

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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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

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

I. REPLY STATE OF CASE.....1-10

 A. Reply to Statement of Facts of Respondent.....1

 1. Reply to Establishment and Governance of Camp 4 and the Association.....1-2

 2. Reply to Applicable Provisions of the Declaration.....2

 3. Reply to Petitioners’ Purchase of Unit 27.....2-4

 4. Reply to Petitioners’ Pipe Freeze Incident.....4-5

 5. Reply to “Discovery of Fire Rated Construction Deficiencies and the Associations Efforts to Repair Those Deficiencies”.....5-7

 6. Reply of Petitioners to “The Association’s Transparency Regarding Pipe Freezes, Construction Defects, and Remediation at Camp 4”.....7-8

 B. Reply to Procedural History of Respondent.....8-10

II. REPLY TO SUMMARY OF ARGUMENT OF RESPONDENT.....10

 1. 36B-4-109.....10

 2. Gist of the Action Doctrine.....10

IV. REPLY TO ARGUMENT OF THE RESPONDENT.....10-19

 A. The Circuit Court Erred in Dismissing the Tort Claims of the Petitioners Based on Gist of the Action Doctrine as Stated in Assignment of Error Nos. 1 and 3.....10-13

 B. Reply to Duty Imposed Upon the Association Pursuant to W.Va. Code §36B-4-109 to Disclose Latent Construction Defects as Code Violations, Alterations or Improvement Under Assignment of Error Number 2.....13-16

 1. Reply of Petitioners that the Circuit Court Committed Error in Failing to Require Disclosure to the Mahers of Latent Construction Defects and Alterations of the Common Elements as Health and Safety Code Violations Pursuant to W.Va. Code §36B-4-109.....14

2.	Reply of Petitioners to Arguments Regarding W.Va. Code §36B-1-111 and W.Va. Code §36B-1-113.....	14-15
3.	Reply to Respondent’s Contention that the First, Second, and Third Motions for Summary Judgment of the Plaintiffs Below Provide No Argument or Support for Assignment of Error Number 2.....	15-16
C.	Reply of Petitioners to Argument of the Respondent Against Assignment of Error No. 4.....	16-19
1.	Arguments Within Petitioners’ Brief Support Assignment of Error No. 4.....	16-17
2.	Reply to Claims of the Respondent of Lack of Legal Authority to Identify Error Committed by the Circuit Court	17-18
3.	The Circuit Court’s Order Directing Petitioners, Plaintiffs Below, to File an Amended Prayer for Injunctive Relief Demonstrates the Error of the Circuit Court in Having Failed to Grant the Motion of Plaintiffs Below for Injunctive Relief in 2016.....	18-19
V.	CONCLUSION.....	19-20

TABLE OF AUTHORITIES

CASES

Blankenship v. Westfield Insurance Co , Civil Action No. 2:14-cv-2470 signed
May 13, 2015.....10, 11

Chamberlaine & Flowers, Inc. v. McBee, 177 W.Va. 755, 356 S.E. 2d 626 (1987).....18

Chamberlaine & Lowers, Inc. v. Smith Contracting, Inc., 176 W.Va. 39, 341 S.E. 2d 414
(1986).....10, 11

Thacker v. Tyree, 171 W.Va. 110, 297 S.E. 2d 885 (1982).....18

STATUTES

W.Va. Code § 36B-1-111.....14, 15, 19

W.Va. Code § 36B-1-112.....15, 19

W.Va. Code § 36B-1-113.....14, 15, 19

W.Va. Code § 36B-1-117.....15, 19

W.Va. Code § 36B-2-103.....2, 11

W.Va. Code § 36B-3-107.....2, 6, 11, 17, 18, 19

W.Va. Code § 36B-4-101.....1

W.Va. Code § 36B-4-109.....1, 2, 4, 10, 11, 13, 14, 16, 19, 20

W.Va. Code § 36B-8-2.....17, 19

W.Va. Code § 36B-4-117.....9, 17, 19

I. REPLY STATEMENT OF CASE

The Petitioners, David G. Maher and Amy C. Maher, offer this Reply to Statement of Case and the facts presented by the Camp 4 Condominium Association, Inc., (“Camp 4”) based upon the claims made within the Response to Petitioners’ Petition. Petitioners would note that all of the factual information presented within the Petitioners’ Petition and within this Reply has been fully argued before the Circuit Court within the numerous pleadings cited in Petitioners’ Petition. Camp 4 has made the same perverted and erroneous arguments before the Circuit Court below in direct contradiction of the exhibits and documents filed with the Circuit Court in various pleadings which prove the error and the misstatements of the Respondent in its Response.

