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

Case No: 2009-CP-22-01655

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. Miller 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, Trustee of the Lois E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, Jason A. Underwood, and Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame, ... Respondents,

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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This action arises out of two cases: Civil Action No. 2009-CP-22-0152, filed January 29, 2009, and Civil Action No. 2009-CP-22-01655, filed October 7, 2009. These cases were consolidated under the latter number. Trial was scheduled for May 21, 2012. On that date, before trial commenced, the trial judge heard arguments from counsel on several pre-trial motions. One of those was Respondents' "Motion for Summary Judgment and/or Partial Summary Judgment Against the [Appellant]." After hearing arguments from counsel, the trial court ruled from the bench in favor of Respondents, granting partial summary judgment in their favor on the issues of duty and breach on their negligence and breach of fiduciary duty causes of action.

On May 23, 2012, the trial court executed and filed a Form 4 Order, stating as follows: "Partial Summary Judgment Granted/Case Stayed by filing of Appeal." On June 6, 2012, Appellant filed a Motion to Reconsider, Alter, or Amend Pursuant to Rules 52 and 59, SCRCP. On June 18, 2012, Respondents filed a motion in opposition to

Appellant's motion, and on July 12, 2012, Appellant filed a response to Respondents' motion in opposition.

On November 15, 2012, the trial court held a hearing on Appellant's motion to reconsider. Later that day, the trial court's Form 4 Order denying that motion was filed. On November 16, 2012, the trial court's written order for its May ruling granting partial summary judgment to Respondents was filed.[1] On November 19, 2012, Appellant received written notice of the trial court's Form 4 Order denying the motion to reconsider. Appellant served and filed a timely notice of appeal on December 12, 2012.

STATEMENT OF THE FACTS

In 1982, the condominium development known as Shipyard Village Horizontal Property Regime ("Shipyard Village") was established, and Appellant, the homeowners association, was incorporated. Shipyard Village is a two-phase development. Phase I consists of Buildings A and B, each of which has forty units. These two buildings were completed in 1982, at the development's inception. Phase II consists of Buildings C and D, each of which contains thirty units. These buildings were completed in 1998.

Shipyard Village's master deed ("Master Deed") was recorded in Georgetown County's Office of the Registrar of Deeds in Deed Book 201 at Page 880. The regime's bylaws ("Bylaws") are recorded in the same deed book, beginning at Page 929. Section 3.6(c) of the Master Deed provides, in part, that each unit's balcony doors 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) states that the general common elements include the roofs and the buildings' stucco exteriors. [R. p. 969.]

[1]After issuing his verbal ruling in May 2012, the trial judge forgot to ask Respondents' counsel to draft a proposed order. When the trial judge realized his omission, in early November, he asked counsel to do so, hence the delayed filing of the written order.

Section 6.1 of the Bylaws provides that the manager or the board of directors is responsible for the maintenance and repair of the common elements, while Section 6.2 makes unit owners responsible for the maintenance of their units. [R. pp. 1018–19.] 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. pp. 974–75.] 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. 993.]

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.] Section 6.3 of the Bylaws provides that if a co-owner fails to perform the maintenance required by the Bylaws, 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.]

Respondents are owners of units in Buildings C and D. This case, which was initiated in 2009, arises out of a dispute over the handling of payment for repairs to Buildings A and B. Over time, Buildings A and B began experiencing leaks that were manifesting in some of the units at the windows and balcony doors. Appellant's board of

directors engaged numerous professionals to assess these problems, and Appellant received conflicting information about the source of the leaks.

In 1999, Henderson Waterproofing performed stucco and concrete repairs to Buildings A and B. [R. p. 2148.] Appellant's site maintenance supervisor, Bobby Warner, monitored the work and informed Appellant's board of directors that the damage to the buildings was not as severe as Henderson had reported and that an engineer was not needed to assess the buildings. [R. p. 2148.] In 2002, Appellant engaged McGee Consulting Associates ("McGee") to study the windows in Buildings A and B. McGee performed hose testing and claimed that many of the windows leaked under hose spray. [R. p. 1127-A.] This hose testing, however, did not comply with published standards for window leak testing. [R. p. 2155.]

The next year, Keystone Construction studied leaks that were manifesting themselves at some of the windows. Keystone concluded that the water was leaking through the stucco and not the windows. [R. p. 2148.] Keystone found that non-existent window flashing was part of the problem. [R. p. 2148.] Notably, window flashing is not the responsibility of individual unit owners under Section 3.6(c) of the Master Deed. [R. p. 968.]

Ben Morrow, the owner of unit B-28, informed Appellant's board of directors that he was having a water intrusion problem in his unit. Bobby Warner reported to the board that water was leaking through the windows. [R. p. 1135.] Morrow replaced his windows in 2005, but reported to the board that he was still having leaks, despite the new windows. [R. pp. 1137, 1141.] Morrow hired an architect to investigate the cause of the water intrusion issues. [R. p. 1141.] The architect, Joe W. Hiller, Jr., made clear to

Morrow that he believed the windows were not the source of the leaks: "It seems obvious to me that there is water migration through the exterior wall that is not related to the window sill, jamb or header." [R. p. 2270.] The new site maintenance supervisor, Richard Bennett, also looked at the issue and found that sealant joint failures at the window–stucco interface as well as cracked stucco could be causing the problem. [R. pp. 1145, 2152.] In 2006, Morrow attended a board meeting with Don Manning, an engineer he had engaged; Manning reported that repairing one window would not solve the leak issues and that an entire vertical stack of windows needed to be removed, flashed, and replaced. [R. pp. 1149, 2152.]

In addition to the fact that leak issues could not be solved by replacing the windows in any one unit, Appellant was concerned about uniform window appearance, code compliance, and the risk of stucco damage during window replacement. [R. pp. 1149–50, 1155.] Thus, Appellant's board of directors began discussing the possibility of amending the Master Deed to make windows and doors part of the common elements. [R. pp. 1149–50, 1155.] At the annual members' meeting on April 15, 2006, a vote was held to amend the Master Deed to classify the windows and balcony doors as common elements, making them the responsibility of Appellant rather than individual co-owners. Of the 140 units in Shipyard Village, 101 participated in the vote; of those units, 90 voted in favor of the amendment and 11 voted against it. [R. pp. 1165–66.] The 90 units voting in favor constituted 63.59% of ownership in the common elements, which fell short of the required 66.67% affirmative vote. [R. p. 1166.] Given the amendment's widespread support, along with the co-owners' sentiments expressed at the meeting, the board of directors believed that most of the owners wanted the amendment to pass. Upon

the motion of a Building D unit owner, voting on the amendment was left open for thirty days so that non-voting co-owners could vote. [R. p. 1166.] The amendment eventually passed through proxy voting, by over 80% of the membership. [R. pp. 1278–79.]

Later in 2006, the board of directors hired Schneider and Associates ("Schneider") to assess the problems in Buildings A and B. [R. p. 1168.] Schneider performed destructive testing on Buildings A and B. In a February 2007 letter to Kellie A. Diehl, Appellant's property manager, Schneider stated that during destructive testing on Ben Morrow's unit it was discovered that "the 'stack' of units was leaking from top-to-bottom at the jamb and sill terminations. 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." [R. p. 1325.] Schneider recommended enlarging the spandrel's vertical dimension to allow space for separate flashing assemblies. [R. pp. 1325–26.]

The board of directors eventually became dissatisfied with Schneider's performance and lack of progress. [R. pp. 1174–75.] After Schneider oversaw repairs to two Building A units in the spring of 2007, the company was not retained for further services. [R. pp. 1179, 1190, 1233.] Subsequently, the board hired MEC Engineering Services, Inc. ("MEC") to represent the homeowners during the renovations to Buildings A and B. [R. p. 1186.] MEC prepared a plan for the repairs, including bid solicitations and project drawings. The board also asked MEC to obtain at least three bids from contractors for the repair work. [R. p. 1215.]

One of the board's consultants, HICAPS, gave a presentation to the board in July 2008 identifying the problems in Buildings A and B. HICAPS identified the two primary problems to be failures in the structural concrete and the building envelope:

1. Structural Concrete Failing
    a) Over the years there has been water and salt intrusion in the concrete
        1) Salt, from ocean spray, has slowly worked its way into the concrete. The salt has reached the reinforcing steel. The concrete has high levels of chlorides. This is a permanent condition.
    b) The reinforcing steel has corroded
        1) Reinforcing Steel (rebar) has expanded causing concrete to pop off (spalling).
        2) Prestressed concrete stands have lost adhesion to concrete.

2. Building envelope not weather tight
    a) Allows water to enter the structure
    b) Window systems are failing
        1) At the end of their service life
    c) Causes wood to rot in walls framing windows and sliders
    d) Any paint/sealer is at the end of its lifespan

[R. p. 1350.]

The board eventually became displeased with the lack of proper communication by MEC. [R. p. 1244.] The board decided to retain Sutton-Kennerly & Associates, Inc. ("SKA") and Spectrum Engineering Services, Inc. ("Spectrum") to review MEC's engineering reports, drawings, and bid specifications. [R. p. 1244.]

SKA, after reviewing the information related to MEC's repair approach, opined that the repairs could be done at a lower cost. SKA also expressed some concerns regarding some of the proposed repair methodology and some project drawings, which lacked sufficient detail. [R. pp. 1249–51.] After receiving this information from SKA,

the board of directors informed MEC that its services would no longer be needed. [R. pp. 1251–52.]

Shortly thereafter, Spectrum presented to the board of directors a report listing 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's report found that rainwater was penetrating the roof, the stucco, lanai slabs, floor beams, and hollow core slabs. [R. pp. 2247–48.] Regarding the windows and doors, Spectrum found that these components "have poor to nonexistent flashing to prevent wind driven rain from getting into the units." [R. p. 2248.] As stated previously, the flashing is not the responsibility of the co-owners under Section 3.6(c) of the Master Deed.

In January 2009, Appellant's board of directors asked SKA to perform tests and investigative work to determine the full scope of repairs required by Buildings A and B and to provide a cost estimate. [R. p. 1271.] After hearing the findings of SKA's investigative work and after considering SKA's and Spectrum's proposals, the board retained SKA to proceed with drafting designs for the repairs and to begin soliciting bids for the work. [R. p. 1275.]

Subsequently, several homeowners challenged the validity of the 2006 amendment that made windows and balcony doors common elements. [R. p. 1278.] As a result of those concerns, Appellant's board of directors called a special membership meeting on March 21, 2009. [R. p. 1278.] A re-vote on the amendment was held, and

48.31% of the ownership voted in favor of it. [R. p. 1283.] Because of the amendment's failure, balcony doors and windows again became the responsibility of each co-owner.

In July 2009, Appellant notified co-owners that SKA would be beginning repairs later that year, with Building B repairs occurring from September 2009 through May 2010, and Building A repairs taking place from September 2010 through May 2011. [R. p. 1293.] The total cost for the repairs, including a 15% contingency, totaled $10,944,468. [R. p. 1292.] Appellant recommended that the repairs be financed through a special assessment. [R. pp. 1293–94.] The per-unit assessment amounts 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. p. 1291.] The assessment amount for the units in Buildings A and B was higher because it included the hard costs of their windows and sliding balcony doors, which were being replaced. [R. p. 733.]

Co-owners were informed that a special members' meeting was scheduled for August 1, 2009, to vote on the proposed special assessment. [R. p. 1294.] The co-owners did not approve the special assessment. [R. p. 2268.] As a result, Appellant 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. p. 2268.]

Respondents subsequently brought suit, alleging numerous causes of action. The case came up for trial on May 21, 2012. Before trial began, the trial court heard arguments on Respondents' "Motion for Summary Judgment and/or Partial Summary Judgment Against the [Appellant]." [R. p. 219.] Specifically, Respondents sought partial

summary judgment on the issues of duty and breach for their negligence and breach of fiduciary duty claims. [R. p. 749, line 24–p. 750, line 9; p. 755, line 15–p. 756, line 3.] Respondents asserted that Appellant, when presented with conflicting reports about the source of damage to the common elements, had a duty to investigate to determine whether any of that damage was due to the failure of any individual co-owners to properly maintain their windows and doors in accordance with the Master Deed and Bylaws. The trial court concluded that such a duty existed and that the duty was breached.[2] [R. p. 833, line 6–p. 837, line 5.] The trial court denied Appellant's motion to reconsider, and this appeal followed.

STANDARD OF REVIEW

"An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment." *Weston v. Kim's Dollar Store*, 399 S.C. 303, 308, 731 S.E.2d 864, 866 (2012). A trial court may grant summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "Summary judgment should be granted only where it is *perfectly clear* that no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of the law." *Weston*, 399 S.C. at 308, 731 S.E.2d at 866 (emphasis added and internal quotation marks omitted) (quoting *Wortman v. Spartanburg*, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992)).

"In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to

[2] The trial court's order is unclear about whether it grants summary judgment on the negligence claim alone or on both the negligence and breach of fiduciary duty claims. Regardless, Appellant is appealing the order in its entirety and as to all causes of action on which summary judgment was granted.

submit a mere scintilla of evidence." *Fountain v. First Reliance Bank*, 398 S.C. 434, 441, 730 S.E.2d 305, 308 (2012) (internal quotation marks omitted). "The appellate court, like the trial court, must view all ambiguities, conclusions, and all inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Smith v. Breedlove*, 377 S.C. 415, 421, 661 S.E.2d 67, 70 (2008). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." *Tupper v. Dorchester Cnty.*, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997).

ARGUMENT

I.

The trial court erred in determining that Appellant had a duty to investigate to determine whether to assess individual co-owners for damage to the common elements.

The trial court held that when Appellant received information indicating that co-owner neglect had damaged the common elements, Appellant had a "duty to investigate" to determine whether assessing the offending co-owner would be appropriate. [R. p. 29.] The trial court found that this duty was created by reading several sections of the Master Deed and Bylaws as a whole. These sections are as follows:

- Section 9.4 of the Master Deed, which requires co-owners to obey the Master Deed, the Bylaws, and applicable regulations, and allows the board of directors to enter a unit in the event of a violation and "to summarily abate and remove, at the expense of the defaulting Co-owner, any structure, thing, or condition" causing the violation [R. pp., 27, 982–83];

- Section 12.1 of the Master Deed, which states that if 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. pp. 28, 993];

- Section 16.2 of the Master Deed, which requires co-owners to comply with the applicable rules and regulations and allows the board of directors, on behalf of the association, to bring suit if a co-owner fails to so comply [R. pp. 28, 999];

- Section 6.3 of the Bylaws, which states that if a co-owner's failure to perform required maintenance "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 appearance of the Regime Property, the Board of Directors shall, after giving such Co-owner reasonable notice and opportunity to perform such maintenance, cause such maintenance to be performed" and assess the co-owner for the expense [R. pp. 28, 1019];

- Section 6.4 of the Bylaws, which states that all maintenance and repair expenses provided by the board of directors are common expenses, except that when such expenses are necessitated by a co-owner's failure to perform required maintenance or by a co-owner's "willful act, neglect, or abuse," they are to be assessed to the co-owner individually [R. pp. 28–29, 1019]; and

- Section 7.3 of the Bylaws, which requires the board of directors to enforce the Master Deed, the Bylaws, the Regime Act, and applicable regulations "by taking prompt and appropriate action to correct any violations" [R. pp. 29, 1021].

Here, after reviewing these six sections of the Master Deed and Bylaws, the trial court found they impose two duties on Appellant: (1) the "duty to enforce the terms of the Act, the Master Deed and these Bylaws by taking prompt and appropriate action to correct any violations," and (2) the duty to investigate,

> when presented with evidence which would show or reasonably show that an individual Unit Owner's neglect in maintaining his or her Unit has resulted in damage to the common elements that an investigation is required by the Bylaws. That is, [Appellant] through its Board, upon receiving such information, would be required to initiate some investigation to determine whether or not it would be appropriate to individually assess the defaulting Unit Owner for the damage.

[R. p. 29.] Appellant does not dispute the existence of the first duty; indeed, it is nearly identical to the language in Section 7.3 of the Bylaws. However, the trial court erred in finding that Appellant has a "duty to investigate," which is found nowhere in the Master Deed, Bylaws, or Regime Act. The trial court merely looked at the six cited sections of

the Master Deed and Bylaws and, without providing an explanation, found that "when read together as a whole," they imposed this duty on the board of directors. [R. p. 29.]

These six foregoing sections can be distilled into three provisions: (a) the requirement of co-owners to comply with the Master Deed, Bylaws, and Regime Act; (b) the requirement of the board of directors to enforce the same; and (c) the requirement of the board to perform repairs if a co-owner's neglect or intentional act damaged another unit or the common elements, and to assess that co-owner for the accompanying cost. Nowhere in these six provisions is there a duty to investigate to determine whether damage to the common elements can be apportioned to individual co-owners. Furthermore, the trial court provided no reasoning in support of its conclusion.

"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. Without a duty, there is no actionable negligence." *Oblachinski v. Reynolds*, 391 S.C. 557, 561, 706 S.E.2d 844, 845-46 (2011). "Proof of negligence in the air, so to speak, will not do." *Doe v. Batson*, 345 S.C. 316, 323, 548 S.E.2d 854, 857 (2001) (quoting *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, 99 (N.Y. 1928) (internal quotation marks omitted)). "An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Hendricks v. Clemson Univ.*, 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) (citation omitted). Whether a duty exists is a determination that is made by the Court. *Id.*

The Master Deed, Bylaws, and Regime Act impose upon Appellant numerous specified duties, and it is these express duties that govern how Appellant is to act. "'[I]n negligence cases, the duty is always the same—to conform to the legal standard of

reasonable conduct in the light of the apparent risk." *Huggins v. Citibank, N.A.*, 355 S.C. 329, 333, 585 S.E.2d 275, 277 (2003). The provisions of the Master Deed, Bylaws, and Regime Act circumscribe the "legal standard of reasonable conduct" for the board of directors. The trial court looked at six provisions of these documents and found that they gave rise to a duty, the existence of which is not reasonably inferable from any of the cited terms. The purported "duty to investigate" goes beyond what the documents' express terms require of the board of directors. Accordingly, this Court should reverse the trial court's finding that Appellant had a "duty to investigate."

