THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No: 2009-CP-22-01655

Supreme Court No. 2014-002394

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

Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan I. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, 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 and Donna C. Covington; Litchfield Captain, 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 Eika T. Walker, Kathy W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Franklin; Lois E. Cooley, Trustee of the Los E. Cooley Living Trust, B. Lee Smith and Margaret H. Smith, James 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. St. Paul Fire and Marine Insurance Company, and Illinois National Insurance Company, ... Third-Party Defendants.

REPLY BRIEF OF PETITIONERS

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I.

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

(A) Respondent mischaracterizes the trial judge's findings and conclusions regarding the inapplicability of the business judgment rule under the facts and circumstances of this lawsuit.

The trial judge noted in his Order that the Respondent cited the business judgment rule as an absolute bar to the Petitioners' claims for negligence/gross negligence. [R. p. 18.] In analyzing this defense, the trial judge determined that the business judgment rule's scope and application are controlled by the Master Deed and Bylaws, S.C. Code Ann. §27-31-10, *et seq.* ("the Act"), and South Carolina case law. [R. pp.18-40.] Specifically, the trial judge's findings and analysis implied that three scenarios exist regarding whether or not the business judgment rule would apply when raised as a defense. The three scenarios found and implied by the trial judge were:

1. The business judgment Rule is inapplicable when a duty to maintain and repair the common elements is mandatory and, non-discretionary, pursuant to its Master Deed and Bylaws, the Act, and South Carolina law, and the co-owners' tort claims arise directly from the alleged breaches of affirmative duties concerning the failure to maintain, failure to inspect, failure to assess, failure to repair, and/or failure to discharge said duties in general. [R. pp. 18-21; R. p. 40.]

2. A Board member's dishonesty, incompetence, inaction, and lack of good faith would preclude the application of the business judgment rule. The challenger must prove the existence of one or more of these exceptions by the preponderance of the evidence. [R. pp. 26-30; R. p. 23.]

3. The business judgment rule applies to all affirmative business judgment decisions authorized by the Master Deed and Bylaws regarding the administration and management of the regime property. The action must be

> *intra vires,* not *ultra vires.* Consequently, the business judgment rule only applies to *intra vires* actions.[1] [R. pp. 24-25; R. p. 23.]

However, the Respondent incorrectly asserts in its Brief that the ***"trial [judge] concluded because the Act, the Master Deed, and the Bylaws all governed Respondent's conduct, the business judgement rule offers Respondent no protection."*** [R. p. 12, Brief of Respondent.] Respondent's assertion is a clear misstatement of the trial judge's findings and conclusion regarding the inapplicability of the business judgment rule. [R. pp. 18-21; R. pp. 26-30; R. p. 40.] Contrary to the Respondent's assertion, the trial judge under the conclusion section of its Order, never stated that the business judgment rule offers no protection to the Respondent because its conduct is governed by the Act, the Master Deed, and the Bylaws [R. p. 40.] This is a misrepresentation of the record on this point.

The relevant portion of the trial judge's determination provides:

> [T]he ***[Petitioners'] claims[2] focus on non-discretionary duties*** imposed upon [Respondent]'s Board by its Master Deed and Bylaws. Therefore, because the duty to maintain and repair the regime property is mandatory and fell upon the [Respondent]'s governing Board pursuant to its Bylaws, it is not discretionary, and, therefore, not subject to the business Judgment rule. [R. pp. 21.]

Here, the two relevant sentences taken from the Order when read together import the clear and unambiguous meaning of the trial judge's determination that because the duty to maintain and repair the common elements is mandatory pursuant to the Master Deed and Bylaws, the Act, and South Carolina law, the Respondent's alleged breach of this affirmative

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[1]The trial judge cited the case of Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 605, 538 S.E.2d 15, 28 (Ct. App. 2000) as authority for the principle that the "business judgment rule only applies to ***intra vires*** acts, not ***ultra vires*** ones." [R. pp. 24-25.]

