

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, Master in Equity/Circuit Court Judge

2012-212486

Madeline R. Arata and Kenneth C. Arata.....Appellants,

v.

Village West Owners' Association, Inc.

d/b/a Village West Horizontal Property Regime.....Respondent,

FINAL BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	Page
Table of Authorities.....	1
Statement of Issues.....	2
Statement of the Case.....	5
Arguments.....	8
I. DO THE TWELVE DOCUMENTS RECOVERED FROM THE BOX OF RECORDS MADE AVAILABLE TO THE ARATAS' COUNSEL ON FEBRUARY 29, 2012, WHICH THE MASTER DISREGARDED AND REFUSED TO CONSIDER IN HIS APRIL 5, 2012 ORDER FOR JUDGMENT IN FAVOR OF VILLAGE WEST, PROVIDE THE REQUIRED EVIDENCE OF FRAUD, DAMAGES AND ATTORNEY'S FEES BY THE COURT OF APPEALS' OPINION NO. 2011-UP-360?.....	8
II. THE REPAIRS TO THE CLIPPER BUILDING BY CALIBOGUE CONSTRUCTION COMPANY, INC., DESCRIBED IN THOMAS J. CARLSON'S JULY 20, 1998, AUGUST 12, 1998, APRIL 14, 1999, APRIL 24, 1999 AND MAY 24, 1999 REPORTS TO PETER SHERRATT, HAVING BEEN MADE TO THE OWNERS' UNITS INCLUDING WALL FRAMING COMPONENTS, INSULATION AND INTERIOR DRY WALL, INTERIOR PAINTING OF NEW WINDOWS AND INTERIOR TRIM, REPLACEMENT OF 4 WINDOW SYSTEMS (12 WINDOW UNITS) AND INTERIOR REPAIRS WITHIN THE RESPECTIVE UNITS IN ADDITION TO REPAIRS TO THE COMMON ELEMENTS. FROM WHAT FUNDS WERE THEY PAID?.....	10
III. DOES THE LANGUAGE OF ARTICLE IX (3) OF THE BY-LAWS OF VILLAGE WEST H.P.R. "IN THE EVENT OF CASUALTY OR DAMAGE TO THE PROPERTY"	

MANDATE PAYMENT BY THE UNIT OWNERS
WHOSE UNITS ARE BEING RECONSTRUCTED
OR REPAIRED IN PROPORTION TO THE DAMAGE
DONE TO THEIR RESPECTIVE SHARES IF THE
INSURANCE PREMIUMS PAID TO THE BOARD
OF DIRECTORS ARE INSUFFICIENT TO COVER
THE COST OF RECONSTRUCTING?.....11

IV. DOES THE LANGUAGE OF JAMES D. DONAHOE,
ASSOCIATE OF THE LAW OFFICE OF EDWARD
E. BULLARD, ON PAGE 7 OF AN OCTOBER 5, 2005
MEMORANDUM IN SUPPORT OF MOTION FOR
SUMMARY JUDGMENT "THERE WAS NO CASUALTY
HERE. THEREFORE, THERE HAS BEEN NO CASUALTY
LOSS OR CASUALTY DAMAGE AND THERE ARE NO
CASUALTY DAMAGE PROCEEDS" ESTABLISH
EXTRINSIC FRAUD AMOUNTING TO FRAUD ON
THE COURT?.....11, 12

V. DOES PARAGRAPH 8 OF THE SEPTEMBER 13, 2005,
AFFIDAVIT OF MARY PROBERT IN WHICH, AS
PRESIDENT AND DIRECTOR OF VILLAGE WEST, SHE
SWORE "THERE HAS BEEN NO CASUALTY AND NO
CASUALTY INSURANCE PROCEEDS HAVE BEEN PAID
TO THE ASSOCIATION" AND THE MINUTES OF AN
AUGUST 24, 1999 VILLAGE WEST OWNERS'
ASSOCIATION BOARD OF DIRECTORS MEETING AT
WHICH A VILLAGE WEST H.O.A. HURRICANE FLOYD
DAMAGE REPORT WAS RECORDED IN THE MINUTES
BY MARY PROBERT, SECRETARY, CONSTITUTE
EXTRINSIC FRAUD AMOUNTING TO FRAUD ON THE
COURT?.....13

VI. DOES THE PASSAGE OF TIME BETWEEN THE DATE
OF THE AUGUST 24, 1999 VILLAGE WEST OWNERS'
ASSOCIATION BOARD OF DIRECTORS MEETING AT
WHICH A VILLAGE WEST H.O.A. HURRICANE FLOYD
DAMAGE REPORT WAS RECORDED IN THE MINUTES
BY MARY PROBERT, SECRETARY, AND SEPTEMBER
13, 2005, THE DATE OF AN AFFIDAVIT OF MARY