II.

The trial court erred in determining that Appellant's conduct should not be judged by the business judgment rule.

Even if the trial court properly concluded that Appellant had a "duty to investigate," the trial court incorrectly determined that Appellant's conduct taken in furtherance of this duty is not protected by the business judgment rule. The trial court offered two reasons for this conclusion: (1) the business judgment rule is inapplicable because the Appellant's conduct is governed by the South Carolina Horizontal Property Regime Act ("Regime Act"), the Master Deed, and the Bylaws; and (2) even if the business judgment rule were applicable, Appellant is not afforded the rule's protection because of Appellant's *ultra vires* acts. [R. pp. 18–25.] As shown below, both of the trial court's reasons were erroneous.

(A) The business judgment rule is applicable.

The trial court concluded that because the Regime Act, the Master Deed, and the Bylaws all governed Appellant's conduct, the business judgment rule offers Appellant no

protection. [R. pp. 18–21.] This alone constitutes reversible error. For instance, the case of *Seabrook Island Prop. Owners Ass'n v. Pelzer* involved a dispute between a property owners association and an individual property owner. 292 S.C. 343, 345, 356 S.E.2d 411, 412 (Ct. App. 1987). This Court noted early in the opinion that the association was governed by its bylaws. *Id.* at 345, 356 S.E.2d at 413. Furthermore, the Regime Act, which is codified at S.C. Code Ann. § 27-31-10 *et seq.* (2007), had been enacted by that time. Although *Pelzer* ultimately concluded that the association could not seek protection of the business judgment rule because the association violated restrictive covenants, the Court recognized that the rule "applies to *intra vires* acts of the corporation." *Id.* at 348, 356 S.E.2d at 414. In other words, the Court did not hold that the business judgment rule was inapplicable merely because of the existence of the Regime Act and bylaws.

The case of *Goddard v. Fairways Development General Partnership* provides even more clarity. This Court held as follows: "*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." 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (emphasis added). Furthermore, because every property regime in this state is established pursuant to the Regime Act and must have bylaws and either a master deed or lease as required by S.C. Code Ann. §§ 27-31-100 & -150 (2007), the trial court's conclusion would have the bizarre effect of automatically and conclusively precluding application of the business judgment rule to

every action by a homeowners association, which would run directly afoul of *Pelzer* and *Goddard.*

The cases cited in the trial court's order also do not support the court's conclusion. The trial court cites to *Murphy v. Yacht Cove Homeowners Ass'n*, 289 S.C. 367, 345 S.E.2d 709 (1986), for the proposition that a member of a homeowners association may sue the association in contract or tort. [R. p. 19.] However, Appellant does not challenge the right of Respondents to file a tort action against Appellant. Rather, the issue at hand is whether Appellant may seek protection of the business judgment rule in such a tort action. *Murphy* is silent on this point. The trial court also quotes the rule from *Ortega v. Kingfisher Homeowners Ass'n, Inc.*, 314 S.C. 180, 442 S.E.2d 202 (Ct. App. 1994), that each co-owner must comply with the bylaws and the master deed's administrative rules and regulations. [R. p. 20.] Again, Appellant does not dispute that it has a duty to enforce the provisions of the Master Deed and Bylaws. *Ortega* is silent in the pertinent issue, which is whether the business judgment rule is inoperable merely because the Regime Act, the Master Deed, and the Bylaws impose specified duties on Appellant.

The trial court also erred in stripping Appellant of protection under the business judgment rule because its analysis focused on an incorrect duty. The trial court found "that [Appellant's] Board is affirmatively required to maintain, and repair the regime's property. . . . [B]ecause the duty to maintain and repair the regime property is mandatory and fell upon [Appellant's] Board pursuant to its Bylaws, it is not discretionary, and, therefore, not subject to the Business Judgment Rule." [R. pp. 19, 21.] The trial court

found that the duty to maintain and repair arose from Section 5.6[3] of the Master Deed and Sections 6.1[4] and 7.3[5] of the Bylaws. [R. pp. 19–20.]

However, the duty that the trial court concluded Appellant breached is the duty to investigate, upon receiving information that co-owner neglect has damaged the common elements, to determine whether to assess individual co-owners for the damage. [R. pp. 39–40.] This duty is distinct from the duty to maintain and repair the regime property. Even if the trial court correctly concluded that the duty to maintain and repair is not subject to the business judgment rule because it is a non-discretionary duty, the trial court erred in extending this determination to the "duty to investigate." In other words, the trial court's order apparently holds that because Appellant's actions when fulfilling (or failing to fulfill) its duty to maintain and repair the common elements are not protected under the business judgment rule, Appellant's actions regarding its duty to investigate similarly cannot be viewed under the lens of the rule. Appellant contends the trial court is incorrect.

First, the trial court's order lacks legal basis for its conclusion that an HOA board of directors is automatically barred from asserting protection under the business judgment rule concerning fulfillment of an express duty. Appellate courts in this state have never recognized any scenarios where, from the outset, the business judgment rule is precluded from applying to decisions by corporate management. Rather, all *intra vires* actions taken by a corporate board are entitled to the rule's protection. *Goddard* enunciated this

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[3] Section 5.6 of the Master Deed states, in part, "Except as specifically provided herein, the maintenance, repair, replacement, management, operation, and use of the Common Elements and Limited Common Elements shall be the responsibility of the Board." [R. p. 974.]

[4] Section 6.1 of the Bylaws provides, "The Manager or the Board of Directors shall provide for the maintenance, repair, and replacement of the Common Elements." [R. p. 1018.]

[5] Section 7.3 of the Bylaws states, in part, "The Board of Directors shall enforce the terms of the Act, the Master Deed, and these Bylaws and the Regulations promulgated pursuant hereto by taking prompt and appropriate action to correct any violations." [R. p. 1021.]

principle in holding that "[i]n 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." *Goddard*, 310 S.C. at 414, 426 S.E.2d at 832.[6]

Second, even if the trial court correctly found that the business judgment rule affords no protection to directors' conduct when performing duties enumerated in the Master Deed and Bylaws, no authority exists for extending this holding to discretionary duties that are not found in these documents. The "duty to investigate" is one such duty. The trial court itself even seems to recognize that this is not an enumerated duty: it determined this duty's existence only after conglomerating six sections of the Master Deed and Bylaws. Discretionary authority is precisely to what the business judgment rule is intended to apply—especially in cases involving the exercise of business judgment by a nonprofit corporation, such as Appellant. As this Court has previously stated,

> [a] court should be reluctant to question action taken *intra vires* by the governing board of a non-profit corporation. This is especially true where the action taken by the governing board of a non-profit corporation requires the board's business judgment. In such instances, the governing board is entitled to have the validity of its *intra vires* action tested by the "business judgment" rule. 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.

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[6] *See also Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 606 n.32, 541 S.E.2d 257, 268 n.32 (2001) ("The Business Judgment Rule immunizes management from liability in corporate transactions undertaken by management where there is a reasonable basis to indicate the transaction was made in good faith."); *Dockside Ass'n, Inc. v. Detyens*, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) ("We now uphold the Court of Appeals' determination that the 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.").

Dockside Ass'n, Inc. v. Detyens, 291 S.C. 214, 216-17, 352 S.E.2d 714, 716 (Ct. App. 1987) (citation omitted), *aff'd*, 294 S.C. 86, 362 S.E.2d 874 (1987).

Because the operation of the business judgment rule is not defeated merely because of the existence of the Master Deed, the Bylaws, and the Regime Act, the inquiry can now turn to whether Appellant's actions are protected by the rule.

(B) Appellant's actions were *intra vires* and protected under the business judgment rule.

The trial court also found that even if Appellant's conduct is to be evaluated in light of the business judgment rule, Appellant's board of directors "had acted without authority, without good faith, and inaction by failing to discharge its affirmative duties under its Master Deed and Bylaws," meaning that Appellant's actions were subject to judicial review. [R. p. 21.] The trial court cited two purportedly *ultra vires* actions by the board that evidenced Appellant's "lack of due or reasonable care [and] lack of good faith": (1) the enactment and enforcement of the 2006 amendment designating windows and balcony doors as part of the common elements, and (2) the board's failure "to place its adopted annual budgets on the annual agenda for presentation to the Co-owners at their Annual Members' Meetings in 2009 and 2010." [R. p. 21, 24.]

Regarding the passage of 2006 amendment, the trial court found that this was an *ultra vires* act because it violated Sections 1.3 and 1.5 of the Bylaws. [Order p. 21.] Section 1.3 states that "[v]otes can be cast only at meetings of the [Association] convened in accordance with the Bylaws," and Section 1.5 provides that if co-owners desire to take action outside of a meeting, it must "be taken by written consent to such action signed by all Co-owners entitled to vote." [R. pp. 1006–07.] The trial court seemed to conclude that Appellant's acceptance of proxy votes outside of a meeting violated Section 1.3, and

that under Section 1.5, Appellant would have been required to obtain unanimous written consent from the co-owners to adopt the amendment outside of a meeting. Even if the enactment of the amendment violated the Bylaws, this action was merely a mistake rather than an act taken in bad faith.[7] Further, even assuming the enactment was done in bad faith, the specific duty that the trial court found to be breached was the "duty to investigate," which is unrelated to the voting procedures outlined in the Bylaws. Merely because a homeowners association's board purportedly violated one section of its bylaws does not mean that every other action taken by that board is unprotected by the business judgment rule.

The trial court also found that Appellant's lack of good faith was evidenced by its decision to continue enforcing the amendment even when the board "knew" it was invalid. The court pointed to a June 2008 letter to the board of directors from attorney Jeff King. Mr. King opined in the letter that the amendment was invalid because it contravened the Bylaws. [R. p. 22–23.] Notably, Mr. King was not Appellant's attorney; he was hired by some of the Respondents and was merely issuing an opinion on a subject. [R. p. 851, line 11–p. 852, line 6.] Merely because the board received an unsolicited letter from an attorney does not mean that the board's failure to follow any advice in that letter constituted bad faith. The trial court also cited a July 2009 letter from the property manager to the co-owners and a purported admission from Appellant's counsel as evidence of Appellant's bad faith in continuing to enforce the amendment. [R. p. 22–23.] However, the letter merely states that a forthcoming court ruling may impact the structure

[7] 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." *Estate of Carr v. Circle S. Enters.*, 379 S.C. 31, 42-43, 664 S.E.2d 83, 88-89 (Ct. App. 2008) (emphasis added).

of the proposed assessment, and the supposed "admission" was merely an acknowledgment that the board had received the letter and was on notice of attorney King's opinion. [R. p. 22–23.] Additionally, evidence exists from which the jury could conclude that the board acted in good faith regarding the enforcement of the amendment—specifically, the fact that the board, in response to concerns raised by co-owners, conducted a re-vote on the amendment in 2009.

Regarding the board's failure to place the annual budgets on the agenda at the annual members' meetings in 2009 and 2010, the trial court found this was an *ultra vires* act in contravention of the Bylaws and Master Deed, which require the board to do so. [R. p. 24–25.] This was error; an *ultra vires* act is an unauthorized act, while the purported failure to place budgets on agendas constitutes inaction. Regardless, even if the trial court is correct on this point, the same issue as above is present: breach of one or more express provisions of the Master Deed and Bylaws does not mean that the board of directors is stripped of protection under the business judgment rule for every other action, especially actions taken in relation to unrelated, discretionary duties such as the "duty to investigate."

In other words, even if Appellant improperly continued to enforce the 2006 amendment and failed to present annual budgets, it was error for the trial court to find that these actions stripped Appellant of all protection under the business judgment rule for all of its other actions. Lack of good faith in relation to the exercise of one duty cannot be imputed to the exercise of a separate duty, in order to preclude the rule's application to that other duty. Accordingly, the trial court committed reversible error in

finding that Appellant's actions are not entitled to protection under the business judgment rule.

(C) Application of the business judgment rule to Appellant's actions requires the reversal of the trial court's grant of summary judgment to Respondents.

The business judgment rule immunizes a board of directors from liability if the board acted in good faith. *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 606 n.32, 541 S.E.2d 257, 268 n.32 (2001). As discussed above, the trial court erred in concluding Appellant lacked good faith when acting pursuant to its duty to investigate, which means Appellant is, in fact, entitled to have its conduct viewed under the lens of the business judgment rule. Accordingly, this Court's inquiry needs to proceed no further. The trial court substituted its judgment for the reasonable business judgment of Appellant's board of directors, which constitutes reversible error: "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." *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (emphasis added). Accordingly, the trial court erred in engaging in judicial review of Appellant's actions taken in furtherance of its duty.

III.

The trial court erred in determining that Appellant breached a duty to Respondents.

Even if the trial court was correct in stripping Appellant of protection under the business judgment rule, the trial court erred in finding, as a matter of law, that Appellant

breached its duty. Absent business judgment rule protection, Appellant's conduct would be evaluated under the standard of basic negligence. Applying this standard demonstrates that ample evidence exists from which a jury could conclude Appellant satisfied its "duty to investigate" and exercised due care in doing so.

Generally, whether a duty was breached is a question of fact for the jury. *See Burnett v. Family Kingdom, Inc.*, 387 S.C. 183, 189, 691 S.E.2d 170, 173 (Ct. App. 2010). A trial court should not grant summary judgment on the question of breach if any triable issues of material fact exist.

(A) The information Appellant obtained regarding the sources of the water intrusion create genuine issues of material fact for consideration by a jury.

The trial court incorrectly found that Appellant breached its duty to investigate. Specifically, the trial court ignored the "mere scintilla" standard when granting summary judgment to Respondents on the issue of breach. Substantial evidence in the record shows that Appellant did, in fact, initiate an investigation into what (or who) was responsible for the water leaking into Buildings A and B.

Indeed, much of this evidence demonstrates that the leaks were due to failures in the common elements rather than co-owner neglect. 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.

As can be seen, by the time the board hired SKA to perform the repair work in 2009, it had received numerous reports from multiple professionals about the source of the water intrusion problems. By that time, Appellant had already spent approximately $576,000 on "engineering firm's [sic] costs, testing, attorney input, etc." [R. p. 1280.] In reviewing a grant of summary judgment, the Court is required not only to view the

evidence in the light most favorable to the non-movant, but also to view all inferences from the evidence in the same manner. Applying that standard here, a jury could examine the evidence and reasonably infer that (1) Appellant performed an extensive investigation into the sources of the water penetration, and (2) given the information Appellant had received by the time it hired SKA, Appellant believed that any further testing or investigation would not be conclusive and would be unduly expensive. Further, merely because windows and doors were leaking does not mean that co-owners were negligent, and a jury could infer from the evidence that co-owner neglect was not to blame for the water penetration.

(B) The reports and affidavits of Appellant's experts create genuine issues of material fact for consideration by a jury.

Appellant's expert, J. Lawrence Elkin, P.E., visited the site in November 2010 while the repair work was occurring and inspected the buildings as they were de-clad, including the windows and balcony doors that were being removed as well as the stucco. [R. p. 2147.] In his affidavit, he opined that Appellant's board of directors "was faced with a systemic failure of the building system. . . . [W]indows are not independent of the stucco wall system, but are instead part of the building enclosure. Transitions must be interfaced properly, detailed with flashing and sealants to prevent the intrusion of water." [R. pp. 2166–67.] Elkin further stated as follows:

> [L]eaks occurred throughout various units at different times, but these leaks were not limited to windows and sliding glass doors. On the contrary, leaks were attributed to the roof, the stucco, HVAC equipment, and other factors. As further noted in paragraph 11 of my report, for example, there are contradictory records as to the source of the leaks. . . .
>
> Simply put, windows and doors in the A and B Buildings cannot be viewed independently. They are part of an integrated building enclosure system which all parties agreed was in dire need of repair. The cost of

repairs attendant to the replacement of windows and doors cannot be neatly or mathematically calculated for purposes of allocation.

[R. p. 2167.] Elkin also prepared a report, which discusses these issues in greater detail:

> Windows, once installed, cannot be considered independent of the opaque wall areas. They both work as part of a larger system called the building enclosure. . . .
>
> Windows transition to walls at an interface. This interface must be properly detailed with flashings and sealants to prevent the intrusion of water. In addition, windows are not intended to be watertight under all conditions; therefore, the flashings must collect and redirect that water back to the exterior. . . .
>
> I visited the site in 2010 and observed the windows and doors that were removed. Most of the aluminum frames exhibited corrosion from contact with stucco or concrete. The windows were designed to be attached with nail flanges which extended over the face of the exterior sheathing and were covered with stucco. Removing and replacing this type of window cannot be accomplished without damaging the stucco. . . .
>
> There is no evidence indicating that the BOD failed to enforce the provisions of the Master Deed requiring Unit Owners in Buildings A & B to maintain, repair and replace certain aspects of their units. Rather[,] the record clearly shows that individual unit owners were notified of needed repairs and violations. . . .
>
> The need for the $11,000,000 assessment is more directly associated with the fact that the facility is located ocean front and was constructed nearly 30 years ago. . . . My experience is that similarly aged and located properties undergo major rehabilitations every 25 to 30 years. . . .
>
> The records do reflect that leaks occurred from time to time in various units. These leaks were attributed to the roof, windows, stucco, sliding glass doors, fenestration in neighboring units, HVAC equipment, water heaters, kitchen fixtures, bathroom fixtures and laundry equipment. Each of these conditions, when reported to the board, was referred to the property manager or site maintenance supervisor for further investigation. When needed, the board notified owners of the need to repair or maintain fixtures and equipment. The BOD also undertook to repair the roofs and secure roof-top HVAC equipment to resolve leak issues. . . .

