THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

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SC Court of Appeals

Hon. John C. Hayes, III
Presiding Circuit Court Judge

Consolidated case no: 2013-000-327

Juontonio Pinckney, et al. .... Appellants,

v.

Epcon Communities, Inc., Epcon Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser Property Group, Inc.,
Stonecrest Villas of Tega Cay, LLC,

And

Stonecrest Villas of Tega Cay Owners' Association, Inc. ....Respondent

FINAL BRIEF OF APPELLANTS

HALFORD NIEMIEC & FREEMAN, LLP

J. Cameron Halford (SC Bar 17184)
238 Rockmont Drive
Fort Mill, South Carolina 29708
803-547-6618
803-547-6638 fax
Attorneys for Appellants

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STATEMENT OF THE CASE

Appellants are twelve (12) homeowners in Stonecrest Villas of Tega Cay, a York County multi-family condominium development. This appeal involves stipulated facts and novel issues of first impression arising from alleged construction defect or design defect claims. Respondent's position mischaracterizes that appellants sought legal and equitable relief for alleged damages and defects resulting from *water intrusion*. [Respondent final brief, p. 09, line 07.]. By contrast, water intrusion is the manifestation of construction or design error alleged by appellants which constitute damaged homes. Initially, four (4) Plaintiffs brought suit as against Brock L. Fankhauser individually ("BF"), the general contractor Fankhauser Property Group, Inc., (FPG), and the property regime Stonecrest Villas of Tega Cay Owners' Association, Inc., ("COA").[7] The initial suits were filed on June 2, 2010, ninety days after service of statutory notice and demand to cure upon *both* the COA and the developer. [1] The September 16, 2011 amended consolidated complaint is plaintiff's current active pleading, naming six (6) defendants. By consent and agreement of all counsel, including both firms representing respondent, the suit is amended and consolidated [R. pp. 006, 007] to ultimately include twelve (12) owners.

The homes sold to Plaintiffs were constructed and sold during years 2006 to 2010 by Epcon franchisee Stonecrest Villas of Tega Cay, LLC (hereafter "Stonecrest LLC"– developer), also *declarant* under the community master deed. Brock L. Fankhauser ("BF") individually is the owner of Stonecrest, LLC and Fankhauser Property Group, Inc. (hereafter "FPG", general contractor). Fankhauser was the incorporator and controlling officer of the COA until the effective date of his resignation, described below. Discovery in the case

evidences that the Declarant Control period described in the Master Deed had expired in year 2008. Fankhauser does not resign or transition board control to owners until July 1, 2010. It is not disputed that transition did not occur until *after* Plaintiffs' initial complaints are filed and served. Noteworthy, among other stipulations described below, is respondent's position is that Stonecrest COA could not afford to make necessary repairs. The parties have stipulated to the following facts:

1. The COA entity is responsible for administering and maintaining the community's common elements pursuant to the Master Deed.
2. That Brock L. Fankhauser resigned and transitioned the board on July 1, 2010.
3. That the common elements were not in good repair as of the date of developer's resignation and transition on July 1, 2010.

PROCEDURAL BACKGROUND

Prior to the trial court determinations now on appeal, the trial court issued two (2) rulings following oral arguments, including the August 27, 2012 order referencing the "Catch 22" *Doc Daneeka* order of Pulliam v. MUI Carolina Corporation, et al., case no. 2008-CP-46-2158. The court ordered that the Pulliam order was to be incorporated by reference *insofar as the context permits (sic)* in denying judgment on standing to the regime. [R. p. 000012, lines 7 - 10]. The dichotomy discussed in said order was the novel issue of who may bring suit for damages regarding the common elements within a condominium development and who had the right to recover for such damage. The following orders precede the orders now under appellate review.

1. August 27, 2012 order denying COA motion for judgment on the pleadings predicated on standing vs. twelve plaintiffs.

Counsel for COA argued that plaintiffs lacked standing because the COA was singularly responsible for maintaining and administering the common areas pursuant to the master deed

and was the *only* party who could do so. The court denied the COA's motion on August 27, 2013. In conjunction with a motion for summary judgment and motion to approve settlement heard December 19, 2012 the "one recovery" element of the Pulliam circuit ruling is again argued by the COA as support for requested dismissal of all claims under Queen's Grant, *supra*, including Plaintiffs' damage cases. The record evidences that the court failed to differentiate between the parties' respective damage claims and viewed them as one set of damage. [R. p. 000748, Lines 13 – 16].

2. October 27, 2013 order denying Plaintiffs' motion for summary judgment predicated on standing vs. COA.

Plaintiffs argued their motion for summary judgment, alleging priority equitable standing vs. the association because the COA owned no common elements; it was not first in priority of time to file statutory demands or suit; and the COA lacked standing because Plaintiffs held both legal estate title and were first in time to file. Plaintiffs' motion for summary judgment was likewise denied on October 27, 2013. Until January 23, 2013 the court's rulings established that neither party held neither superior nor inferior standing vis-à-vis the other as to common element damage claims, thus culminating in the standing imbroglio described by the court. "*I'm not happy about it, but that's the way I see it.*" [R. p. 00737, lines 8-9]. Oral arguments next occur on December 19, 2013 culminating in the January 23, 2013 order. The order reversed prior rulings dated August 27, 2012 and October 27, 2012, respectively.

3. January 23, 2013 order approving COA settlement and dismissing all damage claims by granting summary judgment.

By order dated January 23, 2013 the circuit court approved a $2.62 million mediated *conditional* settlement procured by the COA from the developer, general contractor, and various third- and fourth-party subcontractor litigants. As a condition of settlement, the court

granted the COA's request to *extinguish (sic)* and dismiss *all* parties' claims to common elements implicating exterior building envelopes, save only those issues carved out by footnote (2) of the court's order. [R. p. 00039 at fn # 2]. The carved out issues involved alleged subsurface, gravel, slab, and soil compaction defects beneath some Plaintiffs' homes. The court viewed the parties respective claims as "jointly held"[5] and one set of damages. [R. p. 00041, at 12; fn# 3]; [R. p. 000748, Lines 13 – 16].

4. **April 5, 2013 order granting summary judgment predicated upon the business judgment rule.**

On April 5, 2013 the circuit court subsequently granted summary judgment as to all fifteen (15) of Plaintiffs' causes of action against the association, including breach of fiduciary duty. The court's judgment was predicated on the business judgment rule, S.C. Code Ann. § 33-8-300 as described in Dockside Ass'n, Inc. v. Detyens, 291 S.C. 214, 217, 352 S.E. 2d 714, 716 (Ct. App. 1987) aff'd, 294 S.C. 86, 362 S.E.2d 874 (1987). Plaintiffs opposed summary judgment by citing § 33-8-300(c) under the facts and documentary evidence, and argued amalgamation between developer Fankhauser and the COA precluded grant of summary judgment. Plaintiffs further argued documented awareness of defects and design issues by the COA and developer precluded summary judgment. [R. p. 000679; R. p. 000683; R. p. 00685; R. p. 000695; R. p. 00698]. From the 1/23/2013 and 4/5/2013 orders appellants Pinckney, et al now appeal.

STANDARD OF REVIEW

The instant appeal involves stipulated facts [1]. [Respondent final brief at 13, ¶(2)]. Respondent agrees with appellants' position on equitable review. As confirmed by the trial court: "*all parties agree that control of Stonecrest COA was transitioned to the community*

owners on July 1, 2010, and the Plaintiffs and Stonecrest COA agree the common elements were not in good repair as of that date." [R. p. 00073, ¶(7)]. While respondent agrees to the applicability of J.K. Construction, Inc. v. Western Carolina Regional Sewer Auth., 336 S.C. 162, 519 S.E.2d 561 (2001), it seeks to evade points (2) and (3) of page (5), *supra*, as non-relevant. Respondent does so while tacitly acknowledging that the COA could not afford the cost of making *necessary* (sic) repairs. [Respondent final brief at p. 10; *see also* R. p. 000424, ¶(4)]. The regime's treasurer confirms this state of affairs two years after transition. [R. p. 000425, ¶(4)].

In a case raising novel questions of law, the appellate court is free to decide the question with no particular deference to the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 411, 526 S.E.2d 716, 719 (2000) (citing S.C. Const. Article V, §§ 5 and 9, S.C. Code Ann. § 14-3-320 and 330 (1976 & Supp. 2005). When an appeal involves stipulated or undisputed facts, and appellate court is free to review whether the trial court properly applied the law to those facts. *WDW Properties v. City of Sumter*, 342 S.C. 6, 535 S.E.2d 631 (2000). In such cases, the appellate court is not required to defer to the trial court's legal conclusions. *J.K. Constr., Inc. v. Western Carolina Regional Sewer Auth.*, 336 S.C. 162, 519 S.E. 2d 561 (2001); *Duke Power Co. v. Laurens Elec. Co-op., Inc.*, 344 S.C. 101, 543 S.E.2d 560 (Ct. App. 2001). As cited by the circuit court, the Plaintiffs' current active pleading, seeks both *equitable and legal relief.* [R. p. 00070, ¶(5) at 2-4]. Appellants respectfully assert that because the case *sub judice* raised novel issues and stipulated facts[1] this court is free to determine whether the trial court properly applied the law to the facts. It has jurisdiction to find stipulated facts in accordance with its own view of the preponderance of the evidence, and jurisdiction to review questions of law presented *de novo*.

ARGUMENT

Appellants respectfully assert the trial court's January 23, 2013 and April 5, 2013 rulings are controlled by errors of law under current South Carolina case authority and in misapplying legal definition of "*accident*" under the court's interpretations of the master deed and the facts. Appellants allege error in the trial court's January 23, 2013 ruling by the court failing to view all evidence and inferences of ownership, demands to cure, and priority of claims in a light most favorable to Plaintiffs. Appellants respectfully assert the court erroneously ruled that the regime, pursuant to Queen's Grant, *supra* was the real party in interest as to *all* common element damage claims; and that the language of Queen's Grant effectively eliminated owner's ability to claim damages vis-à-vis their developers. Appellants respectfully assert trial court error on April 5, 2013 in failing to recognize developer amalgamation while by mis-defining "accident" [R. p. 00072 at fn# 2] and error in application of the business judgment rule under Detyens, *supra.* Lastly, appellants allege error in interpreting and applying master deed *affirmative obligations* relevant to a regime facing casualty that was through the date of July 1, 2010 [1] dominated by its developer. [R. p. 000136, Section 13.1]. The justification for respondents anti "transformation" argument and desire to evade pre-transition officer conduct is patent. [Respondent final brief at 30, lines 1-3]. The court, however, previously found as fact that Fankhauser's *menagerie* of corporate interest knew of water intrusion affecting homes in the community as early as year 2008. [R., p. 00074; fn # 4]. This finding went unchallenged through the date of the April 10, 2013 orders. Respondent accurately points out that the directors are, under the laws of every state, responsible for the conduct of the corporation's business..." [Id. at 26 lines 16-18]. The

primary purpose of this nonprofit was directly set forth in the master deed in clear and unambiguous terms. [R., p. 000116, ¶(3), lines 5-7].

