IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III
Beaufort County Master-in-Equity

Case No. 2011-CP-07-02497

Appellate Case No.: 2015-001568

QUARTERMASTER AT BROAD CREEK LANDING OWNERS' ASSOCIATION, INC.,.....Appellant,

vs.

BROAD CREEK LANDING HORIZONTAL PROPERTY REGIME,.....Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

I. Whether the Court of Common Pleas erred in finding that the Reciprocal Easement and Amenity Use Agreement ("the Agreement") was clear and unambiguous regarding the calculation of the assessments imposed on the Appellant (hereinafter "Plaintiff"), when the assessment provisions of the Agreement required the establishment of a common area budget to arrive at an accurate assessment, the Agreement did not set forth how such budget was to be determined, and the Respondent (hereinafter "Defendant") failed to introduce evidence as to such a budget so that accurate assessments could be calculated.

II. Whether the Court of Common Pleas erred in finding that the Plaintiff has no standing to maintain this action after its dissolution, when the Plaintiff has associational standing to represent its members in this matter, and, by law, one of the purposes for which the Plaintiff has continued to exist since its dissolution is to collect its assets and to distribute them to its members.

III. Whether the Court of Common Pleas erred in finding the Plaintiff's action barred by the 3-year statute of limitations for contracts, when the Agreement was sealed by the signatories, and, therefore, falls within the 20-year statute of limitations for sealed instruments.

IV. Whether the Court of Common Pleas erred in finding that the Agreement was an existing contract containing terms that could be enforced against the Plaintiff,

when the Defendant was a dissolved corporate entity that was not in existence at the time the Agreement was entered into, and the Plaintiff also was not in existence at such time.

V. Whether the Court of Common Pleas erred in failing to recognize or rule upon the undisputed testimony that neither the Defendant's president nor any person on the Defendant's board was even aware of the formula by which the Plaintiff was being assessed, when such fact was relevant to whether the Defendant's board met the standard of care for board members, which, in turn, was relevant to whether the Defendant correctly calculated the assessments imposed on the Plaintiff.

VI. Whether the Court of Common Pleas erred in failing to recognize or acknowledge that the budget introduced into evidence by the Plaintiff included insurance and reserves that are clearly not related to common areas or amenities, erred in failing to recognize or acknowledge the undisputed testimony that insurance for the Defendant's condominium buildings was included in the overall budget and that such inclusion created an overcharge to each of the Plaintiff's owners, and erred in finding, against the uncontradicted testimony, that there was no persuasive evidence that the Defendant ever miscalculated assessments or inappropriately charged the Plaintiff's owners under the Agreement.

STATEMENT OF THE CASE

The Plaintiff, Quartermaster at Broad Creek Landing Owners' Association, Inc. ("Quartermaster"), commenced this action by filing its Complaint in the Court of Common Pleas on June 9, 2011. The Plaintiff's action alleged that the Defendant, Broad Creek Landing Horizontal Property Regime ("Broad Creek" or "Regime"), breached the Reciprocal Easement and Amenity Use Agreement by miscalculating the assessments called for by the Agreement and overcharging the Plaintiff for the assessments. The Plaintiff sought an order by the court requiring the Defendant to disclose the financial records sought by the Plaintiff relevant to the alleged overcharges, as well as a refund of all overcharged assessments under the Agreement. The Defendant filed an Answer and Affirmative Defenses. The Defendant then filed a motion and supplementary motion for summary judgment. The court denied the Defendant's motions. A trial was held before Beaufort County Master-in-Equity Honorable Marvin H. Dukes III on October 21, 2013. On September 30, 2014, Judge Dukes issued an order finding that the Agreement was clear and unambiguous regarding the Defendant's assessments against the Plaintiff, and that the Defendant had not breached the Agreement. The Plaintiff filed a Motion for a New Trial and/or Amendment of Judgment. On June 19, 2015, the trial court denied the Plaintiff's Motion. The Plaintiff filed its Notice of Appeal to this Court on July 17, 2015.

STATEMENT OF FACTS

The basis of this action is that the Defendant breached the Agreement between the parties in miscalculating and overcharging the Plaintiff for the assessments set forth in the Agreement. The Agreement was entered into between the parties on December 20, 1990. (*See* Agrmt. p. 1.) All the owners within Quartermaster own their properties in fee simple, and Quartermaster is not a Horizontal Property Regime. (*See* Compl. ¶ 6.) The Agreement was designed to establish the rights of the respective parties and the owners within Quartermaster and Broad Creek to share certain roads, amenities, and open spaces, as well as to share the use and maintenance costs of certain roads, amenities, and open space charges. (*Id.*) The Agreement provided that Quartermaster owners were to pay a pro rata share for Regime road maintenance, roadside landscaping, insect control, security, and maintenance, improvement, and operation of the common area. (Agrmt. arts. 4.1, 4.2.) The Agreement defined "common area" as "[a]ll areas and improvements thereon or thereunder within the exterior boundaries of the Regime Property identified as common area under the Master Deed for the Regime, as the same may be amended from time to time, including parking areas, roadways, sidewalks, landscaped areas, the amenities area." (*Id.* art. 2.5.) The definition of "amenities area" specifically excludes the 54 Broad Creek condominium buildings, which contain 278 units. (*Id.* art. 2.1.)