> The records show that qualified construction professionals were providing guidance to the BOD as early as 1993 and a professional property manager was engaged from the inception of the HOA.

[R. pp. 2151–52, 2154–56.]

The report of Gary Bradham, Appellant's expert in the areas of property management, HOA governance, and fiduciary services, also creates a genuine issue of material fact. Bradham noted that Appellant's board of directors "had enlisted the assistance of technical experts and consultants in every aspect of the management and upkeep of the buildings. . . . [F]rom day one, the [board of directors] hired and relied on the advice of a Professional Property Management company over the years." [R. p. 2194.] Bradham testified that he "didn't find any time where the board had something put in front of them and did nothing." [R. p. 2244, lines 5–6.]

Bradham further opined that Appellant has flexibility and discretion in the discharge of its duties, especially given restraints on what the board of directors can accomplish unilaterally:

> The Acts, the Master Deed, and the Bylaws outline the basic Standards of Care required by the Boards. But, the standards of duty for the Board and its Directors are not "right and/or wrong" standards of responsibility and duty. They require some interpretation by the BOD.
>
> . . . [T]he standard to maintain, protect and enhance the common property of [Shipyard Village], while outlined in the governing directives, allowed flexibility to the Boards to make decisions on how to proceed. . . . The record shows the Boards used the information available at the time to make what they felt was the best decision. . . .
>
> If there was an unlimited pot of money, any decision would have been easy and one might start with the strictest solution . . . . But in the case of property management, the amount of resources available comes from the Co-owners . . . . In the case of [Shipyard Village], the final decision concerning the amount of money to be collected rests with the Co-owners through the affirmative vote of 2/3rds of the percent of ownership interest and drives the final decision as to how much the Co-owners will pay. . . .

. . . .

> From my review of the record and the thousands of pages of information in the files, they show that at no time did the board act outside of its scope. Instead[,] it always relied on technical experts with whom they had hired and feedback from the membership to guide its decision process and final actions.

[R. pp. 2195–97.]

The trial court erred in granting summary judgment to Respondents when faced with this evidence. For instance, in *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 656 S.E.2d 20 (2008), the plaintiff brought a negligence claim against his employer, the defendant, for injuries sustained while working on a railroad track owned by the defendant. *Id.* at 40-41, 656 S.E.2d at 21. The defendant moved for summary judgment, and the plaintiff presented affidavits from two experts. *Id.* at 43-45, 656 S.E.2d at 23-24. The trial court granted the defendant's motion. *Id.* at 45-46, 656 S.E.2d at 24. The Court of Appeals reversed, finding that the plaintiff had established genuine factual issues; the Supreme Court agreed. *Id.* at 46, 656 S.E.2d at 24-25. Regarding the experts' affidavits, the Supreme Court held as follows:

> Arguably, both experts made a few assumptions that are not explicitly supported by [the plaintiff's] deposition testimony. . . .
>
> Nonetheless, the evidence must be construed in the light most favorable to [the plaintiff]. . . .
>
> This Court has plainly stated that even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. . . . Obviously, the parties vehemently dispute the inferences and conclusions to be drawn from the undisputed facts, but that simply establishes that summary judgment is not appropriate in this case.

Id. at 53-54, 656 S.E.2d at 28-29.

Similarly, in the case at hand, the reports and affidavits of Appellant's experts, along with all arising inferences, established a factual issue on the question of breach. A jury could infer that the board always responded to information it received about property conditions requiring attention or repair—that is, the board always investigated every report it received about problematic conditions. This evidence also demonstrates that Appellant's board received a breadth of conflicting information about the causes of the leaks and that it considered all of that information when choosing how to proceed under the Bylaws and Master Deed. Further, a jury could infer that, given the lack of any conclusive evidence that co-owner neglect damaged the common elements, the board exercised reasonable care in not attempting to apportion the damage to individual co-owners. When confronted with the evidence in the experts' reports and affidavits, the trial court committed reversible error in ruling, as a matter of law, that Appellant breached its duty.

(C) Testimony of individual board members creates genuine issues of material fact for consideration by a jury.

The testimony of board members created issues of fact on the question of breach. Board member Doris Bray stated the following in her affidavit:

> Based on my ownership in Building B and my involvement as a board member, I believe that it is impossible to determine if the water intrusion and leaks in the Buildings were primarily caused by the windows and sliding glass doors or by design and/or construction deficiencies originating with the Common Elements of the Buildings and by the Buildings' constant exposure to salt air and water as oceanfront properties.
>
> It would be unfair, unreasonable and contrary to the best interests of [Appellant] to have "individually assessed" the A and B Building Unit Owners for water intrusion that may not have resulted from any lack of maintenance of windows and sliding glass doors by owners, but rather from original design and/or construction defects of the Common Elements . . . .

> . . . As previously stated, there is no conclusive evidence that the Building A and B Co-Owners were negligent, nor is there any conclusive evidence that all Building A and B windows and/or doors were leaking. There was[,] however, no question that the building envelope system had to be repaired, the majority of which [Respondents] agree is a Common Expense. Considering that the work to the Common Elements was a necessity and the lack of conclusive evidence that leaky windows were the culprit in every Unit, or even any Unit, the Board was faced with uncertainty as to how to treat the costs associated with the windows and doors. . . .
>
> The per unit allocation 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. . . .
>
> . . . [T]he Board decided the most that could be attributed to 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 Building A and B Unit Co-Owners, would have been an exercise of bad business judgment and, in my opinion, wrong.
>
> [R. pp. 2254–57.]

Board member Don Johnston testified in his deposition that "the information provided by [SKA] was such that the corrosion throughout the building is not the end result of any one item. It was made clear that from Day One, the buildings absorbed corrosives, and that leaks found throughout—corrosion found throughout the building could come from anywhere." [R. p. 2266, lines 2–8.]

Bray's affidavit and Johnston's testimony were sufficient to create a jury question. This evidence, plus the reasonable inferences to be drawn therefrom, establish that the board considered whether to assess Building A and B co-owners for a portion of the damage to the common elements. The evidence further establishes that given the reports the board received, a jury could conclude it exercised reasonable care in choosing its course of action. Finally, a jury could reasonably infer from the evidence that the

board would not have incurred the time and expense of asking SKA to apportion the damage to individual co-owners if the board believed it already had the answer.

(D) Viewing the foregoing evidence in the light most favorable to Appellant, the trial court erred in holding as a matter of law that Appellant breached its duty.

The evidence discussed above constitutes far more than a mere scintilla of evidence that Appellant did not breach its duty. A look back at the duty at issue here is instructive; in the conclusion of the trial court's order, the duty is expressed as "a duty to investigate when presented with evidence which would . . . reasonably show that an individual Unit Owner's neglect in maintaining his or her Unit has resulted in damage to the common elements . . . . That is, [Appellant] through its Board, upon receiving such information, would be required to initiate some investigation to determine whether or not it would be appropriate to individually assess the defaulting Unit Owner for the damage." [R. pp. 39–40.] The trial court held Appellant "breached its duty to investigate . . . when it failed to determine: (a) first, whether or not the water intrusion damage to the common elements . . . was the fault of a particular Unit Owner or a particular group of Unit Owners; and (b) second, whether or not other non-defaulting co-owners were entitled to a rebate by individual assessment from the A and B Unit Owners who had caused the problem." [R. p. 40.]

Contrary to the trial court's holding, a jury could infer that Appellant never received information that would "reasonably show that [a co-owner's] neglect in maintaining his or her Unit resulted in damage to the common elements." Appellant received reports that Buildings A and B were leaking, including some reports that the windows and balcony doors leaked, but these reports did not indicate that the leaks were

attributable to co-owner neglect. Substantial evidence exists from which a jury could determine that none of the reports received by Appellant's board established that negligent maintenance caused the water damage.

Even if the information received by the board could be construed to indicate that the negligence of unit owners was causing water damage to the common elements, Appellant did, in fact, initiate an investigation to determine whether any of the damage to the common elements could be attributed to individual co-owners. In the years preceding the initiation of this lawsuit, Appellant hired numerous engineers and other professionals to investigate the water intrusion issues. The information Appellant received from Keystone, Schneider, HICAPS, Spectrum, the architect and the engineer hired by Ben Morrow, and site maintenance supervisor Bennett, indicated that the leak issues were attributable to various components of the common elements. Additionally, Appellant's expert Larry Bradham reviewed the evidence and opined that the board of directors always acted within its scope of authority. Appellant's expert Larry Elkin confirmed the information that the board had received from other professionals, which was that the water penetration was the result of a failure of multiple components of the building envelope system. A jury could reasonably determine that the central purpose of Appellant's actions was to find the source of the leaks and to ascertain the best course of remedial conduct—in other words, to determine whether co-owner neglect was to blame and whether to assess the offending co-owners.

Further, Appellant's decision not to engage in costly testing in an attempt specifically to apportion common element damage did not constitute a breach of Appellant's duty. A jury could infer that as a result of the board's investigation, it made

a reasonable, prudent decision that allocating any particular segment of damage to any particular unit owner would have been (1) a waste of time and resources, given the conflicting reports, and (2) impossible to do even if co-owner negligence was to blame. By the time the board selected SKA to perform the repairs, Appellant had already spent almost $600,000 on investigative expenses. [R. p. 1280.] A jury could infer from this fact that further testing would not have been conclusive.

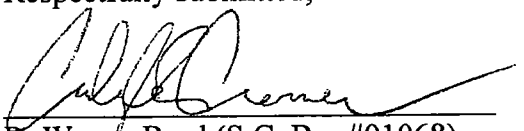
More important, Appellant's expert Elkin visited the site while the work was occurring and observed the original conditions of the buildings, including the stucco, the windows, and the doors. [R. p. 2147.] Elkin opined that "[t]he cost of repairs attendant to the replacement of windows and doors cannot be neatly or mathematically calculated for purposes of allocation." [R. p. 2167.] Elkin's site inspection confirms what Appellant's board of directors already knew from the numerous reports and voluminous information it reviewed: attributing any given portion of the damage to the common elements to any particular unit would have been impossible. Additionally, even if a portion of the moisture damage in the common elements could have been identified as having been caused by leakage from a particular window or balcony door, no evidence existed to show that any leaks manifesting at the windows and doors were due to unit owner neglect. The standard imposed by the Master Deed and Bylaws is negligence, not strict liability; in the absence of an intentional act or neglect, the mere fact that a co-owner's windows and doors leaked does not subject that co-owner to liability.

In light of the foregoing, the trial court erred in determining, as a matter of law, that Appellant breached a duty owed to Respondents.

CONCLUSION

Appellant respectfully submits that the trial court erred in determining (1) that Appellant had a duty to investigate to determine whether to assess individual co-owners for damage to the common elements; (2) that Appellant's actions taken in furtherance of its duty are not entitled to protection under the business judgment rule; and (3) that Appellant breached its duty. For the reasons discussed above, Appellant respectfully requests that this Court reverse the trial court's order and remand this case for trial.

Respectfully submitted,



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ATTORNEYS FOR APPELLANT

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

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 ..... *Respondents*,

v.

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

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.*

FINAL BRIEF OF RESPONDENTS

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I. STATEMENT OF THE ISSUES ON APPEAL

A. Did the circuit court correctly determine that the Appellant had a duty to investigate when presented with evidence which showed or reasonably showed that a majority of unit owners had neglected the maintenance and repair of their units' windows and sliding glass doors which resulted in water intrusion damage to the common elements of Buildings A and B which the Appellant had an affirmative duty to maintain? Specifically, did the circuit court correctly determine that the Appellant, upon receiving such information, had a duty to initiate some investigation to determine whether it would be appropriate to individually assess the defaulting unit owners in Buildings A and B for the resulting damage to the common elements?

B. Did the circuit court correctly determine that Appellant's unauthorized pattern of governance was evidenced by its: (1) inaction, failure to require the timely replacement of the unsafe, leaking oceanfront windows in Buildings A and B for at least 8 years, (2) incompetence, failure to follow advice of its experts to replace the unsafe, leaking oceanfront windows in both buildings and sue the contractors and other responsible parties for the resulting damage in 2002, (3) ultra vires acts, unauthorized adoption of the admittedly invalid window amendment and the 2010 and 2011 Annual Operating Budgets which improperly made the Respondents liable for the repair, removal, and reinstallation cost of the 1,087 new windows and the 80 new sliding glass doors in violation of § 3.6 of the Master Deed, and (4) lack of good faith and improper motives, continued enforcement of the admittedly invalid window amendment after both the Window and Sliding Glass Door Amendments were voted down on March 26, 2009, which are causally related to Appellant's firm decision not to investigate in order to improperly spread the total cost of repair among the membership, including the C and D members, and consequently are not subject to protection of the business judgment rule?

C. Did the circuit court correctly determine the Appellant breached its duty to investigate arising under the Master Deed and Bylaws, Statutes, and the common law of the State of South Carolina? Specifically, did the circuit court correctly determine the Appellant breached its duty by deciding not to investigate in 2010 and 2011 (whether to individually assess the defaulting unit owners for damaging the common elements) by changing the method of assessment in order to spread the total cost of the repair, removal, and reinstallation of the 1,087 new windows and the 80 new sliding glass doors among the membership, including the C and D members even though both amendments had been previously voted down by the membership at a meeting held on March 21, 2009?

D. Did additional sustaining grounds exist to support the circuit court's determination that the Appellant had a duty to investigate and furthermore

D. Did additional sustaining grounds exist to support the circuit court's determination that the Appellant had a duty to investigate and furthermore breached its duty? Specifically, did the Appellant have a duty to determine the cause of the "cracking and spalling which was occurring in the pre-cast slabs and beams," in Buildings A and B in 1993 and 1994 as observed by Procon Waterproofing, Inc. during its inspections, and furthermore did the Appellant breach the following duties: (1) failure to hire a structural engineer as recommended by Procon to investigate reported defects in the concrete structural slabs in Building A and B until 12 years later in 2007, (2) failure to repair the reported defects in the concrete structural slabs and waterproof their surfaces as recommended by Procon until 16 years later in 2011, (3) and failure to timely file a lawsuit within the 3 year statute of limitations against the developer, contractors, architect, and other responsible parties regarding the reported defects in the concrete structural slabs and beams in Buildings A and B?

II. STATEMENT OF THE CASE

This Appeal arises out of two cases: 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. These cases were consolidated under the latter number. Respondents' contractual, fiduciary, declaratory judgment, and negligence/gross negligence claims brought against the Appellant arose in a large part from the Appellant's "unfair pattern of governance" towards the fifty (50) C and D unit owners from 1998 to present date. Specifically, the Appellant's "*unauthorized pattern of governance*" arises from its inaction, lack of good faith, dishonesty and improper motives regarding its *ultra vires* actions to improperly make the Respondents liable for the cost of repair and reconstruction of the 1,087 new windows and the 80 new sliding glass doors in Buildings A and B in 2010 and 2011, which is contrary to the provisions of the Master Deed and Bylaws, and totally disregards the Respondents' rights and benefits under these governing documents evidenced by the following particulars, to wit:

1. Incompetence and Inaction: In failing to follow the recommendations of its consultants/experts: George McGee, P.E. of McGee Consulting Association ("MCA"), Attorney Ralph McCullough of Finkel & Altman, L.L.C. (the "Finkel Firm"), general contractor David Diehl, in August of 2002, to remove the unsafe, leaking and improperly installed oceanfront windows, the Appellant, knowingly, allowed the common elements of Buildings A and B to suffer a considerable amount of water intrusion damage for 8 more years. Specifically, the Appellant had been advised by its consultants/experts ***"that problems from water intrusion are time related and tend to compound"*** every 3 to 6 years. (Emphasis added.) (R. p. 1121; R. p. 1127-A; Order, R. p. 5, R. p. 21, ¶ 2; R. p. 2402.)

2. Incompetence and Inaction: In failing to follow the recommendations of its consultants/experts to pursue legal action in August of 2002 against the "***contractors who improperly and negligently installed***" the oceanfront replacement windows in Buildings A and B after Hurricane Hugo, the Appellant's inaction and incompetence allowed claims by its Board and the membership to be barred by the 3 year statute of limitations. (R. pp. 1319-1320; Order, R. pp. 8-9.) It is important to note that Appellant's Board hired the *"contractors who improperly and negligently installed"* the windows after Hurricane Hugo per Dr. Jennings' e-mail dated March 28, 2003. (Emphasis added.) (R. p. 1322; Order, R. p. 21, ¶ 2.)

3. Ultra Vires Act and Improper Motives: In improperly assessing the fifty (50) C and D Respondents $124,879.32 for repairs to the water damaged interior finishes of the units in Buildings A and B, the Appellant breached § 3.6 of the Master Deed, which provides in pertinent part, "carpeting, floor covering, trim finished surface of ceilings and walls, insulation and other fixtures and furnishings which are within or serve the Unit . . ." are the responsibility of the unit owners. (R. p. 968; R. p. 1404; R. pp. 1336-1337.) Lastly, current board members Jim C. Poag (" Mr. Poag") and Doris Bray (" Ms. Bray") admitted in their depositions that the water damages to the interior finishes of the surface walls, floors, and ceilings of the units in Buildings A and B are the responsibility of the individual unit owners and not the association. (Bray Dep., R. p. 1687, lines 4-18; Poag Dep., R. p. 1532, line 11-p. 1535, line 11.)