A. Reply to Statement of Facts of Respondent

1. Reply to Establishment and Governance of Camp 4 and the Association

The Petitioners, David G. Maher and Amy C. Maher (“The Mahers”) purchased Unit 27 of the Condominiums at Camp 4 by contract signed October 15, 2007 and by Deed dated November 16, 2007, closed on November 19, 2007, as stated within the Plaintiffs’ Complaint, Appx. p. 4-5, attached thereto as Exhibits 3 and 4. Appx. p. 35-43, and Plaintiffs’ Amended Complaint, Appx. p. 768-769, attached thereto as Exhibits 3 and 4, Appx. p. 813-821. By the signing of that contract for purchase, the Mahers came under the protection of the Uniform Common Interest Ownership Act of West Virginia (“UCIOA”) pursuant to W.Va. Code § 36B-4-101, et seq. W.Va. Code § 36B-4-109, “Resale of Units”, specifically states:

...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 or 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;

Chapter 36B, Article 4, is specifically entitled “Protection of Purchasers”. Based thereon, Camp 4 has misrepresented the rights of the Mahers as prospective purchasers under the Declaration and under Chapter 36B of the West Virginia Code. It is necessary that the Intermediate Court of Appeals (“ICA”) clarify and specifically state the protections of prospective purchasers under the UCIOA.

2. Reply to Applicable Provisions of the Declaration

The Declaration of Camp 4 is expressly based upon Chapter 36B of the West Virginia Code. W.Va. Code §36B-2-103 mandates that the Declaration is subject Chapter 36B for any inconsistencies in language or requirements. W.Va. Code §36B-3-107 requires the Association, Camp 4, to be responsible for maintenance, repair, and replacement of the Common Elements. The Declaration is not controlling. Chapter 36B, the UCIOA, is the controlling authority of Camp 4 and for the disputes raised within the Complaint and Amended Complaint of the Plaintiffs in this action.

3. Reply to Petitioners’ Purchase of Unit 27

When the Purchase Contract was signed by the Mahers on October 15, 2007, the Mahers came under the protections of Chapter 36B, Article 4, “Protection of Purchasers”, and were required to be provided information consistent with W.Va. Code § 36B-4-109. The Petitioners have provided an extensive history, citations of authority, and support for their rights as

prospective purchasers of a condominium in the State of West Virginia under the UCIOA within the following pleadings:

Response of Plaintiffs to Camp 4 Condominium Association, Inc., Motion for Summary Judgment; Appx. p. 3558-3703;

Supplemental Response of Plaintiffs to Camp 4 Motions for Summary Judgment argued July 17, 2019; Appx. p. 4682-4744;

Motion for Reconsideration of Order from December 4, 2019, W.Va. Code §36B-4-109; Appx. p. 5113-5121;

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; Appx. p.5326-5330; and

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, Appx. p. 5294-5325 filed together with the disclosure of Marjean K. Pountain, an expert in condominium associations and the duties and responsibilities of condominium associations to owners and prospective owners of condominium units. Appx. p. 5306-5325; also at Appx. p. 2593-2616.

Camp 4 has simply ignored the rights of the Mahers under the UCIOA and Camp 4 has ignored the comprehensive knowledge of the Camp 4 Board since 2002 of the serious latent construction defects, health and building code violations, and the reports which Camp 4 had available to them from 2004 and 2005 as cited within Plaintiffs' First Motion for Summary Judgment, Appx. p. 3282-3303, and Plaintiffs' Second Motion for Summary Judgment, Appx. p. 3304-3421, as referred to within Petitioners' Petition and as filed with the Circuit Court, as well as incorporated by reference within the responses of Plaintiffs to Motions for Summary Judgment of Camp 4. The seriousness of the latent construction defects, the continuing historical freeze events, and the reports available to Camp 4 from various sources prior to purchase of Unit

27 by the Mahers gave clear knowledge and notice to the Camp 4 Board of the necessity of providing notice to prospective purchasers under W.Va. Code §36B-4-109, including the Mahers, in 2007.

The Response of Camp 4 that “there were no sprinkler line freezes documented for more than two (2) years before Petitioners purchased Unit 27 ...” is a play on words and is a fabrication and misrepresentation based upon the “Problem Log” of Thomas Roat attached to Plaintiffs’ Complaint and Amended Complaint as Plaintiffs’ Exhibit 11, Appx. p. 62-72 and Appx. p. 861-870. Multiple units had water line freezes at Camp 4 in February, 2007 as stated within the Roat Problem Log. Appx. p. 70 and 868. The report of Plaintiffs’ expert, Marjean Pountain, clearly states the requirements of Camp 4 to provide notice to the Mahers of the propensity of the water line freezes at Camp 4 occasioned by the known latent construction defects and building code violations which had been apparent since 2004 and 2005. Appx. p.5306-5325. Camp 4 never mitigated the causes of the freeze events noted in the Williamson report and demonstrated within the Invizions report, both from 2005. Appx. p. 3623-3650. Those reports are also included within the exhibits attached to Plaintiffs’ Amended Complaint, Exhibit 13, Appx. p. 872-883, and Exhibit 14, Appx. p. 890-905.

