for the expense for the windows/doors, the assessments will be adjusted accordingly.

[R. p. 1296] (emphasis added). Thus, it can be seen that when the Board assessed the co-owners for the repairs, it did so in accordance with the pre-2006 amendment (and current) version of Section 3.6 of the Master Deed, which makes each unit owner responsible for the cost of his or her windows and doors. The Board explicitly acknowledged that it would require co-owners in Buildings C and D to pay part of the cost of the windows and doors *only* if a court were to uphold the validity of the 2006 amendment. This never occurred, so only the co-owners in Buildings A and B bore the cost.

The Court did not rule, as Petitioners contend, that “a factual issue exists regarding [Appellant’s] improper use of the business judgment rule to change the prescribed method of assessment . . . by requiring the Petitioners to pay part of the construction costs to replace the A and B Co-owners’ windows and sliding glass doors.” Petitioners have simply misapprehended the Court’s ruling on the application of the business judgment rule, which was that the rule applies to actions allowed by the Master Deed, Bylaws, and Act, *intra vires* acts. Accordingly, Petitioners have failed to articulate a basis for rehearing.

(B) Appellant did not “improperly use the business judgment rule” to deviate from its duty to investigate.

Petitioners assert that Appellant “deviated” from the Bylaws when assessing for the cost of repairs to Buildings A and B by failing to hold the co-owners in Buildings A and B partially responsible for the damage to the common elements. As this Court held in its opinion, Appellant had a duty to investigate to determine “who is responsible for damage to the common elements.” In reaching this conclusion, the Court relied in part

on Sections 6.3 and 6.4 of the Bylaws, which provide that in the event a co-owner causes damage to the common elements, the Board must charge that co-owner for the cost of repairs.

The Court also acknowledged that in this case, “ample evidence supports different causes” of the damage to the common elements and that “[t]he record contains evidence [Appellant] did not breach its duty to investigate.” As discussed in Part III of Appellant’s Final Brief, there is substantial evidence in the record indicating that the damage to the common elements was caused by sources other than leaking windows and balcony doors.

For instance, Keystone Construction studied the window leak issue in 2003 and concluded that the water was leaking through the stucco and also found that non-existent window flashing was part of the problem. [R. p. 2148.] Because window flashing is not the responsibility of individual unit owners, Keystone’s conclusions did not indicate to the board that co-owner negligence was causing damage to the buildings.

In 2005, Ben Morrow replaced his windows after experiencing water intrusion problems, but the new windows still leaked. [R. p. 1141.] He hired an architect and an engineer, who opined that water was migrating through the exterior wall and that replacing the windows would not solve the issue. [R. pp. 1149, 2152, 2270.] The site maintenance supervisor found that stucco cracks and sealant joint failures could be causing the problems. [R. pp. 1145, 2152.] A jury could conclude that this information, in combination with the other reports received by the board, gave the board a good faith basis to conclude that the water intrusion in Buildings A and B resulted from common element failures rather than co-owner neglect. Further, a jury could reasonably infer that

the board acted within its scope in not attempting to apportion negligence where it believed none existed.

Schneider, after performing destructive testing, determined in 2007 that leaks, which were occurring at “stacks” of units, were caused by the spandrel’s insufficient vertical dimension. [R. p. 1325.] The spandrel is part of the exterior wall. Schneider also found that enlarging the spandrel would allow space for separate flashing assemblies. [R. pp. 1325–26.] The window system consists of many components that are not part of the “unit” as defined in Section 3.6(c) of the Master Deed, including the spandrel and the flashing. [R. p. 968.] Considering this evidence in the light most favorable to Appellant establishes that problems with these non-unit components—*i.e.*, the common elements—were causing the water intrusion issues.

When HICAPS gave its presentation to the board in July 2008, it opined that the concrete exteriors of Buildings A and B had experienced water and salt intrusion. [R. p. 1350.] HICAPS also informed the board that the building envelopes were not weather-tight and were allowing water to enter the structures. [R. p. 1350.] A jury could conclude that the board considered this report and reasonably made an informed decision that damage to the common elements could not be apportioned to individual unit owners.

Spectrum’s 2008 report found numerous “failures” in Buildings A and B, listed in the following order: roof failure, façade failure, edge beam failure, soffit failure, concrete failure, expansion joint failure, horizontal surface failure, HVAC anchorage failure, and windows and doors. [R. pp. 2247–48.] Spectrum found that rainwater was penetrating the roof, the stucco, lanai slabs, floor beams, and hollow core slabs. Importantly, Appellant received this report in November 2008, the very point in time it was in the

process of obtaining a final identification of the deficient conditions so that the appropriate remediation method could be selected. Of the nine “failures” listed above, only one—“windows and doors”—implicated the units themselves rather than the common elements, and the only problem identified with the windows and doors was the “poor to nonexistent flashing,” which is not part of the units as defined in Section 3.6(c) of the Master Deed and, thus, not the responsibility of co-owners. [R. p. 2248.] A jury could infer from this evidence that the board of directors acted in a reasonably prudent manner when determining that co-owner neglect was not responsible for damage to the common elements.

When faced with these conflicting reports, Appellant did not have a “mandatory duty” to assess co-owners in Buildings A and B for the cost of repairing the common elements, as Petitioners assert. Accordingly, this Court correctly ruled that the record contains evidence that Appellant did not breach its duty to investigate, and this creates an issue of fact for the jury.

(C) Appellant did not “improperly use the business judgment rule” to deviate from its duty to present budgets at annual meetings.

Petitioners argue the Court incorrectly found a factual issue to exist “regarding [Appellant’s] *ultra vires* assessment (invalid window and door amendments) against the Petitioners in conjunction with its Board’s failure to discharge its duties [under] Sections 1.12, 5.2, and 5.3 of the Bylaws.” Section 1.12 provides the order of business at meetings of co-owners. Sections 5.2 and 5.3 set forth the Board’s requirement to present the budget at the annual meeting and a method for the co-owners to amend the budget.

This Court, however, never ruled that a factual issue existed regarding the Board’s actions under these three sections of the Bylaws. Indeed, the Court’s ruling never

specifically mentioned any of these three provisions of the Bylaws or otherwise discussed Appellant's annual budgets in any way. The Court's ruling on the business judgment rule was simply that "[t]he rule would apply to all of [Appellant's] actions except for *ultra vires* ones." Further, Appellant has never argued that the business judgment rule allowed Appellant to circumvent explicit duties under the Master Deed and Bylaws. Petitioners have simply misapprehended what this Court's ruling is regarding the business judgment rule.

