THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No: 2009-CP-22-01655

Appellate Case No. 2012-213634

Supreme Court No. 2014-002394

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

v.

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

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*.

REPLY TO RESPONDENT'S RETURN

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ARGUMENT

I.

The Court of Appeals' decision warrants review by this Court under Rule 242, SCACR.

Rule 242(b) under considerations governing review, provides:

> A writ of certiorari is not a matter of right, but . . . will be granted only where there are ***special and important reasons.*** The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered: ***(1) Where there are novel questions of law***; (2) Where there is a dissent in the decision of the Court of Appeals; ***(3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court***; (4) Where substantial constitutional issues are directly involved; and (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242, SCACR.

The present case falls within category three (3), and also under the "special and important reasons" exception allowing this Court to review the Court of Appeals' decision.

(A) The Court of Appeals' ruling does conflict with prior decisions of this Court.

The Court of Appeals ruled that "***any investigation would be looked at under the business judgment rule to determine if the Council met its duty***," under the Master Deed and Bylaws. Fisher v. Shipyard Village Council of Co-Owners, Inc., 409 S.C. 164, 181,760 S.E.2d 121, 131(Ct. App. 2014) (Emphasis added.) This ruling erroneously expands the application of the business judgment rule to any negligence action against Council. As a consequence of the Court of Appeal's erroneous ruling, the Petitioners will now be required "***to show [that] Council acted without good faith***," in their negligence action, which will insulate Council from liability for ordinary negligence. Id. See Estate of Carr ex rel. Bolton

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

This heightened standard of care requiring proof of Council's bad faith conflicts with prior decisions of this Court where Council may be liable to homeowners for its neglectful inaction and omissions for failing to properly maintain and repair the common elements. See Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (1985)(This Court found "***[s]hould the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements which it maintains, it may be liable to the homeowners for its omissions.***" Id. at 556, 335 S.E.2d at 366.) (Emphasis added.); Murphy v. Yacht Cove Homeowners Ass'n., 289 S.C.367, 345 S.E.2d 709 (1986)(This Court held "***that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort[1] against the association***" for failure to discharge its duties under the Master Deed and Bylaws. Id. at 369, 345 S.E.2d at 710). (Emphasis added.) In Murphy, this Court reasoned

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[1]"Both S.C. Code Ann. § 27-31-170 (1991) and Article XVI, § 16.1 of the Master Deed authorize "an aggrieved unit owner" to bring an action for damages or injunctive relief for failure to comply with the condominium's bylaws. See also Agassiz West Condominium Ass'n v. Solum, 527 N.W.2d 244 (1995), the Supreme Court of North Dakota interpreted the language of Section 47-04.1-08, ND. C. C., which is identical to the language contained in S.C. Code Ann. § 27-31-170 (1991), to authorize "an aggrieved unit owner" the right to bring an action for damages or injunctive relief against the Association for its failure to comply with the condominium's Bylaws." [R. p. 26, Order.]

that "***since the association can sue[2] a member for failure to adhere to the bylaws, rules, and regulations, a member necessarily can sue the association for this same failure.***" Id. at 369, 345 S.E.2d at 710. (Emphasis added.)

However, this new and additional requirement imposed by the Court of Appeals' ruling of having to prove Council's bad faith, effectively changes the standard of care mandated by this Court under Murphy and Queen's Grant. A standard of care penalizing only Council's gross negligence would virtually eliminate any accountability to the Petitioners/unit owners for Council's neglectful inaction and omissions, leaving it to do as it pleases, unfettered by any other shackles. See also, Robert J. Rhee, *The Tort Foundation of Duty of Care and Business Judgment*, 88:3 Notre Dame Law Review 1141 (2013)(***"Yet, the one thing about the business judgment rule on which everyone agrees is that it insulates [the Board of directors] from liability for negligence"***).

For these reasons, the Court of Appeals' ruling overturns this Court's decisions in Murphy and Queen's Grant by insulating Council from liability from simple negligence for failing to properly maintain and repair the common elements.

(B) The Court of Appeals exceeded its scope of review in an action at law by not upholding the trial judge's factual findings that Council had committed several *ultra vires* acts precluding the application of the business judgment rule.

