IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DAVID G. MAHER and AMY C. MAHER,	)	
Plaintiffs Below, Petitioners	)	
vs.	)	**No. 22-ICA-249**
CAMP 4 CONDOMINIUM ASSOCIATION, INC.,	)	
Defendant and Third-Party Plaintiff Below, Respondent	)	

Appeal from the Order of the Circuit Court of Pocahontas County (No. 15-C-55) dated September 5, 2019, as Amended by order dated October 19, 2022

RESPONDENT'S BRIEF

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A. The Circuit Court did not err in concluding that the gist of the action doctrine barred Petitioners' tort claims, and Assignments of Error Nos. 1 and 3 should be rejected. 18

B. The Circuit Court correctly determined that the Association does not owe a duty to prospective purchasers pursuant to W.Va. Code §36B-4-109 to disclose latent construction defects, and Assignment of Error No. 2 should be rejected. 24

1. The Circuit Court correctly determined that W.Va. Code §36B-4-109 does not require the Association to disclose construction defects, latent or otherwise. 24

2. Petitioners offer no argument in support of their contention that the Circuit Court erred in its analysis of W.Va. Code §§36B-1-111 and 36B-1-113. 29

3. Other filings incorporated by reference in Petitioners' Brief provide no support for their appeal to reverse the Circuit Court. 29

C. Petitioners do not provide any justification to reverse the Circuit Court's Order in their discussion of Assignment of Error No. 4, and therefore the Order should be affirmed. 30

1. Petitioners' Brief relative to Assignment of Error No. 4 contains no discussion of the basis for their contention that the Circuit Court erred. 31

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I. COUNTER STATEMENT OF THE CASE

The Camp 4 Condominium Association, Inc. ("Association") offers this Counter Statement of the Case to correct inaccuracies and omissions in Petitioners' Statement of the Case. This Counter Statement is necessarily extensive to provide a coherent understanding of the pertinent events and to emphasize the extent to which Petitioners' mischaracterize, misinterpret, or misrepresent the evidence. The facts and procedural history that are pertinent to the Circuit Court's ruling are narrow, however the Association is constrained to provide this Counter Statement in order to fully respond to the Petitioners' Statement, and to provide this Court with the proper history and context of the case.

A. Statement of the Facts

1. Establishment and Governance of Camp 4 and the Association

The Camp 4 Condominiums ("Camp 4") is a common interest community created pursuant to the Uniform Common Interest Ownership Act, W.Va. Code §36B-1-101 et seq. ("UCIOA") and the Declaration Establishing Camp 4 condominium at Snowshoe Mountain Resort, Pocahontas County, West Virginia ("Declaration"). W.Va. Code §36B-2-101(a); A.R. 2727-2805. The Camp 4 Condominium Association, Inc. ("the Association") is a unit owners' association that was created by Intrawest Snowshoe Development, Inc., ("Intrawest") for the purposes set forth in the UCIOA and in the Declaration. *See* A.R. 2742-2743. Camp 4 consists of six buildings containing 29 condominium units which are "held, sold and conveyed subject to the covenants, conditions, restrictions, reservations, easements, assessments, charges, liens and other provisions of this Declaration." A.R. 2733-2734. Petitioners own Unit 27, located in Building 5. *See* A.R. 42-43, 1366, 1434. Membership in the Association is comprised of the condominium unit Owners. *See* A.R. 2738. Prospective purchasers are not Owners and are not afforded rights of membership under the Declaration.

A three person Executive Board ("Board") that is elected at annual meetings acts on behalf of the Association. *See* A.R. 2745-2746. At all times relevant herein, the Association contracted with a business manager, Thomas Roat, and maintenance managers, Greg Riffe or Mike Cumashot. *See* A.R. 2817-2819, 2821.

2. Applicable Provisions of the Declaration

The Declaration states that, "the Association, or its duly designated agent, shall maintain the Common Elements … in good order and repair and shall otherwise manage and operate the Common Elements **as it deems necessary or appropriate,**" A.R. 2754 (emphasis added). It also states the Association **may** "…modify, add to, repair, replace or renovate any improvements that are located on or constitute part of any Common Element." *Id*. (emphasis added). The Association may, but is not obligated to "make capital improvements, repairs and replacements to the Common Elements." A.R. 2743. Nothing in the Declaration requires the Association to repair latent construction defects, or violations of health, fire, or building codes.

Owners are obligated to pay Assessments that are used for the Association's Common Expenses. *See* A.R. 2747-02750. The Declaration places financial responsibility for repairs and maintenance of the Common Elements on the Owners. *See* A.R. 2735, 2748, 2750. Any expense caused by the negligence or misconduct of an Owner or an Owner's guest is the responsibility of that Owner. *See* A.R. 2750-2751. "Guest" includes an Owner's lessee, customer, or invitee. A.R. 2735.

The Declaration includes a provision stating, "the Association shall ensure that all interior Common Elements are sufficiently heated to prevent the freezing of water and sewer lines serving the Condominium." A.R. 2754. However, the Third Amendment to the Declaration requires the

owners to "ensure that its Unit is sufficiently heated to prevent the freezing of water and sewer lines serving the Condominium." A.R. 2843.

An individual owner can enforce the provisions of the Declaration relative to the Association or the Common Elements only through a proceeding for injunctive relief. *See* A.R. 2773. In contrast, the Association can bring either a suit for damages or pursue injunctive relief. *See id.*

3. Petitioners' Purchase of Unit 27

Petitioners purchased Unit 27 from Defendants Oswald and Geraldine Zeringue, and acquired ownership of that Unit pursuant to a Deed from the Zeringues dated November 16, 2007. *See* A.R. 813-821. The Association was not a party to this transaction. The Petitioners did not become members of the Association until they accepted the Deed. *See* A.R. 2738.