[2]"A review of [the Petitioners'] claims against the [Respondent] here fall in the categories of negligent maintenance, failure to inspect, failure to assess, failure to repair, and failure to discharge duties. . . . All of these claims arise directly from alleged breaches of affirmative duties of due care, ***not discretionary***, as set forth in the [Respondent's] Master Deed and Bylaws." [R. p. 19.]

duty, evidenced by inattention and inaction, is not subject to the protection of the business judgment rule. The trial judge cited the case of Murphy v. Yacht Cove Homeowners Ass'n, 289 S.C. 367, 345 S.E.2d 709 (1986) as authority for this legal principle. In Murphy, this Court held ***"that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association"*** for the failure to discharge its duties under the Master Deed and Bylaws. 289 S.C. at 369, 345 S.E.2d at 710.

The trial judge's two sentence determination as described above is essentially a restatement of this Court's holding in Murphy. Id. Furthermore, the trial judge never found that the Respondent's unauthorized conduct - lack of due care, lack of good faith, inaction, and *ultra vires* acts regarding its Board's invalid assessment - would prevent the Respondent from claiming the protection of other *intra vires* acts under the business judgment rule. But the trial judge specifically found that the Respondent could not claim protection under business judgment rule for its inaction, lack of faith, and *ultra vires* acts related to its Board's admittedly invalid assessment. For these reasons, the trial judge never concluded that the business judgement rule is inapplicable to the Respondent's other *intra vires* actions. Respondent and the Court of Appeals took the alleged meaning of one sentence out of context with respect to the trial judge's collective findings and conclusions by failing to interpret the forty page Order as whole. Accordingly, the Court of Appeals erred by reversing the trial judge's findings and conclusions regarding the inapplicability of the business judgment rule.

(B) Respondent continues to incorrectly represent that the first vote on the window amendment eventually passed through proxy voting.

Respondent'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 and a clear misstatement of the uncontroverted record[3] on this point for several reasons. [Brief of Respondent, p. 6, ¶ 1.] First, the Respondent decided not to leave the vote open for thirty days "so non-voting co-owners could vote." [R. pp. 114-115; (Emphasis added).] Second, the Respondent 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 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

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[3]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. [R. pp. 114-115; R. p. 10 (Emphasis added).]

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 co-owners entitled to vote."*** [R. p. 1007; (Emphasis added).] Respondent admitted that ***it failed to obtain unanimous written consent from all the co-owners on the second vote.*** [R. p. 921;(Emphasis added).] Because the second vote occurred without holding a meeting of the membership, the window amendment required the ***unanimous*** written consent from all of the co-owners entitled to vote for it to pass. Section 1.3 provides, ***"Votes can be cast only at meetings of the Council convened in accordance with the Bylaws."*** [R. p. 1006; (Emphasis added).]

amendment. [R. pp. 918-921; R. p. 1279.] This statement made by former Board President Johnston only confirmed that the second proxy vote held 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 means the window amendment did not pass. [R. pp. 114-115; R. pp. 918-921; R. p.1279.] Also, the Respondent 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; (Emphasis added).] For these reasons, the Respondent incorrectly states that the first vote on the "***window amendment was left open for thirty days and eventually passed through proxy voting***" as indicated in the Respondent's Brief. [R. pp. 114-115; R. pp. 918-921; Brief of Respondent, p. 6, ¶ 1; (Emphasis added).] Consequently, this misrepresentation caused the Court of Appeals to misapprehend that the first vote on the window amendment had passed, and, therefore, the Respondent had not acted in bad faith.[4]

II.

The Court of Appeals erred by applying the business judgment rule in such a way as to virtually preclude any simple negligence claims against a homeowners' association. The heightened standard of care conflicts 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

[4]Shipyard Village, 409 S.C. at 181, 760 S.E.2d at 130.

