

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

67988

APPEAL FROM YORK COUNTY
Court of Common Pleas

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

Consolidated case no. 2010-CP-46-2326

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.

RESPONDENT'S RETURN TO APPELLANTS' MOTION TO DISMISS

Brett Dressler
301 S. McDowell Street, Suite 410
Charlotte, North Carolina 28204
Telephone: 704.377.5050
Facsimile: 704.927.2868
Attorney for Respondent

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APR 16 2013
SC Court of Appeals

Summary of Argument

This appeal presents a question of first impression: Whether a condominium association has a superior and/or exclusive right to pursue a claim for damages to common elements over a group of homeowners pursuing the same claim for damages in the same lawsuit. Respondent, Stonecrest Villas of Tega Cay Condominium Owners (hereinafter "COA"), raised this issue at the Lower Court by way of its Motion for Judgment on the Pleadings as to Exterior Damages filed on June 6, 2012. (See Exhibit A attached hereto). On August 27, 2012, the Lower Court denied the COA's motion. The Lower Court ruled that the COA and the plaintiff Appellants, who are a minority group of owners within the association, both had standing to pursue the same set of damages: the cost to repair construction defects within the common-element exteriors of the neighborhood buildings. (See Exhibit A attached to Appellants' Motion to Dismiss).

The COA thereafter settled the claim for damages to the common-elements with the various defendants. As a condition of the settlement, the COA filed a motion for summary judgment asking the Lower Court to dismiss all parties' claims for damages to the common-elements due to the settlement of same. The Lower Court granted the motion and dismissed all parties' claims for the cost to repair the construction defects within the common-elements, including the identical claims of the plaintiff Appellants.

Appellants appeal the order granting summary judgment and dismissing their claims for the cost to repair the common-elements. The COA appealed the order denying its motion for judgment on the pleadings in response to the appeal of the summary judgment order. The order denying judgment on the pleadings squarely raises the legal issue of standing, which is further addressed in the Lower Court's summary judgment order. Both orders tightly revolve around the issue of standing. Thus, judicial economy suggests a simultaneous appellate review.

1. The Lower Court's order denying the COA's Motion for Judgment on the Pleadings is not directly appealable.

Appellants suggest in their motion to dismiss that the COA should have appealed the order denying the motion for judgment on the pleadings within 30 days of its entry. However, an order denying a motion for judgment on the pleadings, even if it involves only a pure question of law, is not directly appealable. Rose v. Thrash, 291 S.C. 459 (1987). Therefore, the COA could not have appealed the order at or near the time of its entry.

2. The COA was not required to file a motion to reconsider the order denying the COA's Motion for Judgment on the Pleadings.

Appellants argue the COA was required to contest with the Lower Court its order denying the judgment on the pleadings. The COA properly raised its objection to Appellants' standing to pursue damages for common-elements through its motion for judgment on the pleadings. The COA properly apprised the Lower Court of its objection and the bases for it. The Lower Court ruled on

the objection and the COA would have appealed it at the time but for the fact that the order was not final.

The COA is not aware of any case law or rule that required it to file a motion with the Lower Court contesting the order denying the relief it requested in the first place. Indeed, neither a Rule 59 motion nor a Rule 60 motion would have been appropriate as the order was not a final order on the merits. Cf. PrecisionIR, Inc. v. Slawter, 686 F.Supp.2d 540, 542 (E.D. Pa. 2010)(Rule 60 relief from order denying motion for summary judgment held inappropriate because it is not a final order on the merits); see also Dalon v. Golden Lanes, Inc., 320 S.C. 534, 541 (Ct. App. 1996)(noting that Federal law may be used as a guide when the Federal and State rules are identical). A motion to reconsider likewise would have been unwarranted and pointless. Cf. Elam v. S.C. Dep't of Trans., 361 S.C. 9, 15-16 (2004)(a second Rule 59 motion that raises no new grounds does not toll appellate timetable).

On page 4 of their brief, Appellants rely on the well-settled legal principle that "an appellate court will affirm a ruling by a lower party if the offended party does not challenge that ruling." See Bailes v. Young, 315 S.C. 166 (1993); Lindsay v. Lindsay, 328 S.C. 329 (Ct. App. 1997). Bailes and Lindsay, however, both involved an appellant's failure to challenge a lower court's ruling on appeal. More specifically, the Bailes court wrote:

Failure to argue is an abandonment of the issue and precludes consideration on appeal. S.C.A.C.R. Rules 207(b)(1)(B),

(D) and 210(b). See also Howell v. Pacific Columbia Mills, 291 S.C. 469, 354 S.E.2d 384 (1987) (under former rules)."

