

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY
Court of Common Pleas

The Honorable Roger M. Young, Sr.

Case No.: 2010-CP-10-9762

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SC Court of Appeals

Hayden Jeffords, individually and on behalf of all others similarly situated, Titus Gudel, Harold S. McEwan, D. Everett Walker, Paul Kane, Jeanne Debosh, Margarita Staudt, Leslie Anne O'Neal, Trivette C. Hatcher, William Scanlon, Delia Scanlon, Christy C. Parish, Joseph Ladue, Deborah Ladue, Pamela Snyder, Steven Goldberg, Brent McClaine, Brian Rasmussen, McKenzie Hutaff, Brian Kavanagh, Lynn Harris, and Kenneth A. Brown, Plaintiffs,

Of Whom, Hayden Jeffords, individually and on behalf of all others similarly situated, Titus Gudel, Harold S. McEwan, D. Everett Walker, Paul Kane, Jeanne Debosh, Margarita Staudt, William Scanlon, Delia Scanlon, Christy C. Parish, Joseph Ladue, Deborah Ladue, Pamela Snyder, Steven Goldberg, Brent McClaine, Brian Rasmussen, McKenzie Hutaff, Brian Kavanagh, Lynn Harris, and Kenneth A. Brown are the Secondary Appellants,

And

Of Whom John Zohlen, Mary Zohlen, Leslie Anne O'Neal, and Trivette C. Hatcher are the Respondents.

v.

East Bridge Town Lofts, LLC, a/k/a East Bridge, LLC, a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC, Central 3, LLC, Creekstone East Bridge, LLC, Creekstone SC I, LLC, Alexandra Road Investors, LLC, Creekstone Management, LLC, Creekstone Management, Inc., Donald K. Henry, Everett Jackson, Steve Keller, East Coast Carpentry a/k/a ECC Contracting, LLC, Fuller

Drywall & Paint, Ltd., Delta Mechanical, Inc. a/k/a Carolina Delta Mechanical, Wasson Electric Heating & Air, Bay Club Homes, LLC, Terracon Consultants, Inc., Salvador Rubalcaba d/b/a Rubalcaba Construction, Defendants,

Of Whom East Bridge Town Lofts, LLC a/k/a East Bridge, LLC, a/k/a East Ridge Homes, LLC, a/k/a East Bridge Lofts, LLC, Central 3, LLC, Creekstone East Bridge, LLC, Creekstone SC I, LLC, Alexandra Road Investors, LLC, Creekstone Management, LLC, Creekstone Management, Inc., Donald K. Henry, Everett Jackson, Steve Keller, Edward Michael Washburn, and Kevin Ball are the Primary Appellants,

v.

East Bridge Lofts, LLC; Central 3, LLC; Creekstone Eastbridge, LLC; and Creekstone SC I, LLC; Alexandra Road Investors, LLC; Creekstone Management, LLC; Donald K. Henry; Everett Jackson; Steve Keller; Edward Michael Washburn; Kevin Ball; and Bay Club Homes, LLC, Third-Party Plaintiffs,

v.

Robert Wasson and Barbara Wasson, individually and d/b/a Wasson Electric Heating & Air; and Charleston Chimney Services, Inc., Third-Party Defendants.

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STATEMENT OF ISSUES ON APPEAL

1. Whether the Order should be reversed on substantive grounds where the circuit court erred in dismissing with prejudice single unit condominium owner plaintiffs who had valid, timely claims for individual damages under the regime governing documents, under South Carolina statutes, and under common law.

2. Whether the Order dismissing the Jeffords Plaintiffs with prejudice should be reversed on procedural grounds where the motion was actually a motion to strike, where the circuit court erred in failing to review the motion in the light most favorable to the non-moving parties, and where the Order relied on matters outside the pleadings.

3. Whether the Order should be reversed where the Circuit Court erred in dismissing the Complaint rendering all other pending motions moot.

STATEMENT OF THE CASE

Secondary Appellant/Plaintiff Hayden Jeffords, individually and on behalf of all others similarly situated, filed her complaint on November 19, 2010. (Complaint). On July 25, 2011, the Complaint was amended and Titus Gudel, Harold S. McEwan, D. Everett Walker, Paul Kane, John Zohlen, Mary Zohlen, Jeanne Debosh, Margarita Staudt, Leslie Anne O'Neal, Trivette C. Hatcher, William Scanlon, Delia Scanlon, and Christy C. Parish were added as individual Plaintiffs. (July 25 Amended Complaint).

In early 2011, some of the Defendants impleaded third parties. On November 3, 2011, several Defendants and Third Party Defendants moved to consolidate, for discovery purposes only, this action with *Vicki Devereaux et al. v. East Bridge Lofts*,

LLC, Case No. 2010-CP-10-10204 (which had been filed by Attorney Justin Lucey approximately a month after the present case). (Motion to Consolidate).

On January 3, 2012, Attorney Lucey filed a Notice of Appearance in this case on behalf of Plaintiffs John and Mary Zohlen (who had been/were among the initial plaintiffs represented by the undersigned). (Jan. 3 Notice of Appearance).

On January 5, 2012, the Initial Plaintiffs filed an amended complaint which deleted the Zohlens and added Joseph LaDue, Deborah LaDue, Pamela Synder, Steven Goldberg, Brent McClain, Brian Rasmussen, McKenzie Hutaff, Brian Kavanagh, and Lynn Harris as Plaintiffs. (Jan. 5 Amended Complaint).

On January 9, 2012, Attorney Lucey filed a Notice of Appearance on behalf of Plaintiffs Gudel, Hatcher, O'Neal and McClain (who also had been/were among the initial plaintiffs represented by the undersigned). (Jan. 9 Notice of Appearance). At the same time, Mr. Lucey filed a motion, ostensibly on behalf of named Plaintiffs Zohlen, Gudel, Hatcher, O'Neal and McClain, asking for the following relief:

1. An order compelling arbitration of claims subject to arbitration agreement;
2. An order striking claims for derivative relief;
3. An order striking claims for which plaintiffs have no standing;
4. An order striking claims for repair of common and limited common elements;
5. An order striking claims for repair of condominium damages incidental to Regime damages;
6. An order permitting Movants to file an Amended Complaint; and

7. An order staying this action until the Homeowner's Association case is resolved with finality.

(Jan. 9 Zohlen Motion).

On February 3, 2012, Plaintiffs Gudel and McClain filed affidavits, stating essentially that they had not knowingly hired Mr. Lucey or agreed to the January 9 motions made in their name. (Gudel and McClain Affidavits). (From this point forward, the Secondary Appellants, who are the Plaintiffs minus the Zohlens, Hatcher and O'Neal, will be referred to as "the Jeffords Plaintiffs").