PROBERT AS PRESIDENT AND DIRECTOR OF VILLAGE WEST IN WHICH SHE SWORE UNDER OATH IN AN AFFIDAVIT TAKEN BY EDWARD E. BULLARD “THERE HAS BEEN NO CASUALTY AND NO CASUALTY INSURANCE PROCEEDS HAVE BEEN PAID TO THE ASSOCIATION” EXCUSE HER CONCEALING THIS PERTINENT INFORMATION AS A GROUND FOR A CHARGE OF PERJURY?.....	14
VII. DOES THE FAILURE OF THE MASTER TO FIND EXTRINSIC FRAUD AMOUNTING TO FRAUD ON THE COURT ON THE PART OF MARY PROBERT AS PRESIDENT AND DIRECTOR OF VILLAGE WEST FOR FALSELY SWEARING “THERE HAS BEEN NO CASUALTY LOSS...” WHICH SHE KNEW TO BE FALSE CONSTITUTE REVERSIBLE ERROR?.....	15
VIII. DID THE MASTER’S REFUSAL TO RULE IN FAVOR OF THE ARATAS AND RECEIVE EVIDENCE REQUIRING A REFUND OF THE AMOUNT OF THE UNDERTAKING AND CASH BOND AND ARATAS’ ATTORNEY’S FEES FOR WHICH THE CASE WAS REMANDED BY THE COURT OF APPEALS’ OPINION NO. 2011-UP-360 CONSTITUTE REVERSIBLE ERROR?.....	16
Conclusion.....	16

TABLE OF AUTHORITIES

Cases

	Page
Aaron , 381 S.C. at 892-93, 674 S.E. 2d at 486.....	8
Byran v. Byran , 220 S.C. 164, 66 S.E. 609 (1951).....	13
Chewning v. Ford Motor Company , 354 S.C. 72, 80, 579 S.E. 2d 605, 610 (2003).....	8
Designer Showrooms v. Kelley , 304 S.C. 478, 405 9 S.E. 2d 671 (1937).....	12
Greene v. Brown , 199 S.C. 218, 19 S.E. 2d 112 (1942).....	12
Mr. T v. Ms. T. , 378 S.C. 127, 662 S.E. 2d 413 Ct. App. (2008).....	9
Ray v. Ray , 374 S.C. 79; 647 S.E. 2d 237 (2007).....	8
State ex rel Daniel v. Strong , 185 S.C. 27, 192 S.E. 2d 112 (1937).....	12

Opinions

Court of Appeals in Opinion No. 2011-UP-360.....	8
Village West in Civil Action v. Kenneth C. Arata and Madeleine R. Arata No. 95-CP-07-475.....	8

Statutes

S.C. Code Ann.Sec.27-31-260 (2007).....	11
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By-Laws

Article IX (2) of the By-Laws of Village West Horizontal Property Regime and Village West Owners' Association.....	11
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STATEMENT OF THE ISSUES

- I. DO THE TWELVE DOCUMENTS RECOVERED FROM THE BOX OF RECORDS MADE AVAILABLE TO THE ARATAS' COUNSEL ON FEBRUARY 29, 2012, WHICH THE MASTER DISREGARDED AND REFUSED TO CONSIDER IN HIS APRIL 5, 2012 ORDER FOR JUDGMENT IN FAVOR OF VILLAGE WEST, PROVIDE THE REQUIRED EVIDENCE OF FRAUD, DAMAGES AND ATTORNEY'S FEES BY THE COURT OF APPEALS' OPINION NO. 2011-UP-360?
- II. THE REPAIRS TO THE CLIPPER BUILDING BY CALIBOGUE CONSTRUCTION COMPANY, INC., DESCRIBED IN THOMAS J. CARLSON'S JULY 20, 1998, AUGUST 12, 1998, APRIL 14, 1999, APRIL 24, 1999 AND MAY 24, 1999 REPORTS TO PETER SHERRATT, HAVING BEEN MADE TO THE OWNERS' UNITS INCLUDING WALL FRAMING COMPONENTS, INSULATION AND INTERIOR DRY WALL, INTERIOR PAINTING OF NEW WINDOWS AND INTERIOR TRIM, REPLACEMENT OF 4 WINDOW SYSTEMS (12 WINDOW UNITS) AND INTERIOR REPAIRS WITHIN THE RESPECTIVE UNITS IN ADDITION TO REPAIRS TO THE COMMON ELEMENTS. FROM WHAT FUNDS WERE THEY PAID?
- III. DOES THE LANGUAGE OF ARTICLE IX (3) OF THE BY-LAWS OF VILLAGE WEST H.P.R. "IN THE EVENT OF CASUALTY OR DAMAGE TO THE PROPERTY" MANDATE PAYMENT BY THE UNIT OWNERS WHOSE UNITS ARE BEING RECONSTRUCTED OR REPAIRED IN PROPORTION TO THE DAMAGE DONE TO THEIR RESPECTIVE SHARES IF THE INSURANCE PREMIUMS PAID TO THE BOARD OF DIRECTORS ARE INSUFFICIENT TO COVER THE COST OF RECONSTRUCTING?

