THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Civil Action No: 2009-CP-22-01655

Appellate Case No. 2012-213634

Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L. Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry O. Snider and Paula D. Snider; William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R. McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008, and Susan R. McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t/ July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC; Harry L. Belk and Jan C. Belk; Dennis E. Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H. S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998; Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H. Sanders and Rebecca H. Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serro, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan 1. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters

Unit D-31 Association of Multiple Ownerships, Inc., Evelyn Gail Earnest, Thomson and Arleen McKeown David T. McGill and Carol G. Mcgill, Rick L. Bledsoe and Susan H. Bledsoe, Geoffrey A. Wienke and Pamela L. Wienke, A. Donald Ross, III and Nancy Kay Ross, Dennis J. Straw and Roxanne B. Straw, and Resort Investments of Litchfield, Georgia M. Pruitt and Howard C. Covington; Litchfield Captain's and P. Duvall; and Melinda Medina; W. Underwood, Andrew J. Wingo, Jr. and Susan A. Wingo, Melanie S. Cooley, the Lois Cooley Camilla J. Wilson; Stewart South, LLC; Quarter South, LLC; Steven H. Frame and Kay B. Frame ..... *Respondents*,

v.

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

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

v.

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

FINAL BRIEF OF RESPONDENTS

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I. STATEMENT OF THE ISSUES ON APPEAL

A. Did the circuit court correctly determine that the Appellant had a duty to investigate when presented with evidence which showed or reasonably showed that a majority of unit owners had neglected the maintenance and repair of their units' windows and sliding glass doors which resulted in water intrusion damage to the common elements of Buildings A and B which the Appellant had an affirmative duty to maintain? Specifically, did the circuit court correctly determine that the Appellant, upon receiving such information, had a duty to initiate some investigation to determine whether it would be appropriate to individually assess the defaulting unit owners in Buildings A and B for the resulting damage to the common elements?

B. Did the circuit court correctly determine that Appellant's unauthorized pattern of governance was evidenced by its: (1) inaction, failure to require the timely replacement of the unsafe, leaking oceanfront windows in Buildings A and B for at least 8 years, (2) incompetence, failure to follow advice of its experts to replace the unsafe, leaking oceanfront windows in both buildings and sue the contractors and other responsible parties for the resulting damage in 2002, (3) ultra vires acts, unauthorized adoption of the admittedly invalid window amendment and the 2010 and 2011 Annual Operating Budgets which improperly made the Respondents liable for the repair, removal, and reinstallation cost of the 1,087 new windows and the 80 new sliding glass doors in violation of § 3.6 of the Master Deed, and (4) lack of good faith and improper motives, continued enforcement of the admittedly invalid window amendment after both the Window and Sliding Glass Door Amendments were voted down on March 26, 2009, which are causally related to Appellant's firm decision not to investigate in order to improperly spread the total cost of repair among the membership, including the C and D members, and consequently are not subject to protection of the business judgment rule?

C. Did the circuit court correctly determine the Appellant breached its duty to investigate arising under the Master Deed and Bylaws, Statutes, and the common law of the State of South Carolina? Specifically, did the circuit court correctly determine the Appellant breached its duty by deciding not to investigate in 2010 and 2011 (whether to individually assess the defaulting unit owners for damaging the common elements) by changing the method of assessment in order to spread the total cost of the repair, removal, and reinstallation of the 1,087 new windows and the 80 new sliding glass doors among the membership, including the C and D members even though both amendments had been previously voted down by the membership at a meeting held on March 21, 2009?

D. Did additional sustaining grounds exist to support the circuit court's determination that the Appellant had a duty to investigate and furthermore

breached its duty? Specifically, did the Appellant have a duty to determine the cause of the "cracking and spalling which was occurring in the pre-cast slabs and beams," in Buildings A and B in 1993 and 1994 as observed by Procon Waterproofing, Inc. during its inspections, and furthermore did the Appellant breach the following duties: (1) failure to hire a structural engineer as recommended by Procon to investigate reported defects in the concrete structural slabs in Building A and B until 12 years later in 2007, (2) failure to repair the reported defects in the concrete structural slabs and waterproof their surfaces as recommended by Procon until 16 years later in 2011, (3) and failure to timely file a lawsuit within the 3 year statute of limitations against the developer, contractors, architect, and other responsible parties regarding the reported defects in the concrete structural slabs and beams in Buildings A and B?

II. STATEMENT OF THE CASE

This Appeal arises out of two cases: Civil Action No. 2009-CP-22-0152 (invalid window amendment case) filed January 29, 2009, and Civil Action No. 2009-CP-22-01655 (invalid repair and reconstruction assessment case) filed October 7, 2009. These cases were consolidated under the latter number. Respondents' contractual, fiduciary, declaratory judgment, and negligence/gross negligence claims brought against the Appellant arose in a large part from the Appellant's "unfair pattern of governance" towards the fifty (50) C and D unit owners from 1998 to present date. Specifically, the Appellant's "*unauthorized pattern of governance*" arises from its inaction, lack of good faith, dishonesty and improper motives regarding its *ultra vires* actions to improperly make the Respondents liable for the cost of repair and reconstruction of the 1,087 new windows and the 80 new sliding glass doors in Buildings A and B in 2010 and 2011, which is contrary to the provisions of the Master Deed and Bylaws, and totally disregards the Respondents' rights and benefits under these governing documents evidenced by the following particulars, to wit:

1. Incompetence and Inaction: In failing to follow the recommendations of its consultants/experts: George McGee, P.E. of McGee Consulting Association ("MCA"), Attorney Ralph McCullough of Finkel & Altman, L.L.C. (the

"Finkel Firm"), general contractor David Diehl, in August of 2002, to remove the unsafe, leaking and improperly installed oceanfront windows, the Appellant, knowingly, allowed the common elements of Buildings A and B to suffer a considerable amount of water intrusion damage for 8 more years. Specifically, the Appellant had been advised by its consultants/experts ***"that problems from water intrusion are time related and tend to compound"*** every 3 to 6 years. (Emphasis added.) (R. p. 1121; R. p. 1127-A; Order, R. p. 5, R. p. 21, ¶ 2; R. p. 2402.)

2. Incompetence and Inaction: In failing to follow the recommendations of its consultants/experts to pursue legal action in August of 2002 against the "***contractors who improperly and negligently installed***" the oceanfront replacement windows in Buildings A and B after Hurricane Hugo, the Appellant's inaction and incompetence allowed claims by its Board and the membership to be barred by the 3 year statute of limitations. (R. pp. 1319-1320; Order, R. pp. 8-9.) It is important to note that Appellant's Board hired the *"contractors who improperly and negligently installed"* the windows after Hurricane Hugo per Dr. Jennings' e-mail dated March 28, 2003. (Emphasis added.) (R. p. 1322; Order, R. p. 21, ¶ 2.)

3. Ultra Vires Act and Improper Motives: In improperly assessing the fifty (50) C and D Respondents $124,879.32 for repairs to the water damaged interior finishes of the units in Buildings A and B, the Appellant breached § 3.6 of the Master Deed, which provides in pertinent part, "carpeting, floor covering, trim finished surface of ceilings and walls, insulation and other fixtures and furnishings which are within or serve the Unit . . ." are the responsibility of the unit owners. (R. p. 968; R. p. 1404; R. pp. 1336-1337.) Lastly, current board members Jim C. Poag (" Mr. Poag") and Doris Bray (" Ms. Bray") admitted in their depositions that the water damages to the interior finishes of the surface walls, floors, and ceilings of the units in Buildings A and B are the responsibility of the individual unit owners and not the association. (Bray Dep., R. p. 1687, lines 4-18; Poag Dep., R. p. 1532, line 11-p. 1535, line 11.)

4. Ultra Vires Act and Improper Motives: By improperly assessing fifty (50) C and D Respondents for part of the repair cost for the removal, repair, and reinstallation of the 80 new sliding glass doors in Buildings A and B in 2010 and 2011. Specifically, § 3.6 of the Master Deed provides in pertinent part, "[e]ach Unit shall also encompass and include the following: (i) the doors (including screen doors) opening into the Unit and onto any balcony reserved to the use of a Unit, including the frames, casings, hinges, handles and other fixtures which are part of the doors; . . . ." (R. p. 968; R. pp. 1402-1404; R. p. 1321; Order, R. p. 21, ¶ 2.)

5. Ultra Virus Act and Improper Motives: Because the Appellant did NOT submit the 2010 and 2011 Annual Operating Budgets to the membership in 2010 and 2011, the Respondents were unduly prejudiced by NOT having the opportunity to timely challenge, object, and amend the admittedly invalid budgetary assessment requiring them to pay the pro rata construction cost for the removal, repair, and reinstallation of the 1,087 new windows and the 80 new sliding glass doors. (Emphasis added.) (Tr. of Hr'g dated May 21-22, 2012, R. p. 816, lines 11-25; Order, R. pp. 24-25.) See, § 1.12 of the Bylaws which provides for the presentation of the budget as part of the order of business at the annual meeting while § 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 holding two-thirds (2/3) of the Percentage Interest in the Common Elements." (R. p. 1009; R. p. 1016; Order, R. pp. 21-25.)

6. Lack of good faith and Improper Motives: At the hearing on 21 May 2012, the Appellant admitted on the record that "[w]hen the Board received [Respondents' counsel] Jeff King's letter [dated June 9, 2008] and they [were] faced with, '[w]hat do we do, this amendment is not valid,' that is what they [were] considering. . . ." (Tr. of Hr'g dated May 21-22, 2012, R. p. 732, lines 1-14.) Specifically, the Appellant wanted to spread out the cost of repair to include the C and D members despite the contrary language of § 3.6 of the Master Deed. Further, the Appellant's continued lack of good faith is demonstrated in its decision to still improperly assess the Respondents for removal, repair, and reinstallation cost for the 1,087 new windows and the 80 new sliding glass doors even after these Amendments were both voted down by the membership at a members' meeting held on March 21, 2009. (R. p. 1279, ¶ III titled Opening Statements; R. p. 1283, ¶ VIII titled Vote on Proposed Amends.; Order, R. pp. 21-25.)

7. Lack of good faith and Improper Motives: The affidavit of Board Member Ms. Bray, filed October 28, 2011, is further evidence of the Appellant's improper motives and lack of good faith when Ms. Bray stated, in pertinent part, the basis for the Board's business judgment decision to assess the Respondents (after both amendments had failed to pass) was as follows:

> *The per unit allocation was based on efforts by the Board to give full force and effect to all relevant provisions of the Master Deed while preserving practicality and equity.* In keeping with this effort, and to avoid litigation expenses associated with Plaintiffs' claims about the validity of the Windows and Doors Amendment, we as a Board

> decided to put the matter before the ownership for another vote in 2009. This alternative vote on the Amendment was not a "legal position" expressed by the Board; it was an attempt to ratify the amendment and therefore resolve the complaints of the ownership. *By their votes, the ownership made clear that the amendment did not enjoy a super majority of support so we allocated costs of the replacement windows and doors themselves to the A and B owners.* We made our decision based on business judgment, not what might or might not happen in court. (Emphasis added; Bray Aff., R. pp. 2256-2257, ¶ 11.)

