**IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA**



**Docket No. 22-ICA-249**

**DAVID G. MAHER and AMY C. MAHER,**

***Plaintiffs Below*, *Petitioners***

**v.**

**CAMP 4 CONDOMINIUM ASSOCIATION, INC.,**

***Defendant and Third Party Plaintiff Below, Respondent***

**FROM THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA**
**CIVIL ACTION NO. CC-38-2015-C-55**
**HONORABLE JENNIFER P. DENT, JUDGE**

# PETITIONERS' BRIEF OF DAVID G. MAHER AND AMY C. MAHER

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## I. ASSIGNMENTS OF ERROR

Petitioners state the following Assignments of Error:

Assignment of Error No. 1: The Circuit Court erred in denying and dismissing Petitioners' claims against the Respondent, Camp 4 Condominium Association, Inc., hereinafter "Camp 4" within the "Order Amending September 5, 2019 Order" entered by the Circuit Court on October 19, 2022, thereby denying Petitioners' claims for damages as set forth within the Amended Complaint filed by the Petitioners, Plaintiffs below, together with supporting documentation. The original Complaint and the Amended Complaint filed by the Petitioners, Plaintiffs below, were based on violations of statutory duty, contractual duty, misfeasance, malfeasance, negligence, fraud, concealment, the failure of Camp 4 to make repairs in the Common Element structures, and failure to protect the Petitioners, Plaintiffs below, from ongoing damages.

Assignment of Error No. 2: The Circuit Court erred in denying and dismissing Petitioners' claims for violations of statutory duties by Camp 4 in its judgment certified as final under Rule 54(b) in its Order of October 19, 2022, "Order Amending September 5, 2019 Order" for violations of W.Va. Code § 36B-4-109; 36B-1-111; and 36B-1-113, and in finding that Camp 4 had no statutory duty to provide notice of known construction defects, code violations and alterations or improvements to the unit or the Limited Common Elements assigned thereto which violate any provision of the Declaration to prospective purchasers such as the Plaintiffs prior to closing on a condominium in the State of West Virginia and upon its various findings and conclusions stated within that judgment upon which that ruling was based.

Assignment of Error No. 3: The Circuit Court erred in dismissing Counts III and IV of Petitioners' Amended Complaint and the claims of damages made by the Petitioners, Plaintiffs below, within its Amended Complaint and in finding that the gist of the action doctrine precludes

Plaintiffs from pursuing damages claims and tort claims as made within Plaintiffs' Amended Complaint caused by negligence, concealment, misrepresentation, malfeasance, misfeasance, fraud and failure to repair required by the statutory, contractual, and common law duties owed by Camp 4 to the Petitioners as specifically set forth within Petitioners' Amended Complaint below.

Assignment of Error No. 4: The Circuit Court erred in granting Summary Judgment to Camp 4 in the October 19, 2022 Order certified as final under Rule 54(b) in finding that Camp 4 did not breach any statutory, contractual, or common law duties owed to the Petitioners by Camp 4 prior to and at the time of purchase of Unit 27 by the Petitioners in 2007; from purchase in 2007 until the freeze event of January, 2015; and following the freeze event of January, 2015, and thereby dismissing the claims for damages made by the Petitioners against Camp 4 including Camp 4's failure to mitigate and repair damages caused by the freeze event of January, 2015, while continuing to charge and collect assessments after the freeze event, thereby causing additional damages to accrue to the Petitioners in the failure of Camp 4 to mitigate and repair the known construction defects, code violations, and damages prior to and following the freeze event of January, 2015, as set forth within Petitioners' Amended Complaint below.

The Court should thereby reverse the judgment of the Circuit Court certified as final under Rule 54(b) of the West Virginia Rules of Civil Procedure in its October 19, 2022, "Order Amending September 5, 2019 Order."

## II. STATEMENT OF THE CASE

Petitioners, Maher, purchased Unit 27 of the Camp 4 Condominiums at Snowshoe Mountain Resort in Pocahontas County, West Virginia (Camp 4) by contract entered October 15, 2007, Appx. p. 35-40; 813-818, and by Deed dated November 16, 2007, Appx. p. 42-43; 820-821, from Zeringues. Oswald Zeringue was President of the Camp 4 Homeowner's Association

(HOA) on the date of the Contract, on the date of closing, November 19, 2007, and until approximately 2013. Oswald Zeringue is a nuclear engineer overseeing construction and operation of nuclear power plants, and therefore has extensive knowledge of construction defects as code violations. The Maher Deed is expressly subject to the provisions of Chapter 36B of the West Virginia Code, the "Uniform Common Interest Ownership Act" (UCIOA). Appx. p. 42-43; 820-821. No disclosure was made by Zeringues or Camp 4 of any known latent construction defects or code violations, alterations or improvements to the Camp 4 property which violated provisions of Chapter 36, specifically § 36B-4-109, the Declaration, and the West Virginia health and building codes with respect to Unit 27 and Common Elements. On January 9, 2015, the Petitioners were informed by Camp 4 that Unit 27 owned by the Mahers and adjoining units had suffered a freeze event with burst water pipes inside the walls and significant damage. Appx. p. 49; 828. Camp 4 and its manager, Thomas A. Roat (Roat), accused the Mahers of fault and liability although Unit 27 had been leased through Snowshoe Resorts Appx. p. 49; 53-54; 828; 850-852; the Mahers had no knowledge of the details of the rental; Camp 4 and its agents took control of the freeze event before any water damage occurred; and the Mahers had no knowledge or control of the freeze event at all. The Board of Directors of Camp 4 and its manager, Roat, continued to conceal and misrepresent the cause of the freeze event throughout 2015, and denied responsibility for repair through the present.

Following the freeze event of January, 2015, Petitioners learned that Camp 4 had been dealing with freeze events, burst pipes, water damage, latent construction defects and health and building code non-compliance and violations since 2003. Appx. p. 54-55; 58-60; 73; 851-857; 860-905; 967; 991-1014. Zeringues had a freeze event in Unit 27 on January 9, 2005 as recorded by Camp 4. Appx. p.67; 865. Camp 4, had caused numerous construction and architect experts to

inspect and report on the latent construction defects at Camp 4 from 2004 through 2015 with extensive reports and repairs undertaken during 2005, specifically including Unit 27, Complaint and Amended Complaint, Appx. p. 74-107; 872-905, and from 2010-2012 based on reports of Ed Roach, an architect employed by Camp 4, all unknown to the Petitioners. Appx. p. 3482-3505. The Williamson & Associates report of February 11, 2005, Exhibit 13, in both, the original Complaint and the Amended Complaint, specifically identified existing construction issues at the entrance/foyer/air lock of the units as sources of water intrusion occurring as the result of "freezing" sprinkler lines and domestic water lines, Appx. p. 80; 878. Numerous insurance claims had been made by Camp 4 and paid by their insurance carriers and by Camp 4 for damages resulting from freeze events and for repairs of damages in various condominium units at Camp 4 before and after the Mahers purchased Unit 27 at Camp 4. Problem Log of Roat, Complaint and Amended Complaint, Exhibit 11, Appx. p. 62-72; 860-870. Camp 4 had failed to mail any notices, communications, or correspondence to the residential address of the Petitioners after purchase of Unit 27 until shortly before the freeze event of January, 2015, although the Mahers had provided written notice of their Milam, West Virginia, address at the time of purchase consistent with requirements of Chapter 36B and the Declaration. Appx. p.832; 840; 3449; 4237; 4482.

Beginning with the date of notice of the freeze event in January, 2015, Camp 4 failed to disclose and concealed from the Mahers the known underlying construction defects, code violations, and significant damages Camp 4 had suffered over the years with frozen and burst water pipes. Communications from Camp 4 to the Mahers and others claimed fault on the part of the Mahers for the freeze event in January, 2015, although the Mahers were not present at any time during the freeze event; Camp 4 representatives had control of the unit prior to and

following the burst pipes and leaking; the renters who were in the unit prior to the burst pipes in the Common Elements were placed by Snowshoe Resorts; and the Mahers had no control over the unit at any time while the freeze event and burst pipes took place. Following the freeze event, Camp 4 made numerous contradictory and conflicting statements in alleging fault against the Mahers for the freeze event while acknowledging known construction defects and code non-compliance that Camp 4 had dealt with for many years prior to the freeze event in January, 2015, as described in Plaintiffs' Amended Complaint with exhibits, Appx. p. 54-107, and Plaintiffs' First, Second, and Third Motions for Summary Judgment with exhibits, Appx. p. 3282-3516. The Mahers tried to get Camp 4 to cooperate in remediation and repair of Unit 27 and the surrounding Common Elements, however, because of the denial of information and repairs by Camp 4 and continuing claims of fault against the Mahers, the Mahers hired their own experts to inspect and evaluate the conditions of the Common Elements and structures at Camp 4 which further demonstrated concealment and misrepresentation by Camp 4 of the underlying causes of the freeze event. Hempel reports, Appx. p. 373-403; 605-609; 623-631; 4797-4804; WYK report, Appx. p. 610-615. Damages continued to accrue to the Mahers without any relief by Camp 4 as required by the statutory provisions of Chapter 36B of the W.Va. Code and by the common law rights of the Mahers not to be injured and damaged by the actions and inactions of Camp 4.