CONCLUSION

Petitioners have not demonstrated any reason for a rehearing in this case. The Court properly ruled that the business judgment rule applies to all of Appellant's actions except for *ultra vires* ones. Furthermore, the Court properly ruled that the investigation performed by Appellant must be viewed under the business judgment rule in determining whether Appellant met its duty. There was no confusion on the part of the Court, and there are no arguments it overlooked or misapprehended. Therefore, the Court should deny Petitioners' petition.

[Signature on following page]

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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 I. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters

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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*.

REPLY TO APPELLANT'S RETURN

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The Petitioners respectfully submit this Reply in opposition to Appellant's Return.

ARGUMENT

- I. The Court misapprehended Council's lack of good faith and overlooked its improper use of the business judgment rule to change the method of assessment where the Petitioners were improperly assessed for part of the soft and hard construction costs for repairing and replacing the A and B Co-owners' windows and sliding glass doors.

Appellant's contention that the A and B Co-owners were assessed¹ "in accordance with the pre-2006 amendment (and current) version of Section[s] 3.6 and [4.3] of the Master Deed, which makes each unit owner responsible [at his own expense] for the repair costs of his or her windows and sliding glass doors," is an inaccurate statement based upon the total record as discussed below. [Appellant's Return, p. 2.]

Contrary to Appellant's contention, A and B Co-owners are responsible for the total construction costs, including soft costs, for the repair and replacement of their windows and sliding glass doors pursuant to Sections 3.6 and 4.3 of the Master Deed and Section 6.1 of the Bylaws. Specifically, Section 4.3 provides in part, that "[e]very Co-owner shall be responsible at his own expense for maintaining, repairing and decorating all walls, ceilings and floors of his unit." [R. p. 971.] 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.] Section 6.1 of the Bylaws provides that the "units shall be maintained in good condition and repair by respective owner." [R. p. 1019.]

¹Council made decision to charge just the A and B Co-owners for the actual costs of their windows and sliding glass doors only after the Petitioners had already brought a lawsuit under Civil Action No. 2009-CP-22-0152 (invalid window amendment). The lawsuit was filed on January 29, 2009. Council made its decision on or before July 9, 2009. [R. pp. 1295-1297.]

The A and B Co-owners were only assessed \$ 1,760,000 for the cost of their windows and sliding glass doors. [R. pp. 730-733.] This amount was confirmed during motion hearing held on May 21, 2012, when the following exchange occurred:

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 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.] However, Sutton-Kennerly & Associates ("SKA")'s construction budget for repairing Buildings A and B indicates the cost of the new windows and sliding glass doors was \$2, 459,000. (Emphasis added.) [R. p.1292.]

Based upon Appellant's admissions above, the record reflects that Petitioners were still improperly assessed for part of the hard and soft construction costs for the repair and replacement of the A and B Co-owner's windows and sliding glass doors when Council assessed for the repair of Buildings A and B in 2010 and 2011. [R. pp. 2256-2257; Appellant's Return, p. 2.] This fact is confirmed by the affidavit of Board Member Doris Bray ("Bray"), filed October 28, 2011, when she states that the *"alternative vote on the amendment was not a legal position expressed by the Board; . . .and [with] the uncertainty surrounding the Windows and Doors Amendment, the Board decided the most that could be attributed to the Building A and B Unit Owners was the actual costs of the windows and doors."* (Emphasis added.) [Affidavit of Board Member Doris Bray ("Bray"), filed October 28, 2011 R. pp. 2256-2257.] Further, Bray admits that the windows and sliding

glass doors' *repair costs, including the "soft" project costs* were not individually charged to the A and B Co-Owners. [R. pp. 2256-2257.] Her affidavit establishes this fact when she states "that Petitioners are not entitled to a \$531,679 reduction of their assessment to account for the[ir] [payment of the] soft project costs² attributable to the windows." (Emphasis added.) [R. p. 2255.] Sutton-Kennerly & Associates, Inc. ("SKA")'s soft construction costs for the replacement of the windows and sliding glass doors included, but was not limited to: (1) general conditions costs (for permits, mobilization, scaffolding, superintendent, site facilities, dumpsters, port-a-johns, etc.), (2) overhead and profit (~10%), (3) engineering fees for: design and contract administration, (4) contingency fee (15% of construction subtotal). (Emphasis added.) [R. p. 1404, SKA's repair budget for Buildings A and B.] Accordingly, Council's failure to assess the A and B Co-owners for the "[total] repair costs, including the "soft" project costs," for the replacement of their windows and sliding glass doors is an *ultra vires* action, which directly violates the "pre-2006 amendment (and current) version" of Sections 3.6 and 4.3 of the Master Deed. (Emphasis added.) [Appellant's Return, p. 2.]

Further, the affidavit of Board Member Bray is indisputable evidence of Council's use of the business judgment rule to improperly change the method of assessment (after both amendments were down by the membership) to make Petitioners partly responsible for the repair and soft costs of the A and B Co-owners' windows and balcony doors, when she states:

²Soft cost is a construction industry term but more specifically a contractor accounting term for an expense item that is not considered direct construction cost. Soft costs include architectural, engineering, financing, and legal fees, and other pre- and post-construction expenses. The term has been replaced in most contractor accrual accounting with the term General & Administrative abbreviated G&A. Wikipedia, Soft Costs http://en.wikipedia/wiki/Soft_Costs (as of 8 September 2014 at 13:58.)

[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.]

Here, Council's *ultra vires* assessment of the Petitioners for part of the "*repair costs, including the "soft" project costs,*" to replace the A and B Co-owners' windows and sliding glass doors cannot be defended on the grounds that it is a reasonable alternative under the business judgment rule. See Fisher v. Shipyard Village Council of Co-Owners, Inc., at 409 S.C. at 181, S.E.2d at 130. (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) (This Court found that the association's flat fee system of charges violated the fixed rate requirement under Article III, Section 1, of the Bylaws and could not be defended on the grounds that it was a reasonable alternative under the business judgment rule.) (citations omitted.) Accordingly, the Court misapprehended that the 2006 window amendment was valid, and that Council lacked bad faith in continuing to enforce window amendment after 2008. For these reasons, the Court overlooked the fact that Council had improperly used the business judgment rule to change the method of assessment by requiring the Petitioners to pay for part of the soft and hard construction costs for repairing the A and B Co-owners' windows and sliding glass doors.

- II. The Court misapprehended that the first vote on the 2006 window amendment had passed, which caused it to overlook the fact that Council had acted in bad faith in continuing to enforce the admittedly invalid window amendment after 2008, and thus the Court erred in applying the business judgment rule.