Here, Ms. Bray's assertion on behalf of herself and the Board, above, is inaccurate for the following reasons. First, the Board admittedly knew the 2006 Window Amendment was invalid upon receipt of Respondents' attorney Jeff King's letter on or about June 9, 2008. (Tr. of Hr'g dated May 21-22, 2012, R. p. 732, lines 1-14.) Second, Ms. Bray's assertion, *"[w]e made our decision based on business judgment, not what might or might not happen in court[,]"* is not true and contrary to the Appellant's own correspondence dated July 8, 2009. (Bray Aff., R. pp. 2256-2257, ¶ 11.) Specifically, the July 8, 2009 letter from Mrs. Gallagher (on behalf of the Appellant) to the unit owners provided in pertinent part that: "[c]onsequently, the results of the [summary] 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.) (R. p. 1291, ¶ 1, 4th and 5th sentences; Order, R. pp. 21-25.)

On April 30, 2012, the Appellant filed an amended answer in response to Respondents' fourth amended complaint alleging, among other things, the following affirmative defenses: Rule 12(b)(6) SCRCP, statute of limitations, business judgment rule, substantial compliance with Master Deed and Bylaws, doctrine of unclean hands, contributory/comparative negligence, and failure to mitigate. (R. pp. 211-216.) Trial was scheduled for May 21, 2012. On that date, before trial commenced, the circuit court heard arguments from counsel on several pre-trial motions. One of those was Respondents' "Motion for Summary Judgment and/or Partial Summary Judgment Against the [Appellant]."

After hearing arguments from counsel, the circuit court ruled from the bench in favor of Respondents, granting partial summary judgment in their favor on the issues of duty and breach based on the following reasoning:

> THE COURT: A summary judgment is certainly an extraordinary remedy, one which should be used sparingly by the Court. A summary judgment is appropriate, however, where there is no material issue of fact . . . . As I look at the facts of this case I am convinced, though, that there are certain matters for which there is no material issue of fact. I find that summary judgment should be granted as to the issue of whether or not a duty exists under the Horizontal Regime Act and the bylaws of the horizontal regime, a duty to enforce the bylaws, and it would be the Court's duty to make a determination of the existence of that duty in a negligence cause, whether I was asked to in summary judgment or otherwise. That duty additionally, I believe, includes a duty, 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 pursue restitution from the offending property owner. In this case there is abundant evidence that at various times during the life of this project the Board, not only the present Board but the past Boards, became aware of the fact that there was water intrusion coming from the windows and doors of individual units in buildings A and B, or at least information that a reasonable person could have drawn that conclusion . . . . The Board had a duty to move forward. Did they, did they breach that duty? Did they do what a reasonable person should have done? ***I understand the Board was bound by the business judgment rule and how they respond should be judged by the business judgment rule.*** However, the uncontroverted evidence shows that the Board may have, or did take the route in which an assessment was made against all the units . . . . The point that stands out to me is this. In making that decision they did not investigate it to determine whether or not this damage was the fault of any particular unit owner or any particular group of unit owners. I find that in that regard there was an investigation done but it was after the lawsuit started, at the time they were having it declad and did not ask the construction company to look into it to tell them whether or not the intrusion from the windows and doors were the responsibility of the landowner or the unit owners that had caused the problem. I find that they have breached the duty to investigate the allegations of water intrusion to determine whether or not the other members of the homeowners association were entitled to some sort of pitching in by the landowners or unit owners that had caused the problem. Now, whether or not there was any damage caused by leaking windows or doors is a matter for the jury in this case but I do find that as a matter of law, taking the evidence in a light most favorable to the non moving party, that there was a duty, that duty included a duty to investigate and that the [Appellant] breached that duty.

(Emphasis added.) (Tr. of Hr'g dated May 21-22, 2012, R. p. 833, lines 6-10; R. p. 833, line 18-p. 834, line 21; R. p. 835, line 20-p. 836, line 3; R. p. 836, line 6-p. 837, line 5.)

On May 23, 2012, the circuit court executed and filed a Form 4 Order that stated, "Partial Summary Judgment Granted/Case Stayed by filing of Appeal." (R. pp. 51-52.) On June 6, 2012, Appellant filed a Motion to Reconsider, Alter, or Amend Pursuant to Rules 52 and 59, SCRCP. (R. pp. 552-647.) On June 18, 2012, Respondents filed a motion under Rule 59(e), SCRCP in opposition to Appellant's motion, and on July 12, 2012, Appellant filed a response to Respondents' motion in opposition. (R. pp. 648-657.) On December 15, 2012, attorneys Wayne R. Byrd and Carlyle R. Cromer of Turner Padget Graham & Laney, PA were substituted as counsel for the Appellant in replace of attorneys Leigh P. Boan and David J. Mills of the McNair Law Firm. (R. pp. 59-63.)

On November 15, 2012, the circuit court signed the written order for its May ruling granting partial summary judgment to Respondents, and then heard arguments on Appellant's motion to reconsider. The circuit court, after hearing arguments from counsel, denied Appellant's motion to reconsider under Rule 59(e), SCRCP, based on the following reasoning:

> THE COURT: Where did the, what evidence do you have that the Board even considered it? All I heard here and all I see here is the Board upon receiving information there is a problem with the windows and doors and there is no question the bylaws make that, or any resulting damage, collateral, collateral damage the responsibility of the individual homeowner or condo owner if the damage is to the common units or common elements. Instead of addressing it pursuant to the bylaws and making some determination of whether or not it is actually the fault of the unit owner or the fault of the engineer or designer of the windows, they go and try to adopt an amendment which will fix it and just make it everybody's problem rather than the problem of the individual homeowner or unit owner, and that is what really concerns me about this, they knew it, there is only one reason for that amendment, they wanted that amendment because they knew that there was an obligation on the part of these unit owners and they wanted to make sure that these units owners didn't

> bear that responsibility, that it got spread out and was paid by all the other unit owners, including the unit owners in C and D. That is what I see here, repeated attempts to change the bylaws, change that part of the bylaws that would clearly make this a problem of the individual unit owner, and I think it is significant, something you said a moment ago, every unit wasn't leaking, every unit wasn't leaking. If it was a design problem, if it was a problem resulting from the flashing or whatever I would think that every unit would have a problem but there were just some units that were and those units, in my mind, obviously are the units that were not maintained. . . . (Tr. of Hr'g dated Nov. 15, 2012, R. p. 913, line 23-p. 915, line 8.)

Later that day, the circuit court's Form 4 Order denying Appellant's Rule 59(e) Motion, SCRCP, to reconsider was filed. (R. pp. 41-47.) On November 19, 2012, Respondents' counsel received written notice of the circuit court's Form 4 Order denying Appellant's motion to reconsider. (R. pp. 41-47.) On December 12, 2012, Appellant served and filed a Notice of Appeal on Respondents' counsel.

III. STATEMENT OF THE FACTS

On April 19, 2008, at the annual members meeting, the Appellant's 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 $12,000,000.00 to $13,000,000.00 depending on the construction budget prepared by MEC Engineering. Although investigation and testing of Buildings A and B had been ongoing since 2006, this was the first time that the Appellant's Board decided to share the estimated cost of repairs and reconstruction for these buildings with the unit owners. (19 April 2008 Annual Members' Meeting Minutes, R. pp. 1237-1238, subparagraph (1) of ¶ IX titled Homeowners Representative Report for Buildings A and B; Order, R. p. 13, ¶ 3; p. 14, ¶ 1.)

TABLE A[1]			
	Building A&B	3 Bedroom Building C&D	4 Bedroom Building C&D
Number of units	80	50	10
% Interest/Unit	0.6751	0.75949	0.80168
Total % /Interest	54.008	37.9745	8.0168
Special Assessment Low Estimate	$12,000,000	$12,000,000	$12,000,000
Per unit payment amount	$ 81,012	$91,139	$96,202
Total	$6,480,960	$4,556,940	$962,016
Special Assessment High Estimate	$13,000,000	$13,000,000	$13,000,000
Per unit payment amount	$87,763	$98,734	$104,218
Total	$7,021,040	$4,936,685	$1,042,184

Under Table A, the Respondents' pro rata common expense assessment compared to the A and B unit owners' assessment for the reconstruction and repair of Buildings A and B was represented by the Appellant to be in the following range:

1. $91,139.00 to $98,734.00 for three (3) bedroom unit owners in Buildings C and D depending on the amount of repair cost for Buildings A and B as set forth above in Table A.

2. $96,202.00 to $104,218.00 for four (4) bedroom unit owners in Buildings C and D depending on the amount of repair cost for Buildings A and B as set forth above in Table A.

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[1] See, Exhibits C and D to Master Deed, R. pp. 1003-1005; A re-recording on January 19, 1999 of the 1st Amendment to the Master Deed, R. pp. 1067-1069; A re-recording on January 19, 1999, of the 2nd Amendment to the Master Deed, R. pp. 1103-1106).

3. $81,012.00 to $87,763.00 for unit owners in Buildings A and B depending on the amount of the repair cost as set forth above in Table A. (19 April 2008 Annual Members' Meeting Minutes, subparagraph (1) of ¶ IX titled Homeowners Representative Report for Buildings A and B, R. pp. 1237-1239.)

After being overwhelmed by the total cost of the reconstruction and repair that could be assessed against them as a common expense to fix Buildings A and B, the Respondents' representatives sought legal advice. They retained attorneys Howell V. Bellamy, Jr. ("Mr. Bellamy"), and Jeffrey W. King ("Mr. King") of the Bellamy Law Firm to advise them regarding the enforceability and/or validity of the Appellant's proposed special assessment. On June 9, 2008, on behalf of the Respondents, Mr. King sent a letter to the Appellant's Board asserting that its proposed special assessment was invalid or partially invalid based on the following conclusion:

> 2006 [Window] Amendment was not properly adopted, leaving the window glasses, screens, frames, casings and sliding glass doors as part of each Unit, not common elements, and therefore replacement or repair is the responsibility of each individual owner. (R. p. 1342, ¶ 2, last sentence; Order, R. pp. 22-23.)