The Camp 4 Association and its manager, Thomas Roat, maintained meticulous records from the inception of the Camp 4 Association. Exhibit 11, Complaint and Amended Complaint, Appx. p. 62-72; 860-870. The communications, correspondence, recorded history, and the reports of various individuals and experts over the years as recorded are necessary for review as proof of the conduct and actions/inactions of Camp 4 related to the historical freeze events, burst pipes, water damage and efforts of remediation, improvements, and modifications. For instance,

the report of the Invizions Thermographic Study in 2005 involved the Common Elements, Limited Common Elements, and internal structures surrounding Unit 27 now owned by Mahers. The report and photographs contained in that report demonstrate the latent construction defects, lack of insulation, air barrier defects, and the resulting building code violations as early as 2005. Appx. p.92-107; 890-905. The Williamson report, Appx. p. 74-85; 872-883, and the Barnum reports, Appx. p.86-91;884-889, all attached to Plaintiffs' Amended Complaint demonstrate the latent construction defects, air barrier defects, cold air intrusion, and effective building code violations as early as 2003, 2004, and 2005. The communications and record of Camp 4 dealing with the latent construction defects and pipe freeze issues, as well as the responsible parties, contractors, and architects, involved from 2003 through 2007, from 2007 through 2015, and after the 2015 freeze event demonstrate that the purported efforts of Camp 4 over the years to remedy or mitigate the underlying causes were unsuccessful and primarily covered up the construction defects and building code violations rather than repairing them. This is why review of the Camp 4 record is so important in this case.

Petitioners reference herein various pleadings filed in the Circuit Court record, together with supporting exhibits, documents from the Camp 4 record, which prove the claims of the Petitioners, Plaintiffs below. Camp 4 hides its fault and misrepresents its conduct and lack of effective repairs over the years with depositions of involved parties and contractors who contradict the recorded documentary evidence of Camp 4 itself. The deposition of the Assistant Fire Marshals involved also contradict the Fire Marshal reports in the record. Appx. p. 3753-3756; 5242-5243. The reports of Edward Roach, architect of Camp 4 during 2010-2012, and in 2015, clearly show the latent construction defects and building code violations in the Camp 4 structures which were never adequately repaired. Appx. p. 3482-3505; 3738-3752; 4698-4709.

The records and communications of Camp 4 from as early as 2004 demonstrate that the maintenance managers and repair personnel of Camp 4 were actively involved in each inspection giving rise to the reports of the various investigating entities over the years including Barnum, the original architect for Intrawest, Williamson Associates, Invizions, the Fire Marshal's Office, and Ed Roach, Camp 4's architect. Camp 4 was clearly aware of the serious latent construction defects which are building code and fire code violations. Plaintiffs' Complaint and Amended Complaint. Appx. p. 54-107; 856; 860-905; 965-967; 991-1014. The *"Response of Plaintiffs to Joint Motion for Summary Judgment and Joint Memorandum of the Defendants and Third-Party Defendants Claiming Plaintiffs' Failure to Mitigate Damages"* provides a comprehensive statement of the duties of Camp 4 to repair, the knowledge of Camp 4 of defects, and the efforts of the Mahers to have Camp 4 repair the damages to Unit 27. Appx. p. 5209-5277.

On December 30, 2015, Petitioners filed their original *Complaint* with supporting exhibits against the Zeringues, Camp 4, and Thomas Roat, manager of Camp 4, for violations of contract, breach of legal duties and violations of the Declaration, negligence, fraud, and civil conspiracy, demanding damages related to the freeze event, loss of use, economic losses, diminishment in value, annoyance and inconvenience, and punitive damages based on willful failure to comply with the provisions of Chapter 36B, and intentional acts of concealment, fraud and misrepresentation as well as for reimbursement of attorney fees and expenses. Original Complaint, Appx. p. 1-175. Camp 4 filed a Counterclaim against the Mahers alleging fault on the part of the Mahers and demanding damages resulting from the freeze event of January, 2015, despite the Association insurance available under W.Va. Code § 36B-3-113. Appx. p. 192-194 . On March 29, 2017, Petitioners filed an *Amended Complaint* with Exhibits citing wrongful

conduct of Camp 4 and its representatives, with its architects, Omni and Barnum and with its insurance companies, Endurance and Travelers. Appx p. 766-1150.

Plaintiffs' Amended Complaint is separated into "Counts" which reference claims by the Mahers against Camp 4 with successive paragraphs and exhibits which build one upon the other to the Prayer/ad damnum clause. The Counts reference issues or parties such as Roat, Endurance, or Travelers, but the paragraphs in these Counts include important allegations against Camp 4 which involved violations of the UCIOA by Camp 4 with their insurance carriers. When the Circuit Court below dismissed the various parties from this action below, the Circuit Court dismissed the entire "Count", and all paragraphs and notice of claims against Camp 4, then denied the notice of statutory and common law claims against Camp 4 within those Counts. The paragraphs and "Counts" must remain as notice of claims against Camp 4 even though the party identified in the heading of the "Count" is dismissed. The breach of duty of Camp 4 noticed in the Count must remain. This is procedural error by the Court.

In 2016, Petitioners filed a *Motion to Terminate Monthly Maintenance Fees and for Injunctive Relief*. Appx. p. 216-269 in an effort to force Camp 4 to perform repairs. The Circuit Court granted temporary suspension of maintenance fee assessments from January, 2017, through August, 2017, but denied any further suspension. By Order dated November 18, 2016, the Court denied injunctive relief demanded by Petitioners to cause Camp 4 to repair and remediate the damages of the Mahers, Unit 27, and the Common Elements, finding that injunctive relief would "accomplish the whole purpose of the litigations" and that "the Plaintiffs (Maher) have a full remedy at law". The denial of injunctive relief allowed damages of Petitioners to continue. The Circuit Court has now dismissed all damages claims of Petitioners, and directed claims for injunctive relief to be filed by the Plaintiffs below as the sole remaining

relief available to the Petitioners, Maher. Order Denying Camp 4 Condominium Association, Inc.'s Motion for Summary Judgment as to Count II of the Amended Complaint, entered October 19, 2022, Appx. p. 5541-5543.

The Camp 4 Association has the absolute duty to repair, maintain, and replace the defective Common Elements under W. Va. Code § 36B-3-107, using insurance proceeds required under 36B-3-113, for the required repairs under 36A-8-2. These issues are fully developed within *Motion of Plaintiffs to Terminate Monthly Maintenance Fee Payments and Injunctive Relief* filed October 21, 2016, together with exhibits, Appx. p. 216-269, and *Brief in Support of Plaintiffs' Motion to Terminate Monthly Maintenance Fee Payments and for Injunctive Relief* with Exhibits filed October 31, 2016, Appx. p. 270-403, which pointed out the availability of insurance and funding to Camp 4; that the Mahers were first party "insured persons" under the Camp 4 policies, W.Va. Code § 36B-3-113(d) (1)-(4); and that Camp 4 had the duty to repair and maintain the Common Elements and repair damages from the freeze event of January, 2015, as well as the latent construction defects and code violations found to exist in the structures of Camp 4 by the Plaintiffs below and by their experts hired during 2015, W.Va. Code § 36B-3-107; 36A-8-2.

The attorney for Camp 4, Steve Jory, actually stated in an email dated November 12, 2014, the following:

> The foregoing leads to the conclusion that the drywall behind the paint or wallpaper, as well as studs, framing, pipes, and wires between the units are Limited Common Elements. If a pipe within that space breaks, or if snow or rain water leaks through that space in to a unit, the HOA is responsible for the cleanup and repair. That is a common law statement, but an insurance policy containing a "no fault" provision may treat coverage differently. Appx. p. 294.

This email from the attorney for Camp 4, Steve Jory, was quoted within the agenda of the Executive Board of Camp 4 dated June 2, 2015, following the freeze event of the Maher unit.

Rather than following this guidance by the attorney for Camp 4, the Board of Directors of the Camp 4 Association continued to claim fault on the part of the Mahers in an effort to avoid their responsibility for cleanup and repair of the damage caused by the January, 2015, freeze event.

Based on opposition filed by Camp 4 to Plaintiffs' Motion to Terminate Monthly Maintenance Fee Payments, the Petitioners filed the *Reply of Plaintiffs to Brief in Opposition of Plaintiffs' Motion to Terminate Monthly Maintenance Fee Payments and for Injunctive Relief* together with exhibits on December 5, 2016, Appx. p. 567-616. Petitioners filed their *Supplement to Reply of Plaintiffs for Motion to Terminate Monthly Maintenance Fee Payments and for Injunctive Relief* together with the report of John Hempel, home inspection and code compliance expert, on December 5, 2016, Appx. p. 616-631, each of which are incorporated herein by reference, and which further describe the conduct of Camp 4 and supported Petitioners'/Plaintiffs' below, claims against Camp 4 for damages.