The Agreement sets forth alternative methods for calculating the assessments. First, Broad Creek could assess Quartermaster's owners to pay a monthly assessment of $100 per each dwelling unit and $25 per each unimproved lot. (*Id.* art. 4.2.) Alternatively, in its discretion, Broad Creek could impose an assessment on an improved lot in an

> amount equal to its prorata share, if such dwelling unit were an "Average Unit" within the Regime provided further that the budgetary line items entitled "Building Maintenance" and "Termite Bond"are subtracted from the monthly regime fee for the "Average Unit" and provided further that, two-thirds (2/3) of the "Property Insurance" line from the "Average Unit" monthly regime fee is subtracted.

(*Id.* art. 4.2(b)(1).) It was this second formula of the Agreement that Broad Creek purportedly used to calculate the assessments for the owners of Quartermaster. (*See* Transcript of Oct. 1, 2013 Hearing ["Tr."] p. 48, line 10.)

An "Average Unit" is defined as the "[t]otal combined assessment for all regime property owners divided by the number of regime property owners." (Agrmt. art. 2.6.) It is not possible under the Agreement to calculate the amount of the assessment under the second formula set out above without knowing the budget for the operation and maintenance of the common area, given that the assessment for all Regime property owners, which determines the "Average Unit" both for Regime property owners and Quartermaster property owners, is derived from such budget. For example, under the heading "Payment of Monthly Assessment," the Agreement provides that "[t]he Regime or Regime managing agent for the common area located

on the Regime Property shall prepare an annual budget for maintenance and operating expenses for the common area and the improvements located thereon." (*Id.* art. 4.3.) Indeed, there was testimony by the owner of the management company that manages Broad Creek that an "Average Unit" was calculated by taking the *budget* for the common area and dividing it by the number of members in Broad Creek. (Tr. p. 49, lines 6-11.) The common area budget is tied directly to payment of the assessments, in that, in the same article, the Agreement provides that "Quartermaster residents shall make monthly payments as required by the Regime or Regime managing agent." (Agrmt. art. 4.3.) That the assessments are derived from the budget for the common area is also made clear by the provision that "Quartermaster residents shall bear a portion of the expense of operation and management of the common area, including the amenities area, as set forth in Section 4.2 below." (*Id.* art. 4.1.) The Court of Common Pleas did not require Broad Creek to introduce any evidence as to the budget for the common area, and the Defendant introduced no such evidence. In fact, there was testimony by a resident of Quartermaster that he had never seen a common area budget from the Defendant in all the years he had lived in Broad Creek. (Tr. p. 115, line 24–p. 116, line 6.) The president of the Broad Creek board testified on deposition that neither he nor anyone else on the board knows how the Quartermaster assessment works. (*See* Thomas Arthur Waters Dep. p. 65, lines 11-16.) Thus, while the court concluded that the Agreement was clear and unambiguous regarding the calculation

of the assessment, the court lacked the very information essential to calculating the correct assessments. (*See* Order p. 2, dated Sept. 30, 2014.)

In addition to the lack of evidence of a common area budget, which was both required by the Agreement and essential to the Court of Common Pleas' determination as to whether the assessments were properly calculated, there was ample evidence that Quartermaster residents were assessed for items that were not part of the common area for which they were to be assessed a portion of the expense of operation and management. (*See* Agrmt. art. 4.1.) The Agreement provided that the assessments of Quartermaster owners were

> to be used exclusively for landscape maintenance and improvement, security, pool supplies and maintenance, pest control (excluding termite bond), common area electric, common area water/sewer, garbage and trash collection, management fee, reserve and general office expenses (including, but not limited to utilities, office supplies and professional services).

(*Id.* art. 4.2.) The budget of Broad Creek (not the common area) that is used to set the Quartermaster Assessment includes reserves for the structures where the Broad Creek condominiums are located, even though the Agreement specifically excludes such structures under the foregoing provision from the common area for which Quartermaster owners were to pay assessments. (Tr. p. 54, lines 9-19; p. 71, lines 14-18.) Moreover, assessments paid by Quartermaster owners have been used by the Defendant to fund insurance for the Defendant's buildings, which was also a use specifically excluded by the Agreement. (*Id.* p. 72, line 23–p. 73, line 10; p. 128, line

7–p. 129, line 19.) At trial, the Plaintiff introduced a budget showing the amounts by which Quartermaster had been overcharged by the Defendant for such items. (*See* BCL/QM Detailed Financial Document(s) & QM Fee per Reciprocal (by QM Owners) ["BCL/QM Doc(s)."].)