The Court misapprehended, overlooked, and erred in determining in its Opinion that:

(1) “[t]he Council decided to leave voting open for thirty days to allow the Co-owners who did not vote at the meeting or by proxy to vote” and (2) *because 80% of the Co-owners voted in favor of the amendment after leaving the voting open, the Board believed the amendment had passed.*” Fisher v. Shipyard Village Council of Co-Owners, Inc., at 409 S.C. at 173, S.E.2d at 126.

With regard to the first referenced factual statement in the Opinion, the record is uncontroverted that the Board decided not to leave the vote open for 30 days “so non-voting Co-owners could vote.” (Emphasis added.) [R. pp. 114-115.] Board found that the first vote on the window amendment failed, and decided to start the amendment process over again by mailing out a new proxy card enclosed in a letter dated April 24, 2006 to the Co-owners seeking their written consent to adopt the amendment without another meeting. [R. pp. 114-115.] For these reasons, the first factual statement referenced in the Opinion is not true. [R. pp. 918-921.]

Next, the first part of the second factual statement referenced in the Opinion, which states that “*80% of the Co-owners voted in favor of the amendment*”³ refers only to the second proxy vote, not the first vote on the amendment for the reasons previously discussed above. [R. pp. 918-921.] This statement made by former Board President Don Johnston

³Id. at 409 S.C. at 173, S.E.2d at 126.

(“Johnston”) only confirms that the proxy vote without a meeting failed to obtain written consent from one hundred percent (100%) of the Co-owners entitled to vote. [R. pp. 114-115; R. pp. 918-92; R. 1279.], which indicates the window amendment is invalid. The second part of the second factual statement referenced in the Opinion, which provides. *“after leaving the voting open, the Board believed the amendment had passed,”*⁴ is not true based upon Council’s April 24, 2006 letter to the Co-owners indicating that **“the amendment to the master deed did not pass.”** [R. pp. 114-115.] Also, Council admits in responding to Plaintiffs’ discovery request in September 24, 2009, *“that the proposed amendment was considered and voted on at the membership meeting in April 2006. The amendment did not pass at the meeting and was re-voted on, but a meeting was not called for the second vote.”* [R. p. 920, ¶ Answer to question 7, Defendant’s Answers to the Plaintiffs’ Request for Admissions.] Accordingly, for these reasons, the second factual statement referenced in the Opinion is not true. [R. pp. 114-115.]

Clearly, the Board did not have a good faith basis *“to believe the window amendment had passed”* because the voting was not left open on the first vote, which Council admittedly knows is true. [R. pp. 114-115.] Even after 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 membership meeting held on March 21, 2009, Council still continued to assert the validity of the 2006 window and 2007 clarification and correction amendments. For example, at the motion hearing held on December 9, 2011, Appellant argued in opposition to Petitioner’s summary judgment motion requesting that the trial judge declare

⁴Id.

both amendments invalid and unenforceable as a matter of law. [R. pp. 665-672; R. p.1279.] Specifically, Appellant's counsel admitted that if the trial judge finds both 2006 window and 2007 clarification and correction amendments are invalid, then the Petitioners are going to claim A and B Co-owners are now responsible for their windows and sliding glass doors' soft construction costs. [R. pp. 665-672.] Additionally, at the hearing held on May 21, 2012, Appellant's counsel admitted to the trial judge that "*when the Board received Jeff King's letter [dated June 9, 2008] and they are faced with, 'What do we do, this amendment is not valid,' that is what they're considering....*" [R. p. 732, lines 1-14; R. p. 22] Lastly, at the hearing held on May 21, 2012, Appellant's Counsel admitted to the trial judge that "[w]e believe the assessment as rendered by the Board ... is an 'ultra vires act' that should be afforded [protection] under the business judgment rule...." [R. 795, lines 2-17; R.p.24.]

Here, Petitioners' main claim against Council, in part, arises out of being improperly and over assessed for the soft and hard construction costs for the replacement of the A and B Co-owners' windows and sliding glass doors, which are their exclusive responsibility pursuant to the "pre-2006 amendment (and current) version" of Sections 3.6 and 4.3 of the Master Deed. [R. p. 2030; p.1404; Appellant's Return, p. 2.] Accordingly, the Court misapprehended that the 2006 window amendment was valid, and that Council lacked bad faith in continuing to enforce window amendment after 2008. For these reasons, the Court erred in applying the business judgment rule to Council's *ultra vires* repair assessment⁵ for

⁵The trial judge found "that the business judgment rule does not protect the Defendant's *ultra vires* conduct from judicial review based on its invalid assessment under Master Deed and Bylaws" evidenced by the following admission of the [Appellant]:

Buildings A and B. See Fisher v. Shipyard Village Council of Co-Owners, Inc., 409 S.C. at 180, 760 S.E.2d at 129 -130. (“[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires*. The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones. 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.”) (internal quotes and citations omitted.)

III. The Court incorrectly ruled that the business judgment rule applies to all actions except for *ultra vires* ones including “any investigation . . . to determine if the Council met its duty.

The relevant portion of the Court’s ruling in the Opinion is as follows:

The [business judgment] rule would apply to all of its actions except for *ultra vires* ones. As discussed above, the Master Deed and Bylaws did create a duty in the Council to investigate. *Therefore, any investigation would be looked at under the business judgment rule to determine if the*

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 how would we do the assessment, that the amendment is invalid --

THE COURT: All right. [Tr. of Motion Hr’g dated May 21, 2012, R. p.25.]

Council met its duty. Further, the burden is on Respondents to show the Council acted without good faith. Fisher v. Shipyard Village Council of Co-Owners, Inc., 409 S.C. 164, 181, 760 S.E.2d 121, 130 (Ct. App. 2014).

Petitioners assert that Appellant's contention and the Court's ruling that the business judgment rule applies to *"any investigation . . . to determine if the Council met its duty"* is inconsistent and contrary to the common law of this State. Specifically, Petitioners cite the case of Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel Int'l Corp., 286 S.C. 555, 335 S.E.2d 365 (1985) as authority for the legal principle that *"[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.) Additionally, Petitioners rely upon the case of Murphy v. Yacht Cove Homeowners Ass'n, 289 S.C. 367, 345 S.E.2d 709 (1986), where the South Carolina Supreme 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. In Murphy, the Court reasoned that, *"since the association can sue a member for failure to adhere to the bylaws, rules, and regulations, a member necessarily can sue the association for this same failure."* Id. at 369, 345 S.E.2d at 710. See, Olin Mathieson Chern. Corp. v. Planters Corp., 236 S.C. 318, 114 S.E.2d 321 (1960) (finding directors liable for inattention and for negligent supervision of officers); Baker v. Mutual Loan & Inv. Co., 213 S.C. 558, 50 S.E.2d 692 (1948) (finding directors liable for wrongful payment of dividends resulting from inattentiveness).