The relevant portion of the Court of Appeals' ruling provides:

> The circuit court also erred ***in finding that because the Council committed two acts it found to be ultra vires***, the business

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[2] Davenport v. Cotton Hope Plantation Horzontal Prop. Regime, 333 S.C. 71, 88, 508 S. E. 2d 565, 574 (1998)(citing Murphy v. Yacht Cove Homeowners Ass'n, 289 at369, 345 S. E. 2d at 710, the South Carolina Supreme Court re-affirmed its holding ***"that a member of a condominium association established pursuant to the Horizontal Property Act, may bring a tort action against the association for failing to properly maintain the common elements."***) (Emphasis added.)

> judgment rule did not apply to any of its actions. The rule would apply to all of its actions ***except for ultra vires ones***. Fisher, 409 S.C. at 180,760 S.E.2d at 130. (Emphasis added.)

An action in ***negligence is at law and the trial judge's findings of fact will be upheld unless without evidentiary support.*** Hartman v. Jensen's, Inc. 277 S.C. 501, 502, 289 S.E.2d 648, 648 (1982). (Emphasis added). As a general rule, appellate courts will be bound by the factual findings of a lower court made in response to motions preliminary to trial "***where the findings are supported by evidence and not clearly wrong or controlled by error of law. Such has been the practice of this Court.***" City of Chester v. Addison, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981) (citations omitted.) (Emphasis added); See Jean Hoefer Toal, *et al.*, Appellate Practice in South Carolina, 196 (2d ed. 2002).

The Court of Appeals erred by disturbing the trial judge's findings of fact that Council had committed several *ultra vires* acts without first investigating whether: (1) those findings lacked evidentiary support, or (2) were controlled by error of law. See Jean Hoefer Toal, *et al.*, Appellate Practice in South Carolina, 196 (2d ed. 2002). Its ruling was silent on these matters. Stated differently, no abuse of discretion analysis was performed by the Court of Appeals explaining why it reversed the trial judge's findings that Council had committed several *ultra vires* acts.

In the instant case, the trial judge found that the ***"evidence in the record . . . clearly established that [Council's] lack of good faith, inaction, and ultra vires acts regarding its invalid assessment"*** which placed its conduct and inaction outside the protection of the business judgment rule. [R. p. 21, ¶ 3.] (Emphasis added.) Specifically, the trial judge found:

1. That Council's illegal adoption of the window amendment was an *ultra vires* act, which violated Article I, §§ 1.3 and 1.5 of the Bylaws, and, thus, placed

Council's conduct outside the scope and protection of the business judgment rule. [R. pp. 21- 23];

2. That Council was precluded from asserting protection under the business judgment rule based upon its lack of good faith in continuing to enforce the window amendment in this lawsuit when it admittedly knew the amendment was invalid and unenforceable in June 2008. [R. p. 23];
3. That the business judgment rule does not protect Council's *ultra vires* conduct from judicial review regarding its ***invalid repair assessment*** under Master Deed and Bylaws. [R. p. 25];
4. That Council was precluded from asserting protection under the Business Judgment Rule based upon its *ultra vires* conduct, and failure to exercise due care or reasonable care in discharging its required duties under the Bylaws. [R. p. 40, ¶ 5].

Furthermore, the trial judge's above findings regarding Council's *ultra vires* acts were supported by Council's admissions set forth below:

- At the hearing held on May 21, 2012,Council's attorney admitted to the trial judge that "***when the Board received [attorney] 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....***" (Emphasis added.) [R. p. 732, lines 1–14];
- At the hearing held on May 21, 2012, Council's attorney admitted to the trial judge that both the ***"window amendment"*** and the ***"assessment [are] invalid and the windows and doors are now the responsibility of A and B unit owners.***" (Emphasis added.) [R. p. 816, lines 1- 25; R. pp. 22-25];
- Council admitted that ***"the failure to present the annual budgets to the unit owners for amendment in 2010 and 2011 constitutes inaction."*** (Emphasis added.) [Final Brief of Appellant, p. 21, ¶ 2];
- At the hearing held on May 21, 2012,Council's attorney admitted to the trial judge that, "***the assessment as rendered by the board ... is an ultra vires act ....***" (Emphasis added.) [R. p. 25; R. p. 795, lines 13-17];
- Council admitted that it had "***improperly continued to enforce the 2006 amendment and failed to present annual budgets***" to unit owners. (Emphasis added.) [Final Brief of Appellant, p. 21, ¶ 2 and 3].