Despite the lack of evidence, both in the Agreement and in witnesses' testimony, as to how the monthly Quartermaster assessments were to be calculated, the Court of Common Pleas found that the Agreement was "clear and unambiguous regarding calculation of assessments." (Order p. 2.) The court concluded that "assessments are to be calculated using the same budget as the calculation of the monthly assessment for the "Average Unit," notwithstanding that no such budget was in evidence. (*Id.*)

In its subsequent order denying the Plaintiff's Motion for a New Trial and/or Amendment of Judgment, the Court of Common Pleas made a number of additional findings and conclusions. Specifically, the court (1) reiterated that the assessments had been properly calculated according to the formula in the Agreement, (2) found that the Plaintiff had no standing to bring the action, (3) found that the Plaintiff had no standing to bring claims for damages, (4) concluded that the Plaintiff's claims were barred by the statute of limitations, and (5) found that the parties agreed that the budget for the "Average Unit" was the "measuring stick" for the Quartermaster assessments and that to find otherwise would be in direct conflict with the

unambiguous terms of the Agreement, despite the fact that the court had no evidence before it of "the budget for the Average Unit." (*See id.* pp. 4-14.)

ARGUMENT

I. THE COURT OF COMMON PLEAS ERRED IN FINDING THAT THE AGREEMENT WAS CLEAR AND UNAMBIGUOUS REGARDING THE CALCULATION OF THE ASSESSMENTS IMPOSED ON THE PLAINTIFF, WHEN THE ASSESSMENT PROVISIONS OF THE AGREEMENT REQUIRED THE ESTABLISHMENT OF A COMMON AREA BUDGET TO ARRIVE AT AN ACCURATE ASSESSMENT, THE AGREEMENT DID NOT SET FORTH HOW SUCH BUDGET WAS TO BE DETERMINED, AND THE DEFENDANT FAILED TO INTRODUCE EVIDENCE AS TO SUCH A BUDGET SO THAT ACCURATE ASSESSMENTS COULD BE CALCULATED

It is axiomatic that the main guide in contract interpretation is to ascertain and give legal effect to the intentions of the parties as expressed in the language of the contract. *E.g.*, *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 579 S.E.2d 132 (2003); *Cullen v. McNeal*, 390 S.C. 470, 702 S.E.2d 378 (Ct. App. 2010); *N. Am. Rescue Prods. v. Richardson*, 411 S.C. 371, 769 S.E.2d 237 (2015) (the primary concern of the court interpreting a contract is to give effect to the intent of the parties). The best evidence of the parties' intent is the contract's plain language. *N. Am. Rescue Prods.*, 411 S.C. at 378, 769 S.E.2d at 240. A contract is ambiguous when it is capable of more than one meaning, or when its meaning is unclear. *Id.* If

a document creates a contractual ambiguity, a court should look to outside evidence to aid in interpretation. *Id.* at 379, 769 S.E.2d at 241.

The parties' intention must be gathered from the contents of the entire agreement, and not from any particular provision in the contract. *Koon v. Fares*, 379 S.C. 150, 666 S.E.2d 230 (2008); *Cullen*, 390 S.C. at 483, 702 S.E.2d at 385; *Martin v. Carolina Water Servs.*, 280 S.C. 235, 312 S.E.2d 556 (Ct. App. 1984) (when agreement in question is written contract, intention of parties must be inferred from contents of whole agreement and not from any one of its several parts); *N. Am. Rescue Prods.*, 411 S.C. at 378, 769 S.E.2d at 240 (a contract must be read as a whole document); *McGill v. Moore*, 381 S.C. 179, 672 S.E.2d 571 (2009) (same). An interpretation that gives meaning to all parts of a contract is preferable to one that renders provisions in the contract meaningless or superfluous. *Stevens Aviation, Inc. v. DynCorp Int'l, LLC*, 407 S.C. 407, 756 S.E.2d 148 (2014). Hence, a contract should be construed so as to give, if possible, full force and effect to every part of it. *Burch v. S.C. Cotton Growers' Co-op. Ass'n*, 181 S.C. 295, 187 S.E. 422 (1936); *see also M&M Group, Inc. v. Holmes*, 379 S.C. 468, 666 S.E.2d 262 (Ct. App. 2008) (if practical, documents will be interpreted to give effect to all provisions).