Further, in support of Mr. King's conclusion, former board president Don Johnston ("Mr. Johnston") said he agreed with Mr. King's analysis that the 2006 Window Amendment was invalid. Johnston further supported Mr. King's alternative proposal to the Board as discussed in his June 9, 2008 letter. (12 June 2008 Letter from Johnston to King, R. p. 1346; R. p. 1341,¶ 1; p. 1344, ¶ 2.) Specifically, Mr. Johnston's deposition testimony confirmed this admission as follows:

Q. This is Plaintiff's Exhibit Number 2 to your deposition. Let me represent to you -- there's a cover letter to the McNair Firm. But here's a letter from Jeff King to the board of directors dated June 9, 2008. And here's a letter from you to Jeff King dated June 12, '08.

A. Okay.

Q. Do you recall that?
A. Yes, I do. I remember this clearly.
Q. All right, sir. Well, I'm going to ask you a few questions about it.
A. Okay.
Q. Take whatever time you need to look at it.
A. Yeah, I remember this clearly.
Q. All right. Your letter of June 12 says, "Thank you for your analysis and proposal -- to the Board of Directors of Shipyard Village representing the Owners of Buildings C and D. I believe the analysis is comprehensive with the information at your disposal and the proposal reasonable. I/we (Don and Linda Johnston) have submitted our portion of the legal fees ($500) for services rendered. However, this payment for legal fees does not contribute -- does not" -- I'm sorry -- "constitute an agreement to continue incurring legal fees in the event this Board does not accept the proposal and additional legal action as required. Sincerely, Don and Linda Johnston."
A. That's correct, yes.
Q. All right. So that's right before you went on the board.
A. That's right, yes.
Q. And later you changed your mind and said, I'm not going to participate with the group in C and D bringing actions against the association.
A. That's correct.

(Johnston Dep., R. p. 1489, line 16-p. 1491, line 1; R. p. 1346.)

After receiving Mr. King's June 9, 2008 letter stating his objections to the Respondents being improperly assessed for the repair and replacement of the A and B unit owners' windows and sliding glass doors based on the invalidity of the 2006 Window Amendment, the Appellant's Board agreed to meet with him and the Respondents' representatives. (R. pp. 1341-1344.) At the meeting, however, the Board made it clear that it did not agree with Mr. King's reasoning for challenging the legality of the 2006 Window Amendment in conjunction with the Board's proposed special assessment for the reconstruction and repair of Buildings A and B. Lastly, the Board rejected the alternative proposals raised and argued by Mr. King in his letter. (R. pp. 1341-1343.) Unable to reach an equitable resolution in this matter, the Respondents filed a lawsuit against the Appellant under Civil Action No. 2009-CP-22-0152 on January 29, 2009 challenging the legality and

enforceability of the Window Amendment. (R. pp. 76-84.)

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

The substantial evidence in the Record on Appeal is uncontroverted that the Appellant's governing boards, past and present, had knowledge that the A and B unit owners' windows and sliding glass doors were leaking water into Buildings A and B and causing damage to the common elements since 1983. (8 January 2012 ECS Carolinas, LLP's Amended Investigative Report prepared by Steve Geiger, P.E., R. pp. 1869-1844 titled Review of Correspondence; R. pp. 1869-1939 titled January 2010 Shipyard Village Photographs; R. pp. 1853-1856 titled Professional Opinions; R. pp. 2046-2145 titled Photographs of Various Units in Buildings A and B.) Furthermore, Appellant, also, knew that the unit owners were not maintaining and repairing their windows and sliding glass doors as required by § 3.6 of the Master Deed as evidenced by 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 bylaws 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. (R. p. 1120, ¶¶ 1 and 2; Order, R. p. 4, ¶¶ 2, 3, and 4.)

The August 11, 1999 letter from Susan Pendergrass ("Pendergrass"), Property Manager of Waccamaw Management Company ("Waccamaw") to the A and B unit owners explained that: ***"[p]er 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."*** (Emphasis added.) (R. p. 1317, ¶ 1; Order, R. p. 6, ¶ 6, and R. p. 7, ¶ 1.)

The September 27, 2002 Board Special Meeting Minutes indicated that at the Board's request, McGee Consulting Associates ("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 . . . . 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 were 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.
>
> . . . .
>
> ***Water testing was performed utilizing a hose on some of the windows, and the testing confirmed positive water intrusion. The water testing also confirmed that the water channel[ed] down both sides of the windows, which starts at the top floor windows and works its way to the ground. The water intrusion has caused some of the wood framing to deteriorate due to wood-rot.***

Furthermore, the Minutes provided that the Appellant'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. (R. p. 1127-A, Subparagraph (A) titled Window Problems of ¶ V ; Order, R. p. 5, ¶¶ 2 and 3.)

The October 25, 2002, Board Meeting Minutes discussed a problem with water flowing into Unit A-41 caused by Unit A-51'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. (R. pp. 1132-1133; Order, R. p. 6.)

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. (Order, R. p. 6.)

On October 31, 2002, on behalf of the Board, Mrs. Kelli Diehl ("Mrs. Diehl") of K.A. Diehl ("KAD"), Appellant's property manager, 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. (Emphasis added.) (R. p. 1318; Order, R. pp. 6-7.)

On 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. (Emphasis added.) (R. p. 1321; Order, R. p. 7.)

The March 28, 2003 e-mail from Board President Dr. Leon Jennings ("Dr. Jennings") to Board Member Bob Shaffer regarding window leaks and "new SYV information" 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. (Emphasis added.) (R. p. 1322; Order, R. p. 8.)

A proposal from Pro-Tec indicated that approximately $1,200,000.00 per building, or $2,400,000.00 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 the Board was going to 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 Association and not the unit owners. Further reference was made to balcony stucco "leaching" and cracking balcony "frontages." (R. p. 1159; Order, R. p. 10.)

The first vote on the proposed window amendment at the April 15, 2006 Annual Members Meeting did not pass. In response, the Appellant then initiated a mail referendum on or about April 26, 2006, by seeking written consent for the adoption of window

amendment without holding another meeting. (R. pp. 1165-1166; Order, R. p. 10.) For example, § 1.5 of the Bylaws provides 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."* (R. p. 1007.) But the second vote on the Window Amendment did **NOT** obtain written consent from one hundred percent (100%) of the unit owners entitled to vote as required by § 1.5 of the Bylaws. (Emphasis added.) (Appellant's 24 September 2009 Answer to Respondents' Req. to Admit No. 12, R. p. 921.)

The July 6, 2006 letter to the unit owners from the Board alleges that the proposed Window Amendment, which made windows and sliding glass door the responsibility of the Appellant had passed pursuant to a proxy vote mailed out to the unit owners. (R. p. 1323; Order, R. pp. 10-11.)

Despite the fact that unanimous written consent was **NOT** obtained, the Appellant misled the membership that the 2006 Window and Sliding Glass Door Amendment had properly passed. (6 July 2006 letter from Bd. to unit owners, R. pp. 1323-1324.) The Amendment was recorded on October 16, 2006, but the filed Amendment incorrectly states on page 1 in paragraphs 4 and 5 of its text that it had passed ***"at [a] special meeting [held on April 15, 2006] adopted by affirmative vote of Co-owners two-thirds of the total interest in the Common Elements pursuant to Article XIV, Section 14.1 of the Master Deed"*** which is a blatant misrepresentation of how the voting occurred based on the second proxy vote mail referendum. (Emphasis added.) (Third Amend. to Master Deed, R. p. 1108, ¶¶ 4 and 5.) Lastly, the (invalid) Window Amendment only made windows, and not sliding glass doors the maintenance responsibility of the Appellant. (Third Amend. to Master Deed,

R. p. 1108, ¶¶ 4 and 5; 24 September 2009 Appellant's Answer to Respondents' Req. to Admit No. 1, R. p. 1109.)

The July 28, 2006 Board Meeting Minutes, further, provided that consideration for reimbursement of windows already replaced by unit owners would be given but that "stains and water damage" on the interior of the unit would be a unit owner's responsibility. (R. p. 1169, ¶ 4; Order, R. p. 11.)

The January 26, 2007 Board Meeting Minutes reported that the meeting started with a discussion of Kenneth G. Schneider Jr., AIA of Schneider and Associates ("Schneider") findings of "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 unit owner's window replacement was 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. ("Mr. Stokes") and his firm of MEC Engineering Services, Inc.("MEC") (R. p. 1171, ¶ II; Order, R. p. 11.)

The April 28, 2007 Board Meeting Minutes stated that ***"many sliding glass doors have water penetration problems."*** The minutes reported that the reserve account had approximately $1,391,000.00 with the majority of that money being proceeds from the Buildings C and D lawsuit settlement. (R. p. 1182; Order, R. pp. 11-12.)

A September 26, 2007 letter to unit 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.* (Emphasis added.) (R. pp. 1337-1338; Order, R. p. 12.)

The Board's September 26, 2007 letter, also, addressed, ***"[w]ater 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. (R. pp. 1336-1337; Order, R. p. 9.)

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 owner's responsibility, the issue was thrown back at the owners who most ended up doing nothing . . . .***" Her e-mail, also, stated that: "***Bobby Warner only did cosmetic stucco repairs to buildings for 20+ years and kept pushing back to the owners – who clearly could not handle [it] and needed help.***" (Emphasis added.) (R. p. 1328; Order, R. p. 13.)

The January 25, 2008 e-mail from Dr. Jack Eblin ("Dr. Eblin") to the Board, Mrs. Gallagher, and Mr. Eddie Stokes, P.E. of MEC Engineering, stated that: ***"water intrusion began when A and B were built - the BOD took responsibility one and half years ago."*** (Emphasis added.) (R. p. 1340; S. R. p. 29; Order, R. p. 13.) Dr. Eblin's

acknowledgment confirmed the Board had not undertaken timely and proper maintenance, and repair of the Buildings A and B as it was required to do. (Order, R. p. 13.)

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 to 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 $10,944,468.00. (R. p. 1244; Order, R. p. 14.)

At the March 21, 2009 Special Members Meeting, the Board called for a third re-vote on the 2006 Window Amendment and a first vote on the 2009 Sliding Glass Door Amendment because the validity of these amendments were being legally challenged by unit owners. After the votes were taken and tallied on the Amendments, Board President Johnston announced that both the Window and Sliding Glass Door Amendments had failed to pass by the required two-thirds (2/3) majority vote. (21 March 2009 Members' Meeting Mins., R. p. 1279, ¶ III titled Opening Statements; p. 1283, ¶ VIII titled Vote on Proposed Amends.)

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 unit owners as required by § 1.12 of the Bylaws. Specifically § 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 unit 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." (R. pp. 1285-1289; Order, R. p. 15.)

On July 8, 2009 a letter from Mrs. Vicki Gallagher ("Mrs. Gallagher") of KAD was sent to the unit 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 $10,994,468.00 to fund the extensive repairs and reconstruction needed for Buildings A and B. (R. pp. 1290-1292; Order, R. pp. 15-16.) Mrs. 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.) (R. pp. 1290-1292; Order, R. pp. 15-16.)