4. Reply to Petitioners’ Pipe Freeze Incident

Contrary to the representations of Camp 4, there were numerous pipe freezes at Camp 4 from 2007 through 2015. From 2010 through 2012, Camp 4 contracted with Branch & Associates, Inc., and others to provide repairs consistent with requirements of the West Virginia State Fire Marshal and the architect hired by Camp 4, Ed Roach. Appx. p. 3753-3756 and Appx. p. 3482-3505. Those issues were extensively argued in the various pleadings cited within Petitioners’ Petition found documented within the *Response of Plaintiffs to Renewed Motion for*

Summary Judgment for Plaintiffs' Failure to Mitigate Damages filed by Defendants and Third Party Defendants, Appx. p. 3704-3842, all of which were known to Camp 4 long before 2015. The dispute regarding mitigation of damages was raised before the Circuit Court within various pleadings prior to September 5, 2019, and specifically within *Plaintiffs' Third Motion for Summary Judgment*, filed together with extensive exhibits, Appx. p. 3422-3516, as well as the *Response of Plaintiffs to Joint Motion for Summary Judgment and Joint Memorandum of the Defendants and Third Party Defendants Complaining Plaintiffs' Failure to Mitigate Damages*, Appx. p. 5209-5277.

Contrary to the claims of the Respondent, Kim Martin was the housekeeper hired by Snowshoe, the rental agency recommended to the Petitioners by Camp 4. The housekeeper reportedly found that the wall heater in the uninsulated foyer, also known as an "air lock", was not functioning the morning that renters of Snowshoe left the building. The evidence is unclear as whether the wall heater had been "turned off" or whether it had simply ceased functioning based upon overheating. The housekeeper was no expert in wall heaters, and the wall heater had nothing to do with heating the internal spaces of the condominium unit where the water lines froze and broke in the Maher unit in January, 2015. These are all questions of fact.

5. Reply to "Discovery of Fire Rated Construction Deficiencies and the Association's Efforts to Repair Those Deficiencies"

Contrary to the claims of Camp 4, when the freeze event occurred in January, 2015, Thomas Roat, the manager of Camp 4, contacted the Mahers to inform them of the freeze event claimed to have occurred on January 9, 2015. Within that email, Thomas Roat immediately began insinuating fault on the part of the Mahers. Appx. p. 229. Camp 4 continued a campaign of claiming fault on the part of the Mahers for the freeze event in January, 2015, rather than

performing their duties of repair under Chapter 36B, the UCIOA, and specifically W.Va. Code §36B-3-107. The Mahers had absolutely no duty whatsoever to reconstruct or repair the Common Elements which housed their Unit 27. The Orders of the Circuit Court below entered September 5, 2019, and amended October 19, 2022, denied the Mahers any right to obtain monetary damages or what would be reimbursement for repair of the Common Elements finding the sole relief to the Mahers is injunctive relief. Based thereon, the Mahers had no authority or incentive to make repairs outside of their own unit. Based thereon, Camp 4 has no statutory authority to make a claim of a duty of the Mahers to reconstruct, repair, or remediate the damage to the Common Elements resulting from the January, 2015, freeze event.

The “cease and desist” email by David Maher to Camp 4 has been argued, counter argued, and misrepresented by the Respondent in its continuing effort to avoid its duty of repair of under W.Va. Code §36B-3-107. See Appx. p. 3791-3792. As previously stated in numerous pleadings, the Mahers were informed by their experts who inspected the Camp 4 Condominium unit that Streamline did not have the proper licensing to perform the work which it was doing on the Common Elements, including repair of firewalls during August and September of 2015. Appx. p. 3778. The Mahers asked that Camp 4 cease and desist using unlicensed contractors. Appx. p. 3791-3792. They were also concerned that the unlicensed contractor would “cover up” rather than repair the latent construction defects and fire code violations which had been discovered following the freeze event of January, 2015. The Labor Licensing Board of West Virginia confirmed the lack of sufficient license of Streamline by email dated August 17, 2015. Appx. p. 5267.

The claim by Camp 4 of a “20 minute separation rating” by the Fire Marshal was a complete fabrication by the agents and authorities of Camp 4. The Assistant Fire Marshal in

charge of inspections of the unit in 2015 and 2016 verified that the fire separation rating had to be consistent with the previous reports of the Fire Marshal's Office with a one (1) hour fire separation rating. Appx. p. 3753-3756. Camp 4 never provided to the Mahers any plans or drawings necessary for adequate repair of the latent construction defects and clear code violations which were discovered by the Mahers after the January, 2015, freeze event and which had been known by the Association since at least 2005. The architect for Camp 4, Ed Roach, had provided numerous reports to Camp 4 describing serious fire code violations which threatened the safety of the individuals using the condominiums. Appx. p. 3482-3505 and Appx. p. 3734-3752. (Ed Roach Reports). The Mahers had absolutely no statutory authority or statutory duty to obtain their own contractor for repair of the Common Elements, nor were the Mahers in any position to provide the expertise necessary for any plans, drawings, or repair to the Common Elements. These claims by Camp 4 have been a "red herring" throughout this litigation.