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 erroneous ruling greatly expands the application and scope of the business judgment rule to incorrectly include any breach of a simple negligence standard of care claim against the Board due to its neglectful inaction, which in practical terms means that such inaction can only be challenged upon proof of gross negligence or bad faith. It is important to point out that the Respondent finally admitted in its Brief that the application of the business judgment rule precludes a corporate governing Board's liability for simple negligence. [R. pp. 19-20, Brief of Respondent.] However, the Respondent misunderstands the scope and breadth of the Petitioners' argument regarding the inapplicability of the rule. The Petitioners are only challenging the Respondent's neglectful inaction - the failure to disharge its mandatory duties, bad faith, and related *ultra vires* acts -with respect to its invalid assessment. The Petitioners are ***not challenging*** the Respondent's business judgment decisions. [R. pp.18-23.] See Dockside Ass'n v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) ("[T]he business judgment rule precludes judicial review of ***[intra vires] actions taken by a corporate governing board*** absent a showing of a lack of good faith, fraud, self-dealing, or unconscionable conduct.") (Emphasis added).

(A) Respondent incorrectly asserts the Court of Appeals' ruling does not conflict with prior decisions of this Court.

The Respondent incorrectly asserts that the Court of Appeals' ruling does not conflict with this Court's decisions in Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (1985) and Murphy v. Yacht Cove Homeowners Ass'n, 289 S.C. 367, 345 S.E.2d 709(1986). These cases are controlling on the point of law that a homeowners' association may be liable to homeowners for its neglectful

inaction, failure to act, and/or uphold its mandatory duties arising under the Master Deed and Bylaws and State law on a lesser standard of mere or simple negligence. The case of Queen's Grant Villas, involved a negligence action brought by a condominium association against the developer ***"for alleged defects in the construction of the common elements of a condominium project,"*** which the lower court disposed of on summary judgment for lack of standing. 286 at 555-556, 335S.E.2d at 366. This Court reversed, holding that the ***"property regime ha[d] standing to bring an action for construction defects in common elements that the regime ha[d] the duty to maintain,"*** particularly when **"master deeds and the by-laws"** charged the association with ***"the obligation to maintain the common elements."*** 286 at 556 Id. at 366. This Court went on to state,***"should the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements which it maintains, it may be liable to the homeowners for its omissions."*** Id. (Emphasis added).

One year later, in Murphy, this Court held ***"that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association."*** 289 S.C. at 369, 345 S.E.2d at 710. In that case, joint owners of a condominium unit brought a negligence action against Yacht Cove Homeowner's association ("the association")for failure to maintain the common elements after one of the owners suffered physical injury in the common area. 289 S.C. at 367-368, 345 S.E.2d at 709. This Court further stated that, ***"since the association can sue [under Section 21-31-170] a member for failure to adhere to the bylaws, rules, and regulations a member necessarily can sue the association for this same failure."*** 289 S.C. at 368-369,

345 S.E.2d at 709-710. Although Queen's Grant Villas and Murphy focused on the issues of condominium association's standing to sue and whether a condominium association can be sued for simple negligence, Queen's Grant Villas and Murphy, coupled with Dockside Ass'n, collectively stand for the principle that a condominium association or its Board cannot raise the business judgement rule in defense of its negligent inaction and/or failure to uphold its mandatory duties to maintain and repair the common elements and pursue a recovery against the responsible parties as required by the governing documents and South Carolina law. Consequently, only when a Board makes a business judgment decision is the application of the business judgment rule triggered. The principle that the business judgment rule does not apply to the Board's negligent inaction or failure to act is also consistent with the common law of other jurisdictions like Delaware and New Jersey. See Aronson v. Lewis, 473 A. 2d. 805, 813 (Del. Ch. 1984) (The business judgment rule "has no role where directors have either abdicated their functions, or absent a conscious decision, failed to act."); In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 748 (Del. Ch. 2005), aff'd 906 A.2d 27 (Del. 2006) ("Furthermore, in instances where directors have not exercised business judgment, that is, in the event of director inaction, the protections of the business judgment rule do not apply."); Francis v. United Jersey Bank, 432 A.2d 814 (N.J. 1981)(Neglectful inaction is not protected by the rule.) For the foregoing reasons, the Court of Appeal's ruling is wholly inconsistent and conflicts with this Court's decisions in Queen's Grant Villas, Murphy, and Dockside Ass'n,.