Appellants allege that errors occur in court misinterpretation of affirmative obligation, rights, and duties of the parties under this master deed. Abuse of discretion occurs in court analysis of statutory law related to demand to cure notices, misapplying the business judgment rule analyzed under Stonecrest restrictive covenants, and the authority of Queen's Grant, *supra*. Finally, appellants respectfully assert that the court's definition of *"accident"* as applied to the facts and the COA obligations under section 13.1 of the master deed erroneously resulted in a finding of no casualty where competent evidence demonstrated builder and regime awareness of escalating and progressive injury and property damage impacting numerous homes [2] [R. p. 00074, fn#2]. Over sixty (60%) percent of the development is impacted according to the board. [R. p. 00671 24-26; Iadanza depo. at 183, 187]. By failing to view these facts, and inadequate reserves, in a light most favorable to plaintiffs the stage was set for the compounding of error of law manifested in the January 23, 2013 order. Addressing the SCACR 208(b)(3) additional grounds cited by respondent, [P. 32 – 49, Respondent final brief] a foundation of controlling error of law had been laid where the trial court had, *sua sponte*, recognized amalgamation theory [R. p. 00057] and the facts evidencing Fankhauser notice of water intrusion since 2008. [R. p. 00074 at fn#2]. Atop erroneous conception of controlling law, occurs further error, in defining casualty or accident [R. p. 00072 at fn#2] and legal conclusions that the very restrictive covenants are *not contracts in the legal sense* thus giving rise to no regime duty. [R. p. 00080 at 9].

Appellants do not, as part of this appeal, seek to vacate the settlement fund to the COA for *costs to repair* procured from subcontractors. Appellants do not challenge the COA's ability

or business judgment in entering into a financial settlement for common areas at large, nor the release of third and fourth-party litigants[4] whom Plaintiffs did not file suit against. Appellants respectfully assert that the circuit court abused its discretion in taking from the trier of fact plaintiffs' ability to prove causation and damage cases vis-à-vis the developers FPG and Stonecrest, LLC as subsumed within the regime settlement. The dismissal occurs where a developer/builder controlled board had long abrogated affirmative master deed obligations in the face of casualty. [2] Regime treasurer Moscowitz confirms that during water intrusion years (noted by the court to be mid 2008 through 2010)--*with at least 20 homes reporting water intrusion in 2009* -- regime monies are transferring to a "master association". [R. p. 000458 at ¶(3), (4)]. The estimated "overpayment" is over $55,000. [R. p. 00458, ¶(4)]. The master association is described as un-disclosed by plaintiffs and board members alike. [R. p. 00885 at 14].

Appellants respectfully seek reversal of the portion of the January 23, 2013 trial court order dismissing Plaintiffs' exterior claims as against the developer FPG and Stonecrest, LLC and restoring of Plaintiffs' damage claims against these entities. Distinguished from earlier court analysis under Pulliam v. MUI, appellants assert that the parties' claims for relief were inapposite, separate, distinct, and implicate disputed entitlement as to unit common element damage, particularly those comprising the building envelope of Plaintiffs' homes. All deeds reference in the record evidence that the Plaintiffs were granted *all* (sic) of the units, subject to master deed. [R. p. 000188, line 1; R. p. 000108; see also R. pp. 000111 and 000114]. Common elements under the master deed, Article I Section 6 are defined a "*other than*" (sic) the units. [R. pp. 000117; 000121]. Visual depictions are attached of

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exteriors and interiors illustrating units which owners purchased *all* of, subject to the master deed [R. p.p. 149-165].

Long argued in this case has been the concept of *equitable standing*, and the novel concepts of which party may claim damage and/or injury to property in this multifamily development where both the Plaintiffs and regime brought claims.[7] Respondent seeks to characterize as not applicable in this context plaintiffs' statutory demands to cure dwelling defects. Due to the homes being within a regime, under respondent's arguments owner efforts to protect their homes can *only carry meaning* if carried out in derivative form under the authority of directors who ultimately, in this case, had overlapping if not conflicting agendas. [Respondent final brief at 25, Item V]. Followed to logical conclusion, owners under Queen's Grant authority would now have no rights to file notice nor claim damage because the regime board – *irrespective of its make up* – can decide as a matter of business policy the urgency required to address casualty of water intrusions affecting homes it is duty-bound to preserve. The proposition underscores respondent's desire to evade as non-relevant builder control through July 1, 2010 as a stipulated fact. [Respondent final brief at 13] So long as the regime acts within the statute of limitations, as a matter of unfettered business policy, regimes may ignore the very purposes for which it was created and for which owners pay assessments. [R. p. 000116, ¶(2)]. Neither restoration nor repairs to individual homes manifesting water penetration need be deemed necessary or appropriate upon the alter of unfettered business judgment and policy, ignoring affirmative obligation. [R. p. 000136 at 13.1]. The untenable position is most illustrated by "If Stonecrest COA were *never* to repair the common elements, *no one outside of the community would notice or care.*" [Respondent final brief at 49, lines 4-5]. This court should reverse, as legal error, the ruling in the trial

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court's January 23, 2013 decision under Queen's Grant, e.g., that the language effectively eliminates owners' ability to claim individual home damage. As applied and extended by the trial court, the holding sends the wrong message as a matter of public policy.

While reviewing concepts related to equitable priority, standing, and "*first in time*" principals, the circuit court construed Plaintiffs' claims as "*we got to the courthouse first*" (sic) and "*This argument presupposes that one must litigate to settle a claim.*(sic)" [R. p. 00042 at ¶(4), at 2.]. The court failed to consider in a light most favorable to Plaintiffs that initial suits occur *only after* the developer and the developer-controlled COA board fail to respond to statutory demand to cure. The case at bar involves *progressive* injury affecting Plaintiffs' homes and related common elements under a master deed.[2] Appellants allege that the court erroneously construes the respective parties' damage claims as "*jointly-held*" [5] and identical, and thus seeking *identical* relief in dismissing Plaintiffs' damage cases and ignoring affirmative fiduciary obligation of the COA under restrictive covenants. [R. p. 000116 ¶(2)]. In-depth trial court analysis addressed the relief sought in all Plaintiffs' causes of action.

The court cites that relief sought by the twelve owners would be *personal* (sic) *to the Plaintiffs*. [R. p. 00044 ¶ (2)]. The court misinterpreted the differences in relief being sought by the respective parties, and misconstrued duties and affirmative obligations. While analyzing equitable standing and the right to pursue damage claims, the circuit court notes: "*A fair reading of Plaintiffs' Complaint establishes that in no instance . . . do Plaintiffs seek any general relief which would inure to the benefit of SCVTC generally or be available to the COA or* ***other individual homeowners*** *to remediate the alleged defects to the common areas.*" [R. p. 00044, ¶(4)]. The court misconstrued that these obligations would fall to the

regime, at all times, irrespective of board control. In erroneously viewing facts most favorably to the movant, the court's order goes on to note: "*The Plaintiffs do not seek recovery of funds to affect repairs to the common elements*" and "*not recovery on behalf of the owners of all the Stonecrest Villas condominiums*". [R. p. 00045]. The court nevertheless dismisses, as subsumed by COA claims for repair cost, all Plaintiffs' damage cases as part of the extinguishment condition. [R. p. 00048].

Further illustration included the following inquiries by the trial judge to Plaintiffs' counsel occurring months earlier: "How can your twelve *do anything to assist* .... to have anything done to their own units *let alone* contract to have something done by a contractor *for the entire development* ?" As noted by the court, the "Master Deed of Stonecrest Villas of Tega Cay Horizontal Property Regime," was recorded on February 12, 2007 in Book 08852 at Page 149 of the York County Registry (hereinafter "Master Deed"). It is expressly cited by the trial court's order of January 23, 2013. [R. p. 00045, at ¶(1)]. The business judgment rule is cited April 5, 2013 by reference applicable to the January 23, 2013 order, compounding error. [R. p. 00069 at ¶(4)]. At no place specific to the COA is the business judgment rule cited in December 19, 2012 arguments, nor the court's analysis of 1/23/2013. The trial court rulings ignore that on June 2, 2010, four (4) suits were filed with York County naming as primary defendants Brock L. Fankhauser, ("BF") Fankhauser Property Group ("FPG") and Stonecrest Villas of Tega Cay Owners' Association, Inc.("COA"). [3] Procedurally, the COA answered and filed its counterclaims and cross claims on August 6, 2010, after Fankhauser resignation. This occurred thirty six (36) days after transistion. It occurs approximately 184 days after Plaintiff Pinckney's (and others) statutory notice and demands to cure served upon both developer and the COA pursuant to S. C. Code Ann. §40-59-820, *et seq*. As amended

and consolidated,[7] the Plaintiffs' September 16, 2011 suit named twelve (12) Plaintiff owners, all of whom purchased damaged homes from years 2007 to 2010 that experienced water intrusion damage to their homes.

The April 5, 2013 trial court order granted summary judgment to the COA dismissing all Plaintiffs' causes of action as against the regime. The circuit court cited the business judgment rule as implicated in both the January 23, 2013 and April 5, 2013 orders. It did not expressly cite or link dismissal of Plaintiffs' damage cases, noting that the first order on appeal dealt with Stonecrest COA's *settlement of pending litigation (sic)*. [R. p. 00070, ¶(2)]. Appellants respectfully assert that the trial court abused its discretion and erred as a matter of law in dismissing Plaintiffs' individual exterior damage claims. On January 23, 2013 the court misconstrues them as identical to the COA's under Queen's Grant and Pulliam. In granting summary judgment in the January 23, 2013 order, the court does so erroneously viewing all facts and inferences related to damaged homes viewed most favorably to the moving party as "common element" damage. The court's ruling ignores the inapposite property damage claims and claims for relief sought by Plaintiffs, and failed to consider legal estate ownership of units under a "*jointly-held*" analysis. [5] [R. p. 00041, at ¶(3) and fn# 3].

The court cited it's January 23, 2013 ruling to be predicated on the inherent power to manage litigation and approve settlements, and not express reliance upon Rule 56 or Rule 41(a)(2). [R. p. 00040, ¶1 at 1-2.] Appellants respectfully assert the Plaintiffs' and COA common element damage claims were erroneously viewed as singularly one and the same, or identical. [R. p. 000748 lines 13-15]. The record evidences, however, that the COA-procured settlement is for *cost of repair* of the common elements. [R. p. 00048¶(4) at 5]. Using the standard of Rule 56, the court goes on grant the motion approving settlement, while

simultaneously dismissing *all* claims by *all* parties for damages to exterior common element damages. Id. The court's order specifically extinguished claims related to *exterior building envelopes*, despite the COA entity holding no ownership to units. All of units -comprised of common elements- are conveyed to owners, irrespective of the common areas at large. [R. pp. 000117, section 1.6; 000188; 000108; 000114].