On March 29, 2012, the Jeffords Plaintiffs moved to amend their Complaint. (March 29 Motion to Amend).

On May 14, 2012, Plaintiffs John Zohlen, Mary Zohlen, Trivette Hatcher and Leslie Anne O'Neal ("the Zohlen Plaintiffs") filed an "Amended Motion to Strike and Amend" asking for the following relief:

1. An order striking claims for derivative relief;
2. An order striking claims for which plaintiffs have no standing;
3. An order striking claims for repair of common and limited common elements;
4. An order striking claims for repair of condominium damages incidental to Regime damages; and
5. An order granting leave to amend Complaint after Court rules on foregoing motions.

(May 14 Zohlen Motion).

On that same day, the Jeffords Plaintiffs moved for injunctive relief, asking that Mr. Lucey be enjoined from contacting any other persons who were already represented by counsel. (Motion for Injunctive Relief).

On May 23, 2012, the Jeffords Plaintiffs moved to certify the case as a class action. (Motion to Certify).

On September 10, 2012, the Zohlen Plaintiffs filed a memorandum and exhibits “In Support of Dismissing and/or Striking Jeffords’ Complaint, or, in the Alternative, Staying the Jeffords Action and in Opposition to Jeffords’ Plaintiffs’ Motions for Injunctive Relief and Class Certification.” (Memo with Exhibits).

A hearing on all pending motions was held on September 12, 2012. On September 25, 2012, the circuit emailed the parties, instructing Attorney Lucey to draft an order. (Judge Young 9/25/12 email). The Order, dismissing the Jeffords Plaintiffs with prejudice, was filed on October 10, 2012. (Order).

On October 23, 2012, the Jeffords Plaintiffs moved to alter or amend the Order. (Jeffords motion to amend).

The motions to alter or amend were denied on October 30, 2012, and Notices of Appeal were filed on November 16, 2012.

STATEMENT OF THE FACTS

The Order under appeal purports to grant a motion to dismiss, a point which will be discussed in the Argument. Accordingly the source of the “facts” cited in the Order is important.

I. THE JEFFORDS PLAINTIFFS FILE A CONSTRUCTION DEFECT CASE.

The Jeffords Plaintiffs are owners of condominium units at East Bridge Town Lofts (sometimes referred to as “East Bridge”) in Mount Pleasant, SC. The Jeffords Plaintiffs each sued in their individual capacity (Jan. 5 Amended Complaint Para. 2) while Hayden Jeffords also sought to represent a class. (Jan. 5 Amended Complaint Para. 1). The Defendants and Third-Party Defendants were involved in the conversion of the East Bridge Town Lofts from apartments into condominiums. (Jan. 5 Amended Complaint Paras. 22-29). The Jeffords Plaintiffs allege that the East Bridge Town Lofts suffer from construction defects.

31. The Defendants failed to discover and disclose defects which have caused property and consequential damage to the subject property, including property other than the Defendants' work and/or products, and that property and consequential damage occurred and the current owners need to make necessary repairs.

...

33. East Bridge Town Lofts Property Owners Association, Inc. (“East Bridge POA”) is responsible for the repair and maintenance of certain portions of the Buildings.

34. Other portions of the property (the “Limited Common Elements”) are owned by individual unit owners, such as the Individual Homeowner Plaintiffs, and the individuals are responsible for the repair and maintenance of those areas.

35. The Master Deed filed with the Register of Mesne conveyance for Charleston County, South Carolina, Book W524, Page 644, shows that Plaintiffs and other unit owners each hold fee simple title to the various units which are defined in-part as:

The horizontal boundaries of each Unit shall be the planes formed by the unfinished interior surfaces of the floors and ceilings of the Unit.

The parametrical or vertical boundaries of each Unit shall be the planes formed by the unfinished interior surfaces of the exterior walls of the Unit. Entry doors, exterior doors, and exterior glass surfaces, including, but not limited to, glass windows, glass doors, or other exterior doors....

Book W524, Page 646, assigns/defines the Limited Common Elements as:

- a. ...deck, piazza, patio, porch or balcony which is appurtenant to a Unit...
- b. the doorsteps or stoops leading as access to the deck, patio, porch, or balcony...
- c. the Parking Space which are assigned to a Unit...if any
- d. the portion of Common Elements on which there is located any portion of the mechanical, electrical, air conditioning, or heating system exclusively serving a particular Unit or Units...
- e. any gas or electric meter which serves only one Unit...
- f. each unit is assign one (1) mailbox...

36. Despite Defendants representations and/or work performed, various defects resulting from the repairs/renovations of the buildings comprising East Bridge Condominiums have recently been identified. These defects include, but are not limited to the following:

- a. Faulty electrical system;
- b. Water intrusion into the exterior wall system;
- c. Condemned porches and patios;
- d. Leaking windows;
- e. Deficiencies and damages, including but not limited to, defective and deficient materials used during the conversion, defective and deficient design and detailing with regard to the flashing; deficient contract administration; defective and deficient sealant applied around windows, defective windows installed, improperly installed windows, defective, deficient and/or improperly installed weather-lapping and/or flashing; and
- f. Other defects or deficiencies that may be identified through the course of this litigation.

(January 5 Amended Complaint).

The Jeffords Plaintiffs' Complaint went beyond mere defective construction/negligence claims; it included causes of action for Negligent

Misrepresentation, Unfair Trade Practices, Breach of the Covenant of Good Faith and Fair Dealing, Alter Ego/Veil Piercing/Individual Liability and Breach of Fiduciary Duty.

II. ANOTHER INDIVIDUAL UNIT OWNER FILES A NEARLY IDENTICAL CASE.

On December 13, 2010, less than a month after the Jeffords Plaintiffs brought suit, individual unit owner Vicki Devereaux and the East Bridge Town Lofts Property Owners Association, Inc. (“the POA”), both represented by Attorney Lucey, brought their own suit against essentially the same Defendants: *Vicki Devereaux et al. v. East Bridge Lofts, LLC*, Case No. 2010-CP-10-10204. The initial POA/Devereaux Complaint largely mimics the Jeffords Plaintiffs’ Complaint. It seeks class certification and asserts individual claims on behalf of the unit owners. “Plaintiff Regime seeks to recover the damage relating to the common and limited common elements; Plaintiff Devereaux seeks to recover the owners’ damages, including interior finishes and components, personal property and loss of use.” (POA Complaint Para. 35).

In that case, Ms. Devereaux and the POA asserted: “The repeated water intrusion has resulted in damage to the Residences’ interiors and to the owners’ personal property, use and enjoyment.” (POA March 7, 2011 Memorandum in Support of Motion for Class Certification at 4). They further advocated for certification of a class: “a class action is the superior method for the fair and efficient adjudication of this controversy.” (POA March 7, 2011 Memorandum in Support of Motion for Class Certification at 6).