The debate continued before the Circuit Court as to the termination of monthly maintenance fee assessments upon the filing by Camp 4 of a *Motion for Reconsideration of the Order of January 9, 2017*, filed January 19, 2017, Appx. p. 632-657. As a result thereof, Plaintiffs below filed additional pleadings including:

(1) *Response of Plaintiffs to Motion for Reconsideration by Camp 4 and Countermotion for Enforcement of January 9, 2017 Order*, Appx. p. 658-664, as well as the *Amended and Supplemental Response of Plaintiffs to Motion for Reconsideration by Camp 4 and Countermotion for Enforcement of January 9, 2017 Order*, together with exhibits, Appx. p. 665-678, each filed January 30, 2017, each of which are incorporated herein by reference; and

(2) *Brief, Summary and exhibits in opposition to Motion of Camp 4 for Reconsideration of Payment of Maintenance Fees*, together with exhibits, filed February 15, 2017, Appx. p. 694-753.

The Circuit Court granted Plaintiffs' Countermotion within its Order of March 2, 2017, and denied the Motion of Camp 4 for Reconsideration by Order of March 3, 2017. The Order of the Circuit Court of January 9, 2017, suspended payment of maintenance fee assessments by the Plaintiffs below, Maher from January, 2017, through August, 2017. Appx. p.759-765. Maintenance Fee assessments are a continuing damage to the Petitioners.

On August 17, 2017, the Mahers, Plaintiffs below, filed a *Motion to Extend Stay Terminating Monthly Maintenance Fees*. Appx. p. 1218-1226. Upon the *Response of Camp 4 in Opposition to Extending the Stay Terminating Monthly Maintenance Fees*, a *Reply of Plaintiffs to Extend Stay Terminating Monthly Maintenance Fees*, with exhibits, was filed on October 10, 2017. Appx. p. 1318-1342. Notwithstanding the clear supporting evidence of statutory violations by Camp 4, the Circuit Court denied *Plaintiffs' Motion to Extend Terminating Monthly Maintenance Fees* by Order entered October 20, 2017. Appx. p. 1343-1345. As of January, 2019, Petitioners refused to pay further maintenance fee assessments. Camp 4 filed a separate suit against the Petitioners for collection.

The various pleadings cited herein provide a complete factual and legal foundation for the claims of the Plaintiffs and in support of the damages claims made within the Plaintiffs' original and Amended Complaints. These pleadings included documents and exhibits which are the best evidence of the violations of Camp 4 against the rights of your Petitioners and which demonstrate the damages proximately caused by the actions and inactions of Camp 4 which continue to the present.

Because the review of the Orders of the Circuit Court in this matter are *de novo*, the Plaintiffs incorporate herein by reference each of the pleadings referred to herein as if stated verbatim together with all attached exhibits.

The Petitioners had previously raised 36B-4-109 within the *Response of Plaintiffs to Camp 4 Condominium Association, Inc., Motion for Summary Judgment*, with exhibits, filed July 8, 2019, Appx. p. 3558-3703. Petitioners filed their *Motion for Reconsideration of Order from December 4, 2019, W.Va. Code § 36B-4-109*, on December 23, 2019, Appx. p. 5113-5121, which provides an analysis of the requirements and effect of W.Va. Code § 36B-4-109. Each of the statutory provisions of Chapter 36B of the West Virginia Code are expressly applicable in this action by reference in the Declaration and by requirement of the Legislature under W.Va. Code § 36B-1-103, cited at Section 36B-1-101 as the "Uniform Common Interest Ownership Act" (UCIOA). Article 4 of Chapter 36B is expressly titled "Protection of Purchasers". W.Va. Code § 36B-1-103 (25) defines "purchaser" under the UCIOA as follows:

> (25) "Purchaser" means a person, other than a declarant or a dealer, who by means of voluntary transfer acquires a legal or equitable interest in a unit other than: (i) a leasehold interest (including renewal options) of less than twenty (20) years; or (ii) as security for an obligation

The language of 36B-1-103 (25) is present tense in its use of the term "acquires a legal or equitable interest in a unit…" and is specifically applicable to the actions of Camp 4 in having failed to provide notice to the Mahers of the known construction defects and code violations in violation of W. Va. Code §36B-4-109, "Resale of Units", which would have allowed the Mahers to have canceled the purchase based upon that notice under W.Va. Code § 36B-4-108, "Purchaser's Right to Cancel". The Mahers never had this opportunity to cancel the purchase because the Camp 4 Association never provided statutorily required notice of the known construction defects and code violations in the Camp 4 structures. The Circuit Court is in clear

error finding that W.Va. Code § 36B-4-109 is not applicable to the Petitioners as "purchasers" prior to actual ownership by deed as stated within the Orders of September 5, 2019, and October 19, 2022.

Petitioners opposed the Motions for Summary Judgment of Camp 4 within *Plaintiffs' Response of Plaintiffs to Camp 4 Condominium Association, Inc., Motion for Summary Judgment* with attached exhibits. Appx. p. 3558-3703, Petitioners also incorporated by reference Plaintiffs' First, Second, and Third Motions for Summary Judgment filed May 31, 2019, in support of Petitioners' Opposition to the Motion for Summary Judgment of Camp 4. Appx. p. 3282-3516.

Plaintiffs' First, Second, and Third Motions for Summary Judgment filed below on May 31, 2019, provide a full factual and historical basis with supporting documents proving the latent construction defects and building and fire code violations in the Camp 4 structures; the historical knowledge of those conditions by Camp 4 and its Board of Directors; and the concealment of those known conditions from the Petitioners, Maher, by Camp 4, its Board of Directors, and its representatives, all of which were referenced in Petitioners', Plaintiffs' below, Response to the Camp 4 Motion for Summary Judgment. Appx. p. 3558-3703. The Response and Supplemental Response of Plaintiffs to the Motion for Summary Judgment of Camp 4 and the pleadings referenced and incorporated therein are critical in disputing the Motion for Summary Judgment of the Camp 4, including the gist of the action doctrine and claims for damages, all of which are incorporated herein by reference. Petitioners filed a *Supplemental Response of Plaintiffs to Camp 4 Motions for Summary Judgment argued July 17, 2019*, with exhibits, Appx. p. 4682-4744, and *Reply of Plaintiffs to Responses of Defendants to Plaintiffs' Seven Motions for Summary Judgment*, with exhibits, Appx. p. 4745-4810, each filed August 5, 2019, which further define Petitioners' arguments against Camp 4's Motion for Summary Judgment on issues of gist of the

action, the statutory basis for damages, and the common law duties owed by Camp 4 to the Petitioners, Plaintiffs below.

The Endurance American Specialty Insurance Company ("Endurance") and Travelers Casualty and Surety Company of America and its subsidiaries, the Travelers Indemnity Company and Phoenix Insurance Company ("Travelers") were the casualty and liability carriers of Camp 4 under W.Va. Code 36B-3-113(d)(1)-(4) at the times complained within the Amended Complaint of Plaintiffs below, Petitioners herein. Appx. p. 789-797. As such, the Mahers are "insured persons" under each of the companies' policies, by §36B-3-113(d)(1). Any right to subrogation by Camp 4 or the insurance carrier was waived by § 36B-3-113(d)(2). No act of the owner/insured person, in this case, the Mahers, would void recovery under the respective policies under §36B-3-113(d)(3). The insurance policy of the owners, Maher, is secondary, leaving Camp 4 and its insurers, Endurance and Travelers, as "primary" pursuant to Section 36B-3-113(d)(4). The Mahers were entitled to the insurance coverage of Camp 4 for the damage caused by the January, 2015, freeze event. Camp 4 had no legal foundation or standing to accuse the Mahers of liability for the freeze event or damages based upon the "no fault" insurance coverage available through the Association. The insurance coverage of Camp 4 is clearly sufficient for any damages from the January, 2015, freeze event. There was no legal cause or authority for Camp 4 to bring a Counterclaim against the Mahers for claimed contribution for damages resulting from the January, 2015, freeze event. It does not matter who is "at fault". Camp 4 had casualty insurance and Camp 4 is obligated to pay the damages. W.Va. Code § 36B-3-107; 36A-8-2.

Plaintiffs' First, Second, and Third Motions for Summary Judgment provided full and documented evidence including undisputed expert reports which were referenced and incorporated in Petitioners' Response to the Motion for Summary Judgment of Camp 4.