Appellants respectfully assert that when the circuit court granted summary on January 23, 2013 it failed to view the evidence and all reasonable inferences of unit ownership and injury to Plaintiffs' estates in a light most favorable to Plaintiffs. Viewing the evidence in a light most favorable to the nonmoving party, there existed competent record evidence tending to establish material elements of causation and injury that, in fact, Plaintiffs' building envelopes constituted unique individual real property damage. Appellants argued unsuccessfully that such damage would include slab flooring distress due to alleged lack of gravel and defective soil compaction issues "*carved out*" by the court's January 23, 2013 order, first pleaded by Plaintiffs. [R.p. 000372 at 3.] FPG's own expert, Marshall Clarke, by affidavit illustrates problematic design issues found within architectural renderings. [R. p. 000329 at 15(a) – 15(j)]. His testimony, simply, is that "the water management system of these buildings has not been solved...[A]nd if their getting built by these plans, in dealing with the water management, *they're not going to work.*" [R. p. 454 line 6-10].

Prior orders of the court establish that the individual Plaintiffs and the COA litigated issues of equitable priority and standing *vis-à-vis* the other with respect to damage claims brought by both in the case. Both parties cited restrictive covenants in support of their arguments and the authority of <u>Queen's Grant</u>. By order dated August 27, 2012 the court denied the COA's motion for judgment on the pleadings, which had alleged superior priority

standing over plaintiffs. By subsequent order dated October 15, 2012 the court likewise denied plaintiffs' motion for summary judgment as against the regime based on equitable arguments of notice, first to file, and unit ownership. The court denied bifurcating the respective parties' damage cases.

Standing issues were heard a *third* time at oral argument on December 19, 2013, coupled with a COA request to extinguish claims via dismissal. The January 23, 2013 order effectively reversed prior rulings of the trial court and law of the case premised on the restrictive covenants and Queen's Grant. The court's ruling under the authority of Queens Grant effectively eliminated owners' ability to claim property damage where an association *ultimately does so*, irrespective of ownership, filing priority, or where the regime failed to act despite years[2] of awareness of water intrusions.

As part of the January 23, 2013 order the court dismissed *all* Plaintiffs' damage cases as to common elements comprising their building envelopes finding that it was within the *province* and *power* of the association to settle the claims; [R. p. 00047, ¶(15)] yet, the court attempted to extricate and preserve Plaintiffs' right to continued pursuit of the *personal* claims asserted in their amended consolidated complaint. The ruling erroneously cites that the Order of January 23, 2013 *does not affect* (sic) the individual claims Plaintiffs have set forth in their Complaint for *direct damage to themselves or their individual units(sic).* [Id. at fn# 7]. The court failed to view in a light most favorable to Plaintiffs that said damages were de facto injury to Plaintiffs' estates and homes. Id. In dismissing Plaintiffs causes of action on April 5, 2013, the circuit court failed to view all evidence and inferences of years of deteriorations to the owners' homes, including their very building envelopes, in a light most favorable to Plaintiffs.[2] The court errs in comingling the parties inapposite damage claims as jointly-held

pursuant to the earlier Pulliam order, and by viewing the evidence and all inferences in a light most favorable to the movant party under SCRCP 56 and the authority of Queen's Grant, supra.

I. The trial court abused its discretion in dismissing Plaintiffs damage claims by erroneously ruling that *Queens Grant Villas Horizontal Property Regimes I-V, v. Daniel International Corp.*, 286 S.C. 555, 335 S.E.2d 265 (Sup. Ct. 1985) established the regime as the real party in interest as to unit exterior damage claims.

The trial court's January 23, 2013 ruling appears, at first blush, to establish that the Plaintiffs' damage claims pertinent to their homes as preserved inviolated. [R. p. 00047, fn#7; R. p. 0049, ¶(2)]. However, the court clarifies in a subsequent order dated February 27 2013 that: "The answer is the Court's order *does* eliminate (sic) the Plaintiffs' ability to claim damages for repair of the common-elements, regardless of whether the common-elements are "*pertinent*" to their respective units. [R. p. 00051, at ¶(2)]. "*...[t]he Plaintiffs, in their Amended Complaint, seek damages for themselves for damage to their units, based on a variety of legal theories.*" [R. p. 00048 at 18]. The court goes on to state in its 2/27/2013 order: "The *whole point* of the settlement was to *eliminate the possibility that the Plaintiffs*, or any other association members for that matter, *could seek to hold the defendant(s) (sic) responsible for the costs to repair the common-elements*." Id. In so holding, appellants respectfully assert that the trial court erred in extension of the holding of *Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corporation, 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1986*, determining as law that damage suits brought by individual owners should be dismissed so long as the Association *ultimately pursues a claim within the statute of limitations*. [R. p. 00074, fn# 4]. The court ruling effectively deprives owners of protections afforded by prevailing Queen's Grant law. The court's ruling in this case

established the regime was the real party in interest as to *all* exterior damage claims in this case, yet ignored the court's earlier finding of plaintiffs' damaged homes. [R. p. 00048, ¶18 at 4; R. p. 00049 ¶(2)]. The holding ignores equitable principals that aid the vigilant, and erroneously permits parties that slumber on their rights priority. In extending Queen's Grant, the court fails to view *years* of progressive damage and injury to homes in a light most favorable to Plaintiffs [2] under both orders of dismissal.

Appellants assert that the trial court erred as a matter of law by dismissing plaintiffs' claims for continued injury exacerbated by COA inaction where competent evidence showed awareness of casualty, alleged defective design, and/or construction defects. [R. p. 000695-000696]. Over sixty percent (60%) of homes leak according to board member Iadanza. [R. p. 000671]. Appellants assert it was an abuse of discretion to comingle damage cases and grant exclusivity or superiority to the COA under the law, including the right to settle claims involving Plaintiffs' individual damage case against the developers FPG and Stonecrest, LLC. Noteworthy, is court recognition that plaintiffs did not file suit *to repair* the community common elements, nor the common areas at large. Plaintiffs filed suit over damaged real and personal property --their homes. [R. p. 00048, at 18.] The settlement procured by the COA is for *costs of repair* all exterior components. Appellants respectfully assert error where the trial court adopts as a matter of law the damage theory of the defendant COA in paragraph (3) of the January 23, 2013 order. [R. p. 00046, ¶(3)]. The court failed to view competent evidence of latent design defects [R. p. 000329 at 15(a) – 15(g), (16)] and causation per footnote #2 of the January 23, 2013 [R. p. 00039] Order related to damage to Plaintiffs' homes. Unworkmanlike flaws are manifested, most prominently, by years of water intrusion.[2] Plaintiffs' prayer for relief requested special damages related specifically to their homes. [R.

pp. 000119-000120; see also p. 000379, ¶(4), (6) - 9/16/2011 amended consolidate complaint]

Prior to ruling upon Plaintiffs' February 4, 2013 Rule 60 Motion to Alter or Amend, the court had failed to *differentiate* between common areas at large and those common elements comprising building envelopes. The court, in analyzing "*jointly held*" [5] claims, misconstrues that Plaintiffs' inapposite claims for damage were the "*[f]ew holding the remaining homeowners hostage . . . [T]he few who cannot affect any repair to the common elements the maintenance of which* is charged to the COA." [R. p. 00043]. Appellants allege abuse of discretion where the court found error by plaintiffs filing suit for personal relief versus relief calculating to benefit the entire development. The parties have long stipulated that the master deed obligations fall solely, singularly and exclusively to the regime. [1] The inquiry under the facts of this case becomes what provisions within the four corners of a complex master deed were controlling ? The COA proprietary duty of ultimate repair, or affirmative duty related to *casualty* per section 13.1 viewed under stated purpose in restrictive covenants. [R. p. 000116]. According to board member Iadanza, over sixty (60%) percent of homes were impacted. [R. p. 000671].

In grappling with equities and priority of damage claims, the court analyzed the damage cases as one and the same: "How do you come down on those – *the balancing of those equities* ? Use the term *equity*. Obviously, you don't do math, you don't say twelve as to seventy-two or twelve as to eighty-four, you don't do that. But how does the court look at the equity between two people with standing *and one set of damages (sic)* as to who can control when its resolved ? *I mean it's got to be somebody*." [R. p. 000748, lines 13-15]. The court's ruling erodes condominium owners' protections under restrictive covenants,

Queen's Grant, and Pulliam in factual cases where a regime fails to protect owners' interests in the context of multifamily developments, where owners are powerless to effect repairs and the regime is the *only* entity that can make necessary repairs. [Respondent final brief, at IV; see also R. p. 00042 ¶(5)].

II. The trial court erred by ruling as a matter of law that Queens Grant Villas Horizontal Property Regimes I-V, v. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985) eliminated owners' ability to pursue property damage to their homes where owners filed suit first in priority after proper statutory demand to cure.

The court's prior rulings dated September 27, 2012 and October 15, 2012 established, through January 23, 2013, that neither party had *superior* nor *inferior* standing vis-à-vis the other with respect to common element damage claims. Both the COA and Plaintiffs advanced equitable arguments premised upon the master deed and Queen's Grant, primarily. Plaintiffs argued they owned legal estate to their units and owned at large non-unit common elements as undivided joint tenants. Plaintiffs further argued that the COA entity owned no common elements, recognized as "true" by the court. [R. p. 00042]. Rather, the COA owned merely a contractual duty to repair under the master deed and promptly restore in the event of casualty, which was abrogated under developer amalgamation. Plaintiffs also argued they were first in priority of time to give statutory notices and first in priority of time to file suit on June 2, 2010.[7]

The COA argued, unsuccessfully, that it held the *exclusive* right to repair common elements under the master deed, and therefore, Plaintiffs lacked standing. COA counsel argued "*what I am proposing is if that the COA has settled the case, which it has subject to your ruling, then that ought to extinguish the exterior damages claim as a matter of law*". [R.

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p. 000738, lines 12-18]. The court failed to view most favorably to Plaintiffs homes were already damaged property, that the COA did not file suit until after Plaintiffs file and serve lawsuits against the builder and COA. At the relevant time, the builder is the controlling interest of the board, with specialized knowledge and awareness. [R. p. 000685].

Despite affirmatively recognizing two years [2] of notice and awareness of water intrusion problems, the court failed to view casualty, section 13.1 of the master deed's affirmative obligation, and the regime's use of owner paid assessments in a light most favorable to Plaintiffs. All fifteen (15) of Plaintiff's claims against the COA, inclusive of claims for breach of fiduciary duty, are subsequently dismissed on April 5, 2013. In so doing, the court failed to view COA undercapitalization and funding *other entities* in a light most favorable to Plaintiffs while adopting erroneous definitions of "accident" as applied to the facts. In addressing monies paid by owners and use of funds to overpay a "master association" [R. p. 000731 at (4)], the court ignores genuine issue of fact while opining: "*[W]henever one person takes somebody else's money in trust to be used for a certain purpose, does that not in and of itself create some sort of fiduciary duty that it be used property* ? I don't think that it does."…. "*I'm not going to let you take my money then*". (sic) [R. p. 000860 lines 1-15]. It has never been disputed that the regime is funded by assessments paid by (89) homes.