When a unit Owner is selling their condominium unit to a prospective purchaser, the Association is to provide a resale certificate to the selling owner within 10 days of the owner's request, which the selling owner is to then provide to the prospective purchaser. *See* W.Va. Code §36B-4-109(a)-(b). The certificate is required to include, in pertinent part:

> (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;

W.Va. Code §36B-4-109(a)(11) (emphasis added).

The Board did not have knowledge of any health or building code violations at the time of the Petitioners' purchase of Unit 27. *See* A.R. 3080-3081, 4886. As such, the resale certificate provided to the Petitioners stated that the Board did not have knowledge of any health or building code violations.[1] *See* A.R. 3082-3085.

[1] Petitioners claim that they never received this resale certificate. *See* A.R. 3049, 3072, 3087.

The Petitioners rely upon reports of Stephen Barnum, Williamson & Associates, and Invizions to suggest that there were known code violations at Camp 4 in or before 2007. *See Petitioners' Brief, p. 6.* First, the Williamson and Invizions reports were commissioned by Intrawest, and Petitioners have never submitted any evidence that the Association was provided with copies of these reports prior to their purchase of Unit 27. Second, these reports are not citations from a code authority having jurisdiction, nor do they cite any code provisions or state that any code provisions were violated. *See* A.R. 74-107. Further, there were no concerns about fire rated construction raised prior to Petitioners' purchase of Unit 27. *See* A.R. 4563.

Contrary to Petitioners' distorted reading, the record actually shows efforts of remediation and repairs performed at Camp 4 prior to their purchase of Unit 27 that mitigated the occurrences of pipe freezes. The Williamson report, dated February 11, 2005, involved an inspection of Units 6, 14, and 35, and noted insulation that had been positioned over the water lines, vents that had been added to walls and ceilings to allow heat transfer to where freezing problems had occurred, and sprinkler lines that had been repositioned. *See* A.R. 4210. Recommendations in the Invizions report to install insulation over the affected areas were carried out by the original contractor, Branch & Associates, Inc. ("Branch"), in the spring of 2005. A.R. 4222, 4229-4254. Branch also performed work in the spring of 2005 to seal off cold air infiltration, augment the insulation, and spray expandable foam insulation into the uninsulated areas of the Phase 2 units identified by Williamson & Associates. *See id.*

These measures were effective in addressing pipe freezes that had occurred at Camp 4 prior to the Petitioners' purchase of Unit 27. In fact, the problem log relied upon by Petitioners reflects a decline in pipe freeze incidents after these measures were taken. There were no sprinkler line

freezes documented for more than two years before Petitioners purchased unit 27 and no sprinkler line freezes were documented from January of 2005 until January of 2010. *See* A.R. 865-869.[2]

4. Petitioners' Pipe Freeze Incident

In January of 2015, seven years and two months after the Petitioners purchased Unit 27, a sprinkler line froze and burst above the ceiling of the ground floor foyer and powder room due to a lack of heat because the heater located in the foyer had been turned off. *See* A.R. 2901-2954. Greg Riffe was in Unit 27 approximately an hour before the water began flowing from the burst sprinkler line, replacing a fuse in the Petitioners' furnace. *See* A.R. 2960-2961. This work was not performed under Mr. Riffe's contract with the Association. *See* A.R. 2959, 2962.

Kim Martin, Petitioners' housekeeper, discovered that the electric wall heater in the foyer had been turned off. *See* A.R. 2961. She turned the heater back on by removing the faceplate and turning the stem, as the control knob had been previously removed by Mr. Riffe. *See* A.R. 2966-2969. Renters were in Unit 27 just prior to her entry into the unit to clean it. *See* A.R. 2966-2967. There has never been any evidence that anyone other than the Mahers and their guests/lessees/invitees were in Unit 27 prior to when the pipe froze. The Association appropriately and lawfully assessed fault against the Petitioners under the terms of the Declaration. *See* A.R. 54-55, 2735, 2750-2751.

Notwithstanding the Petitioners' clear responsibility for the pipe freeze, the Association's restoration contractor, Perfection Plus, responded immediately to remove water damaged drywall and to dry the Unit after the pipe freeze. *See* A.R. 49. The sprinkler line itself was repaired within a couple of days. *See* A.R. 422.

[2] Pipe freezes are occurred in the sprinkler closets in 2006, which are separate structures outside of the buildings, and were caused by failures of the heaters located inside of the closets. *See* A.R. 865-869.

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

On May 28, 2015, Petitioner David Maher notified Tom Roat that "fire safety issues and construction deficiencies" were found in Petitioners' Unit 27 during an inspection by an insurance representative and Petitioners' contractors. A.R. 2970. Mr. Maher almost immediately threatened to proceed with "actions via the WV State Fire Marshal's office as well as the WV Attorney General." A.R. 2972.

The Board hired architect Ed Roach to inspect and report on the firewall issues and draw up specifications so work could begin in Petitioners' unit. *See* A.R. 2974, 2976. Mr. Roat advised Mr. Maher, "If you have a contractor lined up to repair your unit he can do the firewall and Homeowners' Association will cover the cost." *Id*. On June 23, 2015, Mr. Roach inspected multiple units at Camp 4 and concluded that drywall in the interstitial spaces was not properly installed. *See* A.R. 2978-2992.[3] Mr. Roat advised Mr. Maher of the inspection results and told him the Association would begin work with his unit as soon as Mr. Roach's report and specifications were received. *See* A.R. 2993.

The Association hired Streamline Painting to make the repairs it believed were necessary at that time based on information from Mr. Roach and the Fire Marshal, and to replace the drywall that had been damaged by the pipe freeze. *See* A.R. 2994-2995, 2999, 3005. The Fire Marshal was to approve the work Streamline performed. *See* A.R. 3005.