6. Reply of Petitioners to "The Association's Transparency Regarding Pipe Freezes, Construction Defects, and Remediation at Camp 4"

Documentation and evidence from Camp 4 demonstrate that the Association never mailed notices of meetings, minutes of meetings, notices, letters, or any other documentation to the home address of Mahers in Milam, West Virginia from 2007 through 2015. Exhibit 2 attached to Plaintiffs' Second Motion for Summary Judgment filed with the Court on May 31, 2019, and as referenced within the Petition filed on behalf of the Mahers with the ICA demonstrates that the "Customer Contact List" of the Camp 4 Condominium Association from 2007 through 2015 identified the mailing address of the Mahers at Box 84662804, Sioux Falls, South Dakota. Exhibit 2 attached to Plaintiffs' Second Motion for Summary Judgment, Appx. p. 3340-3361. The handwritten notes by Thomas Roat on each of the Contact Lists state that the

minutes were mailed to the individuals named in the Contact List, each with a pen mark, and the Maher address listed in Sioux Falls, South Dakota, for Unit 27. Petitioners filed with the Respondent their Milam address at the time of purchase of Unit 27 in 2007, Appx. 3449-3451. The Problem Log was also attached to Plaintiffs' Second Motion for Summary Judgment as Exhibit 1, Appx. p. 3329-3339. There is no evidence that the Problem Log was ever provided to the Mahers before being provided in discovery during the civil action below. The Affidavit of David Maher for Summary Judgment attached to Plaintiffs' First Motion for Summary Judgment, Appx. p. 5646-5651, affirms that the Mahers never received a mailing, notice, or any letters from Camp 4 from 2007 through 2015. Whether or not the failure of Thomas Roat to mail notices, minutes of meetings, or letters, to the Maher home address in Milam, West Virginia, was an accident or intentional is a question of fact. The Petitioners cannot and do not dispute the letters and notices mailed on behalf of the Association to the addresses stated in the Owner Contact List as noted by Thomas Roat. The claim that the Association mailed those notices to the Mahers at their home address in Milam, West Virginia, or that the Mahers received those notices is completely false. Whether this was concealment, fraud, or incompetence are issues of fact.

B. Reply to Procedural History of Respondent

The Petitioners rely on the procedural history provided within the Petition.

1. The representation that Camp 4 and its Executive Board had no knowledge of health and building code violations or latent construction defects which allowed cold air infiltration, air flow, and freezing of pipes within the condominiums as alleged in the Response is false and proven false by the documentation provided to the Court below together with the following pleadings:

Plaintiffs' Amended Complaint with Exhibits, Appx. p. 766-1150; and

Plaintiffs' Second Motion for Summary Judgment with Exhibits, Appx. p. 3304-3421;

Plaintiffs' Third Motion for Summary Judgment with Exhibits, Appx. p. 3422-3516;

Response of Plaintiffs to Camp 4 Condominium Association, Inc., Motion for Summary Judgment, together with Exhibits, Appx. p. 3558-3703;

Each of which demonstrate the absolute knowledge of Camp 4, the Executive Board, and that the Association had clear knowledge of the latent construction defects, cold air infiltration, lack of insulation, lack of air barriers, and the long history of frozen water lines and burst water lines in the Common Elements of the Camp 4 condominiums. Health and building code violations are construction defects. Construction defects are health and building code violations. The original reports of Barnum in 2003 and 2004; of Williamson & Associates, Inc., in 2005; and of Invizions in February, 2005, Appx. p.3615-3650, attached to *Response of Plaintiffs to Camp 4 Condominium Association, Inc., Motion for Summary Judgment*, as Exhibits 8, 9, 10, 11, and 12, clearly demonstrate notice to Camp 4 of the findings denied within the Response of Camp 4. The Problem Log of Thomas Roat demonstrates notice of the reports of Barnum, Williamson, and Invizions at the times they were prepared. The maintenance manager of Camp 4 actually participated in the inspections made by each of those consultants as demonstrated by the Problem Log of Thomas Roat. Exhibit 11, Plaintiffs' Amended Complaint, Appx. p. 62 and 68. The denial by the Respondent of knowledge and notice is completely fabricated and false.