The homeowner class action has been combined in a single action with the Homeowners Association; therefore, the class representative and the Association together represent all the interests in all the East Bridge claims: 1) the Associations’ [sic] interest and responsibility for the claims

that affect common elements; 2) the Association and Owners' combined interests for the claims that affect the limited common elements; and 3) the Owners' interests in their condominium property, e.g. interior finishes. . . . For complete satisfaction of the common and individual unit claims, and vice-a-versa [sic], it is necessary and proper for the owners' claims to be consolidated with the Homeowner Association claims. (POA March 7, 2011 Memorandum in Support of Motion for Class Certification at 6-7).

III. A SMALL SUBSET OF THE PLAINTIFFS, THROUGH THEIR LAWYER, ASKS THAT PARTS OF THE COMPLAINT BE STRICKEN.

Shortly after filing Ms. Devereaux's complaint, Mr. Lucey filed a Notice of Appearance in this case on behalf of Plaintiffs John and Mary Zohlen. (Jan. 3 Notice of Appearance). Six days later, Mr. Lucey filed a Notice of Appearance on behalf of Plaintiffs Gudel, Hatcher, O'Neal and McClain. (Jan. 9 Notice of Appearance). At the same time, named Plaintiffs Zohlen, Gudel, Hatcher, O'Neal and McClain, through their new counsel, filed a motion captioned "Plaintiffs' Motion to Compel Arbitration, Strike, Dismiss, Amend and Stay." That motion asked for the following relief:

1. An order compelling arbitration of claims subject to arbitration agreement;
2. An order striking claims for derivative relief;
3. An order striking claims for which plaintiffs have no standing;
4. An order striking claims for repair of common and limited common elements;
5. An order striking claims for repair of condominium damages incidental to Regime damages;
6. An order permitting Movants to file an Amended Complaint; and
7. An order staying this action until the Homeowner's Association case is resolved with finality.

(Jan. 9 Zohlen Motion).

On February 3, 2012, Plaintiffs Gudel and McClain filed affidavits, stating essentially that they had not knowingly agreed to the January 9 motions made in their name, and further, that they had not knowingly agreed to hire Mr. Lucey. Gudel revealed that on December 22, 2011, he was contacted by an employee of Mr. Lucey, who then sent him “some forms” to be filled out. Mr. Lucey’s office did not ask Gudel if he was already represented by counsel; did not tell him that the “forms” had the effect of assigning his claims to the POA; and did not tell him that he should consult a lawyer before signing the forms. Gudel did not choose to be represented by Mr. Lucey and did not agree with the motion made in his name; he believes that he was “misled and misinformed by Attorney Justin Lucey.” (Gudel Affidavit). Mr. Lucey’s office contacted Plaintiff McClain via mail. He too believes that he was “misled and misinformed by Attorney Justin Lucey,” did not choose to be represented by Mr. Lucey and did not agree with the motion made in his name. (McClain Affidavit).

The form that Mr. Lucey provided to Gudel and McClain is titled “Litigation Authorization Form,” but the very first line in the body of the form recites: “I hereby assign my claim to the POA, . . .” The form goes further:

I hereby waive any conflict that should arise by virtue of Ed Buckley and Justin Lucey representing both the POA and me, and I acknowledge that the POA’s claims supersede my individual claim in the event of a conflict.

I understand that any monies received as proceeds of this lawsuit will first be prioritized for structural repairs, followed next be [sic] exterior cladding repairs, and finally interior repairs.
(Lucey form).

The form includes an acknowledgment that the lawyers would be paid on a contingency basis.

An email from another lawyer in Mr. Lucey's office tied the signing of the form to an inspection by engineers and architects: "If you would like the experts to visit your condo and inspect the interior, please send in the Litigation Authorization form previously circulated . . ." (Evans email).

In the wake of the Gudel and McClain affidavits, on May 14, 2012, Mr. Lucey, now on behalf of Plaintiffs John Zohlen, Mary Zohlen, Trivette Hatcher and Leslie Anne O'Neal ("the Zohlen Plaintiffs"), filed an "Amended Motion to Strike and Amend" asking for the following relief:

1. An order striking claims for derivative relief;
2. An order striking claims for which plaintiffs have no standing;
3. An order striking claims for repair of common and limited common elements;
4. An order striking claims for repair of condominium damages incidental to Regime damages; and
5. An order granting leave to amend Complaint after Court rules on foregoing motions.

(May 14 Zohlen Motion).

On that same day, the Jeffords Plaintiffs moved for injunctive relief on the basis of the matters set forth in the Gudel and McClain affidavits. They asked that Mr. Lucey be enjoined from tampering with or harassing plaintiffs who were already represented by counsel. (Motion for Injunctive Relief).

IV. THE PRESIDENT OF THE POA SUBMITS “FACTS” SUPPORTING THE ZOHLEN PLAINTIFFS’ POSITIONS.

Two days before the motions hearing, the Zohlen Plaintiffs filed a memorandum “In Support of Dismissing and/or Striking Jeffords’ Complaint, or, in the Alternative, Staying the Jeffords Action and in Opposition to Jeffords’ Plaintiffs’ Motions for Injunctive Relief and Class Certification.” Exhibit A to that Memorandum is an affidavit by Daniel O’Connor, the President of the POA. Mr. O’Connor’s affidavit sets forth some provisions of the East Bridge Master Deed and By-Laws.

The Master Deed provides that the POA is responsible for maintenance of the Common Elements and Limited Common Elements, as well as for repair of any incidental damage to an individual unit which becomes necessary due to the POA’s work. (O’Connor Affidavit Paras. 7, 8). The Master Deed also gives the POA the right to bring lawsuits (“any proceedings which may be instituted on behalf of or against the Owners concerning the Association.”). (O’Connor Affidavit Para. 9). Article 5 of the Master Deed defines the Common Elements as “all portions of the Regime not located within the boundaries, or considered a part, of a Unit.” Paragraph 17.5 gives the POA “the authority to require all or any Unit Owner(s) to do any act or perform any work involving portions of the Regime which are the maintenance responsibility of the Unit Owner, . . .” (Exhibits to Sept. 14, 2012 Jeffords’ supplemental memo in support of class cert.).

Mr. O’Connor alleges that the Jeffords Plaintiffs are “attempting to ‘piggy-back’ or ‘freeload’ off of the POA case.” (O’Connor Affidavit Para. 12). He further states that he believes that the “quality of the Jeffords’ chosen counsel will harm our case.”

(O'Connor Affidavit Para. 17). The circuit court's record contains two copies of Mr. O'Connor's affidavit. One attaches a jury verdict form from an entirely separate case from September of 2011 in which one of the Jeffords' Plaintiffs' lawyers was involved. (O'Connor Affidavit with Jury Verdict). The other attaches an article from South Carolina Lawyers' Weekly which discusses yet another entirely separate case in which one of the Jeffords' Plaintiffs' lawyers was involved. (O'Connor Affidavit with Article).