The line of cases cited and briefly discussed above indicate that a Director, a Board, or Council, notwithstanding the business judgment rule, may be liable for breaching the

general standard of care for ordinary negligence by disregarding mandatory duties, failing to act, or being inattentive. Only when a Director, Board, or Council makes a *conscious decision*, however, is the application of the business judgment rule triggered. See also, Aronson v. Lewis, 473 A. 2d. 805, 813 (Del. Ch. 1984) (“[*The business judgment rule*] has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act.”); “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.*” In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 748 (Del. Ch. 2005), *aff’d* 906 A.2d 27 (Del. 2006); Neglectful inaction is not protected by the rule. See, e.g., Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981).

Here, the Court erred in requiring the application of the business judgment rule to “any investigation . . . to determine if the Council met its duty,” because the rule would be applied *in instances where Council has failed to act* or was liable to Co-owners for its omissions. (Emphasis added.) See Queen’s Grant Villas Horizontal Property Regimes I-V v. Daniel Int’l Corp., Id. at 556, 335 S.E.2d at 366 (“[Association] may be liable to the homeowners for its omissions.”); See also Aronson v. Lewis, *Id* at 813 (“business judgment rule operates in the context of director action.”); Joy v. North, 692 F.2d 880, 886 (2d Cir 1982) (Business judgment rule does not apply in cases where there is a failure to exercise oversight or supervision.) (Emphasis added.) As a consequence of the Court’s incorrect ruling, the burden is on Petitioners “to show the Council acted without good faith,” which insulates Council from liability for negligence. See, Robert J. Rhee, The Tort Foundation of Duty of Care and Business Judgment, 88:3 Notre Dame Law Review 1141 (2013)(“Yet, the one thing about the business judgment rule on which everyone agrees is that it

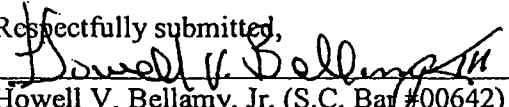
insulates directors from liability for negligence."); For these reasons, the Court's ruling incorrectly applies the business judgment rule to Council's inaction or inattentiveness to its mandatory duties. Decision making is required. Compare Dockside Ass'n v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 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.")

CONCLUSION

Petitioner respectfully submits that the Court misapprehended, overlooked, and erred in determining: (1) that the first vote on the 2006 window amendment was valid which implied that Council had acted in good faith in continuing to enforce the amendment after 2008; (2) that business judgment rule would apply to "*any investigation . . . to determine if the Council met its duty*" which would require its application *in instances where Council has not exercised business judgment* or was liable to Co-owners for its omissions; and (3) that business judgment rule applied to Council's admittedly *invalid* repair assessment for Buildings A and B. For these reasons discussed above, Petitioners respectfully request that the Court reconsider its Opinion via either a rehearing, or by modifying or amending its opinion as requested above, and for such other and further relief as this Court may deem just and proper.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,


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Court of Appeals of South Carolina.

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 T. 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 J. 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, Francis G. Thomson and Arleen S. Thomson, Robert W. Dalton, Red Oak Limited Partnership, William R. McKeown and Margaret A. McKeown, Norman K. Moon and Barbara W. Moon, 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, LLC; Georgia M. Pruitt and Howard M. Pruitt, Jr.; Jean T. Blaylock; William C. Covington, Jr. and Donna C. Covington; Litchfield Captain's Quarters, LLC; James A. Schubert and Laraine C. Schubert; Daniel P. Duvall and Mary Lynn Duvall; Victor A. Medina and Melinda Leigh Medina; Judy P. Hamer; Boyce F. Miler and Carole L. Miller, Raymond A. Shingler and Louise O. Shingler, Paul Larry Barnette and Carol Jane Barnette, James R. Walker and Erika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin, Lois E. Cooley, Truseee of the Lois E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, Jason A. Underwood, Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame, Respondents.

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v.
 SHIPYARD VILLAGE COUNCIL OF
 CO-OWNERS, INC., Appellant.
 Shipyard Village Council of Co-Owners, Inc.,
 Third-Party Plaintiff,

v.
 Cincinnati Insurance Company, Travelers Insurance
 Company, Companion Property & Casualty Insur-
 ance Company, Philadelphia Insurance Company,
 Zurich American Insurance Company, American
 Guarantee and Liability Ins. Co., St. Paul Fire and
 Marine Insurance Company, and Illinois National
 Insurance Company, Third-Party Defendants.
 Appellate Case No. 2012-213634.

No. 5241.
 Heard Feb. 20, 2014.
 Decided June 25, 2014.

Background: Condominium unit co-owners brought action against management council alleging negligence, gross negligence, negligent and gross negligent misrepresentation, breach of fiduciary duty, breach of the master deed, and requesting a declaratory judgment, injunctive relief, specific performance, and judicial dissolution of the council. Following consolidation with another suit brought by unit co-owners involving faulty windows and sliding doors, the Circuit Court, Georgetown County, Larry B. Hyman, Jr., J., 2012 WL 10861797, granted unit co-owners' partial summary judgment motion on the issues of duty and breach for the negligence claim involving the faulty windows and sliding doors. Council appealed.

Holdings: The Court of Appeals, Konduros, J., held that:

- (1) council had a duty to investigate to determine whether to assess individual co-owners for damages to the common elements;
- (2) any investigation of the council's actions would be looked at under the business judgment rule to determine if the council met its duties under the master deed and bylaws;
- (3) the business judgment rule would not allow the council to deviate from its duties, as specified un-

der the association bylaws and the master deed, simply because the actions it took to determine whether to assess individual co-owners for damages to the common elements was reasonable; and (4) there was at least a scintilla of summary judgment evidence that the council did not breach its duty to investigate, as an element of co-owners' negligence claim.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Common Interest Communities 83T 74

83T Common Interest Communities

83TIV Unit Owners' Association

83Tk72 Dues, Assessments, Fines, and Other Fees

83Tk74 k. Power and duty to assess or levy; validity. Most Cited Cases

Condominium management council had a duty to investigate to determine whether to assess individual co-owners for damages to the common elements, pursuant to the master deed and bylaws which provided that the manager or the board was responsible for the maintenance and repair of the common elements, and that all maintenance, repair, and replacement expenses were common elements except when not fully reimbursed by insurance proceeds or necessitated by the failure of a co-owner to provide maintenance as required by the bylaws.