4. Ultra Vires Act and Improper Motives: By improperly assessing fifty (50) C and D Respondents for part of the repair cost for the removal, repair, and reinstallation of the 80 new sliding glass doors in Buildings A and B in 2010 and 2011. Specifically, § 3.6 of the Master Deed provides in pertinent part, "[e]ach Unit shall also encompass and include the following: (i) the doors (including screen doors) opening into the Unit and onto any balcony reserved

to the use of a Unit, including the frames, casings, hinges, handles and other fixtures which are part of the doors; . . . ." (R. p. 968; R. pp. 1402-1404; R. p. 1321; Order, R. p. 21, ¶ 2.)

5. Ultra Virus Act and Improper Motives: Because the Appellant did NOT submit the 2010 and 2011 Annual Operating Budgets to the membership in 2010 and 2011, the Respondents were unduly prejudiced by NOT having the opportunity to timely challenge, object, and amend the admittedly invalid budgetary assessment requiring them to pay the pro rata construction cost for the removal, repair, and reinstallation of the 1,087 new windows and the 80 new sliding glass doors. (Emphasis added.) (Tr. of Hr'g dated May 21-22, 2012, R. p. 816, lines 11-25; Order, R. pp. 24-25.) See, § 1.12 of the Bylaws which provides for the presentation of the budget as part of the order of business at the annual meeting while § 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 holding two-thirds (2/3) of the Percentage Interest in the Common Elements." (R. p. 1009; R. p. 1016; Order, R. pp. 21-25.)

6. Lack of good faith and Improper Motives: At the hearing on 21 May 2012, the Appellant admitted on the record that "[w]hen the Board received [Respondents' counsel] Jeff King's letter [dated June 9, 2008] and they [were] faced with, '[w]hat do we do, this amendment is not valid,' that is what they [were] considering. . . ." (Tr. of Hr'g dated May 21-22, 2012, R. p. 732, lines 1-14.) Specifically, the Appellant wanted to spread out the cost of repair to include the C and D members despite the contrary language of § 3.6 of the Master Deed. Further, the Appellant's continued lack of good faith is demonstrated in its decision to still improperly assess the Respondents for removal, repair, and reinstallation cost for the 1,087 new windows and the 80 new sliding glass doors even after these Amendments were both voted down by the membership at a members' meeting held on March 21, 2009. (R. p. 1279, ¶ III titled Opening Statements; R. p. 1283, ¶ VIII titled Vote on Proposed Amends.; Order, R. pp. 21-25.)

7. Lack of good faith and Improper Motives: The affidavit of Board Member Ms. Bray, filed October 28, 2011, is further evidence of the Appellant's improper motives and lack of good faith when Ms. Bray stated, in pertinent part, the basis for the Board's business judgment decision to assess the Respondents (after both amendments had failed to pass) was as follows:

> *The per unit allocation 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. (Emphasis added; Bray Aff., R. pp. 2256-2257, ¶ 11.)

Here, Ms. Bray's assertion on behalf of herself and the Board, above, is inaccurate for the following reasons. First, the Board admittedly knew the 2006 Window Amendment was invalid upon receipt of Respondents' attorney Jeff King's letter on or about June 9, 2008. (Tr. of Hr'g dated May 21-22, 2012, R. p. 732, lines 1-14.) Second, Ms. Bray's assertion, *"[w]e made our decision based on business judgment, not what might or might not happen in court[,]"* is not true and contrary to the Appellant's own correspondence dated July 8, 2009. (Bray Aff., R. pp. 2256-2257, ¶ 11.) Specifically, the July 8, 2009 letter from Mrs. Gallagher (on behalf of the Appellant) to the unit owners provided in pertinent part that: "[c]onsequently, the results of the [summary] judgment may have an impact on the windows/doors cost allocation to A, B, C, and D owners. If the ruling comes back that all unit owners are responsible for the expense for the windows/doors, the assessment will be adjusted accordingly." (Emphasis added.) (R. p. 1291, ¶ 1, 4th and 5th sentences; Order, R. pp. 21-25.)

On April 30, 2012, the Appellant filed an amended answer in response to Respondents' fourth amended complaint alleging, among other things, the following affirmative defenses: Rule 12(b)(6) SCRCP, statute of limitations, business judgment rule, substantial compliance with Master Deed and Bylaws, doctrine of unclean hands, contributory/comparative negligence, and failure to mitigate. (R. pp. 211-216.) Trial was scheduled for May 21, 2012. On that date, before trial commenced, the circuit court heard arguments from counsel on several pre-trial motions. One of those was Respondents'

"Motion for Summary Judgment and/or Partial Summary Judgment Against the [Appellant]." After hearing arguments from counsel, the circuit court ruled from the bench in favor of Respondents, granting partial summary judgment in their favor on the issues of duty and breach based on the following reasoning:

> THE COURT: A summary judgment is certainly an extraordinary remedy, one which should be used sparingly by the Court. A summary judgment is appropriate, however, where there is no material issue of fact . . . . As I look at the facts of this case I am convinced, though, that there are certain matters for which there is no material issue of fact. I find that summary judgment should be granted as to the issue of whether or not a duty exists under the Horizontal Regime Act and the bylaws of the horizontal regime, a duty to enforce the bylaws, and it would be the Court's duty to make a determination of the existence of that duty in a negligence cause, whether I was asked to in summary judgment or otherwise. That duty additionally, I believe, includes a duty, when presented with evidence which would show or reasonably show that an individual unit owner's neglect in maintaining his or her unit has resulted in damage to the common elements, that an investigation is required by the bylaws. That is, the homeowners association through its Board, upon receiving such information, would be required to initiate some investigation to determine whether or not it would be appropriate to pursue restitution from the offending property owner. In this case there is abundant evidence that at various times during the life of this project the Board, not only the present Board but the past Boards, became aware of the fact that there was water intrusion coming from the windows and doors of individual units in buildings A and B, or at least information that a reasonable person could have drawn that conclusion . . . . The Board had a duty to move forward. Did they, did they breach that duty? Did they do what a reasonable person should have done? ***I understand the Board was bound by the business judgment rule and how they respond should be judged by the business judgment rule.*** However, the uncontroverted evidence shows that the Board may have, or did take the route in which an assessment was made against all the units . . . . The point that stands out to me is this. In making that decision they did not investigate it to determine whether or not this damage was the fault of any particular unit owner or any particular group of unit owners. I find that in that regard there was an investigation done but it was after the lawsuit started, at the time they were having it declad and did not ask the construction company to look into it to tell them whether or not the intrusion from the windows and doors were the responsibility of the landowner or the unit owners that had caused the problem. I find that they have breached the duty to investigate the allegations of water intrusion to determine whether or not the other members of the homeowners association were entitled to some sort of pitching in by the landowners or unit owners that had caused the problem. Now, whether or not there was any damage caused by leaking windows or doors is a matter for the jury in this case but I do find that as a matter of law, taking

the evidence in a light most favorable to the non moving party, that there was a duty, that duty included a duty to investigate and that the [Appellant] breached that duty. (Emphasis added.) (Tr. of Hr'g dated May 21-22, 2012, R. p. 833, lines 6-10; R. p. 833, line 18-p. 834, line 21; R. p. 835, line 20-p. 836, line 3; R. p. 836, line 6-p. 837, line 5.)

On May 23, 2012, the circuit court executed and filed a Form 4 Order that stated, "Partial Summary Judgment Granted/Case Stayed by filing of Appeal." (R. pp. 51-52.) On June 6, 2012, Appellant filed a Motion to Reconsider, Alter, or Amend Pursuant to Rules 52 and 59, SCRCP. (R. pp. 552-647.) On June 18, 2012, Respondents filed a motion under Rule 59(e), SCRCP in opposition to Appellant's motion, and on July 12, 2012, Appellant filed a response to Respondents' motion in opposition. (R. pp. 648-657.) On December 15, 2012, attorneys Wayne R. Byrd and Carlyle R. Cromer of Turner Padget Graham & Laney, PA were substituted as counsel for the Appellant in replace of attorneys Leigh P. Boan and David J. Mills of the McNair Law Firm. (R. pp. 59-63.)

On November 15, 2012, the circuit court signed the written order for its May ruling granting partial summary judgment to Respondents, and then heard arguments on Appellant's motion to reconsider. The circuit court, after hearing arguments from counsel, denied Appellant's motion to reconsider under Rule 59(e), SCRCP, based on the following reasoning:

THE COURT: Where did the, what evidence do you have that the Board even considered it? All I heard here and all I see here is the Board upon receiving information there is a problem with the windows and doors and there is no question the bylaws make that, or any resulting damage, collateral, collateral damage the responsibility of the individual homeowner or condo owner if the damage is to the common units or common elements. Instead of addressing it pursuant to the bylaws and making some determination of whether or not it is actually the fault of the unit owner or the fault of the engineer or designer of the windows, they go and try to adopt an amendment which will fix it and just make it everybody's problem rather than the problem of the individual homeowner or unit owner, and that is what really concerns me about this, they knew it, there is only one reason for that amendment,

> they wanted that amendment because they knew that there was an obligation on the part of these unit owners and they wanted to make sure that these units owners didn't bear that responsibility, that it got spread out and was paid by all the other unit owners, including the unit owners in C and D. That is what I see here, repeated attempts to change the bylaws, change that part of the bylaws that would clearly make this a problem of the individual unit owner, and I think it is significant, something you said a moment ago, every unit wasn't leaking, every unit wasn't leaking. If it was a design problem, if it was a problem resulting from the flashing or whatever I would think that every unit would have a problem but there were just some units that were and those units, in my mind, obviously are the units that were not maintained. . . . (Tr. of Hr'g dated Nov. 15, 2012, R. p. 913, line 23-p. 915, line 8.)

Later that day, the circuit court's Form 4 Order denying Appellant's Rule 59(e) Motion, SCRCP, to reconsider was filed. (R. pp. 41-47.) On November 19, 2012, Respondents' counsel received written notice of the circuit court's Form 4 Order denying Appellant's motion to reconsider. (R. pp. 41-47.) On December 12, 2012, Appellant served and filed a Notice of Appeal on Respondents' counsel.

III. STATEMENT OF THE FACTS

On April 19, 2008, at the annual members meeting, the Appellant's Board reported to the unit owners that extensive repairs were needed to fix Buildings A and B. The Board stated that the costs of the repairs and reconstruction would be in the range of $12,000,000.00 to $13,000,000.00 depending on the construction budget prepared by MEC Engineering. Although investigation and testing of Buildings A and B had been ongoing since 2006, this was the first time that the Appellant's Board decided to share the estimated cost of repairs and reconstruction for these buildings with the unit owners. (19 April 2008 Annual Members' Meeting Minutes, R. pp. 1237-1238, subparagraph (1) of ¶ IX titled Homeowners Representative Report for Buildings A and B; Order, R. p. 13, ¶ 3; p. 14, ¶ 1.)

TABLE A[1]			
	Building A&B	**3 Bedroom Building C&D**	**4 Bedroom Building C&D**
Number of units	80	50	10
% Interest/Unit	0.6751	0.75949	0.80168
Total % /Interest	54.008	37.9745	8.0168
Special Assessment Low Estimate	$12,000,000	$12,000,000	$12,000,000
Per unit payment amount	$ 81,012	$91,139	$96,202
Total	$6,480,960	$4,556,940	$962,016
Special Assessment High Estimate	$13,000,000	$13,000,000	$13,000,000
Per unit payment amount	$87,763	$98,734	$104,218
Total	$7,021,040	$4,936,685	$1,042,184

Under Table A, the Respondents' pro rata common expense assessment compared to the A and B unit owners' assessment for the reconstruction and repair of Buildings A and B was represented by the Appellant to be in the following range:

1. $91,139.00 to $98,734.00 for three (3) bedroom unit owners in Buildings C and D depending on the amount of repair cost for Buildings A and B as set forth above in Table A.

2. $96,202.00 to $104,218.00 for four (4) bedroom unit owners in Buildings C and D depending on the amount of repair cost for Buildings A and B as set forth above in Table A.

[1] See, Exhibits C and D to Master Deed, R. pp. 1003-1005; A re-recording on January 19, 1999 of the 1st Amendment to the Master Deed, R. pp. 1067-1069; A re-recording on January 19, 1999, of the 2nd Amendment to the Master Deed, R. pp. 1103-1106).

3. $81,012.00 to $87,763.00 for unit owners in Buildings A and B depending on the amount of the repair cost as set forth above in Table A. (19 April 2008 Annual Members' Meeting Minutes, subparagraph (1) of ¶ IX titled Homeowners Representative Report for Buildings A and B, R. pp. 1237-1239.)

After being overwhelmed by the total cost of the reconstruction and repair that could be assessed against them as a common expense to fix Buildings A and B, the Respondents' representatives sought legal advice. They retained attorneys Howell V. Bellamy, Jr. ("Mr. Bellamy"), and Jeffrey W. King ("Mr. King") of the Bellamy Law Firm to advise them regarding the enforceability and/or validity of the Appellant's proposed special assessment. On June 9, 2008, on behalf of the Respondents, Mr. King sent a letter to the Appellant's Board asserting that its proposed special assessment was invalid or partially invalid based on the following conclusion:

> 2006 [Window] 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. (R. p. 1342, ¶ 2, last sentence; Order, R. pp. 22-23.)

Further, in support of Mr. King's conclusion, former board president Don Johnston ("Mr. Johnston") said he agreed with Mr. King's analysis that the 2006 Window Amendment was invalid. Johnston further supported Mr. King's alternative proposal to the Board as discussed in his June 9, 2008 letter. (12 June 2008 Letter from Johnston to King, R. p. 1346; R. p. 1341,¶ 1; p. 1344, ¶ 2.) Specifically, Mr. Johnston's deposition testimony confirmed this admission as follows:

Q. This is Plaintiff's Exhibit Number 2 to your deposition. Let me represent to you -- there's a cover letter to the McNair Firm. But here's a letter from Jeff King to the board of directors dated June 9, 2008. And here's a letter from you to Jeff King dated June 12, '08.

A. Okay.

Q. Do you recall that?
A. Yes, I do. I remember this clearly.
Q. All right, sir. Well, I'm going to ask you a few questions about it.
A. Okay.
Q. Take whatever time you need to look at it.
A. Yeah, I remember this clearly.
Q. All right. Your letter of June 12 says, "Thank you for your analysis and proposal -- to the Board of Directors of Shipyard Village representing the Owners of Buildings C and D. I believe the analysis is comprehensive with the information at your disposal and the proposal reasonable. I/we (Don and Linda Johnston) have submitted our portion of the legal fees ($500) for services rendered. However, this payment for legal fees does not contribute -- does not" -- I'm sorry -- "constitute an agreement to continue incurring legal fees in the event this Board does not accept the proposal and additional legal action as required. Sincerely, Don and Linda Johnston."
A. That's correct, yes.
Q. All right. So that's right before you went on the board.
A. That's right, yes.
Q. And later you changed your mind and said, I'm not going to participate with the group in C and D bringing actions against the association.
A. That's correct.

(Johnston Dep., R. p. 1489, line 16-p. 1491, line 1; R. p. 1346.)

After receiving Mr. King's June 9, 2008 letter stating his objections to the Respondents being improperly assessed for the repair and replacement of the A and B unit owners' windows and sliding glass doors based on the invalidity of the 2006 Window Amendment, the Appellant's Board agreed to meet with him and the Respondents' representatives. (R. pp. 1341-1344.) At the meeting, however, the Board made it clear that it did not agree with Mr. King's reasoning for challenging the legality of the 2006 Window Amendment in conjunction with the Board's proposed special assessment for the reconstruction and repair of Buildings A and B. Lastly, the Board rejected the alternative proposals raised and argued by Mr. King in his letter. (R. pp. 1341-1343.) Unable to reach an equitable resolution in this matter, the Respondents filed a lawsuit against the Appellant under Civil Action No. 2009-CP-22-0152 on January 29, 2009 challenging the legality and

enforceability of the Window Amendment. (R. pp. 76-84.)

HISTORY OF THE WINDOWS AND SLIDING GLASS DOORS LEAKING WATER INTO BUILDINGS A AND B

The substantial evidence in the Record on Appeal is uncontroverted that the Appellant's governing boards, past and present, had knowledge that the A and B unit owners' windows and sliding glass doors were leaking water into Buildings A and B and causing damage to the common elements since 1983. (8 January 2012 ECS Carolinas, LLP's Amended Investigative Report prepared by Steve Geiger, P.E., R. pp. 1869-1844 titled Review of Correspondence; R. pp. 1869-1939 titled January 2010 Shipyard Village Photographs; R. pp. 1853-1856 titled Professional Opinions; R. pp. 2046-2145 titled Photographs of Various Units in Buildings A and B.) Furthermore, Appellant, also, knew that the unit owners were not maintaining and repairing their windows and sliding glass doors as required by § 3.6 of the Master Deed as evidenced by the following:

The June 15, 1999 Board of Director's ("the Board") Organizational Meeting Minutes discussed and confirmed who was responsible for waterproofing the balcony thresholds and window frames of the units pursuant to the Master Deed. The Minutes provided in pertinent part:

> The Board agreed to omit the thresholds and window frames from the [painting and waterproofing] bid [for Buildings A and B], and if the individual owner wants done, it would be their expense; therefore, optional to the owners. Mr. Bond asked where in the bylaws does it state that the owners are responsible for their thresholds and window frames. Mr. Cody reviewed Article III, Section 3.6-the boundaries of unit in paragraph C. The notice is to state that the owners are responsible for any leaks caused by leaking windows.
>
> MOVED: To notify all the owners and inform them that they are responsible for their threshold and window frame on their unit. (R. p. 1120, ¶¶ 1 and 2; Order, R. p. 4, ¶¶ 2, 3, and 4.)

