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**ORIGINAL**

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

**RECEIVED**  
APR 05 2013

Consolidated Case No. 2010-CP-46-2326

**SC Court of Appeals**

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

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

APPELLANT NOTICE OF MOTION AND MOTION  
TO DISMISS CROSS APPEAL INVOLVING  
THE TRIAL COURT'S AUGUST 27, 2012 ORDER  
OR ALTERNATIVELY  
MOTION TO CONSOLIDATE ALL TRIAL COURT ORDERS

Appellants move pursuant to SCACR 224 to dismiss Respondent/Cross Appellant's cross appeal involving dismissal of the COA's motion for judgment on the pleadings as to Plaintiffs' claims for exterior damages, dated August 27, 2012. Alternatively, Appellants seek consolidation of all orders related to standing of the parties previously litigated before the circuit court should the court of appeals determine the issues to be preserved for review.

Oral argument on the COA's motion for judgment on the pleadings occurred on July 30, 2012. By order dated August 27, 2012 the circuit court denied the COA's motion for judgment on the pleadings, citing by reference a prior order of the circuit

court in case no. 2008-CP-46-2158 Pulliam v. M.U.I. Corporation. The two orders are attached as Exhibit A. The grounds for Appellant's Motion to Dismiss is that the order cited by Respondent/Cross Appellant was and is not a final, appealable order of the court and not properly preserved as no timely appeal, motion to reconsider, alter or amend was filed by the COA on or before October 1, 2012. Rule 203(b)(1), SCACR. The Pulliam order is likewise not a matter of record related to the appealed issues arising from the January 23, 2013 Order of the Court dismissing all parties' damage claims as to common elements. The August 27, 2012 order, likewise, was not raised or cited by the COA by oral argument nor memorandum before the lower court on December 19, 2012.

#### PROCEDURAL BACKGROUND

On June 6, 2012 the property regime Stonecrest Villas of Tega Cay Owners' Association, Inc. (hereafter "COA") moved before the court for judgment on the pleadings related to Plaintiffs' claims as to *exterior* condominium damages and related common elements. The trial court heard oral arguments on July 30, 2012. The trial court denied the COA's motion by order dated August 27, 2012. Exhibit A. The COA filed no motion to reconsider, alter or amend. The COA likewise did not timely appeal the order on or before October 1, 2012. Rule 203(b)(1), SCACR. The COA now seeks, for the first time, to have the prior orders of the trial court raised in the now-pending issues before the court of appeals. These issues arise specifically out of the January 23, 2013 order of the circuit court granting summary judgment and dismissing all parties claims as to common element damages pursuant to Appellants' notice of appeal. They do not arise out of the August 27, 2012 trial court ruling.

As a procedural side note, the court likewise denied Plaintiffs' motions for partial summary judgment as to standing *vis-à-vis* the COA on or about October 27, 2012. Exhibit B. Until January 23, 2013 Judge Hayes' rulings set forth the law of the case establishing that neither party had superior standing *vis-à-vis* the other as to ability to claim damages related to common elements. Appellants move to dismiss the COA's cross appeal involving the August 27, 2012 order of the trial court as untimely, collateral and raising issues not properly preserved for review.

#### APPLICATION OF LAW

The March 28, 2013 cross notice by respondent certifies that counsel for the COA received Appellants' Notice of Appeal on March 25, 2013.<sup>1</sup> However, Appellant's notice raised before this court issues properly preserved and related to the January 23, 2013 order of the circuit court granting summary judgment and dismissing plaintiffs' claims as to common elements affecting their homes. The order approved a COA-sought settlement with the developer, general contractor, and various other third and fourth party litigants. The order dismissed *all* parties claims as to common elements in granting summary judgment in favor of the property regime.

- 1. The cross appeal notice fails to state grounds involving the trial court's August 27, 2012 Order raised with specificity as to the January 23, 2013 order now on appeal before this court.**

Without reference to the precise order and issues now on appeal, the respondent's cross notice improperly attempts to *link* prior *un-challenged* orders of the trial court and consolidate them with the appeal matters now pending appeal. With regard to the

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<sup>1</sup> The order now on appeal is the January 23, 2013 order of the Hon. John C. Hayes, III. The issues implicated by the August 27, 2012 order of the circuit court were not raised by oral argument or memorandum of law by the COA at the last two motion hearings, dated December 19, 2012 and March 20, 2013 respectively.

COA's motion for judgment on the pleadings (filed June 6, 2012 and argued July 30, 2012), the trial court entered and mailed its order on August 27, 2012. Exhibit A. The Form 4 cited that the order was not a final order, and that it did not end the case. Id.