- IV. DOES THE LANGUAGE OF JAMES D. DONAHOE, ASSOCIATE OF THE LAW OFFICE OF EDWARD E. BULLARD, ON PAGE 7 OF AN OCTOBER 5, 2005 MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT "THERE WAS NO CASUALTY HERE. THEREFORE, THERE HAS BEEN NO CASUALTY LOSS OR CASUALTY DAMAGE AND THERE ARE NO CASUALTY DAMAGE PROCEEDS" ESTABLISH EXTRINSIC FRAUD AMOUNTING TO FRAUD ON THE COURT?
- V. DOES PARAGRAPH 8 OF THE SEPTEMBER 13, 2005, AFFIDAVIT OF MARY PROBERT IN WHICH, AS PRESIDENT AND DIRECTOR OF VILLAGE WEST, SHE SWORE "THERE HAS BEEN NO CASUALTY AND NO CASUALTY INSURANCE PROCEEDS HAVE BEEN PAID TO THE ASSOCIATION" AND THE MINUTES OF AN AUGUST 24, 1999 VILLAGE WEST OWNERS' ASSOCIATION BOARD OF DIRECTORS MEETING AT WHICH A VILLAGE WEST H.O.A. HURRICANE FLOYD DAMAGE REPORT WAS RECORDED IN THE MINUTES BY MARY PROBERT, SECRETARY, CONSTITUTE EXTRINSIC FRAUD AMOUNTING TO FRAUD ON THE COURT?
- VI. DOES THE PASSAGE OF TIME BETWEEN THE DATE OF THE AUGUST 24, 1999 VILLAGE WEST OWNERS' ASSOCIATION BOARD OF DIRECTORS MEETING AT WHICH A VILLAGE WEST H.O.A. HURRICANE FLOYD DAMAGE REPORT WAS RECORDED IN THE MINUTES BY MARY PROBERT, SECRETARY, AND SEPTEMBER 13, 2005, THE DATE OF AN AFFIDAVIT OF MARY PROBERT AS PRESIDENT AND DIRECTOR OF VILLAGE WEST IN WHICH SHE SWORE UNDER OATH IN AN AFFIDAVIT TAKEN BY EDWARD E. BULLARD "THERE HAS BEEN NO CASUALTY AND NO CASUALTY INSURANCE PROCEEDS HAVE BEEN PAID TO THE ASSOCIATION" EXCUSE HER CONCEALING THIS PERTINENT INFORMATION AS A GROUND FOR A CHARGE OF PERJURY?

- VII. DOES THE FAILURE OF THE MASTER TO FIND EXTRINSIC FRAUD AMOUNTING TO FRAUD ON THE COURT ON THE PART OF MARY PROBERT AS PRESIDENT AND DIRECTOR OF VILLAGE WEST FOR FALSELY SWEARING " THERE HAS BEEN NO CASUALTY LOSS..." WHICH SHE KNEW TO BE FALSE CONSTITUTE REVERSIBLE ERROR?
- VIII. DID THE MASTER'S REFUSAL TO RULE IN FAVOR OF THE ARATAS AND RECEIVE EVIDENCE REQUIRING A REFUND OF THE AMOUNT OF THE UNDERTAKING AND CASH BOND AND ARATAS' ATTORNEY'S FEES FOR WHICH THE CASE WAS REMANDED BY THE COURT OF APPEALS' OPINION NO. 2011-UP-360 CONSTITUTE REVERSIBLE ERROR?

STATEMENT OF THE CASE

In Madeleine R. Arata and Kenneth C. Arata, v. Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime Case Number 09-CP-07-00036, an action for relief from the judgment in case number 05-CP-07-475 assessing a deficiency against the Plaintiffs in a lawsuit against the contractor and architect of the Clipper, Schooner, Galleon and Flagship buildings of which the Spinnaker Building, in which the Aratas reside, was not a part, upon the ground of extrinsic fraud amounting to fraud on the court, Marvin H. Dukes, Master in Equity/ Special Circuit Judge granted summary judgment in favor of the Association against the Aratas dismissing with prejudice Aratas' case for fraud against the Association pursuant to Rule 12(b)(6) and 12(c) SCRCF.

