

11/16/12

STATE OF SOUTH CAROLINA )

COUNTY OF GEORGETOWN )

IN THE COURT OF COMMON PLEAS )  
FIFTEENTH JUDICIAL CIRCUIT )  
CIVIL ACTION NO. 2009-CP-22-01655 )

Richard Fisher, Platte B. Moring, Jr., Marianne )  
Kochanski, and Jim H. Markley, Individually, and )  
in a Representative Capacity on Behalf of All )  
Persons Similarly Situated Who Owned Units in )  
Buildings C and D of the Shipyard Village )  
Horizontal Property Regime; Robert A. Wright, )  
Mary Beth C. Wright and Carolyn Lee Wright; )  
Carmen J. and Ann D. Savoca, William J. Savoca )  
and Donna Strom; James T. Hunter and Mary D. )  
Hunter; Dwain C. Andrews; WWS, LLC.; 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; Captains Quarters 32, LLC.; Otis T. )  
Harrison and Rose C. Harrison; James E. )  
Newman, Jr.; Fisher-Canning, LLC.; James D. )  
Reynolds; Fuller Family, LLC.; Richard T. and )  
Rory L. White; Propst and Dawson, LLC.; )  
Litchfield Quarters, LLC; William C. Hammond )  
Trust and Shawn S. Hammond Trust; GAB IV, )  
LLC.; Robert C. McBride Family Trust and Susan )  
R. McBride Family Trust; Evelyn J. Valuska; )  
Barbara W. Beymer; Montrose Associates, LLC.; )  
Harry L. Belk and Jan C. Belk; Dennis E. Barrett )  
and Wilma J. Barrett, JT WROS; First Family )  
Properties, Inc.; Joseph P. Heaton and Frances H. )  
Heaton; Robert N. Kelly; Sandra Keeter and Hoyt )  
S. Keeter; Linda A. Mendicino; Captains Quarters )  
D-24 Association of Owners, Inc.; Michael C. )  
Foster and Laura L. Foster; Captains Quarters Unit )  
D-31 Association of Multiple Ownerships, Inc.; )  
Howard L. Pruitt, Jr. and Georgia M. Pruitt; Jean T. )  
Blaylock; William C. Covington, Jr. and Donna C. )  
Covington; Litchfield Captains Quarters, LLC.; )  
James A. Schubert and Laraine C. Schubert; Daniel )  
P. Duvall and Mary Lynn Duvall; Victor A. and )  
Melinda L. Medina; Judy Hamer; Stewart South, )  
LLC.; Quarter South, LLC.; Steven H. Frame and )  
Kay B. Frame, )

Plaintiffs, )

**ORDER GRANTING PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT ON THE ISSUES OF  
DUTY AND BREACH**

FILED )  
GEORGETOWN COUNTY S.C. )  
2012 NOV 16 AM 8:33 )  
ALMA Y. WHITE )  
CLERK OF COURT )

10/11/12

vs. )  
 )  
 Shipyard Village Council of Co-Owners, Inc., )  
 )  
 Defendant. )

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**THIS MATTER** came before the Court on May 21–22, 2012, upon the Rule 56 Motion for Partial Summary Judgment filed by the Plaintiffs against Shipyard Village Council of Co-owners, Inc., a non-profit corporation of the Shipyard Village Horizontal Property Regime. Plaintiffs sought an Order for Partial Summary Judgment on the issues of duty and breach against the Defendant on its cause of actions for negligence, breach of contract, and breach of fiduciary duty. The Court heard oral argument on Tuesday, May 21–22, 2012, at which time the Plaintiffs were represented by attorneys, Howell V. Bellamy, Jr., and Howell V. Bellamy, III, and Defendant was represented by attorneys David J. Mills and Leigh P. Boan.

After oral argument and after thorough consideration of the record in this case, the pleadings to date, Plaintiffs’ Motion for Partial Summary Judgment and exhibits placed into the record, and for the reasons explained below, I hereby reduce my previous ruling from the bench and Form 4 Order into a written Order Granting Plaintiffs’ Motion for Partial Summary Judgment on the issues of duty and breach.

**STATEMENT OF THE FACTS**

On **July 9, 1982**, the phased condominium development known as Shipyard Village Horizontal Property Regime (“Shipyard Village HPR”) was established pursuant to the recording of the Master Deed in the Office of Register of Deeds of Georgetown County, in Deed Book 201 at Page 880. (Plaintiffs’ Evidence Number 1: Master Deed, includes Bylaws attached as

Exhibit C.) The Defendant, Shipyard Village Council of Co-Owners, Inc. ("Shipyard Village," "Association," or "SVCOC"), was incorporated for the purpose of administrating the affairs of the regime property in accordance with SVCOC's Bylaws in July 7, 1982. Specifically, SVCOC's stated purpose "is to provide for the acquisition, construction, management, maintenance, and care of the common elements" under its articles of incorporation. (Plaintiffs' Evidence Number 31: Master Deed, includes articles of incorporation filed on July 7, 1982.) Shipyard Village HPR is a two (2) phase condominium regime consisting of four (4) buildings as follows:

- a. **Building A of Phase I** contains forty (40) Units, and was submitted to condominium ownership on or before July 9, 1982.
- b. **Building B of Phase I** contains forty (40) Units, and was submitted to condominium ownership on or before July 9, 1982.
- c. **Building "Captains Quarters C" of Phase II** contains thirty (30) Units, and was submitted to condominium ownership on or before August 5, 1998.
- d. **Building "Captains Quarters D" of Phase II** contains thirty (30) Units, and was submitted to condominium ownership on or before October 16, 1998.

All eighty (80) Units in Buildings A and B of Phase I of the Shipyard Village HPR were approved for Final Certificate of Occupancy on May 13, 1982, by the Georgetown County Building Department. Further, Phase I's Units, including Buildings A and B, are at least sixteen (16) years older in age than the sixty (60) Units of Buildings C and D of Phase II. (Plaintiffs' Evidence Number 31: Master Deed, includes the First and Second Amendments to the Master Deed.)

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

The evidence in the record is uncontroverted regarding Defendant's knowledge of the Co-owners' windows and sliding glass doors leaking water into Buildings A and B, and the Co-owners' failure to maintain and repair their units as required by the Master Deed and Bylaws based on the following:

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

The Board agreed to omit the thresholds and window frames from the [painting and waterproofing] bid [for Buildings A and B], and if the individual owner wants done, it would be their expense; therefore, optional to the owners. Mr. Bond asked where in the by-laws does it state that the owners are responsible for their thresholds and window frames. Mr. Cody reviewed Article III, Section 3.6 – the boundaries of unit in paragraph C. The notice is to state that the owners are responsible for any leaks caused by leaking windows.