Respondent would have had thirty (30) days from the date of receipt of said order to properly raise objections before the court. No motion to alter or amend the August 27, 2012 order was undertaken. No direct appeal was filed. The issues implicated by said order(s) are not properly preserved. Even if the order cited by the cross notice could be viewed as timely, the notice fails to state specific grounds related to pending appeal issues. The order denying the motion for judgment on the pleadings by the COA was final, and not subject to appeal, as of October 1, 2012. Respondent does not raise the issues related to the August 27, 2012 order until some 179 days after entry of the trial court's order.

**2. The issues implicated in the prior orders of the trial court are now abandoned and are the un-challenged law of the case.**

It is a fundamental rule of law that an appellate court will affirm a ruling by a lower court if the offended party does not challenge that ruling. *Bailes v. Young*, 315 S.C. 166, 432 S.E.2d 482 (1993); *Lindsay v. Lindsay*, 328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997). Failure to challenge the ruling is an abandonment of the issue and precludes consideration on appeal. *Id.* An un-appealed order, right or wrong, is ordinarily the law of the case. *Charleston Lumber Co. v. Millar Hous. Corp.*, 338 S.C. 171, 525 S.E.2d 869 (2000); *Resolution Trust Corp. v. Eagle Lake & Golf Condominiums*, 310 S.C. 473, 427 S.E. 2d 646. The trial court's rulings that precede

the January 23, 2013 order granting summary judgment are now the unchallenged law of the case before this court.

### CONCLUSION

Neither the Plaintiff parties nor the COA timely challenged the orders dated August 27, 2012 (Exhibit – A) and October 17, 2012 (Exhibit – B), respectively. Failure to challenge the rulings were an abandonment of those issues. *Lindsay*, supra at 329. The orders are now the law of the case preceding the current order on appeal. These matters arise specifically out of the January 23, 2013 order of the circuit court dismissing plaintiffs' claims as to common elements affecting their homes and granting summary judgment to the regime. The January 23, 2013 order effectively dismissed *all* parties' claims as to common element damages, inclusive of the Plaintiffs'.

On March 28, 2013, for the very first time, respondent raises the August 27, 2012 Order of the trial court concurrently with (and attached to) its cross notice of appeal. Prior to it's March 28, 2013 filing, Respondent failed to timely raise or properly preserve the issues. As such, Respondent/Cross Appellant's Notice of Appeal involving the August 27, 2012 order should be dismissed. In the alternative, Appellants would move to consolidate all prior orders of the trial court pertinent to standing.<sup>2</sup>

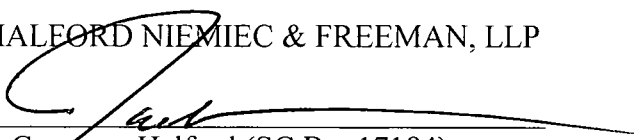
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<sup>2</sup> The two prior trial court orders related to standing of the parties as to ability to claim exterior common element damages are August 27, 2012 attached as [Exhibit A] and October 15, 2012 attached as [Exhibit B].

April 4, 2012.

Respectfully submitted,

HALFORD NIEMIEC & FREEMAN, LLP



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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM YORK COUNTY  
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Consolidated Case No. 2010-CP-46-2326

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

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

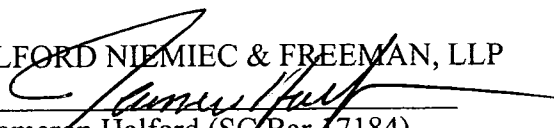
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PROOF OF SERVICE

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I certify that I have served the foregoing Appellant Notice of Motion, Motion to Dismiss and Memorandum in Support on counsel for respondent/cross appellant on April 4, 2013 by depositing a copy of the same in the United States mail, postage prepaid, and addressed to : Brett E. Dressler, Esq., 301 S. McDowell Street, Suite 410, Charlotte, North Carolina 28204.

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April 4, 2013

Jenny Abbott Kitchings, Clerk of Court  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

Re: *Juontonio Pinckney, et al. v. Brock L. Fankhauser, et al.*  
Consolidated Case No.: 2010-CP-46-2326

Dear Ms. Kitchings:

Please find enclosed an original and seven copies of Appellant Notice of Motion and Motion to Dismiss Cross Appeal Involving the Trial Court's August 27, 2012 Order or Alternatively Motion to Consolidate all Trial Court Orders and Proof of Service in the above referenced matter, along with the required filing fee. Please file the original and return a filed copy to me in the envelope enclosed.

With kind regards, I remain

Respectfully,



Kristie Williams  
Paralegal to J. Cameron Halford

JCH/klw  
Enclosures

cc: *(Via U.S. Mail and E-Mail):*  
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Mike Wilkes, Esq.  
Bradford W. Cranshaw, Esq.  
Brett E. Dressler, Esq.