THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No: 2009-CP-22-01655

Appellate Case No. 2012-213634

Supreme Court No. 2014-002394

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

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

v.

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

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

v.

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

BRIEF OF PETITIONERS

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

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QUESTIONS PRESENTED

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

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

STATEMENT OF THE CASE

Petitioners are owners of fifty (50) of the sixty (60) units in Buildings C and D which are a part of the Shipyard Village Horizontal Property Regime. This appeal arises out of two cases that were later consolidated: Civil Action No. 2009-CP-22-0152 (invalid window amendment case) filed January 29, 2009, and Civil Action No. 2009-CP-22-01655 (invalid repair and reconstruction assessment against Petitioners case) filed October 7, 2009. Petitioners' main claim on appeal against Council, arises out of being improperly assessed and over assessed for the construction costs related to the repair and replacement of the A and B Co-owners' windows and sliding glass doors, which are their exclusive responsibility pursuant to Sections 3.6 and 4.3 of the Master Deed and Section 6.1 of the Bylaws. [R. p. 2030; p.1404.]

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

record . . . clearly established that the [Council]'s governing board, past and present, had acted without authority, without good faith, and inaction by failing to discharge its affirmative duties under its Master Deed and Bylaws." [R. p. 21.] Specifically, the trial judge determined that the business judgment rule did not apply to Council's "invalid assessment" in 2010 and 2011 for the following reasons:

1. *Ultra Vires* Act and Improper Motives: The Board's illegal adoption of the window amendment pursuant to a second vote by proxy by mail in May of 2006 was an *ultra vires* act. [R. p. 21.] Specifically, the proxy vote failed to obtain unanimous written consent from all the Co-owners entitled to vote as required by Section 1.5 of the Bylaws. Nor was a meeting held on the re-vote as required by Section 1.3 of the Bylaws. Board still informed the Petitioners and the other Co-owners the amendment had passed in July 2006. [R. pp. 114-1; R. pp. 1006-1007.]

2. Lack of Good Faith and Improper Motives: The Board's lack of good faith in continuing to enforce the window amendment against the Petitioners in this lawsuit when it admittedly knew the amendment was invalid and unenforceable in June 2008. [R. pp. 22-23.] Specifically, at the hearing on May 21, 2012, the Board's attorney admitted to 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,'. . . .*" [R. p. 22.];

3. *Ultra Vires* Act and Improper Motives: The Board's "invalid assessment" against Petitioners for part of the repair and replacement costs needed to fix the A and B Co-owners' 1,087 windows and 80 sliding glass doors was an *ultra vires* act. [R. p. 25.] The trial judge found "the evidence in the record [was] uncontroverted that Co-owners of Buildings A and B were solely responsible for the maintenance and repair of their window and sliding glass door systems pursuant to [Sections] 3.6 and 4.3 of the Master Deed, and [Section] 6.1 of the Bylaws. Additionally, the Co-owners were, further, charged with the responsibility of caulking and waterproofing their sliding glass door thresholds and window frames pursuant to these specific sections by the [Respondent]." [R. p. 31.];

4. Ultra Vires Act and Inaction: The Board's knowing failure to present their adopted 2010 and 2011 annual operating budgets to the

Petitioners (after the special repair assessment vote failed to pass) was an *ultra vires* act, and violated the affirmative requirements of Sections 1.12, 5.2, and 5.3 of the Bylaws. Specifically, the Board's inaction unduly prejudiced the Petitioners' right to challenge, object, and/or amend the admittedly "invalid assessment"for Buildings A and B, which repair assessment was incorporated into 2010 and 2011 annual operating budgets. [R. p.24.]; and

5. Incompetence and Inaction: The Board's neglectful inaction in failing to exercise ordinary care in discharging its mandatory duties under Sections 6.3, 6.4, and 7.3 of Bylaws. [R. pp. 38-40.] Specifically, the trial judge found the "Board, past and present, had actual notice that the Co-owners' windows and sliding glass doors had been leaking water into Buildings A and B since 1983 evidenced by the [Board]'s Meeting Minutes from 1983 to 2010." [R. p. 31; R. p. 1833.] The Board failed to timely abate the A and B's Co-owners' unsafe windows and sliding glass doors from leaking water into the buildings as required by Sections 6.3, which caused the damage to the common elements. [R. pp 5-9.] Additionally, the Board failed to investigate and/or pursue a recovery from the A and B's Co-owners, who had already been identified, for damages to the common elements and the individual units as required by Sections 6.3 and 6.4. [R. pp. 6-9; R. pp. 25-31; R. pp. 38-40; R. p.1319.]

On November 19, 2012, Respondent received written notice of the trial court's Form 4 Order denying the motion to reconsider. Respondent served and timely filed a Notice of Appeal on December 12, 2012.

In its opinion filed on June 25, 2014, the Court of Appeals affirmed the trial judge's grant of summary judgment on the existence of a duty to investigate. However, the Court of Appeals reversed the trial judge's decisions that the business judgment rule does not apply to the Board's invalid repair assessment and its granting summary judgment on the issue that the Council breached its duty to investigate. The case was remanded to the Circuit Court for a trial by jury.

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

This Court granted Petitioners' Petition for writ of certiorari to review the Court of Appeals' decision in Fisher v. Shipyard Village Council of Co-owners, Inc., 409 S.C. 164, 760 S.E.2d 121 (Ct. App. 2014) by Order dated March 19, 2015.

STATEMENT OF FACTS

In 1982, the phased condominium development known as Shipyard Village Horizontal Property Regime ("Shipyard Village") was established pursuant to the recording of the Master Deed. The Council, a non-profit corporation, was established to administer the affairs of the regime property in accordance with its Bylaws[1] through its Board of Directors ("Board"). Shipyard Village was built in two phases. Phase I consists of Buildings A and B, and each has forty (40) units. Buildings A and B were approved for final occupancy in 1982. Phase II which was completed in 1998, consists of Buildings C and D, and each contains thirty (30) units.

In June 1999, the Board by resolution decided to notify all Co-owners that they were responsible for waterproofing the balcony thresholds (underneath sliding glass doors) and the window frames of their units pursuant to Section 3.6 of the Master Deed. [R. p. 1120; R. p. 4.] The Board's records contain a copy of such a notice that was mailed to the Co-owners by the property manager on August 11, 1999, confirming the Board's position that:

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[1]Shipyard Council of Co-owners, Inc. ("Council"), eleemosynary corporation, was issued a certificate of incorporation by the Secretary of State of South Carolina on August 27, 1984. Pursuant to Council's Articles of Incorporation, its petitioners declared under its Fourth Article that:

> **FOURTH.** The purpose of the said corporation is to provide for the acquisition, construction, management, maintenance and care of the common elements of the Shipyard Council of Co-Owners, Inc., at the Litchfield-by-the -Sea, South Carolina; to administer the property constituted into the Shipyard Council of Co-Owners, Inc.; to make expenditures for the acquisition, construction, management, maintenance, and care of the property of Shipyard Council of Co-Owners, Inc., **and to rebate to the members excess ... assessments.** [R. pp. 508-510.]