The Court of Appeals in its June 30, 2011 Unpublished Opinion No. 2011-UP-360 (R.p.17) reversed the June 15, 2009 order of the master granting the Village West's motion to dismiss based on res judicata, finding that "the Aratas' Complaint does not allege intrinsic fraud amounting to fraud on the court" and remanded to the master for further proceedings on the issues of fraud, damages and attorney's fees alleged and sought in Aratas' Complaint. On remand, from a storage box labeled "Village West Archives #33250", made available for inspection by Village West, documents which were not available when the Court of Appeals reversed the master's grant of the motion to dismiss based on res judicata. On remand, in response to Aratas' Request for Admissions, Village West admitted as genuine numbers 2, 4, 5, 6, 7, 8, 10 of the following documents

offered and received into evidence as proof of extrinsic fraud amounting to fraud on the court and damages:

2. July 20, 1998 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc.'s letter to Peter Sherratt, AIA, giving an estimate of the cost of repairs to be made to the Units as well as to the common elements...(Paragraph 8, above);
4. April 14, 1999 letter of Transmittal, 41499 Request for Payment #3 of Calibogue Construction Company Inc., etc....
5. April 24, 1999 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc.'s letter to Mr. David Kilgus with notes on front "Payments to Sherratt"...
6. May 11, 1999 letter of Thomas J. Carlson, Vice President of Calibogue Construction Company, Inc.'s letter to Peter Sherratt, AIA, the Sherratt Company with (6) photographs proposed repairs...
7. September 17, 1999 SPM DEFENDER, INC. Damage Control Incident Report of Ray Dowling with detailed list of Damage in Village West H.O.A., Hurricane Floyd Damage Report...(Paragraph 5 above)
8. Minutes of an August 24, 1999 meeting reported in the September 24, 1999 report of the Village West Owners Association Board of Directors Meeting Minutes...(Paragraph 7 above)
9. September 13, 2005 Affidavit of Mary Probert as president and director of Village West in Village West Property Regime v. Kenneth C. Arata and Madeleine R. Arata, Case No. 05-CP-07-475, on page 34 of the Record on Appeal, also without Article IX of subpart (3) of the by-laws attached.
10. August 2, 2011 letter from Jerri Ann Roseneau to Jack D. Simrill enclosing all documents related to the \$75,000.00 bond filed by the Aratas in Case No. 05-CP-07-475...
11. October 3, 2005 Law Office of Edward E. Bullard's Notice and Motion for Summary Judgment in Case No. 05-CP-07-475...

12. Edward E. Bullard's testimony or statement to the Court in the March 7, 2006 hearing on Page 9, lines 6 and 7 of page 52 of the Record on Appeal in Civil Action No. 07-CP-07-474, "(n)ow, there has been no casualty loss", etc. (R.p. 27, line 2)

Response 11 to Aratas' Request for Admissions on remand to the master is offered as proof of the allegation of the Complaint of extrinsic fraud, actual or constructive, by the Law Office of Edward E. Bullard in an October 5, 2005 Memorandum in Support of Motion for Summary Judgment signed by James Day Donahoe, SC Bar No. 70296, of counsel for the Plaintiffs, where he says "(t)here was no casualty here. Therefore there was no casualty loss or casualty damage and there are no casualty insurance proceeds." (R.p.158)?? Responses 7, 8, and 9 not only prove extrinsic fraud and fraud upon the court by Mary Probert, who having knowledge that the first part of Paragraph 8 of a September 13th 2005 Affidavit taken by Edward E. Bullard was false, swore: "There was no casualty and no casualty insurance proceeds have been paid to the association" but also perjury for which she could be prosecuted. Responses 2, 4, 5, and 6 establish by the required preponderance Of the evidence a casualty in the form of Hurricane "Floyd" and extrinsic fraud of Mary Probert, as elected director and president of Village West. Response 10 establishes a measure of initial attorney's fees to which Aratas are entitled which was paid to Edward E. Bullard in Case No. 05-CP-07-475.

The Court of Appeals in Unpublished Opinion No. 2011-UP-360 reversed the master's grant of the motion to dismiss based on res judicata and remanded the case for further proceedings on the issues of fraud, damages and attorney's fees alleged and sought

in Aratas' Complaint and retried issues raised on remand unrelated to the purpose of for which the case was remanded and granted judgment against the Aratas by Orders dated June 5, 2012 and June 20, 2012, respectively, from which Aratas timely appealed.

ARGUMENTS

- I. DO THE TWELVE DOCUMENTS RECOVERED FROM THE BOX OF RECORDS MADE AVAILABLE TO THE ARATAS' COUNSEL ON FEBRUARY 29, 2012, WHICH THE MASTER DISREGARDED AND REFUSED TO CONSIDER IN HIS APRIL 5, 2012 ORDER FOR JUDGMENT IN FAVOR OF VILLAGE WEST, PROVIDE THE REQUIRED EVIDENCE OF FRAUD, DAMAGES AND ATTORNEY'S FEES BY THE COURT OF APPEALS' OPINION NO. 2011-UP-360?