[2] Negligence 272 202

272 Negligence

272I In General

272k202 k. Elements in general. Most Cited Cases

In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or dam-

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ages.

[3] Negligence 272 ⚡210

272 Negligence

272II Necessity and Existence of Duty

272k210 k. In general. Most Cited Cases

An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff.

[4] Negligence 272 ⚡1692

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1692 k. Duty as question of fact or law generally. Most Cited Cases

In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff.

[5] Common Interest Communities 83T ⚡54

83T Common Interest Communities

83TIII Common Elements

83Tk50 Management and Maintenance

83Tk54 k. Responsibility of unit owners' association for condition of common areas. Most Cited Cases

When master deeds and bylaws show a homeowner's association has the obligation to maintain the common elements, the association has a duty to pursue a recovery for any alleged construction defects in the common elements.

[6] Common Interest Communities 83T ⚡64

83T Common Interest Communities

83TIV Unit Owners' Association

83Tk64 k. Governing board; members, directors, and officers; committees. Most Cited Cases

The business judgment rule applied to all of condominium management council's actions, except for those that were ultra vires, and thus, any investigation of the council's actions would be looked at

under the business judgment rule to determine if the council met its duties under the master deed and bylaws.

[7] Common Interest Communities 83T ⚡64

83T Common Interest Communities

83TIV Unit Owners' Association

83Tk64 k. Governing board; members, directors, and officers; committees. Most Cited Cases

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.

[8] Common Interest Communities 83T ⚡158

83T Common Interest Communities

83TVII Actions and Proceedings

83Tk158 k. Evidence. Most Cited Cases

In a dispute between a homeowners association and aggrieved homeowners, the burden of proving good faith under the business judgment rule 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.

[9] Corporations and Business Organizations 101 ⚡2253

101 Corporations and Business Organizations

101IX Corporate Powers and Liabilities

101IX(A) Extent and Exercise of Powers in General

101k2252 Scope of Corporate Power in General

101k2253 k. In general. Most Cited Cases

Corporations and Business Organizations 101 ⚡2254

101 Corporations and Business Organizations

101IX Corporate Powers and Liabilities

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101IX(A) Extent and Exercise of Powers in General

101k2252 Scope of Corporate Power in General

101k2254 k. Ultra vires acts in general. Most Cited Cases

A corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are ultra vires.

[10] Corporations and Business Organizations 101 ⚡1842

101 Corporations and Business Organizations

101VII Directors, Officers, and Agents

101VII(D) Rights, Duties, and Liabilities as to Corporation and Its Shareholders or Members

101k1840 Fiduciary Duties as to Management of Corporate Affairs in General

101k1842 k. Business judgment rule in general. Most Cited Cases

The business judgment rule only applies to intra vires acts, not ultra vires ones.

[11] Common Interest Communities 83T ⚡68(4)

83T Common Interest Communities

83TIV Unit Owners' Association

83Tk66 Powers, Duties, and Functions

83Tk68 Constitution, By-Laws, and Rules

83Tk68(4) k. Construction, operation, and effect. Most Cited Cases

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.

[12] Common Interest Communities 83T ⚡64

83T Common Interest Communities

83TIV Unit Owners' Association

83Tk64 k. Governing board; members, directors, and officers; committees. Most Cited Cases

The business judgment rule would not allow condominium management council to deviate from its duties, as specified under the association bylaws and the master deed, simply because the actions the council took to determine whether to assess individual co-owners for damages to the common elements were reasonable.

[13] Judgment 228 ⚡185.3(1)

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.3 Evidence and Affidavits in Particular Cases

228k185.3(1) k. In general. Most Cited Cases

Summary judgment evidence that condominium management council hired many construction and engineering companies and consultants to determine what was causing water problems, utilized several different construction companies over the years in an attempt to resolve the problems, and was informed by its attorneys that initiating a lawsuit regarding the water problems would be expensive and likely unproductive, constituted at least a scintilla of evidence that the council did not breach its duty to investigate to determine whether to assess individual co-owners for damages to the common elements, as an element of condominium co-owners' negligence claim.

[14] Negligence 272 ⚡1692

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Directed Verdicts

272k1692 k. Duty as question of fact or law generally. Most Cited Cases

Negligence 272 ⚡1693

272 Negligence

272XVIII Actions

272XVIII(D) Questions for Jury and Direc-

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ted Verdicts

272k1693 k. Negligence as question of fact or law generally. Most Cited Cases

The question of negligence is a mixed question of law and fact; first, the court must resolve, as a matter of law, whether the law recognizes a particular duty.

****124** Carlyle Richardson Cromer and R. Wayne Byrd, both of Turner Padgett Graham & Laney, PA, of Myrtle Beach, for Appellant.

Howell V. Bellamy, Jr., and Howell Vaught Bellamy, III, both of Bellamy, Rutenberg, Copeland, Epps, Gravely & Bowers, P.A. of Myrtle Beach, for Respondents.

KONDUROS, J.

***170** The Shipyard Village Council of Co-Owners, Inc. (the Council) appeals the circuit court's grant of partial summary judgment to owners of condominiums within the development in the case involving faulty windows and sliding doors. The Council argues it did not have a duty to investigate, the business judgment rule should have applied, and a jury could have found it did not breach any duty. We affirm in part, reverse in part, and remand.

FACTS/PROCEDURAL HISTORY

The condominium development Shipyard Village Horizontal Property Regime (Shipyard Village) in Pawleys Island was established in 1982 pursuant to the recording of the Master Deed. The Council was incorporated to administer the affairs in accordance with the Bylaws through a Board of Directors (the Board). Shipyard Village was built in two phases. Phase I was approved for final occupancy in 1982 and contained two buildings, A and B. Phase II was submitted to condominium ownership in 1998 and was comprised of Buildings C and D.

Section 3.6(c) of the Master Deed provides that a unit's balcony doors including its ****125** frame

and "window glasses, screens, frames, and casings" are part of each unit. Section 6.1 of the Bylaws provides the manager or the Board is responsible for the maintenance, repair, and replacement of the common elements. Section 6.2 of the Bylaws specifies that unit owners (Co-owners) are responsible for the maintenance and repair of their units. Section 5.6 of the Master Deed states maintenance, repair, and replacement of the common elements are the Board's responsibilities "except in the case of the negligence of a Co-owner ..., and in the event of such negligence, such expenses of a portion thereof may be assessed as an individual assessment." Additionally, section ***171** 12.1 of the Master Deed indicates that if regime property is damaged due to "neglect, willful act[,] or abuse" of a Co-owner and insurance proceeds are insufficient to cover the cost of the damage, the deficiency amount "shall be charged to such Co-owner as an individual assessment." The Bylaws state in section 6.4 that all maintenance, repair, and replacement expenses are common expenses except when those expenses are not fully reimbursed by insurance proceeds and are necessitated by the failure of a Co-owner to perform the maintenance required by the Bylaws or by the willful act, neglect, or abuse by a Co-owner, in which case they will be charged to the Co-owner as an individual assessment. The Master Deed does not list window flashing as one of Co-owners' responsibilities but window frames and casings are included as Co-owners' responsibilities.