**MOVED;** To notify all the owners and inform them that they are responsible for their threshold and window frame on their unit.

(Plaintiffs' Evidence Number 34: SVCOC Meeting Minutes from 1994 to 2005, includes Page 2 of the Minutes from the Organizational Meeting of the Board of Directors dated June 15, 1999.)

The **August 11, 1999** letter from Susan Pendergrass, Property Manager of Waccamaw Management Company to the A and B Co-owners explained that: "*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.*" (Plaintiffs' Evidence Number 24: Deposition of Dr. Leon Jennings, includes Plaintiffs' Exhibit Number 4: Letter to A and B Co-owners from Susan Pendergrass, Property Manager of Waccamaw Management Company dated August 11, 1999.)

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

McGee Consulting investigated and performed testing on buildings A and B windows. Mr. Gleissner then displayed a slide illustration of their findings. The slides have been filed with the official records of the Association.

It was reported after Hurricane Hugo some of the windows in said buildings were replaced. The windows utilized appear to be residential versus commercial and we prefabricated versus custom made. Due to the windows being prefabricated, the windows were smaller than the opening, therefore, installer installed wood framing in order to fill the gaps.

The replacement windows were not as "thick" as the original windows which is evident in the pictures. **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 channels down both sides of the windows, which starts at the top floor windows and works its way to the ground. The water intrusion has caused some of the wood framing to deteriorate due to wood-rot.**

Furthermore, the Minutes provided that the SVCOC's attorney, Ralph McCullough, told the Board "*there were safety issues with respect to the durability of the windows,*" and recommended pursuing legal action against the responsible parties. (Plaintiffs' Evidence

*RBW*

Number 34: SVCOC Meeting Minutes from 1994 to 2005, includes Page 3 of the Special Meeting Minutes of the Board of Directors dated September 27, 2002.)

The **October 25, 2002** Board Meeting Minutes discussed a problem with water flowing into Unit A-41 caused by Unit A-5's leaking sliding glass door. The Minutes, specifically, stated in pertinent part:

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

(Plaintiffs' Evidence Number 34: SVCOC Meeting Minutes from 1994 to 2005, includes Pages 3 and 4 of the Regular Meeting Minutes of the Board of Directors dated October 25, 2002.)

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

On **October 31, 2002**, on behalf of the Board, Mrs. Kelli Diehl ("Diehl") of K A. Diehl & Associates, Inc., ("KAD") wrote a letter to attorney Robert J. Moran which referenced the window leak problems in Unit B-15. Mrs. Diehl's letter, specifically, stated in pertinent part:

I am in receipt of my copy of your letter to Dr. C. Leon Jennings, President of Shipyard Village. You informed me in our phone

conversation that this letter was in reference to window leak problems at unit B15.

Please note that the Shipyard Village Council of Co-Owners Master Deed clearly states that windows are the responsibility of the owner, not the association. See section 3.6 in the Master Deed. *Therefore, I am wondering how you are contending that the leaks are "caused by some failure in a common element of the buildings, the responsibility of which falls upon the regime council."*

The Board is hoping to provide some direction to those owners who have window leak problems; but the responsibility to address any window issues clearly lies with the unit owner.

(Plaintiffs' Evidence Number 30: Deposition of Dr. Leon Jennings, includes Plaintiffs' Exhibit Number 5: Letter to Bob Moran from Mrs. Diehl dated October 31, 2002.)

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

Dear Ms. Murray:

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

(Plaintiffs' Evidence Number 30: Deposition of Dr. Leon Jennings, includes Plaintiffs' Exhibit Number 5: Letter to Carol Murray from Mrs. Diehl, on behalf of the Board dated March 28, 2003.)

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

Hi Bob:

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

(Plaintiffs’ Evidence Number 26: Deposition of Gary Curtis Bradham, includes Plaintiffs’ Exhibit Number 4: E-mail from Dr. Leon Jennings dated March 28, 2003.)

Additionally, Dr. Jennings’ signed letter (undated) to the Co-owners confirmed that the Board had knowledge of the serious problems associated with the leaking windows in Buildings A and B, and, also, their lack of stability as a potential danger to the Co-owners. For example, his letter to the Co-owners provided in pertinent part:

Dear Co-Owners:

Recently, our Property manager, K. A. Diehl & Associates (“KAD”), sent a survey to each owner attempting to discover any problems within the units. 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.

...

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

*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.*

...

(Defendant's Evidence - Number 5: Deposition of Michael Parades, includes Plaintiffs' Exhibit Number 1: Letter to Co-owners from Board.)

The February 17, 2006 Board Meeting Minutes discussed at length the recommendation from the engineer (Mr. Donald Manning, P.E.) for Unit B-28 that all windows for Buildings A and B be replaced. Mr. Manning confirms that Building B is "sick and about to become cancerous." He further stated that the inside intrusion of moisture is "severe and that some

Owners are in denial of this ever-increasing problem.” Mr. Manning recommended to the Board a team approach to successfully remedying the moisture intrusion issues with Buildings A and B. (Plaintiffs’ Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes Page 2 of the Regular Meeting Minutes of Board of Directors.)

A proposal from Pro-Tec indicated that approximately One Million Two Hundred Thousand and No/100 (\$1,200,000.00) Dollars per building, or Two Million Four Hundred Thousand and No/100 (\$2,400,000.00) Dollars total, would be required to replace the windows in Buildings A and B, and was discussed at the March 14, 2006 Board meeting. The March 2006 Minutes, further, stated that Board was going put an amendment to the Master Deed up for vote and that it would essentially make the windows and sliding glass doors the responsibility of the SVCOC and not the Co-owners. Further reference was made to balcony stucco “leaching” and cracking balcony “frontages.” (Plaintiffs’ Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes Page 3 of the Regular Meeting Minutes of the Board of Directors dated March 14, 2006.)

The **April 15, 2006** Annual Members’ Meeting Minutes stated that the initial vote on the Third Amendment/Window Amendment failed to pass by the affirmative vote of the Co- owners. (Plaintiffs’ Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes Page 5 of the Twenty-Fourth (24th) Annual Members’ Meeting Minutes dated April 15, 2006.)

The **July 6, 2006** letter to the Co-owners from the Board alleges that the proposed Third Amendment/Window Amendment making windows the responsibility of the association had passed pursuant to a proxy vote mailed out to the Co-owners. (Plaintiffs’ Evidence - Number 33:

Shipyards Village Meeting Minutes from 2005 to 2010, includes Page 1 of Letter to the Co-owners from the Board dated July 6, 2006.)

The July 28, 2006 Board Meeting Minutes, further, provided that consideration for reimbursement of windows already replaced by Co-owners would be given but that "stains and water damage" on the interior of the unit would be a Unit owner's responsibility. (Plaintiffs' Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes Page 1 of the Regular Meeting Minutes of the Board of Directors dated July 28, 2006.)