The August 11, 1999 letter from Susan Pendergrass ("Pendergrass"), Property Manager of Waccamaw Management Company ("Waccamaw") to the A and B unit owners explained that: ***"[p]er 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."*** (Emphasis added.) (R. p. 1317, ¶ 1; Order, R. p. 6, ¶ 6, and R. p. 7, ¶ 1.)

The September 27, 2002 Board Special Meeting Minutes indicated that at the Board's request, McGee Consulting Associates ("MCA") had investigated and performed testing on the windows of Buildings A and B. The Minutes, specifically, stated in pertinent part that:

> McGee Consulting investigated and performed testing on buildings A and B windows . . . . It was reported after Hurricane Hugo some of the windows in said buildings were replaced. The windows utilized appear to be residential versus commercial and were prefabricated versus custom made. Due to the windows being prefabricated, the windows were smaller than the opening, therefore, installer installed wood framing in order to fill the gaps.
>
> . . . .
>
> ***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 provided that the Appellant's 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, Subparagraph (A) titled Window Problems of ¶ V ; Order, R. p. 5, ¶¶ 2 and 3.)

The October 25, 2002, Board Meeting Minutes discussed a problem with water flowing into Unit A-41 caused by Unit A-51's leaking sliding glass door. The Minutes, specifically, stated in pertinent part:

> The Board was apprised on a leak originating from the balcony sliding glass door area in [Unit] A-51 into [Unit] A-41. The leak has been ongoing, and the owner of A51 has made repairs to correct this problem, however, [Unit] A-41 continues to have water intrusion. Mr. Warner generated two (2) letters in September to the owner of [Unit] A-51 requesting they find a solution to this continued problem. Mr. Warner received a telephone call from the owner of [Unit] A-51 who committed to repairing this area. The owner of [Unit] A-41 would like a letter from the Board stating that they are not aware of any structural defects that would cause water intrusion from [Unit] A-51. (R. pp. 1132-1133; Order, R. p. 6.)

The subsequent Board Meeting Minutes do not reflect that a letter was ever sent to the owner of Unit A-41 from the Board stating that structural defects in the common elements had caused the water intrusion from Unit A-51 into his Unit. (Order, R. p. 6.)

On October 31, 2002, on behalf of the Board, Mrs. Kelli Diehl ("Mrs. Diehl") of K.A. Diehl ("KAD"), Appellant's property manager, wrote a letter to attorney Robert J. Moran which referenced the window leak problems in Unit B-15. Mrs. Diehl's letter, specifically, stated in pertinent 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; Order, R. pp. 6-7.)

On March 28, 2003, on behalf of the Board, Mrs. Diehl wrote a letter to Carol Murray of Unit A-28 regarding her leaking sliding glass door. Mrs. Diehl's letter, specifically, stated in pertinent part:

Dear Ms. Murray:

> It has been determined that during a hard rain, ***water flows under the threshold of your sliding glass door and leaks onto the unit below.*** The sliding doors are the owner's responsibility to maintain and thus, we are requesting that you take action to correct this problem. (Emphasis added.) (R. p. 1321; Order, R. p. 7.)

The March 28, 2003 e-mail from Board President Dr. Leon Jennings ("Dr. Jennings") to Board Member Bob Shaffer regarding window leaks and "new SYV information" stated in pertinent part:

> Hi Bob:
>
> You are correct that the owners are responsible for window repairs due to age, leaks, breakage, etc., and that is covered in the Master Deed. ***The real kicker is whether McGee, David Diehl and our attorneys are correct in saying that the leakage many units have experienced is due to improper windows incorrectly sized and installed. That may make it an Association liability issue and force us to take action*** - or at least, have the owners make the decision. Which certainly put us in a difficult position. Incidentally, the Master Deed specifically states that the owners are responsible for the window frames, so one could argue either way. (Emphasis added.) (R. p. 1322; Order, R. p. 8.)

A proposal from Pro-Tec indicated that approximately $1,200,000.00 per building, or $2,400,000.00 total, would be required to replace the windows in Buildings A and B, and was discussed at the March 14, 2006 Board meeting. The March 2006 Minutes, further, stated that the Board was going to put an amendment to the Master Deed up for vote and that it would essentially make the windows and sliding glass doors the responsibility of the Association and not the unit owners. Further reference was made to balcony stucco "leaching" and cracking balcony "frontages." (R. p. 1159; Order, R. p. 10.)

The first vote on the proposed window amendment at the April 15, 2006 Annual Members Meeting did not pass. In response, the Appellant then initiated a mail referendum on or about April 26, 2006, by seeking written consent for the adoption of window

amendment without holding another meeting. (R. pp. 1165-1166; Order, R. p. 10.) For example, § 1.5 of the Bylaws provides 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."* (R. p. 1007.) But the second vote on the Window Amendment did **NOT** obtain written consent from one hundred percent (100%) of the unit owners entitled to vote as required by § 1.5 of the Bylaws. (Emphasis added.) (Appellant's 24 September 2009 Answer to Respondents' Req. to Admit No. 12, R. p. 921.)

The July 6, 2006 letter to the unit owners from the Board alleges that the proposed Window Amendment, which made windows and sliding glass door the responsibility of the Appellant had passed pursuant to a proxy vote mailed out to the unit owners. (R. p. 1323; Order, R. pp. 10-11.)

Despite the fact that unanimous written consent was **NOT** obtained, the Appellant misled the membership that the 2006 Window and Sliding Glass Door Amendment had properly passed. (6 July 2006 letter from Bd. to unit owners, R. pp. 1323-1324.) The Amendment was recorded on October 16, 2006, but the filed Amendment incorrectly states on page 1 in paragraphs 4 and 5 of its text that it had passed ***"at [a] special meeting [held on April 15, 2006] adopted 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 blatant misrepresentation of how the voting occurred based on the second proxy vote mail referendum. (Emphasis added.) (Third Amend. to Master Deed, R. p. 1108, ¶¶ 4 and 5.) Lastly, the (invalid) Window Amendment only made windows, and not sliding glass doors the maintenance responsibility of the Appellant. (Third Amend. to Master Deed,

R. p. 1108, ¶¶ 4 and 5; 24 September 2009 Appellant's Answer to Respondents' Req. to Admit No. 1, R. p. 1109.)

The July 28, 2006 Board Meeting Minutes, further, provided that consideration for reimbursement of windows already replaced by unit owners would be given but that "stains and water damage" on the interior of the unit would be a unit owner's responsibility. (R. p. 1169, ¶ 4; Order, R. p. 11.)

The January 26, 2007 Board Meeting Minutes reported that the meeting started with a discussion of Kenneth G. Schneider Jr., AIA of Schneider and Associates ("Schneider") findings of "engineer joint" located directly under the sliding glass door between adjoining hollow core slabs of the balcony and unit. Additional discussion of reimbursement for a unit owner's window replacement was noted. The March 2007 Minutes discussed the Board's dissatisfaction with Schneider, who was later replaced by a mechanical engineer named Eddie Stokes, P.E. ("Mr. Stokes") and his firm of MEC Engineering Services, Inc.("MEC") (R. p. 1171, ¶ II; Order, R. p. 11.)

The April 28, 2007 Board Meeting Minutes stated that ***"many sliding glass doors have water penetration problems."*** The minutes reported that the reserve account had approximately $1,391,000.00 with the majority of that money being proceeds from the Buildings C and D lawsuit settlement. (R. p. 1182; Order, R. pp. 11-12.)

A September 26, 2007 letter to unit owners from the Board regarding actions taken to remedy water intrusion into Buildings A and B provided in pertinent part:

> The Board wishes to remind you that even though the Association assumed responsibility of door and window replacement in July 2006 the problems in A and B buildings are currently experiencing didn't just happen last year -- they have been developing over the time when the owners were responsible for their doors and windows. Those buildings were built well over twenty years ago. ***Studies***

> ***have shown that repairs made in the past years did not really address the water intrusion issue, but were more cosmetic in nature.*** (Emphasis added.) (R. pp. 1337-1338; Order, R. p. 12.)

The Board's September 26, 2007 letter, also, addressed, ***"[w]ater Problems Associated with the Recent Rains,"*** leaking into the interior of some of the A and B units provided in pertinent part:

> The Board has been made aware of acute water leaks into the interior of some of the A and B units during recent rains. The question has been raised as to who is responsible for the interiors of the units. Please refer to Article II, Section 5(c) of the amended Master Deed, a copy of which is attached.
>
> This document explains that only the sliding glass doors and the windows are the responsibility of the association. The rest of the unit is the responsibility of the owner and/or the maintenance company hired by the owner, and not the on-site management staff. The Board hopes this clarifies the matter. (R. pp. 1336-1337; Order, R. p. 9.)

A September 18, 2007 e-mail to the Board from Mrs. Diehl regarding window leaks in Buildings A and B stated in pertinent 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 . . . ."*** Her e-mail, also, stated 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; Order, R. p. 13.)

The January 25, 2008 e-mail from Dr. Jack Eblin ("Dr. Eblin") to the Board, Mrs. Gallagher, and Mr. Eddie Stokes, P.E. of MEC Engineering, stated that: ***"water intrusion began when A and B were built - the BOD took responsibility one and half years ago."*** (Emphasis added.) (R. p. 1340; S. R. p. 29; Order, R. p. 13.) Dr. Eblin's

acknowledgment confirmed the Board had not undertaken timely and proper maintenance, and repair of the Buildings A and B as it was required to do. (Order, R. p. 13.)

On July 28, 2008, the Board hired Sutton-Kennerly & Associates, Inc. ("SKA") to review the repair project engineering reports, bid specifications, drawings and proposals and to provide a report to the Board with its findings and recommendations. Later the Board hired SKA to prepare the final design for the repairs and reconstruction of Buildings A and B after it fired MEC Engineering for poor performance. SKA prepared a construction budget which estimated to complete the repairs (including design and construction administration) to Buildings A and B would cost in the range of $10,944,468.00. (R. p. 1244; Order, R. p. 14.)

At the March 21, 2009 Special Members Meeting, the Board called for a third re-vote on the 2006 Window Amendment and a first vote on the 2009 Sliding Glass Door Amendment because the validity of these amendments were being legally challenged by unit owners. After the votes were taken and tallied on the Amendments, Board President Johnston announced that both the Window and Sliding Glass Door Amendments had failed to pass by the required two-thirds (2/3) majority vote. (21 March 2009 Members' Meeting Mins., R. p. 1279, ¶ III titled Opening Statements; p. 1283, ¶ VIII titled Vote on Proposed Amends.)

The April 4, 2009 Annual Members Meeting Minutes clearly and unambiguously show that the Board failed to present the annual budget as part of the order of business at the annual meeting of unit owners as required by § 1.12 of the Bylaws. Specifically § 1.12 provides for the presentation of the budget as part of the order of business at the annual meeting. Because the Board did not submit the proposed budget, the unit owners did not

have an opportunity to discuss and amend the annual budget pursuant to § 5.3 of the Bylaws which provides "[t]he Budget, as adopted by the Board, may be amended upon the motion and affirmative vote of Co-owners holding two-thirds (2/3) of the Percentage Interest in the Common Elements." (R. pp. 1285-1289; Order, R. p. 15.)

On July 8, 2009 a letter from Mrs. Vicki Gallagher ("Mrs. Gallagher") of KAD was sent to the unit owners regarding the Board's call for a special members' meeting on Saturday, August 1, 2009, to vote on a special assessment in the amount of $10,994,468.00 to fund the extensive repairs and reconstruction needed for Buildings A and B. (R. pp. 1290-1292; Order, R. pp. 15-16.) Mrs. Gallagher's letter to the unit owners, further, provided in pertinent part:

> If the Special Assessment does not pass the cost of the repairs will be added to the 2010 and 2011 Operating fund.
>
> The Special Assessment per unit is based on the percentage of interest assigned to the unit as dictated in the Association's governing documents.
>
> Special Assessment Unit Assessment Calculation with 80 units sharing windows/ doors expense (Building A and B owners only):
>
> | | |
> |---|---|
> | A & B Units | $ 88,398 |
> | C & D-3 Bdr | $ 64,888 |
> | C & D-4 Bdr | $ 68,471 |
>
> The payment amount of the special assessment will be dependant on the outcome of the lawsuit filed against the Association with respect to the windows and sliding glass doors 2006 amendment. The calculations above assume that the ***expense of the windows and sliding glass doors will be borne by the homeowners in building A & B.*** Currently the Association has moved forward with a Summary Judgment as a means for resolving the civil action filed by C & D owners. Consequently, the results of the judgment may have an impact on the windows/doors cost allocation to A, B, C, and D owners. ***If the ruling comes back that all unit owners are responsible for the expense for the windows/doors, the assessment will be adjusted accordingly.*** (Emphasis added.) (R. pp. 1290-1292; Order, R. pp. 15-16.)

IV. STANDARD FOR REVIEW

Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. Trico Surveying, Inc. v. Godley Auction Co.. 314 S.C. 542,431 S.E.2d 565 (1993). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 443 S.E.2d 392 (1994). In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Baughman v. American Tel. and Tel. Co., 306 S.C. 101,410 S.E.2d 537 (1991). Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings. Id. at 115-116, 410 S.E.2d at 545-546. "It is not sufficient that one create an inference that is not reasonable or an issue of fact that is not genuine. The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine [or material]." Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990) (internal citations omitted). Conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. Id.; see also Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). "The purpose of summary judgment is to obviate delay where there is no

material issue of fact involved." Manley v. Manley, 291 S.C. 325, 329, 353 S.E.2d 312, 314 (Ct. App. 1987) (citations omitted).

V. ARGUMENTS

A. The circuit court correctly determined that Appellant had a duty to investigate when presented with evidence which showed or reasonably showed that a majority of unit owners had neglected the maintenance and repair of their units' windows and sliding glass doors which resulted in water intrusion damage to the common elements of Buildings A and B which Appellant had an affirmative duty to maintain. Specifically, the circuit court correctly determined that Appellant, upon receiving such information, had a duty to initiate some investigation to determine whether it would be appropriate to individually assess the defaulting unit owners in Buildings A and B for the resulting damage to the common elements.

Appellant's assertions that no "duty to investigate" exists under the expressed or implied language of the Master Deed and Bylaws, and no "duty to investigate" exists even when presented with evidence which showed or reasonably showed the neglect of a majority of unit owners in maintaining their units' windows and sliding glass doors had resulted in water intrusion damage to the common elements, are without merit. Its assertions are contrary to the provisions of the Master Deed and Bylaws, the Statutory law, and common law of the State of South Carolina based on the following grounds:

1. Duty to inquire exists under the Master Deed and Bylaws.

Appellant's argument that it has no duty to inquire under the expressed or implied language of the Master Deed and Bylaws is inconsistent with its prior argument that it had complied with its duty to inquire at the motion hearings on May 21-22, 2012. Specifically, in responding to the circuit court's questions during the hearing, the Appellant's counsel made the following admissions: (1) that Appellant has an affirmative duty to maintain, replace, and repair the common elements of Buildings A and B (Tr. of Hr'g dated

May 21-22, 2012, R. p. 778, lines 4-11; Appellant's Answer to First Req. To Admit No. 1, R. p. 931; Order, R. p. 26); (2) that Appellant and the unit owners are bound by the Master Deed and Bylaws (Tr. of Hr'g dated May 21-22, 2012, R. p. 778, lines 22-23; Appellant's Answers to Respondents' Second Req. To Admit Nos. 3, 6, 7, 8, and 9, R. pp. 941-945; Order, R. p. 26); (3) that Appellant has a duty to require a defaulting unit owner to comply with provisions of the Master Deed and Bylaws by taking prompt and appropriate action to correct any violations (Tr. of Hr'g dated May 21-22, 2012, R. p. 779, lines 16-19; R. p. 780, lines 7-12; Order, R. p. 26); and (4) that Appellant has a duty to individually assess a defaulting unit owner if his or her unit has damaged the common elements which it has an affirmative duty to maintain and repair. (Tr. of Hr'g dated May 21-22, 2012, R. p. 734, lines 5-10; Appellant's Certificate of Incorporation filed on July 7, 1982, R. p. 509, ¶ 4; Order, R. p. 26.) Lastly, Appellant's counsel admitted on the record that a duty to investigate and pursue a recovery exists based on her positive response to the circuit court's question:

> THE COURT: We're not in trial yet. I just want to put this one question to you, Miss Boan. If you're on the Board and you've got a problem and you've got people giving you two or three causes for the problem, okay, there is one of them you can get some money from, and that is why you attribute it to these homeowners, these unit owners not maintaining their building, under the bylaws they are supposed to pay for it, shouldn't you, and the other two everybody is going to have to share, don't you have a duty to these other members to go back and at least check on the theory of whether or not the individual owners of the A and B units, where you had leak problems, should have paid?
>
> MISS BOAN: I think, Your Honor, to answer your question, yes, I think you do look into it and I think this Board did. I think this Board considered it and that is how -- (Tr. of Hr'g dated May 21-22, 2012, R. p. 771, lines 6-23; Order, R. p. 30.)