V. THE JEFFORDS PLAINTIFFS ARE THROWN OUT OF COURT.

A hearing on all pending motions was held on September 12, 2012. The circuit court took the matter under advisement then instructed Mr. Lucey to draft an order, which was signed and dismissed the Jeffords Plaintiffs with prejudice. Having dismissed the Jeffords Plaintiffs' claims, the Circuit Court never addressed the motion for injunctive relief regarding Mr. Lucey's conduct.

Meanwhile, Ms. Devereaux's nearly identical case is proceeding forward.

ARGUMENT

I. SUMMARY AND INTRODUCTION.

The Circuit Court dismissed the Jeffords Plaintiffs stating that they lacked status to bring a claim. This is plain error. Jeffords and her co-plaintiffs are property owners and have every right to bring a claim for relief as a result of construction deficiencies that cause them to be in danger. A similarly situated homeowner has no standing and no right to have the well-pled case brought by Jeffords discussed as a matter of law.

In a condominium construction defect case, there is no legal prohibition against an individual unit owner bringing suit for damages. Ms. Devereaux's complaint is a

perfect example. (POA Complaint). The Order in this case, which in effect chooses certain individual unit owners over others, adopts a prohibition which does not exist under South Carolina law.

The question is not whether the East Bridge Master Deed and By-Laws confer on the POA some obligation to repair and some right to redress wrongs – they do. The question is whether they deprive the individual owners of any individual claims whatsoever – they do not. The question is not whether the POA has a claim – it does – but whether the individual owners also have claims – they do.

The circuit court committed errors of law, both substantively and procedurally. The law should endeavor to avoid absurd results. See, Kennedy v. South Carolina Retirement System, 345 S.C. 339, 549 S.E.2d 243, 249 (2000) (statutory interpretation).

This Order results in a series of absurdities:

1. At least two plaintiffs are forced to be represented by a lawyer whom they did not choose and who misled them;
2. Words which do not appear in South Carolina statutes and the East Bridge governing documents have been used to support the Order;
3. The Jeffords Plaintiffs have been declared to have no standing and to not be real parties in interest, and are not afforded the protections of Rule 17, SCRCF;
4. The Jeffords Plaintiffs' unfair trade practice claim, based on a violation of the disclosure requirements of South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-430, has been dismissed as a

matter of law, even though that code section requires disclosure to *individuals* (“all prospective purchasers, including tenants in possession”), not to the POA;

5. The Zohlen Plaintiffs, who are not subject to counterclaims, have used a “defense” (Rule 12(b)(6)) to get their co-plaintiffs thrown out of court, even though the Zohlen Plaintiffs really asked only for an order striking portions of the complaint; and
6. A lawyer who filed a complaint seeking damages on behalf of individual unit owners has successfully argued that individual unit owners have no claims.

This Court is in the position of having to either reverse the Order, or change long-standing South Carolina law.

Is there any set of facts under which the Jeffords Plaintiffs could recover? The answer is yes. The Order avoided this fundamental question and committed legal error.

II. THE STANDARD OF REVIEW.

In reviewing an order which dismisses a complaint, this Court applies the same standard as the circuit court:

In reviewing a ruling on a motion to dismiss a claim, this Court must base its decision solely on the allegations set forth on the face of the complaint. ‘The motion cannot be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.’ ‘The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief. The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action.’

Grazia v. S.C. State Plastering, 390 S.C. 562, 703 S.E.2d 197, 199 (2010), citing McCormick v. England, 328 S.C. 627, 494 S.E.2d 431, 433 (Ct. App. 1997).

The facts alleged and inferences reasonably deducible therefrom would entitle the Jeffords Plaintiffs to relief under several theories of the case. This is especially true when the case is viewed through the proper lens, in the light most favorable to the Jeffords Plaintiffs.

III. THE ORDER SHOULD BE REVERSED ON SUBSTANTIVE GROUNDS BECAUSE THE CIRCUIT COURT ERRED IN DISMISSING WITH PREJUDICE SINGLE UNIT CONDOMINIUM OWNER PLAINTIFFS WHO HAD VALID, TIMELY CLAIMS FOR INDIVIDUAL DAMAGES.

The Order adopts a false dichotomy – if the POA has claims and a duty to repair and maintain, then the individual owners do not. That is incorrect.

Ms. Devereaux knows that the individual unit owners have claims separate from those of the POA. She, through her lawyer, filed a complaint which alleged, “Plaintiff Devereaux seeks to recover the owners’ damages, including interior finishes and components, personal property and loss of use.” (POA Complaint, Para. 35). She and the POA, through their lawyer, told the court: “The repeated water intrusion has resulted in damage to the Residences’ interiors and to the owners’ personal property, use and enjoyment.” (POA March 7, 2011 Memorandum in Support of Motion for Class Certification at 4).

The homeowner class action has been combined in a single action with the Homeowners Association; therefore, the class representative and the Association together represent all the interests in all the East Bridge claims: 1) the Associations’ [sic] interest and responsibility for the claims that affect common elements; 2) the Association and Owners’ combined interests for the claims that affect the limited common elements; and 3) the

Owners' interests in their condominium property, e.g. interior finishes. . .
. For complete satisfaction of the common and individual unit claims, and
vice-a-versa [sic], it is necessary and proper for the owners' claims to be
consolidated with the Homeowner Association claims.
(POA March 7, 2011 Memorandum in Support of Motion for Class
Certification at 6-7).

Ms. Devereaux and the POA are right: the individual unit owners have individual
claims. The circuit court erred in choosing one set of individual unit owners over
another.

A. The East Bridge governing documents do not support dismissal.

The Order holds that "the POA is the proper party to pursue claims involving the
construction of East Bridge because: (a) the POA is designated to bring these claims
under the regime's governing documents; and (b) the POA has the duty to repair and
maintain the East Bridge properties." (Order p. 5). The circuit court had before it only
selected portions of the East Bridge governing documents, but none of those portions
support these broad holdings.

Not surprisingly, the Master Deed provides that the POA is responsible for
maintenance of the Common Elements and Limited Common Elements, as well as for
repair of any incidental damage to an individual unit which becomes necessary due to the
POA's work. (O'Connor Affidavit). The Master Deed and Bylaws also give the POA
the right to bring lawsuits ("any proceedings which may be instituted on behalf of or
against the Owners concerning the Association."). (O'Connor Affidavit). Article 5
defines the Common Elements as "all portions of the Regime not located within the
boundaries, or considered a part, of a Unit." Paragraph 17.5 gives the POA "the authority

to require all or any Unit Owner(s) to do any act or perform any work involving portions of the Regime which are the maintenance responsibility of the Unit Owner, . . .”