Over the years, Buildings A and B experienced leaks at the windows and balcony doors. In 1993, Procon Waterproofing, Inc., which had waterproofed the buildings in 1990, informed a management company that following its preliminary inspection of the concrete structural slabs of Buildings A and B, it recommended "a structural engineer further evaluate the cracking and spalling [that] is occurring in the pre-cast slabs and beams." In 1994, Procon found that all the work it completed in 1990 was performing as intended with no problems. It noted that for the ocean-front windows, "the metal end stop bead associated with the stucco

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system which was installed during the original construction over each floor band are beginning to deteriorate and rust." The Council had Procon replace the corroded metal casing beads.

At the June 15, 1999 Board meeting, the Board decided to "notify all the [Co-]owners and inform them that they are responsible for their threshold and window frame on their unit." The property manager sent a letter dated August 11, 1999, to all Co-owners in Buildings A and B stating "the waterproofing of the balcony thresholds and windows are the responsibility of the unit owners." The letter provided Co-owners could waterproof their balcony thresholds and windows for \$737.50. In 1999, Henderson Waterproofing performed some stucco and concrete repairs to Buildings A and B. Bobby Warner, the Council's maintenance supervisor at that time, observed the work and did not believe the damage *172 to the building was as severe as Henderson did and did not think an engineer was needed to assess the buildings.

In 2002, the Council hired McGee Consulting Associates to study the windows for Buildings A and B. It determined some of the windows leaked when sprayed by a hose. However, the hose testing failed to comply with the published standards for window leak testing. The hose test indicated "water channels down both sides of the windows, which starts at the top floor windows and works its way to the ground. The water intrusion had caused some of the wood framing to deteriorate due to wood-rot." During the investigation, McGee discovered some of the windows had been replaced after Hurricane Hugo, in 1989, and appeared to be residential instead of commercial and prefabricated instead of custom made. Because the windows were prefabricated, they were smaller than the opening and wood framing had been installed to fill the gaps. The replacement windows were also less thick than the original windows. An attorney for the Board noted issues with the statute of limitations in pursuing any action for deficiencies in the replacement windows and the original developer had filed bankruptcy in

1993.

The following year, the Council hired Keystone Construction to examine the leaks at **126 the windows and it determined the water was leaking through the stucco instead of the windows. Keystone informed the Council the lack of window flashing was part of the cause of the leaking. It further found the windows were improperly sized and poorly installed and stucco had been used to fill the gaps around the windows.

In 2004, the owners of a unit in Building B, Ben and Katie Morrow, were having water intrusion problems, and in 2005, they replaced their windows. They continued to experience leaks afterwards and hired an architect and an engineer to investigate the cause of the leaking. The architect found "there is water migration through the exterior wall that is not related to the window sill, jamb[,] or header." The new site maintenance supervisor, Richard Bennett, looked into the issue and found sealant joint failures at the window-stucco interface along with cracked stucco could have been causing the problems. The Morrows' engineer reported at a board meeting in 2006 that repairing one window would not solve the *173 leak issue and an entire vertical stack of windows needed to be removed, flashed, and replaced at the same time.

Because the Board was concerned about the uniformity of new windows, complying with codes, stucco being damaged during replacement, individual owners' ability to procure competent contractors, and the need to replace entire stacks at the same time, in 2006, it considered amending the Master Deed to include windows and sliding doors as common elements. The Board received a proposal from Pro-Tec Finishes, Inc. to replace all of the windows in Buildings A and B for a total of \$2.48 million. At the annual members' meeting on April 15, 2006, 71.94% of the Co-owners voted on whether to amend the Master Deed to include the window and sliding doors. To pass the amendment, 66.68% was needed to vote in favor of it, but only 63.59% voted for it. The Board determined ninety

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units had voted in favor of the amendment, eleven had voted against it, and thirty-nine had not voted. The Council decided to leave voting open for thirty days to allow the Co-owners who did not vote at the meeting or by proxy to vote.^{FN1} Because over 80% of Co-owners voted in favor of the amendment after leaving the voting open, the Board believed the amendment had passed. An amendment to the Master Deed recorded on October 16, 2006, added "[t]he Limited Common Elements shall also include the window glasses, screens, frames and casings" and deleted the language indicating the windows were a part of the unit. On November 14, 2007, another amendment was recorded, stating this amendment was to correct and clarify the previously recorded amendment, which omitted adding the sliding glass doors to the common elements.

FN1. Section 1.5 of the Bylaws states, "Any action which may be taken by a vote of the Co-owners may also be taken by written consent to such action signed by all [C]o-owners entitled to vote."

In 2006, the Board hired Schneider and Associates, Inc. to investigate the water problems for Buildings A and B. Schneider found that considering the buildings were over thirty years old, it observed better than average building envelope performance. Schneider performed destructive testing on the Morrows' unit and discovered "the stack" of units was leaking from top-to-bottom at the jamb and sill terminations. *174 The existing conditions rely on the window-wall's frame configuration to "turn" the water to the exterior. The spandrel, formed by the slab edge, is insufficient to accomplish this alone." Schneider recommended enlarging the spandrel's vertical dimension to allow space for separate flashing assemblies. Schneider oversaw repairs for two units in Building A, but the Board was dissatisfied with its performance and lack of progress.

In August of 2007, the Board hired MEC Engineering Services, Inc. to oversee the remainder of renovations to Buildings A and B. The Board re-

quested MEC procure at least three bids from contractors for the repairs.

On April 19, 2008, the Board reported at the annual members' meeting Buildings A and B needed extensive repairs. The Board informed the members the cost would range between \$12 and \$13 million and the Co-owners would be charged by special assessment. Some Co-owners of units in Buildings C and D, contacted an attorney, who sent a **127 letter to the Board asserting the special assessment was invalid because the 2006 amendment was not properly approved and accordingly the cost of replacement or repairs of windows and sliding doors were the responsibility of the individual Co-owners.