In response to the Appellant's argument that it has no duty to investigate under the governing documents that was raised for the first time in Appellant's Initial Brief, the Respondents' assert that the contrary is true based on the Appellant's authority and

affirmative obligation to investigate and individually assess the defaulting unit owners as prescribed in Paragraph Two (2) of Article IX, § 9.4, Covenant to Comply with Restrictions and Obligations; §§ 12.1 and 16.2 of the Master Deed; and §§ 6.3, 6.4, and 7.3 of the Bylaws which provide in pertinent part as follows:

- § 9.4 of the Master Deed, provides in pertinent part, "[t]he violation of any rule or regulation adopted by the Board or the breach of any covenant or provision herein contained, SHALL, in addition to any other rights provided for in the Act, this Master Deed and the Bylaws, give the Board the right: (a) to enter upon the unit, or any portion of the property upon which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting co-owners, any structure, thing or condition that may exist thereon contrary to the intent and meaning of the provisions hereof . . . ." (Order, R. p. 27; Master Deed § 9.4, R. pp. 982-984.)

- § 12.1 of the Master Deed, provides in pertinent part, "[a]ny such deficiency resulting from damage to the Regime Property as a result of the neglect ... by any Co-owner . . . SHALL be charged to such Co-owner as an individual assessment." (Order, R. p. 28; Master Deed § 12.1, R. p. 992.)

- § 16.2 of the Master Deed, provides in pertinent part, "[e]ach Co-owner SHALL comply strictly with the By-laws and with the administrative rules and regulations adopted pursuant thereto . . . . Failure to comply with any of the same SHALL be grounds for an action to recover . . . damages, injunctive relief, or both, maintainable by the manager, or the Board of directors on behalf of Council." (Order, R. p. 28; Master Deed § 16.2, R. p. 999.)

- § 6.3 of the Bylaws provides in pertinent part, "[i]n the event that any Co-owner fails to perform the maintenance required by him by these By-laws or by any lawful regulation, and such failure creates or permits a condition which is hazardous to life, health, or property, or which unreasonably interferes with the right of another Co-owner, . . . the Board of Directors SHALL . . . cause such maintenance to be performed and charge all reasonable expenses of so doing to such co-owner by Individual Assessment." (Order, R. p. 28; Bylaws § 6.3, R. p. 1019.)

- § 6.4 of the Bylaws, provides in pertinent part, "[t]he expenses of all maintenance, repair, replacement provided by the Board of Directors . . . shall be Common Expenses, except that when such expenses are necessitated by (1) the failure of a Co-owner to perform the maintenance required by these By-laws or by any lawful Regulation (2) the willful act, neglect,

or abuse of a Co-owner, they SHALL be charged to such Co-owner as an Individual Assessment." (Order, R. p. 28-29; Bylaws § 6.4, R. p. 1019.)

- § 7.3 of the Bylaws, provides in pertinent part, "[t]he Board of Directors SHALL enforce the terms of the Act, the Master Deed and these Bylaws and the Regulations promulgated pursuant hereto by taking prompt and appropriate action to correct any violations." (Order, R. p. 29; Bylaws § 7.3, R. p. 1021.)

"Property, whether subject to the Horizontal Property Act, may, of course, be governed by restrictive covenants. Real covenants have been defined as 'agreement[s] . . . to do, or refrain from doing, certain things with respect to real property.' 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 1 (2005). Therefore, covenants, 'in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract.' Id. (citing Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct. App.1987)). Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. 17 S.C. Jur. *Covenants* § 2 (2005) . . ." Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp.., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (citations omitted). "'The purpose of all rules of contract construction is to ascertain the intention of the parties and that intention must be gathered from the entire agreement and not from any one particular phrase thereof.'" Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citations omitted). Highlands Property Owners Ass'n, Inc. v. Shumaker Land, LLC, 397 S.C. 432, 438, 724 S.E.2d 685, 688 (Ct. App. 2012) ("It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where

possible, all the language used should be given a reasonable meaning.") (quoting from Brady v. Brady, 222 S.C. 242, 246,72 S.E.2d 193, 195 (1952)).

Here, applying the legal principles enunciated by this Court in Queen's Grant II Horizontal Property Regime, supra, Stone Creek Cove Condominium II Horizontal Property Regime, supra, and Highlands Property Owners Ass'n, Inc. v. Shumaker Land, LLC, supra, when reading the affirmative requirements of §§ 9.4, 12.1, and 16.2 of the Master Deed together with the requirements of §§ 6.3, 6.4, and 7.3 of the Bylaws can yield only one practical interpretation that a duty to investigate exists in order to give reasonable meaning and effect to all of these sections. (Master Deed § 9.4, R. pp. 982-984, § 12.1, R. p. 992, and § 16.2, R. p. 999; Bylaws §§ 6.3 and 6.4, R. p. 1019, and § 7.3, R. p. 1021.) Specifically, the Appellant has already admitted that it has a ***"'duty to enforce the terms of the Act, Master Deed and these Bylaws by taking prompt and appropriate action to correct any violations,'"*** (quoting from the Order of the circuit court) which presupposes a duty to investigate possible violations of the covenants exists in order to take appropriate action to correct any violations as required by its affirmative duties. (Appellant's Initial Br., pp. 12-13; Order, R. p. 29.) Consequently, without such a reasonable interpretation, the Appellant would not be able to comply with its other fundamental duties such as its duty to determine if a ***"Co-owner's failure to perform the maintenance required by him by these By-laws . . . creates or permits a condition which is hazardous to life, health, or property, or which unreasonably interferes with the right of another Co-owner . . . ."*** (Bylaws §§ 6.3 and 6.4, R. p. 1019, § 7.3, R. p. 1021.) See Cohan v. Riverside Park Place Condominium Ass'n, Inc., 123 Mich. App. 743, 748-750, 333 N.W.2d 574, 576-577 (Mich. App. 1983) (Court held that the board of directors of a condominium had the right to request

access to an individual unit in order to "*inspect it for suspected violations of condominium building regulations*"). Further, the Appellant's argument that there is no duty to inquire or inspect is misplaced and contrary to the fundamental purpose of the Master Deed and Bylaws which is to ensure the safety and structural integrity of the regime's buildings. See also, Dockside Ass'n, Inc. v. Detyens, 291 S.C. 214, 216, 352 S.E.2d 714, 716 (Ct. App.1987) (this Court interpreted the by-laws to give the Board of Directors the *implied authority* to determine the existence of an emergency where the by-laws prescribe that notice of a need for an assessment for emergency common expenses shall be given to the co-owners for needed repairs to the common elements). Furthermore:

> [N]either law nor equity requires every term or condition to be set forth in a contract. Where an implied term is necessary to effectuate the intention of the parties, the law will supply it. The unexpressed provision may be inferred from the language of the contract itself, or by looking to the external facts and circumstances surrounding the bargain, or by proving a general custom and usage of including certain terms as part of similar contracts.
>
> Time Warner Cable v. Condo Services, Inc., 381 S.C. 275, 285, 672 S.E.2d 816, 820-821 (Ct. App. 2009) (internal citations omitted).

Respondents, further, rely on the case of Messer v. Messer, 359 S.C. 614, 598 S.E.2d 310 (Ct. App. 2004) for this Court's holding that, "[i]n the absence of an express provision in the contract, the law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made." Id. at 628, 598 S.E.2d at 318. Accordingly, this Court should affirm the circuit court's ruling that the Appellant has a "duty to investigate" under the expressed or implied language of the Master Deed and Bylaws based on this Court's reasoning in the cases of Dockside Ass'n, Inc. v. Detyens, supra, and Messer v. Messer, supra, and Time Warner Cable v. Condo Services. Inc., supra, in order for the Appellant to perform its affirmative duties such as

abating ***"a condition which is hazardous to life, health, or property"*** or preventing the A and B unit owners' windows and sliding glass doors from leaking water into and damaging the common elements. (Bylaws §§ 6.3 and 6.4, R. p. 1019, Bylaws § 7.3, R. p. 1021.)

2. Duty to inquire exists under the South Carolina Nonprofit Corporation Act.

Appellant's assertion that it has no "duty to inquire" is misplaced and contrary to its Board's expressed requirements under S.C. Code Ann. § 33-31-302(18) of the South Carolina Nonprofit Corporation Act, and the substantial evidence in the Record on Appeal for the following reasons. First, under the clear and unambiguous language of § 7.3(e) of the Master Deed, this document provides that ***"the Council and its Board of Directors shall have all the powers, rights and obligations of corporations organized under the laws of the state of its incorporation...."*** It is undisputed that the Appellant is a nonprofit corporation under the provisions of the South Carolina Nonprofit Corporation Act. Further, S.C. Code Ann. § 33-31-302 (2006) regarding a nonprofit corporation's general powers provides in pertinent part:

> Unless its articles of incorporation provide otherwise, every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power:
>
> . . . .
>
> (18) to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

The South Carolina Reporters' Comments to S.C. Code Ann. § 33-31-302(18) states that, "[t]he purpose of item (18) is to ensure that all of the powers granted in this section are broadly interpreted and that there be no limitation imposed on the powers of any nonprofit corporation." S.C. Code Ann. § 33-31-302(18) (2006). Second, S.C. Code Ann.

§ 33-31-830(a)(2) requires that a director in discharging his or her duties to act "*with the care of an ordinarily prudent person in a like position under similar circumstances.*" S.C. Code Ann. § 33-31-830(a)(2) (2006). The South Carolina Reporters' Comments to S.C. Code Ann. § 33-31-830(a)(2) (2006) assert that:

> [i]n appropriate circumstances the duty of care *requires reasonable inquiry*. Where a problem exists or a report on its face does not make sense, a director has a duty to inquire into the surrounding facts and circumstances. The inquiry required is the inquiry an ordinarily prudent person in a like position would make under similar circumstances.

Here, based on Appellant's broad general powers under S.C. Code Ann. § 33-31-302(18) (2006) in conjunction with its due care requirement in the performance of its duties under S.C. Code Ann. § 33-31-830(a)(2) (2006), the Appellant is required to conduct *a reasonable inquiry* to determine whether it would be appropriate to individually assess the defaulting unit owners in Buildings A and B for their damage to the common elements based on the following reasons. First, Appellant admits that the maintenance, repair, and replacement of the windows and sliding glass doors is the responsibility of the individual unit owners in Buildings A and B under § 3.6 of the Master Deed. (R. pp.1280-1283.) Second, Mrs. Diehl's e-mail to the Board dated September 18, 2007, confirmed that the Board and KAD were aware that many of the A and B unit owners were doing nothing to prevent their units' windows and sliding glass doors from leaking water into and damaging the common elements of Buildings A and B. For example, she stated, "many of these units were leaking ... the issue was thrown back at the owners who most ended up doing nothing...." (R. p. 1328; Order, R. p. 13.) Third, in 1999 Appellant "notifi[ed] all unit owners and inform[ed] them that they are responsible for waterproofing: (1) the threshold underneath their sliding glass doors, and (2) window frames of their unit." (R. p. 1120; Order, R. p. 4.)

Accordingly, this Court should affirm the circuit court's ruling that the Appellant's duty of care requires *a reasonable inquiry* whether it would be appropriate to individually assess the defaulting unit owners for their damage to the common elements in Buildings A and B, under the Board's general duties as provided by S.C. Code Ann. § 33-31-302(18) (2006) in conjunction with the application of its due care requirement in performing its affirmative duties under S.C. Code Ann. § 33-31-830(a)(2) (2006).

3. Duty to inquire exists under common law negligence.

Appellant's assertion that it has no "duty to inquire" is misplaced and contrary to Record on Appeal for the following reasons. First, an affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 373 S.C. 43, 47-49, 644 S.E.2d 43, 46-47 (2007). For example, in the case of Murphy v. Yacht Cove Homeowners Ass'n, 289 S.C. 367, 345 S.E.2d 709 (1986), 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 failure to discharge its duties under the Master Deed and By-laws. 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. "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006) (citations omitted) (e.g., S.C. Code Ann. § 33-31-830(a)(2) (2006) requires that a director

in discharging his or her duties to act "*with the care of an ordinarily prudent person in a like position under similar circumstances*"). See also, 15B Am. Jur. 2d *Condominiums* § 22 (2013) (A homeowners' association has a duty to the members of the common-interest community to use ordinary care and prudence in managing the property of the community that is subject to its control) (citations omitted). Second, the Respondents, also, 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 additional authority for the legal principle that a condominium association has a "***duty to pursue a recovery for any alleged construction defects in the common elements which it maintains,***" and that if the association fails to do so the individual owners have a cause of action against the association for its negligence. Id. at 556, 335 S.E.2d at 366 (emphasis added). This necessarily implies that the Appellant has an affirmative duty to investigate and possibly pursue a recovery when presented with evidence that the source of the water intrusion damage to the common elements of Buildings A and B was caused by the defaulting unit owner's neglectful maintenance of their units. See, id. at 556, 335 S.E.2d at 366. Third, "*it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care.*" Madison ex rel. Bryant, supra. Id. at 137, 638 S.E.2d at 675 (citing Sherer v. James, 290 S.C. 404, 406, 351 S.E. 2d 148, 150 (1986)); Roundtree Villas Ass'n v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984).

Here, the evidence is uncontroverted that the Appellant assumed a duty to act with due care when it hired a contractor and/or installer to replace the damaged oceanfront windows in Buildings A and B after Hurricane Hugo in 1990. (R. p. 1322.) The window maintenance and repair is the sole responsibility of the A and B unit owners under

§ 3.6 of the Master Deed. Further, the Appellant breached its assumed duty of care by: (1) refusing to follow the recommendations in August of 2002 of its consultants/experts: George McGee, P.E. of MCA, and attorney Ralph McCullough of the Finkel Firm to remove the unsafe, leaking, and improperly installed oceanfront windows in Buildings A and B (R. p. 1127-A; R. p. 2402; R. p. 1322); (2) refusing to take any responsibility for fixing the window problem after being advised by its consultants/experts "*that problems from water intrusion are time related and tend to compound*" every 3 to 6 years. (R. p. 1121; R. pp. 1319-1320; Order, R. p. 8); and (3) refusing to pursue legal action in August of 2002 against the contractors and other responsible parties who had allowed the membership's claims to be barred by the 3 year statute of limitations. (R. pp. 1319-1320; Order, R. p. 8.) Specifically, the e-mail to Board member Bob Shaffer from former Board President Dr. Jennings admits the Board's liability for the installation of the defective windows when Dr. Jennings states: "***[t]he real kicker is whether McGee, David Diehl and our attorneys are correct in saying that the leakage many units have experienced is due to improper windows incorrectly sized and installed. That may make it an Association liability issue and force us to take action -- or at least, have the owners make the decision.*** Which certainly put us in a difficult position." (R. p. 1322.) "All the ocean side windows were removed and replaced after Hurricane Hugo." (R. p. 2154, ¶ 5.) "The installed windows [were] prefabricated residential windows; the building over 3 floors are to utilize commercial windows" and these windows were not Code compliant per the Georgetown County Building Code. (R. p. 2402, ¶¶ 3 and 4.) See, 15B Am. Jur. 2d *Condominiums* § 51 (2013) (A presumption of negligence on the part of a condominium homeowners association may arise from failure to comply with a statute, a safety order, an administrative regulation, or a local

building code provision) (citations omitted). Accordingly, this Court should affirm the circuit court's determination that the Appellant had a common law duty of care, and furthermore breached its duty of care based on the foregoing facts and circumstances and the reasoning of Madison ex rel. Bryant v. Babcock Center, Inc., supra, Murphy v. Yacht Cove Homeowners Ass'n, supra, and Roundtree Villas Ass'n v. 4701 Kings Corp., supra. (Order, R. pp. 8-9.)

B. The circuit court correctly determined that Appellant's unauthorized pattern of governance was evidenced by its: (1) inaction, failure to require the timely replacement of the unsafe, leaking oceanfront windows in Buildings A and B for at least 8 years, (2) incompetence, failure to follow advice of its experts to replace the unsafe, leaking oceanfront windows in both buildings and sue the contractors and other responsible parties for the resulting damage in 2002, (3) ultra vires acts, unauthorized adoption of the admittedly invalid Window Amendment and the 2010 and 2011 Annual Operating Budgets which improperly made the Respondents liable for the repair, removal, and reinstallation cost of the 1,087 new windows and the 80 new sliding glass doors in violation of § 3.6 of the Master Deed, and (4) lack of good faith and improper motives, continued enforcement of the admittedly invalid Window Amendment after both the Window and Sliding Glass Door Amendments were voted down on March 26, 2009, which are causally related to Appellant's firm decision not to investigate in order to improperly spread the total cost of repair among the membership, including the C and D members, and consequently are not subject to protection of the business judgment rule.

Appellant's assertion that its "failure to investigate" is protected by the business judgment rule is without merit, and not supported by the substantial evidence in the Record on Appeal and the case law for the following reasons:

1. The business judgment rule does not permit the Appellant to change the assessment method specified in the governing documents.

Appellant's contention that its pro rata assessment of the Respondents for the removal and replacement cost of the 1,087 new windows and the 80 new sliding glass doors located in Buildings A and B is reasonable and was adopted in good faith in the exercise of its

business judgment is without merit, and contrary to the case law. Appellant's argument misses the point because its assessment violates § 3.6 of the Master Deed. (Master Deed § 3.6, R. p. 968.)