IV. 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), SCRCP. 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. Id. 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, 329, 353 S.E.2d 312, 314 (Ct. App. 1987) (citations omitted).

V. ARGUMENTS

A. The circuit court correctly determined that Appellant had a duty to investigate when presented with evidence which showed or reasonably showed that a majority of unit owners had neglected the maintenance and repair of their units' windows and sliding glass doors which resulted in water intrusion damage to the common elements of Buildings A and B which Appellant had an affirmative duty to maintain. Specifically, the circuit court correctly determined that Appellant, upon receiving such information, had a duty to initiate some investigation to determine whether it would be appropriate to individually assess the defaulting unit owners in Buildings A and B for the resulting damage to the common elements.

Appellant's assertions that no "duty to investigate" exists under the expressed or implied language of the Master Deed and Bylaws, and no "duty to investigate" exists even when presented with evidence which showed or reasonably showed the neglect of a majority of unit owners in maintaining their units' windows and sliding glass doors had resulted in water intrusion damage to the common elements, are without merit. Its assertions are contrary to the provisions of the Master Deed and Bylaws, the Statutory law, and common law of the State of South Carolina based on the following grounds:

1. Duty to inquire exists under the Master Deed and Bylaws.

Appellant's argument that it has no duty to inquire under the expressed or implied language of the Master Deed and Bylaws is inconsistent with its prior argument that it had complied with its duty to inquire at the motion hearings on May 21-22, 2012. Specifically, in responding to the circuit court's questions during the hearing, the Appellant's counsel made the following admissions: (1) that Appellant has an affirmative duty to maintain, replace, and repair the common elements of Buildings A and B (Tr. of Hr'g dated

May 21-22, 2012, R. p. 778, lines 4-11; Appellant's Answer to First Req. To Admit No. 1, R. p. 931; Order, R. p. 26); (2) that Appellant and the unit owners are bound by the Master Deed and Bylaws (Tr. of Hr'g dated May 21-22, 2012, R. p. 778, lines 22-23; Appellant's Answers to Respondents' Second Req. To Admit Nos. 3, 6, 7, 8, and 9, R. pp. 941-945; Order, R. p. 26); (3) that Appellant has a duty to require a defaulting unit owner to comply with provisions of the Master Deed and Bylaws by taking prompt and appropriate action to correct any violations (Tr. of Hr'g dated May 21-22, 2012, R. p. 779, lines 16-19; R. p. 780, lines 7-12; Order, R. p. 26); and (4) that Appellant has a duty to individually assess a defaulting unit owner if his or her unit has damaged the common elements which it has an affirmative duty to maintain and repair. (Tr. of Hr'g dated May 21-22, 2012, R. p. 734, lines 5-10; Appellant's Certificate of Incorporation filed on July 7, 1982, R. p. 509, ¶ 4; Order, R. p. 26.) Lastly, Appellant's counsel admitted on the record that a duty to investigate and pursue a recovery exists based on her positive response to the circuit court's question:

> 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 from, 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 Hr'g dated May 21-22, 2012, R. p. 771, lines 6-23; Order, R. p. 30.)

In response to the Appellant's argument that it has no duty to investigate under the governing documents that was raised for the first time in Appellant's Initial Brief, the Respondents' assert that the contrary is true based on the Appellant's authority and

affirmative obligation to investigate and individually assess the defaulting unit owners as prescribed in Paragraph Two (2) of Article IX, § 9.4, Covenant to Comply with Restrictions and Obligations; §§ 12.1 and 16.2 of the Master Deed; and §§ 6.3, 6.4, and 7.3 of the Bylaws which provide in pertinent part as follows:

- § 9.4 of the Master Deed, provides in pertinent part, "[t]he 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-owners, any structure, thing or condition that may exist thereon contrary to the intent and meaning of the provisions hereof . . . ." (Order, R. p. 27; Master Deed § 9.4, R. pp. 982-984.)

- § 12.1 of the Master Deed, provides in pertinent part, "[a]ny 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." (Order, R. p. 28; Master Deed § 12.1, R. p. 992.)

- § 16.2 of the Master Deed, provides in pertinent part, "[e]ach 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, injunctive relief, or both, maintainable by the manager, or the Board of directors on behalf of Council." (Order, R. p. 28; Master Deed § 16.2, R. p. 999.)

- § 6.3 of the Bylaws provides in pertinent part, "[i]n the event that any Co-owner fails to perform the maintenance required by him by these By-laws 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 Individual Assessment." (Order, R. p. 28; Bylaws § 6.3, R. p. 1019.)

- § 6.4 of the Bylaws, provides in pertinent part, "[t]he expenses of all maintenance, repair, replacement provided by 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 By-laws or by any lawful Regulation (2) the willful act, neglect,

or abuse of a Co-owner, they SHALL be charged to such Co-owner as an Individual Assessment." (Order, R. p. 28-29; Bylaws § 6.4, R. p. 1019.)

- § 7.3 of the Bylaws, provides in pertinent part, "[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." (Order, R. p. 29; Bylaws § 7.3, R. p. 1021.)

"Property, whether subject to the Horizontal Property Act, may, of course, be governed by restrictive covenants. Real covenants have been defined as 'agreement[s] . . . to do, or refrain from doing, certain things with respect to real property.' 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* § 1 (2005). Therefore, covenants, 'in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract.' Id. (citing Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct. App.1987)). Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. 17 S.C. Jur. *Covenants* § 2 (2005) . . ." Queen's Grant II Horizontal Property Regime v. Greenwood Dev. Corp.., 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (citations omitted). "'The purpose of all rules of contract construction is to ascertain the intention of the parties and that intention must be gathered from the entire agreement and not from any one particular phrase thereof.'" Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citations omitted). Highlands Property Owners Ass'n, Inc. v. Shumaker Land, LLC, 397 S.C. 432, 438, 724 S.E.2d 685, 688 (Ct. App. 2012) ("It is fundamental that in the construction of the language of a [contract], it is proper to read together the different provisions therein dealing with the same subject matter, and where

possible, all the language used should be given a reasonable meaning.") (quoting from Brady v. Brady, 222 S.C. 242, 246,72 S.E.2d 193, 195 (1952)).

Here, applying the legal principles enunciated by this Court in Queen's Grant II Horizontal Property Regime, supra, Stone Creek Cove Condominium II Horizontal Property Regime, supra, and Highlands Property Owners Ass'n, Inc. v. Shumaker Land, LLC, supra, when reading the affirmative requirements of §§ 9.4, 12.1, and 16.2 of the Master Deed together with the requirements of §§ 6.3, 6.4, and 7.3 of the Bylaws can yield only one practical interpretation that a duty to investigate exists in order to give reasonable meaning and effect to all of these sections. (Master Deed § 9.4, R. pp. 982-984, § 12.1, R. p. 992, and § 16.2, R. p. 999; Bylaws §§ 6.3 and 6.4, R. p. 1019, and § 7.3, R. p. 1021.) Specifically, the Appellant has already admitted that it has a ***"'duty to enforce the terms of the Act, Master Deed and these Bylaws by taking prompt and appropriate action to correct any violations,'"*** (quoting from the Order of the circuit court) which presupposes a duty to investigate possible violations of the covenants exists in order to take appropriate action to correct any violations as required by its affirmative duties. (Appellant's Initial Br., pp. 12-13; Order, R. p. 29.) Consequently, without such a reasonable interpretation, the Appellant would not be able to comply with its other fundamental duties such as its duty to determine if a ***"Co-owner's failure to perform the maintenance required by him by these By-laws ... creates or permits a condition which is hazardous to life, health, or property, or which unreasonably interferes with the right of another Co-owner ...."*** (Bylaws §§ 6.3 and 6.4, R. p. 1019, § 7.3, R. p. 1021.) See Cohan v. Riverside Park Place Condominium Ass'n, Inc., 123 Mich. App. 743, 748-750, 333 N.W.2d 574, 576-577 (Mich. App. 1983) (Court held that the board of directors of a condominium had the right to request

access to an individual unit in order to "*inspect it for suspected violations of condominium building regulations*"). Further, the Appellant's argument that there is no duty to inquire or inspect is misplaced and contrary to the fundamental purpose of the Master Deed and Bylaws which is to ensure the safety and structural integrity of the regime's buildings. See also, Dockside Ass'n, Inc. v. Detyens, 291 S.C. 214, 216, 352 S.E.2d 714, 716 (Ct. App.1987) (this Court interpreted the by-laws to give the Board of Directors the *implied authority* to determine the existence of an emergency where the by-laws prescribe that notice of a need for an assessment for emergency common expenses shall be given to the co-owners for needed repairs to the common elements). Furthermore:

> [N]either law nor equity requires every term or condition to be set forth in a contract. Where an implied term is necessary to effectuate the intention of the parties, the law will supply it. The unexpressed provision may be inferred from the language of the contract itself, or by looking to the external facts and circumstances surrounding the bargain, or by proving a general custom and usage of including certain terms as part of similar contracts.
>
> Time Warner Cable v. Condo Services, Inc., 381 S.C. 275, 285, 672 S.E.2d 816, 820-821 (Ct. App. 2009) (internal citations omitted).

Respondents, further, rely on the case of Messer v. Messer, 359 S.C. 614, 598 S.E.2d 310 (Ct. App. 2004) for this Court's holding that, "[i]n the absence of an express provision in the contract, the law will imply an agreement to do those things that according to reason and justice should be done to carry out the purpose for which the contract was made." Id. at 628, 598 S.E.2d at 318. Accordingly, this Court should affirm the circuit court's ruling that the Appellant has a "duty to investigate" under the expressed or implied language of the Master Deed and Bylaws based on this Court's reasoning in the cases of Dockside Ass'n, Inc. v. Detyens, supra, and Messer v. Messer, supra, and Time Warner Cable v. Condo Services. Inc., supra, in order for the Appellant to perform its affirmative duties such as

abating *"a condition which is hazardous to life, health, or property"* or preventing the A and B unit owners' windows and sliding glass doors from leaking water into and damaging the common elements. (Bylaws §§ 6.3 and 6.4, R. p. 1019, Bylaws § 7.3, R. p. 1021.)

2. Duty to inquire exists under the South Carolina Nonprofit Corporation Act.

Appellant's assertion that it has no "duty to inquire" is misplaced and contrary to its Board's expressed requirements under S.C. Code Ann. § 33-31-302(18) of the South Carolina Nonprofit Corporation Act, and the substantial evidence in the Record on Appeal for the following reasons. First, under the clear and unambiguous language of § 7.3(e) of the Master Deed, this document provides that ***"the Council and its Board of Directors shall have all the powers, rights and obligations of corporations organized under the laws of the state of its incorporation...."*** It is undisputed that the Appellant is a nonprofit corporation under the provisions of the South Carolina Nonprofit Corporation Act. Further, S.C. Code Ann. § 33-31-302 (2006) regarding a nonprofit corporation's general powers provides in pertinent part:

> Unless its articles of incorporation provide otherwise, every corporation . . . has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without limitation, power:
>
> . . . .
>
> (18) to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

The South Carolina Reporters' Comments to S.C. Code Ann. § 33-31-302(18) states that, "[t]he purpose of item (18) is to ensure that all of the powers granted in this section are broadly interpreted and that there be no limitation imposed on the powers of any nonprofit corporation." S.C. Code Ann. § 33-31-302(18) (2006). Second, S.C. Code Ann.