Bailes at 168. These cases do not stand for the proposition that a moving or objecting party must contest the entry of an order/ruling after entry of the order or ruling itself. As Lieutenant Commander Jo Galloway of the movie *A Few Good Men* learned the hard way, "strenuously objecting" to a trial court's ruling after it has ruled is a practice that is neither necessary nor appreciated.

3. This Court should exercise its discretion to review the order denying judgment on the pleadings.

This Court has the discretion to consider an unappealable order if an appealable issue is before the court and a ruling on appeal will avoid unnecessary litigation. Hite v. Thomas & Howard Co. of Florence, Inc., 305 S.C. 358, 409 S.E.2d 340 (1991). Appellants suggest the order denying judgment on the pleadings is not related to the summary judgment order. However, the order granting summary judgment refers in substance to the earlier order denying judgment on the pleadings. The Lower Court wrote on page 3 of its summary judgment order:

As has been noted by the Plaintiffs' Memorandum and oral arguments, the standing issue continues to vex the Court and the parties to the litigation. The Court has earlier ruled that Plaintiffs and Stonecrest Villas of Tega Cay Owners' Association Inc. (COA) have standing to pursue claims regarding the alleged deficiencies in the common elements of Stonecrest Villas of Tega Cay.

The issue before the Lower Court on summary judgment was the proper post-settlement disposition of the common-element repair claims in light of the

Lower Court's decision to confer standing on both the COA and the homeowner plaintiffs. Thus, the standing issue is critical to the resolution of both appeals. The appellate court may reverse the order denying judgment on the pleadings and hold that the COA enjoyed exclusive standing to pursue the claim for the cost to repair the common-elements. In that event, the Lower Court's summary judgment order dismissing the claims becomes moot and further review will not be necessary. The COA would have the unfettered authority to dismiss the repair-cost claim against the defendants without further judicial intervention.

Appellants also seem to suggest the form of the COA's notice of appeal is defective. The notice of appeal complies in all material respects with South Carolina Rule of Appellate Procedure 203(e). Rule 203 does not require a cross-appellant to "state with specificity" the grounds for the appeal as suggested in caption one on page 3 of appellants' motion to dismiss.

4. The appellate rules do not allow Appellants to supplement their notice of appeal by "consolidating" trial court orders.

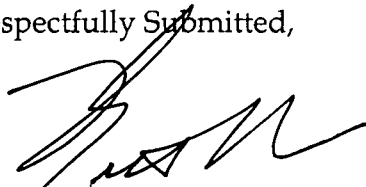
Appellants argue for a "consolidation" of certain trial court orders so that they may present an additional order for appellate review.¹ Appellants are, in essence, asking the Court to review an order from which no appeal has been taken. South Carolina Rule of Appellate Procedure 203 requires a notice of appeal to be filed within 30 days of written notice of the entry of the order. Rule 203, SCACR. It further requires the notice to identify the order being appealed

¹ The additional order is the denial of Plaintiff's motion for summary judgment against the COA.

and a copy of the order must be filed with the notice. Rule 203(d)(1)(B)(ii), Rule 203(e)(1)(C), SCACR. The deadline to file an appeal is jurisdictional and the appellate court "has no authority to rescue the delinquent party by extending [it]." Elam v. S.C. Dept. of Trans., 361 S.C. 9, 14-15 (2004).

Although this Court's jurisdiction to review the order granting summary judgment has been invoked, the rules do not permit an appellant to supplement its notice of appeal by requesting the review of additional orders not identified in the notice of appeal. Appellants could have appealed this additional order under the discretionary review doctrine, but they failed to appeal it. Allowing Appellants now to include an additional order for review would open the door for such "consolidations" at any time during the appellate process - a clearly unworkable procedure. For these reasons, the COA asks the Court to deny Appellants' motions.