Court of Appeals, Opinion No. 2011-UP-360 reversed Master in Equity

Marvin H. Dukes, III's grant of Village West's motion to dismiss with prejudice Aratas' claim against Village West in Civil Action No. 95-CP-07-475 ("Case 1") on the basis of res judicata and remanded the case to the master for further proceedings in accordance with its opinion, finding "...the Aratas' complaint does allege extrinsic fraud amounting to fraud on the court. Thus, res judicata does not bar collateral attack of the Arata 1 judgment. Accordingly, we reverse the master's grant of summary judgment based on res judicata", citing *Aaron*, 381 S.C. at 892-93, 674 S.E. 2d at 486 for the rule that the doctrine of res judicata does not bar collateral attack of a judgment based on extrinsic fraud. Court of Appeals' Opinion No. 2011-UP-360 found that the Aratas's Complaint does allege extrinsic fraud amounting to fraud on the court, which the Supreme Court in *Chewning v. Ford Motor Company*, 354 S.C. 72, 80, 579 S.E. 2d 605, 610 (2003), reiterated was necessary to set aside a judgment based on fraud, however the ground asserted in *Chewning* was for fraud limited to fraud by conduct of attorneys or officers

of the court. However, the Supreme Court in **Ray v. Ray**, 374 S.C. 79, 647 S.E. 2d 237 (2007) said “our holding in **Chewning** [does] not limit the finding of extrinsic fraud to misconduct of an attorney or officer of the court” and the Court of Appeals in **Mr. T. v. Ms. T.**, 378 S.C. 127, 662 S.E. 2d 413 (Ct. App. 2008) broadened the grounds for relief by holding:

“Rule 60 explicitly indicates that it in no way limit’s the court’s power to entertain an independent action “to relieve a party from judgment or to set aside a judgment for fraud upon the court.” (emphasis added). While the most common ground of the independent action is fraud, the rule is not restricted to that ground. The structure of this rule and use of the word “or” indicate to this court two potential independent action attacks on a judgment, order or proceeding: “1) one based on such rare, special, exceptional or unusual circumstances that may warrant equitable relief, including accident or mistake or 2) one based on equity for fraud on the court.”

The Eighth Circuit characterized the independent action as follows:

The indispensable elements of such a cause of action Ar.1) a judgment which ought not, in equity and good conscience, be enforced; 2) a good defense to the alleged cause of action on which judgment is founded; 3) fraud, accident, or mistake which prevented the defendant from obtaining the benefit of his defense; 4) the absence of fraud or negligence on the part of the defendant; and 5) the absence of any adequate remedy at law.

Finding the Aratas’ appeal to be premature, the Court of Appeal “remanded for further proceedings on numerous issues including the merits of their allegations of fraud, damages and attorney’s fees” which Village West refused to address on remand.

The recovered documents, with the exception of the testimony or statements of Edward E. Bullard, who is now deceased, provided the required evidence of extrinsic fraud amounting to fraud on the court and the damages to which the Aratas should be

entitled to the extent of the \$77,659.36 paid to the Law Office of Edward E. Bullard by check dated November 7, 2007 plus interest to date and attorney's fees earned by Aratas on appeal and on remand, however, the master refused to consider evidence of extrinsic fraud amounting to fraud on the court by Village West's attorneys and Mary Probert, president and director of Village West, and refused to receive into evidence or consider attorney's fees of the Aratas' attorney by his decision in favor of Village West in which he ordered attorney's fees in favor of Village West's attorney from which the Aratas have appealed.

II. THE REPAIRS TO THE CLIPPER BUILDING BY CALIBOGUE CONSTRUCTION COMPANY, INC., DESCRIBED IN THOMAS J. CARLSON'S JULY 20, 1998, AUGUST 12, 1998, APRIL 14, 1999, APRIL 24, 1999 AND MAY 11, 1999 REPORTS TO PETER SHERRATT HAVING BEEN MADE TO THE OWNERS' UNITS INCLUDING WALL FRAMING COMPONENTS, INSULATION AND INTERIOR DRY WALL, INTERIOR PAINTING OF NEW WINDOWS AND INTERIOR TRIM, REPLACEMENT OF 4 WINDOW SYSTEMS (12 WINDOW UNITS) AND INTERIOR REPAIRS WITHIN THE RESPECTIVE UNITS IN ADDITION TO REPAIRS TO THE COMMON ELEMENTS, FROM WHAT WHAT FUNDS WERE THEY PAID?