(Exhibits to Sept. 14, 2012 Jeffords’ supplemental memo in support of class cert.).

The Order erroneously holds that the “Master Deed and Bylaws intend for [construction defect] claims to be pursued by the POA, on behalf of its members, as discussed below.” (Order at 5). Written documents do not “intend” anything; they either spell something out or they do not. There is no evidence in this record about the intentions of the drafters of the Master Deed and Bylaws. Such evidence would be inadmissible in any event.

The Order states: “Article 17.2(a) of the East Bridge Master Deed provides the POA shall maintain and keep in good repair the ‘Area of Responsibility,’ which includes, but is not limited to, all common elements, both general and limited.” (Order at 6). First, Article 17.2(a) of the Master Deed is not in the record. Second, and more importantly, the very use of the term “Area of Responsibility” by the POA means that there are some areas that are not its responsibility. Otherwise, why not just refer to the whole regime or property?

The Order relies on the provision of the Bylaws that gives the POA the right to file lawsuits: “bringing any proceedings which may be instituted on behalf of or against the Owners concerning the Association.” The Order italicizes (without noting its added emphasis) the wrong portion of this provision. (Order at 7). “[C]oncerning the Association” is the pivotal phrase -- the damages to individual units do not *concern the Association*, because the individual unit owners bear those losses by themselves.

The Order holds that “the Master Deed and Bylaws provide the authority of the POA to take such action on behalf of its members is plenary,” and then cited the Master Deed: “The Association *may* exercise any right or privilege given to it . . .” (Order at 7, emphasis added). “Plenary” means complete or full; a plenary session is one to which all attend. It does not mean “exclusive.” The drafters did not use the words “plenary” or “exclusive” anywhere in the East Bridge governing documents. The word “may” was used by those drafters, and “may” is a word of permission or option, not of obligation or exclusivity.

The Order holds that the POA “has *an interest* in pursuing claims which are related to the construction and development of [East Bridge]. The POA’s interest is *superior* to the interest of individual unit owners . . .” (Order at 8, emphases added). Yes, the POA has AN interest in construction defects at East Bridge; so do individual unit owners. The portions of the East Bridge governing documents in the record provide no support for the Order’s holding that the POA’s interest is *superior* to that of individual unit owners. Indeed, that conclusion makes little sense because the individual unit owners can exist without the POA, but the POA cannot exist without the individual unit owners.

Finally, and most importantly, the Order completely ignores the fact that no matter how large the POA’s realm of responsibility is, it is not limitless. Each individual owner owns and controls his or her unit, and is entitled to bring suit for damages. Article 5 of the Master Deed, by exclusion, defines the individually owned elements as those portions of the Regime “located within the boundaries, or considered a part, of a Unit.”

Paragraph 17.5 gives the POA “the authority to require all or any Unit Owner(s) to do any act or perform any work involving portions of the Regime which are the maintenance responsibility of the Unit Owner, . . .” (Exhibits to Sept. 14, 2012 Jeffords’ supplemental memo in support of class cert.). Therefore, there are portions of East Bridge which are the maintenance responsibility of the individual owners.

The circuit court erred in holding that the East Bridge governing documents support dismissal of the Jeffords Plaintiffs’ claims.

B. South Carolina statutes do not support dismissal (in fact, they demand reversal).

The Order mis-cites or misconstrues the South Carolina Horizontal Property Act (“the Act”). The Act actually bolsters the Jeffords Plaintiffs’ arguments.

The Order states that S.C. Code Ann. Section 27-31-150 “requires the Master Deed and Bylaws provide for the proper form of property administration as well as the care, upkeep, and surveillance of regime property.” (Order at 6). That citation is inaccurate. The statute actually provides that “The administration of the property constituted into horizontal property, whether incorporated or unincorporated, shall be governed by bylaws which shall be inserted in or appended to and recorded with the master deed or lease.” S.C. Code Ann. Section 27-31-150.

This mis-citation is particularly alarming given the amount of litigation regarding third-party criminal acts and “surveillance” of common areas. Generally, owners and operators of places where multiple people congregate argue that they do not have a responsibility for “surveillance.” See e.g., Jackson v. Swordfish Investments, L.L.C., 365

S.C. 608, 620 S.E.2d 54 (2005); Cramer v. Balcor Property Management, Inc., 312 S.C. 440, 441 S.E.2d 317 (1994); Parks v. Characters Night Club, 345 S.C. 484, 548 S.E.2d 605 (Ct. App. 2001); Daniel v. Days Inn of America, Inc., 292 S.C. 291, 356 S.E.2d 129 (Ct. App. 1987).

Similarly, the Order's holding, and the Zohlen Plaintiffs' position, expands the POA's maintenance responsibility far beyond the limits that most property owner associations assert. Presumably, the POA is not agreeing to repair torn linoleum in any individual owner's bathroom just because it wants certain individual unit owners preferred over others. The Order essentially makes the POA responsible for any and all damages everywhere on the property, including the interiors of the units. If it does not, then it takes away the unit owners' right to hold anyone accountable for damages to the interior of their units.

The Order cites S.C. Code Ann. Section 27-31-170. That statute provides:

Each co-owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the master deed or lease or in the deed or lease to his apartment. Failure to comply with any of the same shall be grounds for a civil action to recover sums due for damages or injunctive relief, or both, maintainable by the administrator or the board of administration, or other form of administration specified in the bylaws, on behalf of the council of co-owners, or in a proper case, by an aggrieved co-owner.

This code section is uncontroverted and irrelevant. The Jeffords Plaintiffs agree that the POA can bring suit against unit owners who violate the bylaws.

The Order offers no citation for its holding that the Act "suggests a more

organized approach to litigation, one spearheaded by diligent regimes, under the regime's governing documents, on behalf of regime members." (Order at 8). First, laws do not suggest; they either say something or they do not. Second, there is no citation because the Act does not say this. Third, even if this holding was legally correct, the Order goes beyond it -- whatever "spearheaded," means, it does not mean that individual unit owners cannot sue for their own damages. Fourth, one of the Zohlen Plaintiffs, Plaintiff Hatcher, actually moved to compel arbitration with one Defendant. (January 9 Motion to Compel). Plaintiff Hatcher is one of the Plaintiffs who was represented by the undersigned, but is now represented by Mr. Lucey. Mr. Lucey filed that motion in January 2012, but then he and Plaintiff Hatcher reconsidered and withdrew the motion in May, 2012. (May 14 Amended Motion to Strike or Amend). One of 200 plaintiffs arbitrating against one of several at-fault parties is hardly a "more organized" approach to litigation.