Respectfully Submitted,



Brett Dressler
State Bar Number 77650
301 S. McDowell Street, Suite 410
Charlotte, North Carolina 28204
Telephone: 704.377.5050
Facsimile: 704.927.2868
Attorney for Respondent

April 8, 2013

APPEAL FROM YORK COUNTY
Court of Common Pleas

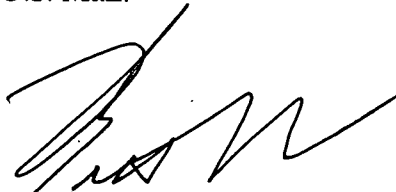
Hon. John C. Hayes, III
Presiding Circuit Court Judge

Consolidated case no. 2010-CP-46-2326

Juontonio Pinckney, et al.Appellants,
v.
Epcn Communities, Inc., Epcn 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

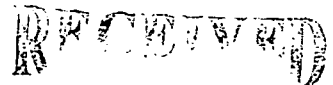
PROOF OF SERVICE

I certify that I have served the foregoing RESPONDENT'S RETURN TO APPELLANTS' MOTION TO DISMISS on counsel for Appellants Juontonio Pinckney, et al, J. Cameron Halford, Halford Niemiec & Freeman, L.L.P., 238 Rockmont Drive, Fort Mill, South Carolina 29708, by depositing a copy in the U.S. Mail, postage prepaid, on April ____, 2013 with all other parties served by U.S. Mail.



Brett Dressler
State Bar Number 77650
301 S. McDowell Street, Suite 410
Charlotte, North Carolina 28204
Telephone: 704.377.5050
Facsimile: 704.927.2868
Attorney for Respondent

April 8, 2013



APR 10 2013

SC Court of Appeals

Other Counsel of Record Served:

(Via U.S. Mail)

Curtis W. Dowling, Esquire
Barnes Alford Stork & Johnson, L.L.P.
Post Office Box 8448
Columbia, South Carolina 29202
Attorney for Stonecrest Villas of Tega Cay Owners' Association, Inc.

(Via U.S. Mail)

Graham P. Powell, Esquire
Wall, Templeton & Haldrop, P.A.
145 King Street, Suite 300
Charleston, South Carolina 29401
Attorney for Brock L. Fankhauser, Fankhauser Property Group, Inc. and Stonecrest Villas of Tega Cay, L.L.C.

(Via U.S. Mail)

Mike Wilkes, Esquire
J. Derham Cole, Esquire
Wilkes Law Firm, P.A.
127 Dunbar Street, Suite 200
Spartanburg, South Carolina 29306
Attorneys for Epcon Communities, Inc. and Epcon Communities Franchising, Inc.

(Via U.S. Mail)

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

STATE OF SOUTH CAROLINA)
)
 COUNTY OF YORK)
)
)
)
Juontonio Pinckney, et al)
 Plaintiff,)
 vs.)
)
)
Brock L. Fankhauser, et al)
 Defendant.)

IN THE FAMILY COURT
 SIXTEENTH JUDICIAL CIRCUIT

**MOTION AND ORDER INFORMATION
 FORM AND COVERSHEET**

Docket No. 2010-CP-16-2326

Plaintiff's Attorney: Brett Dressler, Bar No. 77650 Address: 301 South McDowell Street, Suite 410 Charlotte, NC 28201 Phone: 704-377-5050 Fax 704-927-2868 E-mail: BDressler@sellershinslaw.com Other:	Defendant's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____
--	--

FILED-RECEIVED
 2012 JUN -6 AM 9:38
 DAVID HAMILTON
 C.C.P. & G.S.
 YORK COUNTY, SC

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information
 Nature of Motion: Motion for Partial Judgment on the Pleadings As To the Plaintiffs' Claims for Exterior Damages
 Estimated Time Needed: 1 hour Court Reporter Needed: YES / NO

SECTION II: Motion/Order Type
 Written motion attached
 Form Motion/Order
 I hereby move for relief or action by the court as set forth in the attached proposed order.

 Signature of Attorney for Plaintiff / Defendant Date submitted _____

SECTION III: Motion Fee
 PAID - AMOUNT: \$ _____
 EXEMPT: (check reason)

- Rule to Show Cause in Child or Spousal Support
- Domestic Abuse or Abuse and Neglect
- Indigent Status State Agency v. Indigent Party
- Sexually Violent Predator Act Post-Conviction Relief
- Motion for Stay in Bankruptcy
- Motion for Publication Motion for Execution (Rule 69, SCRPC)
- Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions

 Name of Court Reporter: _____
 Other: _____

JUDGE'S SECTION
 Motion Fee to be paid upon filing of the attached order.
 Other: _____
 JUDGE CODE _____
 Date: _____

CLERK'S VERIFICATION
 Collected by: _____ Date Filed: _____
 MOTION FEE COLLECTED: \$ _____
 CONTESTED - AMOUNT DUE: \$ _____



STATE OF SOUTH CAROLINA

COUNTY OF YORK

Juontonio Pinckney, et al.,

Plaintiffs,

v.