2. The claims of the Respondent and the findings by the Court that the Plaintiffs are entitled solely to injunctive relief is contrary to Chapter 36B, UCIOA, and specifically at W.Va. Code §36B-4-117. Again, the Declaration is governed by the UCIOA, and the statutory requirements thereof control the actions of Camp 4 in the administration of the Declaration. There is no limitation of the statutory rights of the Petitioners to obtain monetary damages based

upon the affirmative acts of negligence, misfeasance, malfeasance, fraud, concealment, and misrepresentation by the Respondent.

II. REPLY TO SUMMARY OF ARGUMENT OF RESPONDENT

The issues raised by the Respondent within its Summary of Argument are wrong.

1. 36B-4-109

W.Va. Code §36B-4-109 is a statutory protection of purchasers of condominiums in the State of West Virginia as noted within W.Va. Code §36B-4-101, et seq. The duty of the Association to the Mahers began with the signing of a contract on October 15, 2007. W.Va. Code §36B-4-109.

2. Gist of the Action Doctrine

The gist of the action doctrine does not protect a Defendant from tort claims which are based on negligent affirmative conduct, misfeasance, malfeasance, fraud, misrepresentation, or concealment as proven by the Mahers against Camp 4. *Chamberlaine & Flowers, Inc. v. Smith Contracting, Inc.*, 176 W.Va. 39, 341 S.E. 2d 414 (1986); *Blankenship v. Westfield Insurance Co.*, Memorandum Opinion and Order, Civil Action No. 2:14-cv-2470 signed May 13, 2015, citing *Chamberlaine*, supra.

The citations within the Petitioners' Petition, the pleadings before the Circuit Court below as identified within the Petition, and the exhibits attached to each of the pleadings identified within the Petition and within this Reply demonstrate the questions of fact upon which the ICA must reverse the Orders of the Circuit Court below *de novo*.

IV. REPLY TO ARGUMENT OF THE RESPONDENT

A. The Circuit Court Erred in Dismissing the Tort Claims of the Petitioners

Based on Gist of the Action Doctrine as Stated in Assignment of Error Nos. 1 and 3.

The actions of Camp 4 in failing to provide notice of construction defects, notice of work performed, notice of minutes of meetings and agendas, and of the repairs made by Camp 4 from 2007 through 2015 violated the statutory rights of the Mahers under the UCIOA. The failure of Camp 4 to provide notice of clearly known latent construction defects, propensity of freeze events, and consequential health and building code violations in 2007, prior to purchase of Unit 27 by the Mahers, violated W.Va. Code §36B-4-109 which is designed as a protection to purchasers of condominiums in the State of West Virginia.

The gist of the action doctrine clearly does not bar the claims of the Petitioners against the Respondent for damages under theories of tort for negligent affirmative conduct, misfeasance, malfeasance, fraud, misrepresentation, and concealment, all of which clearly damaged the Petitioners, Plaintiffs below, the Mahers. *Chamberlaine & Flowers, Inc. v. Smith Contracting, Inc.*, 176 W.Va. 39, 341 S.E. 2d 414 (1986); *Blankenship v. Westfield Insurance Co.*, supra.

Regardless of the limiting language of the Declaration, purchasers of condominiums in the State of West Virginia are protected by the UCIOA, Chapter 36B of the West Virginia Code. In issues of conflict or inconsistency between the Declaration and the UCIOA, Chapter 36B, the statutory provisions of the UCIOA control. W.Va. Code §36B-2-103. The Respondent cannot lawfully contract out of its statutory duties under the UCIOA. Based thereon, W.Va. Code §36B-3-107 prevails. Also, W.Va. Code §36B-4-117 prevails. Since the statute does not define “appropriate relief”, it is up to this Court, the ICA, to determine the liberal effect of the UCIOA in the “protection of purchasers” under Article 4 of Chapter 36B to protect the Mahers from the misfeasance, malfeasance, negligent affirmative conduct, fraud, misrepresentation, and concealment of Camp 4 as demonstrated within the exhibits attached to the various pleadings

cited within the Petitioners' Petition and as cited within this reply. Clearly, the defects and conditions known to Camp 4 at the time the Mahers purchased Unit 27, and from 2007 through 2015 substantially affected the value and the habitability of the condominium purchased by the Petitioners. The actions of Camp 4 following the freeze event of January, 2015, also substantially affected the value and the habitability of the Maher property. The arguments and misrepresentations of Camp 4 in its Response demonstrate the questions of fact of fraud, negligent affirmative conduct, misfeasance, and concealment by the Respondent, Camp 4, throughout the timeframe complained of in Plaintiffs' Amended Complaint.

1. The address used by Camp 4 for the Mahers as stated within the records of Camp 4 and as cited within the Customer Contact List of Thomas Roat demonstrates the failure of Camp 4 to provide any notice whatsoever to the Petitioners throughout the time that the Petitioners owned Unit 27.