Plaintiffs' First Motion for Summary Judgment demonstrates indisputable evidence of the latent construction defects and violations of building and fire codes within the structures of Camp 4 housing Unit 27 owned by the Petitioners, Maher. Appx. p. 3282-3303. Plaintiffs' Second Motion for Summary Judgment with Exhibits demonstrates indisputable evidence of the knowledge of each of the Defendants below of the latent construction defects and violations of building and fire codes prior to purchase of Unit 27 by the Petitioners, Maher, in 2007; following purchase of Unit 27 by the Petitioners, Maher, most significantly during 2010-2012; the ongoing freeze issues, lack of insulation and cold air infiltration from 2007 -2014; and the knowledge of Camp 4 proven following the freeze event of January, 2015, through the present. Appx. p. 3304-3421. Plaintiffs' Third Motion for Summary Judgment demonstrates indisputable evidence and proof of concealment, misrepresentation, and intentional failure of Camp 4 to inform or provide notice to the Petitioners, Maher, of the known existing construction defects and code violations in the structures of Camp 4. Appx. p. 3422-3516. Petitioners' First, Second, and Third Motions for Summary Judgment were referenced and included in arguments and pleadings to the Circuit Court in opposition to Camp 4's Motion for Summary Judgment. Therefore, Plaintiffs' First, Second, and Third Motions for Summary Judgment are absolutely necessary for this appellate court to consider the issues in dispute *de novo*.

Section 36B-3-113(d) provides in pertinent part: (1) That each unit owner is an "insured person"; (2) that the insurer waives subrogation against any unit owner; (3) that no act of any unit owner voids or conditions recovery under the policy; and (4) that the Association insurance is primary even if the unit owner has other insurance. Rather than allowing the insurance to pay the claim, Camp 4 began blaming the Mahers for the freeze event of January, 2015, despite the long knowledge of Camp 4 of the cold air infiltration and the propensity of the pipes to freeze in

the area of the powder room in the Phase 2 condominiums. The Camp 4 personnel had complete control of Unit 27 and the freeze event before any damage occurred. The counterclaim brought against the Petitioners, Maher, by Camp 4, is further evidence of the bad faith of Camp 4 below.

Camp 4 has been aware of its responsibility for repair and the responsibility of the Camp 4 insurance coverage with many claims over many years since 2003. There can be no argument contrary to the statutory duty of Camp 4 to repair the damages, latent construction defects, and code violations discovered by the Mahers following the freeze event of January, 2015, under W.Va. Code § 36B-3-107 or the duty of Camp 4 insurance to pay for the repairs under W.Va. Code § 36B-3-113(h) and §36A-8-12. This litigation would never have occurred if Camp 4 had not started immediately on January 9, 2015, trying to shift blame and responsibility for payment of the damage from the freeze event to the Mahers as unit owners. Camp 4 has clearly damaged the Mahers by its continuing violations of the rights of the Mahers. There is no "question of fact" as to the responsibility of Camp 4 to repair the damage, nor is there any issue of material fact to prevent "injunctive relief" against Camp 4. Camp 4 is required to mitigate the damages by statute, and provide repairs. Injunctive relief and the duty of mitigation is not an issue for the jury, but is equitable relief required to be determined by the Court based on legal duties mandated by statute. Plaintiffs have fully briefed facts and law of mitigation issues within *Response of Plaintiffs to Renewed Joint Motion for Summary Judgment for Plaintiffs' Failure to Mitigate Damages by Defendants and Third-Party Defendants* with exhibits filed January 8, 2020, Appx. p.3704-3842; *Response of Plaintiffs to Joint Motion for Summary Judgment and Joint Memorandum of the Defendants and the Third-Party Defendants Claiming Plaintiffs' Failure to Mitigate Damages* with exhibits filed July 8, 2019, Appx. p. 5209-5277; and *Supplemental Brief on Issues of Mitigation, Repair and Maintenance of Construction Defects,*

*Code Violations and Damages Resulting from the January, 2015, Freeze Event* with exhibits filed December 23, 2019, Appx. p. 5101-5112. Mitigation of damages should have been required by injunctive relief back in November, 2016. All damages to the Mahers resulting from the failure of Camp 4 to provide notice, repairs, and mitigation are the responsibility of the Defendant, Camp 4, from the time of purchase in 2007 through the present.

## III. SUMMARY OF ARGUMENT

The Petitioners have statutory rights under Chapter 36B, the "Uniform Common Interest Ownership Act" (UCIOA), as prospective purchasers and as owners at Camp 4. The Petitioners have statutory and common law rights to prosecute claims for damages against Camp 4, the perpetrator of concealment, fraud, failure to repair, misrepresentation, and failure to notice the Petitioners, Plaintiffs below, Maher, of the known construction defects and code violations before purchase, after purchase, and before and after the freeze event of January, 2015. This case should never have gone this far. The issues are relatively simple based on the purchase of a condominium by the Mahers, protected consumers under Chapter 36B of the West Virginia Code. Petitioners' claims for damages are based on the failure of Camp 4 to perform its statutory duties; The intentional and willful violations of Chapter 36B in the concealment of the knowledge by Camp 4 of the true and actual cause of the freeze event and damages; and upon the long historical concealed efforts of Camp 4 to repair and remediate the known damages in the structures at Camp 4 without notice to the Mahers.

The Petitioners, Maher, are innocent purchasers of a condominium/home at Snowshoe, West Virginia. The historical Board of Directors of Camp 4 and the maintenance personnel of Camp 4 had extensive knowledge of problems with frozen and burst pipes in the structures and Common Elements of Camp 4 for years prior to the Petitioners, Maher, having purchased Unit

27 in Building 5 at Camp 4. Complaint and Amended Complaint, Appx. p. 54-55; 58-60; 62-72; 73-107; 851-857; 860-905; 965-967; 991-1014. Cold air infiltration, lack of air barriers, lack of insulation, and a "chimney effect" in the Common Elements had been identified as early as 2005 by the developer, the builder, the architects, and the Camp 4 Association, all as evidenced by an extensive "Problem Log" kept and maintained by the manager of the Association, Thomas Roat, and by the Association itself as a history of events at Camp 4, a copy of which is attached Petitioners' original Complaint and Amended Complaint below as Exhibit 11, Appx. p. 62-72 and 860-870. Oswald Zeringue was president of the Camp 4 Association at the time of the contract and sale of Unit 27 to the Mahers in October and November, 2007. Documented records and communications of Camp 4 demonstrate that Oswald Zeringue and Camp 4 had knowledge of the freeze issues from the winter and spring of 2004-2005 based on shared communications of Camp 4 through Thomas Roat, its manager. Appx. p. 3334; 3345; 3364; 3378-3380; 3386-3388; 3391; 3397-3400; 3411; 3415-3419.

The Mahers were provided no notice of the known freeze issues, latent construction defects, and code non-compliance at Camp 4 prior to or following purchase of Unit 27 at Camp 4, contrary to statutory and contractual duties and obligations of the sellers, Zeringue, and the Camp 4 Association, specifically under W.Va. Code § 36B-4-109. The Declaration of Camp 4 is expressly based on Chapter 36B of the West Virginia Code, the Uniform Common Interest Ownership Act (UCIOA), and the deed of the Mahers for Unit 27 at Camp 4 is expressly subject to the Declaration and the UCIOA. The claims of the Petitioners, Plaintiffs below, are clearly set forth within the Amended Complaint filed with the Circuit Court on March 29, 2017, together with exhibits documenting support for the damages claims made by the Plaintiffs against the Defendants below. When the freeze event occurred in January, 2015, again with frozen and burst

pipes inside the walls/Common Elements, rather than accepting responsibility, Camp 4, and its manager, Thomas Roat, concealed, misrepresented, and denied the known historical causes associated with the freeze event and resulting damage. Camp 4 and its representatives made intentionally false claims of fault against the Mahers together with claims of liability within the notice served upon the Mahers by the Association and its manager, Roat, on January 9, 2015, Appx. p. 67; 828. The Mahers had absolutely no control or knowledge of the situation at Camp 4 giving rise to the freeze event in January, 2015. As a result of the unfounded claims of the Association of fault for the freeze event and resulting damage, the Mahers had no alternative but to hire their own experts to investigate the cause of the freeze event and to later file suit against Camp 4 for damages.

Even after the Mahers informed Camp 4 of the findings of their building inspectors, Camp 4 continued to deny responsibility. Camp 4 instructed their insurance carrier, Endurance, to refuse payment or settlement to the Mahers for damages occasioned by the January, 2015, freeze event in direct violation of the provisions of the UCIOA, W.Va. Code § 36B-3-107 and § 36A-8-2. Camp 4 continued the false narrative of blame against the Mahers and refused to provide code compliant repairs by licensed contractors to make the Maher Unit 27 habitable. The Maher condominium has remained uninhabitable since January, 2015. The Mahers paid $39,464.95 in maintenance fees/assessments following the freeze event through December, 2018. Although the Maher Unit 27 has remained uninhabitable, the Camp 4 Association has continued to invoice the Mahers for maintenance fee assessments throughout the eight (8) years since the freeze event in January, 2015. The Camp 4 Association has now filed a separate civil action in the Circuit Court of Pocahontas County, West Virginia, C.A. No. 21-C-35, to enforce liens against the Mahers for unpaid assessments since January, 2019. Unit 27 remains uninhabitable

after eight (8) years of the Mahers having no use of their unit, and while paying mortgage payments and interest, utilities, insurance, and other expenses. The Mahers have also lost the ability to rent their unit for the past eight (8) years. The Mahers clearly have legal claims for damages against the Defendants as a result of statutory, common law, and contractual violations, concealment, misrepresentation, fraud, and negligence of Camp 4 in failing to perform its statutory and common law duties.