"Per the Shipyard Village Council of Co-owners, Inc. Master Deed, the waterproofing of the balcony thresholds and windows are the responsibility of the unit owners." [R. p. 1317; R. p. 4; (Emphasis added).]

In 2002, Council hired McGee Consulting Associates ("MCA") to investigate and perform testing on the windows in Buildings A and B. [R. p. 1121; R. p. 1127-A.] The September 27, 2002 Board minutes provided in relevant part that:

> Water testing was performed utilizing a hose on some of the windows, and the testing confirmed positive water intrusion. The water testing also confirmed that the water channel[ed] down both sides of the windows, which starts at the top floor windows and works its way to the ground. The water intrusion has caused some of the wood framing to deteriorate due to wood-rot. [R. p. 1127-A; R. p. 5.]

Furthermore, the minutes indicated that attorney Ralph McCullough ("McCullough") told the Board ***"there were safety issues with respect to the durability of the [A and B windows],"*** and recommended pursuing legal action against the responsible parties. [R. p. 1127-A; R. p. 5.] Additionally, the Board's consultants/experts "stressed that problems from water intrusion are time related and tend to compound" every three to six years. [R. p. 1121.]

On October 31, 2002, on behalf of the Board, property manager K. A. Diehl & Associates, Inc., ("K. A. Diehl") wrote to one unit owner's attorney referencing window leak problems in the Unit B-15. That letter stated in relevant 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 <u>any</u> window issues clearly lies with the unit owner***. [R. p. 1318; R. pp. 6-7; (Emphasis added).]

In 2003, a letter to the Co-owners from then-Board President Dr. C. Leon Jennings, Jr., MD ("Jennings") confirmed that the Board had knowledge of the serious problems associated with the leaking windows and sliding glass doors of the A and B units. Jennings' letter also confirmed once again the Board's interpretation of the Bylaws, to the effect that the financial responsibility for the maintenance and repair of the windows and sliding glass doors lies with the individual Co-owners and not the Association. Jenning's letter provided in relevant part:

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

> **responsibility of the individual owners**. Nothing in this decision would preclude an individual or group of individuals from initiating a suit if they so desire. [R. p.1319; R. pp. 6-9; (Emphasis added).]

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

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

The Board's position was repeated in at least one 2003 letter from property manager K.A. Diehl to a unit owner in Building A which provides, ***"It has been determined that during a hard rain, water flows under the threshold of your sliding glass door and leaks onto the unit below. The sliding doors are the owner's responsibility to maintain and thus, we are requesting that you take action to correct this problem."*** [R. p. 132; R. p. 7; (Emphasis added).]

Notwithstanding knowledge of the problem by the Board dating back to at least 1999, nothing was done to systematically address the leaking window and sliding glass door problems. Finally because the windows and sliding glass doors continued to allow water to penetrate and damage the individual units, private balconies, and common walls, the Board hired a firm known as Pro-Tec Finishes, Inc., ("Pro-Tec") to evaluate the problem and specify a fix. Pro-Tec estimated that it would cost about $2,480,000 to purchase new windows. [R. p. 1159; R. p. 10.] This arrangement would have put the total construction

costs of replacing the windows and sliding glass doors in the A and B units solely on the individual Co-owners in Buildings A and B. [R. pp. 1152-1160.]

In 2006, the Board attempted to amend the Bylaws to designate the windows and sliding glass doors as "common elements." [R. pp. 1152-1160.] If successful, this would have spread the burden for the total construction costs to repair Buildings A and B (windows and sliding glass doors) to include Co-owners of Buildings C and D.

The first vote on the proposed window amendment was taken at the April 15, 2006 annual meeting of the Co-owners. [R. pp. 114-115; R. p. 10.] The amendment failed to receive the required two-thirds (2/3) affirmative vote needed from the Co-owners to pass. A motion was made to leave the vote open for thirty days to allow those Co-owners who did not vote at the meeting or by proxy, to vote. The motion carried unanimously. [R. p. 1166.] In subsequent discussions with its attorney, the Board decided not to the leave the vote open for thirty days. [R. pp. 114-115.] Since the first vote on the window amendment did not pass, ***"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.[2] [R. pp. 114-115; R. p. 10; (Emphasis added).] The second

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[2]The Board's letter dated April 24, 2006 to the Co-owners states in relevant 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.***
> . . .

vote by proxy also failed to pass because written consent was not obtained from all the Co-owners entitled to vote as required by Section 1.5 of the Bylaws. [R. p. 1007.] Nor was a meeting held on the re-vote as required by Section 3.1 of the Bylaws. [R. p. 92; R. p. 1006.]

Despite the fact that unanimous written consent was not obtained, the Board sent a letter to all Co-owners in July 6, 2006 misrepresenting that the window amendment had passed. The letter did not address the voting procedure utilized to adopt the amendment by the Co-owners. [R. p. 1323; R. pp. 10-11.] Additionally, the recorded window amendment incorrectly provides that it had passed ***"at [a] special meeting [held on April 15, 2006] by affirmative vote of Co-owners two-thirds of the total interest in the Common Elements pursuant to Article XIV, Section 14.1 of the Master Deed."*** This is clearly an erroneous statement since the second proxy vote by mail referendum did not occur at a meeting and the deadline for returning the proxy vote was May 26, 2006. [R. pp. 114-115; R. p. 1108; (Emphasis added).]

In 2006, the Board hired Kenneth G. Schneider, Jr., AIA of Schneider Associates, Inc. ("Schneider") to investigate water infiltration problems with Buildings A and B. Schneider found: "***[n]umerous windows/sliding doors are leaking rain water into interior areas of the buildings. Water is migrating from the upper story down through the intermediate stories to ground level, causing water damage to the floor/ceiling assemblies, the exterior finishes, and interiors of the outside units of buildings A and B. Damage***

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).]

appears to occur more severely on the corner stacks." [R. p. 2397; R. p. 32; (Emphasis added).]