2. The failure of Camp 4 to send notices, letters, agendas, and information to the Mahers, by Camp and by Roat are proven by the Customer Contact List attached to Plaintiffs' Second Motion for Summary Judgment, Exhibit 2. Appx. p. 3340-3361. Clearly, Thomas Roat never sent any letters or documents to the home address of the Mahers based upon the address stated within the Owner Contact List and the notations made.

3. The filings and briefs of the Mahers as cited within their Petition and within this Reply are subject specific and have argued and proven the claims of the Mahers of wrongful conduct by Camp 4, including misfeasance, negligent affirmative conduct, fraud, concealment, and damages resulting therefrom to the Petitioners.

4. The citations by the Respondents of California law do not demonstrate that California has in effect or follows the UCIOA as is in effect in the State of West Virginia and

which forms the basis of the statutory requirements of the Respondent in conducting a homeowners association for a common interest community.

5. The failure of Camp 4 to comply with the UCIOA, as well as the negligent affirmative conduct, misfeasance, concealment, fraud, and misrepresentation proximately resulted in damages to the Petitioners, the Mahers, as complained of within their Complaint, Amended Complaint, and as set forth within the Petition filed with the ICA. Camp 4 has clearly violated the statutory provisions of the UCIOA in violating the statutory rights of the Petitioners.

B. Reply to Duty Imposed Upon the Association Pursuant to W. Va. Code §36B-4-109 to Disclose Latent Construction Defects as Code Violations, Alterations or Improvements Under Assignment of Error Number 2.

As previously noted, W.Va. Code §36B-4-109 is under the provisions of Article 4, Protection of Purchasers, under the UCIOA. The Respondent clearly had notice and knowledge of the latent construction defects, lack of insulation, lack of air barriers, propensity for freeze events, burst pipes and damage, and failed to disclose those latent construction defects and building code violations at the time of purchase of Unit 27 by the Mahers. Plaintiffs' expert, Marjean Pountain opined that the Association was under an affirmative duty to provide notice to the Mahers at the time of purchase consistent with W.Va. Code §36B-4-109. Appx. p. 2308-5325. Failure to disclose the known construction defects and code violations, as well as the alterations by Camp 4 of the Common Elements prior to purchase of Unit 27 by the Mahers violated W.Va. Code §36B-4-109. The failure to disclose and affirmative concealment by Camp 4 was at best negligent affirmative conduct, and at worst outright fraud. These are questions of fact.

1. Reply of Petitioners that the Circuit Court Committed Error in Failing to Require Disclosure to the Mahers of Latent Construction Defects and Alterations of the Common Elements as Health and Safety Code Violations Pursuant to W.Va. Code §36B-4-109.

The Respondents mount the same arguments within their Response that they made before the Circuit Court below in opposing the requirements of Camp 4 to comply with W.Va. Code §36B-4-109. Petitioners responded to these arguments before the Circuit Court in the following:

Supplemental Response of Plaintiffs to Camp 4 Motions for Summary Judgment argued July 17, 2019, together with exhibits, Appx. p. 4682-4744;

Supplemental Reply of Plaintiffs to Camp 4 Condominium Association Response to Plaintiffs' Motion for Reconsideration of Order from December 4, 2029, W.Va. Code §36B-4-109, Appx. p. 5294-5325, citing the report of Plaintiffs' expert, Marjean Pountain; and

Reply of Plaintiffs to Camp 4 Condominium Association Response to Plaintiffs' Motion for Reconsideration of Order from December 4, 2029, W.Va. Code §36B-4-109, Appx. p. 5326-5330.

The UCIOA, Chapter 36B, Article 4, of the West Virginia Code should be applied liberally for the protection of purchasers. There is no showing that California adopted the UCIOA. West Virginia should be the standard for protecting prospective purchasers of condominiums, most especially given the clear notice and knowledge of Camp 4 for the freeze events, burst pipes, and preexisting damage to the Association Common Elements prior to and after purchase of Unit 27 by the Petitioners.

2. Reply of Petitioners to Arguments Regarding W.Va. Code § 36B-1-111 and W.Va. Code § 36B-1-113.

The Respondent advances the argument that the Declaration is the authority for the Court to determine the contractual obligations of the Association to the Petitioners as purchasers of a unit at Camp 4. In the event the Court would be persuaded by the arguments of contractual obligation created by the Declaration, the Court must read the terms of the contract consistent with the UCIOA, W. Va. Code §36B-1-111, 112, and 113. The remedies allowed to the Petitioners under W.Va. Code §36B-4-117 must be considered and applied liberally under W.Va. Code §36B-1-113 together with obligations of the Association to act in good faith under W.Va. Code §36B-1-112, and that the Association cannot lawfully advance an unconscionable agreement or contract in violation of W.Va. Code §36B-1-111. These are statutory provisions and protections of the UCIOA.