Far from supporting the Order's conclusions, the Act actually recognizes the standing of individual unit owners like the Jeffords Plaintiffs. The Act acknowledges each unit as an individual piece of property:

Once the property is submitted to the horizontal property regime, an apartment in the property may be individually conveyed and encumbered and may be the subject of ownership, possession or sale and of all types of juridic acts inter vivos or mortis causa, as if it were sole and entirely independent of the other apartments in the property of which it forms a part, and the corresponding individual titles and interests shall be recordable.

S.C. Code Ann. Section 27-31-40.

S.C. Code Ann. Section 27-31-60 is titled “Property rights of apartment owner” and provides that an “apartment owner shall have the exclusive ownership of his apartment and shall have a common right to a share, with the other co-owners, in the common elements of the property, . . .” It is the individual unit owners who must pay for the “the expenses of administration and of maintenance and repair of the general common elements and, in the proper case, of the limited common elements of the property and toward any other expense lawfully agreed upon.” S.C. Code Ann. Section 27-31-190. The Act dictates the application of insurance proceeds in the event of an insured loss, and includes provisions for distribution of proceeds to individual unit owners: “If the entire property is not repaired or replaced, the insurance proceeds: . . . (2) attributable to apartments and limited common elements that are not rebuilt must be distributed to the owners of those apartments and to the owners of those apartments to which limited common elements were allocated, or to the lienholders, as their interests may appear.” S.C. Code Ann. Section 27-31-250(C)(2).

The circuit court erred in holding that South Carolina statutes support dismissal of the Jeffords Plaintiffs’ claims.

C. Common law does not support dismissal (in fact, it demands reversal).

The Order cites Murphy v. Yacht Cove Homeowners Assoc., 289 S.C. 367, 345 S.E.2d 709 (1986) and Queen's Grant Villas Horizontal Property Regimes I-V v. Daniel International Corporation, 286 S.C. 555, 335 S.E.2d 365 (1985) in support of its holding. Murphy and Queen’s Grant stand for the proposition that a property regime has standing to sue for defects in common elements which it has a duty to maintain. That proposition

is not contested in, or relevant to, this appeal. Roland v. Heritage Litchfield, 372 S.C. 161, 641 S.E.2d 465 (Ct. App. 2007) establishes that individual unit owners can also bring suit for damages to common elements.

The Order proffers footnote support for its holdings from the law of foreign jurisdictions. (Order at 8). Those cases actually support reversal of the Order. Siller v. Hartz Mountain Assoc., 461 A.2d 568 (N.J. 1983) is especially strong in its support for the Jeffords Plaintiffs' position:

The unit owner, of course, does have primary rights to safeguard his interests in the unit he owns. *N.J.S.A. 48:8B-4*. The physical extent of that property depends upon what has been included in the common elements. This may be ascertained by examination of the statutory definition and the master deed. Moreover, defective conditions in the common elements may also result in injury to the unit owner and damages to his personal property and the unit. For example, a faulty roof may result in personal property damage in the unit. The unit owner's right to maintain an action for compensation for that loss against the wrongdoer is not extinguished or abridged by the association's exclusive right to seek compensation for damage to the common element.

...

Plaintiffs as unit owners may also continue with their individual causes of actions based upon damages to their individual units. Their complaint referred to such damages. The common elements as defined in the statute, *N.J.S.A. 46:8B-3(d)*, and in the master deed, do not include certain items peculiar to the individual units, such as doors and windows that open from a unit. The Associations cannot preclude plaintiffs from pursuing these claims. Each plaintiff should be prepared at the precircuit conference to itemize these individual unit owner claims. We do not pass upon the propriety of the class action, an issue which is not before us.
Id. (footnote omitted).

Poulet v. HFO, LLC, 817 N.E.2d 1054 (Ill. App. Ct. 2004) is important only because it distinguishes itself from Tassan v. United Dev. Co., 410 N.E.2d 902 (Ill. App. Ct. 1980). In Poulet, the Illinois court decided that an association had exclusive standing

to bring claims of conversion and common law constructive fraud that related to the mishandling of funds in its own account. Tassan, on the other hand, held that held that “individual condominium unit owners could bring a class action for claims of breach of an implied warranty of habitability and breach of an express warranty that were based on the individual contracts for sale of the condominium units against a developer of the condominium.” Poulet, 817 N.E.2 at 1062.

The remaining foreign decisions are not on point. Frantz v. CBI Fairmac Corp., 331 S.E.2d 390 (Va. 1985) involved a multi-acre piece of land next door to the condominium, and a settlement involving an easement. Caprer v. Nussbaum, 825 N.Y.S.2d 55 (App. Div. 2006) dealt with financial improprieties, not construction issues. In Cigal v. Leader Development Corp., 557 N.E.2d 1119 (Mass. 1990), the court held, at the summary judgment stage, that under Massachusetts law, the property owners’ association had the exclusive right to sue for negligent construction of *common areas*. Greenstein v. Avalon Court, 29 A.3d 604 (Md. Ct. of Special Appeals 2011) was also decided on summary judgment and holds that individual unit owners may sue their condominium association for failing to maintain the common elements.

Murphy, Queen's Grant, Roland and Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp., 282 S.C. 415, 321 S.E.2d 46 (1984) establish that under South Carolina law, an owners’ association or individual unit owners or both may have standing to sue for defects in the common elements. “The trial judge should have held as a matter of law that the Regime had no standing to sue for damages to property not encompassed in the

term ‘common element.’” Roundtree, 321 S.E.2d at 50. No case holds that the individual unit owners are deprived of the right to sue for damages to their own units.

The circuit court erred in holding that common law supports the dismissal of the Jeffords Plaintiffs’ claims.

IV. THE ORDER DISMISSING THE JEFFORDS PLAINTIFFS SHOULD BE REVERSED ON PROCEDURAL GROUNDS BECAUSE THE MOTION WAS ACTUALLY A MOTION TO STRIKE; BECAUSE THE CIRCUIT COURT ERRED IN FAILING TO REVIEW THE MOTION IN THE LIGHT MOST FAVORABLE TO THE NON-MOVING PARTIES; AND BECAUSE THE ORDER RELIES ON MATTERS OUTSIDE THE PLEADINGS BUT DOES NOT CONFESS TO BEING A SUMMARY JUDGMENT ORDER.

Several motions were pending before the circuit court. The Order purports to grant the “Zohlen Plaintiffs’ Motion to Strike and Dismiss the Complaint,” and deny four other motions as moot. (Order pp. 1, 13).

A. The Zohlen Plaintiffs moved to strike more than they moved to dismiss.

The caption of the Zohlen Plaintiffs’ original January 9, 2012 motion includes the word “dismiss.” (Jan. 9 Motion). However, the requested relief does not mention dismissal; instead it asks that certain portions of the Complaint be stricken. There were no attachments to that motion. The Zohlen Plaintiffs’ May 14, 2012 motion is captioned “Amended Motion to Strike and Amend.” Again, the requested relief does not mention dismissal, but does ask that certain parts of the Complaint be stricken and that the Plaintiffs be allowed to amend. There were no attachments to this amended motion. (May 14 Motion).