The January 26, 2007 Board Meeting Minutes started with a discussion of Kenneth G. Schneider, Jr., AIA ("Schneider") of Schneider and Associates' findings of an "engineer joint" located directly under the sliding glass door between adjoining hollow core slabs of the balcony and unit. Additional discussion of reimbursement for a Co-owner's window replacement is noted. The March 2007 Minutes discussed the Board's dissatisfaction with Schneider who was later replaced by a mechanical engineer named Eddie Stokes, P.E. ("Stokes") and his firm of MEC Engineering Services, Inc. ("MEC Engineering"). (Plaintiffs' Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes Page 1 of the Regular Meeting Minutes of the Board of Directors dated January 26, 2007.)

The April 28, 2007 Board Meeting Minutes stated that "*many sliding glass doors have water penetration problems.*" Additional discussions of the exterior coating application to Buildings A and B is discussed but warranty issues exist unless all windows are replaced. It is reported that the reserve account had approximately One Million Three Hundred Ninety-One Thousand and No/100 (\$1,391,000.00) Dollars, the majority of that money being proceeds from the Buildings C and D lawsuit settlement. (Plaintiffs' Evidence Number 33: SYCOC Meeting

Minutes from 2005 to 2010, includes Page 2 of the Regular Meeting Minutes of the Board of Directors dated April 28, 2007.)

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

The Board wishes to remind you that even though the Association assumed responsibility of door and window replacement in July 2006 the problems in A and B buildings are currently experiencing didn't just happen last year – they have been developing over the time when the Owners were responsible for their doors and windows. Those buildings were built well over twenty years ago. Studies have shown that repairs made in the past years did not really address the water intrusion issue, but were more cosmetic in nature.

(Plaintiffs' Evidence Number 23: Deposition of Jack Clark Eblin, D.D.S., includes Plaintiffs' Exhibit Number 6: Letter to Shipyard Village Owners from the Board of Directors dated September 26, 2007, regarding actions taken to remedy water problems with windows and doors.)

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

The Board has been made aware of acute water leaks into the interior of some of the A and B units during recent rains. **The question has been raised as to who is responsible for the interiors of the units.** Please refer to Article II, Section 5(c) of the amended Master Deed, a copy of which is attached.

This document explains that only the sliding glass doors and the windows are the responsibility of the association. **The rest of the unit is the responsibility of the owner and/or the maintenance company hired by the owner, and not the on-site management staff.** The Board hopes this clarifies the matter.

A September 18, 2007, e-mail to the Board from Mrs. Diehl regarding window leaks in Buildings A and B stated in pertinent part, *“many of these units were leaking previously and because windows were the owners’s responsibility, the issue was thrown back at the owners who most ended up doing nothing....”* Her e-mail, also, stated that she *“tried to bring this up after I was here for a while and got my hand slapped by Bobby Warner and some board members because this was an Owner responsibility.”* Finally, her e-mail indicated that *“Bobby Warner only did cosmetic stucco repairs buildings for 20 + years and kept pushing back to the Owners — who clearly could not handle [it] and needed help.”* (Defendant’s Evidence Number 5: Deposition of Michael Parades, includes Plaintiffs’ Exhibit Number 2: e-mail to Board Members from Kellie Diehl dated September 18, 2007.)

The January 25, 2008 e-mail from Dr. Jack Eblin to the Board, Ms. Gallagher and Mr. Eddie Stokes, P.E. stated that: *“Water intrusion began when A and B were built – the HOA took responsibility one and half years ago.”* Dr. Eblin’s acknowledgment confirms the Board has not undertaken timely and proper maintenance, and repair of the Buildings A and B as they are required to do. (Plaintiffs’ Evidence Number 23: Deposition of Jack Clark Eblin, D.D.S., includes Plaintiffs’ Exhibit Number 5: e-mail to Ms. Fletcher from Jack C. Eblin dated January 25, 2008.)

The April 19, 2008 Annual Members’ Meeting Minutes, the Board reported to the Unit owners that extensive repairs were needed to fix Buildings A and B. The Board stated that the costs of the repairs and reconstruction would be in the range of Twelve Million and No/100 (\$12,000,000.00) Dollars to Thirteen Million and No/100 (\$13,000,000.00) Dollars, based on a construction budget prepared by MEC Engineering. Although investigation and testing of

Buildings A and B has been ongoing since 2006, this was the first time the estimated cost of repairs and reconstruction was shared with Co-owners. (Plaintiffs' Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes Page 4 of the Twenty-Sixth (26th) Annual Members' Meeting Minutes.)

On **July 28, 2008**, the Board hired Sutton-Kennerly & Associates, Inc. ("SKA") to review the repair project engineering reports, bid specifications, drawings and proposals, and provide a report to the Board with its findings and recommendations. Later the Board hired SKA to prepare the final design for the repairs and reconstruction of Buildings A and B after it fired MEC Engineering for poor performance. SKA prepared a construction budget which estimated to complete the repairs (including design and construction administration) to Buildings A and B would cost in the range of Ten Million Nine Hundred Forty-Four Thousand Four Hundred Sixty-Eight and No/100 (\$10,944,468.00) Dollars. (Plaintiffs' Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes Page 2 of the Regular Meeting Minutes of the Board of Directors dated August 12, 2008.)

At the **March 21, 2009** Special Members' Meeting, the Board called for a re-vote on the 2006 Windows/Sliding Glass Door Amendments because the validity of the amendments were being legally challenged by Unit owners. After the third re-vote was taken and the votes were tallied, Board President Don Johnston announced that both Windows/Sliding Glass Door Amendments had failed to pass by the required the two-thirds (2/3) majority vote. (Plaintiffs' Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes Page 5 of the Special Members' Meeting Minutes of the Board of Directors dated March 21, 2009.)

The April 4, 2009 Annual Members' Meeting Minutes clearly and unambiguously show that the Board failed to present the annual budget as part of the order of business at the Annual meeting of Co-owners as required by Section 1.12 of the Bylaws. For example Section 1.12 provides for the presentation of the budget as part of the order of business at the Annual Meeting. Because the Board did not submit the proposed budget, the Co-owners did not have an opportunity to discuss and amend the annual budget pursuant to § 5.3 of the Bylaws which provides "[t]he Budget, as adopted by the Board, may be amended upon the motion and affirmative vote of Co-owners holding two-thirds (2/3) of the Percentage Interest in the Common Elements." (Plaintiffs' Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes Pages 1-5 of the Twenty-Seventh (27th) Annual Members' Meeting Minutes dated April 4, 2009.)