In July 2008, HICAPS presented to the Board that it had identified two primary problems for Buildings A and B. The first problem was the structural concrete was failing due to water and salt intrusion and the reinforcing steel's corrosion. The other problem was the building envelope was not weather tight, which allowed water to enter the structure and caused wood to rot in walls framing the windows and sliding doors. Additionally, the paint sealer was at the end of its lifespan as were the windows, which were failing.

The Board became displeased with MEC and hired Sutton-Kennerly & Associates, Inc. along with Spectrum Engineering Services, Inc. to review MEC's reports, proposals, drawings, and bid specifications. Sutton-Kennerly believed the repairs could be completed at a lower cost than MEC had specified. It also thought some of the proposals and drawings lacked sufficient details and did not agree with some of the proposed repair methods. The Board decided to discontinue MEC's *175 services. Spectrum presented the Board with a report noting failures to the roof system, façade, edge beams, soffits, concrete, expansion joints, horizontal surfaces, and HVAC anchorage. Spectrum reported that rainwater was penetrating the roof, the stucco, lanai slabs, floor beams, and hollow core slabs. Spectrum found the "windows and doors have poor to nonex-

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istent flashing to prevent wind driven rain from getting into the units."

In January 2009, the Board requested Sutton-Kennerly to perform tests and investigate to determine the full scope of repairs required for Buildings A and B and supply a cost estimate. On February 16, 2009, the Board hired Sutton-Kennerly to draft designs for repairs and solicit bids.

On January 29, 2009, some Building C and D Co-owners brought suit against the Council for breach of the Master Deed's covenants and restrictions, injunctive relief, and declaratory judgment due to the recording of the 2006 amendment making windows and sliding doors common elements. Due to the challenge of the 2006 amendment, on March 21, 2009, the Board called a special membership meeting to revote on the amendment. Only 48.31 % voted in favor of the amendment, meaning the Co-owners were still responsible for the unit windows and sliding doors.

In July 2009, the Council notified the Co-owners that repairs would occur for Building B from September 2009 through May 2010 and from September 2010 to May 2011 for Building A. The repairs were estimated to cost \$10,944,468. The Council wished to finance the repairs through a special assessment. The proposed assessment was \$88,398 per unit for Buildings A and B; \$64,868 per unit for three-bedroom units in Buildings C and D; and \$68,471 for four-bedroom units in Building C and D. The assessments for Buildings A and B covered the cost to replace their windows and doors. The Co-owners voted on August 1, 2009, on the special assessments. To pass the assessments, 50% plus one vote was needed, and only 44.26% voted in favor. Council informed the members the repairs would be incorporated into the 2010 and 2011 operating budgets and would be billed monthly to the Co-owners in addition to their regular assessments.

*176 On October 7, 2009, more Building C and D Co-owners (Respondents) filed a new suit, al-

leging negligence and gross negligence, negligent and gross negligent misrepresentation, breach of fiduciary duty, and breach of the Master Deed and requesting a declaratory judgment, injunctive relief, specific performance, and judicial dissolution of the Council. This suit was consolidated with the prior suit. The Council hired a professional engineer, J. Lawrence Elkin, with experience in diagnostic evaluations, building repair design, and construction project management to inspect the premises and analyze the documents from the former construction companies and consultants that had inspected and given opinions on the conditions of Buildings A and B. He noted "[t]he need for the \$11,000,000 assessment is more directly associated with the fact that the facility is located **128 ocean front and was constructed nearly 30 years ago." He further stated "similarly aged and located properties undergo major rehabilitations every 25 to 30 years." Elkin opined:

The [Board] enlisted the assistance of technical experts and consultants to provide them guidance as to the condition of Buildings A & B. The [Board] acted in accordance with their recommendations. At times these recommendations were conflicting; the [Board] made choices based on the best information at [its] disposal and within the constraints of [its] budgets.

On May 4, 2012, Respondents moved for summary judgment or partial summary judgment on their negligence and breach of fiduciary duty causes of action. Following a hearing, the circuit court granted Respondents' partial summary judgment motion on the issues of duty and breach for the negligence claim. It determined the Bylaws and Master Deed impose affirmative duties on the Board to enforce, investigate, and correct known violations of the Master Deed, the Bylaws, and South Carolina Horizontal Property Act (the Act). The court further found the Council breached its duty to investigate the substantial evidence in the record that reasonably showed that Co-owners had neglected the maintenance of their leaking windows and sliding

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glass doors, which allegedly caused damages to the common elements of Buildings A and B. The circuit court found the business judgment rule was not applicable because the Master Deed, Bylaws, and Act all governed *177 the Board's actions. The circuit court further determined the Council was precluded from asserting the business judgment rule based on its lack of good faith in enforcing the 2006 amendment after June 2008. The court noted that whether the leaking windows and doors caused any damage is for the jury to decide. This appeal followed.

STANDARD OF REVIEW

The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). When reviewing the grant of a summary judgment motion, this court applies the same standard that governs the trial court under Rule 56(c), SCRCP; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). "In a negligence case, where the burden of proof is a preponderance of the evidence standard, the non-moving party must only submit a mere scintilla of evidence to withstand a motion for summary judgment." *Bass v. Gopal, Inc.*, 395 S.C. 129, 134, 716 S.E.2d 910, 912 (2011) (citing *Hancock v. Mid-South Mgm't Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)). In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003).

LAW/ANALYSIS

I. Duty to Investigate

[1] The Council contends the circuit court erred in finding it had a duty to investigate to determine whether to assess individual Co-owners for the

damage to the common elements. It asserts the Master Deed and Bylaws do not contain such a duty.^{FN2} We disagree.

FN2. The Council also asserts that if the circuit court granted summary judgment on the fiduciary duty issue, it was error. Respondents did move for summary judgment on the issue of fiduciary duty in addition to on its breach of contract and negligence causes of action. The order only mentions a fiduciary duty in passing and does not make specific rulings on the issue. The circuit court states its grant of summary judgment was only on the issues of duty and breach, presumably for the negligence cause of action. To the extent the circuit court did grant summary judgment on the issue of fiduciary duty, it is reversed. See *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, such as the Board, which are vested with the discretion to ensure that proposed modifications to residential property enhance the entire community. Instead, under the correct standard, the Board has a duty to exercise judgment reasonably and in good faith." (footnote omitted)).

**129 178[3][4] "In a negligence action, a plaintiff must show the (1) defendant owes a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages." *Sabb v. S.C. State Univ.*, 350 S.C. 416, 429, 567 S.E.2d 231, 237 (2002). "An essential element in a cause of action based upon negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." *Platt v. CSX Transp., Inc.*, 388 S.C. 441, 445, 697 S.E.2d 575, 577 (2010). "In a negligence action, the court must determine, as a matter of law, whether the defend-

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ant owed a duty of care to the plaintiff." *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 334, 566 S.E.2d 536, 545 (2002).