Mr. Maher ordered work to cease and desist based on the incorrect assertion that Streamline was not licensed to perform the work, even though the Association provided evidence that Streamline was properly licensed.[4] *See* A.R. 3026, 3028-3029. Petitioners also were advised that

[3] Assistant State Fire Marshal Tim Mouse accompanied Mr. Roach on this inspection.
[4] There is no special license required for fire separation assemblies. *See* A.R. 3040-3041.

the proposed work by Streamline was approved by the Fire Marshal. *See* A.R. 3028. Nevertheless, Petitioners refused to allow the work to proceed in order to preserve evidence. *See* A.R. 3008-3009. They also rejected an offer of settlement from the Association's insurer. *See* A.R. 3264-3265. These facts cause Petitioners' claims to ring hollow, and particularly their extensive and ultimately meaningless arguments about insurance coverage.

During the time that Petitioners were obstructing and preventing repairs to their unit, repairs were made to unit 26 (adjacent to Unit 27) and approved by the Fire Marshal. *See* A.R. 472. At that time, the Fire Marshal was telling the Association that there needed to be a 20 minute separation rating, but that the work the Association was doing provided for a two hour separation. *See id*. This was communicated to Petitioners on September 4, 2015. *See* A.R. 3011-3013. Petitioners nevertheless refused to allow the work to proceed. *See id.* They never made any proposals for different contractors or a different scope of work. *See* A.R. 3013-3015.

While the Association was having the work performed by Streamline to install drywall in the interstitial spaces, Stephen Barnum, the original project architect, advised the Association that this work was unnecessary because the wall and ceiling drywall alone provided sufficient separation and was approved by the Fire Marshal. *See* A.R. 434-435. This was communicated to all Camp 4 owners, including the Petitioners, at the October 20, 2015 Annual Meeting. *See* A.R. 437.

Given the competing information from Mr. Roach, Mr. Barnum, and the Fire Marshal, the Board attempted to get clarification as to what, if anything, was required to be done at the Camp 4 condominiums, and accepted an offer from Mr. Barnum to meet with the Fire Marshal's office to obtain confirmation, clarification, and documentation that the buildings were constructed in

accordance with the code. *See* A.R. 478, 3002-3004, 3018-3021. This issue was still unresolved at the time the Petitioners filed their original Complaint.

6. The Association's Transparency Regarding Pipe Freezes, Construction Defects, and Remediation at Camp 4

Contrary to Petitioners' allegations of concealment, pipe freezes at Camp 4 were "no secret." A.R. 4198. The Petitioners' claim is contradicted by the very existence of a "problem log" that was given to the owners which lists the pipe freeze incidents at Camp 4. A.R. 03312, 3378-79. Petitioners base their claims on the voluminous minutes, budgets, letters, and other documents kept and maintained by the Association's business manager which document pipe freezes, fire rated construction defects, and the efforts to remediate those issues. The existence, extent, and publication of these documents shows the Petitioners' claims of concealment have no merit. The record before this Court establishes that the incidents and conditions the Petitioners claim were concealed from them were in fact disclosed to, and discussed with, the Camp 4 owners including the Petitioners.

Mr. Roat mailed notices, minutes, documents and correspondence to all owners using addresses provided by the owners or their real estate agents. *See* A.R. 3089-3090, 3103-3102. Information about pre-2007 pipe freezes, including the problem log, was given to all of the Camp 4 owners. *See* A.R. 3378-3379. Any one of the owners at that time could have sold their units to the Petitioners, as the Zeringues did.

Once the Petitioners became members of the Association, Mr. Roat mailed Association meeting minutes and notices to their home address in Milam, West Virginia, but used a different address to send billing statements to Petitioners, at Mr. Maher's request. *See* A.R. 3099-3100. Petitioners never informed Mr. Roat they were not receiving meeting notices or minutes. *See* A.R. 3102.

Following a round of pipe freezes in the winter of 2009-2010, letters went to all owners, including the Petitioners, on July 9, 2010, advising that the Board had hired an architect, Ed Roach, to determine the causes of the pipe freezes; the Fire Marshal had identified several problems that need to be corrected; the Fire Marshal's report and Mr. Roach's report would be made available to the owners; and that a special meeting was to be held on August 14, 2010. *See* A.R. 3124-3125. A subsequent letter was sent to all owners on July 27, 2010, including the Petitioners, with the findings of Mr. Roach and the Fire Marshal and copies of their reports, along with a Notice of a Special Meeting to be held on August 14, 2010 to consider ratification of a budget amendment to spend up to $500,000 to repair building defects to the Fire Marshal and/or Architect's specification. *See* A.R. 3126-3158.

The special meeting was convened and Resolutions were passed authorizing the Executive Board to repair a phase 1 and phase 2 unit to the Architect's and Fire Marshal's specifications and to amend the budget authorizing the Executive Board to spend up to $500,000 to repair building defects. *See* A.R. 3159. Petitioners did not attend this meeting, nor did they submit a proxy. *See* A.R. 3160.

At the annual meeting on October 2, 2010, Mr. Roach personally attended "to answer questions about his investigations into the problems with frozen pipes." A.R. 3161-3162. The Minutes state: "In the course of his investigation he discovered deficiencies in the fire walls separating the units." *Id*. Mr. Roach suggested at the meeting that all owners keep the temperature in their units at 65 degrees when unoccupied. *See id*. Petitioners did not attend this meeting, nor did they submit a proxy. *See* A.R. 3160.

A letter was sent to the owners on December 9, 2010 "to impress upon everyone the importance of maintaining the heat in the condominiums at 65 [degrees] F during the winter."

A.R. 3164-3165. The letter informed the owners that Branch had conducted an inspection, planned to conduct another inspection, and that it "indicated a willingness to correct the problems identified by the Fire Marshall." *Id.* The letter further informed the owners that the Association's attorney advised the Association to work with Branch to give them an opportunity to correct the problems and that the goal was to reach an agreement with Branch. *See id.*

On September 21, 2011, Mr. Roat sent yet another letter to the owners providing notice of the 2011 annual meeting and enclosing the agenda for that meeting, the budget for the year ending 11/30/2012, and also the minutes from the 2010 annual meeting, discussed above. *See* A.R. 3166-3175. The letter advised the owners, including Petitioners, that the Board and its attorney "have been undergoing tedious negotiations" with Branch, and that Branch "expressed a willingness to correct many of the problems that have been identified by our architect and the fire marshal." A.R. 3166. The budget contained a line item stating "The Executive Board will spend what is necessary to correct the cold air intrusion and fire code deficiencies in the buildings." A.R. 3175.