On July 8, 2009 a letter from Ms. Vicki Gallagher ("Gallagher") of KAD was sent to the Co-owners regarding the Board's call for a Special Members' Meeting on Saturday, August 1, 2009, to vote on a special assessment in the amount of Ten Million Nine Hundred Ninety-Four Thousand Four Hundred Sixty-Eight and No/100 (\$10,994,468.00) Dollars to fund the extensive repairs and reconstruction needed for Buildings A and B. (Plaintiffs' Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes a letter from Ms. Gallagher to the Unit Owners dated July 8, 2009.) Ms. Gallagher's letter to the Unit owners, further, provided in pertinent part:

If the Special Assessment does not pass the cost of the repairs will be added to the 2010 and 2011 Operating fund.

**The Special Assessment per unit is based on the percentage of interest assigned to the unit as dictated in the Association's governing documents.**

Special Assessment Unit Assessment Calculation with 80 units sharing windows/doors expense (Building A and B owners only):

A & B Units	\$ 88,398
C & D – 3 Bdr	\$ 64,888
C & D – 4 Bdr	\$ 68,471

The payment amount of the special assessment will be dependant on the outcome of the lawsuit filed against the Association with respect to the windows and sliding glass doors 2006 amendment. The calculations above assume that the expense of the windows and sliding glass doors will be borne by the homeowners in building A & B. **Currently the Association has moved forward with a Summary Judgment as a means for resolving the civil action filed by C & D owners. Consequently, the results of the judgment may have an impact on the windows/doors cost allocation to A, B, C, and D owners. If the ruling comes back that all unit owners are responsible for the expense for the windows/doors, the assessment will be adjusted accordingly.**

(Emphasis added.) (Plaintiffs' Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes a letter from Ms. Gallagher to the Co-owners regarding the Board's call for a Special Members' Meeting on Saturday, August 1, 2009, to vote on a special assessment based SKA's proposed reconstruction budget dated July 8, 2009.)

The **November 13, 2009** Board Special Meeting Minutes discussed information regarding the 2010 operational budget for Shipyard Village. Minutes provided the 2010 operating Budget is being increased to over Six Million and No/100 (\$6,000,000.00) Dollars to fund approximately one-half (1/2) of the repairs and reconstruction of Buildings A and B after the special assessment was voted down by the Co-owners on August 1, 2009. (But the Board's amended 2010 operational budget for the Association was never submitted, as required by the

affirmative Bylaws, to the Co-owners for their review and amendment.) The Board's actions were discussed in a November 2009 Memorandum mailed to the Unit Owners. The balance of the repairs and reconstruction will be funded in the 2011 operating budget via the assessment. (Plaintiffs' Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes Page 1 of the Special Meeting Minutes of Board of Directors dated November 13, 2009.)

### STANDARD FOR REVIEW

Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. Koester v. Carolina Rental Ctr., 313 S.C. 490, 443 S.E.2d 392 (1994). In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings. 306 S.C. at 115-116, 410 S.E.2d at 545-546.

"It is not sufficient that one create an inference that is not reasonable or an issue of fact that is not genuine. The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an

issue of fact that is not genuine [or material].” Priest v. Brown, 302 S.C.405, 396 S.E.2d 638 (Ct. App. 1990) (internal citations omitted).

Conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Id.*; see also Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). “The purpose of summary judgment is to obviate delay where there is no material issue of fact involved.” Manley v. Manley, 291 S.C. 325, 353 S.E.2d 312, 314 (Ct. App. 1987) (citation omitted).

### LEGAL ANALYSIS

**A. Business Judgment Rule is not applicable to the Defendant’s unauthorized conduct resulting from its violations of the Master Deed and Bylaws.**

Defendant cites the business judgment rule as an absolute bar to Plaintiffs’ claims for negligence/gross negligence, breach of contract, and breach of fiduciary duty. In analyzing this defense, this Court considered two relevant issues: First, does the business judgment rule apply to the conduct of the Defendant in this case, or is the conduct of the Defendant to be judged by other standards, laws, and rules and regulations, and, Second, even if the Plaintiffs are required to surmount the business judgment rule, is there any evidence of the Defendant’s lack of due care, lack of good faith, dishonesty, or incompetence that would preclude the rule’s application to the case.

Addressing the first issue, the business judgment rule is a general corporate law standard created by the common law which discusses the discretionary decision making standard of the governing board of a corporation in the absence of any other controlling documents or other standards. Conversely, in this case, the standards of the Defendant’s governing board are

controlled by three specific documents, and not the general corporate standard of the business judgment rule. Three documents are: (1) the South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-10, *et seq.* (hereinafter “the Act”); (2) the Master Deed of Shipyard Village Horizontal Property Regime recorded on July 9, 1982; and, (3) the Bylaws for the Shipyard Village Council of Co-Owners, Inc. of the same date. For example, in the case of Murphy v. Yacht Cove Homeowners Ass’n, 289 S.C. 367, 345 S.E.2d 709 (1986), the Supreme Court of South Carolina held “*that a member of a condominium association, established pursuant to the Horizontal Property Act, may bring an action in contract or tort against the association[,]*” for failure to discharge its duties under the Master Deed and Bylaws. 289 S.C. at 369, 345 S.E.2d at 710.

A review of Plaintiffs’ claims against the Defendant here fall in the categories of negligent maintenance, failure to inspect, failure to assess, failure to repair, and failure to discharge duties, as well as breach of fiduciary duty. All of these claims arise directly from alleged breaches of affirmative duties of due care, not discretionary, as set forth in the Defendant’s Master Deed and Bylaws.

Examining these documents, I find that the Defendant’s Board is affirmatively required to maintain, and repair the regime’s property. There is no option or discretion. For example, the Article V, § 5.6 of the Master Deed requires the “*the maintenance, repair, replacement, management, operation and use of the Common Elements and Limited Common Elements SHALL be the responsibility of the [Defendant’s] Board[,]*” and, specifically, Article VI, § 6.1 of the Bylaws provides in pertinent part, “. . . *the Board of Directors SHALL provide for the maintenance, repair and replacement of the Common Elements.*”(emphasis added.)