The record evidences that the trial court grappled with equitable priorities described as the '*standing improglio*" for months prior to January 23, 2013, failing to distinguish de facto property damage from costs of repair. South Carolina Code Ann. § 33-8-300 is relied upon in granting summary judgment on April 5, 2013 and cited by the court by reference as applicable to the January 23, 2013 order dismissing Plaintiffs' damage claims. The court acknowledges that [W]hile the business judgment rule is implicated in both the Order on

appeal and the instant order, at issue are *two distinct business judgments*. [R. p. 00070, ¶(2) at 2.] The grant of relief under both orders, premised on the business judgment rule, arises out of months of equitable standing litigation argued before the court related to common elements, the master deed, Queen's Grant, and by reference the incorporated context of Pulliam. Having *sua sponte* recognized amalgamation theory on 3/8/2013 involving the Fankhauser defendants, the court thereafter erroneously failed to view amalgamation in a light most favorable to the Plaintiffs in granting summary judgment on April 5, 2013. [*see discussion* Magnolia North Property Owners' Ass'n v. Heritage Communities, Inc., 397 S.C. 348, 725 S.C. 2d 112 (S.Ct. 2012) as cited by 3/8/12 trial court order re: Fankhauser Defendants' motions to dismiss vs. Plaintiffs; [R. p. 00057]. [*See also*, R. p. 00070 at (3)]. "*The issue of amalgamation, to the extent it is an issue regarding an individual and a non-profit homeowners' association, is not an issue in the Order on appeal.*" Id. The court had expressly recognized the stipulations of fact addressed in footnote (1), infra.

On April 5, 2013 the business judgment rule is expressly adopted and brought to bear under the court's legal analysis. The COA through counsel argued its applicability via Dockside Ass'n, Inc. v. Detyens, 294 S.C. 86, 362 S.E.2d 874 (1987). It is cited by the court to grant the COA summary judgment, after dismissing Plaintiffs' damage cases January 23, 2013 as within the control and provice of the COA who "*has the power to settle the claims*". [R. p. 00047, at 15] under Queen's Grant. On April 5, 2013 the business judgment rule, despite documentary evidence of self-dealing and bad faith proffered by Plaintiffs, is adopted to fully and finally extricate the court from the equitable standing dilemma. [R. p. 00683 – 00704] It occurs, compounding January 23, 2013 errors, construing the parties' claims as singular, identical, or the same. The court erroneously interprets and applies the statutory

business judgment rule in a light most favorable to the moving party ignoring subsection (c) of the § 33-8-300 (Supp. 1999), cited by Plaintiffs. The trial court ignored documented evidence of water intrusion awareness, self-dealing, oppression and bad faith by Fankhauser as controlling officer. [R. p. 000698]. The "*equity argument*" not recognized by the court or respondent is that the regime's director – while aware of both (a) insufficient fund and (b) common areas not in good repair--was seeking to transfer the burdens to owners after having denied demands to repair plaintiffs' homes under the restrictive covenants.

Appellants respectfully assert that the court neglected to view in a light most favorable to Plaintiffs documented *awareness* of design flaw, progressive damage claims, inaction, and master deed casualty obligation in a light most favorable to Plaintiffs in granting summary judgment on April 5, 2013. Exhibits admitted by Plaintiffs included forensic studies evidencing the severity and design causes of water intrusion addressed specifically to the developer-controlled COA, *three times*, prior to resignation. [R. p. 00683, 000685, Exhibits #1(a) – Exhibit #1(g)]. At oral argument, Plaintiffs expressly cited § 33-8-300 (c) of the business judgment rule and amalgamated conduct in opposition to arguments advanced by the COA. Appellants respectfully assert that the court failed to construe the documented evidence and all reasonable inferences of developer self dealing and amalgamation in a light most favorable to Plaintiffs in granting summary judgment on April 5, 2013. Said evidence included two (2) prior forensic evaluations, one performed specifically for Brock L. Fankhauser and FPG. [R. p. 00685]. The documents also included a South Carolina attorney opinion warning owner transition members against transition, expressly citing existing problems plaguing Stonecrest, lack of adequate funding, and detailing fiduciary duties owed by the developer. [R. pp. 000698-000699] Each document addressed to the attention of the

controlling interest of the board, Fankhauser, prior to transition. The transition board was, likewise, aware of the forensic reports.

In prior orders, the court *sua sponte* recognized amalgamation in the case at bar as between Fankhauser, his corporate entities, and other companies. The court's recognition extended to the franchisor Epcon, not owned by Brock Fankhauser. In granting summary judgment, however, the court expressly declined to recognize amalgamated conduct despite years of water intrusion awareness and scores of homes affected. The court fails to view inferences involving developer amalgamated control in a light most favorable to Plaintiffs in granting summary judgment on April 5, 2013. The court's earlier March 8, 2013 order reflected that under Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc., 397 S.C. 348, 725 S.C. 2d 112 (S. Ct. 2012) the court viewed Magnolia and the cases cited therein "seem to establish the theory of amalgamation is a theory underpinned by the facts supporting the theory.... *Here, Plaintiffs have alleged sufficient facts regarding their theory of amalgamation to support the Court's reliance on the theory in addressing the motions herein.*" [R. p. 00057, at 6]. Appellants respectfully assert that the court failed to view all evidence and inferences involving COA abrogation of master deed obligation while under Fankhauser directorship in a light most favorable to Plaintiffs in granting summary judgment under the April 5, 2013 order. This occurred after the circuit court, sua sponte, recognized and applied amalgamation in the case related to Fankhauser's "*menagerie*" of corporate entities and *awareness* of water intrusions.[2] Despite the myriad of corporate entities involved, at the core is Brock L. Fankhauser, controlling officer of the COA through July 1, 2010.[1] The regime's articles reflect Fankhauser as incorporator. The entity, oddly, is to have no members. [R. p. 000116 at 4(b)]. The court expressly cites in prior orders that

"The record is clear that Brock Fankhauser's menagerie of entities knew of water intrusion problems as early as the late spring or summer of 2008." [R. p. 00074, fn#4]. Through the date of his resignation, he was the controlling officer with awareness and superior knowledge. Forensic claim documents evidenced the severity of defects characterized as "*systemic*" and "*ongoing*" since construction [R. pp. 000683-000696, Exhibits #1(a) through (d); R. p. 000712], arguably the grounds for COA inaction to assist individual owners vs. the entire community. The record in this case evidences developer and Epcon failure to address structural issues regarding concrete floor slabs as early as year 2007. In frustration, the Gonzalez family reaches out to the developer's father, Philip Fankhauser, of Epcon Communities, Inc. and Epcon Communities Franchising, Inc. Through a community- wide September 4, 2008 email, Brock L. Fankhauser addresses water intrusion and design issues as follows:

> "The fact of the matter is our homes are *not designed* to prevent rainwater intrusion during extreme rainfalls (e.g., sideways rain at 2" per hour)." [R. p. 000703 - Exhibit 1(f), Plaintiff 3/20/13 memorandum.]

The court's rulings failed to view the evidence and all inferences of amalgamation, *casualty* and COA failures to act in a light most favorable to Plaintiffs. The COA and its transition members, through Fankhauser, had written legal opinions and forensic reports directly addressing, *existing* common element damage, water intrusions, impending lawsuits, inadequate reserves, and fiduciary duties owed by a developer as early as January 14, 2010. [R. pp. 000698-000699]. The letter expressly cited <u>Goddard v. Fairways Dev. Gen. Partnership</u>, 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993). Both the developer and COA are served Pinckney's statutory notice and demand to cure in February, 2010. Initial lawsuits by four (4) Plaintiffs follow and are filed June 2, 2010. Despite claims already filed with carriers

for both, the developer and COA jointly proceed, nevertheless, to conduct *test case deconstructive repairs* at the homes of soon-to-be board member Iadanza. [R. p. 000701, Plaintiff 3/20/13 Memo. Exhibit #1(e)]. The reason is patently disclosed by Fankhauser :

> "...now remember, the reason *we* (emphasis) are contemplating a scope of repair different than that proposed by my insurance carrier is that said scope of repair *may be impossible to achieve – both logistically and financially*".

The court's April 5, 2013 ruling presupposes in favor of the movant, without any evidentiary support, that legal action by the COA while under developer control, *however unlikely*, was an impossibility. Amalgamated conduct is recognized by the Court, yet not viewed most favorably to Plaintiffs. Instead, erroneously viewing all facts and inferences in a light most favorable to the movant, the court held "Stonecrest elected to pursue a recovery against the community's general contractor and developer, *and it did so swiftly (sic)*...just 36 days after the *transition to owner control*..." [R. p. 00074]. The court fails to view in a light most favorable to owners over two (2) years of progressive water intrusion problems, documented awareness of construction defects, subsurface defects, an inadequate funding most favorable to the Plaintiffs. [R. p. 00039 footnote #2]. The policy is continued under the transitioned board post July 1, 2010 [R. p. 000425, at 4], four years later. Pre – transition conduct is ignored.

The court's interpretation and application of the business judgment rule in this case April 5, 2013 arises out of the prior dilemma of equitable standing and priority of claims under Queen's Grant. The business judgment rule under Detyens, supra, is utilized April 5, 2013 to extricate the court from the vexing standing imbroglio while erroneously misconstruing the parties' claim or claims as "*one set of damages*" (sic) [R. p. 000478]. The business judgment

rule is expressly cited by the court's April 5, 2013 order, yet it is not expressly cited in the January 23, 2013 order. The court nevertheless analyzes, *in depth*, the business judgment of the *post-transitioned* board in considering settlement and "*extinguishment*" of claims at the request of the COA on January 23, 2013.

The relief sought by the COA is an adjudication on the merits and *dismissal* of Plaintiffs' damage cases based on equitable superiority under Queen's Grant and the proprietary contractual duty of repair under master deed. The court's subsequent April 5, 2013 order rules that the court is precluded-- *and the court abstains entirely from*-- review of business decisions of a builder-dominated COA. The application of the business judgment rule to the facts differs substantially in the April 5, 2013 order from that of the January 23, 2013 order, cited by reference on April 5, 2013. [R. p. 00070]. Appellants respectfully assert the circuit court erred by viewing stipulated facts, evidence, and inferences of inadequate reserves despite paid assessments in a light most favorable to the moving party in dismissing all Plaintiffs' claims on April 5, 2013.