In 2007, Schneider[3] performed destructive testing on several units and found an ***"open joint" located directly underneath the sliding glass doors' threshold between adjoining hollow core slabs of the balcony and unit***, which allowed water to leak into the unit below.[4] [R. p. 1171; R. p. 11; (Emphasis added).] Schneider made it clear that this condition existed underneath every sliding glass doors' 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 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. The preexisting problem was compounded by the Board's failure to timely address it as demonstrated by Jenning's 2003 letter to the Co-owners. [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 September 18, 2007, an e-mail was sent to the Board from K. A Diehl regarding window leaks in Buildings A and B, which stated in pertinent part, ***"many of these units were leaking previously and because windows were the owners' responsibility, the issue was thrown back at the owners who most[ly] ended up doing nothing. . . ."*** Her e-mail also

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

[4]Also, Council's expert J. Lawrence Elkin, P.E. ("Elkin") agreed with Schneider, AIA's findings that water was entering an "open joint" underneath the sliding glass doors and leaking into the units below when he said, "***[t]hat that's where the water was going in. It would blow up against the [sliding glass door] and it would go into that joint.***" [R. p. 1592; (Emphasis added).]

stated that she ***"tried to bring this up after [she] was here for a while and got [her] hand slapped by Bobby Warner and some board members because this was an Owner responsibility."*** [R. p. 13; R. p. 1328; (Emphasis added).]

Two more years went by while nothing was done. Then, on April 19, 2008, the Board reported at the annual members meeting that Buildings A and B needed extensive repairs and that all of the Co-owner's windows and sliding glass doors needed to be removed and replaced. The Board stated that reconstruction and repair costs could be in the range of $12,000,000 to $13,000,000. [R. pp. 1237-1238; R. p. 13.] Although investigation and testing of Buildings A and B had been ongoing since 2006, this was the first time that the Board divulged the estimated cost of repairs with the unit owners. [R. pp. 1237-1238; R. p. 13.]

In 2008, another one of the Board's consultants, HICAPS, Inc. ("HICAPS") reported to the Board that: (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 [door] unit and showing up at the bottom. The water is entering the concrete [under the sliding glass door unit] and leaking into the units below."*** [R. pp. 1367-1376; R. pp. 1369-1376; R. p. 33; (Emphasis added).]

In May of 2008, Petitioners hired attorney Jeff King ("King"). King sent a letter dated June 8, 2008 ("King Letter") to the Board asserting that the proposed special repair assessment was invalid because the window amendment was not properly adopted under Sections 1.3, 1.4, and 1.5 of the Bylaws, and therefore, argued that the total cost of repair and

replacement of the windows and sliding glass doors remained the sole responsibility of the A and B Co-owners. [R. pp. 22-23; R. p.1342;R. pp. 1006-1007.]

On January 29, 2009, the great majority of C and D Co-owners, Petitioner herein, brought a lawsuit challenging the validity of the 2006 window amendment after negotiations broke down with the Board. [R. pp. 64-85.] Due to the Board's concerns about the enforceability of the window amendment, the Board called a special members meeting on March 21, 2009. [R. pp. 64-85.] At that meeting, the third re-vote on the 2006 window amendment and the first vote on a similar sliding glass door amendment both failed to obtain the required two-thirds (2/3) majority vote from the membership to pass. [R. p. 1279.]

On August 1, 2009, the Board's proposed special assessment for the Building A and B's reconstruction and repair costs was voted down by Co-owners at another special members' meeting. As a result, the Board 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 Co-owners along with their regular condominium fees. [R. pp. 1299-1300.]

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

During the pendency of the first lawsuit the Board partially relented. It agreed to absolve C and D Co-owners from any hard costs associated with the purchase of the

windows and sliding glass doors for Buildings A and B. [R. pp. 1295-1297.] However, the Board made no effort to determine how much of the damage to the common walls and private balconies in Buildings A and B was due to the A and B Co-owners' failure to properly maintain and repair their windows and sliding glass doors. [R. pp. 33-34.]

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

Compounding the Board's failure to follow the clear terms of the Bylaws relating to voting requirement, the 2010 and 2011 annual budgets were not presented to the Co-owners for review and amendment as required by Sections 5.2 and 5.3 of the Bylaws. [R. pp. 1285-1289; R. p.15; R. pp. 24-25.] Consequently, Petitioners were denied the opportunity to challenge the "invalid [window amendment] assessment" against them for repair costs by the Board. Unlike the Board, however, Petitioners complied with their affirmative duties under the Master Deed and Bylaws and paid their per-unit assessment, albeit under protest, in 2010 and 2011.

On May 4, 2012, Petitioners moved for partial summary judgment on their negligence and breach of fiduciary duty causes of action. [R. pp. 217-222.] During the hearing on May 22, 2012, the trial judge granted Petitioners' partial summary judgment motion on the duty and breach of duty components of their negligence claim. [R. pp. 51-52.] The trial judge determined that the Bylaws and Master Deed impose affirmative duties on the Board to enforce, investigate, and correct known violations of the Master Deed, the Bylaws, and the

South Carolina Horizontal Property Act. [R. pp.1-40.] The trial judge further found that the Council breached its duty to investigate based on the substantial evidence in the record that clearly showed A and B Co-owners had neglected the maintenance of their leaking windows and sliding glass doors. [R. pp 1-40.] The trial judge further determined that the Council was precluded from asserting protection under the business judgment rule based upon its inaction, *ultra vires* conduct, bad faith, and failure to exercise reasonable care in discharging its required duties under Sections 6.3, 6.4, and 7.3 of the Bylaws. [R. pp. 21-25; R. p. 40.]

The Court of Appeals' opinion filed on June 25, 2014, affirmed the trial judge's findings that Council had a duty to investigate, but reversed the trial judge's decision finding that the duty had been breached and that the business judgement rule could not be invoked to shield the Council from liability in these circumstances. The Court of Appeals' decision contained no abuse of discretion analysis explaining why it reversed the trial judge's findings of fact supporting his holdings to the effect that the Board had committed several *ultra vires* acts and lacked good faith and further through neglectful inaction failed to exercise ordinary care in discharging its mandatory duties under Sections 6.3, 6.4, and 7.3 of Bylaws. [R. pp. 24-25.] Stated differently, the opinion failed to address whether: (1) the trial judge's factual findings described above lacked evidentiary support, or (2) were controlled by error of law.

SCOPE OF APPELLATE REVIEW IN CIVIL CASES

Rule 56(d), SCRCP, *Case Not Fully Adjudicated on Motion*, provides, "If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by ***interrogating counsel***, shall if practicable ascertain ***what material facts exist without substantial controversy*** . . . . It may thereupon make an order

specifying the facts that appear without substantial controversy . . . and directing such further proceedings in the action as are just." Rule 56(d), SCRCP. See Hartman v. Jensen's, Inc. 277 S.C. 501, 502, 289 S.E.2d 648, 648 (1982)(An action in negligence is at law and the trial judge's findings of fact will be upheld unless without evidentiary support); See Jean Hoefer Toal, *et al.*, Appellate Practice in South Carolina, 183 (2d ed. 2002). This Court has stated that appellate courts are bound by the factual findings of a lower court made in resolving pre-trial motions ***"where there has been conflicting evidence or where the findings are supported by evidence and not clearly wrong or controlled by error of law."*** City of Chester v. Addison, 277 S.C. 179, 182, 284 S.E.2d 579, 580 (1981) (citations omitted.); See Jean Hoefer Toal, *et al.*, Appellate Practice in South Carolina, 196 (2d ed. 2002).