Detailed discussions occurred at the annual meeting held on October 1, 2011 related to pipe freezes, fire rated construction, and the negotiations with Branch. *See* A.R. 3176-3178. The Petitioners would have heard these discussions if they had attended this meeting, but they failed to do so. *See* A.R. 3179. The Minutes of this meeting were mailed to all owners, including Petitioners. *See* A.R. 3180-3181.

Branch performed work in 2011 and 2012, with the assistance of Mr. Barnum and Omni, and addressed several conditions identified in the Roach reports by installing rated light covers over the second floor light fixtures, attic access doors, re-distributing insulation, sealing various penetrations in the attic walls, and installing rock-wool insulation in the gap at the top of the party

walls.[5] *See* A.R. 3224-3229. Thus, to the extent these conditions existed prior to the Petitioners' pipe freeze in 2015, they were repaired or modified. Consistent with their treatment of the Williamson and Invizions reports however, Petitioners misleadingly claim that conditions identified in the Roach reports existed at the time of their pipe freeze in 2015. Only three pipe freezes occurred after Branch completed its work, including the Petitioners' pipe freeze, and all three were caused by heat loss due to an open door, power outage, or a heat source being turned off. *See* A.R. 54.

The Association continued to discuss, disclose, and provide information related to pipe freezes and fire rated construction from 2012 up through the time of Petitioners' pipe freeze. At the 2012 annual meeting it was discussed that insurance expenses would be over budget due to a premium increase related to water damage claims. *See* A.R. 3182. Unresolved issues from Branch's work were discussed, including a four inch strip of drywall that had been removed to install rock-wool into the gap between units and had not been replaced. *See* A.R. 3185. Petitioners did not attend this meeting and did not submit a proxy; however, the minutes from this meeting were mailed to them by Mr. Roat along with the Budget for Year Ending 11/30/2014. *See* A.R. 3186-3194. The Budget contained a line item stating "The Executive Board will spend what is necessary to correct the cold air intrusion and fire code deficiencies in the buildings." A.R. 3194.

The Petitioners also failed to attend the 2013 and 2014 annual meetings, during which discussions were held about pipe freezes, construction deficiencies, and remediation, although, as with the other meetings, the minutes and budgets were sent to Petitioners. *See* A.R. 3195-3216.

[5] The installation of the rockwool insulation addressed earlier findings of Williamson and Invizions that there were gaps in the party walls apparently leading to cold air flow through those areas, also rendering that condition non-existent, at the time of Petitioners' pipe freeze in 2015.

The small mountain of evidence this Court has before it clearly demonstrates that information was not concealed from the Petitioners. The pipe freezes, construction issues, and efforts of remediation were all openly discussed at meetings and provided in documents with the intent it would be heard and/or received by all Owners, including the Petitioners. As Mr. Roat testified: "we did everything we could to keep the owners alerted, aware of what was going on." A.R. 3097. There was no attempt to conceal information. *See* A.R. 2822-2833, 2839-2840.

The Association's transparency continued after the Petitioners' pipe freeze in 2015. The information and documents the Petitioners cite and rely upon were given to them by Mr. Roat, the Association's business manager. *See* A.R. 44, 46, 49, 50, 54-61. In one glaring example, a letter from the Association directly to the Petitioners states; "The attached report from our architect, Ed Roach, details the problem." A.R. 54. Petitioners' claims of concealment are thoroughly contradicted by the record and have no merit.

B. <u>Procedural History</u>

Petitioners filed their original Complaint in this case on December 30, 2015, against the Zeringues, Mr. Roat, and the Association. *See* A.R. 1-175. The Complaint asserted claims for Breach of Legal Duty and Declaration of Covenants, Negligence, Fraud, and Civil Conspiracy against the Association. *See* A.R. 12, 17, 22. The Complaint did not assert a claim for injunctive relief, nor did it request such relief in its Prayer. *See* A.R. 1-175. While the parties were still in the early stages of discovery, and before expert reports were exchanged, the Petitioners filed a motion seeking injunctive relief, including a request that the Court direct the Association to "bring Unit 27 of the Camp 4 Condominiums into compliance of the West Virginia Fire Marshal, the International Builders Code, and the contractual provisions of the Declaration of Camp 4 Condominiums." A.R. 226. Recognizing that the Petitioners had elected to pursue monetary damages in their Complaint rather than injunctive relief, the Circuit Court denied this Motion. *See* A.R. 561-566.

The Circuit Court found that "[t]he Plaintiffs do not make a claim equitable relief in their Complaint" and that they had chosen a remedy at law. A.R. 562, 566.

On March 29, 2017, the Petitioners filed an Amended Complaint, once again asserting the claims for Breach of the Declaration/Breach of Duty, negligence, and fraud against the Association, but also adding a claim for Civil Conspiracy that encompassed Mr. Barnum/Omni, as well as several insufficiently pled claims against the Association's insurers that asserted various coverage claims and conspiracies, some of which purported to envelope the Association. *See* A.R. 766-803. The Amended Complaint, like the original, sought monetary damages, not injunctive relief. *See* A.R. 800-803.

Following the close of discovery, the Association filed its Motion for Summary Judgment along with supporting Memorandum of Law and Exhibits. *See* A.R. 2664-3281. The Association's Motion sought dismissal of Petitioners' claims on several bases including, as is pertinent to this appeal, that the Association did not owe a duty to the Petitioners to disclose prior pipe freezes, construction defects, water damage, or incidents and repairs affecting other units because it was not a seller/vendor of the property, and that the Petitioners were precluded from making tort claims against the Association by the gist of the action doctrine. *See* A.R. 2665-2666. The Association also filed a Reply Memorandum and Supplemental Memorandum in support of its Motion for Summary Judgment. *See* A.R. 4540-4551, 4552-4581. The Circuit Court held a hearing on July 17, 2019. *See* A.R. 4584-4681. Additional briefing was filed thereafter by the Petitioners and the Association at the request of the Circuit Court. *See* A.R. 4682-4744, 4811-4881).