The Supreme Court has made clear that the business judgment rule is not absolute. The rule will not apply if the directors have engaged in self-dealing, fraud, or other unconscionable conduct. *See* Dockside Ass'n, Inc. v. Detyens, 294 S.C. 86, 362 S.E.2d 874 (1987)(business judgment rule precludes judicial review of actions taken by corporate governing board absent showing of lack of good faith, fraud, self-dealing or unconscionable conduct)(citing *Papalexiou v. Tower West Condominium*, 401 A.2d 280 (N.J. Super. Ct. Ch. Div. 1979). At minimum, Plaintiffs had adduced evidence of self dealing and unconscionable conduct as illustrated by documents attached as Exhibits #1(a)-(g) of their memorandum

opposing summary judgment; said conduct by the controlling interest occurs subsequent to claims and studies are commenced thru FPG's carrier and the carrier for the regime.

Transcripts in the case reveal that counsel for all parties searched, *to no avail*, for controlling South Carolina authority which would guide the circuit court with regard to the equitable standing dilemma to bridge the gap between Goddard, supra, Concerned Dunes West Residents, Inc.v. Georgia Pacific Corporation, 349 S.C. 251, 562 S.E.2d 633 (Sup. Ct. 2002) and Queen's Grant Villas Horizontal Property Regimes I-IV, vs. Daniel International Corp., 286 S.C. 555, 335 S.E.2d 365 (Sup. Ct. 1985). CDWR was cited by reference in the trial court's year 2008 order of Pulliam v. MUI Carolina Corporation case no. 2008-CP-46-2326. In denying judgment on the pleadings requested by the COA, the court's September 27, 2012 order addressed the parties' standing to claim damages as to common elements. The court does so for a second time on October 27, 2012, denying Plaintiffs summary judgment based on ownership standing and filing priority. This was the unchallenged law of the case until the standing argument is raised for the *third* time on December 19, 2012 in oral argument. Here the regime sought court-approval of settlement with various Defendants, third and fourth parties and, ultimately, dismissal of all Plaintiffs' damage cases against the general contractor and developer – FPG and Stonecrest, LLC.

As erroneously argued by the COA on December 19, 2012 in support of settlement and dismissal: "*This does not implicate or attack the standing issue that you've already ruled upon (sic)*". COA counsel accurately summarized the proceedings to date: "*I do want to point out as a matter of procedure that I raised the standing issue I think initially through a motion for judgment on the pleadings. The plaintiffs then raised the standing issue on the motion for summary judgment. You of course had ruled that both parties have standing to*

assert essentially the same damages. That obviously raises some contention". [R. p. 000737 at lines 1-7]. In reply, the court acknowledged: "*I'm not happy about it, but that's the way I see it.*" [Id. at 8-9]. Appellants assert, respectfully, that error enters the court's analysis at this stage. While the business judgment rule is not expressly cited for the arguments, the novel fix-all for the standing quagmire is argued by COA counsel as follows, and erroneously adopted as law of the case by the court:

"What I am proposing is that if the COA has settled the case (sic), which it has *subject to your ruling*, then that ***ought to extinguish*** the exterior damage *claim (sic) as a matter of law.*" [R. p. 000738 lines 14-15]. In reference to the Pulliam order of 2008, COA Counsel further argued in reference to subcontractors "And if all these defendants would *prefer to do business (sic)* with the COA, presumably because the COA is the one with the *contractual obligation (sic)* to repair all these units, and presumably in your prior order you had said that *only one recovery (sic) can be had*, and that recovery inures to the benefit of the COA, then it just makes good common sense that the COA ought to be able to settle it." "But of course, in the process we need a ruling from you that says the settlement *extinguishes* the exterior damage claim (sic)." [Id at 000739 lines 1-9]. The business judgment rule is impliedly implicated, albeit not expressly relied upon in reference to the COA. Queen's Grant, however, is expressly relied upon in granting summary judgment.

In reference to Queens Grant, supra, the court's order erroneous adopts as law the regime's argument that "the language effectively *eliminates* an owners ability to pursue a claim on exterior damages *for so long as* the association is pursuing that claim*(sic)*. The novelty is openly recognized by COA counsel in arguments occurring months earlier: *'[A]dmittedly, that's a novel argument and I don't know if it's a position that you necessarily*

have to adopt." "[U]ltimately *as long as the money (sic) goes to the Association, I'm okay with that.* (sic)" [R. p. ___; 7/30/13 Transcr. at 5, lines 11-12]. Under the trial court's holding of January 23, 2013 the COA is erroneously ceded the real party in interest concurrently with dismissal of two plaintiffs (*later restored under 4/10/2013 order*) because neither held legal title to property within Stonecrest. As argued by plaintiff counsel: "The COA *owns nothing.* They own the *contractual right to repair*, and that's what gives the plaintiffs standing here." [Id. at 20]. From July, 2012 through January, 2013 the law of the case was that neither party held superior, nor inferior, standing.

In later oral argument and briefing, Plaintiffs were *equally unable* to articulate controlling authority, other than reference to Queen's Grant and Goddard. Plaintiffs argued as guidance the case of *Powers v. Fidelity & Deposit Co. of Maryland, et al*, 180 S.C. 501, 186 S.E. 523 (1936) and principals of Pomeroy's Equity Jurisprudence, vol. 2, §602 on 12/19/2013. Plaintiffs advanced the long-standing proposition of South Carolina equity law that as among successive equitable estates or interests, where there exists no special claim, advantage, or superiority in any one over the others, the *order of time* controls. Id. Plaintiffs filed initial lawsuits in this case June 2, 2010.[7] At oral argument on July 30, 2012, Plaintiff counsel advised the court of statutory demands to cure by Plaintiff Pinckney and others and notice: "*..they were on notice in February of 2010 under the Notice to Cure statute and the statute, and a letter both, told them what to do. And so when we talk about this right, we're suing the builder also for damages. They abrogated [aggregated (sic)] that right, they had ample opportunities. In fact they've known, and I think we've established that here this morning, since as far back as* 2008..." [R. p. ____ 7/30/12 Transcr. at p. 6, line 23-25; p. 7 lines 1 – 7.] The circuit court later construes Plaintiffs' claims as "*we got to the courthouse first*" (sic)

and "*This argument presupposes that one must litigate to settle a claim.*" [R. p. 00042, ¶(4), at 2.].The trial court months earlier compared the necessity of repair of the entire development ignoring individual claims for injury to Plaintiffs' real and personal property: "*How can your twelve do anything to assist ....let alone contract to have something done by a contractor for the entire development* ?" (sic) [R. p. ____ 7/30/12 Trans. p. 7 at lines 17-21). The trial court failed to view notice and that the COA, not plaintiffs, "[h]ave an obligation under the master deed to effect prompt repair and they've aggregated (sic) that duty." [R. p. ___, 7/30/2012 Transcr. at 6, lines 18-19]. The court failed to view awareness and notice in a light most favorable to Plaintiffs. As argued by Plaintiffs: "*[Y]ou've got to look at notice, a nonprofit notice, the shareholder notice.* At that point the law triggers a duty and *even then* they didn't act." [Id. at 9, lines 1-5]. As cited by defense counsel, what leads the court into the standing quagmire as early as July 30, 2012 is cited by COA Counsel: "*[W]hat prompted this was a demand for policy limits from the plaintiffs for unspecified damages*" [Id. at 4, line 18-19].

The trial court ultimately issues orders denying relief sought under both parties' standing arguments, which remains the law of the case through January 23, 2013. However, it reversed the status quo through its ruling dismissing Plaintiffs' individual damage cases as an *extinguishment condition* sought by the regime. The ruling effectively rendered an adjudication on the merits affecting substantial rights. Appellants respectfully assert the trial court erred by failing to view evidence of legal estate, priority of notice, claims, and filing priority in a light most favorable to Plaintiffs. Appellants respectfully assert the trial court erred in failing to differentiate between the type of damages being sought by the respective claims of the Plaintiffs and the COA. In granting summary judgment, the court failed to view

de facto injury and damage sustained by Plaintiffs including, but not limited to, the cost to repair damage *caused by* defective work vs. damages for *costs to repair common elements* sought by the COA. In Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co., 395 S.C. 40, 717, S.E.2d 589 (2011) the Supreme Court of South Carolina has held "the difference between a claim for the costs of repairing or removing defective work, which is not a claim for property damage, and a claim for the costs of repairing damage caused by defective work, *which is* a claim for "property damage". Id. While discussed in the context of insurance coverage, this court's May 8, 2013 decision in Pulliam v. Travelers Indemnity Company, reinforces the concept and is analogous to the case at bar as it defines damage and injury.

In arguing ownership of disputed entitlement to common elements damage affecting / comprising the building envelope of Plaintiffs' homes, specifically, Plaintiffs argued "The COA has *no interest, zero, none* as to ownership. They have an obligation under the master deed to effect prompt repair and they've abrogated that duty". Defense counsel confirmed: "[T]he COA is the party with the contractual (sic) obligation to repair all these units...." [R. p. 000739 at 24-25]; "We have the *contractual responsibility* to repair this.". Both parties cited the master deed in support of their respective positions. Despite documented awareness of *systemic* errors and water penetration affecting numerous homes, the developer-controlled COA ignored Pinckney and others' year 2010 statutory notices and demand to cure, occurring after months of abrogating affirmative master deed obligation in the face of casualty.

III. The trial court erred by failing to recognize casualty under erroneous definition of "*accident*" related to master deed affirmative obligations of the regime.

Under the master deed, the COA entity is vested with the *duty* and *power* [R. p. 000116] to administer and maintain the common elements. More specifically, the COA is responsible for prompt restoration in the event of *casualty*. [R. p. 000136 at 13.1]. Appellants respectfully allege error where the trial court employed erroneous definition of "casualty" or "*accident*" and failed to view evidence of known progressive injuries affecting Plaintiffs' homes in a light most favorable to owners under master deed. The ruling is controlled by error of law, both in mis-defining "accident" and in failing to recognize affirmative obligations of the COA where casualty. Id. Instead, the proprietary duty and ultimately necessity of community repair is singularly focused upon by the trial court within the four corners of the restrictive covenants, ignoring affirmative obligations of section 13.1. The necessity of *whom* solely must repair the community contractually vs. neglect of affirmative obligation is weighed by the court in a light most favorably to the movant in granting summary judgment under both the January 23, 2013 order and April 5, 2013 order.