In the case at bar, the trial court erred in finding that the Agreement was clear and unambiguous as to the calculation of the assessments imposed on the owners of Quartermaster. As discussed above, the terms of the Agreement do not expressly

provide a method to calculate the amount of the assessment under the second formula used by Broad Creek without knowing the budget for the operation and maintenance of the common area. Broad Creek failed to introduce any evidence as to the budget for the common area. There was testimony by a resident of Quartermaster that he had never seen a common area budget from the Defendant in all the years he lived in Broad Creek. (Tr. p. 115, line 24–p. 116, line 6.) The president of the Broad Creek board testified on deposition that neither he nor anyone else on the board knows how the Quartermaster assessment works. (*See* Thomas Arthur Waters Dep. p. 65, lines 11-16.) In light of such evidence, the trial court erroneously concluded that the Agreement was clear and unambiguous regarding the calculation of the assessment, because the court lacked the information necessary to calculate the correct assessments. (*See* Order p. 2.) Under these circumstances, the Agreement was ambiguous under the law of South Carolina because it was capable of more than one meaning with respect to calculation of the assessments, or its meaning was unclear on this point. *N. Am. Rescue Prods.*, 411 S.C. at 378, 769 S.E.2d at 240. Therefore, the trial court erred in finding that the Agreement was clear and unambiguous.

The Court of Common Pleas also erred in interpreting the Agreement because it did not read the instrument as a whole, as required under the foregoing principles of law. It is not possible to understand the meaning of the "Average Unit" formula for the assessments without examining the provisions on which this formula is based,

including the provisions (1) explaining that the purpose of the assessments is to have Quartermaster residents bear a portion of the expense of the operation and management of the common area (*see* Agrmt. art. 4.1), which requires establishment of a budget for such expense, and (2) requiring Broad Creek to prepare an annual budget for common area maintenance and operating expenses, which, in turn, gives rise to the obligation of Quartermaster owners to pay the monthly assessments (*id.* art. 4.3). The trial court, however, focused upon the "Average Unit" formula in isolation, without recognizing that such formula depends for its meaning on the other aforesaid provisions of the Agreement.

Moreover, the trial court erroneously failed to construe the Agreement as a whole by ignoring the evidence that the assessments imposed by Broad Creek included elements that were specifically excluded by the Agreement. As discussed above, the calculation of the assessments included reserves for the structures where the Broad Creek condominiums are located, even though the Agreement specifically excludes such structures, and the assessments paid by Quartermaster owners have been used to fund insurance for the Defendant's buildings, which was also a use specifically excluded by the Agreement. The court's failure to consider the provisions of the Agreement that specifically excluded assessments for such items resulted in its erroneous finding that the assessments were properly calculated. To compound this

error, the court also failed to consider the budget prepared by Quartermaster, which clearly showed the Defendant's charges for these improper items.

For all the foregoing reasons, the Court of Common Pleas erred in its application of South Carolina law to reach its finding that the Agreement was clear and unambiguous, and that the Defendant had properly calculated the assessments under the Agreement. Therefore, the court's judgment should be reversed.

II. THE COURT OF COMMON PLEAS ERRED IN FINDING THAT THE PLAINTIFF HAS NO STANDING TO MAINTAIN THIS ACTION AFTER ITS DISSOLUTION, WHEN THE PLAINTIFF HAS ASSOCIATIONAL STANDING TO REPRESENT ITS MEMBERS IN THIS MATTER, AND, BY LAW, ONE OF THE PURPOSES FOR WHICH THE PLAINTIFF HAS CONTINUED TO EXIST SINCE ITS DISSOLUTION IS TO COLLECT ITS ASSETS AND TO DISTRIBUTE THEM TO ITS MEMBERS

An association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy. *Warth v. Seldin*, 422 U.S. 490 (1975). Moreover, in attempting to secure relief from injury to itself, the association may assert the rights of its members, at least so long as the challenged infractions adversely affect its members' associational ties. *Id.* at 511; *see also Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333 (1977) (an association may have standing to assert the claims of its members, even when it has suffered no injury from the challenged activity); *Carnival Corp. v. Hist.*