Inasmuch as the Clipper Building is one of the four buildings constructed by the same contractor, the demolition and repairs done to Units in addition to repairs to the common elements described in Thomas J. Carlson's July 20, 1998, August 12, 1998, April 14, 1999, April 24, 1999 letters to Peter Sherratt and described and shown by Photo #1, Photo #2, Photo #3, Photo #4, Photo #5, and Photo #6, in Thomas J. Carlson's May 11, 1999 are an exemplar of repairs to and reconstruction of the Schooner, Galleon,

and Flagship buildings upon which reconstruction and repairs were also completed. This raises the question of what funds these repairs and reconstruction were paid from inasmuch as paragraph 5 of the Village West's Complaint against the Aratas in Case No. 05-CP-07-475 alleges "(t)hat the bylaws of the Association provide for assessments against the owners of each property for common expenses to be used to maintain the common elements of the Regime" and paragraph 16 of the Answer of Village West in Case No. 09-CP-07-00036 alleges "(t)he cost and expense which resulted in a deficiency, special assessment, and amount owed by the Aratas under the judgment was for damage to the common elements..."

III. DOES THE LANGUAGE OF ARTICLE IX (3) OF THE BY-LAWS OF VILLAGE WEST H.P.R. "IN THE EVENT OF CASUALTY OR DAMAGE TO THE PROPERTY" MANDATE PAYMENT BY THE UNIT OWNERS WHOSE UNITS ARE BEING RECONSTRUCTED OR REPAIRED IN PROPORTION TO THE DAMAGE DONE TO THEIR RESPECTIVE SHARES IF THE INSURANCE PREMIUMS PAID TO THE BOARD OF DIRECTORS ARE INSUFFICIENT TO COVER THE COST OF RECONSTRUCTING?

Article IX (3) of the By-Laws of Village West Horizontal Property Regime and Village West Owners' Association provides: "If the insurance proceeds paid to the Board are insufficient to cover the cost of reconstruction, the deficiency shall be paid as a special assessment by the Unit Owners whose units are being reconstructed or repaired in proportion to the damage done to their respective Units. S.C. Code Ann. Sec. 27-31-260 (2007) provides in pertinent part. "(w)here the property is not insured or the insurance is

insufficient to cover the cost of reconstruction, the rebuilding costs shall be paid by all the co-owners directly affected by the damage, in proportion to the value of their respective apartments, or as may be provided the bylaws; and if any one or more of those composing the minority shall refuse to make such payments, the majority may proceed with the reconstruction at the expense of the owners benefited thereby...”

IV. DOES THE LANGUAGE OF JAMES D. DONAHOE, ASSOCIATE OF THE LAW OFFICE OF EDWARD E. BULLARD, ON PAGE 7 OF AN OCTOBER 5, 2005 MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT “THERE WAS NO CASUALTY HERE. THEREFORE, THERE HAS BEEN NO CASUALTY LOSS OR CASUALTY DAMAGE AND THERE ARE NO CASUALTY DAMAGE PROCEEDS” ESTABLISH EXTRINSIC FRAUD AMOUNTING TO FRAUD ON THE COURT?

If Village West and James D. Donahoe, associate of the firm the Law Office of Edward E. Bullard, representing Village West, did not have knowledge of the falsity or intend to deceive, it would have been constructive fraud arising from a breach of fiduciary duty Village West owed to the Aratas, State ex rel **Daniel v. Strong**, 185 S.C. 27, 192 S.E. 2d 671 (1937), **Showrooms v. Kelley**, 304 S.C.478, 405 S.E. 2d 671 (1937), Article IV, Section 2 and 3 (a) of the By-Laws of Village West Horizontal Property Regime set forth the responsibilities of the Board of Directors to the Association of Co-owners, thereby creating a fiduciary relationship to the co-owners: “A breach of a legal duty, irrespective of moral guilt of the tortfeasor, is a constructive fraud in the eyes of the law. An intent to deceive is an essential element of “actual fraud” but neither

dishonesty of purpose nor intent to deceive is an essential element of “constructive fraud” and the presence or absence of such intent distinguishes actual fraud from constructive fraud. **Green v. Brown**, 199 S.C. 218, 19 S.E. 2d 114 (1942). Moreover, constructive fraud has the same legal effect as actual fraud. The false statement that there has been no casualty, casualty loss or casualty damage was not intrinsic fraud, described by the Court of Appeals in Opinion No. 2011-UP-360 as “fraud which was presented and considered at trial. It is fraud which misleads a court in determining issues and induces the court to find for the party perpetrating fraud.” It was extrinsic fraud, “fraud that induces a person not to present a case or deprives a person of the opportunity to be heard” and, because the fraud prevented the person from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action. In *Arata 1*, there were denials by Judge Gregory, Village West’s counsel and Mary Probert but no of a Casualty or claim of a casualty by anyone. **Bryan v. Bryan**, 220 S.C. 164, 66 S.E. 609 (1951) cited for the rule that perjured testimony is a classic case of intrinsic fraud, not extrinsic fraud does not stand for the proportion for which it is cited. It is not necessary to go any further in the language at the second line of the second column of page 610: “(g)generally speaking, in order to secure equitable relief, it must appear that the fraud was extrinsic or collateral to the question examined and determine in the action in which the judgment was rendered; intrinsic fraud is not sufficient for equitable relief” which is the same as stated in the Court of Appeals Opinion No. 2011-UP-360.