Two days before the hearing, the Zohlen Plaintiffs filed a memorandum “In Support of Dismissing and/or Striking Jeffords’ Complaint, or, in the Alternative, Staying the Jeffords Action and in Opposition to Jeffords’ Plaintiffs’ Motions for Injunctive Relief and Class Certification.” That Memorandum starts with an Overview in which the Zohlen Plaintiffs state that the pending motions include asking the Court to strike the Complaint, but no mention is made of dismissal. (Sept. 10 Memo). The Memorandum concludes, however, with a request that the Complaint be dismissed. (Sept. 10 Memo at).

By its plain language, Rule 12(b)(6) is a mechanism for asserting a “defense.” The Zohlen Plaintiffs are plaintiffs, and not subject to any counterclaims. Therefore, they do not have any “defenses.” They could have moved to dismiss themselves, but only under Rule 41, which they did not invoke. They did move to strike -- Rule 12(f) allows a court to order “stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.” The circuit court erred in taking a motion to strike and using it as a vehicle to dismiss the Complaint with prejudice.

B. The circuit court erred in failing to judge the Complaint in the light most favorable to the non-moving parties.

A motion to strike under Rule 12(f) is subject to the same standard as a Rule 12(b)(6) motion to dismiss. McCormick, 494 S.E.2d at 433; Grazia, 703 S.E.2d at 199.

The question is whether in the light most favorable to the plaintiff, and with every reasonable doubt resolved in her behalf, the complaint states any valid claim for relief. The cause of action should not be struck merely because the court doubts the plaintiff will prevail in the action. McCormick, 494 S.E.2d at 433-434 (citations omitted); accord, Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245, 247-248 (2007).

The circuit court erred in failing to apply this standard. The Zohlen Plaintiffs, the POA, and their lawyer admit that individual unit owners have individual claims, separate and apart from those of the POA. See, Lucey “Litigation Claim Form,” POA Complaint, Para. 35; POA March 7, 2011 Memorandum in Support of Motion for Class Certification at 4, 6-7. The Order concludes that “the Jeffords’ [sic] Plaintiffs allege no particularized, individual injury which exists separate and apart from the injuries suffered by the POA.” (Order at 9). This conclusion is not supported by the Complaint, where the Jeffords Plaintiffs allege:

The Defendants failed to discover and disclose defects which have caused property and consequential damage to the subject property, including property other than the Defendants' work and/or products, and that property and consequential damage occurred and the current owners need to make necessary repairs.
(Complaint Para. 31).

Plaintiffs have suffered significant physical damage to elements of the buildings, as well as diminution in the value of all units, and may suffer future loss of use when future repairs are made.
(Complaint Para. 41).

The Jeffords Plaintiffs’ damages include:

- a. Faulty electrical system;
 - b. Water intrusion into the exterior wall system;
 - c. Condemned porches and patios;
 - d. Leaking windows;
 - e. Deficiencies and damages, including but not limited to, defective and deficient materials used during the conversion, defective and deficient design and detailing with regard to the flashing; deficient contract administration; defective and deficient sealant applied around windows, defective windows installed, improperly installed windows, defective, deficient and/or improperly installed weather-lapping and/or flashing; and
 - f. Other defects or deficiencies that may be identified through the course of this litigation.
- (Complaint Para. 36).

Especially considering the obligation to view the Complaint in the light most favorable to the Jeffords Plaintiffs, these are sufficient allegations of particularized, individual damage. The circuit court erred in holding otherwise.

C. The circuit court erred in considering matters outside of the pleadings.

As argued above, the Zohlen Plaintiffs did not have standing to move to dismiss pursuant to Rule 12(b)(6), which is a “defense.” Even if they did have the right to move to dismiss, the circuit court erred in relying on several matters outside the pleadings. “A ruling on a motion to dismiss a claim must be based solely on the allegations set forth on the face of the complaint.” McCormick, 494 S.E.2d at 433 (citations omitted).

“If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.” Rule 12(b)(6), SCRPC. The Order does not say that the circuit court was treating the motion as one for summary judgment, but if that is what happened, then the Jeffords Plaintiffs were not given notice or the opportunity provided by the Rules of Civil Procedure.

The Zohlen Plaintiffs presented a moving target: motions captioned as motions to dismiss or to strike, but then not asking for dismissal as part of the relief; affidavits filed

in support but no request to transform the motions from Rule 12 to Rule 56. Neither the January 9 nor May 14, 2012 motions had any attachments. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999) dealt with similar chaos: “There has been much confusion in this case over whether the circuit court properly granted summary judgment on several of the issues. . . . For the 12(b)(6) motions, the circuit court ruled that it must convert them to motions for summary judgment since matters outside the pleadings were submitted by both parties and not excluded by it at the hearing. We find that the circuit court improperly converted County's 12(b)(6) motions into summary judgment motions.”

Id. at 73.

County submitted its motion to dismiss to the circuit court on June 30, 1997. On September 23, 1997, just two days before the motion hearing, County filed its memorandum in support of its motion to dismiss along with supporting affidavits. At the hearing, County never argued that its affidavits and other documents were in support of its 12(b)(6) motions. In fact, County's attorney unequivocally stated at the hearing that the affidavits were being introduced in support of County's jurisdictional motion: ‘I have filed several affidavits in this in support of my jurisdictional motion because this gives you the background of what is at stake here and what University Medical Associates is;’ ‘I presented affidavits that deal with the jurisdictional issues in this case.’ Moreover, the circuit court did not give notice to the parties prior to the hearing that it was going to consider affidavits and hear the 12(b)(6) motions as motions for summary judgment. The first indication that County's 12(b)(6) motions would be converted to summary judgment motions was the circuit court's *order of dismissal*. Under these facts, the circuit court erred in converting County's 12(b)(6) motions into motions for summary judgment. Id. at 74 (citations and footnotes omitted; emphasis added).

The circuit court in this case had before it a motion to strike. It granted a motion to dismiss. It further erred in considering matters outside the pleadings.

V. THE CIRCUIT COURT ERRED IN DISMISSING THE COMPLAINT AND THEREFORE RENDERING OTHER PENDING MOTIONS MOOT.

A. The Jeffords Plaintiffs' Motion to Amend.

On March 29, 2012, the Jeffords Plaintiffs moved to amend their Complaint. The Order states only that “any amendment of Jeffords’ Complaint is futile . . .” (Order at 12). Especially considering that the circuit court had before it a motion to strike, masquerading as a motion to dismiss, the motion to amend should have been addressed.