Ansonborough Neighborhood Ass'n, 407 S.C. 67, 753 S.E.2d 846 (2014) (a plaintiff that is an association may possess standing by virtue of associational standing on behalf of its members, if one or more of its members will suffer an individual injury by virtue of the contested act). The three-part test for associational standing provides that an association has standing to bring suit on behalf of its members when (1) the members would otherwise have standing to sue in their own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit. *Hunt*, 432 U.S. at 343; *Carnival Corp.*, 407 S.C. at 76, 753 S.E.2d at 851; *Pa. Psychiatric Soc'y v. Green Spring Health Servs.*, 280 F.3d 278 (3d Cir. 2002). The need for some individual participation by association members does not necessarily bar associational standing, provided that there is no need for fact-intensive individual inquiry. *Pa. Psychiatric Soc'y*, 280 F.3d at 283. The court in *Pennsylvania Psychiatric Society* held that a psychiatrists' association potentially had associational standing to bring claims on its members' behalf against managed care organizations ("MCOs"), including an allegation that the MCOs excessively burdened the reimbursement process, since the association could potentially establish the claims without extensive participation by individual members, in that the association alleged systemic violations by the MCOs requiring only sample testimony from members. *Id.* at 286; *see also Hunt*, 432 U.S. at 344 (neither interstate commerce claim nor request

for declaratory judgment and injunctive relief required individualized proofs and thus were properly resolved in a group context on issue of associational standing to sue).

In the present case, the Plaintiff has standing under the doctrine of associational standing. This is because the owners of Quartermaster have standing to sue in their own right in that they were forced to pay the disputed assessments, the interest in accurate assessments is germane to the purpose of Quartermaster in that the organization exists to defend the interests of its members, including their financial interests, and the Plaintiff's claims and the relief requested does not require a fact-intensive individual inquiry of the members. Here, the Plaintiff sued both for declaratory relief, which, as discussed above, does not require individualized proofs sufficient to defeat associational standing, and for a refund of the overcharged assessments. As to the latter relief, fact-intensive individualized proof is unnecessary because each of the members was charged the same assessment under the "Average Unit" formula, and each member suffered the same loss through the improper inclusion of building reserves and building insurance in the assessments. The determination of these amounts requires only a simple mathematical calculation. Accordingly, fact-intensive individualized proofs are unnecessary. For these reasons, the Plaintiff has associational standing to assert the rights of its members, and the trial court erred in concluding that the Plaintiff had no standing to assert such rights.

The court below also erred in concluding that the Plaintiff lacked standing because it had been administratively dissolved before it filed this action. S.C. Code Ann. § 33-14-210 provides, in relevant part:

> § 33-14-210. Procedure for and effect of administrative dissolution.
>
> . . . .
>
> (d) A corporation dissolved administratively continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs under Section 33-14-105 and notify claimants under Sections 33-14-106 and 33-14-107.

Id. § 33-14-210(d).

Section 33-14-105, cited in the foregoing statute, provides:

> § 33-14-105. Effect of dissolution.
>
> (a) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs, including:
>
> (1) *collecting its assets*;
>
> (2) disposing of its properties that will not be distributed in kind to its shareholders;
>
> (3) discharging or making provision for discharging its liabilities;
>
> (4) *distributing its remaining property among its shareholders according to their interests*; and
>
> (5) doing every other act necessary to wind up and liquidate its business and affairs.
>
> . . . .

(c) *Dissolution of a corporation does not*:

. . . .

(5) *prevent commencement of a proceeding by or against the corporation in its corporate name*[.]

Id. § 33-14-105(a), (c)(5) (emphasis added).

In the present case, Quartermaster commenced this action in order to collect its assets, i.e., to seek a refund of assessment overcharges made by Broad Creek against the Plaintiff's members, and to distribute such recovered property to its members. As discussed above, even though Quartermaster had been administratively dissolved prior to its commencement of this action, it was authorized by statute to engage in such litigation. Therefore, the Court of Common Pleas erred in finding that the Plaintiff's administrative dissolution resulted in a lack of standing to maintain this action. Therefore, the judgment of the court below should be reversed.

III. THE COURT OF COMMON PLEAS ERRED IN FINDING THE PLAINTIFF'S ACTION BARRED BY THE 3-YEAR STATUTE OF LIMITATIONS FOR CONTRACTS, WHEN THE AGREEMENT WAS SEALED BY THE SIGNATORIES, AND, THEREFORE, FALLS WITHIN THE 20-YEAR STATUTE OF LIMITATIONS FOR SEALED INSTRUMENTS

The statute of limitations for an action upon a contract is three years. *See* S.C. Code Ann. § 15-3-530. However, an action upon a sealed instrument must be brought

within 20 years. *See id.* § 15-3-520. By statute, a nonsealed instrument may be considered as sealed under specified circumstances:

> § 19-1-160. Nonsealed instruments may be considered as sealed.
>
> Whenever it shall appear from the attestation clause or from any other part of any instrument in writing that it was the intention of the party or parties thereto that such instrument should be a sealed instrument then such instrument shall be construed to be, and shall have the effect of, a sealed instrument although no seal be actually attached thereto.

Id. § 19-1-160.