III.
The Court of Appeals incorrectly ruled that the record contains evidence that the Respondent did not breach its duty to investigate.

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, . . . 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. Shipyard Village, 409 S.C. at 179, 760 S.E.2d at 129. (Emphasis added.)

Contrary to the Court of Appeals' ruling, no evidence exists in the record from which a jury could conclude the Respondent satisfied its duty to investigate to determine whether to assess the individual A and B co-owners for the water intrusion damage to the individual units and the common elements. For example, the Respondent previously admitted that it did not investigate whether to assess the individual co-owners for the water intrusion damage to the common elements because it believed it had no duty to investigate under the Master Deed and Bylaws. Additionally, the record reflects that no resolution was ever passed or voted on by the Respondent's Board, utilizing its affirmative business judgment, to initiate an investigation whether to assess the A and B co-owners for the water intrusion damage to the common elements as required by sections 6.3, 6.4, and 7.3 of the Bylaws. The Board's meeting minutes, correspondence and e-mails to the co-owners, and numerous reports from its expert/consultants are silent on this point. Now, the Respondent asserts in its brief that ***"[it] did, in fact, initiate an investigation to determine whether any of the damage to the [individual units and the] common elements could be attributed to individual [A and B] co-owners."*** [R. p. 33, Brief of Respondent; Emphasis added.] This new assertion by the Respondent is a gross misstatement of the record for the following reasons. First, the Respondent previously admitted that, ***"[It] is undisputed that the Board did not ask any***

expert to break out the damages attributable to the alleged failure of [A and B] Co-owners to maintain their windows and sliding glass doors." [R. p. 34.] The Court of Appeals confirmed this fact when it stated that the Respondent had "hired many construction companies and consultants to determine ***what*** [but not who] was causing the water problems."[5] Second, the Affidavit of Board member Doris Bray ("Bray"), filed October 28, 2011, is further proof of the Respondent's failure to investigate to determine whether to assess the A and B co-owners for their leaking windows and balcony doors' damage to the individual units and common elements. Her affidavit provides in pertinent part:

> ***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.*** [R. pp. 2256-2257; (Emphasis added).]

Consequently, Bray's affidavit illustrates how the Respondent incorrectly used the business judgment rule[6] to circumvent its mandatory duties under sections 6.3, 6.4, and 7.3 of the Bylaws in order not to have to investigate ***who*** caused the problems to the common elements and whether to ***seek a recovery*** from the A and B co-owners as known responsible

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[5] Shipyard Village, 409 S.C. at 173, 760 S.E.2d at 126. ("The Council decided to ***leave the vote open for thirty days*** to allow the Co-owners who did not vote *sic* at the meeting or by proxy to vote. Because over 80% of Co-owners voted in favor of the amendment ***after leaving the voting open***, the Board believed the amendment had passed.") (Emphasis added). This is not a true statement of the facts for the reasons described above. The Court of Appeals' misapprehension was caused by the Respondent's misrepresentation that the first vote had been left open for thirty days.