Disregarding the clear dictates of this Court, the Court of Appeals exceeded its scope of authority in its review of Petitioners' negligence action by neither upholding the trial judge's factual findings nor explaining why they were clearly wrong and not supported by the evidence.

ARGUMENT

I.

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

In the instant case, the trial judge found that the "evidence in the record . . . at the hearing on May 21–22, 2012, clearly established that [Council's governing board's] lack of good faith, inaction, and *ultra vires* acts regarding its invalid assessment" were outside the protection of the business judgment rule. Judge Hyman's sound analysis, based on his intimate knowledge of the numerous and detailed facts in the record should be controlling

since they are supported by the evidence in the record and are clearly not wrong, should be re-affirmed.

(A) The Court of Appeals' erred by misapprehending, and reversing the following findings of fact of the trial judge: (1) that the window amendment was invalid, and (2) that the Board had acted in bad faith by continuing to enforce an admittedly "invalid assessment" against the Petitioners for repair costs.

The trial judge found that "[the Board] was precluded from asserting [protection under] the business judgment rule . . . based [upon] its lack of good faith in continuing to enforc[e] the 2006 Window Amendment . . . when it admittedly knew the amendment was invalid and unenforceable in June 2008." [R. pp. 23-25.] The record and trial judge's finding support this conclusion for several reasons. First, the Board has admitted that the first vote on the window amendment that occurred on April 15, 2006 ***failed to receive the required two-thirds (2/3) affirmative vote from the unit owners to pass***. [R. pp. 114-115; R. pp. 918-921.] Second, the Board has admitted that the second re-vote on the window amendment by proxy occurred without a meeting, and that all Co-owners did not consent in writing to adopt the amendment as required by Section 1.5 of Bylaws.[5] [R. pp. 918-921.] Third, the Board has admitted that the third re-vote on the 2006 window amendment and the first vote on the 2009 sliding glass door amendment were voted down at the special members meeting held on March 21, 2009. [R. p.1279.] Indeed, the Court of Appeals itself found that "[o]nly 48.31 % voted in favor of the amendment[s] *sic*, meaning the [unit] owners were

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

still responsible for the unit windows and sliding doors." Fisher v. Shipyard Village Council of Co-owners, Inc., 409 S.C. 164, 175, 760 S.E.2d 121, 127 (Ct. App. 2014).

Astonishingly, even after the third re-vote on the 2006 window amendment and the first vote on 2009 sliding glass door amendment were voted down, Council's attorney still continued to assert the validity of both amendments. For example, at the motion hearing held on December 9, 2011, Council's attorney argued in opposition to Petitioners' summary judgment motion regarding the invalidity and unenforceability of the 2006 window amendment and 2007 clarification and correction amendment as a matter of law. [R. pp. 665-672; R. p.1279.] It was not until the motion hearing held on May 21, 2012, that Council's attorney admitted to the trial judge that the Board was aware that the 2006 window amendment was invalid, and had known since its receipt of a June 9, 2008 letter from Petitioners' attorney King, which provides in relevant part:

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

[R. pp. 1341-1345; Order, R. pp. 22-23; (Emphasis added).]

The reaction of the Board, after receiving the King letter in 2008, was to acknowledge the point, paraphrased by the Council's attorney as, "***What do we do, this amendment is not***

valid." [R. p. 732, lines 1–14; R. p. 22; (Emphasis added).] The acknowledgment of the window amendment's invalidity in 2008 is further supported by another admission from the Board's attorney to the trial judge at the motion hearing held on May 21, 2012:

> **MISS BOAN**: The Board discussed what will we do with this assessment, how do we treat this A and B in light of the fact the **assessment is invalid and the windows and doors are now the responsibility of A and B unit owners**, how do we assess for that, knowing that, and the Board, knowing that and knowing what the other --
>
> **THE COURT**: Wait a minute, I'm not sure I understand. Could you repeat that right there, I was listening but I just got sort of, I stumbled when you were doing that.
>
> **MISS BOAN: The Board, in trying to decide how would we do the assessment, that the amendment is invalid**. [R. p. 816; R. pp. 22-25; (Emphasis added).]

Accordingly, the Court of Appeals erred by reversing the trial judge's factual findings that the Board's assessment against the Petitioners for the window and sliding glass door repair and replacement costs was invalid. [R. pp. 23-25; R. p.816.]

The trial judge took it one step further, holding that the Board's prior knowledge of the amendment's invalidity rendered its later assertions of validity in bad faith. This is a factual finding, entitled to deference on appeal. See Youmans v. Youmans, 128 S.C. 31,121S.E.2d 674 (1924) (Whether a party acted in good faith or in bad faith is a question of fact).

In sum, the trial judge's rulings that the window amendment was invalid, and that the Board acted in bad faith in knowingly asserting the validity of a known void amendment were his factual findings, supported by the admissions and substantial evidence in the record, and were not clearly wrong. The Court of Appeals erred in setting aside these findings.

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

The trial judge found "the evidence in the record is uncontroverted that Co-owners of Buildings A and B were solely responsible[6] for the maintenance and repair [costs] of their window and sliding glass door systems pursuant to [Sections] 3.6[7] and 4.3[8] of the Master Deed, and [Section] 6.1[9] of the Bylaws." [R. p. 31; R. pp. 4-9; R. p. 1319; (Emphasis added).]

As shown above, the record was uncontroverted then, and remains uncontroverted today that the grounds upon which the Board relied on in assessing the [Petitioners] and other Building C and D Co-owners for repairs to privately owned components of the units in Buildings A and B were improper and, to the Board's own prior knowledge, invalid.

Now, the Board asserts that Co-owners in Buildings A and B ***"were assessed in accordance with the pre-2006 amendment ([original] version) of Section 3.6 of the Master Deed,"*** for the costs of their new windows and sliding glass doors without any help from the C and D Co-owners. [Respondent's Return to Petitioners' Petition for Rehearing,

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

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

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

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

pp. 2-3; R. pp. 730-739; R. pp. 2256-2257 (Emphasis added).] Board's assertion is factually incorrect for several reasons.