§ 33-31-830(a)(2) requires that a director in discharging his or her duties to act "*with the care of an ordinarily prudent person in a like position under similar circumstances.*" S.C. Code Ann. § 33-31-830(a)(2) (2006). The South Carolina Reporters' Comments to S.C. Code Ann. § 33-31-830(a)(2) (2006) assert that:

> [i]n appropriate circumstances the duty of care *requires reasonable inquiry*. Where a problem exists or a report on its face does not make sense, a director has a duty to inquire into the surrounding facts and circumstances. The inquiry required is the inquiry an ordinarily prudent person in a like position would make under similar circumstances.

Here, based on Appellant's broad general powers under S.C. Code Ann. § 33-31-302(18) (2006) in conjunction with its due care requirement in the performance of its duties under S.C. Code Ann. § 33-31-830(a)(2) (2006), the Appellant is required to conduct *a reasonable inquiry* to determine whether it would be appropriate to individually assess the defaulting unit owners in Buildings A and B for their damage to the common elements based on the following reasons. First, Appellant admits that the maintenance, repair, and replacement of the windows and sliding glass doors is the responsibility of the individual unit owners in Buildings A and B under § 3.6 of the Master Deed. (R. pp.1280-1283.) Second, Mrs. Diehl's e-mail to the Board dated September 18, 2007, confirmed that the Board and KAD were aware that many of the A and B unit owners were doing nothing to prevent their units' windows and sliding glass doors from leaking water into and damaging the common elements of Buildings A and B. For example, she stated, "many of these units were leaking ... the issue was thrown back at the owners who most ended up doing nothing...." (R. p. 1328; Order, R. p. 13.) Third, in 1999 Appellant "notifi[ed] all unit owners and inform[ed] them that they are responsible for waterproofing: (1) the threshold underneath their sliding glass doors, and (2) window frames of their unit." (R. p. 1120; Order, R. p. 4.)

Accordingly, this Court should affirm the circuit court's ruling that the Appellant's duty of care requires *a reasonable inquiry* whether it would be appropriate to individually assess the defaulting unit owners for their damage to the common elements in Buildings A and B, under the Board's general duties as provided by S.C. Code Ann. § 33-31-302(18) (2006) in conjunction with the application of its due care requirement in performing its affirmative duties under S.C. Code Ann. § 33-31-830(a)(2) (2006).

3. Duty to inquire exists under common law negligence.

Appellant's assertion that it has no "duty to inquire" is misplaced and contrary to Record on Appeal for the following reasons. First, 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). 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 By-laws. Id. at 369, 345 S.E.2d at 710. In Murphy, the Court reasoned that, "*since the association can sue a member for failure to adhere to the bylaws, rules, and regulations, a member necessarily can sue the association for this same failure.*" Id. at 369, 345 S.E.2d at 710. "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a defendant's own policies and guidelines." Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006) (citations omitted) (e.g., S.C. Code Ann. § 33-31-830(a)(2) (2006) requires that a director

in discharging his or her duties to act "*with the care of an ordinarily prudent person in a like position under similar circumstances*"). See also, 15B Am. Jur. 2d *Condominiums* § 22 (2013) (A homeowners' association has a duty to the members of the common-interest community to use ordinary care and prudence in managing the property of the community that is subject to its control) (citations omitted). Second, the Respondents, also, cite the case of Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel Int'l Corp,, 286 S.C. 555, 335 S.E.2d 365 (1985) as additional authority for the legal principle that a condominium association has a "***duty to pursue a recovery for any alleged construction defects in the common elements which it maintains,***" and that if the association fails to do so the individual owners have a cause of action against the association for its negligence. Id. at 556, 335 S.E.2d at 366 (emphasis added). This necessarily implies that the Appellant has an affirmative duty to investigate and possibly pursue a recovery when presented with evidence that the source of the water intrusion damage to the common elements of Buildings A and B was caused by the defaulting unit owner's neglectful maintenance of their units. See, id. at 556, 335 S.E.2d at 366. Third, "*it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care.*" Madison ex rel. Bryant, supra. Id. at 137, 638 S.E.2d at 675 (citing Sherer v. James, 290 S.C. 404, 406, 351 S.E. 2d 148, 150 (1986)); Roundtree Villas Ass'n v. 4701 Kings Corp., 282 S.C. 415, 423, 321 S.E.2d 46, 50-51 (1984).

Here, the evidence is uncontroverted that the Appellant assumed a duty to act with due care when it hired a contractor and/or installer to replace the damaged oceanfront windows in Buildings A and B after Hurricane Hugo in 1990. (R. p. 1322.) The window maintenance and repair is the sole responsibility of the A and B unit owners under

§ 3.6 of the Master Deed. Further, the Appellant breached its assumed duty of care by: (1) refusing to follow the recommendations in August of 2002 of its consultants/experts: George McGee, P.E. of MCA, and attorney Ralph McCullough of the Finkel Firm to remove the unsafe, leaking, and improperly installed oceanfront windows in Buildings A and B (R. p. 1127-A; R. p. 2402; R. p. 1322); (2) refusing to take any responsibility for fixing the window problem after being advised by its consultants/experts "*that problems from water intrusion are time related and tend to compound*" every 3 to 6 years. (R. p. 1121; R. pp. 1319-1320; Order, R. p. 8); and (3) refusing to pursue legal action in August of 2002 against the contractors and other responsible parties who had allowed the membership's claims to be barred by the 3 year statute of limitations. (R. pp. 1319-1320; Order, R. p. 8.) Specifically, the e-mail to Board member Bob Shaffer from former Board President Dr. Jennings admits the Board's liability for the installation of the defective windows when Dr. Jennings states: "***[t]he 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." (R. p. 1322.) "All the ocean side windows were removed and replaced after Hurricane Hugo." (R. p. 2154, ¶ 5.) "The installed windows [were] prefabricated residential windows; the building over 3 floors are to utilize commercial windows" and these windows were not Code compliant per the Georgetown County Building Code. (R. p. 2402, ¶¶ 3 and 4.) See, 15B Am. Jur. 2d *Condominiums* § 51 (2013) (A presumption of negligence on the part of a condominium homeowners association may arise from failure to comply with a statute, a safety order, an administrative regulation, or a local

building code provision) (citations omitted). Accordingly, this Court should affirm the circuit court's determination that the Appellant had a common law duty of care, and furthermore breached its duty of care based on the foregoing facts and circumstances and the reasoning of Madison ex rel. Bryant v. Babcock Center, Inc., supra, Murphy v. Yacht Cove Homeowners Ass'n, supra, and Roundtree Villas Ass'n v. 4701 Kings Corp., supra. (Order, R. pp. 8-9.)

B. The circuit court correctly determined that Appellant's unauthorized pattern of governance was evidenced by its: (1) inaction, failure to require the timely replacement of the unsafe, leaking oceanfront windows in Buildings A and B for at least 8 years, (2) incompetence, failure to follow advice of its experts to replace the unsafe, leaking oceanfront windows in both buildings and sue the contractors and other responsible parties for the resulting damage in 2002, (3) ultra vires acts, unauthorized adoption of the admittedly invalid Window Amendment and the 2010 and 2011 Annual Operating Budgets which improperly made the Respondents liable for the repair, removal, and reinstallation cost of the 1,087 new windows and the 80 new sliding glass doors in violation of § 3.6 of the Master Deed, and (4) lack of good faith and improper motives, continued enforcement of the admittedly invalid Window Amendment after both the Window and Sliding Glass Door Amendments were voted down on March 26, 2009, which are causally related to Appellant's firm decision not to investigate in order to improperly spread the total cost of repair among the membership, including the C and D members, and consequently are not subject to protection of the business judgment rule.

Appellant's assertion that its "failure to investigate" is protected by the business judgment rule is without merit, and not supported by the substantial evidence in the Record on Appeal and the case law for the following reasons:

1. The business judgment rule does not permit the Appellant to change the assessment method specified in the governing documents.

Appellant's contention that its pro rata assessment of the Respondents for the removal and replacement cost of the 1,087 new windows and the 80 new sliding glass doors located in Buildings A and B is reasonable and was adopted in good faith in the exercise of its

business judgment is without merit, and contrary to the case law. Appellant's argument misses the point because its assessment violates § 3.6 of the Master Deed. (Master Deed § 3.6, R. p. 968.)

Respondents rely upon the case of Seabrook Island Prop. Owners Ass'n v. Pelzer, 292 S.C. 343, 356 S.E.2d 411 (Ct. App. 1987) as authority for the legal principle that the business judgment rule does not permit the Appellant to change the assessment method specified in the governing documents. Id. at 347-348, 356 S.E.2d at 414. In Seabrook Island Prop. Owners Ass'n, the Association instituted an action against J. Randolph Pelzer ("Pelzer") to collect an unpaid annual assessment on two lots owned by Pelzer at Seabrook Island. Id. at 345, 356 S.E.2d at 412. Pelzer counterclaimed, alleging the assessment on his properties was invalid, because the annual maintenance charge was not "*based upon assessed valuation for taxation purposes*" as required by the restrictive covenants and bylaws. Id. In Seabrook Island Prop. Owners Ass'n, this Court found that the association's restrictive covenants and bylaws required the annual maintenance charges to be based on property values, not a flat fee system of assessment. Specifically, this Court found that the association's flat fee system of charges violated the fixed rate requirement under Article III, Section 1, of the bylaws, and, therefore, the flat fee system could not be defended on the ground that it was a reasonable alternative under the business judgment rule. Id. at 348, 356 S.E.2d at 414; citing Lovering v. Seabrook Island Property Owners Ass'n, 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986), *aff'd as modified,* 291 S.C. 201, 352 S.E.2d 707 (1987) as authority for legal principle that "a corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are ultra vires." Id. at 348,

356 S.E.2d at 414. Further, citing the case of Dockside Association, Inc. v. Detyens, 291 S.C. 214, 352 S.E.2d 714 (Ct. App. 1987) as authority for legal principle the "'business judgment' rule applies to intra vires action of the corporation, not to ultra vires acts.'" Id. Accordingly, relying on these legal principles from the cases of Lovering v. Seabrook Island Property Owners Ass'n, supra, and Dockside Ass'n, Inc. v. Detyens, supra, this Court held "[t]he Association is bound to follow the covenants and its own bylaws." Id.