Additionally, Council acknowledged that, ***"the Court [of Appeals'] ruling never specifically mentioned [Sections 1.12, 5.2, and 5.3] of the Bylaws or otherwise discussed***

[Council's] annual budgets in any way." (Emphasis added.) [Return to Petitioners' Petition for Rehearing, p. 7.] This is very important because the trial judge specifically found that "[Council's] knowing fail[ure] to place the adopted annual budgets on the agenda for presentation to the Co-owners . . . [were] an *ultra vires* act[s]" because their inaction violated the affirmative requirements of Sections 1.12, 5.2[3], and 5.3 of the Bylaws." (Emphasis added.) [R. p. 24, ¶ 2.] However, the Court of Appeals' ruling failed to demonstrate that the trial judge's findings of fact concerning Council's *ultra vires* acts[4] lacked evidentiary support, or were based upon an error of law. See Shipyard Village, 409 S.C. at 171-178, 760 S. E. 2d. at 125-129.

For these reasons, the Court of Appeals erred by not upholding the trial judge's factual findings that Council had committed several ***ultra vires*** acts, including its ruling that the business judgment rule was inapplicability to Council's admittedly invalid repair assessment. [R. pp. 24-25.]

II.

Council's returns contain factually incorrect statements as set forth below.

Council's return was not responsive to Petitioners' arguments under Sections I (A) (B) and (C) of its Petition for Writ of Certiorari to the Supreme Court. So the Petitioners also plan to address any incorrect factual statements made by Council in its return to the

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

[4]The Court of Appeals' opinion under "FACTS/PROCEDURAL HISTORY" states that ***"the circuit court further determined the Council was precluded from asserting the business judgment rule based on its lack of good faith in enforcing the 2006 amendment after June 2008."*** Shipyard Village, at 409 S.C. at 177, 760 S.E.2d at128. (Emphasis added.) However, the Court of Appeals' ruling is also silent as to why it reversed the trial judge's determination that Council was precluded from asserting the business judgment rule based on its lack of good faith . Id. Accordingly, the Court of Appeals erred by not being bound by the trial judge's findings of fact in action at law.

Petitioners' Petition for Rehearing to the Court of Appeals, which are responsive to the arguments made under Sections I (A) (B) and (C).

(A) Council incorrectly states that the first vote on the window amendment eventually passed through proxy voting.

Council's assertion that the first vote on ***"the window amendment was left open for thirty days and eventually passed through proxy voting, by over 80% of the membership"*** is factually incorrect[5] for several reasons. [Return to Petition for Writ of Certiorari, p. 6, ¶ 1.] First, Council decided not to leave the vote open for 30 days "so non-voting Co-owners could vote." (Emphasis added.) [R. pp. 114-115.] Second, Council found that the first vote on the window amendment did not pass and decided to start the amendment process over again by mailing out a new proxy card, enclosed in a letter dated April 24, 2006, to the unit

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

> Please note that **the amendment to the master deed did not pass**. The Shipyard Village Master Deed cannot be amended unless 66.66% vote in favor of the amendment. You will note in the minutes of the meeting that a motion was made towards the end of the meeting to leave the vote on the amendment open for 30 days, in order to allow those owners who did not vote, to vote. ***In subsequent discussions with the attorney for Shipyard Village, the Board was advised that it is Questionable whether the vote on the amendment can be "left open."***
>
> ***While the Board is confident that the majority of the owners are in favor of the amendment, the Board has decided not to follow any "questionable" procedures regarding this. Thus, the Board had decided to start the amendment process over.*** . . .
>
> Enclosed please find a **NEW PROXY CARD** for the amendment vote. Please take a minute **NOW** to fill this out and drop it in the mail or fax it to the Management Office at 843-357-9890. The deadline for returning the proxy is May 26, 2006. (Emphasis added.) [R. pp. 114-115; R. p. 10.]