Brock L. Fankhauser, et al.

Defendants.

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

CONSOLIDATED

Civil Action No. 2010-CP-46-2326

STONECREST VILLAS OF TEGA CAY
CONDOMINIUM OWNERS'
MOTION FOR PARTIAL JUDGMENT
ON THE PLEADINGS AS TO THE
PLAINTIFFS' CLAIMS FOR EXTERIOR
DAMAGES.

Comes now, Stonecrest Villas of Tega Cay Condominium Owners, improperly named as Stonecrest Villas of Tega Cay Home Owners Association, Inc., and hereby moves for partial judgment on the pleadings as to the plaintiffs' claims for damages to the exterior of the condominiums at issue.

Respectfully submitted,

DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

2012 JUN -6 AM 9:33

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BRETT E. DRESSLER

SELLERS, HINSHAW, SYERS, DORTCH & LYONS, PA
301 S. McDowell Street, Suite 410

Charlotte, NC 28204

704.377.5050 (Office)

704.339.0172 (Fax)

bdressler@sellershinshaw.com

Attorneys for Stonecrest Villas of Tega Cay
Condominium Owners

(Cross-Claims and Third-Party Complaint)

CERTIFICATE OF SERVICE

The undersigned employee of Sellers, Hinshaw, Ayers, Dortch & Lyons, PA, certifies that he or she has, on the date below, served the below document(s) upon the below person(s) via first class mail.

DOCUMENT(S) SERVED:

STONECREST VILLAS OF TEGA CAY CONDOMINIUM OWNERS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO THE PLAINTIFFS' CLAIMS FOR EXTERIOR DAMAGES

PERSON(S) SERVED:

J. Cameron Halford, Esquire
Halford, Niemiec & Freeman, LLP
238 Rockmont Drive
Fort Mill, SC 29708
Attorney for Plaintiff

Morgan S. Templeton, Esquire
Graham P. Powell, Esquire
145 King Street, Suite 302
P. O. Box 1200
Charleston, SC 29402

Attorneys for Defendants Brock L. Fankhauser, Fankhauser Property Group, Inc., and Stonecrest Villas of Tega Cay, LLC

Thomas F. Dougall, Esquire
Law Offices of Thomas F. Dougall
1700 Woodcreek Farms Road, Suite 100
Elgin, SC 29045
Attorney for Pro-Car, Inc.

Sarah E. Wetmore, Esquire
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401-3001
Attorney for The Southeastern Group, Inc.

Payton D. Hoover, Esquire
Dean & Gibson, PLLC
Cameron Brown Building
301 South McDowell Street, Suite 900
Charlotte, NC 28204-2686
Attorney for Lucas Lawn and Landscape, Inc.

Tracy T. Vann, Esquire
Christi P. Cox, Esquire
Hamilton Martens & Ballou, LLC

FILED-RECEIVED
2012 JUN -6 AM 9:33
DAVID HAMILTON
C.C.C.P. & G.S.
YORK COUNTY, SC

Post Office Box 10940
Rock Hill, SC 29731
Attorney for Al-Mega Construction, Inc.

Christy E. Mahon, Esquire
Sweeny Wingate & Barrow
1515 Lady Street
Columbia, SC 29201
Attorney for Exterior Expressions of North Carolina, Inc.

David C. Cleveland, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
Attorney for Marcos Gonzalez

Bonum S. Wilson, III, Esquire
Post Office Box 13177
Charleston, SC 29422
and

D. Andrew Williams, Esquire
Turner, Padgett, Graham & Laney, PA
Post Office Box 1473
Columbia, SC 29202
Attorney for M&L Roofing Co., LLC, MB Roofing Company and Jose Simenez

Michael B.T. Wilkes, Esquire
Melissa Nichols, Esquire
Wilkes Law Firm
101 West St. John Street, Suite 200
Spartanburg, SC 29305

and
Jonathan P. Corwin, Esquire
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
Columbus, OH 43215
Attorney for Epcon Communities, Inc. and Epcon Communities Franchising, Inc.

Stephanie H. Burton, Esquire
Scott D. Spivey, Esquire
Gibbes Burton, LLC
308 East St. John Street
Spartanburg, SC 29302
Attorney for Architectural Alliance, Ltd.