Here, the evidence is uncontroverted that Appellant improperly assessed the fifty (50) C and D Respondents in 2010 and 2011 for the repair and soft cost associated with the windows, sliding glass doors, and interior finishes of the A and B units for the following reasons. First, the third re-vote on the 2006 Window Amendment and the first vote on 2009 Sliding Glass Door Amendment did NOT pass at the special members meeting held on March 21, 2009. (21 March 2009 Members' Meeting Mins., R. p. 1279, ¶ III titled Opening Statements; p. 1283, ¶ VIII titled Vote on Proposed Amendments.) Second, the Appellant admitted, ***"because of the amendment's failure, the balcony doors and windows again became the responsibility of [A and B] co-owners[,]"*** and not the Respondents. (Appellant's Initial Br., p. 9.) Third, at the motion hearings on May 21-22, 2012, the Appellant finally admitted on the record after being questioned by the circuit court that the 2006 Window Amendment was invalid as a matter of law. (Tr. of Hr'g dated May 21-22, 2012, R. p. 732, lines 1-14.) Fourth, the Appellant's September 26, 2007 letter to the unit owners provided that, ***"leaking into the interior of the A and B units are the responsibility of the owner and/or the maintenance company hired by the owner, and not the on-site management staff."*** (R. p. 1337, ¶¶ 2 and 3.)

Furthermore, since the Master Deed and Bylaws require the maintenance and repair, replacement, and soft cost associated with the windows, sliding glass doors, and interior finishes to be individually assessed against the A and B unit owners as specified § 3.6 of the Master Deed, the Appellant's ***"per unit allocation ... based on ... practicality and equity"*** violates § 3.6 of the Master Deed and cannot be defended on the ground that it is a reasonable alternative under the business judgment. (Bray Aff., R. pp. 2256-2257, ¶ 11.) Specifically, the Appellant's common expense assessment against the Respondents is in direct contravention of this Court's holding in Seabrook Island Prop. Owners Ass'n v. Pelzer, supra. (Master Deed § 3.6, R. p. 968.) Accordingly, this Court should affirm the circuit court's ruling that the Appellant's "failure to investigate" is not protected by the business judgment rule.

2. The business judgment rule does not protect the Appellant from its inaction and incompetence regarding affirmative duty to maintenance and repair of the common elements of Buildings A and B.

Appellant's assertion that any failure to comply with its affirmative duties under the Master Deed and Bylaws is protected by the business judgment rule is without merit, and not supported by the case law and the substantial evidence in the Record on Appeal.

Respondents rely upon the case of Murphy v. Yacht Cove Homeowners Ass'n, 289 S.C. 367, 345 S.E.2d 709 (1986) as authority for the legal principle that "***since the association can sue a member for failure to adhere to the bylaws, rules, and regulations, a member necessarily can sue the association for this same failure.***" Id. at 369, 345 S.E.2d at 710; Queen's Grant Villas Horizontal Property Regimes 1-V v. Daniel Int'l Corp., supra at 555, 335 S.E.2d at 365 (Regime has a duty to pursue recovery for construction defects in common elements which it has the duty to maintain, and regime may be liable to

homeowners if it does not uphold such duty). Also, the Respondents cite the case of Agassiz West Condominium Ass'n v. Solum, 527 N.W.2d 244 (N.D. 1995) as persuasive authority for the legal principle that the Board's inaction and failure to make definite plans for necessary repairs to the common areas is not protected by the business judgment rule. Id. at 247-249. In Agassiz West Condominium Ass'n, the condominium association brought action against a unit owner Judy Solum ("Solum") to collect unpaid amounts of common charges and pro rata insurance charges, and she counterclaimed against the association for failing to make the necessary repairs to common areas of the building in which Solum's unit was located. Id. The county court found that the association failed to maintain and repair common areas of Solum's building, and the association appealed. Id.

The Supreme Court of North Dakota, relying on the case of Murphy v. Yacht Cove Homeowners Ass'n, supra at 367, 345 S.E.2d at 710 as authority for the legal proposition that "Courts have allowed unit owners to sue a condominium association for ... negligence relating to upkeep and maintenance of common areas[,]" Id. at 247, found in Agassiz West Condominium Ass'n that the "***board ... failed to make definite plans for necessary repairs to the common areas in Solum's building, and its failure posed serious, potential dangers for the condominium residents.***" Id. at 249. Further, the court held "***that Agassiz's bylaws affirmatively require[d] the board to make repairs to common areas, and under the business-judgment rule and the trial court's findings, the board's inaction was not authorized and was a breach of its duty.***" Id. (emphasis added) (compare citing Schoninger v. Yardarm Beach Homeowners Ass'n, Inc., 134 A.D.2d 1, 523 N.Y.S.2d 523, 529 (N.Y. App. Div. 01987) (board's choice between two plans for repair of common area and implementation of one plan governed by business-judgment rule)). Id. See, Goddard v.

Fairways Dev. General Partnership, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993) (A showing of bad faith, dishonesty or *incompetence* by the governing board is not protected under the business judgment rule). A governing board and/or director may breach its general standard of care by *disregarding fundamental duties* or *being inattentive*. See, Olin Mathieson Chem. Corp. v. Planters Corp., 236 S.C. 318, 114 S.E.2d 321 (1960) (finding directors liable for inattention and for negligent supervision of officers); Baker v. Mutual Loan & Inv. Co., 213 S.C. 558, 50 S.E.2d 692 (1948) (finding directors liable for wrongful payment of dividends resulting from inattentiveness).

Here, the evidence is uncontroverted that Appellant's failure to adhere to its acknowledged affirmative duties under the Master Deed and Bylaws is not subject to protection under business judgment rule based on the following reasons. First, the Board's inaction and failure to replace or require the timely replacement of the unsafe, leaking oceanfront windows in Buildings A and B for at least 8 years. (Letter from Jennings to Co-owners, R. pp. 1319-1320; Sept. 18, 2007 E-mail from Diehl to Board regarding window leaks, R. p. 1328; Order, R. p. 8; R. p. 1322.) Second, the Board's incompetence and failure to follow the advice of its consultants/experts to replace the unsafe, leaking oceanfront windows in both buildings and sue the contractors and other responsible parties for the resulting damage to the common elements in 2002. (R. pp. 1319-1320; Order, R. p. 8.) Third, the Board's failure to make definite plans for the necessary repairs and replacement of the unsafe, leaking oceanfront windows and sliding glass doors for over 8 years. Thus, the Appellant permitted the previously known water intrusion damage to the common elements to compound for over 8 years in Buildings A and B. (Schneider Dep., R. p. 1550, line 7-p. 1551, line 17; R. p. 1552, lines 4-14; R. p. 1553, lines 1-p. 1557, line 15; R. pp.

1538-1543; Gallagher Dep., S. R. p. 24, line 15-p. 27, line 19; R. pp. 1435-1438; Parades Dep., R. p. 1414, line 21-p. 1417, line 18; R. pp. 1407-1409; Report of Parades, S. R. pp. 38-51; 3 August 2009 Report of Construction Science and Engineering, Inc., prepared by Derek A. Hodgin, P.E., R. p. 1817, ¶ Issue "B".)

Accordingly, based on the reasoning of Murphy v. Yacht Cove Homeowners Ass'n, supra, and Agassiz West Condominium Ass'n v. Solum, supra, this Court should affirm the circuit court's ruling that the Appellant's conduct is not subject to protection under the business judgment rule. Specifically, the Appellant's gross inaction and incompetence in not addressing the leaking windows and sliding glass doors for over 8 years allowed Buildings A and B to become ***"two badly distressed, unsafe, and arguably uninhabitable buildings in ... [the] regime"*** as described by the Board in its 2010 letter to the unit owners. (Emphasis added.) (R. p. 1405, ¶ 2, 5th sentence.)

3. The business judgment rule does not shield the Appellant from its ultra vires actions, lack of good faith, and improper motives concerning its affirmative duties to enforce the covenants, correct violations, and maintain, repair, and replace the common elements of Buildings A and B.

Appellant's arguments: (1) that its enforcement of an admittedly invalid Window Amendment (which improperly made the Respondents liable for the maintenance, repair, and replacement of the A and B unit owners' windows and sliding glass doors), and (2) that its improper approval and assessment of the Respondents with 2010 and 2011 operating budgets, are protected by the business judgment rule is without merit, and not supported by the case law and the substantial evidence in the Record of Appeal for the following reasons.

First, Appellant's illegal adoption of the 2006 Window Amendment was an *ultra vires* act, which violated Article I, §§ 1.3 and 1.5 of the Bylaws, and, thus, placed the

Appellant's conduct outside the scope and protection of the business judgment rule. (Bylaws §§ 1.3 and 1.5, R. pp. 1006-1007.) Furthermore, at the hearing on May 21-22, 2012, the Appellant 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 Hr'g dated May 21-22, 2012, R. p. 732, lines 1-14.) However, the Appellant's governing Board continued to assert the validity of the 2006 Window Amendment (knowing the amendment was invalid) even after receiving Mr. King's letter which provided in pertinent part:

> 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.
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> . . . .
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> 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. (R. p. 1342, ¶ 2; Order, R. pp. 22-23.)

Second, the Appellant knowingly failed to place its adopted annual operating budgets on the annual agenda for presentation to the unit owners at their Annual Members Meetings in 2009 and 2010, respectively; and, therefore, Appellant acted without authority and violated the affirmative requirements of §§ 1.12, 5.2, and 5.3 of the Bylaws. (Bylaws § 1.12, R. p. 1009; §§ 5.3 and 5.4, R. p. 1016.) Specifically, Article V, § 5.3 of the Bylaws provides

that "*[t]he 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.) (Bylaws § 5.3, R. p. 1016.) Furthermore, at the hearing on May 21-22, 2012 the Appellant admitted on the record, "***[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 Hr'g dated May 21-22, 2012, R. p. 795, lines 2-15.) However, the Appellant'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.) 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, this Court should affirm the circuit court's ruling that the business judgment rule does not protect the Appellant's *ultra vires* actions from judicial review based on its invalid assessment under the Master Deed and Bylaws evidenced by the following admission of the Appellant:

> 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 --
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> 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 Hr'g dated May 21-22, 2012, R. p. 816, lines 11-24; Order, R. p. 25, ¶ 2.)

C. The circuit court correctly determined the Appellant breached its duty to investigate arising under the Master Deed and Bylaws, Statutes, and the common law of the State of South Carolina. Specifically, the circuit court correctly determined the Appellant breached its duty by deciding not to investigate in 2010 and 2011 (whether to individually assess the defaulting unit owners for damaging the common elements) by changing the method of assessment in order to spread the total cost of the repair, removal, and reinstallation of the 1,087 new windows and the 80 new sliding glass doors among the membership, including the C and D members even though both Amendments had been previously voted down by the membership at a meeting held on March 21, 2009.