3. Reply to Respondent’s Contention that the First, Second, and Third Motions for Summary Judgment of the Plaintiffs Below Provide No Argument or Support for Assignment of Error Number 2.

Plaintiffs’ First, Second, and Third Motions for Summary Judgment provide clear support and reference to the issues raised in Assignment of Error No. 2 by the Petitioners. Plaintiffs’ First Motion for Summary Judgment clearly defines the latent construction defects, building code violations, and fire and safety code violations which were known to the Respondent, Camp 4, from 2002 through 2015. Plaintiffs’ Second Motion for Summary Judgment demonstrates the knowledge of Camp 4 of the latent construction defects and code violations of Camp 4 from 2002 through 2015. Plaintiffs’ Third Motion for Summary Judgment demonstrates the fraudulent concealment of latent construction defects and health and safety and building code violations by Camp 4 from the Petitioners, Maher, from 2007 through 2015. Each of those Motions for Summary Judgment are incorporated together with the attached exhibits within the Petitioners’

Petition. The Petitioners specifically referenced the violations of W.Va. Code §36B-4-109 and the remaining provisions of Chapter 36B, the UCIOA. There is no basis for the claims of the Respondent that the Motions for Summary Judgment of the Petitioners, Plaintiffs below, do not support the arguments made by the Petitioners within their Petition. It is also necessary for the ICA to recognize that the Order amending September 5, 2019, Order entered by the Circuit Court on October 19, 2022, was after the filing of all of the other pleadings referenced and cited within the Petitioners' Petition. Based thereon, the amendment and the considerations by the Circuit Court for its amendment to the September 5, 2019, Order must necessarily include each of the pleadings filed together with documents in the Circuit Court below.

C. Reply of Petitioners to Argument of the Respondent Against Assignment of Error No. 4.

In its Order of October 19, 2022, the Circuit Court found that Camp 4 did not breach any statutory, contractual, or common law duties owed to the Petitioners by Camp 4 prior to purchase of Unit 27, from purchase in 2007 until January, 2015, and following the freeze event of January, 2015. These findings are clear error, and were the basis for the Order of the Circuit Court granting Summary Judgment to the Respondent. Petitioners' Brief and the pleadings and documents cited within the argument of the Petitioners in favor of Assignment of Error No. 4 clearly support the assignment of error.

1. Arguments Within Petitioners' Brief Support Assignment of Error No. 4.

The argument under Section D, Assignment of Error No. 4, in Petitioners' Petition clearly supports the assignment of error that the Circuit Court erred in finding that Camp 4 did not breach any statutory, contractual, or common law duties owed to the Petitioners as stated. The

Respondent had the affirmative statutory duty under W.Va. Code §36B-3-107 to keep and maintain the Common Interest community, including maintenance, repair and replacement of damaged Common Elements. The Mahers could not physically repair their unit until Camp 4 repaired the Common Elements. Camp 4 was under the affirmative duty to repair and reconstruct the Common Elements with insurance proceeds pursuant to W.Va. Code §36A-8-2. Camp 4 failed to mitigate and repair the Common Elements, and the Circuit Court erroneously failed to require the Respondent to mitigate the damages which were being incurred against the Petitioners, Plaintiffs below, by the failure of Camp 4 to reconstruct and repair the Common Elements. In part, this is based on the failure of the Circuit Court to grant the Motion for Injunctive Relief filed by the Petitioners in 2016. The Circuit Court below then granted Summary Judgment to the Respondent, Camp 4, in denying monetary damages and other appropriate relief available to the Petitioners, Plaintiffs below, pursuant to the UCIOA, and specifically under W.Va. Code §36B-4-117. Petitioners' Petition points to the various pleadings filed before the Circuit Court which supported the statutory, contractual, and common law duties owed to the Petitioners by Camp 4. The Petitioners point out that the arguments have previously been made before the Circuit Court, and reference is made to those pleadings within Petitioners' Petition. Clearly, the Circuit Court erred as stated in Assignment No. 4.

2. Reply to Claims of the Respondent of Lack of Legal Authority to Identify Error Committed by the Circuit Court

The Petitioners rely upon Chapter 36B, the UCIOA, and each of the provisions cited within the Petitioners' Petition and within this Reply. Petitioners also rely upon the supporting documentation, legal citations, and exhibits attached to the pleadings incorporated by reference within Petitioners' Petition filed with the ICA and each of the pleadings cited and referenced

within the various pleadings filed in the Circuit Court below. The Respondent acknowledges in FN 12 of its Brief that the Circuit Court ruled that Petitioners could not recover monetary damages for repairs to the Common Elements at Camp 4. Based thereon, not only was there no incentive for the Petitioners, Plaintiffs below, to repair the Common Elements, but the Petitioners, Plaintiffs below, had no statutory duty or obligation to repair the Common Elements as apparently now demanded by Camp 4 and as argued by Camp 4 in its Response to the Petitioners' Petition before the ICA. The duty was on Camp 4 to repair the Common Elements pursuant to W.Va. Code §36B-3-107. Camp 4 cannot allocate to others this duty.