On September 5, 2019, the Circuit Court entered an Order granting in part, and denying in part, the Association's Motion for Summary Judgment.[6] *See* A.R. 4882-4892. The Circuit Court's

[6] Petitioners' civil conspiracy claim was dismissed by the Circuit Court's Order of June 8, 2020. *See* A.R. 5336-5341. That Order is not a subject of this appeal.

rulings with respect to the claims asserted in Count III sounding in negligence, and Count IV sounding in fraud, are pertinent to this appeal. The Petitioners asserted two separate claims for fraud, one alleging that the Association fraudulently concealed construction defects and code violations from them prior to their purchase of Unit 27, and one alleging that those conditions were concealed after the Petitioners purchased Unit 27 and became members of the Association. The Court disposed of these claims in different ways.

The claim for fraud relative to the Petitioners' purchase of Unit 27 was dismissed because the statute governing the Association's disclosure obligations, West Virginia Code §36B-4-109, only required the Association to disclose whether the Executive Board had knowledge of health or building code violations, and the Petitioners failed to provide a scintilla of evidence that the Board had any such knowledge. *See* A.R. 4886. The fraud claim relative to the time period after the Petitioners became members of the Association was dismissed, along with the Petitioners' negligence claim, pursuant to the gist of the action doctrine. *See* A.R. 4888-4890. The Circuit Court found that any duties the Association owed to the Petitioners arose from the Declaration – the contract between the parties – and that the Petitioners' tort claims were duplicative and inextricably intertwined with their contract claims. *See* A.R. 4889-4890. The Circuit Court did not make any determinations as to whether the Association breached any duties arising under the Declaration. It simply held that the only duties owed to the Petitioners "were created and grounded" in the Declaration. A.R. 4890.

Two subsequent motions filed by the Petitioners also are pertinent to this appeal. First, on December 13, 2019, the Petitioners filed a Motion to Amend Plaintiffs' Complaint to Re-Allege and to Include Statutory Claims. *See* A.R. 5088-5100. Petitioners filed this Motion in an effort to assert "statutory" claims against the Association. The Motion makes clear that they had either

never asserted such claims, or had asserted those claims against other parties that were dismissed. *See* A.R. 5089-5091. Petitioners withdrew this Motion, but it is relevant here to the extent that the Petitioners advance arguments about statutory claims that were never asserted, as shown by the Petitioners' Motion which contemplated the assertion of such claims but was withdrawn. Second, Petitioners filed a "Motion for Reconsideration of Order from December 4, 2019, WV Code 36B-4-109," which was actually a motion seeking reconsideration of the Circuit Court's Order entered on September 5, 2019 granting in part and denying in part the Association's Motion for Summary Judgment, and specifically the Circuit Court's ruling as to West Virginia Code §36B-4-109. This Motion was denied pursuant to the Circuit Court's Order of June 2, 2020, and the arguments and evidence should not be considered here for the reasons articulated by the Circuit Court. *See* A.R. 5331-5335.

The result of these rulings was that the Circuit Court dismissed any claims pursuant to which the Petitioners could recover monetary damages, and left the Petitioners with the sole remedy of injunctive relief. However, because the Petitioners did not assert a claim for injunctive relief, nor did they request such relief in their Amended Complaint, the Association moved for summary judgment as to the remaining claim against it on the basis that the Petitioners would not be able to establish an element of their cause of action – namely, damages. *See* A.R. 5377-5510. The Circuit Court not only denied this Motion, but it *sua sponte* permitted the Petitioners to file an amended pleading to assert a claim for injunctive relief. *See* A.R. 5541-5543. Petitioners filed an Amended Prayer for relief on October 25, 2022, in which they asserted a claim for injunctive relief against the Association for the first time in a complaint, more than seven years after the pipe freeze in their condominium. *See* A.R. 5555-5562.

II. SUMMARY OF ARGUMENT

The Circuit Court's Order of September 5, 2019, as amended by the Order dated October 19, 2022 should be affirmed. The Petitioners' legally deficient Brief fails to provide any basis upon which to reverse the Circuit Court. Instead, it reveals the Petitioners' misguided attempts to recover damages from the Association under theories of liability that are more properly asserted against a developer, architect, builder, and seller of the condominium at issue. None of the duties that would attach to parties in those roles are owed by a homeowners association, and none of the damages Petitioners sought are recoverable against the Association.

The only time that the Association owed any duties to the Petitioners was after they purchased their condominium and became members of the Association, and any duty owed by the Association arose from the Declaration, which is a contract under the West Virginia law. The Declaration defines and limits the remedies available to a member of the Association, and provides that the provisions of the Declaration applicable here can only be enforced through an action for injunctive relief. The recovery of monetary damages is not authorized by the Declaration, although a prevailing party can recover their attorneys' fees and other costs. Rather than pursue the remedy expressly provided to them, the Petitioners instead asserted various tort based claims against the Association in an attempt to recover monetary damages. The Circuit Court correctly held that these tort claims were barred by the gist of the action doctrine under well-established West Virginia law.

The Association did not owe any duties to the Petitioners related to the purchase of their condominium unit because the Petitioners were not members of the Association at that time, and because the Association did not sell the condominium unit to the Petitioners. The only obligation the Association had with regard to that transaction was to provide a resale certificate to the seller as specified by West Virginia Code §36B-4-109. Petitioners argue that the Association was

required to directly disclose to them information regarding prior pipe freezes, construction defects, code violations, and other conditions affecting the property. This is contrary to what is called for by the unambiguous statutory language. The information required to be provided by the Association, as is pertinent to this appeal, is a statement as to whether the Executive Board has knowledge of health or building code violations. There was no such knowledge at the time the Petitioners purchased their condominium, which was accurately reflected in the resale certificate that was provided. Accordingly, the Circuit Court correctly held that the Association did not owe any duties to the Petitioners relative to the purchase of their condominium.