The Appellant's contention that the circuit court erred in ruling that the Appellant had breached its duty to investigate is misplaced, and contrary to the substantial evidence in the Record on Appeal for the following reasons. First, the Appellant admitted "***[i]t is undisputed that the . . . [Appellant's] Board did not ask any expert to break out the damages attributable to the alleged failure of the [A and B] Co- owners to maintain their windows and sliding glass doors***" in response to Respondents' Rule 59(e) Motion. (Emphasis added.) (R. p. 653, ¶ 3, 2nd sentence; Order, R. p. 34, n. 3.) Furthermore, as additional supporting evidence of Appellant's admission above both former Board President Mr. Johnston and Board Member Ms. Bray, who served on the board when SKA's repair assessment budget for Buildings A and B was adopted as part of the 2010 and 2011 Annual Operating Budgets, testified at their depositions as follows:

Q. Okay. That's fair. In any case, at the point -- Sutton-Kennedy 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.

(Johnston Dep., R. p. 1495, lines 12-22.)

Q. Did the board -- let me back up for a second. When the board got Sutton-Kennerly's estimated cost of repair for Buildings A and B in the amount of $11 million, did the board undertake to do any investigation to find out to what extent the A and B unit owners had been negligent regarding the maintenance repair of their units?
A. No.
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?

(Bray Dep., R. p. 1663, line 20-p. 1664, line 7.)

Second, the evidence in the Record of Appeal is uncontroverted that unit owners of Buildings A and B were solely responsible for the maintenance and repair of their window and sliding glass doors pursuant to §§ 3.6 and 4.3 of the Master Deed, and § 6.1 of the Bylaws. (Master Deed § 3.6, R. p. 968, § 4.3, R. p. 971; Bylaws § 6.1, R. p. 1018.) The Window and Sliding Glass Door Amendments were voted down at the special members meeting in March 26, 2009. (R. pp. 1280-1283; Order, R. p. 14.) Additionally, the unit owners were specifically charged with the responsibility for caulking and/or waterproofing their sliding glass door thresholds and window frames as mandated by Appellant's Board pursuant to these specific sections. (R. p. 1120; Order, R. p. 4.)

Third, the evidence is uncontroverted that the sliding glass door thresholds were allowing water to leak into the buildings and damage their common elements since 2002. The reason for this was the lack of caulking or sealing between sliding glass door thresholds and the concrete balcony slabs of each unit. (R. p. 1328.) Flashing was not a component of the sliding glass door threshold. Specifically, the Appellant's experts/consultants confirmed that the lack of caulking or sealing between the sliding glass door thresholds and the concrete

balcony slabs (not flashing) was allowing the water to leak into Buildings A and B and damage their common elements as discussed below:

- Mr. Kenneth Schneider, AIA: On July 25, 2006, Mr. Schneider, AIA ("Schneider"), performed an inspection of the leaking sliding glass doors in Buildings A and B at the request of the Appellant. His inspection found damage to the common elements based on: "[n]umerous windows/sliding doors are leaking rain water into interior areas of the buildings. Water is migrating from the upper story down through the intermediate stories to ground level, causing water damage to the floor/ceiling assemblies, the exterior finishes, and interiors of the outside units of buildings A and B. Damage appears to occur more severely on the corner 'stacks'. The water infiltration appears to be the result of the combination of corrosion of the frame of the window/sliding door assemblies, the age of the window/door assemblies, the breaching of the continuity from 'sill' assembly (screws penetrating), separation of caulking from the 'sill' and separation of caulking from the expansion joint between the exterior floor/ceiling assemblies and the interior floor ceiling assemblies." (R. p. 2397, ¶ 1; Order, R. p. 32, ¶ 3.)

- HICAPS, Inc.: On July 19, 2008, at the request of the Appellant, HICAPS, Inc. ("HICAPS"), made a Power Point presentation regarding its investigation of the water intrusion problems associated with the window and sliding glass doors in Buildings A and B. HICAPS' investigation found: (1) the "window systems are the main source of water intrusion," (2) the "leaks have allowed water to enter the walls which is causing the wood framing to rot," (3) the "[window systems] also ha[ve] allowed water to get into the concrete which is causing the corrosion," . . . . and (4) the "[m]oisture is entering the slider [glass door] unit and showing up at the bottom. The water is entering the concrete and leaking into the unit below." (R. pp. 1367-1368; R. pp. 1369-1376; Order, R. p. 33, ¶¶ Nos. 1, 2, 3, and 4.)

- Spectrum Engineering Services, Inc.: On October 29, 2008, Bill Boone, P.E. ("Boone") of Spectrum Engineering Services, Inc. ("Spectrum"), performed an inspection of Buildings A and B at the request of the Appellant regarding the water intrusion problems associated with the window and sliding glass door systems in Buildings A and B. Boone's inspection confirmed the window and sliding glass door systems were leaking water into Buildings A and B, and further damaging the common elements based on his following observations: (1) ***"severe staining has also occurred where the water is captured in the sliding frame and drips down from unit to unit,"*** . . . (2) ***"damage has occurred in all units due to wind driven rain bypassing the slider seals and entering all units,"*** . . . . and (3) the ***"[m]ost damage was at the ceiling above the sliding glass door and on the walls adjacent to***

all windows." (R. p 1772, ¶ 6, 4th and 8th sentences; R. p. 1774, ¶ 15, 2nd sentence; R. pp. 1869-1939; R. pp. 2046-2145.)

- Sutton Kennerly & Associates, Inc.: On July 30, 2009, Steven Robinson, P.E. of Sutton Kennerly & Associates, Inc. ("SKA"), sent a letter to Vicki Gallagher of KAD confirming that the window and sliding glass door systems needed to be replaced because there was considerable visual evidence that the systems were leaking water into Buildings A and B based on the following observations:(1) "corrosion and deterioration on the securement (fasteners)," (2) "leaking evidenced by interior staining, cracking/split gypsum, peeling gypsum," (3) "corroded frames," (4) "corroded sill tracks," (5) "deterioration of wood blocking," (6) "insect infiltration at the perimeters," (7) "voids and holes," and (8) "failed glazing." (R. pp. 1810-1811, ¶ 2(a); R. p. 2315.)

- J. Lawrence Elkin, P.E.: On August 10, 2011, during his deposition, J. Lawrence Elkin ("Elkin") agreed with and concurred with the findings of Schneider that water was entering an open joint underneath the sliding glass doors and leaking into the units below when he said, "***[t]hat that's where the water was going in. It would blow up against the ... [sliding glass door] and it would go into that joint.***" (Elkin Dep., R. p. 1592, lines 2-13.)

Accordingly, based on the foregoing reasons and analysis, this Court should affirm the circuit court's ruling that the Appellant breached its duty to investigate for the following reasons. First, by specifically deciding not to investigate as a business judgment (whether it would be appropriate to individually assess the defaulting A and B unit owners for their leaking windows and sliding glass doors), the Appellant improperly changed the method of assessment by spreading the total cost of repair and reconstruction for the windows and sliding glass doors among the membership, including the C and D members although both the Window and Sliding Glass Door Amendments had been previously voted down by the membership on March 21, 2009. Consequently, the Appellant's decision to change the method of assessment violates this Court's holding in Seabrook Island Prop. Owners Ass'n v. Pelzer, supra at 347-348, 356 S.E.2d at 414, which controls this case. (Bray Aff., R. pp. 2256-2257, ¶ 11.) Second, Spectrum's field report stated that the ***"damage has occurred***

in all units due to wind driven rain bypassing the slider seals and entering all units[.]" (R. p. 1773, ¶ 6, 8th sentence; R. p. 2397, ¶ 1; and R. pp. 1367-1376.) The lack ofwaterproofing and/or sealing between the sliding glass door thresholds and the concrete balcony slabs was solely the fault of the unit owners in Buildings A and B. For example, a March 28, 2003 letter from Mrs. Diehl to a unit owner confirms this when she states, "***It has been determined that during a hard rain, water flows under the threshold of your sliding glass door and leaks onto the unit below. The sliding doors are the owner's responsibility to maintain and thus, we are requesting that you take action to correct this problem.***" (R. p. 1321; Order, R. p. 7.) This required the Appellant to investigate whether to individually assess the defaulting A and B unit owners pursuant to §§ 6.4 and 6.5 of the Bylaws. Third, as an additional sustaining ground the Appellant breached its duty of care by improperly assessing the 50 C and D Respondents for: (1) the repair and soft cost[2] for the removal and reinstallation of the 1,087 new windows and the 80 new sliding glass doors in Buildings A and B in 2010 and 2011, (2) the repair and soft cost to fix the water damaged interior finishes of the units in Buildings A and B in the amount of $124, 879. 32. This common expense repair assessment violates § 3.6 of the Master Deed. See, Council of Dorset Condominium Apartments v. Gordon, 801 A.2d 1 (Del. Supr. Ct. 2002) (Delaware Supreme Court found exterior windows and sliding glass doors were not common elements of condominium association, and thus could not be considered in a common expense assessment where the

[2] Soft cost are defined as general conditions (mobilization, scaffolding, superintendent, site facilities, dumpsters, port-a-johns, etc.), (2) overhead and profit (~10%)), (3) engineering fees for: design and contract administration, (4) contingency (15% of construction subtotal) (SKA's Repair Methodology Budget for Buildings A and B, R. pp. 1402-1404).

condominium declaration's description of a unit included doors leading to patios and balconies, and all windows).

D. Additional sustaining grounds exist to support the circuit court's determination that the Appellant had a duty to investigate and furthermore breached its duty. Specifically, Appellant had a duty to determine the cause of the "cracking and spalling which was occurring in the pre-cast slabs and beams," in Buildings A and B in 1993 and 1994 as observed by Procon Waterproofing, Inc. ("Procon") during its inspections, and furthermore the Appellant breached the following duties: (1) failure to hire a structural engineer as recommended by Procon to investigate reported defects in the concrete structural slabs in Building A and B until 12 years later in 2007, (2) failure to repair the reported defects in the concrete structural slabs and waterproof their surfaces as recommended by Procon until 16 years later in 2011, and (3) failure to timely file a lawsuit within the 3 year statute of limitations against the developer, contractors, architect, and other responsible parties regarding the reported defects in the concrete structural slabs and beams in Buildings A and B.