The Zohlen Plaintiffs were attempting to challenge the Jeffords Plaintiffs’ right to bring suit and the Order bases its decision on the issues of standing and real party in interest. (Order at 5, 9). The South Carolina rules dictate that the Jeffords Plaintiffs should have been given an opportunity to amend their complaint before being dismissed with prejudice. “No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed, after objection, for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.” Rule 17(a), SCRCF.

The circuit court erred in failing to consider the Jeffords Plaintiffs’ motion to amend and in failing to properly apply Rule 17.

B. The Jeffords Plaintiffs' Motion to Certify a Class.

The Order decides that the motion to certify a class was moot; but, anticipating an appeal, it also concluded that the adequacy, commonality and typicality requirements were not satisfied because of “intra-class contrasts existing between the one hundred and

fourteen unit owners supporting the POA and eighteen owners asserting individual claims.” (Order at 11).

Ms. Devereaux and the POA, through their lawyer who also represents the Zohlen Plaintiffs, believe that a class action is the appropriate vehicle for resolving all of the East Bridge construction defect claims. Before changing their minds due to their efforts to get the Jeffords Plaintiffs thrown out of court, they advocated for certification of a class: “a class action is the superior method for the fair and efficient adjudication of this controversy.” (POA March 7, 2011 Memorandum in Support of Motion for Class Certification at 6).

The homeowner class action has been combined in a single action with the Homeowners Association; therefore, the class representative and the Association together represent all the interests in all the East Bridge claims: 1) the Associations’ [sic] interest and responsibility for the claims that affect common elements; 2) the Association and Owners’ combined interests for the claims that affect the limited common elements; and 3) the Owners’ interests in their condominium property, e.g. interior finishes. . . . For complete satisfaction of the common and individual unit claims, and vice-a-versa [sic], it is necessary and proper for the owners’ claims to be consolidated with the Homeowner Association claims. (POA March 7, 2011 Memorandum in Support of Motion for Class Certification at 6-7).

In Pope v. Heritage Communities, Inc., 395 S.C. 404, 717 S.E.2d 765 (Ct. App. 2011), this Court affirmed jury verdicts for both a POA and a class of individual owners.

The POA filed an action against Appellants alleging defects in the construction of Riverwalk. Condominium owners Tony and Lynn Pope (the Popes) also filed an action against Appellants, on their own behalf and on behalf of the owners of Riverwalk, seeking to recover damages for the loss of use of their property during the estimated repair period. By order filed September 3, 2008, the Honorable Benjamin Culbertson certified the Popes and all other unit owners as a class (the Class). The Class and POA actions were consolidated for trial.

Id. at 769.

The record contains evidence that all unit owners, regardless of the manner of their use, would be excluded from the property for four months. We find the representatives' claims were typical of the claims of the other class members.

Id. at 775.

At the motions hearing, the circuit court appropriately asked Mr. Lucey why he opposed the certification of a class, which would benefit all unit owners. Mr. Lucey had no real answer. (Transcript, 35-36). The Order gives short shrift to the motion for class certification, dismissing it as moot. This Court should reverse and remand so that the record can be more fully developed.

C. The Jeffords Plaintiffs' Motion for Injunctive Relief.

The circuit court never ruled on the Jeffords Plaintiffs' motion for injunctive relief. The circuit court had, and this Court has, sworn statements from Plaintiffs Gudel and McClain stating that they did not knowingly agree to the January 9 motions made in their name by Mr. Lucey; that they had not knowingly agreed to hire separate counsel; that they were, without a request by them, contacted by Mr. Lucey's office; that they were not asked if they were represented by counsel; that they were not told they should consult a lawyer before signing the proffered form; and that they were not told that the form had the effect of assigning their claims to the POA. Plaintiffs Gudel and McClain both believe that they were "misled and misinformed by Attorney Justin Lucey." (Gudel and McClain Affidavits).

The form that provided to Gudel and McClain is titled “Litigation Authorization Form,” but the very first line in the body of the form recites: “I hereby assign my claim to the POA, . . .” The form goes further:

I hereby waive any conflict that should arise by virtue of Ed Buckley and Justin Lucey representing both the POA and me, and I acknowledge that the POA’s claims supersede my individual claim in the event of a conflict.

I understand that any monies received as proceeds of this lawsuit will first be prioritized for structural repairs, followed next be [sic] exterior cladding repairs, and finally interior repairs.
(Lucey form).

The form includes an acknowledgment that Mr. Lucey will be paid on a contingency basis. An email from another lawyer in Mr. Lucey’s office tied the signing of the form to an inspection by engineers and architects: “If you would like the experts to visit your condo and inspect the interior, please send in the Litigation Authorization form previously circulated . . .” (Evans email).

The Gudel and McClain affidavits caused Mr. Lucey to stand down. After the affidavits were filed, Mr. Lucey filed an “Amended Motion to Strike and Amend.” on behalf of the “Zohlen Plaintiffs” (*sans* Gudel and McClain).

The Jeffords Plaintiffs sought to protect themselves and their neighbors by asking the circuit court to enjoin Mr. Lucey from tampering with or harassing plaintiffs who were already represented by counsel. Rule 4.2, SCRPC is designed to prevent precisely this conduct:

This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client

lawyer relationship and the uncounselled disclosure of information relating to the representation.

Id., cmt. 1.

By ignoring the motion for injunctive relief, the Order has the effect of sanctioning behavior forbidden by the Rules of Professional Conduct. More insidiously, the Order essentially forces Gudel and McClain (named plaintiffs, not just members of an as-yet uncertified class) to be represented by a lawyer not of their choosing, and to waive any conflicts that that lawyer may have.

Gudel and McClain, two of the Jeffords Plaintiffs, are left to wonder: If we have no individual claims, such that dismissal of our suit was proper, then what exactly did Mr. Lucey want us to assign to the POA?

The circuit court erred in refusing to address this motion and its serious subject matter.

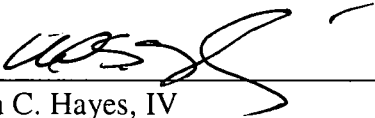
CONCLUSION

The circuit court committed substantive and procedural legal errors in choosing some individual unit owners over others. All owners have viable claims and dismissal of the Jeffords case by way of Motion of similarly situated owners and the POA was error. This Court should get this matter on track for resolution by vacating the Order, ruling that the Jeffords Plaintiffs have standing to pursue claims, and remanding this case with instructions to:

1. Rule on the Zohlen Plaintiffs' motion to strike portions of the Jeffords Plaintiffs' complaint;
2. Rule on the Jeffords Plaintiffs' motion to amend;

3. Rule on the Jeffords Plaintiffs' motion to certify a class; and
4. Rule on the Jeffords Plaintiffs' motion for injunctive relief.

Respectfully submitted,



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