The Petitioners' Brief fails to provide this Court with any factual or legal basis to reverse the Circuit Court's rulings. Instead, it attempts to persuade this Court to use its *de novo* standard of review in order to render a verdict against the Association and grant relief that is not available at this procedural stage. This Court need not, and should not, engage in such an exercise. The extensive and inaccurate factual information set forth in Petitioners' Brief has no value to this appeal. The Circuit Court's rulings do not require an extensive review of the record to affirm.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter is appropriate under Rules 18(a) and 20 of the West Virginia Rules of Appellate Procedure, as all parties have not waived oral argument, and one of the issues presented in this appeal has not previously been decided. Specifically, the West Virginia appellate courts have not considered the question of whether, pursuant to West Virginia Code §36B-4-109, a homeowner's association owes a duty to a *prospective purchaser* to disclose latent construction defects in a Resale Certificate. Petitioners herein argue that this additional duty should be imposed on the Association in spite of the unambiguous language of the statute that requires the *seller* to provide to the prospective purchaser 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." W.Va. Code §36B-4-109(a)(11) (emphasis added). As this is a case of first impression on this issue, oral argument is appropriate in accordance with Rule 20(a).

IV. ARGUMENT

A. The Circuit Court did not err in concluding that the gist of the action doctrine barred Petitioners' tort claims, and Assignments of Error Nos. 1 and 3 should be rejected.

Petitioners' first and third Assignments of Error each argue that the Circuit Court erred in dismissing their tort based claims set forth in Counts III and IV of the Amended Complaint. The Association will address both Assignments of Error here because they raise the same issue and make the same arguments.

All of the tort claims Petitioners asserted against the Association for alleged acts or omissions that occurred after they purchased Unit 27 arise out of the parties' contractual relationship established by the Declaration. There is no dispute that "the Plaintiffs and the Association are contractually bound by the Declaration . . ." and that the Declaration "is a contractual document binding both, the Plaintiffs and the Defendant Association." A.R. 3232-3233. West Virginia courts consider Declarations between homeowners associations and the owners to be contracts. *See Conkey v. Sleepy Creek Forest Owners Ass'n.*, 240 W.Va. 459, 463, 813 S.E. 2d 112, 116 (2018).

It is well-settled that tort claims are barred under the gist of the action doctrine, which "is triggered when the asserted duty of care derives, in fact, from a contract: 'If the action is not maintainable without pleading and proving the contract, where the gist of the action is the breach of the contract, either by malfeasance or nonfeasance, it is, in substance, an action on the contract, whatever may be the form of the pleading.'" *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*,

239 W.Va. 549, 556, 803 S.E. 2d 519, 526 (2017) (quoting *Cochran v. Appalachian Power Co.*, 162 W.Va. 86, 92, 246 S.E.2d 624 (1978)). The gist of the action doctrine is applied "to prevent the recasting of a contract claim as a tort claim." *Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, LLP*, 231 W.Va. 577, 586, 746 S.E.2d 568, 577 (2013).

> Under this doctrine, recovery in tort will be barred when any of the following factors is demonstrated:
>
> > (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

Id. (citations omitted). Furthermore, "a tort claim arising from a breach of contract may be pursued only if 'the action in tort would arise independent of the existence of the contract.'" *Backwater Properties, LLC v. Range Resources-Appalachia, LLC*, 2011 U.S. Dist. LEXIS 48496 at *16 (N.D. W.Va. 2011) (cited in *Gaddy Engineering v. Bowles Rice*, 231 W.Va. at 586, 746 S.E.2d at 577).

In this case, the Petitioners asserted both contract and tort claims against the Association. *See* A.R. 776-786. However, as the Circuit Court correctly found, the relationship between the Petitioners and the Association is governed by, and arises solely from, the Declaration. *See* A.R. 4889-4890. The Declaration itself expressly provides that the subject property "shall be held, sold and conveyed subject to the covenants, conditions, restrictions, reservations, easements, assessments, charges, liens and other provisions of this Declaration." A.R. 2733-2734. It has been widely held that restrictive covenants on real property are contractual in nature. *See, e.g., Warrender v. Gull Harbor Yacht Club, Inc.*, 747 S.E.2d 592, 600 (N.C. App. 2013) (stating that "restrictive covenants are contractual in nature, and that acceptance of a valid deed incorporating covenants implies the existence of a valid contract with binding restrictions"); *Moss Creek Homeowners Association v. Bissette*, 689 S.E.2d 180 (N.C. App. 2010) [affirming that "restrictive

covenants are contractual in nature" and "[w]here the language of a contract is plain and unambiguous . . . [a] court may not ignore or delete any of its provisions, nor insert words into it, *but must construe the contract as written"* (alterations and emphasis in original) (citations omitted)]; *Twin Oaks Condominium Association v. Jones*, 2010 Conn. Super. LEXIS 95 at *36 (Sup. Ct. Conn. 2010) (holding that the declaration "operates in the nature of a contract, in that it establishes the parties' rights and obligations"), *affirmed by Twin Oaks Condominium Association v. Jones*, 30 A.3d 7 (Conn. App. 2011); *Wallace v. St. Clair*, 147 W.Va. 377, 388, 127 S.E.2d 742, 750 (1962) (stating that restrictive covenants will be enforced "to the same extent . . . [as] any other valid contractual relationship").

Here, all of the required factors for barring tort liability pursuant to the gist of the action doctrine are satisfied. The relationship between the Petitioners and the Association only exists because the Petitioners are members of the Association, which was created, formed, and is governed pursuant to the Declaration. The Petitioners have asserted no tort claim against the Association for acts or omissions that occurred after they purchased unit 27 that would exist independent of the existence of the Declaration.