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

owners seeking their written consent to adopt the amendment without holding another meeting. [R. pp. 114-115; R. pp. 918-921.] Third, that ***"80% of the Co-owners voted in favor of the amendment"*** refers only to the second vote by proxy, not the first vote on the window amendment. [R. pp. 918-921.] This statement made by former Board President Don Johnston ("Johnston") only confirmed that the second proxy vote without a meeting had failed to obtain written consent from one hundred percent (100%) of the unit owners entitled to vote as required by Section 1.5 of the Bylaws, which meant the window amendment did not pass. [R. pp. 114-115; R. pp. 918-921; R. p.1279.] Also, Council admitted in responding to Petitioners' discovery request in September 24, 2009, ***"that the proposed amendment was considered and voted on at the membership meeting in April 2006. The amendment did not pass at the meeting and was re-voted on[by proxy], but a meeting was not called for the second vote."*** [R. p. 920, ¶ Answer to question 7, [Respondent's] Answers to the [Petitioners'] Request for Admissions.]

For these reasons, the first vote on the window amendment did not pass by proxy voting as indicated in Council's return. [R. pp. 114-115; R. pp. 918-921.] [Return to Petition for Writ of Certiorari, p. 6, ¶ 1.]

(B) Council incorrectly states that the A and B unit owners paid for their new windows and balcony doors in accordance with the pre-2006 window amendment (original version) of Section 3.6 of the Master Deed without any help from the Petitioners, the C and D unit owners.

Council's assertion ***"[t] hat the co-owners in Buildings A and B paid for their new windows and balcony doors . . . in accordance with the pre-2006 amendment (original version) of Section 3.6 of the Master Deed without any help from the C and D co-owners"***

is factually incorrect for several reasons. (Emphasis added.) [Respondent's Return to Petitioners' Petition for Rehearing, p. 7.]

First, the ***A and B unit owners were only assessed $1,760,000***, which is less than the required amount of actual ("hard") costs needed to purchase their windows and sliding glass doors, which does not include any soft costs. Emphasis added.) [R. pp. 730-733; R. pp. 2256-2257.] This amount was confirmed during motion hearing for partial summary judgment held on May 21, 2012, during the interrogation of Council's attorney by the trial judge.[6] Second, Sutton-Kennerly & Associates ("SKA")'s construction budget for repairing Buildings A and B indicates the ***actual ("hard") costs of the new windows and sliding glass doors was $2, 459,000***. (Emphasis added.) [R. p.1292.] This clearly indicates that Petitioners were still improperly assessed for part of the costs for the repair and replacement of the A and B unit owners' windows and sliding glass doors. This fact is further confirmed by the affidavit of Board member Doris Bray ("Bray"), filed October 28, 2011, when she states:

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

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

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

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

For these reasons, the A and B unit owners did not exclusively pay for their new windows and balcony doors as required by pre-2006 window amendment (original version) of Section 3.6 of the Master Deed without any help from the Petitioners, the C and D unit owners. [R. pp. 730-733; R. p.1292; R. pp. 2256-2257.] [Respondent's Return to Petitioners' Petition for Rehearing, p. 7.]

(C) Council incorrectly states that the business judgment rule was never used to circumvent mandatory duties under the Master Deed and Bylaws.

Council's assertion that ***"[it] has never argued that the business judgment rule allowed [Respondent] to circumvent explicit duties under the Master Deed and Bylaws"*** is factually incorrect. [Return to Petitioners' Petition for Rehearing, p. 7.]

The affidavit of Board member Doris Bray ("Bray"), filed October 28, 2011, is indisputable evidence of Council's use of the business judgment rule to justify a change in the prescribed method of assessment (after both amendments had failed to pass) to make Petitioners and other C and D unit owners partly responsible for the construction costs to replace the A and B Co-owners' windows and balcony doors. Her affidavit provides in pertinent part:

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

to the A and B owners. ***We made our decision based on business judgment, not what might or might not happen in court.***

. . . .

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

For these reasons, Council did improperly use the business judgment rule to circumvent the mandatory duties under Sections 3.6, 4.3, and 6.1 of the governing documents in order not to have to assess the A and B unit owners for the total costs for the removal and replacement of their windows and sliding glass doors. [R. pp. 2256-2257.]

(D) Council incorrectly states that the Court of Appeals' ruling did not address its Board's duty to pursue a recovery for construction defects in the common elements.