Respondents rely upon the case of Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct. App. 1987) as authority for the legal principle that the business judgment rule does not permit the Appellant to change the assessment method specified in the governing documents. Id. at 347-348, 356 S.E.2d at 414. In Seabrook Island Prop. Owners Ass'n, the Association instituted an action against J. Randolph Pelzer ("Pelzer") to collect an unpaid annual assessment on two lots owned by Pelzer at Seabrook Island. Id. at 345, 356 S.E.2d at 412. Pelzer counterclaimed, alleging the assessment on his properties was invalid, because the annual maintenance charge was not "*based upon assessed valuation for taxation purposes*" as required by the restrictive covenants and bylaws. Id. In Seabrook Island Prop. Owners Ass'n, this Court found that the association's restrictive covenants and bylaws required the annual maintenance charges to be based on property values, not a flat fee system of assessment. Specifically, 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, therefore, the flat fee system could not be defended on the ground that it was a reasonable alternative under the business judgment rule. Id. at 348, 356 S.E.2d at 414; citing Lovering v. Seabrook Island Property Owners Ass'n, 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986), *aff'd as modified,* 291 S.C. 201, 352 S.E.2d 707 (1987) as authority for legal principle that "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." Id. at 348,

356 S.E.2d at 414. Further, citing the case of Dockside Association, Inc. v. Detyens, 291 S.C. 214, 352 S.E.2d 714 (Ct. App. 1987) as authority for legal principle the "'business judgment' rule applies to intra vires action of the corporation, not to ultra vires acts.'" Id. Accordingly, relying on these legal principles from the cases of Lovering v. Seabrook Island Property Owners Ass'n, supra, and Dockside Ass'n, Inc. v. Detyens, supra, this Court held "[t]he Association is bound to follow the covenants and its own bylaws." Id.

Here, the evidence is uncontroverted that Appellant improperly assessed the fifty (50) C and D Respondents in 2010 and 2011 for the repair and soft cost associated with the windows, sliding glass doors, and interior finishes of the A and B units for the following reasons. First, the third re-vote on the 2006 Window Amendment and the first vote on 2009 Sliding Glass Door Amendment did NOT pass at the special members meeting held on March 21, 2009. (21 March 2009 Members' Meeting Mins., R. p. 1279, ¶ III titled Opening Statements; p. 1283, ¶ VIII titled Vote on Proposed Amendments.) Second, the Appellant admitted, ***"because of the amendment's failure, the balcony doors and windows again became the responsibility of [A and B] co-owners[,]"*** and not the Respondents. (Appellant's Initial Br., p. 9.) Third, at the motion hearings on May 21-22, 2012, the Appellant finally admitted on the record after being questioned by the circuit court that the 2006 Window Amendment was invalid as a matter of law. (Tr. of Hr'g dated May 21-22, 2012, R. p. 732, lines 1-14.) Fourth, the Appellant's September 26, 2007 letter to the unit owners provided that, ***"leaking into the interior of the A and B units are the responsibility of the owner and/or the maintenance company hired by the owner, and not the on-site management staff."*** (R. p. 1337, ¶¶ 2 and 3.)

Furthermore, since the Master Deed and Bylaws require the maintenance and repair, replacement, and soft cost associated with the windows, sliding glass doors, and interior finishes to be individually assessed against the A and B unit owners as specified § 3.6 of the Master Deed, the Appellant's ***"per unit allocation ... based on ... practicality and equity"*** violates § 3.6 of the Master Deed and cannot be defended on the ground that it is a reasonable alternative under the business judgment. (Bray Aff., R. pp. 2256-2257, ¶ 11.) Specifically, the Appellant's common expense assessment against the Respondents is in direct contravention of this Court's holding in Seabrook Island Prop. Owners Ass'n v. Pelzer, supra. (Master Deed § 3.6, R. p. 968.) Accordingly, this Court should affirm the circuit court's ruling that the Appellant's "failure to investigate" is not protected by the business judgment rule.

2. The business judgment rule does not protect the Appellant from its inaction and incompetence regarding affirmative duty to maintenance and repair of the common elements of Buildings A and B.

Appellant's assertion that any failure to comply with its affirmative duties under the Master Deed and Bylaws is protected by the business judgment rule is without merit, and not supported by the case law and the substantial evidence in the Record on Appeal.

Respondents rely upon the case of Murphy v. Yacht Cove Homeowners Ass'n, 289 S.C. 367, 345 S.E.2d 709 (1986) as authority for the legal principle 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; Queen's Grant Villas Horizontal Property Regimes 1-V v. Daniel Int'l Corp., supra at 555, 335 S.E.2d at 365 (Regime has a duty to pursue recovery for construction defects in common elements which it has the duty to maintain, and regime may be liable to

homeowners if it does not uphold such duty). Also, the Respondents cite the case of Agassiz West Condominium Ass'n v. Solum, 527 N.W.2d 244 (N.D. 1995) as persuasive authority for the legal principle that the Board's inaction and failure to make definite plans for necessary repairs to the common areas is not protected by the business judgment rule. Id. at 247-249. In Agassiz West Condominium Ass'n, the condominium association brought action against a unit owner Judy Solum ("Solum") to collect unpaid amounts of common charges and pro rata insurance charges, and she counterclaimed against the association for failing to make the necessary repairs to common areas of the building in which Solum's unit was located. Id. The county court found that the association failed to maintain and repair common areas of Solum's building, and the association appealed. Id.

The Supreme Court of North Dakota, relying on the case of Murphy v. Yacht Cove Homeowners Ass'n, supra at 367, 345 S.E.2d at 710 as authority for the legal proposition that "Courts have allowed unit owners to sue a condominium association for ... negligence relating to upkeep and maintenance of common areas[,]" Id. at 247, found in Agassiz West Condominium Ass'n that the "***board ... failed to make definite plans for necessary repairs to the common areas in Solum's building, and its failure posed serious, potential dangers for the condominium residents.***" Id. at 249. Further, the court held "***that Agassiz's bylaws affirmatively require[d] the board to make repairs to common areas, and under the business-judgment rule and the trial court's findings, the board's inaction was not authorized and was a breach of its duty.***" Id. (emphasis added) (compare citing Schoninger v. Yardarm Beach Homeowners Ass'n, Inc., 134 A.D.2d 1, 523 N.Y.S.2d 523, 529 (N.Y. App. Div. 01987) (board's choice between two plans for repair of common area and implementation of one plan governed by business-judgment rule)). Id. See, Goddard v.

Fairways Dev. General Partnership, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (A showing of bad faith, dishonesty or *incompetence* by the governing board is not protected under the business judgment rule). A governing board and/or director may breach its general standard of care by *disregarding fundamental duties* or *being inattentive.* See, Olin Mathieson Chem. 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).

Here, the evidence is uncontroverted that Appellant's failure to adhere to its acknowledged affirmative duties under the Master Deed and Bylaws is not subject to protection under business judgment rule based on the following reasons. First, the Board's inaction and failure to replace or require the timely replacement of the unsafe, leaking oceanfront windows in Buildings A and B for at least 8 years. (Letter from Jennings to Co-owners, R. pp. 1319-1320; Sept. 18, 2007 E-mail from Diehl to Board regarding window leaks, R. p. 1328; Order, R. p. 8; R. p. 1322.) Second, the Board's incompetence and failure to follow the advice of its consultants/experts to replace the unsafe, leaking oceanfront windows in both buildings and sue the contractors and other responsible parties for the resulting damage to the common elements in 2002. (R. pp. 1319-1320; Order, R. p. 8.) Third, the Board's failure to make definite plans for the necessary repairs and replacement of the unsafe, leaking oceanfront windows and sliding glass doors for over 8 years. Thus, the Appellant permitted the previously known water intrusion damage to the common elements to compound for over 8 years in Buildings A and B. (Schneider Dep., R. p. 1550, line 7-p. 1551, line 17; R. p. 1552, lines 4-14; R. p. 1553, lines 1-p. 1557, line 15; R. pp.

1538-1543; Gallagher Dep., S. R. p. 24, line 15-p. 27, line 19; R. pp. 1435-1438; Parades Dep., R. p. 1414, line 21-p. 1417, line 18; R. pp. 1407-1409; Report of Parades, S. R. pp. 38-51; 3 August 2009 Report of Construction Science and Engineering, Inc., prepared by Derek A. Hodgin, P.E., R. p. 1817, ¶ Issue "B".)

Accordingly, based on the reasoning of Murphy v. Yacht Cove Homeowners Ass'n, supra, and Agassiz West Condominium Ass'n v. Solum, supra, this Court should affirm the circuit court's ruling that the Appellant's conduct is not subject to protection under the business judgment rule. Specifically, the Appellant's gross inaction and incompetence in not addressing the leaking windows and sliding glass doors for over 8 years allowed Buildings A and B to become ***"two badly distressed, unsafe, and arguably uninhabitable buildings in ... [the] regime"*** as described by the Board in its 2010 letter to the unit owners. (Emphasis added.) (R. p. 1405, ¶ 2, 5th sentence.)

3. The business judgment rule does not shield the Appellant from its ultra vires actions, lack of good faith, and improper motives concerning its affirmative duties to enforce the covenants, correct violations, and maintain, repair, and replace the common elements of Buildings A and B.

Appellant's arguments: (1) that its enforcement of an admittedly invalid Window Amendment (which improperly made the Respondents liable for the maintenance, repair, and replacement of the A and B unit owners' windows and sliding glass doors), and (2) that its improper approval and assessment of the Respondents with 2010 and 2011 operating budgets, are protected by the business judgment rule is without merit, and not supported by the case law and the substantial evidence in the Record of Appeal for the following reasons.

First, Appellant's illegal adoption of the 2006 Window Amendment was an *ultra vires* act, which violated Article I, §§ 1.3 and 1.5 of the Bylaws, and, thus, placed the

Appellant's conduct outside the scope and protection of the business judgment rule. (Bylaws §§ 1.3 and 1.5, R. pp. 1006-1007.) Furthermore, at the hearing on May 21-22, 2012, the Appellant 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, R. p. 732, lines 1-14.) However, the Appellant's governing Board continued to assert the validity of the 2006 Window Amendment (knowing the amendment was invalid) even after receiving Mr. King's letter which provided in pertinent part:

> The 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.
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> . . . .
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> 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.' (emphasis added). 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. (R. p. 1342, ¶ 2; Order, R. pp. 22-23.)

Second, the Appellant knowingly failed to place its adopted annual operating budgets on the annual agenda for presentation to the unit owners at their Annual Members Meetings in 2009 and 2010, respectively; and, therefore, Appellant acted without authority and violated the affirmative requirements of §§ 1.12, 5.2, and 5.3 of the Bylaws. (Bylaws § 1.12, R. p. 1009; §§ 5.3 and 5.4, R. p. 1016.) Specifically, Article V, § 5.3 of the Bylaws provides

"[t]he Budget, as adopted by the Board may be amended upon the motion and affirmative vote of Co-owners two-thirds (2/3) of the Percentage Interest in the Common Elements." (Emphasis added.) (Bylaws § 5.3, R. p. 1016.) Furthermore, at the hearing on May 21-22, 2012 the Appellant admitted on the record, ***"[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 ...."*** (Tr. of Hr'g dated May 21-22, 2012, R. p. 795, lines 2-15.) However, the Appellant's assertion of protection under the business judgment rule is without merit and contrary to the law of this state. See 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.) 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).

Accordingly, this Court should affirm the circuit court's ruling that the business judgment rule does not protect the Appellant's *ultra vires* actions from judicial review based on its invalid assessment under the Master Deed and Bylaws evidenced by the following admission of the Appellant:

> 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 --
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> THE COURT: wait a minute, I'm not sure I understand. Could you repeat that right there, I was listening but I just got sort of, I stumbled when you were doing that.
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> MISS BOAN: The Board, in trying to decide how would we do the assessment, that the amendment is invalid --

THE COURT: All right. (Tr. of Hr'g dated May 21-22, 2012, R. p. 816, lines 11-24; Order, R. p. 25, ¶ 2.)

C. The circuit court correctly determined the Appellant breached its duty to investigate arising under the Master Deed and Bylaws, Statutes, and the common law of the State of South Carolina. Specifically, the circuit court correctly determined the Appellant breached its duty by deciding not to investigate in 2010 and 2011 (whether to individually assess the defaulting unit owners for damaging the common elements) by changing the method of assessment in order to spread the total cost of the repair, removal, and reinstallation of the 1,087 new windows and the 80 new sliding glass doors among the membership, including the C and D members even though both Amendments had been previously voted down by the membership at a meeting held on March 21, 2009.

The Appellant's contention that the circuit court erred in ruling that the Appellant had breached its duty to investigate is misplaced, and contrary to the substantial evidence in the Record on Appeal for the following reasons. First, the Appellant admitted "***[i]t is undisputed that the . . . [Appellant's] 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***" in response to Respondents' Rule 59(e) Motion. (Emphasis added.) (R. p. 653, ¶ 3, 2nd sentence; Order, R. p. 34, n. 3.) Furthermore, as additional supporting evidence of Appellant's admission above both former Board President Mr. Johnston and Board Member Ms. Bray, who served on the board when SKA's repair assessment budget for Buildings A and B was adopted as part of the 2010 and 2011 Annual Operating Budgets, testified at their depositions as follows:

Q. Okay. That's fair. In any case, at the point -- Sutton-Kennedy was not asked or requested, in their assessment of all the damages, to break out what damages, if any, they attributed to the leaks around the windows and doors that may have gotten into the common elements, as to whether unit owners in A and B should be responsible for that collateral damage.
A. That's correct.
Q. They were never asked to do that?
A. That's correct.

(Johnston Dep., 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. Was it -- was it -- was it -- did the board -- why didn't they undertake that responsibility to do that?
A. Why should we have?

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

Second, the evidence in the Record of Appeal is uncontroverted that unit owners of Buildings A and B were solely responsible for the maintenance and repair of their window and sliding glass doors pursuant to §§ 3.6 and 4.3 of the Master Deed, and § 6.1 of the Bylaws. (Master Deed § 3.6, R. p. 968, § 4.3, R. p. 971; Bylaws § 6.1, R. p. 1018.) The Window and Sliding Glass Door Amendments were voted down at the special members meeting in March 26, 2009. (R. pp. 1280-1283; Order, R. p. 14.) Additionally, the unit owners were specifically charged with the responsibility for caulking and/or waterproofing their sliding glass door thresholds and window frames as mandated by Appellant's Board pursuant to these specific sections. (R. p. 1120; Order, R. p. 4.)

Third, the evidence is uncontroverted that the sliding glass door thresholds were allowing water to leak into the buildings and damage their common elements since 2002. The reason for this was the lack of caulking or sealing between sliding glass door thresholds and the concrete balcony slabs of each unit. (R. p. 1328.) Flashing was not a component of the sliding glass door threshold. Specifically, the Appellant's experts/consultants confirmed that the lack of caulking or sealing between the sliding glass door thresholds and the concrete

balcony slabs (not flashing) was allowing the water to leak into Buildings A and B and damage their common elements as discussed below:

- Mr. Kenneth Schneider, AIA: On July 25, 2006, Mr. Schneider, AIA ("Schneider"), performed an inspection of the leaking sliding glass doors in Buildings A and B at the request of the Appellant. His inspection found damage to the common elements based on: "[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'. The water infiltration appears to be the result of the combination of corrosion of the frame of the window/sliding door assemblies, the age of the window/door assemblies, the breaching of the continuity from 'sill' assembly (screws penetrating), 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." (R. p. 2397, ¶ 1; Order, R. p. 32, ¶ 3.)

- HICAPS, Inc.: On July 19, 2008, at the request of the Appellant, HICAPS, Inc. ("HICAPS"), made a Power Point presentation regarding its investigation of the water intrusion problems associated with the window and sliding glass doors in Buildings A and B. HICAPS' investigation found: (1) the "window systems are the main source of water intrusion," (2) the "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 [glass door] unit and showing up at the bottom. The water is entering the concrete and leaking into the unit below." (R. pp. 1367-1368; R. pp. 1369-1376; Order, R. p. 33, ¶¶ Nos. 1, 2, 3, and 4.)

- Spectrum Engineering Services, Inc.: On October 29, 2008, Bill Boone, P.E. ("Boone") of Spectrum Engineering Services, Inc. ("Spectrum"), performed an inspection of Buildings A and B at the request of the Appellant regarding the water intrusion problems associated with the window and sliding glass door systems in Buildings A and B. Boone's inspection confirmed the window and sliding glass door systems were leaking water into Buildings A and B, and further damaging the common elements based on his following observations: (1) ***"severe staining has also occurred where the water is captured in the sliding frame and drips down from unit to unit,"*** . . . (2) ***"damage has occurred in all units due to wind driven rain bypassing the slider seals and entering all units,"*** . . . . and (3) the ***"[m]ost damage was at the ceiling above the sliding glass door and on the walls adjacent to***

all windows." (R. p 1772, ¶ 6, 4th and 8th sentences; R. p. 1774, ¶ 15, 2nd sentence; R. pp. 1869-1939; R. pp. 2046-2145.)

- Sutton Kennerly & Associates, Inc.: On July 30, 2009, Steven Robinson, P.E. of Sutton Kennerly & Associates, Inc. ("SKA"), sent a letter to Vicki Gallagher of KAD confirming that the window and sliding glass door systems needed to be replaced because there was considerable visual evidence that the systems were leaking water into Buildings A and B based on the following observations:(1) "corrosion and deterioration on the securement (fasteners)," (2) "leaking evidenced by interior staining, cracking/split gypsum, peeling gypsum," (3) "corroded frames," (4) "corroded sill tracks," (5) "deterioration of wood blocking," (6) "insect infiltration at the perimeters," (7) "voids and holes," and (8) "failed glazing." (R. pp. 1810-1811, ¶ 2(a); R. p. 2315.)