The Circuit Court analyzed the Counts of the Amended Complaint that were asserted against the Association – Counts II, III, and IV – and found that the Petitioners recast the contract claims asserted in Count II as tort claims in Counts III and IV. *See* A.R. 4888-4889. The overlapping claims in Counts III and IV assert that the Association is liable for the January 2015 pipe freeze through its acts or omissions, that it failed to repair construction defects before and after the January 2015 pipe freeze, and that it concealed information related to pipe freezes and construction defects from the Petitioners after their purchase of Unit 27. *See* A.R. 4889. The

Circuit Court correctly determined that these allegations are "duplicative of and/or inextricably intertwined" with the claims in Count II. A.R. 4889.

Based on the foregoing, the Circuit Court was correct in applying the gist of the action doctrine, and dismissing the Petitioners' tort claims. The Petitioners fail to provide any factual or legal argument that warrants a different conclusion.

Petitioners argue that the gist of the action doctrine should not protect the Association because it allegedly violated multiple provisions of the UCIOA and one provision of the Unit Property Act, which is codified at W.Va. Code Section 36A-1-1 *et. seq*. First, Petitioners fail to provide any authority for the application of the Unit Property Act here, and omit that they never alleged any breach or cause of action arising under that Act. Second, Petitioners do not set forth any argument or authority to support the proposition that violations of the UCIOA provisions give rise to a tort based claim for monetary damages. Conspicuously missing from the Petitioners' Brief is any citation to statute or case law which authorizes a private right of action for damages under the UCIOA. The UCIOA itself contains no such provision.

Petitioners argue that the provisions of Chapter 36B do not limit their claims. *See* Petitioners' Brief, p. 32. The UCIOA does not the authorize the relief that the Petitioners sought to recover from the Association, however, and this is nothing more than a tacit acknowledgment that the UCIOA does not expressly permit an aggrieved condominium owner to sue an association in tort for noncompliance with its provisions. Indeed, the only provision of the UCIOA that mentions available remedies is §36B-4-117, which provides:

> If a declarant or any other person subject to this chapter fails to comply with any of its provisions or any provision of the declaration or bylaws, **any person or class of persons adversely affected by the failure to comply has a claim for appropriate relief**. Punitive damages may be awarded for a willful failure to comply with this chapter. The court, in an appropriate case, may award reasonable attorney's fees.

W.Va. Code §36B-4-117 (emphasis added).

The statute does not define "appropriate relief" and Petitioners do not attempt to provide one. They cite no authority for the proposition that appropriate relief for a breach of the provisions of the UCIOA includes loss of use, loss of rental income, diminishment in value of Petitioners' investment, recovery of mortgage payments, interests, and other ownership expenses incurred by the Petitioners. *See* Petitioners' Brief, p. 33.

In contrast, the Declaration expressly provides for the relief that the Association or individual owners can pursue. An individual owner's appropriate relief is to seek to enforce the provisions of the Declaration by an action for injunctive relief and, if they prevail, recovery of their costs and expenses including attorneys' fees.[7] *See* A.R. 154-155. Petitioners argue that they should not be so limited because they have suffered damages due to the actions of the Association. *See* Petitioners' Brief, p. 32. The Association vehemently denies that it breached any duties that resulted in harm to the Petitioners and, in fact, maintains that any damages the Petitioners may have suffered are purely of their own making. Even if it is assumed that there was a breach, however, it would not alter the unambiguous language of the Declaration which does not allow for the recovery of monetary damages against the Association. *See Conkey v. Sleepy Creek Forest Owners Ass'n.*, 240 W.Va. 459, 464, 813 S.E. 2d 112, 117 (2018) (clear and unambiguous terms of a contracted are to be applied, not construed).

Next, the Petitioners cite to *Thacker v. Tyree*, 171 W.Va 110, 297 S.E. 2d 885 (1985) and *Chamberlaine & Flowers, Inc. v. McBee*, 177 W.Va. 755, 356 S.E.2d 626 (1987) for the proposition that the Association "has no protection by the gist of the action doctrine…" Petitioners' Brief, p. 22). Neither of these cases even mentions the gist of the action doctrine, let alone supports

[7] Owners can also participate in the governance of the Association by attending meetings, voting, and volunteering on the Executive Board, none of which these Petitioners have regularly availed themselves.

the proposition for which Petitioners cite to it. The *Thacker* and *Chamberlaine* cases discuss the common law disclosure obligations of a vendor:

> Where a vendor is aware of defects or conditions which substantially affect the value or habitability of the property and the existence of which are unknown to the purchaser and would not be disclosed by a reasonably diligent inspection, then the vendor has a duty to disclose the same to the purchaser. His failure to disclose will give rise to a cause of action in favor of the purchaser.

Chamberlaine & Flowers v. McBee, 177 W.Va. at 758, 356 S.E.2d at 629; *Thacker v. Tyree*, 171 W.Va. at 113, 297 S.E.2d at 888. These cases do not establish a tort based duty on the Association because it was not a vendor or seller of Unit 27. *See* A.R. 813-821.

Having failed to provide any legal authority for this Court to rely upon in reaching a different result than the Circuit Court, the Petitioners implore this Court to consider all of the pleadings filed from September 5, 2019 until October 19, 2022. Petitioners feign bewilderment as to why the Circuit Court certified its September 5, 2019 Order on October 19, 2022, suggesting there was an "apparent change of heart or need for clarification". Petitioners' Brief, p. 26. The Circuit Court thoroughly explained its reasoning at a hearing on August 10, 2022, at which Petitioners and their counsel were in attendance. For whatever reason, Petitioners have chosen to omit from the appellate record the Order and transcript of proceedings from that hearing. There was no change of heart or need for clarification. Rather, the Circuit Court, having made rulings that eliminated the Petitioners' ability to recover monetary damages from the Association, proposed to amend the Order of September 5, 2019 to provide the express language under Rule 54 of the West Virginia Rules of Civil Procedure making the Order appealable. The Circuit Court apparently believed that judicial economy was best served by allowing the Petitioners to appeal the Order of September 5, 2019 before going through a trial only to have the Order appealed later. As it relates to this Court's review of the Order appealed, the Circuit Court did not consider any evidence or argument filed subsequently to September 5, 2019, in dismissing the Petitioners' tort

claims. This Court need not indulge the Petitioners' suggestion to review their pleadings, motions, briefs, or exhibits filed thereafter.