First, the A and B Co-owners were only assessed $1,760,000 which is far less than the actual ("hard") costs needed to purchase their windows and sliding glass doors. Further, the $1,760,000 does not include any soft costs or repair costs. [R. pp. 730-733; R. pp. 2256-2257.] This number was confirmed during the motion hearing for partial summary judgment held on May 21, 2012, during the trial judge's interrogation of the Board's attorney about the assessment of the A and B Co-owners for window repair costs.[10]

However, Sutton-Kennerly & Associates, Inc. ("SKA")'s original construction budget indicated that the actual ("hard") costs for the new windows and sliding glass doors was approximately $2, 459,000. SKA was hired by the Board to prepare the costs of repair and reconstruction budget for Buildings A and B. [R. p.1292.] Contrary to the Board's assertion, the record clearly demonstrates that Petitioners were still improperly assessed for part of the repair and replacement costs of the A and B Co-owners' windows and sliding glass doors because the A and B Co-owners were under assessed by the Board.

Second, this fact is further confirmed by the affidavit of Board member Doris Bray ("Bray"), filed on October 28, 2011, when she states:

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

MISS BOAN: [$]22,000 [represents the costs of the windows and sliding glass doors paid by each of the 80 A and B Co-owners]. [R. pp. 733-739; (Emphasis added).]

The paid amount of $22,000 multiplied by the 80 A and B Co-owners' units equals $1,760,000.

> 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).]

Here, the Board purported to use the business judgment rule to unilaterally change the prescribed method of assessment under Sections 3.6 and 4.3 of the Master Deed as evidenced by the affidavit of Bray. [R. pp. 2256-2257.] This occurred after the window and sliding glass door amendments had been voted down three separate times and one time, respectively, between 2006 and 2009, with the result that the total repair costs, including the soft project costs, to replace their windows and sliding glass doors remained the sole financial responsibility of the A and B Co-owners. [R. p. 40.] See Fisher v. Shipyard Village Council of Co-owners, Inc., at 409 S.C. at 181, S.E.2d at130. (A homeowners' association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis that is a reasonable alternative) (citations omitted); Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 348, 356 S.E.2d 411, 414 (Ct. App. 1987) (Court of Appeals found that the association's flat fee system of charges violated the fixed rate requirement under Article III, Section 1, of the Bylaws and could not be defended on the grounds that it was a reasonable alternative under the business judgment rule.) (citations omitted.)

For these reasons, the Court of Appeals erred in failing to uphold the trial judge's factual findings that the cost of repair and replacement of the A and B Co-owners' windows and sliding glass doors remained their sole financial responsibility. Consequently, the Court of Appeals further erred by applying the business judgment rule to the Board's invalid

assessment. The Board had previously admitted on the record to using the business judgment rule to change the prescribed method of assessment after the window and sliding glass door amendments had been finally voted down by the membership for good in March of 2009. [R. pp. 2256-2257; R. p. 1283.] It is hard to understand why the Court of Appeals failed to take exception with the Board's unauthorized use of the business judgment rule for this purpose. By changing the prescribed method of assessment mandated under Sections 3.6 and 4.3 of the Master Deed and 6.1 of the Bylaws, the Board's *ultra vires* action directly violated the Court of Appeals' own holding in Seabrook Island Prop. Owners Ass'n. Id. at 348, 356 S.E.2d at 414 [R. pp. 2256-2257.]

(C) The Court of Appeals' erred by reversing the trial judge's findings of fact that the Board's 2010 and 2011 operating budget costs of repair assessment were ultra vires actions and outside the scope and protection of the business judgment rule.

The trial judge found that "[t]he Board's knowing[] fail[ure] to place the adopted annual budgets on the agenda for presentation to the Co-owners at their Annual Members' Meetings in 2009 and 2010, respectively, was an *ultra vires* act because it violated the affirmative requirements of [Sections] 1.12,[11] 5.2,[12] and [Section]5.3 of the Bylaws." [R. p. 24, ¶ 2. (Emphasis added).] Further, the trial judge found that the Board's failure to discharge its mandatory duty under Section 5.3[13] unduly prejudiced the Petitioners' rights to

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

[12]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.]

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

timely challenge, object, and/or amend the invalid budgetary repair assessments. [R. p. 816; R. pp. 24-25.] The Court of Appeals' position on this issue is particularly hard to comprehend given that at the hearing on May 21–22, 2012, the Council's attorney admitted on the record that, "***the [budgetary] assessment as rendered by the board ... is an 'ultra vires act.'***" [R. p. 795, p. 25; (Emphasis added).] The trial judge found that the Board's attempt to remedy this deficiency through its assertion of protection under the business judgment rule was without merit and contrary to South Carolina law. [R. pp. 24-25.]

Now, the Board maintains that the trial judge's ruling was error. Specifically, the Board contended in its appeal to the Court of Appeals that "an *ultra vires* is an unauthorized act, while the (admitted) failure to present the annual budgets to the [Petitioners] and Co-owners for amendment in 2010 and 2011 constitutes inaction." [Final Brief of Appellant, p. 21, ¶ 2; R. pp. 1624-1631.] The Board argues in the alternative that, "even if the trial court is correct on this point . . . breach of one or more expressed provisions of the Master Deed and Bylaws does not mean that the Board is stripped of protection under the business judgment rule for every other action. . . ." In other words, even if the [Respondent] improperly continued to enforce the 2006 amendment and failed to present annual budgets, it was error for the trial judge to find that these actions stripped [the Board] of all protection under the business judgment rule for all ***other*** actions." [Final Brief of Appellant, p. 21, ¶ 2 and 3; R. pp. 1624-1631.]

The Board's argument compounds its deliberate and illegal actions in attempting to enforce amendments that it previously admitted were invalid, with a disingenuous distinction that is meaningless. First, the Board's inaction in failing to present its 2010 and 2011 operating surcharges to all Co-owners, including the Petitioners, for review and amendment

was not authorized under Sections 1.12, 5.2, and 5.3 of the Bylaws and was a material breach of its mandatory duties. This fact coupled with Council's extreme bad faith by simultaneously requiring the Petitioners to pay repair costs pursuant to an admittedly "invalid [window amendment] assessment" speaks for itself. [R. p. 816; R. pp. 24-25.] Second, it is irrelevant whether the business judgment rule applies to any other Board action because the ***only relevant action*** in this lawsuit concerns the Board's window and sliding glass door repair assessment against Petitioners. This act, which the trial judge found was an improper effort to enforce an invalid assessment, is not some "other" act, it is the act complained of, itself. Moreover, all of the Board's inaction and breaches of affirmative duties under the Bylaws are unauthorized and *ultra vires*, and therefore not afforded protection under the business judgment rule.

For these reasons, the Court of Appeals exceeded its scope of review 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.

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 the South Carolina Supreme Court where a Board may be liable for its neglectful inaction and failure to uphold its mandatary duties under the Master Deed and Bylaws and South Carolina law.