Thus, the court in *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (Ct. App. 2005), stated that under the statute governing sealed instruments, if it appears from a nonsealed instrument that the parties intended for the contract to be sealed, then it will be deemed sealed. The court further observed that a nonsealed instrument may include provisions and indicia that evidence an intent that the contract be construed as a sealed instrument. *Id.* at 173, 609 S.E.2d at 551.

In the present case, the Agreement contains the following language: "IN WITNESS WHEREOF, the parties hereto set their hands and seals effective the date first above written." (*See* Agrmt.) Moreover, the probate as to each signature states that the witness "saw" the signatory "sign, *seal* and as its corporate act and deed, deliver the within written instrument." (*Id.* (emphasis added).)

The Court of Common Pleas cited *Orlando Residence, Ltd. v. Hilton Head Hotel Investors*, No. 9:89-CV-0662-DCN, 2013 WL 1103027 (D.S.C. Mar. 15, 2013),

aff'd, 565 F. App'x 212 (4th Cir. 2014), in finding that the Agreement is not a sealed instrument. Although the court stated that the agreement in *Orlando* was "identical" to the Agreement in the present case, this is clearly not so. As in the present case, the agreement in *Orlando* contained the language "IN WITNESS WHEREOF, the undersigned have hereunto set their hands and seals." *Id.* at *11. However, unlike in the present case, the agreement in *Orlando* did not contain the language "signed, sealed, and delivered." *Id.* Moreover, in *Orlando*, the notary's signature was sealed, but the party's was not. *Id.* at *11 n.5. Here, the parties' signatures were sealed in the probates, and the witness "saw" each signer's seal of the instrument. (*See* Agrmt.) Hence, unlike in *Orlando*, here there is clear evidence of an intent to seal the contract. Accordingly, under section 19-1-160, the Agreement is properly deemed to be a sealed instrument, such that the 20-year statute of limitations applies. Therefore, the trial court erred in concluding that the Plaintiff's claims are barred by the three-year statute of limitations, and its judgment should be reversed.

IV. THE COURT OF COMMON PLEAS ERRED IN FINDING THAT THE AGREEMENT WAS AN EXISTING CONTRACT CONTAINING TERMS THAT COULD BE ENFORCED AGAINST THE PLAINTIFF, WHEN THE DEFENDANT WAS A DISSOLVED CORPORATE ENTITY THAT WAS NOT IN EXISTENCE AT THE TIME THE AGREEMENT WAS ENTERED INTO, AND THE PLAINTIFF ALSO WAS NOT IN EXISTENCE AT SUCH TIME

A contract exists when there is an agreement between two or more persons upon sufficient consideration either to do or not to do a particular act. *Allegro, Inc. v. Scully*, 409 S.C. 392, 762 S.E.2d 54 (Ct. App. 2014), *cert. granted* (Apr. 22, 2015). It is essential to the validity of every agreement or instrument that the parties should be in existence. *See Allgood v. Allgood*, 135 S.C. 233, 132 S.E. 48 (1926). If one of the parties does not exist, then no contract can be formed. *In re Hawthorne Townhomes, L.P.*, 282 S.W.3d 131 (Tex. App. 2009). For example, a mortgage given to a person then deceased is void. *Allgood*, 135 S.C. 233, 132 S.E. at 53.

In the case at bar, the Court of Common Pleas failed to examine the implications of the fact that Broad Creek was a dissolved corporate entity or that the Plaintiff was not in existence at the time the Agreement was entered into. As discussed above, it is an essential prerequisite to the formation of a contract that both parties to the contract be in existence at the time the contract purportedly comes into being. Here, neither party was in existence. Because the Agreement was central to both the Plaintiff's claims and the Defendant's defenses, it was imperative for the trial court to take up the issue of whether the Agreement came into existence in the first

place. If the Agreement did not exist, then the Court of Common Pleas erred in entering judgment for the Defendant that the assessments were correctly charged to the owners of Quartermaster, in that, without the Agreement, Broad Creek had no basis to make the Plaintiff or its members pay anything to the Defendant.

Because the court below committed a fundamental legal error in failing to consider whether the Agreement came into existence, its judgment should be reversed.