The rulings of the Circuit Court in the Order of October 19, 2022, are clearly wrong. Camp 4 has willfully and intentionally forced the Petitioners, consumers and innocent purchasers, to incur tremendous costs and attorney fees for which your Petitioners are entitled to recovery by statute, 36B-4-117. Petitioners bring this matter before this Court for reversal of the erroneous rulings of the Circuit Court below, and for directions to the Circuit Court to enter judgment in accordance with applicable law.

## IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary pursuant to the criteria of Rule 18(a). This requires oral argument under Rule 20 as involving issues not previously ruled upon by West Virginia Courts, and involving fundamental issues of public importance given the implications to a broad sector of property ownership in West Virginia. Because of the number of issues, the importance of the issues, and the number of parties, additional time is requested for oral argument in the discretion of the Court pursuant to Rule 20.

## V. STANDARD OF REVIEW

The Circuit Court below entered its Order Amending September 5, 2019 Order specifically noting the following:

**The objections of the Plaintiffs are duly noted and saved.**

**This Order may be appealed pursuant to Rule 54(b) as this is a final judgment as to one or more but fewer than all of the Plaintiffs' claims. The Court determines that there is no just reason for delay and directs entry of judgment as to all claims by the Plaintiffs against Camp 4 Condominium Association, Inc., except for County II- Breach of Legal Duty and Declaration of Covenants.**

Based upon the specific stated determination of the Circuit Court, the adjudicated issues raised in this Petition are ripe for appeal.

The entry of Summary Judgment by the Circuit Court below is reviewed *de novo. Painter v. Peavy,* 192 W. Va. 189, 451 S.E. 2d 755(1994). Issues raised on appeal from the Circuit Court involving a question of law or involving an interpretation of a statute is reviewed *de novo*. *Neal v. Marion*, 222 W.Va. 380, 664 S.E. 2d 721 (2008). Each of the issues raised on appeal in Petition are based on questions of law, interpretation of statute, and from summary judgment entered by the Circuit Court, and therefore, reviewed *de novo* based on the record below.

## VI. ARGUMENT

### A. The Circuit Court erred in dismissing the Petitioners' claims for damages against the Camp 4 Association within the "Order Amending September 5, 2019, Order" entered by the Circuit Court on October 19, 2022.

The claims of the Plaintiffs in the original Complaint and the Amended Complaint before the Circuit Court from which this appeal is brought was for damages based upon statutory violations, violations of contractual duties, negligence, fraud, malfeasance, concealment, the failure of Camp 4 to make repairs in the Common Element structures and the failure of Camp 4 to protect the Petitioners from ongoing damages. The statutory duties violated by Camp 4 include W.Va. Code §36B-3-107, Upkeep of Common Interest Communities; W.Va. Code

§36A-8-2, Repair or Reconstruction, Related to Damage of the Building or the Common Elements Using Proceeds of Insurance; W.Va. Code §36B-3-113(d)(1)-(4), Insurance; W.Va. Code §36B-4-109(a)(10)(11), Protection of Purchasers; and W.Va. Code §36B-4-117, Effect of Violations on Rights of Action; Attorney Fees. If there were no other facts presented to the Court other than that the Mahers purchased Unit 27, a condominium in West Virginia; that the unit was damaged by a freeze event and water damage; and that the Camp 4 Association refused to repair or remedy the damages from the freeze event; the Plaintiffs below, Petitioners herein, Maher, have a right of action for damages based on statutory authority. The Camp 4 Association has no protection by the gist of the action doctrine for its malfeasance, misfeasance, statutory violations, and violations of common law by the willful actions of Camp 4 in causing damage to the Plaintiffs below. *Thacker v. Tyree*, 171 W.Va. 110, 297 S.E. 2d 885 (1982); and *Chamberlaine & Flowers, Inc. v. McBee*, 177 W.Va. 755, 356 S.E. 2d 626 (1987). The action below was brought as a claim for damages. If the opinion and judgment of the Circuit Court below is allowed to stand, purchasers and owners of condominiums in the State of West Virginia will have no statutory protections as mandated by the West Virginia Legislature. Chapter 36B, UCIOA.

The Camp 4 Association took over the duties of the declarant and developer, Intrawest Snowshoe once the Association was formed and once the Camp 4 Association took on the responsibility to manage, insure, repair, and maintain the Common Elements of the Camp 4 structures and membership. The recitals of the Declaration at Camp 4 at the beginning of the Declaration state as follows:

> B. Declarant desires to create a condominium on the property pursuant to the West Virginia Common Interest Ownership Act, Chapter 36B of the Code of West Virginia of 1931 as same may be amended from time to time. Plaintiffs' Exhibit 15 attached to Amended Complaint. Appx. p. 906-964.

Article 4 of the Declaration, 4.02, "Purposes and Powers" state:

> (a) The Association's purposes are:
>
> > (i) To manage, operate, insure, improve, repair, replace and maintain the Common Elements;

Article 9 of the Declaration, Maintenance of Common Elements and Units, 9.01, "Maintenance of Common Elements" states:

> Except as otherwise provided in this Declaration, the Association, or its duly designated agent, shall maintain the Common Elements and the improvements and landscaping located thereon in good order and repair and shall otherwise manage and operate the Common Elements as it deems necessary or appropriate. In addition, the Association shall ensure that all interior Common Elements are sufficiently heated to prevent the freezing of water and sewer lines serving the condominium.

These provisions are in concert with and based upon the statutory provisions of the Uniform Common Interest Ownership Act, Chapter 36B of the West Virginia Code (UCIOA).

W. Va. Code §36B-2-103, Construction and Validity of Declaration and By-Laws, Subsection (c) states as follows:

> (c) In the event of a conflict between the provisions of the Declaration and the By-Laws, the Declaration prevails except to the extent that the Declaration is inconsistent with this Chapter.

The Deed of Conveyance from the Zeringues to the Mahers dated November 16, 2007 expressly states as follows:

> This conveyance is made subject to all of the provisions of the Declaration and maps as aforementioned including all restrictions, encumbrances, conditions, reservations, and by-laws therein described or attached hereto, to the applicable provisions of Chapter 36B of the Code of West Virginia of 1931, as amended, known as the "Uniform Common Interest Ownership Act", to the reservations, restrictions and agreements set forth in said Deed from Snowshoe Resort, Inc., to Intrawest, as corrected, and as further subject to all other matters affecting title thereto found of record in the aforesaid Clerk's Office.

Based upon these citations, the Petitioners, Maher, have the absolute right to rely upon the statutory duties imposed upon Camp 4 by the Uniform Common Interest Ownership Act, Chapter 36B of the West Virginia Code. The Declaration was attached to the Amended Complaint and the original Complaint as Exhibit 15. The Deed of Conveyance of the Mahers was attached to the Amended Complaint as Exhibit 4 together with all of the purchase documents of the Mahers from the Zeringues as Plaintiffs' Exhibit 3 attached to the Amended Complaint. When the Camp 4 Association failed to make repairs to the Common Element structures and failed to protect the Petitioners, Maher, from the damages resulting from the freeze event and burst water pipes which occurred in January, 2015, the Camp 4 Association violated its statutory duties to the Mahers regardless of any other contractual obligations upon which the Circuit Court may rely in citing the "gist of the action doctrine". The Amended Complaint from which this appeal is taken is not an effort to "enforce the provisions of the Declaration". Article 18, Section 18.01, "Enforcement" (a) of the Declaration, states:

> (a) Each provision of this Declaration with respect to the Association or the Common Elements shall be enforceable by the Declarant or by any owner by proceeding for injunctive relief.

The Amended Complaint, in and of itself, made no demand for "enforcement of the Declaration" although the Amended Complaint does cite and include as Exhibit 15 the Declaration which specifically cites the Uniform Common Interest Ownership Act, Chapter 36B of the West Virginia Code. Based thereon, the Petitioners have the absolute right to rely upon the statutory mandates of Chapter 36B as cited within the Declaration attached to the Amended Complaint as Exhibit 15. The Plaintiffs also have the absolute legal right to rely upon the common law of the State of West Virginia to enforce their rights to make claims for damages against the Camp 4 Association for its willful violations of the Declaration and the provisions of

the Uniform Common Interest Ownership Act, Chapter 36B of the West Virginia Code. The Circuit Court is clearly wrong in dismissing the claims for damages made by the Petitioners, Maher, because of the clear violations of statutory duty, contractual duty, misfeasance, malfeasance, negligence, fraud, concealment, the failure of Camp 4 to make repairs in the Common Element structures and in failing to protect the Petitioners from ongoing damages. Otherwise, no purchaser of a condominium in the State of West Virginia can be or will be protected from the errant, intentional, willful, and fraudulent actions of a condominium association and Board of Directors. Why else would the Legislature have required the Association to maintain casualty insurance under W.Va. Code §36B-3-113(d)?