The expanded application of the business judgment rule pronounced by the Court of Appeals will cause it to be erroneously applied in instances such as this where the Board of a horizontal property regime has failed to make a business judgment decision or is liable to the Petitioners/Co-owners for its inaction and omissions under the Bylaws.

(A) The business judgment rule is only triggered by an affirmative business judgment decision.

Only when Council's governing board makes a ***conscious decision*** or a ***business judgment decision*** is the application of the business judgment rule triggered under South Carolina law.[14] see Dockside Ass'n v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987) ("[T]he business judgment rule precludes judicial review of ***actions taken by a corporate governing board*** absent a showing of a lack of good faith, fraud, self-dealing, or unconscionable conduct.")(citations omitted, Emphasis added); see also Goddard v. Fairways Development General Partnership, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App.1993)("In a dispute between the directors of a homeowners association and aggrieved homeowners, the ***conduct of the directors*** should be judged by the "business judgment rule" and absent a showing of bad faith, dishonesty, or ***incompetence***,[15] the ***judgment of the directors*** will not be set aside by judicial action.")

In light of the cases discussed above, it is implicit that the business judgment rule does not protect Council or its Board from its negligent inaction and omissions by failing to uphold its mandatory duty to maintain, repair, and replace the common elements. As its

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

[15]See 65 C.J.S. Negligence § 16 (2015)("In the law of negligence, *incompetence, or incompetency, is want of ability suitable to the task*, either with respect to natural qualities or experience or deficiency of disposition to use one's abilities and experience properly"). Here, the Board failed to follow the recommendations of its consultants/experts: George McGee, P.E. of McGee Consulting Association ("MCA"), Attorney 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 ocean front windows, the Respondent, 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 Respondent had been advised by its consultants/experts *"that problems from water intrusion are time related and tend to compound"* every 3 to 6 years. [R. pp. 1121-1127-A; R. pp. 5-6; (Emphasis added).] Accordingly, the Board's incompetence is evidenced by its failure to follow the safety and repair recommendations of its consultants/experts. Consequently, ***the board's inaction was not authorized under the governing documents and therefore was a breach of its duty***. [R. pp. 26-30.]

name suggests, for the business judgment rule to apply, actual decision making is required. It neither does, nor should it be applied in situations where a Board causes or exacerbates damages through negligent inaction, because that was not a business judgment. Put another way, here we had a failure to act, not an action.

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.). These decisions are compelling and persuasive, and more importantly, are wholly consistent with existing South Carolina precedent.

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

- "Council's governing Board, past and present, ***had actual notice that the Co-owners' windows and sliding glass doors had been leaking water into Buildings A and B since 1983*** evidenced by [its] meeting minutes from 1983 to 2010." [R. p. 31; R. p. 2007; (Emphasis added).];

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

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

- "[Respondent]'s consultants and/or experts had already determined that the Co-owners' leaking windows and sliding glass doors were causing damage to the common elements of Buildings A and B contrary to the [Council]'s reported denials of causation from the windows to this Court."[16] [R. pp. 32-33.];

- The Board's attorney admitted that, "[i]t is undisputed that the [Respondent]'s Board did not ask any expert to break out the damages attributable to the alleged failure of a Co-owners to maintain their windows and sliding glass doors[,]" in its response to Plaintiffs Rule 59(e) Motion."[17] [R. pp. 33-34.]; and

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

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

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

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

- "[Sections] 9.4, 12.1, and 16.2 of the Master Deed, and [Sections] 6.3,[18] 6.4,[19] and 7.3[20] of the Bylaws,[and the common law] ***impose affirmative obligations on Council's governing Board,*** *including, but not limited to: (1)* ***a duty enforce the terms of the Act, the Master Deed and these Bylaws by taking prompt and appropriate action to correct any violations***; and, additionally, (2) ***a duty to investigate***, . . . when presented with evidence which would show or reasonably show that an individual Unit Owner's neglect in maintaining his or her Unit has resulted in damage to the common elements . . ., [and] ***to determine whether or not it would be appropriate to individually assess the defaulting Unit Owner for the damage.***" [R. pp. 26-40; (Emphasis added).]

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

A. No.

Q. Can you explain why -No?

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

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

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

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

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

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

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

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

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

Here, the Board deviated from its mandatory duties under Sections 6.3, 6.4, and 7.1 of the Bylaws and the common law by its inaction in failing to investigate and pursue a recovery from any of the A and B Co-owners who were already known to be responsible parties liable for damages to the common elements and other individuals' units. [R. p. 1773; R. p. 2397; R. p. 32.] See Fisher v. Shipyard Village Council of Co-owners, Inc., at 409 S.C. at 178, 760 S.E.2d at 129. (The Court of Appeals ruled that "the duties created by the Bylaws and South Carolina law . . . support a duty to investigate who is responsible for damage to the common elements. . . . For Council to be able to perform its duty to try to recover from the responsible parties, it must first find out who caused the problem").

The Board admits ***"the requirement of the board to perform repairs if a co-owner's neglect . . . damaged another unit or the common elements, and to assess that co-owner for the accompanying cost."*** [Final Brief of Appellant below, p. 13; R. pp.1018-1023; (Emphasis added).] Thus, by its own admission the Board cannot escape the consequences of its inaction by arguing that it had no power to act. Accordingly, the Court of Appeals erred by applying the business judgment under these circumstances because the Board's inaction, by failing to investigate and assess the A and B Co-owners as known responsible parties for their damage to the private balconies, common walls, and the individual units, was not authorized under Sections 6.3, 6.4, and 7.3 of the Bylaws and South Carolina law, and therefore was a breach of its duty. [R. pp. 4- 13; R. p. 1328; (Emphasis added).]

(B) Court of Appeals' ruling erroneously applies the business judgment rule to any investigation concerning the Board's neglectful inaction and failure to uphold its mandatory duties under the Master Deed and Bylaws and South Carolina law.

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 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. This, in turn, creates a heightened standard of care implicitly requiring proof of gross negligence or bad faith which conflicts with the prior decisions of this Court 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).[21] 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 S.C. at 555-556, 335S.E.2d at 366. This Court reversed, holding that the

[21] Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 88, 508 S. E. 2d 565, 574 (1998), the lessee sued the condominium association in negligence after he fell down a stairway at night in an area where the lights were not working. This Court cited its earlier holding in Murphy, that a member of a condominium association may bring a tort action against the association for failing to properly maintain the common elements. 289 S.C. at 369, 345 S.E.2d at 709 The holding in Murphy coupled with S.C. Code Ann. § 27–31–120 (2007) led this Court to conclude that a *lessee* could bring an action *in tort* against the property regime for its failure to maintain the common areas. Id. (Emphasis added.)