V. THE COURT OF COMMON PLEAS ERRED IN FAILING TO RECOGNIZE OR RULE UPON THE UNDISPUTED TESTIMONY THAT NEITHER THE DEFENDANT'S PRESIDENT NOR ANY PERSON ON THE DEFENDANT'S BOARD WAS EVEN AWARE OF THE FORMULA BY WHICH THE PLAINTIFF WAS BEING ASSESSED, WHEN SUCH FACT WAS RELEVANT TO WHETHER THE DEFENDANT'S BOARD MET THE STANDARD OF CARE FOR BOARD MEMBERS, WHICH, IN TURN, WAS RELEVANT TO WHETHER THE DEFENDANT CORRECTLY CALCULATED THE ASSESSMENTS IMPOSED ON THE PLAINTIFF

A condominium management council has a duty to make a proper determination in deciding whether to assess charges to an owner for the common elements, when such charges arise from the owner's failure to provide maintenance for the common elements, as required by the bylaws. *See Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 409 S.C. 164, 760 S.E.2d 121 (Ct. App. 2014), *aff'd as modified on other grounds*, No. 2014-002394, 2016 WL 324721 (S.C. Jan. 27, 2016). In a dispute between the directors of a homeowners association and aggrieved

homeowners, the conduct of the directors should be evaluated by the business judgment rule. *Id.* at 179, 760 S.E.2d at 129. Absent a showing of bad faith, dishonesty, or incompetence, the judgment of the directors will not be set aside by judicial action. *Id.* at 180, 760 S.E.2d at 129. The business judgment rule does not allow a condominium management council to deviate from its duties, as specified in the association's bylaws and the master deed, simply because the actions the council took to determine whether to assess amounts for the common elements were reasonable. *Id.* at 181, 760 S.E.2d at 130; *see also Dockside Ass'n v. Detyens*, 294 S.C. 86, 362 S.E.2d 874 (1987) (business judgment rule precludes review of action taken by corporate governing board of condominium absent showing of lack of good faith, fraud, self-dealing, or unconscionable conduct).

In the present case, the president of the Defendant's board testified on deposition that neither he nor anyone else on the board knows how the Quartermaster assessment works. (*See* Thomas Arthur Waters Dep. p. 65, lines 11-16.) In light of the fact that such assessments resulted in hundreds of thousands of dollars in overcharges to the Plaintiff and its owners, the conduct of the Defendant's board with respect to the assessments is highly significant. A total lack of knowledge by anyone on the Defendant's board as to how the assessments against the Plaintiff work amounts at least to incompetence, which, as indicated above, is a basis for setting aside director action under the business judgment rule. The fact that the Defendant's

board likely violated the standard of care for directors of a condominium association is relevant to the core issue in this matter, i.e., whether the assessments were miscalculated and the Plaintiff was overcharged. If the Defendant's board failed in its supervisory duty by lacking the knowledge as to how to make the assessments, this is relevant evidence as to whether the assessments were miscalculated. By failing to consider the issue, the trial court overlooked evidence supporting a finding that the Defendant miscalculated the assessments and overcharged the Plaintiff and its owners. Accordingly, the judgment of the Court of Common Pleas should be reversed.

VI. THE COURT OF COMMON PLEAS ERRED IN FAILING TO RECOGNIZE OR ACKNOWLEDGE THAT THE BUDGET INTRODUCED INTO EVIDENCE BY THE PLAINTIFF INCLUDED INSURANCE AND RESERVES THAT ARE CLEARLY NOT RELATED TO COMMON AREAS OR AMENITIES, ERRED IN FAILING TO RECOGNIZE OR ACKNOWLEDGE THE UNDISPUTED TESTIMONY THAT INSURANCE FOR THE DEFENDANT'S CONDOMINIUM BUILDINGS WAS INCLUDED IN THE OVERALL BUDGET AND THAT SUCH INCLUSION CREATED AN OVERCHARGE TO EACH OF THE PLAINTIFF'S OWNERS, AND ERRED IN FINDING, AGAINST THE UNCONTRADICTED TESTIMONY, THAT THERE WAS NO PERSUASIVE EVIDENCE THAT THE DEFENDANT EVER MISCALCULATED ASSESSMENTS OR INAPPROPRIATELY CHARGED THE PLAINTIFF'S OWNERS UNDER THE AGREEMENT

An appellate court is bound by the factual findings of the trial court in a case at law unless the findings are without evidentiary support. *Eastman Kodak Co. v. S.C.*

Tax Comm'n, 308 S.C. 415, 418 S.E.2d 542 (1992). A finding of fact by a judge in an action tried without a jury is subject to being overruled on appeal if it is clearly inconsistent with the undisputed testimony in the case. *Kibler v. McIlwain*, 16 S.C. 550 (1882). In an action in equity, tried by the judge alone, on appeal the Court of Appeals has jurisdiction to find facts in accordance with its views of the preponderance of the evidence. *Barnes v. Johnson*, 402 S.C. 458, 742 S.E.2d 6 (Ct. App. 2013); *see also Blanks v. Rawson*, 296 S.C. 110, 370 S.E.2d 890 (Ct. App. 1988) (when action in equity is tried by a single judge, the Court of Appeals on review may decide whether the evidence supports factual findings based on its own view of the preponderance of the evidence); *Town of Kingstree v. Chapman*, 405 S.C. 282, 747 S.E.2d 494 (Ct. App. 2013) (on appeal in an action in equity, the Court of Appeals may find facts in accordance with its views of the preponderance of the evidence; therefore, the Court of Appeals may reverse a factual finding by the trial court in such cases when the appellant satisfies the appellate court that the finding is against the preponderance of the evidence). Except where the facts have been settled by a jury whose verdict has not been set aside, it is the duty of the Court of Appeals in equity cases to review challenged findings of fact as well as matters of law. *Barnes*, 402 S.C. at 466, 742 S.E.2d at 9.