Additionally, Article VII, § 7.3 of the Bylaws provides, “[t]he Board of Directors **SHALL enforce the terms of the Act, the Master Deed, and these Bylaws and the Regulations promulgated pursuant hereto by taking prompt and appropriate action to correct any violations.**”

“Each Co-owner must comply with the Bylaws and with the administrative rules and regulation set forth in the Master deed.” Ortega v. Kingfisher Homeowners Ass’n, Inc., 314 S.C. 180, 442 S.E.2d 202 (Ct. App. 1994) (citing S.C. Code Ann. § 27-31-170 (1991)). The clear and unambiguous language of both the Master Deed for Shipyard Village HPR, and S.C. Code Ann. § 27-31-170 (1991) provide that the Master Deed and Bylaws shall be strictly enforced.<sup>1</sup>

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<sup>1</sup> **Article XVI, Miscellaneous, and § 16.1, Compliance, of the Master Deed provides:**

Each Co-owner **SHALL comply strictly** with the By-laws and with the administrative rules and regulations ... and with the covenants, conditions and restrictions set forth in this Master Deed or in the deed to the Unit of such Co-owner. Failure to **comply with any of the same SHALL** be grounds for an action to recover ... damages or injunctive relief, or both, maintainable by the Manager or the Board of Directors on behalf of the Council, or in a proper case, **by an aggrieved Co-owner.** (*emphasis added.*)

S.C. Code Ann. § 27-31-170 (1991) provides:

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 administrator or the board of administration, or other form of administration specified in the bylaws, on behalf of the council of co-owners, or in a proper case, by an aggrieved co-owner.** (*Emphasis added.*)

Here, what is established pursuant to the Shipyard Village HPR's operative documents governing the conduct of the Defendant's governing Board is nothing less than the absolute requirement to strictly enforce the provisions of the governing documents and to do so in a timely and fiduciary capacity. See Kneale v. Bonds, 317 S.C. 262, 452 S.E. 2d 840 (Ct. App. 1994) (South Carolina Court of Appeals stated that South Carolina Horizontal Property Act provides that Master Deeds should be strictly enforced). For example, the Plaintiffs' claims focus on non-discretionary duties imposed upon SVCOC's Board by its Master Deed and Bylaws. Therefore, because the duty to maintain and repair the regime property is mandatory and fell upon the SVCOC's governing Board pursuant to its Bylaws, it is not discretionary, and, therefore, not subject to the Business Judgment Rule. See also TNS Mills, Inc. v. South Carolina Dep't of Revenue, 331 S.C. 611, 503 S.E.2d 471 (1998) (Ordinarily, the use of the word "shall" in a statutory provision indicates the provision is mandatory).

Addressing the second issue, the evidence in the record before the Court at the hearing on May 21–22, 2012, clearly established that the Defendant'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. Examples of the SVCOC's unauthorized conduct: lack of due or reasonable care, lack of good faith, inaction, and *ultra vires* acts regarding its invalid assessment are based on following:

1. SVCOC's illegal adoption of the Third Amendment/2006 Window Amendment was an *ultra vires* act, which violated Article I, §§ 1.3 and 1.5 of the Bylaws, and, thus, placed the Defendant's conduct outside the scope and protection of the business judgment rule.

Furthermore, at the hearing on May 21–22, 2012, the Defendant admitted on the record that “when the Board received Jeff King’s letter [dated June 9, 2008] and they are faced with, ‘What do we do, this amendment is not valid,’ that is what they’re considering....” (Tr. of Motion Hr’g dated May 21-22, 2012, p. 30, lines 1–14.) However, the Defendant’s governing Board continued to assert the validity of the 2006 Window Amendment (knowing the amendment was invalid) even after receiving attorney Jeff King’s letter which provided in pertinent part:

The amendment to the Master Deed of Shipyard Village Horizontal Property Regime dated September 26, 2006, and recorded in Deed Book 235, Page 005, records of Georgetown County, South Carolina (“2006 Amendment”) was not properly approved and is not binding on the Regime or the Owners. The amendment purported to rewrite the definition of Units within the Regime to exclude “the window glasses, screens, frames and casings which are part of the window openings of the Unit” and to designate these items as Limited Common Elements. However, the amendment failed to pass at the only meeting that was held to vote on the matter, the April 15, 2006, annual meeting. Thereafter, the Board and management agent solicited proxies from various members to “re-vote” on the amendment.

...

No such procedure is authorized in the governing documents or corporate law. The Bylaws, Section 1.4, provide that Owners may vote in person or by proxy at any meetings of the Association, and Section 1.3 provides that votes may only be cast at meetings. The only procedure for taking action without a meeting is set forth in Section 1.5, which states that “Any action which may be taken by a vote of the Co-owners may also be taken by written consent to such action signed by all Co-owners entitled to vote, or, in the case of Units owned by two or more Co-owners, by the designated voting member.” (*Emphasis added.*) All Co-owners did not consent in writing to adopt the 2006 Amendment, and no meeting was held at which a vote could have been taken. **The end result is that the 2006 Amendment was not properly adopted, leaving**

the window glasses, screens, frames, casings and sliding glass doors as part of each Unit, not common elements, and therefore replacement or repair is the responsibility of each individual owner.

(Plaintiffs' Evidence Number 26: Deposition of Gary Curtis Bradham, includes Plaintiffs' Exhibit Number 13: Letter to Board Members from attorney Jeff King dated June 9, 2008.)

Specifically, evidence of the Defendant's lack of good faith is documented in its July 8, 2009 letter from Ms. Gallagher to the Co-owners regarding the future enforce ability of the 2006 Window Amendment which provided in pertinent part:

[T]he Association has moved forward with a Summary Judgment [on the window amendment] as a means for resolving the civil action filed by C & D owners. Consequently, the results of the judgment may have an impact on the windows/doors cost allocation to A, B, C, and D owners. If the ruling comes back that all unit owners are responsible for the expense for the windows/doors, the assessment will be adjusted accordingly.

(Plaintiffs' Evidence Number 33: SVCOC Meeting Minutes from 2005 to 2010, includes a letter from Ms. Gallagher to the Unit Owners dated July 8, 2009).

Accordingly, I find the Defendant is precluded from asserting the business judgment rule in this case based on its lack of good faith in continuing to enforcing the 2006 Window Amendment in this lawsuit when it admittedly knew the amendment was invalid and enforceable in June 2008. See Dockside Ass'n, Inc. v. Detyens, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987), aff'd, 294 S.C. 86, 362 S.E.2d 874 (1987) (Under the business judgment rule, a court will not review the business judgment of a corporate governing board *unless it acts without authority, with corrupt motives, and in bad faith*).