Michelle Beman
MICHELLE BEMAN

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Juontonio Pinckney, et al.,

Plaintiffs,

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CONSOLIDATED

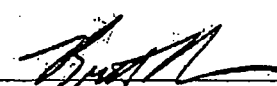
Civil Action No. 2010-CP-46-2326

NOTICE OF HEARING

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2012 JUN -6 AM 9:37
DAVID HAMILTON
C.C.O.P. & G.S.C.
YORK COUNTY, SC

YOU ARE HEREBY NOTIFIED that Stonecrest Villas of Tega Cay Condominium Owners' Motion for Partial Judgment on the Pleadings as to the Plaintiffs' Claims for Exterior Damages will be heard on August 3, 2012 beginning at 9:30 a.m. before Judge Hayes.

Respectfully submitted,


BRETT E. DRESSLER
SELLERS, HINSHAW, SYERS, DORTCH & LYONS, PA
301 S. McDowell Street, Suite 410
Charlotte, NC 28204
704.377.5050 (Office)
704.339.0172 (Fax)
bdressler@sellershinshaw.com
Attorneys for Stonecrest Villas of Tega Cay
Condominium Owners
(Cross-Claims and Third-Party Complaint)

CERTIFICATE OF SERVICE

The undersigned employee of Sellers, Hinshaw, Ayers, Dortch & Lyons, PA, certifies that he or she has, on the date below, served the below document(s) upon the below person(s) via first class mail.

DOCUMENT(S) SERVED:

STONECREST VILLAS OF TEGA CAY CONDOMINIUM OWNERS' MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS AS TO THE PLAINTIFFS' CLAIMS FOR EXTERIOR DAMAGES

PERSON(S) SERVED:

J. Cameron Halford, Esquire
Halford, Niemiec & Freeman, LLP
238 Rockmont Drive
Fort Mill, SC 29708
Attorney for Plaintiff

Morgan S. Templeton, Esquire
Graham P. Powell, Esquire
145 King Street, Suite 302
P. O. Box 1200
Charleston, SC 29402

Attorneys for Defendants Brock L. Fankhauser, Fankhauser Property Group, Inc., and Stonecrest Villas of Tega Cay, LLC

Thomas F. Dougall, Esquire
Law Offices of Thomas F. Dougall
1700 Woodcreek Farms Road, Suite 100
Elgin, SC 29045
Attorney for Pro-Car, Inc.

Sarah E. Wetmore, Esquire
Carlock, Copeland & Stair, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401-3001
Attorney for The Southeastern Group, Inc.

Payton D. Hoover, Esquire
Dean & Gibson, PLLC
Cameron Brown Building
301 South McDowell Street, Suite 900
Charlotte, NC 28204-2686
Attorney for Lucas Lawn and Landscape, Inc.

Tracy T. Vann, Esquire
Christi P. Cox, Esquire
Hamilton Martens & Ballou, LLC

FILED-RECEIVED
2012 JUN -8 AM 9:37
DAVID HAMILTON
C.C.P. & G.S.
YORK COUNTY, SC

Post Office Box 10940
Rock Hill, SC 29731
Attorney for Al-Mega Construction, Inc.

Christy E. Mahon, Esquire
Sweeny Wingate & Barrow
1515 Lady Street
Columbia, SC 29201
Attorney for Exterior Expressions of North Carolina, Inc.

David C. Cleveland, Esquire
Clawson & Staubes, LLC
126 Seven Farms Drive, Suite 200
Charleston, SC 29492
Attorney for Marcos Gonzalez

Bonum S. Wilson, III, Esquire
Post Office Box 13177
Charleston, SC 29422

and

D. Andrew Williams, Esquire
Turner, Padgett, Graham & Laney, PA
Post Office Box 1473
Columbia, SC 29202
Attorney for M&L Roofing Co., LLC, MB Roofing Company and Jose Simenez

Michael B.T. Wilkes, Esquire
Melissa Nichols, Esquire
Wilkes Law Firm
101 West St. John Street, Suite 200
Spartanburg, SC 29305

and

Jonathan P. Corwin, Esquire
Vorys, Sater, Seymour and Pease, LLP
52 East Gay Street
Columbus, OH 43215
Attorney for Epcon Communities, Inc. and Epcon Communities Franchising, Inc.

Stephanie H. Burton, Esquire
Scott D. Spivey, Esquire
Gibbes Burton, LLC
308 East St. John Street
Spartanburg, SC 29302
Attorney for Architectural Alliance, Ltd.

Michelle Beman
MICHELLE BEMAN