[6] However, Respondent contends that *"**[it] has never argued that the business judgment rule allowed [the Respondent] to circumvent explicit duties under the Master Deed and Bylaws**,"* which is factually incorrect based upon the Bray affidavit. [Return to Petitioners' Petition for Rehearing, p. 7; (Emphasis added).]

parties. [R. p. 2257; (Emphasis added).] See Shipyard Village, 409 S.C. at 180, 760 S.E.2d at 130. ("A homeowners association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative.") Third, the trial judge found that the Respondent failed to present any evidence at the summary judgment motion hearing held on May 21–22, 2012 disputing the fact that its Board never asked Sutton-Kennerly & Associates, Inc. ("SKA") or any other qualified expert to break out what damages to the common elements were attributed to the A and B co-owners' leaking windows and sliding glass doors.[7] [R. pp. 26-36.] For example, the deposition testimonies of former Board President Don Johnston ("Johnston") and Board Member Doris R. Bray ("Bray"), respectively, establish the correctness of the trial judge's findings:

Deposition testimony from Johnston:

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

A. **That's correct**.

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[7] Respondent's position that it had no "duty to investigate" was clearly expressed later in the hearing, when the following exchange occurred:

THE COURT: But when I had this construction company came in and said, "This is what we've got to do," and you say, "Go ahead and do it," **couldn't you have just said, "Let us know whether this was from the windows or from some other source?" Couldn't you just do that ? I mean, when they tear it off they can tell, they can tell where it's coming from.**

MR. MILLS: **We could have. We had no duty to do so and if we did not do so we have not failed in the exercise** - -

THE COURT: **Mr. Mills, I disagree with you there**. [R. pp. 798-799; Final Reply Brief, p. 2; (Emphasis added).]

Q. They were never asked to do that?
A. **That's correct**. [Dep. of Johnston, R. p. 34; R. pp. 1467-1468; (Emphasis added).]

Deposition testimony from Bray:

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**. [Dep. of Bray, R. pp. 34-35; R. p. 1620; (Emphasis added).]

For these reasons, the Court of Appeals erred by not affirming the trial judge's ruling that the Respondent breached its duty to investigate to determine whether to access the individual A and B co-owners for their damage to the common elements as required by sections 6.3, 6.4, and 7.3 of the Bylaws.

(A) Respondent's assertion that its Board had a good faith basis to conclude the water intrusion in Buildings A and B resulted from common element failures instead of co-owner neglect is misplaced and contrary to the evidentiary record.

In 1999, the A and B co-owners were charged with the responsibility of waterproofing, caulking and/or sealing their sliding glass door thresholds and window frames pursuant to sections 3.6 and 4.3 of the Master Deed, and Section 6.1 of the Bylaws as mandated by the Respondent's Board. [R. p. 4; R. p. 31.] Contrary to the Respondent's assertion, its Board already knew that A and B co-owners were one of the responsible parties for the water intrusion damage to the individual units and the common elements due to their failure to adequately waterproof, caulk, and/or seal their sliding glass door thresholds and window frames. This fact is established by the Board's meeting minutes, the Board's e-mails and letters to the A and B co-owners, and the Board's reports from the experts/consultants. [R. pp. 4-17; R. pp. 30-40.] For example, in September 2007, an e-mail to the Board from

the property manager, Mrs. Diehl of K A. Diehl & Associates, Inc., ("Diehl"), regarding window leaks in Buildings A and B stated in pertinent part that, ***"many of these units were leaking previously and because windows were the owners' responsibility, the issue was thrown back at the owners who most ended up doing nothing. . . ."*** [R. p. 4;R. p.13; R. p. 31; (Emphasis added).] Additionally, the Board hired Schneider Associates, Inc. ("Schneider") in 2006 to investigate water infiltration problems with Buildings A and B. Schneider found:

> Numerous 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. 32: R. pp. 1886-1939, Photos; R. pp. 2046-2145, Photos; R. pp. 2396- 2397.]