2. Defendant's knowingly failed to place its adopted annual budgets on the annual agenda for presentation to the Co-owners at their Annual Members' Meetings in 2009 and 2010, respectively, and, therefore, acted without authority and violated the affirmative requirements of §§ 1.12, 5.2, and 5.3 of the Bylaws. As such, I find that the Defendant's failure to discharge its duties under these sections denied the Unit Owners their right to discuss, and an opportunity to amend the regime's annual operating budgets for 2009 and 2010. For example, 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.*" (Emphasis added.) Furthermore, at the hearing on May 21–22, 2012 the Defendant admitted on the record that, "[w]e believe the assessment as rendered by the Board ... is an 'ultra vires act' that should be afforded [protection] under the business judgment rule...." (Tr. of Motion Hr'g dated May 21–22, 2012, p. 93, lines 2–17.) However, the Defendant's assertion of protection under the business judgment rule is without merit and contrary to the law of this state. See Baumann v. Long Cove Club Owners Ass'n, Inc., 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008) (A corporation can only exercise the powers granted to it by law, its charter or articles of incorporation, and any Bylaws made pursuant thereto.) (citing Lovering v. Seabrook Island Prop. Owners Ass'n, 289 S.C. 77, 82, 344 S.E.2d 862, 865 (Ct. App. 1986), aff'd as modified on other grounds, 291 S.C. 201, 352 S.E.2d 707 (1987), overruled on other grounds by S. C. Code Ann. § 33-31-302); "Acts beyond the scope of a corporation's powers as defined by law or its charter are ultra vires." Lovering, 289 S.C. at 82, 344 S.E.2d at 865; see also Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 605, 538 S.E.2d

15, 28 (Ct. App. 2000) (The business judgment rule only applies to *intra vires* acts, not *ultra vires* ones).

Accordingly, I find that the business judgment rule does not protect the Defendant's *ultra vires* conduct from judicial review based on its invalid assessment under Master Deed and Bylaws evidenced by the following admission of the Defendant:

**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 --

**THE COURT:** All right.

(Tr. of Motion Hr'g dated May 21-22, 2012, p. 114, lines 11-25.)

**B. Defendant's governing documents impose affirmative duties on its Board to enforce, investigate, and correct known violations of the Act, the Master Deed and the Bylaws.**

In order for liability to attach based on a theory of negligence, the parties must have a relationship recognized by law as providing the foundation for a duty to prevent an injury. See Murphy v. Yacht Cove Homeowners Ass'n, supra., 289 S.C. at 368, 345 S. E. 2d at 710 (*a member of a condominium association, established pursuant to the Horizontal Property Act,*

*has a contractual relationship with the Association's Board under the governing documents).*

An affirmative legal duty may be created by statute, a contractual relationship, status, property interest, or some other special circumstance. McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 373 S.C. 43, 47–49, 644 S.E.2d 43, 46– 47 (2007). Both S.C. Code Ann. § 27-31-170 (1991) and Article XVI, § 16.1 of the Master Deed authorize “an aggrieved unit owner” to bring an action for damages or injunctive relief for failure to comply with the condominium’s bylaws. See also Agassiz West Condominium Ass’n v. Solum, 527 N.W.2d 244 (1995), the Supreme Court of North Dakota interpreted the language of Section 47-04.1-08, ND. C. C., which is identical to the language contained in S.C. Code Ann. § 27-31-170 (1991), to authorize “an aggrieved unit owner” the right to bring an action for damages or injunctive relief against the Association for its failure to comply with the condominium’s Bylaws.

At the hearing on Plaintiffs’ Motion for Partial Summary Judgment, the Defendant’s attorneys admitted on the record: (1) *that the Defendant has an affirmative duty to maintain, replace, and repair the common elements of Buildings A and B* (Tr. of Motion Hr’g dated May 21–22, 2012, p. 76, lines 4–11); (2) *that the Defendant and Co- owners are bound by the Master Deed and Bylaws* (Tr. of Motion Hr’g dated May 21–22, 2012, p. 76, lines 22–23); (3) *that the Defendant has a duty to require a defaulting Co-owner to comply with provisions of the master deed* (Tr. of Motion Hr’g dated May 21–22, 2012, p. 77, lines 16–19; p. 78, lines 7–12); and (4) *that the Defendant has a duty to individual assess a Co-owner if his or her unit damages a common element* (Tr. of Motion Hr’g dated May 21–22, 2012, p. 32, lines 5–10).

However, the Defendant refused to admit that it had a duty to investigate to determine if the leaking windows and sliding glass systems were the source of the water intrusion into Buildings A and B that was causing damage to the common elements even though the affirmative language of regime's governing documents clearly provides otherwise under §§ 9.4, 12.1, and 16.2 of the Master Deed, and §§ 6.3, 6.4, and 7.4 of the Bylaws. (Tr. of Motion Hr'g dated May 21–22, 2012, p. 96, lines 20–25; p. 97, lines 1–14). These relevant sections provide as follows:

**1. The Master Deed.**

Article IX, § 9.4 of the Master Deed, Covenant to Comply with Restrictions and Obligations, provides in pertinent part:

Each Co-owner by acceptance of a deed or lease to a Unit ratifies and covenants to observe on behalf of himself, his heirs, successors, and assigns this Master Deed, the Regime Bylaws and the decisions, resolutions and regulations of the Council, Board of Directors or their representatives, as lawfully amended from time to time.

The violation of any rule or regulation adopted by the Board or the breach of any covenant or provision herein contained, **SHALL**, in addition to any other rights provided for in the Act, this Master Deed and the Bylaws, give the Board the right: (a) to enter upon the Unit, or any portion of the Property upon which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Co-owner, any structure, thing or condition that may exist thereon contrary to the intent and meaning of the provisions hereof, ....

Article XII, § 12.1 of the Master Deed, Reconstruction and Repair, provides in pertinent part:

... any such deficiency resulting from damage to the Regime Property as a result of the neglect, ... by any Co-owner ... **SHALL** be charged to such Co-owner as an individual assessment. *(Emphasis added.)*

Article XIX, § 16.2 of the Master Deed, Compliance, provides in pertinent part:

Each Co-owner **SHALL** comply strictly with the By-laws and with the administrative rules and regulations adopted pursuant thereto, ... Failure to comply with any of the same **SHALL** be grounds for an action to recover ... damages or injunctive relief, or both, maintainable by the Manager, or the Board of Directors on behalf of the Council, .... *(Emphasis added.)*

## 2. The Bylaws.

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.” *(Emphasis added.)*

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. (*Emphasis added.*)

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. (*Emphasis added.*)

Here, based on the clear and unambiguous language of §§ 9.4, 12.1, and 16.2 of the Master Deed, and §§ 6.3, 6.4, and 7.3 of the Bylaws, when read together as a whole, I find as matter of law that these sections impose affirmative obligations on the Defendant'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 that an investigation is required by the Bylaws. That is, the homeowners association through its Board, upon receiving such information, would be required to initiate some investigation to determine whether or not it would be appropriate to individually assess the defaulting Unit Owner for the damage.