Respondents assert as additional sustaining grounds in support of the circuit court's determination that the Appellant had a duty to inquire and, furthermore, breached its duty by deciding not to investigate the cause of the ***"cracking and spalling which was occurring in the pre-cast slabs and beams"*** in Buildings A and B in 1993 and 1994. (9 April 1993 Letter from Procon to Waccamaw, R. p. 1302; 9 March 1994 Letter from Procon to Waccamaw, R. pp. 1306-1313, including 19 pictures.) Specifically, Procon Waterproofing, Inc. ("Procon") inspected these buildings at the request of the Appellant. Mr. Robert Gallagher (" Mr. Gallagher"), who is the owner of Procon, sent letters in April of 1993, and in March of 1994 to Appellant's management company, Waccamaw, and ***"recommended that a structural engineer [be hired to] further evaluate the cracking and spalling which [was] occurring in the pre-cast slabs and beams."*** (R. p. 1302; R. pp.1306-1313.) Additionally, Procon recommended the application of a protective waterproof deck coating material to help protect the concrete slabs from future deterioration. (R. p.1302; R. pp. 1306-

1313.) In 2007, Mr. Gallagher of Procon again inspected Buildings A and B at the request of MEC Engineering, and he confirmed that the Appellant had failed to follow any of his recommendations outlined in his 1993 and 1994 letters addressed its management company. (Gallagher Dep., S. R. p. 11, lines 13-25; p. 12, line 1-p. 13, line 8; p. 20, lines 21-25; p. 21, line 1-p. 23, line 19; R. pp. 1419-1438; October 22, 2007 Procon's Inspection Report of Buildings A and B, R. pp. 1329-1335.) Lastly, Mr. Gallagher testified that if the Appellant had followed his recommendations outlined in his 1993 and 1994 letters to its Board, there would be no need to replace every private floor panel and structural beam as required by SKA's scope of repair budget. Mr. Gallagher opined this would have saved the association conservatively $2,000,0000.00. (Gallagher Dep., S. R. p. 5, lines 18-25; p. 6, line 1- p. 10, line 6; p. 20, lines 21-25; p. 21, line 1-p. 23, line19; p. 24, lines 15-25; p. 25, line 1-p. 27, line19; R. pp. 1419-1438; 22 October 2007 Procon's Inspection Report of Buildings A and B, R. pp. 1329-1335) (SKA's Report entitled "Safety concerns at Buildings A and B" signed by Stephen P. Robinson, P.E., R, pp. 1399-140.)

Respondents cite the case of Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, Inc., 201 Md. App. 186, 29 A.3d 604 (Md. App. 2011) where the condominium unit owners brought an action against the condominium association, alleging negligence based on the following grounds. First, in failing to timely investigate water leakage into the individual units and buildings in the condominium regime. Second, in failing to file a lawsuit against the developer of the Condominium Questar within the statute of limitations. Id. at 187-189, 29 A.3d at 614-615. The circuit court granted the association's motion for summary judgment. Unit owners appealed. Id. The Maryland Court of Appeals reversed the judgment of the circuit court based on the reasoning that the association, which

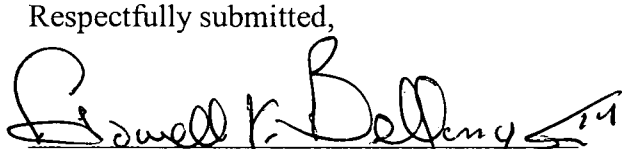
has the obligation to maintain and repair the common elements and the right to bring suit thereon, has the "*duty to pursue a recovery for any alleged construction defects in the common elements which [the association] maintains,*" quoting from Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel Int'l Corp., supra at 555, 335 S.E.2d at 365, and Murphy v. Yacht Cove Homeowners Ass'n, supra at 369, 345 S.E.2d at 710, and holding that ***"the individual unit owners have a cause of action against the association when the association breaches that duty by failing to pursue the claim altogether or to negligently pursue such claim.***" Id. at 204, 29 A.3d at 605-606. Accordingly, based on the reasoning of Greenstein v. Council of Unit Owners of Avalon Court Six Condominium, Inc., supra, additional sustaining grounds do exist to support the circuit court's determination that the Appellant had a duty to investigate the ***"cracking and spalling which was occurring in the pre-cast slabs and beams"*** in Buildings A and B as observed by Gallagher of Procon during his inspections in 1993 and 1994 at the request of the Board. (R. p. 1302; R. pp. 1306-1313.) Furthermore, the Appellant breached its duty to investigate: (1) in failing to hire a structural engineer as recommend by Procon to investigate the reported defects in the concrete structural slabs in Buildings A and B until 12 years later in 2007, (2) in failing to repair the reported defects in the concrete structural slabs in Buildings A and B until16 years later in 2011, (3) and in failing to timely file a lawsuit within the 3 year statute of limitations against the developer, contractor, architect, and other responsible parties regarding the reported defects in the concrete structural slabs in Buildings A and B. (Gallagher Dep., S. R. p. 14, line 1-p. 15, line 25; p. 16, line 15-p. 18, line 9; p. 19, lines 6-16; p. 20, lines 21-25; p. 21, line 1-p. 23, lines 1-19; p. 24, lines 14-25; p. 25, line 1-p. 27, line 19; R. pp. 1419-1438; 22 October 2007 Inspection Report by Procon, R. pp. 1329-1333; Procon's Bid Cost

Estimate, R. pp. 1334-1335; 8 January 2012 ECS Carolinas, LLP's Amended Investigative Report, R. pp. 1869-1844; pp. 1869-1939; pp. 1853-1856; 11March 1994 Special Meeting Mins. of Bd., R. p. 527, ¶ 4; p. 528, ¶ 1, 2nd and 3rd sentences.)

VI. CONCLUSION

In light of the foregoing reasons and analysis, the circuit court correctly determined, as a matter of law that Appellant had a duty to investigate whether to individually assess the defaulting unit owners for damaging the common elements. Furthermore, the circuit court correctly determined that Appellant had breached its duty by improperly changing the method of assessment in 2010 and 2011 from an individual to a pro rata common expense in order to spread the total cost of repair, removal, and reinstallation of the 1,087 new windows and the 80 new sliding glass doors among the membership to include the C and D members. This violated § 3.6 of the Master Deed since both the Window and Sliding Glass Door Amendments had been previously voted down by the membership at a members meeting held on March 21, 2009. The Respondents respectfully request this Court to affirm the circuit court's Order and remand this case for trial.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court Of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No: 2009-CP-22-01655

Richard A. Fisher, Platte B. Moring, Jr., Trustee of the Platte B. Moring, Jr. Living Trust dated March 13, 2001; Marianne Kochanski, and Jim H. Markley, III, Individually, and in a Representative Capacity on Behalf of All Persons Similarly Situated Who Own Units in Buildings C and D of the Shipyard Village Horizontal Property Regime; Robert A. Wright, Mary Beth C. Wright, H. Allen Wright, Joyce Y. Wright and Carolyn L Wright; Carmen J. Savoca, Ann D. Savoca, William John Savoca and Donna S. Strom; James T. Hunter and Mary D. Hunter; Dwain C. Andrews; WWS, LLC, a South Carolina Limited Liability Company; Donald L. Henson and Sandra L. Henson; Allen M. Funk; Norman J. Rish and Mary T. Rish; Angela M. Markley; Walter C. Worsham and Carolyn W. Worsham; Enrico S. Piraino and Giusto Piraino; Otis T. Harrison and Rose C. Harrison; James E. Newman, Jr.; Brenda E. Fisher and Joseph R. Canning and Kathleen B. Canning; James D. Reynolds, Jr.; Fuller Family, LLC; Richard T. White and Rory L. White; Propst and Dawson, LLC; Litchfield Quarters, LLC, and Larry 0. Snider and Paula D. Snider, William C. Hammond, Jr., Living Trust and the Shawn S. Hammond Living Trust; GAB IV, LLC, a Virginia Limited Liability Company; Robert C. McBride and Susan R McBride, Trustees of the Robert C. McBride Family Trust u/d/t July 24, 2008, and Susan R McBride and Robert C. McBride, Trustees of the Susan R. McBride Family Trust u/d/t July 24, 2008; Evelyn J. Valuska; Barbara W. Beymer; Montrose Associates, LLC; Harry L. Belk and Jan C. Belk; Dennis R Barrett and Wilma J. Barrett; First Family Properties, Inc., Cynthia L. Jones, Sandra D. Huggins and Margaret S. Dover, Thomas Franklin Huggins, Frank S. Krouse and Barbara T. Krouse, Judith W. Mill, William Mill and Susan Mill, Gene R. Riley and Patricia C. Riley, Harold LeMaster and Patti LeMaster; Joseph P. Heaton and Frances H. Heaton; Robert N. Kelly; H. S. Keeter and Sandra C. Keeter; Brian R. Nisbet Trust Agreement dated November 16, 1998 and Mary M. Nisbet Trustee of the Mary M. Nisbet Trust Agreement dated November 16, 1998; Dorothy Jean Foster; Captains Quarters D-24 Association of Owners, Inc., Michael H Sanders and Rebecca H Sanders, Ruth Gray Wheliss, David B. Shivell and Nicki M. Shivell, Debra B. Leeke, Joseph Alan Capobianco and Lara Serra, Sharon Gibson Daniel, Gary C. Andes and Andrea W. Andes, Jay Hendler and Laura Hendler, Joy P. McConnell, Charles W. Fortner, Judith C. Woodson, Warren W. Riggs and Charles G. Martin, Riggs Ventures, LLC, and SGS Beach Partners, LLC; Morgan J. Mann and Angela M. Mann; Michael Cameron Foster, Sr. and Laura Lee Foster; Captains Quarters Unit D-31 Association of

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v.

Shipyard Village Council of Co-Owners, Inc., ... Appellant.

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

v.

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PROOF OF SERVICE OF
FINAL BRIEF OF RESPONDENT

The undersigned hereby certifies that he has this day served the Final Brief on the Appellant's counsel of record by Hand Delivery a copy of same addressed to their attorneys of record at the addresses listed below:

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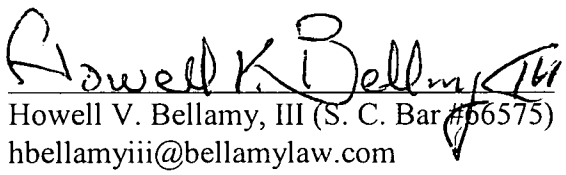

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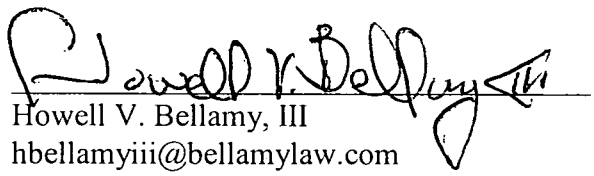
APPELLANT'S RULE 211 CERTIFICATION

The undersigned, attorney for Respondents Richard A. Fisher, Platte B. Moring, Jr. et. al, certifies, pursuant to Rule 211, SCACR, that Respondents' Final Brief complies with Rule 211(b), SCACR.

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



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