"***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 S.C. 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"), an unincorporated condominium 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. The association raised imputed negligence as a defense, arguing that, as members of an unincorporated association, each member is both a principal and agent for the other members of the association, and thus the negligence of each member must be imputed to every other member. 289 S.C. at 368-369, 345 S.E.2d at 709-710. This Court disagreed with the association, reasoning 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."[22] Id. (Emphasis added.) In so determining, this Court relied on its opinion in Queen's Grant Villas, stating in relevant part:

> This Court has addressed the question of whether a property regime has standing to sue for defects in the common elements which it has a duty to maintain. Queen's Grant Villas Horizontal Property Regimes I–V v. Daniel International Corporation, 286 S.C. 555, 335 S.E.2d 365 (1985); Roundtree Villas Association v. 4701 Kings Corporation, 282 S.C. 415, 321 S.E.2d 46 (1984). We have noted that ***"[s]hould the Regime not uphold its duty to pursue a recovery for any alleged construction defects in the common elements which it maintains, it may be liable to the homeowners for its omissions."*** Queen's Grant, 286 S.C. at 556, 335 S.E.2d at 366. This necessarily implies that an association can be sued by the unit owners for its failure to discharge its duties. Murphy, 345 S.E.2d at 710. (alterations in original) (Emphasis added). Id.

Although Queen's Grant Villas and Murphy[23] focused on the issues of a condominium association's standing to sue and whether a condominium association can be sued for simple negligence, these cases taken together establish the proposition that a condominium association can be sued for breaching an ordinary negligence standard of care regarding its Board's neglectful inaction and/or failure to uphold its mandatory duties under the governing documents and South Carolina law.

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[22] As authority for this legal proposition this Court cited S.C. Code Ann. § 27-31-170 (2007). This Section provides in pertinent part: "Each co-owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the master deed or lease or in the deed or lease to his apartment. ***Failure to comply with any of the same shall be grounds for a civil action to recover sums due for damages or injunctive relief***, or both, maintainable by the . . . Council of Co-owners, ***or in a proper case, by an aggrieved co-owner***." (Emphasis added.)

[23] "Both S.C. Code Ann. § 27-31-170 (2007) and Article XVI, § 16.1 of the Respondent's 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 (N.D.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 (2007), 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: (Emphasis added).]

The Petitioners also rely upon decisions of this Court in Daniels v. Berry, 148 S.C. 446, 146 S.E. 420 (1929); Plyler v. Southern, 153 S.E. 277, 278 (1930) and Olin Mathieson Chem. Corp. v. Planters Corp. 236 S.C. 318, 114 S.E.2d 321(1960) for the principle that a director may breach his/ her ordinary negligence standard of care to the bank and/or private corporation by disregarding fundamental duties or by being inattentive. In Daniels v. Berry, a depositor sued the directors of an insolvent financial institution for the loss of certain deposits the bank received while it was insolvent This Court held that the directors were not liable to depositors for negligence. Yet, this Court stated:

> "Unquestionably directors, as agents of the bank, owe to the bank itself the duty to exercise ordinary care in the management of its affairs. A violation of that duty would constitute negligence, and the bank or its receiver when one has been appointed, or the creditors if the receiver should refuse to sue, may bring an action for the benefit of the bank against the directors for such negligence." 146 S.E. at 421.

In Plyler v. Southern,[24] this Court stated that the principle announced in Daniels v. Berry, governs in another context and that directors of corporation, whether organized for lending money or not may be liable on an ordinary negligence standard of care in the management of the affairs of the corporation and not merely for gross negligence. 153 S.E. at 278-279. Similarly, in Olin Mathieson Chem. Corp. v. Planters Corp., this Court stated: "[a]n officer of a corporation will not be shielded from liability because of want of

[24]In Plyler, the receiver of a "money lending institution" brought an action against the directors of the institution charging them with negligence and gross negligence for various actions. The trial judge instructed the jury based upon gross negligence standard, and the jury returned a verdict in favor of the directors. On a motion by the receiver, however, the judge granted a new trial because, according to the judge: "I instructed the jury that the Plaintiff must show by the preponderance of the evidence that the defendant directors were guilty of gross negligence before he could recover. I was in error. I am satisfied I should have charged the jury that the Plaintiff could recover if it were shown by a preponderance of the evidence that the defendant directors were guilty of negligence." 153 S.E. at 278. This Court affirmed the granting of a new trial. Id. at 279.

wrongdoing of another officer if that ignorance is the result of such officer's ***negligence and inattention to the business***." 236 S.C. at 328, 114 S.E.2d at 326. (Emphasis added.)

In that case, Olin Mathieson Chemical Corporation ("Olin") sold irrigation equipment to Planters Corporation of Conway ("Planters"), on consignment. James P. McAlpine ("McAlpine") and by James K Massey ("Massey")were the sole directors, officers, and stockholders of the corporation, with McAlpine serving as President and Massey serving as vice-president, secretary, and treasurer. 236 S.C. at 321-322, 114 S.E.2d at 322. Olin sued Planters, including McAlpine and Massey individually; alleging that they had negligently handled and intermingled the funds from the sale of its consigned irrigation equipment, which belonged to Olin, with the funds of the corporation, and never paid over the funds to Olin. 236 S.C. at 321-322, 114 S.E.2d at 323. Massey answered and asserted that he was not guilty of negligence or willfulness in permitting McAlpine to manage an operate the business. Massey further answered that at no time did he negligently or willfully handle or intermingle any of the funds derived from the sale of the consigned equipment. Id. The trial judge submitted to the jury the issue of whether Massey had been guilty of negligence in the handling of the funds that represented the sale of the equipment that was cosigned to Planters by Olin. 236 S.C. at 323,114 S.E.2d at 324. The jury returned a verdict against Massey. Massey appealed Id. This Court stated:

> When [Massey] accepted the position of vice-president, secretary, treasurer, and director of Planters, he contracted to give diligent attention to the business of the corporation and to be faithful in the discharge of the duties which the positions imposed upon him. [Massey] as treasurer of Planters Corporation, in accepting such office, obligated himself, and assumed the responsibility for receiving all moneys due and payable to the corporation, and property disbursing the same. ***If he failed in this duty, he was, at least, guilty of negligence***. 236 S.C. at 327-329, 114 S.E.2d at 326. (Emphasis added.)

This Court overruled all exceptions cited by Massey, and affirmed the rulings of the trial judge. 236 S.C. at 323,114 S.E.2d at 324.