The Plaintiffs, also, cite the case of Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (1985) as additional authority for the proposition of law that a condominium association has a "*duty to pursue a recovery for any alleged construction defects in the common elements which it maintains.*" Queen's Grant Villas, 286 S.C. at 556, 335 S.E.2d at 366 (*emphasis added*), and that if it fails to do so the

individual owners have a cause of action against the association for its negligence. This necessarily implies that the Defendant has an affirmative duty to investigate and possibly pursue a recovery when presented with evidence that the source of the water intrusion damage to Buildings A and B was caused by the defaulting Co-owners's neglectful maintenance of their units. Id. For example, at the Motion Hearing on May 21–22, 2012, the Defendant admitted that it had a duty to investigate and pursue a recovery from the defaulting Co-owners based on its positive response to my question as follows:

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

**MISS BOAN:** I think, Your Honor, to answer your question, yes, I think you do look into it and I think this Board did. I think this Board considered it and that is how - -

(Tr. of Motion Hr'g dated May 21–22, 2012, p. 69, lines 6–23.)

- C. **Defendant breached a duty to investigate the substantial evidence in the record which reasonably showed that unit owners had neglected the maintenance of their leaking windows and sliding glass doors which allegedly caused damage to the common elements of Buildings A and B.**

Plaintiffs, next, argue that the Defendant breached a duty to investigate the water intrusion damage to the common elements of Buildings A and B which they attribute to the failure of the



A and B Co-owners to maintain and repair their leaking windows and sliding glass doors. Accordingly, I find that the Defendant breached a duty of care when it failed to investigate and possibly pursue a recovery from the defaulting Co-owners's neglectful maintenance and repair of their units based on the following reasons:

First, the evidence in the record is 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 §§ 3.6 and 4.3 of the Master Deed, and § 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 Defendant.

Second, the Defendant'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 SVCOC's Meeting Minutes from 1983 to 2010. Furthermore, certain past and present Board Members had personal knowledge that the windows and sliding glass doors were leaking water into the buildings evidenced by:

1. Pictures of interior water intrusion damage taken from the Video of Unit A-31 owned by current Board President Robert Postiglone, which is Plaintiffs' Evidence Number 47.
2. Pictures of interior water intrusion damage taken from the Video of Unit B-54 owned by past Board President Leon C. Jennings, M.D., which is Plaintiffs' Evidence Number 71.
3. Pictures of interior water intrusion damage taken from the Video of Unit B-27 owned by current Board Member Doris Bray, which is Plaintiffs' Evidence Number 60.

4. Pictures of interior water intrusion damage taken from the Video of Unit A-51 owned by current Board Member Jim C. Poag, which is Plaintiffs' Evidence Number 68.

Third, the Defendant'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 Defendant's reported denials of causation from the windows to this Court. For example, on July 25, 2006, Mr. Schneider, AIA, performed an inspection of Buildings A and B at the request of the Defendant. His inspection found damage to the common elements caused in part from the Co-owners' leaking windows and sliding glass doors based on:

**Numerous windows/sliding doors are leaking rain water into interior areas of the Buildings. Water is migrating from the upper story down through the intermediate stories to ground level, causing water damage to the floor/ceiling assemblies, the exterior finishes, and interiors of the outside units of buildings A and B. Damage appears to occur more severely on the corner "stacks." The water infiltration appears to be the result of the combination of corrosion of the frame of the window/sliding door assemblies, the age of the window/door assemblies, the breaching of the continuity from "sill" assembly (screws penetrating), separation of caulking from the "sill" and separation of caulking from the expansion joint between the exterior floor/ceiling assemblies and the interior floor ceiling assemblies. (Defendant's Evidence Number 4: Deposition of Robert Gallagher, includes Defendant's Exhibit Number 1: Affidavit of Robert Gallagher with attachments, including Kenneth G. Schneider's letter to the Board dated July 25, 2006.)**

Also, Defendant's consultant, HICAPS, Inc. ("HICAPS"),<sup>2</sup> made a PowerPoint presentation to its Board on July 19, 2008, and its experts identified and explained the water intrusion problems associated with the Building A and B Co-owners' window and sliding glass door systems. HICAPS' investigation found:

1. ***"The window systems are the main source of water intrusion."*** (HICAPS' Report dated July 19, 2008, at p. 21.)
2. ***"The leaks have allowed water to enter the walls which is causing the wood framing to rot."*** (HICAPS' Report dated July 19, 2008, at p. 21.)
3. ***"It also has allowed water to get into the concrete which is causing the corrosion."*** (HICAPS' Report dated July 19, 2008, at p. 21.)
4. ***"Moisture is entering the slider [glass door] unit and showing up at the bottom. The water is entering the concrete and leaking into the unit below."***(HICAPS' Report dated July 19, 2008, at p. 22.); Defendant's Evidence Number 4: Deposition of Robert Gallagher, includes, Defendant's Exhibit Number 1: Affidavit of Robert Gallagher with attachments, which includes HICAPS' PowerPoint presentation to the Board on July 19, 2008.)

Fourth, the Defendant, next, failed to present any evidence at the Motion Hearing on May 21-22, 2012 disputing the fact that its Board never asked SKA or any other qualified expert to break out what damages were attributed to the leaking windows and sliding glass doors that

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<sup>2</sup> HICAPS is a full-service Construction Management Company. HICAPS' Construction Management Team has specialized experts including engineers, contractors, architects, and information technology experts.

may have gotten into the common elements<sup>3</sup>. For example, Board President Don Johnston (“Johnston”) and Board Members Doris Bray (“Bray”) and Jim Poag (“Poag”), who were on the Board when SKA’s proposed repair assessment was adopted by them as part of the annual operating budgets for 2010 and 2011, testified at their depositions as to the following:

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.

(Deposition of Don Johnston dated April 23, 2012, p. 49, lines 12–21.)

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

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<sup>3</sup> Defendant acknowledged on the record that it never asked SKA or any other qualified expert to break out what damages were attributed to the leaking windows and sliding glass doors when it, finally, admitted that, “[i]t is undisputed that the Defendant’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. (Defendant’s Response to Plaintiffs’ Motion in Opposition to Defendant Shipyard Village Council of Co-Owners, Inc.’s Notice of Motion and Motion to Reconsider, Alter or Amend the Court’s Order Pursuant to Rules 52 and 59, SCRCF, filed on July 17, 2012, at Page 6, second sentence from the beginning of Paragraph 3.)

A. No.

Q. Can you explain why? No. Was it -- was it -- was it -- did the board -- why didn't they undertake that responsibility to do that?

A. Why should we have?

(Deposition of Doris R. Bray dated May 17, 2012, p. 53, line 20 – p. 54, line 7.)

Q. When you came on the board, obviously the Master Deed provided that A and B and C and D, all were responsible for the maintenance and upkeep of the windows and doors?