- V. DOES THE SEPTEMBER 7, 1999 SPM DEFENDER, INC. DAMAGE CONTROL INCIDENT REPORT OF RAY DOWLING WITH DETAILED LIST OF DAMAGE IN VILLAGE WEST H.O.A. HURRICANE FLOYD DAMAGE REPORT AND THE MINUTES OF AN AUGUST 24, 1999 MEETING REPORTED IN THE SEPTEMBER 24, 1999 REPORT OF THE VILLAGE WEST OWNERS' ASSOCIATION BOARD OF DIRECTORS MEETING MINUTES (REQUEST FOR ADMISSIONS 7 AND 8 RESPECTIVELY) AND THE SEPTEMBER 13, 2005 AFFIDAVIT OF MARY PROBERT AS PRESIDENT AND DIRECTOR OF VILLAGE WEST "THAT THERE HAS BEEN NO CASUALTY OR CASUALTY LOSS..." ESTABLISH FRAUD AMOUNTING TO FRAUD ON THE COURT?

Mary Probert's September 13, 2005 affidavit, which Master in Equity Marvin H. Dukes, III ruled was improper to consider, is on page 103 of the Record on Appeal in Case No. 05-CP-07-475, notice of which both counsel and the Master in Equity are charged. Moreover, paragraph 24 of the Complaint in the instant action which reads: "Village West, acting through its duly authorized agent, fraudulently concealed from the Aratas and the Court that the reconstruction and repair to the Clipper, Schooner, Galleon and Flagship buildings was to reconstruct and repair damage from Hurricane Floyd as well as from defective construction of the Units and Common Elements appurtenant to the Units" was sufficient to identify Mary Probert as the author of her September 13, 2005 affidavit. Even if all of this is insufficient to satisfy opposing counsel and the master, if the first sentence of Rule 15, Amended and Supplemental Pleadings: "(w)hen the issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated

in all respects as if they had been raised in the pleadings” which the admitted requests for admissions should establish, then the denial of Aratas’ Rule 15 motion is reversible error.

- VI. DOES THE PASSAGE OF TIME BETWEEN THE DATE OF AN AUGUST 24, 1999 VILLAGE WEST OWNERS’ ASSOCIATION BOARD OF DIRECTORS MEETING AT WHICH A VILLAGE WEST H.O.A. HURRICANE FLOYD DAMAGE REPORT WAS RECORDED IN THE MINUTES BY MARY PROBERT, SECRETARY, AND SEPTEMBER 13, 2005, THE DATE OF AN AFFIDAVIT OF MARY PROBERT AS PRESIDENT AND DIRECTOR OF VILLAGE WEST IN WHICH SHE SWORE UNDER OATH IN AN AFFIDAVIT TAKEN BY EDWARD E. BULLARD “THERE HAS BEEN NO CASUALTY AND NO CASUALTY INSURANCE PROCEEDS HAVE BEEN PAID TO THE ASSOCIATION” EXCUSE HER CONCEALING THIS PERTINENT INFORMATION AS A GROUND FOR CHARGE OF PERJURY?

Mary Probert was president and director of Village West from 1999 through September 13, 2005 and thereafter and had access to all records of Village West when she performed her duties of her office and she and the board of directors were responsible for her actions and those of the board of directors during that time.

- VII. DOES THE FAILURE OF THE MASTER TO FIND EXTRINSIC FRAUD AMOUNTING TO FRAUD ON THE COURT ON THE PART OF MARY PROBERT AS PRESIDENT AND DIRECTOR OF VILLAGE WEST FOR FALSELY SWEARING “THERE HAS BEEN NO CASUALTY LOSS...” WHICH SHE KNEW TO BE FALSE, CONSTITUTE REVERSIBLE ERROR?

It is undisputed that Mary Probert under oath swore “there has been no casualty...” which she knew to be false, having, as secretary, recorded in the minutes of an August 24, 1999 Village West Owners’ Association Board of Directors Meeting a Village West H.O.A.