The Circuit Court below has allowed the Camp 4 Association to overcome the damages claims of the Petitioners, Plaintiffs below, Maher, in dismissing the claims of the Plaintiffs below in what could be described as "death by a thousand cuts". Apparently, the Circuit Court has confused the contractual rights of enforcement under the Declaration and the statutory and common law rights of the Petitioners, Plaintiffs below, to institute an action for damages when the Association fails to adhere to its statutory duties thereby causing damages to a member of the Association and an owner of a unit, Unit 27 owned by the Mahers.

All of these issues have been previously argued to the Circuit Court in Responses of the Plaintiffs to the Camp 4 Motion for Summary Judgment. The Petitioners, Maher, specifically refer to the *Response of Plaintiffs to Camp 4 Condominium Association, Inc., Motion for Summary Judgment,* together with Exhibits, filed July 8, 2019, Appx. P. 3558-3703; *Supplemental Response of Plaintiffs to Camp 4 Motions for Summary Judgement* argued July 17, 2019, together with Exhibits, filed August 5, 2019, Appx. P. 4682-4744; as well as the Plaintiffs First, Second, and Third Motions for Summary Judgment which were referenced and

incorporated therein by reference as if stated verbatim, together with Exhibits, Plaintiffs' First Motion for Summary Judgment filed May 31, 2019 together with the Affidavit of David Maher for Summary Judgment Appx. p. 3282-3303 and Appx. p. 5646-5651; Plaintiffs' Second Motion for Summary Judgment together with Exhibits (knowledge of defects and code violations by the Defendants, Zeringue, Camp 4, Roat and Barnum), Appx. p. 3304-3421; and Plaintiffs' Third Motion for Summary Judgment together with Exhibits (concealment of defects and code violations by Defendants) filed May 31, 2019, Appx. p. 3422-3516; together with the *Reply of Plaintiffs to Responses of the Defendants to Plaintiffs Seven Motions for Summary Judgment*, together with Exhibits, filed August 5, 2019, Appx. p. 4745-4810. All of these pleading were before the Circuit Court prior to the granting of Summary Judgment by the Circuit Court on September 5, 2019. For whatever reason, after filing numerous other pleadings referred to within the various sections of this Brief, the Circuit Court certified its judgment from September 5, 2019, in its "Order Amending September 5, 2019 Order" entered and filed on October 19, 2022. Because of this apparent change of heart or need for clarification, it is necessary for the Intermediate Court of Appeals to consider *de novo* the relevant pleadings considered by the Circuit Court between September 5, 2019, and October 19, 2022 as referenced within this Brief.

As hereinbefore noted in Section II, Statement of Case, Camp 4 filed a counterclaim against the Mahers alleging fault on the part of the Mahers and demanded damages resulting from the freeze event of January, 2015, despite the Association insurance available under W.Va. Code §36B-3-113. Appx. p. 192-194. In 2016, the Petitioners filed their *Motion to Terminate Monthly Maintenance Fees and for Injunctive Relief*, together with supporting Exhibits, Appx. p. 216-269, which was opposed by the Association despite the allowance of injunctive relief within the Declaration and despite the clear allowance of injunctive relief as "appropriate relief under

W.Va. Code §36B-4-117. Those pleadings are incorporated herein by reference. By the Order dated November 18, 2016, Appx. p. 561-566, denying injunctive relief, the Circuit Court allowed the damages of the Petitioners to continue unmitigated until the present, finding that granting injunctive relief would somehow "accomplish the whole purpose of the litigation" filed by the Petitioners below in their Amended Complaint and the supporting exhibits attached thereto. It is incomprehensible that Circuit Court has now dismissed all damages claims of the Petitioners and directed claims for injunctive relief to be filed by the Plaintiffs as the sole remaining relief available to the Petitioners, Maher, in its separate "Order Denying Camp 4 Condominium Association, Inc.'s Motion for Summary Judgment at to County II of the Amended Complaint" entered October 19, 2022, Appx. p. 5541-5543. The Brief filed by the Plaintiffs below in support of Plaintiffs' *Motion to Terminate Monthly Maintenance Fee Payments and for Injunctive Relief* with exhibits filed October 21, 2016, Appx. p. 270-403 pointed out the availability of insurance to Camp 4; that the Mahers were first-party "insured persons" under the Camp 4 policies, W. Va. Code §36B-3-113(d)(1)-(4) and that Camp 4 had the duty to repair and maintain the Common Elements and damages from the freeze event of January, 2015, as well as the duty of repair for the latent construction defects and code violations found to exist in the structures of Camp 4 by the Plaintiffs below and by their experts hired during 2015 based upon W.Va. Code §36B-3-107 and 36A-8-2, each incorporated herein by reference.

Based on the opposition filed by Camp 4 to Plaintiffs' Motion to Terminate Monthly Maintenance Fee Payments, the Petitioners filed their *Reply of Plaintiffs to Brief in Opposition of Plaintiffs' Motion to Terminate Monthly Maintenance Fee Payments and for Injunctive Relief* together with exhibits on December 5, 2016, Appx. p. 567-616, and Petitioners filed their *Supplement to Reply of Plaintiffs for Motion to Terminate Monthly Maintenance Fee Payments*

*and for Injunctive Relief* together with the report of John Hempel, the expert of the Plaintiffs in home inspection and code compliance, on December 5, 2016, Appx. p. 617-631. Each of which are incorporated herein by reference.

Petitioners are clearly entitled to maintain their claims for damages against Camp 4. The Order of the Circuit Court dismissing the claims of the Petitioners for damages is clear error.

**B. Assignment of Error No. 2: The Circuit Court erred in denying and dismissing Petitioners' claims for violations of statutory duties by Camp 4 in its judgment certified as final under Rule 54(b) in its Order of October 19, 2022, "Order Amending September 5, 2019 Order" for violations of W.Va. Code §36B-4-109; 36B-1-111; and 36B-1-113, and in finding that Camp 4 owed no statutory duty to prospective purchasers as required under Chapter 36B-4-109(a)(10)(11). The Circuit Court also erred in finding that the term "violation" as used in W.Va. Code §36B-4-109 required a finding "synonymous with crime or offense", while apparently disregarding the multiple Fire Marshal's Reports and expert reports which demonstrate that the construction defects at Camp 4 are violations of health and/or building codes as recognized in the State of West Virginia.**

Article 4 of Chapter 36B of the West Virginia Code is entitled "Protection of Purchasers" and is clearly intended by the Legislature to protect prospective purchasers of condominiums in West Virginia by requiring a "Resale Certificate" to comply with the provisions of W.Va. Code §36B-4-109(a)(10)(11). W.Va. Code §36B-4-109, "Resale of Units" states in pertinent part the following:

> **36B-4-109. Resale of Units.**
>
> (a) Except in the case of sale in which delivery of a public offering statement is required, or unless exempt under Section 4-101(b)[§36B-4-101], a unit owner shall furnish to a purchaser before execution of any contract for sale of a unit, or otherwise before conveyance, a copy of the Declaration (other than any plats and

plans), the by-laws, the rules or regulations of the Association, and a certificate containing:

(10) A statement as to whether the Executive Board has knowledge that any alterations or improvements to the unit or to the limited Common Elements assigned thereto violate any provision of the Declaration;

(11) A statement as to whether the Executive Board has knowledge of any violations of the health or building codes with respect to the unit, the Limited Common Elements assigned thereto, or any other portion of the Common Interest community;

On August 5, 2019, the Plaintiffs filed their *Supplemental Response of Plaintiffs to Camp 4 Motions for Summary Judgment Argued July 17, 2019* which specifically included the argument of Plaintiffs below, Petitioners herein, in support of W.Va. Code §36B-4-109 applying to the sale of Unit 27 by the Zeringues to the Mahers in 2007. The Supplemental Response referenced as foundation and background information of the existence of defects and code violations, knowledge of Camp 4, and the concealment by Camp 4 of those defects and code violations by incorporating Plaintiffs' First, Second, and Third Motions for Summary Judgment which are also incorporated herein by reference as if stated verbatim. Appx. p. 3282-3516. The pleadings which are referenced and which were placed before the Circuit Court for consideration must be considered in the *de novo* review of these issues by the Intermediate Court of Appeals. The Plaintiffs below filed with the Circuit Court and referenced herein the *Reply of Plaintiffs to Camp 4 Condominium Association Response to Plaintiffs' Motion for Reconsideration of Order from December 4, 2019, W.Va. Code §36B-4-109,* filed January 24, 2020, Appx. p. 5326-5330, and the *Supplemental Reply of Plaintiffs to Camp 4 Condominium Association Response to Plaintiffs' Motion for Reconsideration of Order from December 4, 2019, W.Va. Code §36B-4-109*, filed January 21, 2020, Appx. p. 5294-5325, together with the report of Plaintiffs' expert, Marjean K. Pountain, Appx. p. 5306-5325; also at Appx. p. 2593-2616, which contains expert

opinions directly contrary to the findings, conclusions, and rulings of the Circuit Court related the failure of Camp 4 to disclose information inconsistent with W.Va. Code §36B-4-109 in the statutorily required "Certificate for Resale".