A. Correct.

Q. And the amendments that -- then finally it was voted down, in March 21 of '09, the amendment failed, did it not?

A. Yes.

Q. ...

All right, Sir. Did you, as a member of the board, or the board collectively, instruct any of your experts to make a determination of how much of the repair costs to Buildings A and B should be assessed against the unit owners in A and B.

(Deposition of Jim C. Poag dated April 18, 2012, p. 30, lines 10–18; and p. 30, lines 23–25.)

A. Separately? No, not until later when we talk about the windows and the doors.

Q. Okay. So was there ever any attempt or any calculations done besides ---

A. **The total package.**

Q. -- besides paying for the windows and doors -- and obviously, according to our records, after we brought the lawsuit challenging the amendment, the board voted to have A and B pay for the hard costs of the windows; is that correct? You reassessed ---

A. **That's when -- but to go back to your question, that's when we did ask Sutton-Kennerly to break that out for that purpose.**

Q. All right. Just the hard costs for the windows and doors?

A. **Just the windows and the doors.**

Q. Why did you not ask Sutton-Kennerly to investigate what damage, besides replacing the windows, should be attributable to the A and B unit owners for the collateral damage that came for leakage around the windows that went into the common elements, did you ask them to extensively go in and look at what that should be and what would be a fair assessment?

A. **Not to my knowledge, because that was part of the common elements.**

(Deposition of Jim C. Poag dated April 18, 2012, p. 31, line 1 – p. 32, line 4.)

Q. And is it my understanding that the board does not intend -- and you tell me yes or no if I'm wrong -- does not intend to make an effort to determine how much unit owners of A and B should be assessed for any damages they caused to the

common elements as a result of their failure to maintain the windows and doors?

A. Repeat that, if you don't mind.

Q. Does the board intend -- knowing where we are today, does the board intend to go back and reconsider whether or not they should additionally assess A and B? I know you've given credit for the windows, a general credit, but for the collateral damage that's done as a result of water coming -- the windows not being sealed and maintained and going into the common elements, does the board intend to reassess how much more A and B should be assessed?

A. No, sir.

Q. All right. Do you think that's necessary?

A. You mean to reassess?

Q. To determine how much more they should pay.

A. No.

(Deposition of Jim C. Poag dated April 18, 2012, p. 44, line 18 – p. 45, line 15.)

Q. Well, I'm a little surprised you don't understand it, because this lawsuit is about A and B, the windows and doors, prior to the attempt to amend the Master Deed, were the responsibility of A and B, C and D.

A. That's correct.

Q. All right. And if they fail to maintain the windows and doors and, as a result of that, other collateral damage occurred, it would be the responsibility of that unit owner, would it not?



**A. I guess it would.**

(Deposition of Jim C. Poag dated April 18, 2012, p. 59, line 12 – p. 59, line 22.)

Further, during the Motion Hearing on May 21–22, 2012, I specifically inquired from Defense counsel, “did SKA [sic] ever tell the [Board], ‘*We have found evidence that leakage from the common elements has damaged the windows[,]*’” and Miss Boan responded, “[*t*]hat is what Larry Elkin will say to Your Honor.” (Tr. of Motion Hr’g dated May 21–22, 2012, p. 116, lines 6–11.) However, the record reflects that Lawrence Elkin, P.E. was asked the same question by Plaintiffs’ counsel at his deposition taken on August 10, 2011, and he responded in the negative:

**Q.** So you’re not going to offer an opinion the water basically migrated through the - - as far as through the cracks and stucco and damaged the window?

**A.** If that’s possible. But I didn’t test it.

Accordingly, Lawrence Elkin, P.E.’s negative response (to the same question asked by this Court of Defendant’s counsel) confirms that the Defendant’s inaction and failure to investigate the Co-owners’ lack of maintenance to their units and resulting damage has nothing to do with conflicting information allegedly received from Defendant’s consultants, but instead only evidences the Defendant’s true intent to just ignore the problem and not deal fairly with the Plaintiffs and the other harmed Co-owners as required by the affirmative Bylaws.

Consequently, the record is clear, in the instant case, that the Defendant breached a “duty to investigate” in conjunction with its affirmative duties under the Regime’s Master Deed and

Bylaws. Furthermore, in every instance, where this Court found that Defendant breached a duty under the Master Deed and Bylaws, this Court expressly or implicitly found a failure by Defendant to use due or reasonable care. Specifically, this Court found, either expressly or implicitly, a failure to use due or reasonable care by the Defendant when it found: (1) a failure to enforce the terms of the Act, the Master Deed and the Bylaws; and (2) a failure to investigate and, possibly, pursue a recovery when presented with evidence which reasonably showed the neglect of one or more individual Co-owners in the maintenance and repair of their units which resulted in damage to the common elements. Murphy v. Yacht Cove Homeowners Ass'n, supra; Queen's Grant Villas, supra; see Shinn v. Thrust IV, Inc. 56 Wash. App. 827, 836, 786 P.2d 285, 290– 291 (Wash. App. 1990) (Failure to exercise due care or reasonable care would preclude application of the business judgment rule).

### CONCLUSION

For the reasons stated herein, taking the evidence in a light most favorable to the Defendant as the non-moving party, this Court hereby GRANTS Plaintiffs' Motion for Partial Summary Judgment as a matter of law on the following issues:

1. That the Defendant had an affirmative duty enforce the terms of the Act, the Master Deed, and these Bylaws by taking prompt and appropriate action to correct any known violations;
2. That the Defendant had 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 that an investigation is required by the Bylaws. That is, the homeowners association through its Board, upon receiving such information, would be required to initiate

some investigation to determine whether or not it would be appropriate to individually assess the defaulting Unit Owner for the damage;

3. That the Defendant breached its duty to investigate under the affirmative Bylaws when it failed to determine: (a) first, whether or not the water intrusion damage to the common elements of Buildings A and B was the fault of a particular Unit Owner or a particular group of Unit Owners; and, (b) second, whether or not other non-defaulting Unit Owners were entitled to a rebate by individual assessment from the A and B Unit Owners who had caused the problem; and, additionally
4. Now, whether or not there was any damage caused by leaking windows or doors is a matter for the jury to decide in this case, but I do find that as a matter of law, taking the evidence in a light most favorable to the Defendant as the non-moving party, that there was a duty to enforce the affirmative Bylaws, and that duty to enforce included a duty to investigate and that the Defendant breached that duty as a matter of law.
5. Further, I find that the Defendant is precluded from asserting protection under the Business Judgment Rule based on its *ultra vires* conduct, and failure to exercise due care or reasonable care in discharging its required duties under the Bylaws.

**AND IT IS SO ORDERED**



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Larry B. Hyman, Jr., Presiding Judge  
Fifteenth Judicial Circuit

Conway, South Carolina

Dated: 11-14, 2012