In the case at bar, the trial court ignored the budget that the Plaintiff introduced into evidence showing that the Defendant assessed the Plaintiff's owners for insurance

and building reserves clearly not related to the common areas and amenities. As discussed herein, use of the assessments to fund insurance and reserves for the Defendant's buildings was specifically excluded by the Agreement. (*See* Agrmt. art. 4.2.) The budget introduced by the Plaintiff showed the amounts by which Quartermaster had been overcharged by the Defendant for such amounts. (*See* BCL/QM Doc(s).) In light of such evidence, the trial court's factual finding that there was "no persuasive evidence that Defendant has at any time miscalculated assessments or inappropriately charged owners of property at Quartermaster under the Agreement" (*see* Order p. 2) is wholly without evidentiary support and should not be accepted by the Court of Appeals. In fact, it is the duty of this Court to review the trial court's challenged findings of fact, and this Court may make findings of fact in accordance with its views of the preponderance of the evidence.

On a related point, the trial court erred by failing to consider the undisputed testimony that insurance for the Defendant's condominium buildings was included in Broad Creek's overall budget, resulting in an overcharge to the Plaintiff's owners. (Tr. p. 72, line 23–p. 73, line 10; Tr. p. 128, line 7–p. 129, line 19.) The court's failure to consider such testimony renders its finding that there was no evidence that the Defendant miscalculated the assessments or overcharged the Plaintiff's owners totally unsupported by the evidence, and subject to overturning by this Court under the aforesaid principles.

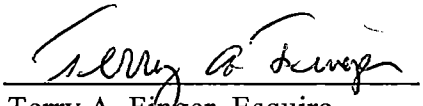
For these reasons, the trial court's findings on these points cannot stand under the applicable standards of review. Such findings were central to the court's judgment for the Defendant. Accordingly, this Court should reverse the judgment of the Court of Common Pleas.

CONCLUSION

For all the foregoing reasons, the Appellant, Quartermaster at Broad Creek Landing Owners' Association, Inc., respectfully requests that this Honorable Court reverse the judgment of the Court of Common Pleas, and enter judgment in favor of the Appellant as to the relief sought in the Appellant's Complaint.

Respectfully submitted,

Quartermaster at Broad Creek Landing
Owners' Association, Inc.

By: 

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Honorable Marvin H. Dukes, III
Beaufort County Master-in-Equity

Case No. 2011-CP-07-02497

Appellate Case No.: 2015-001568

QUARTERMASTER AT BROAD CREEK LANDING OWNERS' ASSOCIATION, INC., ... Appellant,

vs.

BROAD CREEK LANDING HORIZONTAL PROPERTY REGIME, ... Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Initial Brief of Appellant on Broad Creek Landing Horizontal Property Regime, by depositing a copy of the same in the U.S. Mail, postage prepaid, on March 8, 2016, addressed to Respondent's attorney of record, John S. Wilkerson, III, Esquire, Turner, Padget, Graham & Laney, P.A., P. O. Box 22129, Charleston, SC 29413.

March 8, 2016

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March 8, 2016

VIA UPS OVERNIGHT EXPRESS

The Honorable Jenny Abbot Kitchings
Clerk of Court
c/o Ms. Diane Greene
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Quartermaster at Broad Creek Landing Owner's Association, Inc.
vs. Broad Creek Landing Horizontal Property Regime
Civil Action No.: 2011-CP-07-02497
Appellate Case No. 2015-001568
Our File No.: 3986.001

Dear Clerk Kitchings:

Enclosed please find an original and one copy of the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal in the above-referenced matter. In addition, enclosed please find originals and copies of the respective Proofs of Service indicating service of the Initial Brief and Designation of Matter upon opposing counsel of record.

I would appreciate your filing the Initial Brief of Appellant, Designation of Matter, and Proofs of Service with the Court and returning clocked copies of each to me in the envelope provided herein for your convenience.

Thank you for your assistance in this matter.

Very truly yours,

FINGER, MELNICK & BROOKS, P.A.

Terry A. Finger

TAF/cc
Enclosures
cc: John S. Wilkerson, Esquire
Mr. Charles Vienne (via e-mail only)
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