The language of Section 13.1 of the master deed is unambiguous. It is denoted by the word "*shall*" per Section 13.1 of the Master Deed. It is *not* permissive. Any ambiguity would be construed as against the declarant, should it exist. Appellants assert that the court failed to view evidence and inferences involving developer and COA abrogation of duty in the face of progressive casualty in a light most favorable to the twelve owners, if not the entire development. In erroneously viewing facts and inferences of amalgamation in a light most favorable to the COA, by contrast, the court bifurcates effective dates of board control finding that Stonecrest COA elected to pursue a recovery against the parties it believed were responsible, "*[a]nd did so swiftly*... just 36 days after *transition to owner control*..." [R. p. 00073 at ¶(6).] The circuit court failed to view evidence and factual inferences of two years

of amalgamated awareness previously recognized by the court *sua sponte* of water intrusions in a light most favorable to the Plaintiff owners[2]. [R. p. 00074, fn #2]. In adopting business judgments by a *new* board, the court further acknowledges damages – that the COA claims for damage were " *based on the condition of the common elements at the time of transition ... were asserted well within the statute of limitations*". [Id.] . The court nevertheless failed to view in a light most favorable to Plaintiffs the COA inaction, and Plaintiffs' filing priority; All ignored in the face of awareness of systemic defects, casualty, and master deed section 13.1. Under the trial court's definition of accident applied within the context of Queen's Grant, vigilance can never be triggered in cases of prolonged developer conflict and control. Owners are deprived of their only recourse, self help through resort to the courts. More importantly, without any evidence, the court's ruling presupposes within the facts of the case at bar that legal action by the COA entity was an impossibility while under Fankhauser. If, at law, the COA is vested as the real property in interest under Queen's Grant, then multifamily dwelling owners have no recourse to protect what is arguably the largest investment of their lifetime, their homes. The court analyzed the legal concept of real party in interest: "*Well, I think the answer to that is under South Carolina real estate law the real parties interest is the person who owns the property*". [R. p. 00852]. "*[T]he only person that has a right to, if depending on who has rights you would go back to the standing and all those things. But nobody but the title owner will have right to seek any kind of relief on behalf of the COA or themselves personally as to the property at Stonecrest.*" [R. pp. 000852-000853]. By order entered April 10, 2013 the court recognized as such in re-instating the Pinckney and Musgrave defendants, dismissed previously under FPG arguments that they held no legal title to properties in the development. [R. p. 000100¶ (2)].

IV. The court erred by failing to consider amalgamation and the business judgments of a developer-controlled board most favorably to Plaintiffs in granting summary judgment on April 5, 2013.

In the April 5, 2013 order, the trial court abstains from any scrutiny of *pre*-July 1, 2010 business judgments of the COA board under Fankhauser-dominated control. However, in-depth scrutiny of ***post***-July 1, 2010 business judgments of the governing board occurs within the preceding January 23, 2013 order and is thoroughly examined by the court. The court cites Queen's Grant, including recognizing that "Queen's Grant goes farther than establishing the property regime's right to pursue claims related to the common elements, *but also holds the regime itself may be liable to the homeowners for its failure to seek recovery in instances involving allegations of alleged construction defects in common areas.* COA counsel, during argument, cautioned the court against engaging in scrutiny of the governing board's judgment cited to support dismissal and settlement: "*[I] would caution the court into opening the door into an inquiry into whether it's a good settlement or not.*" [R. p. 000739 at 19-21]. The court, nevertheless, *thoroughly* examines the business judgment of the post-transitioned board in relation to the settlement and subsumed dismissal of Plaintiffs' damage claims. The court error in subsumed dismissal of plaintiff damage cases under the January 23, 2013 order is as follows: "Failure of the COA to accept *a viable and well thought out settlement* would subject the COA to a suit by the non-plaintiff homeowners for such failure." [R. pp. 00043; R. p. 00051]. Ultimately, the court clarified on February 27, 2013 "The *whole point (sic)* of the settlement was to eliminate the *possibility that the Plaintiffs*, or any other association members for that matter, *could seek to hold the defendant(s) (sic) responsible for the costs to repair the common-elements.*" [R. p. 00051 at 6-7]. The court effectively adopts as law arguments advanced by the COA under Queen's Grant that "[t]he

language effectively *eliminates* an owners ability to pursue a claim on exterior damages", erroneously ceding the COA entity as the real party in interest; even with regard to Plaintiffs' individual home exterior damage claims. The court fails to view in a light most favorable to Plaintiffs developer amalgamation, Plaintiffs' statutory demands to cure, and complaints filed and served June 2, 2010 in a light most favorable to the twelve owners, subsumed by the ultimate necessity to fund long-needed repairs, erroneously viewed as one set of damage, where the COA could not afford repairs despite assessments being paid by owners.

The court expressly ruled on April 5, 2013 that it ***will not review*** the business judgment of a corporate board. [R. p. 00076]. *"[T]he court's default position must be to defer to the decisions of a corporate board unless the challenging parties can produce evidence of bad faith."* Id. The court's ruling decisively abstained from analysis of the *pre*-July 1, 2010 scrutiny of business judgments. Yet, in paragraph (14) of the January 23, 2013 order the court engaged in polar opposite scrutiny related to the *post* July 1, 2010 directors' judgments. "[T]he court finds the Board's reasoning and its conclusions . . . *"to be an exercise of sound business judgment under the circumstances."* [R. p. 00047 at 14]. Appellants respectfully allege error where the trial judge engaged in inapposite scrutiny of business judgments of the COA governing board during water intrusion years 2008 to 2010, failing to view conflicts and builder amalgamation in a light most favorable to the Plaintiffs as the nonmoving parties. The court failed to view documented evidence of awareness of financial transfers during 2008 and 2009 to Plaintiffs. [R. p. 00085; see also R. p. 000458 at 4].

While omitting reference of subsumed dismissals the court erroneously describes the January 23 decision as follows: *"The order on appeal deals with Stonecrest COA's settlement of pending litigation"*. In reference to the April 5, 2013 Order the court acknowledges that it

"*[a]ddresses alleged conduct by the Stonecrest COA board from its creation until institution of the instant lawsuit.*" [R. p. 00070, at ¶(2)]. The court expressly recognized that, at issue were *two* (2) distinct business judgments. One pertained to review of the judgments of a board comprised of builder-appointed owners. One abstained entirely from review of developer-amalgamated judgment, *after* awareness and statutory demand to cure. Appellants respectfully assert the trial court rulings are controlled by compounding errors of law and abuse of discretion, culminating in the April 5, 2013 order granting summary judgment to the regime and dismissing *all* Plaintiffs causes of action.

As early as July 30, 2012 oral arguments, Plaintiff counsel advised the court of the statutory notice by Pinckney and others to the COA and builder: "*We put them on notice under the statute which is what the law requires us to do. It was actually hand delivered to the builder in Matthews, North Carolina. The COA at that time got notice too by registered mail.*" [Id. at 9 lines 7-10]. Attached under Exhibit #1(a) through Exhibit 1(g) of Plaintiffs memorandum of 3/20/2013 were no less than three documented forensic reports addressed to the developer, Fankhauser, all of which were delivered/received *prior to* statutory demands to cure served by Pinckney, and others. [R. pp. 000683-00696]. The documents and reports are all dated prior to plaintiffs' lawsuits being filed and served. The trial court erroneously declines to view the documents and amalgamation in a light most favorable to Plaintiffs in granting summary judgment on April 45, 2013 The court failed to view all evidence and inferences of amalgamated control and conflict most favorable to Plaintiffs, effectively ignoring developer controlled COA inaction in the face of scores of homes being impacted by water intrusion. *Did the circuit court err by failing to expressly recognize casualty* ? A May 15, 2012 affidavit filed in the record of Ansel Edgar Hardin, III, York County tax

appraiser, confirmed that at least sixty-five (65) of (89) condominium tax re-assessments occurred specifically over owner water intrusion complaints in year 2011 where values were contested by owners. [5/15/12 Hardin affidavit, ¶ (3) and (19)]. In deposition, Paulette Iadanza confirms that over sixty (60%) percent of the development's homes have reported water intrusion problems. [R. pp. 000671, at 25-27]. The numbers factually represent over half of the entire development. They demonstrate wide-spread continuous or repeated exposure to substantially the same general harmful conditions and property damage resulting from faulty workmanship, exclusive of the faulty workmanship itself. Crossman, *supra*; S.C. Code Ann. § 38-61-70 (May 17, 2011).

The trial court consults neither the statutory definition, nor current case authority, but cites dictionary definitions of "accident" in review of the facts within the April 5, 2013 legal ruling and analysis. In so doing, section 13.1 of the master deed is not reviewed most favorably to the non-movants. Nor can casualty ever be triggered under the master deed to protect owners, leaving only the proprietary repair obligation because there is no "accident" and no "contract" in the legal sense giving rise to duty. Hence, there can be no *affirmative* duty to protect owners and their homes in the wake of unfettered business policy. The trial court determinations, respectfully, sends the wrong message, particularly in the context of multifamily dwelling developments where owners have no recourse to repair their homes.

At oral argument on March 20, 2013 Plaintiffs produced proof of these forensic studies detailing COA and builder awareness of the severity of construction defects, and its likely causes stemming from design flaws. At least one (1) attorney opinion advised the developer of fiduciary duties pertinent to tendering common areas in good repair relative to transition to owner control. In opposition to COA oral arguments occurring December 19, 2012, Plaintiffs

produced competent evidence of *design error* as testified to by FPG's own expert Marshal Clark, AIA. [R. p. 454, lines 4-15]. The court failed to view causal facts and inferences of latent design defect in Plaintiffs' favor in dismissing Plaintiffs' individual damage claims as part of COA-granted costs of repair settlement. In essence, the court adopted legally and factually the damage theory and conclusions of the COA in the face of genuine material facts viewed, erroneously, in favor of the moving party. [*See*, R. p. 00046 para. (3)]. More importantly, the court's ruling erroneously ceded the COA as the real party in interest with respect to *all* damage claims under the facts, inclusive of Plaintiffs' damage cases. The court does so despite recognizing unit ownership via deeds. In re-instating two Plaintiffs who were earlier dismissed, the court expressly recognized their estate ownership. [R. pp. 100; 106 & p. 111]. In expressly recognizing the COA held no ownership of common areas, the court held: "Plaintiffs third argument is that the COA cannot settle *their* claims as the COA owns no legal title in the Stonecrest Villas of Tega Cay's common areas. *While this is true (sic)* plaintiffs clearly recognize the COA has an obligation to maintain the common areas, and in fact, Plaintiffs have sued the COA for failure to maintain the common areas." The court, viewing the obligation of repair without reference to section 13.1 of the Master Deed, failed to view casualty in a light most favorable to Plaintiffs as the nonmoving parties under SCRCP 56.

The court grants dismissals January 23, 2013, failing to view facts and evidence of ownership, notices, demands, and claim priorities in a light most favorable to Plaintiffs. The initial Plaintiffs filed suit June 2, 2010 and not September 19, 2011.[7] The court grants the COA summary judgment on April 5, 2013 failing to consider developer amalgamation and *documented awareness* of severity of design defects and casualty. The notices are sent from,

or received by, the developer-controlled board - Brock L. Fankhauser, individually. [R. p. 00683-00700, Exhibits #1(a) through #1(e).] The court fails to consider COA knowledge by and thru Fankhauser illustrated by communications from the builder attached as Exhibit 1(a) through Exhibit #1(g) of Plaintiffs' reply memorandum opposing summary judgment. [R.p. 00683-000704]. Depositions confirm that the transition board is likewise aware, has viewed these reports, [R. p. 000656], and fully grasps the purposes for which owners are paying assessments. [R. pp. 000664-000665].