[5] When master deeds and bylaws show a homeowner's association has the obligation to maintain the common elements, the association has a duty to pursue a recovery for any alleged construction defects in the common elements. *Queen's Grant Villas Horizontal Prop. Regimes I-V v. Daniel Int'l Corp.*, 286 S.C. 555, 556, 335 S.E.2d 365, 366 (1985).

Section 6.1 of the Bylaws provides the manager or the Board is responsible for the maintenance and repair of the common elements. Section 6.2 of the Bylaws provides that "the Units shall be maintained in good condition and repair by their respective Co-owners." Section 6.3 states:

In the event that any Co-owner fails to perform the maintenance required of 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 rights of another Co-owner, or which substantially detracts from the value or *179 appearance of the Regime Property, the Board ... shall, after giving such Co-owner reasonable notice and opportunity to perform such maintenance, cause such maintenance to be performed and charge all reasonable expenses of so doing to such Co-owner by an Individual Assessment.

The Bylaws state in section 6.4 that all maintenance, repair, and replacement expenses are common expenses except when those expenses are not fully reimbursed by insurance proceeds and are necessitated by the failure of a Co-owner to provide maintenance required by the Bylaws or by the willful act, neglect, or abuse by a Co-owner, in which case they will be charged to the Co-owner as an individual assessment.

The circuit court properly granted Respondent's

partial summary judgment motion on whether the Council had a duty to investigate. The Council is charged with maintaining the common elements. Should a problem arise with those elements, as did here, the Council is responsible for pursuing any responsible parties, whether they are Co-owners or contractors or the developer. Although some problems' cause may be obvious, here, ample evidence supports different causes. 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. Accordingly, even though the Bylaws do not specifically state the Council had a duty to investigate, the duties created by the Bylaws and South Carolina law also support a duty to investigate who is responsible for damage to the common elements. Therefore, the circuit court did not err in granting summary judgment on the issue of duty.

II. Business Judgment Rule

[6] The Council maintains the circuit court erred in determining its conduct should not be judged by the business judgment rule. It argues the business judgment rule applies even when bylaws, the regime act, and a master deed govern conduct. Further, it contends the circuit court erred in finding its conduct was *ultra vires* and thus the business judgment rule did not apply. Additionally, it asserts that even if it had committed an *ultra vires* act, that does not prohibit the business judgment rule from applying to *intra vires* actions. We agree.

180[8] "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, **130 dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action." *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct.App.1993); see also *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

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faith, fraud, self-dealing[,] or unconscionable conduct.”); *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct.App.2000) (“Under the business judgment rule, a court 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.” (internal quotation marks omitted)). “[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.” *Dockside Ass’n*, 294 S.C. at 87, 362 S.E.2d at 874.

[9][10][11] “[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires*.” *Seabrook Island Prop. Owners Ass’n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct.App.1987). The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones. *Kuznik*, 342 S.C. at 605, 538 S.E.2d at 28. A homeowners association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative. *Seabrook Island Prop. Owners Ass’n*, 292 S.C. at 348, 356 S.E.2d at 414.

[12] The circuit court erred in finding the business judgment rule did not apply because the Master Deed, Bylaws, and the Act applied instead. The business judgment rule applies to actions allowed by the Master Deed, Bylaws, and Act, *intra vires* acts. The rule does not extend to actions not allowed by the Master Deed, Bylaws, and Act, *ultra vires* acts. The circuit court also erred in finding that because the Council *181 committed two acts it found to be *ultra vires*, the business judgment rule did not apply to any of its actions. The rule would apply to all of its actions except for *ultra vires* ones. As discussed above, the Master Deed and Bylaws did create a duty in the Council to investigate. Therefore, any investigation would be looked at under the business judgment rule to de-

termine if the Council met its duty. Further, the burden is on Respondents to show the Council acted without good faith. However, if the Bylaws and Master Deed specified how duties should be performed, the business judgment rule would not allow the Council to deviate from those simply because what they did was reasonable.

III. Breach of Duty

[13][14] Shipyard Village asserts the circuit court erred in determining it breached a duty to Respondents. It maintains the record contains evidence it did investigate what was responsible for the water leaking and received contradicting reports. We agree. “The question of negligence is a mixed question of law and fact. First, the court must resolve, as a matter of law, whether the law recognizes a particular duty.” *Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct.App.2010) (citation omitted). If a duty exists, the jury determines whether a breach of the duty that resulted in damages occurred. *Id.*

The record contains evidence the Council did not breach its duty to investigate. It hired many construction and engineering companies and consultants to determine what was causing the water problems. Although some evidence was presented the water was intruding through the doors and windows, other reports indicated the water was coming through the stucco and roof among other ways. The Council utilized several different construction companies over the years that had conflicting theories and solutions. The record also indicates the Board was informed by its attorneys over the years that initiating a law suit regarding the water problems would be expensive and likely unproductive. The record contains at least a mere scintilla of evidence the Council did not breach its duty to investigate. Accordingly, the circuit court erred in granting Respondents summary judgment on this issue.

**131 *182 CONCLUSION

We affirm the circuit court’s grant of summary judgment on the existence of a duty to investigate. Additionally, we reverse the circuit court’s decision

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that the business judgment rule does not apply and its granting summary judgment on the issue of breach of duty and remand the case to the circuit court for trial.^{FN3}

FN3. We decline to rule on Respondents' additional sustaining ground that the Council had the duty to determine the cause of the "cracking and spalling in the pre-cast slabs and beams" in Buildings A and B that Procon observed in 1993 and 1994. See *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) ("It is within the appellate court's discretion whether to address any additional sustaining grounds."); *id.* ("An appellate court may not rely on Rule 220(c), SCACR, ... when the court believes it would be unwise or unjust to do so in a particular case.")

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

HUFF, J., and CURETON, A.J., concur.

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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 I. 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.*

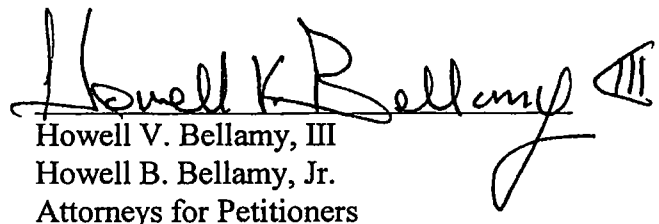
Shipyard Village Council of Co-Owners, Inc. *Third-Party Plaintiff,*

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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