The Circuit Court committed error in finding that Camp 4 was under no contractual duty to disclose design and construction defects alleged by the Plaintiffs prior to the Plaintiffs' purchase of the condominium. The Sale Contract and the Agreement to Purchase Unit 27 by the Mahers created the statutory duty of Camp 4 under W.Va. Code §36B-4-109 for disclosure which is also bound within the Deed of Conveyance for Unit 27 which expressly includes the provisions of the West Virginia Common Interest Ownership Act for "protection of purchasers" under Article 4 of Chapter 36B. Clearly, "construction defects" are synonymous with building and health and safety code violations. The reports of the experts filed in this action reference the construction defects in the Camp 4 structures as violations of the building code and/or the fire code of the State of West Virginia. Hempel Final Report Appx. p. 4797-4804; Lorey Caldwell Reports of February 27, 2019, Appx. p. 1365-2546; 2547-2592.

Camp 4 is bound by the statutory provisions of W.Va. Code §36B-4-109 and Camp 4 was responsible to the Mahers as prospective purchasers to provide accurate and truthful information and for the failure to disclose construction defects and known code non-compliance which are violations of building codes or fire codes known to Camp 4 and which were statutorily required to be noticed to the purchasers, Maher, prior to closing on the deed. The Affidavit of David Maher attached to the First Motion for Summary Judgment of Plaintiffs demonstrates that the Plaintiffs would not have purchased the unit had they been informed of the serious construction defects and code violations in the structures of the Camp 4 units. Appx. p. 5646-5651. Camp 4 sent the Resale Certificate to Petitioners' bank which allowed approval of the Maher loan for

purchase of Unit 27. The Circuit Court erred in denying the claims of the Petitioners, Maher, under statutory duties, as prospective purchasers, and in its interpretation of the requirements of W.Va. Code § 36B-4-109.

**C. Assignment of Error No. 3: The Circuit Court erred in dismissing Counts III and IV of Petitioners' Amended Complaint and the claims of damages made by the Petitioners, Plaintiffs below within its Amended Complaint and in finding that the gist of the action doctrine precludes Plaintiffs from pursuing damages claims and tort claims as made within Plaintiffs' Amended Complaint caused by negligence, concealment, misrepresentation, malfeasance, misfeasance, concealment, fraud and failure to repair required by statutory, contractual, and legal duties owed by Camp 4 to the Petitioners as specifically set forth within Petitioners' Amended Complaint below.**

The Petitioners have addressed issues of the gist of the action doctrine within the *Response of Plaintiffs to Camp 4 Condominium Association, Inc., Motion for Summary Judgment* with Exhibits filed July 8, 2019, Appx. p. 3558-3703; and *Supplemental Response of Plaintiffs to Camp 4 Motions for Summary Judgment Argued July 17, 2019, filed August 5, 2019,* with Exhibits, filed August 5, 2019, Appx. p. 4682-4744 which must be considered *de novo* by the Intermediate Court of Appeals.

The claims against Camp 4 as set forth within the Amended Complaint of Plaintiffs below are for damages based in tort caused by the negligence, concealment, misrepresentation, fraud, and failure to repair known construction defects, code violations, and damages resulting from the January, 2015, freeze event. The Plaintiffs' claims are also based upon violations of statutory duties of Camp 4 and its Board of Directors as specifically stated within the Amended

Complaint and supporting documents attached thereto. Clearly the Circuit Court was wrong in its findings stated at page 9 of its Order of October 19, 2022:

> The allegations in Counts III and IV are duplicative of and/or inextricably intertwined with the allegations contained within Count II. The Declaration is the contract between the parties and came into existence when the Plaintiffs purchased their condominium. The elements of gist of the action are met because the tort claims of negligence and fraud arise solely from the contract between the parties, the duties alleged breached were created and grounded in the contract itself; Camp 4's liability, if any, stems from the contract; the tort claims essentially duplicate a breach of contract claim, and the Plaintiffs' success on their claims of negligence and fraud are wholly dependent on the terms of the contract between the parties, the Declaration. The Plaintiffs' negligence and fraud claims are inextricably intertwined with the breach of the contract claim and consequently are barred by the gist of the action doctrine.

These findings and conclusions by the Circuit Court are absolutely wrong and must be reversed with the *de novo* review by the Intermediate Court of Appeals. The actions of Camp 4 have caused significant damages to the Petitioners, Maher, and the Petitioners cannot be made whole without allowing a jury to assess the damages claims based in tort.

The true effect of the ruling of the Circuit Court in dismissing Counts III and IV of Plaintiffs' Amended Complaint based on gist of the action doctrine is to preclude the Plaintiffs from obtaining any damages whatsoever from the Camp 4 Association for their violations of duties to the Petitioners under statute and under common law. W.Va. Code § 36B-4-117 clearly states that when a person subject to Chapter 36B fails to comply with the provisions of Chapter 36B, the person adversely affected by the failure to comply has claims for "appropriate relief". The statutory provisions of Chapter 36B do not limit the claims of the Petitioners to enforcement of the provisions of the Declaration by injunctive relief. The Circuit Court has ignored the damages occasioned to the Petitioners by the wrongful acts of Camp 4 and its representatives. The injunctive relief allowed by the Circuit Court as the sole remaining relief to the Petitioners

fails to provide compensation for the significant damages suffered by the Petitioners based on the failure of Camp 4 to repair the known latent construction defects and health and building code violations and to return the Common Elements and Limited Common Elements of Camp 4 to a habitable condition as required by W.Va. Code §36B-3-107. Camp 4 continues to claim a right to collect assessments or "maintenance fees" from the Petitioners despite the fact that Unit 27 has remained uninhabitable since January, 2015. The Mahers have suffered significant loss of use, loss of rental income, diminishment in value of their investment, and economic losses occasioned by the continued payment of utilities, mortgage payments, interest, and other expenses associated with their Unit 27 following the freeze event of January, 2015. The gist of the action doctrine mandated by the Circuit Court disregards all of these damages to the Petitioners which were occasioned by the negligence and fraud of Camp 4 and its representatives and in its statutory violations of the rights of the Petitioners in the failure of Camp 4 to perform its statutory and common law duties to repair Unit 27 and the Common Elements associated therewith with the applicable insurance which is available to Camp 4. *Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc.*, 783 F. 3d 976 (2015); *Thacker v. Tyree*, 171 W.Va. 110, 297 S.E. 2d 885 (1982); *Chamberlaine & Flowers, Inc. v. McBee*, 177 W.Va. 755, 356 S.E. 2d 626 (1987).

All that said and done, the injunctive relief Motion raised by the Mahers in 2016 is a huge issue in the Maher's efforts to prevent additional damage. The Mahers have suffered exponentially more in harm from 2015-2023 than anything the repair of the Common elements would have cost Camp 4 following the freeze event of January, 2015, and if the Court had granted the Maher Motion for Injunctive Relief in 2016. The Mahers would have been back in their condominium (home) and would have had the enjoyment, use, and the ability to sell the unit

with full notice of compliant codes and free of construction defects. Rather, Camp 4 went into the unit following the freeze event of January, 2015, and allowed the walls, ceilings, floors and Common Elements to be opened up and left open to the interior of the Common Elements as the unit continues to exist today, uninhabitable.

**D. Assignment of Error No. 4: The Circuit Court erred in granting Summary Judgment to Camp 4 in the Order of October 19, 2022 in finding that Camp 4 did not breach any statutory, contractual, or common law duties owned to the Petitioners by Camp 4 prior to and at the time of purchase of Unit 27 by the Petitioners in 2007; from purchase in 2007 until the freeze event of January, 2015; and following the freeze event of January, 2015, thereby dismissing the claims for damages made by the Petitioners against Camp 4 including Camp 4's failure to mitigate and repair damages caused by the freeze event of January, 2015, and by continuing to charge and collect assessments after the freeze event, thereby causing additional damages to accrue to the Petitioners in the failure of Camp 4 to mitigate and repair the known construction defects, code violations, and damages prior to and following the freeze event of January, 2015, as set forth within Petitioners' Amended Complaint below.**

Prior to the January, 2015, freeze event, the Petitioners, Maher, had no notice or knowledge whatsoever that any construction defects or code violations existed in the structures of Camp 4. Following the freeze event of January, 2015, the Petitioners' Maher, made repeated efforts to gain the cooperation of Camp 4 to repair and mitigate the damages from the freeze event and from the latent construction defects and code violations discovered following the freeze event of January, 2015. The efforts by the Mahers are documented within various pleadings filed with the Circuit Court below including the following:

1. *Motion of Plaintiffs to Terminate Monthly Maintenance Fee Payments and Injunctive Relief*, together with exhibits filed October 21, 2016, Appx. p. 216-269;

2. *Brief in Support of Plaintiffs' Motion to Terminate Monthly Maintenance Fee Payments and for Injunctive Relief,* together with exhibits filed October 31, 2016, Appx. p. 270-403;

3. *Response of Plaintiffs to Joint Motion for Summary Judgment and Joint Memorandum of the Defendants and Third-Party Defendants Claiming Failure to Mitigate Damages,* together with exhibits, Appx. p. 5209-5277;

4. *Supplemental Brief on Issues of Mitigation, Repair and Maintenance of Construction Defects, Code Violations and Damages Resulting from the January, 2015, Freeze Event,* with exhibits, filed December 23, 2019, Appx. p. 5101-5112; and

5. *Response of Plaintiffs to Renewed Joint Motion for Summary Judgment for Plaintiffs Failure to Mitigate Damages filed by Defendants and Third-Party Defendants*, with exhibits, filed January 8, 2020, Appx. p. 3704-3842.