Hurricane Floyd Damage Report of damages to the Units as well as the common elements. Inasmuch as the "...the bylaws of the Association provide for assessments against the owners of each property for common expenses to be used to maintain the common elements of the Regime" (paragraph 5 of the Village West's Complaint against the Aratas in Case No. 05-CP-07-475 and the damage from Hurricane Floyd was to the Units as well as the common elements the cost of repairs had to come from the owners of the Units. The same is true as to the repairs to the Units themselves of the Clipper Building (July 29, 1998 letter of Thomas J. Carlson to Peter Sherratt.) If the cost did not come from the \$35,445.00 assessment against all owners inasmuch as the 2004 assessment was only for repairs to the common elements, where did they come from? Nothing in either the April 7, 2012 Order for Judgment or the June 20, 2012 answers this. The same is true as to the Schooner, Galleon and Flagship buildings. The failure to find extrinsic fraud and fraud on the court by Mary Probert for falsely swearing there was no casualty and Village West not reporting repair to and reconstruction of the Schooner, Galleon and Flagship buildings upon which reconstruction and repairs were completed as were done in the Clipper building was Reversible error.

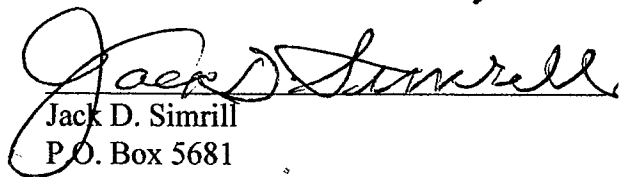
VIII. DID THE MASTER'S REFUSAL TO RULE IN FAVOR OF THE ARATAS AND RECEIVE EVIDENCE REQUIRING A REFUND OF THE AMOUNT OF THE UNDERTAKING AND CASH BOND AND ARATAS' ATTORNEY'S FEES FOR WHICH THE CASE WAS REMANDED BY THE COURT OF APPEALS' OPINION NO. 2011-UP-360 CONSTITUTE REVERSIBLE ERROR?

The master erred in refusing to rule in favor of the Aratas based on the law and the evidence presented and compounded the error by ruling in favor of Village West.

CONCLUSION

For the foregoing reasons the judgment of the master should be reversed and judgment entered in favor of the Aratas affirming the judgment of the Court of Appeals in Opinion No. 2011-UP-360 along with an award to the Aratas of \$77, 659.36, representing the amount of the undertaking and case bond together with interest at legal rate from November 7, 2007 to date as actual damages plus punitive and exemplary damages up to three times actual damages to which the Aratas are entitled by virtue of a judgment setting aside the Arata 1 judgment in Village West Horizontal Property Regime v. Kenneth C. Arata and Madeleine R. Arata, Case No. 05-CP-07-475.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Jack D. Simrill", is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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SC Court of Appeals

Marvin H. Dukes, Master in Equity/Circuit Court Judge

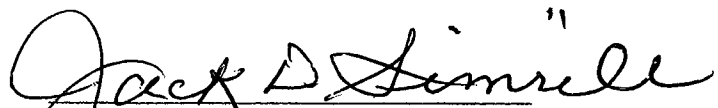
Kenneth C. Arata and Madeleine R. Arata.....Appellants'

v.

Village West Owners' Association, Inc.
d/b/a Village West Horizontal Property Regime..... Respondent,

CERTIFICATE OF COMPLIANCE WITH RULE 211(B)

I certify that the Brief of Appellant complies with Rule 211(b) of South Carolina Appellate Court Rules.



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master in Equity/Circuit Court Judge

Case No. 2009-CP-07-00036

Madeline R. Arata and Kenneth C. Arata.....Appellants,

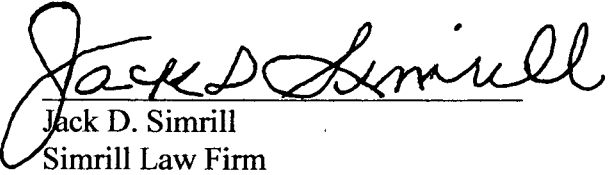
v.

Village West Owners' Association, Inc.
d/b/a Village West Horizontal Property Regime.....Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2012, a copy of the Final Brief of Appellants in the above captioned action was served on the Respondent, Village West Owners' Association, Inc. d/b/a Village West Horizontal Property Regime, by hand delivery in the manner prescribed by the applicable rules of Civil Procedure addressed to its counsel as follows:

Brian C. Pitts, Esquire
Smoot & Pitts
15C Lafayette Place
P.O. Drawer 23439
Hilton Head Island, SC 29925-3439

A handwritten signature in black ink, reading "Jack D. Simrill". The signature is fluid and cursive, with the first name "Jack" and last name "Simrill" clearly legible. The signature is positioned above a horizontal line.

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December 28, 2012