In 2007, Schneider performed destructive testing on several units and found an ***"open joint"*** located directly underneath the sliding glass doors' thresholds between adjoining hollow core slabs of the balconies and units. This allowed water to leak into the units below.[8] [R. p. 1171; R. p. 11; (Emphasis added).] Schneider made it clear that this condition existed underneath every sliding glass doors's threshold in Buildings A and B. [R. p. 1171; R. pp. 1367-1376.] Schneider's identification in 2007 of the ***"open joint"*** only explained the

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[8] Also, Respondent's expert J. Lawrence Elkin, P.E. ("Elkin") agreed with Schneider's findings that water was entering an ***"open joint"*** underneath the sliding glass doors and leaking into the units below when he said, ***"that's where the water was going in. It would blow up against the [sliding glass door] and it would go into that joint."*** [R. p. 1592; (Emphasis added).]

specific cause of what the Board already knew: that a serious water intrusion problem existed with the sliding glass doors, which had been apparent since at least 2002. [R. p. 132; R.p.7.] The April 28, 2007 Board Meeting Minutes stated that ***"many sliding glass doors have water penetration problems."*** [R. pp. 11-13; R. p. 11823; (Emphasis added).] In July 2008, another one of the Respondent's consultant, HICAPS, Inc. ("HICAPS"),investigated the water intrusion problems associated with the A and B co-owners' window and sliding glass door systems. HICAPS reported to the Board: (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)***"it also has allowed water to get into the concrete which is causing the corrosion,"*** and (4) ***"moisture 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. 1367-1376; R. pp. 1369-1376; R. p. 33; (Emphasis added).]

In October 2008, Spectrum Engineering, Inc. ("Spectrum") at the request of the Respondent inspected the windows and sliding glass door systems in Buildings A and B. Spectrum found that, ***"severe staining . . . occurred where the water is captured in the sliding frame and drips down from unit to unit," and that "[m]ost damage was at the ceiling above the sliding glass door and on the walls adjacent to all windows."*** [R. p. 1772; R. p. 1774; R. pp. 1869-1939; R. pp. 2046-2145.] Further, Spectrum found that the ***"damage has occurred in all units due to wind driven rain bypassing the slider seals and entering all units,"*** [R. p. 1773; R. pp. 1886-1939, Photos; R. pp. 2046-2145; (Emphasis added).]

In light of this evidence, the A and B co-owners, as defaulting parties under section 6.3 and 6.4 of the Bylaws, are clearly proper parties for the Respondent to seek a recovery against for the damages to the individual units and the common elements. [R. p. 1773.]

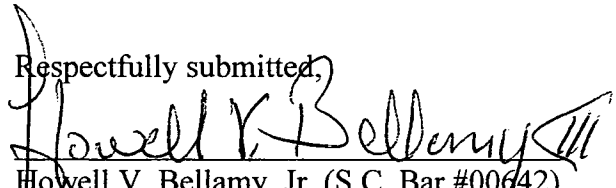
Consequently, the Respondent's assertion that its ***"[B]oard [had] a good faith basis to conclude the water intrusion in Building A and B resulted from [only] common element failures rather than A and B co-owner neglect"*** is without merit and a gross misstatement of the record. [R. p. 24, Brief of Respondent; R. pp. 4-13; R. pp. 30-39; (Emphasis added).]

For these reasons, the Respondent had a mandatory duty to pursue a recovery from "all responsible parties, whether they are co-owners or contractors or the developer," including the A and B co-owners when a problem arose in the common elements as did here. Accordingly, the Respondent's admission of not even attempting to apportion the common element damages is a clear breach of its affirmative duties under section 6.3, 6.4, and 7.3 of the Bylaws and South Carolina law, and therefore, its neglectful inaction is not subject to protection under business judgment rule as an *intra vires* action. [R. p. 33, Brief of Respondent; R. pp. 1886-1939, Photos; R. pp. 2046-2145, Photos; R. pp. 2396- 2397.]

CONCLUSION

For all the reasons discussed above, the Petitioners respectfully request the Supreme Court to reverse the decision of the Court of Appeals, and re-affirm the rulings of the trial judge, and remand this case to the circuit court for a trial by jury.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No: 2009-CP-22-01655

Supreme Court No. 2014-002394

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

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

v.

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

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

v.

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

PROOF OF SERVICE

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

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Myrtle Beach, South Carolina
June 8, 2015