Another case, particularly persuasive because of its almost identical facts is Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, Inc., 201 Md. App. 186, 29 A.3d 604 (Md. App. 2011). In Greenstein, condominium unit owners brought an action against the condominium association, alleging negligence based upon the following grounds: (1) in failing to timely investigate water leakage into the individual units and buildings in the condominium regime; and (2) in failing to file a lawsuit against the developer of the condominium within the statute of limitations. 201 Md. App at 187-189, 29 A.3d at 614-615. The Circuit Court granted the Association's motion for summary judgment. Unit owners appealed. Id. The Maryland Court of Special Appeals reversed the judgment of the Circuit Court reasoning that the association, which has the affirmative obligation to maintain and repair the common elements and the exclusive right to bring suit thereon, has the ***"duty to pursue a recovery for any alleged construction defects in the common elements which [the association] maintains."*** Id. Its authority is augmented by the fact that Maryland Court of Special Appeals' ruling cites this Court's holdings in Queen's Grant Villas, 286 S.C. at 555, 335 S.E.2d at 365, and Murphy,[25] 289 S.C. at 369, 345 S.E.2d at 71 as supporting authority. Relying on this Court's holdings, the Court of

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[25]The Supreme Court of North Dakota in Agassiz West Condominium Ass'n, relying on the case of Murphy v. Yacht Cove Homeowners Ass'n, Id. 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" 527 N.W.2d at 248. In Agassiz West Condominium Ass'n, 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***." 527 N.W.2d at 248-249. . (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

Special Appeals held that ***"the individual unit owners have a cause of action against the association when the association breaches that duty by failing to pursue the claim altogether or to negligently pursue such claim."*** 201 Md. App at 204, 29 A.3d at 605-606.

As a consequence of the Court of Appeals' erroneous ruling, the business judgment rule will now be broadly applied to ***"any investigations"*** to determine if Council met its duty, ***even those concerning its Board's alleged inaction, omissions, and/or failure to uphold its mandatory duties under the Master Deed and Bylaws and South Carolina law.*** This effectively changes the simple negligence standard of care mandated by this Court under Queen's Grant Villas, and Murphy by further requiring Petitioners ***"to show the Council acted without good faith."***[26] Shipyard Village, 409 S.C. at 181,760 S.E.2d at131. (Emphasis added.) A standard of care penalizing only the Board's gross negligence or bad faith would virtually eliminate any accountability to the Petitioners/Co-owners for the Board's inaction and omissions, leaving it to ignore problems and do as it pleases, unfettered by any other shackles.

Contrary to Court of Appeals' ruling, the theory of "Board liability" for inattention, evidenced by a failure to monitor or manage the affairs of the corporation by disregarding mandatory duties, is well recognized in South Carolina, and the common thread in the above cases and this case is the Board's breach of that affirmative duty under the corporation's governing documents and South Carolina law.

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[26] 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***.)

For the foregoing reasons, the Court of Appeals' ruling is wholly inconsistent and conflicts with this Court's decisions in Queen's Grant Villas, Murphy, Olin Mathieson Chem. Corp., and Dockside Ass'n, which are controlling on this point of law. See S.C. Const. Art. V., § 9; State v. Cheeks, 400 S.C. 329, 342, 733 S. E. 2d 611, 618 (Ct. App. 2014) (Court of Appeals lacks authority to rule ***against prior published precedent from the South Carolina Supreme Court***, and is bound by the decisions of the Supreme Court).

CONCLUSION

The Court of Appeals' opinion should be reversed, and the trial judge's findings of fact and rulings should be re-affirmed regarding the inapplicability of the business judgment rule to the Council's "invalid [window] assessment" based upon its Board's *ultra vires* acts, lack of good faith, and inaction by failing to discharge its affirmative duties under Section 3.6 and 4.3 of the Master Deed and Sections 1.12, 5.2, 5.3, 6.1, 6.3, 6.4. and 7.3 of Bylaws." [R. p. 21; R. pp. 38-40.] Additionally, trial judge's findings of fact and ruling that the Board breached its duty to investigate the A and B Co-owners (as known responsible parties) for damages to the common elements should be re-affirmed. [R. pp. 38-40.] The relief requested is supported by the following uncontroverted evidence in the record:

- In 2003, the Council instructed the Co-owners that they were totally responsible for all maintenance and repair costs regarding their windows and sliding glass doors instead of the Association. [R. pp.6-9; R. p. 1319.];
- Window amendment did not pass after three failed votes between 2006 and 2009 as admitted by Council. [R. pp. 114-115; R. p. 816; R. p.1283, ¶ VIII];
- The Board has taken no action to void the admittedly "invalid [window] amendment" filed in 2007 in the Georgetown County Clerks' Office. [R. p. 1108];

- Special repair assessment (pursuant to invalid window amendment) was voted down by the unit owners on August 1, 2009;

- 2010 and 2011 annual budgets were not authorized repair assessments under Sections 1.12, 5.2, and 5.3 of the Bylaws. [R. p. 24, ¶ 2];

- A and B Co-owners are still responsible for all construction costs ("hard and soft") relating to the repair and replacement of their windows and sliding glass doors. [R. p. 31; R. p. 1319; Appellant (Council)'s Return, p. 2];

- The Board knowingly chose not to fully assess the A and B Co-owners for all construction costs relating to the repair and replacement of their failing windows and sliding glass doors in direct contravention of the governing documents. A and B Co-owners were only assessed for part of the construction costs based upon the business judgment rule. [Bray Aff., R. pp. 2256-2257,¶ ¶ 11and 12; R. pp. 730-739.];

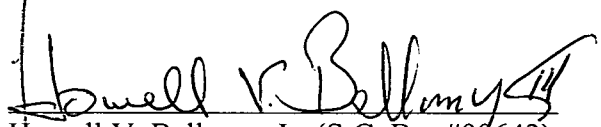
- The Board has no right to change the method of assessment set out in Sections 3.6 and 4.3 of the Master Deed and Section 6.1 of the Bylaws (after the window and sliding glass door amendments had failed to pass) by not collecting the total construction costs for the replacement and repair of windows and sliding glass doors from A and B Co-owners. [Bray Aff., R. pp. 2256-2257; R. pp. 730-739.];

- The Board claims that the business judgment rule gives it the right to assess the C and D Co-owners for part of the construction costs is misplaced when such a decision is *ultra vires* because it changes the method of assessment. [Bray Aff., R. pp. 2256-2257; R. pp. 730-739.]; and

- The Board argued that it had no duty to investigate in furtherance of that contention and has admitted that it "did not ask any expert to break out the damages attributable to the failure of the [A and B] Co-owners to maintain, repair, and replace their windows and sliding glass doors." [R. p. 34.].

For all reasons described herein, 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

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,

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v.

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

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

v.

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

PROOF OF SERVICE

I certify that I have served copies of the **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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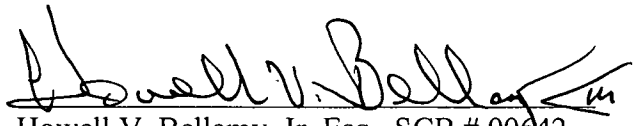

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