Plaintiffs argued on March 20, 2013 that this knowledge and awareness coupled with amalgamation, viewed in a light most favorable to Plaintiffs, precluded grant of summary judgment and dismissal of *all* claims. While expressly citing the authority of Queen's Grant in the preceding January 23, 2013 ruling, the court notes: "*Queen's Grant goes farther than establishing the property regime's right to pursue claims related to the common elements, but also holds the regime itself may be liable to the homeowners for its failure to seek recovery in instances involving allegations of alleged construction defects in common areas*". The court's ruling under Queen's Grant failed to view progressive property damage claims brought first, under statutory notice, by owners attempting to protect their homes. The ruling ignores that suits file June 2, 2010 *only after* the developer and developer-controlled regime ignored statutory demands to cure. The April 5, 2013 order supplants business judgment in place of, or in addition to, erroneous application of Queen's Grant, *supra*, to extricate the court from the vexing standing imbroglio. [R. p. 00041 at 5].

Viewing the master deed section 13.1 in a light most favorable to the movant, the court's definition and application of "accident" is likewise applied in a light most favorable to the association, not the non-moving plaintiffs. It occurs despite competent, documented evidence

existing to show progressive injury and damage claims and failure to act by a developer-controlled COA. The courts analysis fails to consider the COA failed to protect common elements and building envelopes under unfettered developer business judgment and conflict. Irrespective of the master deed *affirmative* obligations, under the court's analysis a developer-controlled board is free to determine whether casualty is, or is not, implicated within the confines the declarant's own master deed to protect and preserve real property (homes) that the regime owns no legal title to.

The court cites provisions of the master deed, inclusive of Section 13.1 [R. p. 00072, at ¶(4)], yet the court errs by failing to view in a light most favorable to the twelve (12) owners continuous or repeated exposure to substantially the same *systemic* defects and water intrusion as "casualty". Respondent argues that "construction defects *do not happen by chance*" [Resp. brief at 31, line 4]. Arguably, neither does failure to address known individualized damaged homes in lieu of a global fix-all. [R. p. 425 at (4)]. Damaged homes languish while litigation runs its course to determine which parties are *truly* (sic) and *ultimately* (sic) responsible for admitted damages, [Id at 6.] irrespective of assessments.

Fankhauser awareness of water intrusion is noted by the court, factually, as early as year 2008. The court fails to view COA awareness of water intrusion, through Fankhauser, in relation to the affirmative obligations of the master deed section 13.1 addressing casualty. Under the court's holding, no *affirmative* duty can be triggered because no casualty is implicated as "accident" is misdefined. Moreover, because the court rules that the master deed and bylaws do not constitute contracts *in the legal sense (sic)*, there can be no corresponding duty owed to owners' or their estates. Under the court's application of Queen's Grant the COA entity becomes the real party in interest as to *all* damage claims

capable of evading even its own affirmative obligations. Vigilance, duty, and affirmative obligation are subsumed, if not voided entirely, by unfettered business judgments viewed erroneously by the court in a light most favorable to the movant.

V. The circuit court erred by dismissing Plaintiffs' damage cases implicating individually-owned real and personal property damage by misconstruing "common elements" under the master deed under a jointly-held analysis.

Appellants respectfully assert the circuit court erred by failing to view common element ownership pertinent to Plaintiffs' building envelopes in a light most favorable to the non-movants in granting summary judgment. The court failed to differentiate between common areas at large under the master deed, and disputed common comprising Plaintiffs' building envelopes. Article I, Section 1.6 of the Master Deed defines "*Common Elements*" to mean and refer to "all portions of the Condominium *other than* the Units (sic), [emphasis] as depicted on the Plans and as more particularly described in Section 5.1 of the Master Deed." The master deed goes on to incorporate, as Exhibits, visual depictions of units-- exteriors and interiors. [R. pp. 000149-000150]. The provisions of the master deed that the court takes judicial notice of in paragraph (2) page (7) of the January 23, 2013 order expressly identifies common elements that are components of the building envelopes purchased by Plaintiffs as homes. Both the master deed and the Plaintiffs' deeds cite individual ownership of units, comprised of common elements. The COA owns no common elements, only contractual obligation under the master deed. Even if the courts were to view the COA as made up of its collective members' estates, the physical common elements comprising an owners' individual damage case belongs to the owner. The court recognizes such in substitution of parties premised on title ownership, but fails to recognize such in a light most favorable to Plaintiffs in granting summary judgment dismissal on January 23, 2013. By contrast, the

circuit court dismisses claims establishing, as a matter law, that the language of Queen's Grant effectively eliminated owners' ability to claim damage to their real property.

Respondent has long sought to persuade the courts to adopt the circuit court's prior rulings in the "Catch 22 *Doc Daneeka*" order of the circuit court from case no. 2008-CP-46-2158 *Pulliam v. M.U.I*, which Judge Hayes cites by reference in the court's August 27, 2012 order; e.g., "*[A]s observed by Judge Kimball, there may only be one recovery for damages pertaining to common elements.*" [R. p. 00018, at 19]. It is here that controlling legal error manifests itself in the case. By citing the case "*insofar as the context permits*", the rulings were unclear as to whether the court was citing amalgamation principal or who could claim common element damage under the facts. The Pulliam case was later decided on appeal by this court on May 8, 2013 on different grounds in Op No. 5130 (S.C.Ct. App., filed May 8, 2013) (Shearouse Adv. Sh. No 21 at 4). While analyzed in the context of D&O insurance coverage and construction defects, this court, however, ruled that allegations alleging breach of fiduciary duty are not excluded in construction defect claims. Like this case and Crossman II, the case at bar involves physical damage cases which suggests the property (homes comprised of common elements) may not have been not defective at the outset, but initially proper and injured thereafter. The inquiry becomes whether casualty was truly implicated under the facts and master deed in view of the sheer number of residences and common areas impacted by alleged construction defects (of varying types) [6] manifesting water intrusion and injury to real and personal property of the owners. [R. p. 00039, fn#2]. Appellants respectfully assert that the circuit court erred by failing to recognize widespread casualty under the facts where, ultimately, record evidence exists to show regime awareness that sixty percent (60%) of the development homes have suffered water intrusion. The core inquiry

becomes why, if the Appellants do not object to nor seek to vacate the court-ordered settlement fund of January 23, 2013 does the regime allege Plaintiffs' damage claims to be the "*same*", "*identical*" and thus allegedly barred pursuant to Queen's Grant, *supra* and Pulliam, *supra*. The answer can be found by looking to the articles of incorporation for the COA regime and the amalgamated control that existed between Fankhauser and the COA board through, *at minimum*, July 1, 2010. The court failed to view these documented/stipulated facts in a light most favorable to Plaintiffs in granting summary judgment. The court erred by failing to view these factors in a light most favorable to Plaintiffs in applying the business judgment rule. The court erred upon adopting the view that Plaintiffs' claims for property damage were jointly held, the "*same*", or one set of damage. Abuse of discretion occurs in viewing the owners' claims were not calculated to benefit the Stonecrest community at large, or were the few "*holding the majority hostage*". [R. p. 00043].

By contrast to respondent characterization of damage, Plaintiffs asserted causes of action for property damage to their homes implicating the building envelope of their residences, including breach of fiduciary duty claims as against the regime. The common elements comprising the Plaintiffs' homes are de facto property damage as individually owned, irrespective of repair costs sought by the COA. The injury occurs due to alleged design and construction defects and COA abrogation of affirmative obligations where casualty. Even if not viewed as a casualty, progressive deterioration occurs for years during COA abrogation of affirmative duties under Fankhauser control. [2] The obligation of repair is solely the responsibility of the COA, irrespective of board control, under restrictive covenants. Section 13.1 of the master deed, however, where "casualty", the language is unambiguous. It is

denoted by *affirmative* language *shall* that the court fails to view in a light most favorable to the non-moving Plaintiffs:

> "In the event of damage to or destruction of any Building as a result of fire or other casualty, the Association ***shall*** arrange for the ***prompt restoration and replacement*** of the damaged or destroyed building[.]"

The court erroneously views the duty of repair versus casualty in a light most favorable to the movant under the business judgment rule analysis of April 5, 2013 and Queen's Grant on 1/23/2013. The court erroneously finds that Plaintiffs filed suit for COA failure to repair homes "*on demand.* " [R. p. 00078, ¶(2), line (2).] by parties "*who got to the courthouse first*". The court erroneously adopts non-statutory legal definitions of "*accident*" and fails to view the affirmative language of the master deed in a light most favorable to Plaintiffs in dismissing *both* Plaintiffs' property damage claims and Plaintiffs' causes of action against the regime.

The COA entity, not individual owner litigants, is charged with the affirmative duties in the event of casualty. Under the trial court's interpretation, where casualty there exists neither duty nor vigilance mandated upon either the regime governing board. Irrespective of ongoing progressive deterioration "*so long as*" the COA ultimately pursues the same claim filing priority is rendered moot and the court's ruling effectively suppresses multifamily unit owners' ability to resort to the courts under Queens' Grant because they are not the real party in interest as to damage claims, even those impacting their damaged homes. Under the narrow interpretation adopted as law by the court below, restorative action were accident or casualty is never triggered under the guise and absolute of unfettered business judgment. In cases of prolonged developer control and conflict, the court's application of Queen's Grant strips implied protections afforded to multifamily unit owners. The rulings convey the wrong

message as a matter of public policy. The rulings effectively nullify affirmative obligations in these specific restrictive covenants, the terms of which no owners were able to negotiate the terms of. If, for no other reason, the same are nullified and voidable, because they are not contracts in the legal sense. Yet, they bind owners to pay assessments but are powerless to repair their own homes because the homes are comprised of common elements.