Council's contention that ***"the Court of Appeals' ruling did not address the duty of a condominium regime's board to pursue a recovery for construction defects"*** in the common elements is not factually correct. (Emphasis added.) [Respondent's Return to Petition for Writ of Certiorari, p. 15, ¶.] The relevant portion of the Court of Appeals' ruling provides:

> The circuit court properly granted [Petitioners'] partial summary judgment motion on whether the Council had a duty to investigate. ***The Council is charged with maintaining the common elements. Should a problem arise with those elements, as did here, the Council is responsible for pursuing any responsible parties, whether they are Co-owners or contractors or the developer.*** . . . ***For Council to be able to perform its duty to try to recover from the responsible parties, it must first find out who caused the problem.*** Accordingly, even though the Bylaws do not specifically state the ***Council had a duty to investigate, the duties created by the Bylaws and South Carolina law also support a duty to investigate who is responsible for damage to the common elements.*** Therefore, the circuit court did not err in granting summary

judgment on the issue of duty. Shipyard Village, 409 S.C. at 179, 760 S.E.2d at 129. (Emphasis added.

Contrary to Council's contention, a clear and unambiguously reading of the Court of Appeals' ruling provides: (1) that ***Council has a duty to investigate problems arising in the common elements***, including defects, which it has duty to maintain; (2) that ***Council has a duty to investigate who is responsible for the damage to the common elements***; and (3) that ***Council has a duty to pursue a recovery from any responsible parties, whether they are unit owners or contractors or the developer, for damages to the common elements***. Id. (Emphasis added.)

In the instant case, Council already knew the A and B unit owners were responsible parties for the water intrusion damage to the individual units and common elements in Buildings A and B based upon its meeting minutes, its e-mails and letters to the A and B unit owners, and its reports from experts/consultants. [R. pp. 4-17; R. pp. 30-40.] However, Council chose not to investigate and pursue a recovery from the A and B unit owners as responsible parties for the damage to the individual units and common elements. [R. pp 33-38.] Specifically, Council ***"did not ask any expert to break out the damages attributable to the failure of the [A and B] Co-owners to maintain their windows and sliding glass doors."*** [R. p. 34.]. Like, Board member Bray said, ***[t]o attribute any more of the repair costs, including the "soft" project costs, to the Building A and B Units Owners, would have been an exercise of bad business judgment and, in my opinion wrong***. (Emphasis added) [R. pp. 2256-2257.]

For these reasons, the Court of Appeals' ruling does address the duty of a condominium regime's board to pursue a recovery for construction defects in the common elements. [Respondent's Return to Petition for Writ of Certiorari, p. 15, ¶.]

CONCLUSION

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

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
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S.C. Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No: 2009-CP-22-01655

Appellate Case No. 2012-213634

Supreme Court No. 2014-002394

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

Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan 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 Barnett, 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 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 .... *Petitioners*,

v.

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

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.*

PROOF OF SERVICE

I certify that I have served copies of the **Reply to Respondent's Return** in the above-captioned appeal on the following individuals by Hand Delivery to the Clerk of Supreme Court and by United Stated Mail to Carlyle R. Cromer and R. Wayne Byrd, with sufficient first-class postage affixed, addressed as follows:

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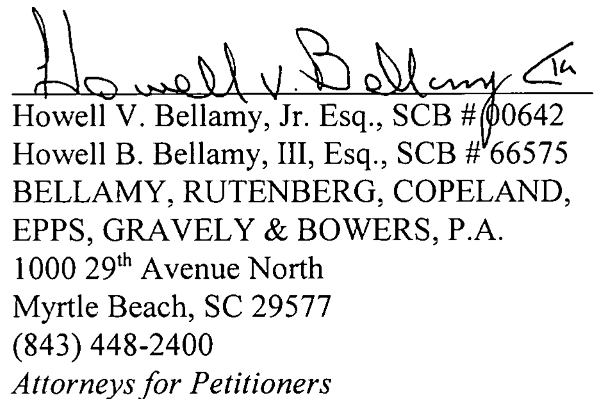

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January 16, 2015

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

Dear Mr. Shearouse:

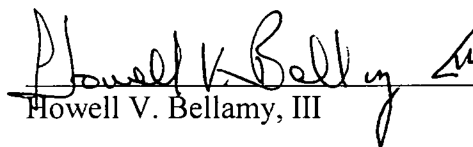
Forwarded herewith please find enclosed original and six (6) copies of the Reply to Respondent's Return regarding the above captioned matter and Proof of Service of same.

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

With kindest regards, I remain

Sincerely,

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



Howell V. Bellamy, III

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