- J. Lawrence Elkin, P.E.: On August 10, 2011, during his deposition, J. Lawrence Elkin ("Elkin") agreed with and concurred with the findings of Schneider 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.***" (Elkin Dep., R. p. 1592, lines 2-13.)

Accordingly, based on the foregoing reasons and analysis, this Court should affirm the circuit court's ruling that the Appellant breached its duty to investigate for the following reasons. First, by specifically deciding not to investigate as a business judgment (whether it would be appropriate to individually assess the defaulting A and B unit owners for their leaking windows and sliding glass doors), the Appellant improperly changed the method of assessment by spreading the total cost of repair and reconstruction for the windows and sliding glass doors among the membership, including the C and D members although both the Window and Sliding Glass Door Amendments had been previously voted down by the membership on March 21, 2009. Consequently, the Appellant's decision to change the method of assessment violates this Court's holding in Seabrook Island Prop. Owners Ass'n v. Pelzer, supra at 347-348, 356 S.E.2d at 414, which controls this case. (Bray Aff., R. pp. 2256-2257, ¶ 11.) Second, Spectrum's field report stated that the ***"damage has occurred***

in all units due to wind driven rain bypassing the slider seals and entering all units[.]" (R. p. 1773, ¶ 6, 8th sentence; R. p. 2397, ¶ 1; and R. pp. 1367-1376.) The lack ofwaterproofing and/or sealing between the sliding glass door thresholds and the concrete balcony slabs was solely the fault of the unit owners in Buildings A and B. For example, a March 28, 2003 letter from Mrs. Diehl to a unit owner confirms this when she 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. 1321; Order, R. p. 7.) This required the Appellant to investigate whether to individually assess the defaulting A and B unit owners pursuant to §§ 6.4 and 6.5 of the Bylaws. Third, as an additional sustaining ground the Appellant breached its duty of care by improperly assessing the 50 C and D Respondents for: (1) the repair and soft cost[2] for the removal and reinstallation of the 1,087 new windows and the 80 new sliding glass doors in Buildings A and B in 2010 and 2011, (2) the repair and soft cost to fix the water damaged interior finishes of the units in Buildings A and B in the amount of $124, 879. 32. This common expense repair assessment violates § 3.6 of the Master Deed. See, Council of Dorset Condominium Apartments v. Gordon, 801 A.2d 1 (Del. Supr. Ct. 2002) (Delaware Supreme Court found exterior windows and sliding glass doors were not common elements of condominium association, and thus could not be considered in a common expense assessment where the

[2] Soft cost are defined as general conditions (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) (SKA's Repair Methodology Budget for Buildings A and B, R. pp. 1402-1404).

condominium declaration's description of a unit included doors leading to patios and balconies, and all windows).

D. Additional sustaining grounds exist to support the circuit court's determination that the Appellant had a duty to investigate and furthermore breached its duty. Specifically, Appellant had a duty to determine the cause of the "cracking and spalling which was occurring in the pre-cast slabs and beams," in Buildings A and B in 1993 and 1994 as observed by Procon Waterproofing, Inc. ("Procon") during its inspections, and furthermore the Appellant breached the following duties: (1) failure to hire a structural engineer as recommended by Procon to investigate reported defects in the concrete structural slabs in Building A and B until 12 years later in 2007, (2) failure to repair the reported defects in the concrete structural slabs and waterproof their surfaces as recommended by Procon until 16 years later in 2011, and (3) failure to timely file a lawsuit within the 3 year statute of limitations against the developer, contractors, architect, and other responsible parties regarding the reported defects in the concrete structural slabs and beams in Buildings A and B.

Respondents assert as additional sustaining grounds in support of the circuit court's determination that the Appellant had a duty to inquire and, furthermore, breached its duty by deciding not to investigate the cause of the ***"cracking and spalling which was occurring in the pre-cast slabs and beams"*** in Buildings A and B in 1993 and 1994. (9 April 1993 Letter from Procon to Waccamaw, R. p. 1302; 9 March 1994 Letter from Procon to Waccamaw, R. pp. 1306-1313, including 19 pictures.) Specifically, Procon Waterproofing, Inc. ("Procon") inspected these buildings at the request of the Appellant. Mr. Robert Gallagher ("Mr. Gallagher"), who is the owner of Procon, sent letters in April of 1993, and in March of 1994 to Appellant's management company, Waccamaw, and ***"recommended that a structural engineer [be hired to] further evaluate the cracking and spalling which [was] occurring in the pre-cast slabs and beams."*** (R. p. 1302; R. pp.1306-1313.) Additionally, Procon recommended the application of a protective waterproof deck coating material to help protect the concrete slabs from future deterioration. (R. p.1302; R. pp. 1306-

1313.) In 2007, Mr. Gallagher of Procon again inspected Buildings A and B at the request of MEC Engineering, and he confirmed that the Appellant had failed to follow any of his recommendations outlined in his 1993 and 1994 letters addressed its management company. (Gallagher Dep., S. R. p. 11, lines 13-25; p. 12, line 1-p. 13, line 8; p. 20, lines 21-25; p. 21, line 1-p. 23, line 19; R. pp. 1419-1438; October 22, 2007 Procon's Inspection Report of Buildings A and B, R. pp. 1329-1335.) Lastly, Mr. Gallagher testified that if the Appellant had followed his recommendations outlined in his 1993 and 1994 letters to its Board, there would be no need to replace every private floor panel and structural beam as required by SKA's scope of repair budget. Mr. Gallagher opined this would have saved the association conservatively $2,000,0000.00. (Gallagher Dep., S. R. p. 5, lines 18-25; p. 6, line 1- p. 10, line 6; p. 20, lines 21-25; p. 21, line 1-p. 23, line19; p. 24, lines 15-25; p. 25, line 1-p. 27, line19; R. pp. 1419-1438; 22 October 2007 Procon's Inspection Report of Buildings A and B, R. pp. 1329-1335) (SKA's Report entitled "Safety concerns at Buildings A and B" signed by Stephen P. Robinson, P.E., R, pp. 1399-140.)

Respondents cite the case of Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, Inc., 201 Md. App. 186, 29 A.3d 604 (Md. App. 2011) where the condominium unit owners brought an action against the condominium association, alleging negligence based on the following grounds. First, in failing to timely investigate water leakage into the individual units and buildings in the condominium regime. Second, in failing to file a lawsuit against the developer of the Condominium Questar within the statute of limitations. Id. at 187-189, 29 A.3d at 614-615. The circuit court granted the association's motion for summary judgment. Unit owners appealed. Id. The Maryland Court of Appeals reversed the judgment of the circuit court based on the reasoning that the association, which

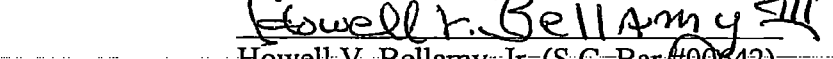
has the obligation to maintain and repair the common elements and the right to bring suit thereon, has the "*duty to pursue a recovery for any alleged construction defects in the common elements which [the association] maintains,*" quoting from Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel Int'l Corp., supra at 555, 335 S.E.2d at 365, and Murphy v. Yacht Cove Homeowners Ass'n, supra at 369, 345 S.E.2d at 710, and holding that ***"the individual unit owners have a cause of action against the association when the association breaches that duty by failing to pursue the claim altogether or to negligently pursue such claim."*** Id. at 204, 29 A.3d at 605-606. Accordingly, based on the reasoning of Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, Inc., supra, additional sustaining grounds do exist to support the circuit court's determination that the Appellant had a duty to investigate the ***"cracking and spalling which was occurring in the pre-cast slabs and beams"*** in Buildings A and B as observed by Gallagher of Procon during his inspections in 1993 and 1994 at the request of the Board. (R. p. 1302; R. pp. 1306-1313.) Furthermore, the Appellant breached its duty to investigate: (1) in failing to hire a structural engineer as recommend by Procon to investigate the reported defects in the concrete structural slabs in Buildings A and B until 12 years later in 2007, (2) in failing to repair the reported defects in the concrete structural slabs in Buildings A and B until16 years later in 2011, (3) and in failing to timely file a lawsuit within the 3 year statute of limitations against the developer, contractor, architect, and other responsible parties regarding the reported defects in the concrete structural slabs in Buildings A and B. (Gallagher Dep., S. R. p. 14, line 1-p. 15, line 25; p. 16, line 15-p. 18, line 9; p. 19, lines 6-16; p. 20, lines 21-25; p. 21, line 1-p. 23, lines 1-19; p. 24, lines 14-25; p. 25, line 1-p. 27, line 19; R. pp. 1419-1438; 22 October 2007 Inspection Report by Procon, R. pp. 1329-1333; Procon's Bid Cost

Estimate, R. pp. 1334-1335; 8 January 2012 ECS Carolinas, LLP's Amended Investigative Report, R. pp. 1869-1844; pp. 1869-1939; pp. 1853-1856; 11March 1994 Special Meeting Mins. of Bd., R. p. 527, ¶ 4; p. 528, ¶ 1, 2nd and 3rd sentences.)

VI. CONCLUSION

In light of the foregoing reasons and analysis, the circuit court correctly determined, as a matter of law that Appellant had a duty to investigate whether to individually assess the defaulting unit owners for damaging the common elements. Furthermore, the circuit court correctly determined that Appellant had breached its duty by improperly changing the method of assessment in 2010 and 2011 from an individual to a pro rata common expense in order to spread the total cost of repair, removal, and reinstallation of the 1,087 new windows and the 80 new sliding glass doors among the membership to include the C and D members. This violated § 3.6 of the Master Deed since both the Window and Sliding Glass Door Amendments had been previously voted down by the membership at a members meeting held on March 21, 2009. The Respondents respectfully request this Court to affirm the circuit court's Order and remand this case for trial.

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

Case No: 2009-CP-22-01655

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. Miller 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, Trustee of the Lois E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, Jason A. Underwood, and Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame, ... Respondents,

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.

FINAL REPLY BRIEF

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I.

Appellant did not have a "duty to investigate."

(A) The Master Deed and Bylaws do not impose such a duty on Appellant.

Respondents incorrectly argue that Appellant previously acknowledged it had a duty to investigate pursuant to the Master Deed and Bylaws. In support of their assertion, Respondents point to the following exchange between the trial judge and Appellant's counsel:

> THE COURT: We're not in trial yet. I just want to put this one question to you, Miss Boan. If you're on the Board and you've got a problem and you've got people giving you two or three causes for the problem, okay, there is one of them you can get some money for, and that is why you attribute it to these homeowners, these unit owners not maintaining their building, under the bylaws they are supposed to pay for it, shouldn't you, and the other two everybody is going to have to share, don't you have a duty to these other members to go back and at least check on the theory of whether or not the individual owners of the A and B units, where you had leak problems, should have paid?
>
> MISS BOAN: I think, Your Honor, to answer your question, yes, I think you do look into it and I think this Board did. I think this Board considered it and that is how --

[R. p. 771, lines 6–23.] Though its question is unclear, the trial court appears to be merely asking about the duty imposed on the board by Section 6.3 of the Bylaws, which states that if a co-owner's failure to perform required maintenance impairs the common elements, "the Board of Directors shall, after giving such Co-owner reasonable notice and opportunity to perform such maintenance, cause such maintenance to be performed" and assess that co-owner for the expense. [R. p. 1019.] The trial court's question did not implicate the duty on which it subsequently granted summary judgment, which is the

duty to investigate, upon receiving information that co-owner neglect has damaged the common elements, to determine whether to assess individual co-owners for the damage. Specifically, the trial court's question did not include an assumption that the board had already received evidence that co-owner neglect was responsible for harm to the common elements.

Appellant's position on the "duty to investigate" was clearly expressed later in the hearing, when the following exchange occurred:

> THE COURT: Let me stop you a minute. Mr. Mills, tell me, tell me, Miss Boan has said they got conflicting reports as to the damage or the cause of the damage. Well, that does nothing more than tell me that they received some report. What is your position on the duty to investigate to determine whether or not these damages are attributable to individual unit owners and what did they do, if anything.
>
> MR. MILLS: Our position is, Your Honor, there is no such duty to make that inquiry.

[R. p. 814, line 20–p. 815, line 5.]

Respondents also assert that Sections 9.4, 12.1, and 16.2 of the Master Deed, as well as Sections 6.3, 6.4, and 7.3 of the Bylaws,[1] are restrictive covenants that impose contractual obligations on Appellant. Respondents contend that conglomerating these sections impose on Appellant a contractual duty to investigate. However, Respondents fail to consider a central canon of contract interpretation: "If the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. When a contract is unambiguous a court must construe its provisions according to the terms the parties used; understood in their plain, ordinary, and popular sense." *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003) (citation omitted). The trial court did not find that any provisions of the Bylaws

[1] See pp. 11–12 of Appellant's Final Brief for a discussion of these provisions.

or Master Deed were ambiguous. Accordingly, these six sections must be interpreted according to their plain language, and none of them impose a duty to investigate.

(B) The South Carolina Nonprofit Corporation Act does not impose a "duty to investigate" on Appellant.

Contrary to Respondents' assertion, the South Carolina Nonprofit Corporation Act does not impose a "duty to investigate." Respondents base their argument on a sentence in the Official Comment to S.C. Code Ann. § 33-31-830 (2006) that states, "In appropriate circumstances the duty of care requires reasonable inquiry." The concept of "reasonable inquiry" is not at issue. As discussed in Appellant's brief, Appellant certainly undertook a reasonable inquiry into the water intrusion issues in Buildings A and B by engaging multiple professionals to address the problems. "Reasonable inquiry" differs from the duty at issue on appeal, which is the "duty to investigate," and that duty is not found in the Code, in any Official Comments, or in Appellant's governing documents.

II.

Appellant is entitled to have its actions evaluated under the business judgment rule.

Respondents assert that Appellant is not entitled to the protection of the business judgment rule because (1) Appellant's method of assessing co-owners for the repair costs violated the Master Deed, (2) Appellant violated the Bylaws by enacting the 2006 window amendment, and (3) Appellant violated the Bylaws by failing to place its annual operating budgets on the agendas at the annual members' meetings in 2009 and 2010. However, this argument is misplaced. Even if Respondents' contentions were factually accurate, which they are not, these issues are not relevant to this appeal, because the

specific duty at issue on appeal is the "duty to investigate." In other words, the application of the business judgment rule here depends on whether the board's actions taken in furtherance of the duty to investigate were *intra vires* or *ultra vires*; the propriety of its actions taken in furtherance of separate, unrelated duties, such as the duty to impose assessments in accordance with the Master Deed or the proper procedure for amending the Bylaws, is irrelevant.

Respondents also assert that Appellant is not entitled to the business judgment rule's protection because of Appellant's "inaction and failure to make definite plans for necessary repairs to the common areas." Respondents seem to be drawing a line between action and inaction for purposes of the rule—arguing, in other words, that negligent inaction is to be treated more harshly than negligent action. However, the law makes no such distinction. Regardless, as detailed at length in Appellant's brief, Appellant did not sit idly; it acted affirmatively based on the advice of the professionals it hired.

III.

Even if Appellant owed a duty to Respondents, it did not breach that duty.

In arguing that no genuine issue of material fact exists on the question of whether Appellant breached its duty, Respondents overlook all of the evidence to the contrary. The trial court ruled that Appellant's duty to investigate attached when Appellant received evidence demonstrating that co-owner neglect was to blame for water intrusion into the building envelope. In other words, this duty involves a two-step inquiry: (1) whether the water intrusion was occurring as a result of deficient windows and doors, as opposed to deficient stucco, roofing, or another deficient building component; and (2) if so, whether the deficiency in the windows and doors was attributable to co-owner

neglect—stated differently, the standard is one of negligence, not strict liability. The evidence cited by Respondents merely states that water intrusion was occurring. It does not demonstrate how any co-owner was negligent. Furthermore, Respondents ignore the evidence discussed in Section III of Appellant's Brief establishing that Appellant's board received a plethora of information about the causes of the water intrusion and properly exercised its business judgment in deciding how to proceed. Importantly, Appellant's evidence exceeds the "mere scintilla" standard, and viewing this evidence in the light most favorable to Appellant reveals the existence of genuine issues of material fact.

IV.

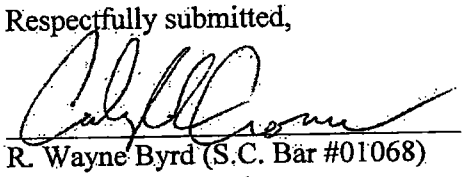
Respondents' purported additional sustaining grounds do not support the trial court's conclusion.

As their first additional sustaining ground, Respondents allege that Appellant was aware of water intrusion issues back in the 1990s. Even if this were true, this is unrelated to the existence of a "duty to investigate" and whether that duty was breached. Respondents also cite the case of *Greenstein v. Council of Unit Owners of Avalon Court Six Condo., Inc.*, 29 A.3d 604 (Md. Ct. Spec. App. 2011) in support of their argument that Appellant breached a duty owed to Respondents. However, *Greenstein* merely holds that individual unit owners may sue a condominium association when the association fails to pursue a claim for construction defects in the common elements. *Id.* at 614-15. The case does not address the "duty to investigate" and does not involve alleged neglect on the part of unit owners. Accordingly, it is not relevant and provides no guidance.

CONCLUSION

Based on the arguments presented above and in Appellant's Final Brief, this Court should reverse the trial court's order and remand this case for trial.

Respectfully submitted,



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