In reviewing the master deed, the court opines that "[F]ire is not an issue in this case. Neither is any other '*casualty*", which is defined as an "*accident*". The court cites Black's Law Dictionary and The American Heritage College Dictionary. [R. p. 00072, at fn#2]. Appellants respectfully assert that the trial court's legal determinations regarding developer and COA obligation under section 13.1 of the master deed are controlled by errors of law, including failure to view the master deed as a legal contract. The court's ruling effectively ignores inaction after notice and demands to cure by Plaintiffs under S.C. Code Ann. §40-59-840. The rulings neglect to view most favorably to Plaintiffs that, but for the filing of Plaintiffs' initial suits, builder resignation likely would not have occurred. The initial suits in this case are not filed until 90 days after statutory notice to cure is served. The notice is sent to *both* the developer and the COA governing board. The notice is ignored by both, arguably due to conflict, or amalgamated conduct, either ignored entirely by the court or erroneously viewed in a light most favorable to the movant. The court failed to view competent material evidence, documents, and factual inferences of over 184 days of notice of impending suits, two years of progressive water problems, and conflicting builder control in a light most favorable to Plaintiffs in granting summary judgments. Error occurs where the trial court adopts an improper definition of accident in relation to the master deed's mandate regarding casualty. Section 13.1 master deed. In error, the court ignores competent evidence and

inferences that a developer controlled COA have long abrogated its duties, power, and affirmative obligation under the master deed, especially section 13.1. Prior factual findings of the court establish that homes have been exposed to the same general or harmful conditions of water intrusion for approximately two years.[2] In reality, it has effectively spanned four (4) years pursuant the date of affidavit of board member Moscowitz. [R. p. 000426]. Appellants respectfully assert error by the court in failing to recognize amalgamation combined with COA post-transition abrogation of duties, power, and affirmative obligation under the master deed section 13.1 where *accident* is mis-defined and erroneously applied to the facts by the trial court. The same are erroneously viewed under Rule 56 SCRCP in a light most favorable to the movant under controlling errors of law and abuse of discretion related to interpretations under restrictive covenants.

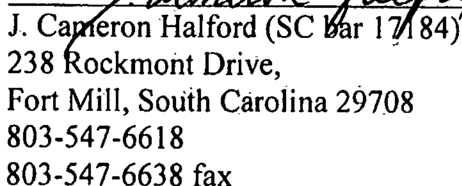
CONCLUSION AND PRAYER FOR RELIEF

Appellants respectfully assert that the circuit court erred as a matter of law in dismissing Plaintiffs' common element damage cases on January 23, 2013 by failing to view evidence of unit ownership, individual property damage, Fankhauser amalgamation, casualty, and master deed affirmative obligation in a light most favorable to the Plaintiffs. Appellants further allege that the trial court's holdings are controlled by error of law in interpreting and applying statutory and case law definitions related to accident and business judgment within the context of affirmative duties imposed by the master deed. The court's rulings of law related to equitable standing and Queen's Grant misconstrue Plaintiffs' claims for damage, filed first in priority, as identical and properly subsumed by the regime settlement. The rulings erroneously establish the COA as the real party in interest where Plaintiffs' damage cases for injury to their homes was distinct, separate, and inapposite from costs of repair

procured by the regime. Appellants respectfully seek reversal of the trial court's rulings dated January 23, 2013 and April 5, 2013, respectively and remand for trial.

Respectfully submitted October 9, 2013.

HALFORD NIEMIEC & FREEMAN, LLP



J. Cameron Halford (SC Bar 17184)
238 Rockmont Drive,
Fort Mill, South Carolina 29708
803-547-6618
803-547-6638 fax

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1 Stipulations of Record in This Case: (1) Brock L. Fankhauser resigned control and transitioned the COA executive board on July 1, 2010; (2) The common elements were not in good repair as of the date of the builder's transition; (3) The COA entity is responsible for administering and maintaining the common elements of the condominium under the community's master deed.

2 The trial court previously found: "*The record is clear that Brock L. Fankhauser's menagerie of entities knew of water intrusion problems as early as the late spring or summer of 2008*". See, Order denying Third-Party Plaintiff FPG and Stonecrest LLC motion to amend Third Party Complaint, at p. 6, ¶(3) at Line (2). [R. p. 00074, fn#2].

3 On June 2, 2010 four Plaintiffs [Pinckney, Smith, Barone and Sciacca] filed suit as against Brock L. Fankhauser, FPG and Stonecrest "HOA". Through consent amendments, designations, and consolidation the September 16, 2011 amended consolidated complaint is Plaintiff's current active pleading filed on behalf of twelve (12) owners and naming the following six (6) parties as Defendants: Epcon Communities, Inc.; Epcon Communities Franchising, Inc; Brock L. Fankhauser; Fankhauser Property Group, Inc.; Stonecrest Villas of Tega Cay, LLC (declarant/developer) and Stonecrest Villas of Tega Cay Owners' Association, Inc. ("COA").

4 The circuit court characterizes the January 23, 2013 order as dealing with Stonecrest COA's *settlement of pending litigation* (sic). Appellants assert error in the circuit court dismissal of Plaintiffs' individual claims for damage as against the general contractor (FPG) and developer (Stonecrest, LLC) as an *extinguishment precondition* of settlement requested by the regime; e.g., that the trial court's dismissal prejudiced

Plaintiffs' right to prove causation and damages and denied Plaintiffs a fair trial on the issue of damage to their homes.

5 "*The court is not sure this is the legally technical phrase to use to describe the instant situation, but it is the best that it could do.*" [R. p. 00041, fn #3].

6 On April 9, 2013, following the April 5, 2013 court order, the COA files secondary lawsuits in case no. 2013CP461194 involving alleged defects in subsurface soils and grading conditions against the general contractor (FPG), developer (Stonecrest, LLC) and the year 2006 soils engineering firm, pursuing defects "carved out" by footnote #2 of the January 23, 2013 order. Appellants allege error where the circuit court failed to view these damage issues in a light most favorable to Plaintiffs, including impact to their individual building envelopes and slabs.

7 By consent signatures, including counsel for respondent, first occurring in September, 2010, the plaintiffs' suits are amended and consolidated. [R. pp. 0006 – 0007].

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. John C. Hayes, III
Presiding Circuit Court Judge

Consolidated case no. 2013-000-327

Juontonio Pinckney, et al. .... Appellants,

v.

Epcon Communities, Inc., Epcon Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser Property Group, Inc.,
Stonecrest Villas of Tega Cay, LLC,

And

Stonecrest Villas of Tega Cay Owners' Association, Inc. ....Respondent

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PROOF OF SERVICE

Counsel for Appellants does hereby certify that on October 9, 2013 a copy of the FINAL BRIEF OF APPELLANTS was served upon all other counsel of record by depositing a copy of the same in the United States mail, first class, sufficient postage prepaid, with return address(es) clearly noted, addressed as follows:

Curtis W. Dowling, Esq.
Barnes Alford Stork & Johnson, LLP
1613 Main Street
Columbia, South Carolina 29201
Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.

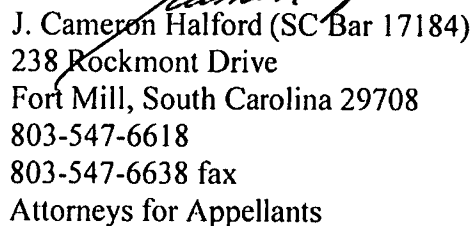
Brett E. Dressler, Esq.
Sellers Hinshaw Ayers Dortch & Lyons, P.A.
301 S. McDowell Street, Suite 410
Charlotte, North Carolina 28204
Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.

Graham P. Powell, Esq.
Wall Templeton & Haldrop, P.A.
145 King Street, Suite 302
Charleston, South Carolina 29402
Attorneys for Brock L. Fankhauser, Fankhauser Property Group, Inc., and Stonecrest Villas of Tega Cay, LLC

Michael B.T. Wilkes, Esq.
J. Derham Cole, Esq.
127 Dunbar Street, Suite 200
Spartanburg, South Carolina 29306
Attorneys for Epcon Communities, Inc. and Epcon Communities Franchising, Inc.

Bradford W. Cranshaw, Esq.
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, South Carolina 29202-2823
Attorneys for Epcon Communities, Inc. and Epcon Communities Franchising, Inc.

HALFORD NIEMIEC & FREEMAN, LLP



J. Cameron Halford (SC Bar 17184)
238 Rockmont Drive
Fort Mill, South Carolina 29708
803-547-6618
803-547-6638 fax
Attorneys for Appellants

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APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. John C. Hayes, III
Presiding Circuit Court Judge

RECEIVED
OCT 1 1 2013
SC Court of Appeals

Consolidated case no. 2013-000-327

Juontonio Pinckney, et al. .... Appellants,

v.

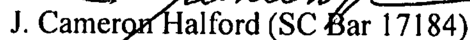
Epcon Communities, Inc., Epcon Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser Property Group, Inc.,
Stonecrest Villas of Tega Cay, LLC,

And

Stonecrest Villas of Tega Cay Owners' Association, Inc. ....Respondent

CERTIFICATION OF APPELLANT COUNSEL

Counsel for Appellants does hereby certify that the enclosed FINAL BRIEF OF APPELLANTS complies with Rule 211(b), SCACR.

HALFORD NIEMIEC & FREEMAN, LLP

J. Cameron Halford (SC Bar 17184)
238 Rockmont Drive
Fort Mill, South Carolina 29708
803-547-6618
803-547-6638 fax
Attorneys for Appellants

Ocotober 9, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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PROOF OF SERVICE

Counsel for Appellants does hereby certify that on October 9, 2013 a copy of the FINAL BRIEF OF APPELLANTS was served upon all other counsel of record by depositing a copy of the same in the United States mail, first class, sufficient postage prepaid, with return address(es) clearly noted, addressed as follows:

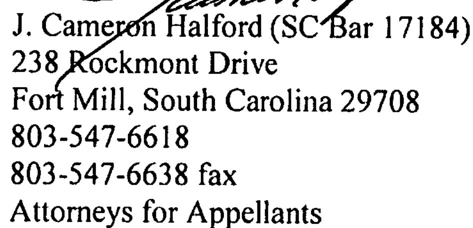
Curtis W. Dowling, Esq.
Barnes Alford Stork & Johnson, LLP
1613 Main Street
Columbia, South Carolina 29201
Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.

Brett E. Dressler, Esq.
Sellers Hinshaw Ayers Dortch & Lyons, P.A.
301 S. McDowell Street, Suite 410
Charlotte, North Carolina 28204
Attorneys for Stonecrest Villas of Tega Cay Condominium Owners Association, Inc.

Graham P. Powell, Esq.
Wall Templeton & Haldrop, P.A.
145 King Street, Suite 302
Charleston, South Carolina 29402
Attorneys for Brock L. Fankhauser, Fankhauser Property Group, Inc., and Stonecrest Villas of Tega Cay, LLC

Michael B.T. Wilkes, Esq.
J. Derham Cole, Esq.
127 Dunbar Street, Suite 200
Spartanburg, South Carolina 29306
Attorneys for Epcon Communities, Inc. and Epcon Communities Franchising, Inc.

Bradford W. Cranshaw, Esq.
Grier, Cox & Cranshaw, LLC
Post Office Box 2823
Columbia, South Carolina 29202-2823
Attorneys for Epcon Communities, Inc. and Epcon Communities Franchising, Inc.



HALFORD NIEMIEC & FREEMAN, LLP

J. Cameron Halford (SC Bar 17184)
238 Rockmont Drive
Fort Mill, South Carolina 29708
803-547-6618
803-547-6638 fax
Attorneys for Appellants

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