Contrary to the arguments of Camp 4 in its Response, the Respondent took over the duties and the obligations of the original developer in contracting with Branch and Associates, Inc., in 2010 for a major overhaul of the Common Elements at Camp 4. Camp 4 thereby took over the duties of the "vendor" in having failed to require Intrawest Snowshoe Development, Inc., to perform its statutory and common law obligations of repair in a timely manner. The support for these allegations are contained within the Amended Complaint filed on behalf of the Petitioners, Plaintiffs below. Petitioners dispute the arguments of the Respondent and affirmatively state that *Chamberlaine & Flowers v. McBee*, 177 W.Va. 755, 758, 356 S.E. 2d 626, 629 (1987) and *Thacker v. Tyree*, 171 W.Va. 110, 297 S.E. 2d 885 (1982) do apply to the duties of Camp 4 to the Petitioners, the Plaintiffs below, the Mahers. That position is also supported by the pleadings cited and referenced within Petitioners' argument under Assignment of Error No. 4.

3. The Circuit Court's Order Directing Petitioners, Plaintiffs Below, to File an Amended Prayer for Injunctive Relief Demonstrates the Error of the Circuit Court in Having Failed to Grant the Motion of Plaintiffs Below for Injunctive Relief in 2016.

By the Circuit Court having denied the Motion for Injunctive Relief filed by the Petitioners, Plaintiffs below, in 2016, the Court failed to require Camp 4 to mitigate the damages which continued to accrue from 2015 through the present. The Circuit Court then erroneously dismissed the claims of the Petitioners, Plaintiffs below, for compensatory damages in violation of the UCIOA, specifically under W.Va. Code §36B-4-117, which should have been interpreted pursuant to W.Va. Code §§36B-1-111,112, and 113. The rights of the Petitioners must be liberally construed and administered requiring the good faith of the Association to provide relief to the innocent purchasers, the Mahers, when the Respondent, Camp 4, fraudulently concealed the known latent construction defects, building code violations, and fire code violations as found by Ed Roach, the architect for Camp 4 in 2010. Appx. p. 3482-3505. The argument related to the required filing of the Amended Prayer goes back to the Order of the Circuit Court dismissing the monetary damages claims of the Plaintiffs in dismissing Counts III and IV of Petitioners' Amended Complaint leaving only injunctive relief. This Order violates the rights of the Plaintiffs under W.Va. Code §36B-4-117, W.Va. Code §36B-3-107, and W.Va. Code §36A-8-2 under the requirements of W.Va. Code §§36B-1-111, 112, and 113.

V. CONCLUSION

The arguments of the Respondent within their Response are pure fabrications and questions of fact which should go to a jury for damages claims by the Petitioners. Camp 4 must be made to prove its unsupported misrepresentations as questions of fact to a jury. Those include failure to send mailings to the local address of the Petitioners; failure to perform the statutory duties of repair required by the UCIOA; the failure of the Respondent to provide statutory notice to a prospective purchaser under W.Va. Code §36B-4-109; the violations of the Petitioners' statutory rights by the Respondent claiming a duty upon the Petitioners to repair the Common

Elements while the Respondent Association actually destroyed the Common Elements supporting Unit 27 then refused to repair the damage after the freeze event over the past eight (8) years. Petitioners are left with a condominium without value.

Injunctive relief under the Declaration does not make the Petitioners whole. Injunctive relief does not correct the willful failure of Camp 4 to comply with its statutory duties; for its negligent affirmative conduct; for misfeasance and malfeasance; for fraud and misrepresentation; and for concealment of latent construction defects which are in fact code violations contemplated within W.Va. Code §36B-4-109. The Petitioners have suffered significant and continuing damages as a direct result of the affirmative conduct of the Respondent by their actions and their inactions in refusing to comply with the provisions of the UCIOA. The Orders of the Circuit Court of Pocahontas County, West Virginia, should be reversed with instructions to reinstate the damages claims of the Petitioners, Plaintiffs below, and to allow the claims made by the Petitioners within their Amended Complaint to go forward to a jury.

For these reasons, and for those reasons set forth within the Petitioners' Brief, the judgment ordered by the Circuit Court in favor Camp 4 Condominium Association, Inc., should be reversed with directions and instructions to the Circuit Court.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

The undersigned, counsel of record, does hereby certify that I served this, *REPLY BRIEF OF PLAINTIFFS*, on this the 20th day of April, 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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