Each of these pleadings give detailed analysis of the issues in dispute between the Mahers and Camp 4 with detailed support by documents, reports, and communications which give rise to the damages claims of the Mahers against Camp 4 and the duties breached by Camp 4. These pleadings include drawings, reference to code violations and construction defects allowed by Camp 4 to remain unrepaired. Petitioners cannot stress enough the importance of review of these pleadings as detailed support for this appeal.

Each of these pleadings filed with the Circuit Court were considered by the Circuit Court prior to entry of the "Order Amending September 5, 2019 Order" on October 19, 2022. The Circuit Court below has certified the issues contained within the Order Amending September 5,

2019, Order to allow the Appellate Court to review the rulings of the Circuit Court in the September 5, 2019, Order prior to trial. The findings, conclusions, and judgment stated by the Circuit Court in its Order of October 19, 2022, are clearly wrong. The Petitioners, Plaintiffs below, have been damaged by the actions and inactions of Camp 4 and its representatives. The Petitioners, Plaintiffs below, Maher, are entitled to compensation and damages resulting from the statutory and common law violations by Camp against the interests of the Petitioners as purchasers and owners of a condominium unit in the State of West Virginia pursuant to the Uniform Common Interest Ownership Act, Chapter 36B of the West Virginia, and pursuant to the common law rights of the Mahers to damages as described within the multiple pleadings referenced and incorporated herein for review by the Intermediate Court of Appeals. The Circuit Court was clearly wrong in finding that Camp 4 did not owe a contractual, statutory or common law duty to the Plaintiffs prior to purchase of Unit 27 and in finding that the Petitioners, Plaintiffs below, have no right of claims of damages prior to or following the purchase of Unit 27 and prior to and following the damages caused by the freeze event of January, 2015. *Thacker v. Tyree*, 171 W.Va. 110, 297 S.E. 2d 885 (1982); *Chamberlaine & Flowers, Inc. v. McBee*, 177 W.Va. 755, 356 S.E. 2d 626 (1987).

Contemporaneously with the Order from which this appeal is taken, entered October 19, 2022, was a second Order by the Circuit Court denying Camp 4 Condominium Association, Inc.'s Motion for Summary Judgment as to Count II of the Amended Complaint. Within that Order, the Circuit Court found that "the only remaining claim against the Association by the Plaintiffs is Count II- Breach of Legal Duty and Declaration of Covenants". The Circuit Court went on to find that the unit owners' remedy under the Declaration is injunctive relief, as provided by Section 18.01 of the Declaration. Based thereon, the Circuit Court directed the

Petitioners, Plaintiffs below, to amend the Prayer of the Amended Complaint to request injunctive relief. Based upon that Order, the Petitioners, Plaintiffs below, filed an Amended Prayer with the Circuit Court. Appx. p. 5555-5562. In response thereto, Camp 4 filed an Answer, Affirmative Defenses, and a Counterclaim which misrepresents the efforts of the Petitioners, Plaintiffs below, to have Camp 4 properly and appropriately mitigate and repair the damages suffered by Unit 27 and the Common Elements associated therewith, and demanding all costs and expenses, including attorney's fees and litigation, based upon false claims against the Plaintiffs for failure to comply with the Declaration. Appx. p. 5563-5574. The Plaintiffs filed their Motion to Dismiss, Affirmative Defenses and Reply to Counterclaim of Camp 4 together with exhibits on November 16, 2022, Appx. p. 5625-5645, which included a copy of the Release signed by Camp 4 dated June 27, 2019, and a copy of the Partial Dismissal Order entered by the Circuit Court on July 24, 2019, dismissing all matters asserted in the previous counterclaim including those matters which were asserted in the second counterclaim by Camp 4 filed on November 9, 2022, referenced above. The Counterclaim by Camp 4 again demonstrates the bad faith of Camp 4 and the continuing refusal of Camp 4 to acknowledge its statutory duties under Chapter 36B of the West Virginia Code. Camp 4 continues to refuse to acknowledge its statutory duties and continues to perpetuate the damages suffered by the Petitioners.

## VII. CONCLUSION

Based upon the forgoing, the judgment of the Circuit Court of Pocahontas County, West Virginia, stated in its Order of October 19, 2022, "Order Amending September 5, 2019 Order" is clearly wrong and must be reversed based upon *de novo* review by the Intermediate Court of Appeals.

1. The Circuit Court erred and is clearly wrong in denying and dismissing Plaintiffs' claims for damages against Camp 4 in failing to repair the damages from the freeze event and burst pipes of January, 2015, and the known latent construction defects and health and building code violations in the Common elements of Camp 4 structures which are causing continuing damages to the Plaintiffs as alleged in their Amended Complaint.

2. The Circuit Court erred and is clearly wrong in ruling that W.Va. Code §36B-4-109(a)(11) is not a statutory duty owed by Camp 4 to prospective purchasers such as the Plaintiffs, prior to purchase of a unit.

3. The Circuit Court erred and is clearly wrong in finding, concluding, and ordering that W.Va. Code §36B-4-109 does not require disclosure to sellers of "latent construction defects" as violations of health and building codes which are demonstrated by the evidence and documents available to the court through expert reports to be both defects and code violations clearly known to Camp 4 as such.

4. The Circuit Court erred and is clearly wrong in finding, concluding and ordering that Camp 4 had no knowledge of any "violation" of health and building codes in the structures of Camp 4. "(synonymous with crime or offense)" that was subject to disclosure at the time of the sale to the Plaintiffs, and thereby did not breach any statutory duty under W.Va. Code §36B-4-109, as a matter of law and with no issue of material fact in dispute.

5. The Circuit Court erred and is clearly wrong in finding, concluding and ordering that the tort claims of Plaintiffs against Camp 4 in Counts III and IV of Plaintiffs' Amended Complaint were recast from breach of contract claims alleged in Count II and are thereby barred under gist of the action doctrine.

6. The Circuit Court erred and is clearly wrong in finding, concluding and ordering that Petitioners', Plaintiffs' below, tort claims subsequent to their purchase of Unit 27 are barred or precluded by the gist of the action doctrine because the tort claims by Plaintiffs against Camp 4 of negligence and fraud arise solely from the contract between the partied and are dependent on the terms of the contract between the parties.

7. The Circuit Court erred and is clearly wrong in finding and concluding and ordering that Camp 4 did not owe a contractual, statutory, or common law duty to the Plaintiffs prior to and following their purchase of Unit 27 to disclose alleged "existing defects known to its Board of Directors since 2005" and consequently did not breach any statutory, contractual or common law duty by allegedly fraudulently concealing "the defects of the Common Elements and structure of the condominiums", and thereby granting Camp 4's Motion for Summary Judgment as to Plaintiffs' allegation of fraud prior to and following their purchase of Unit 27 as contained in Count IV of the Amended Complaint.

The Petitioners respectfully petition the Intermediate Court of Appeals to reverse the error of the Circuit Court and remand this action to the Circuit Court with directions finding that the Plaintiffs may proceed with claims of damages against Camp 4 related to theories of tort, and upon statutory and common law violations by Camp 4 as demanded within the Amended Complaint filed by the Petitioners, Plaintiffs below. Petitioners further petition the Intermediate Court of Appeals to enter an Order directing the Circuit Court to require Camp 4 to mitigate the damages of the Petitioners, Plaintiffs below, and to enter an Order granting injunctive relief to the Petitioners, Plaintiffs below, against Camp 4 requiring full repair, mitigation and modification of the structures of Camp 4, if possible, to comply with applicable code requirements. Petitioners further petition the Intermediate Court to grant such other and further

relief as mandated by the statutory authority of the Uniform Common Interest Ownership Act, Chapter 36B of the West Virginia Code, including but not limited to all appropriate relief allowed under W.Va. Code §36B-4-117.

Submitted by:
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**CERTIFICATE OF SERVICE**

The undersigned, counsel of record, does hereby certify that I served this, *PETITIONERS' BRIEF OF DAVID G. MAHER AND AMY C. MAHER*, on this the 20th day of February, 2023, consistent with the West Virginia Rules of Appellate Procedure, by having uploaded a true copy thereof to the WV Courts e-file to the counsel as follows:

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