Finally, Petitioners cite to *Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc.* 783 F.3d 976 (2015). *See Petitioners' Brief, p. 33*. In that case, the United States Court of Appeals for the Fourth Circuit applied West Virginia law, recognized "West Virginia's gist of the action doctrine", and after a lengthy analysis and summary of the doctrine's genesis and application, held that the doctrine barred tort claims that had been asserted in that case. *Dan Ryan Builders*, 783 F.2d at 980-982. *Dan Ryan Builders* is of no assistance to Petitioners and, in fact, supports the Association's position and the Circuit Court's Order of September 5, 2019.

B. The Circuit Court correctly determined that the Association does not owe a duty to prospective purchasers pursuant to W.Va. Code §36B-4-109 to disclose latent construction defects, and Assignment of Error No. 2 should be rejected.

Petitioners' Assignment of Error No. 2 argues that the Circuit Court erred in dismissing their claims for violation of statutory duties. More accurately, the Circuit Court determined that the Association does not owe a statutory duty to the Petitioners, and therefore did not breach any such duty. *See* A.R. 5546, 5550. Accordingly, as the Association owed no contractual, statutory, or common law duties to the Petitioners, the Court awarded judgment as a matter of law in favor of the Association on Petitioners' claim for fraudulent concealment in Count IV of the Amended Complaint. *See* A.R. 5550, 784-786. The Circuit Court's decision was correct and should be affirmed.

1. The Circuit Court correctly determined that W.Va. Code §36B-4-109 does not require the Association to disclose construction defects, latent or otherwise.

The Association's obligations relative to the sale of a condominium unit from an owner to a prospective purchaser are set forth in the UCIOA in West Virginia Code §36B-4-109. That section states, in pertinent part:

> a) Except in the case of a sale in which delivery of a public offering statement is required, or unless exempt under section 4-101(b), **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 bylaws, the rules or regulations of the association, and **a certificate containing**:
>
> (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;

W.Va. Code §36B-4-109(a)(11) (emphasis added).

The statute makes clear that the burden of providing a disclosure to the purchaser falls on the seller. The Association's role in this process is to provide a certificate to the seller that enables the seller to provide the information required by the statute to the prospective purchaser. The Association must provide the certificate within ten days of the request from the seller. *See* W.Va. Code §36B-4-109(b).

The statute further expressly defines and limits the information the Association is required to provide. It does not require the Association to disclose latent construction defects, prior property damage, prior repairs, or information related to defects, damages, incidents, or repairs affecting other units as the Petitioners allege. The only information the Association is required to provide about the condition of the unit being purchased or the associated common elements is "a statement as to whether the executive board has knowledge of any violations of the health or building codes." W.Va. Code §36B-4-109(b). Notably, it does not require a statement of whether the Executive Board has any knowledge of actual or potential fire code violations.[8] Petitioners argued that prior

[8] At the hearing held by the Circuit Court on July 17, 2019, Petitioners argued that that the West Virginia building code and fire code are the same, in an attempt to have this Court read the fire code into §36B-4-109. This claim was made without support of any legal authority, deposition testimony, or expert opinion. *See* A.R. 4641-4642, 4664, 4667. Former Assistant State Fire Marshal Edsel Smith specifically testified that the building code and the fire code are not identical. *See* A.R. 4561. Thus, any obligation to disclose fire code violations cannot be read into §36B-4-109 as that term is conspicuously absent. *See Swinson v. Lords Landing Village Condo*, 360 Md. 462, 758 A.2d 1008 (2000) (a homeowners association's duty is limited

pipe freezes in other units, water damage, and other issues with Unit 27 were not disclosed. However, §36B-4-109 does not require disclosure of any and all defects, nor did it require the Association to make disclosures directly to the Petitioners.

No witness testified that the Board had knowledge of health or building code violations at the time Petitioners purchased Unit 27. The only witness questioned on this issue was Mike Cumashot.[9] Mr. Cumashot was questioned extensively by Petitioners' counsel on various reports, inspections, and issues related to the Camp 4 condominiums prior to 2007, including pipe freeze incidents and cold air intrusion. As to the critical issue of whether the Executive Board had knowledge of health or building code violations, Mr. Cumashot testified that he was never told there were any Health Code or Building Code violations, and is not aware of the Executive Board having any such knowledge on the date of the Certificate. *See* A.R. 2682, 3080-3081.

The West Virginia Supreme Court has not interpreted or applied §36B-4-109. There is no West Virginia authority holding that a homeowners' association has a duty to disclose latent construction defects to prospective purchasers. Courts in other jurisdictions that have addressed this issue have squarely held that homeowners' associations do not owe a duty to prospective purchasers to disclose latent construction defects. These authorities were cited by the Association in its summary judgment briefing and were properly considered by the Circuit Court. *See* A.R. 2683-2685, 5547-5548.

In *Maillard v. Dowdell*, 528 So. 2d 512 (Fla. Dist. Ct. App. 1988), plaintiffs alleged that a condominium homeowners' association had a fiduciary duty to plaintiffs as prospective purchasers

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to providing the information enumerated in the statute, which did not require disclosure of housing code violation). *See* A.R. 4554.

[9] The Owners who were on the Executive Board in 2007 were all deposed in this case. Petitioners' counsel failed to question any of these witnesses as to whether they had knowledge of health or building code violations. *See* A.R. 2672-73, 2682.

to disclose defective conditions of a condominium. In that case, the court held that the statutory fiduciary duty the association owed to its members did not extend to prospective purchasers. *Maillard*, 528 So.2d at 514.

In *Kovich v. Paseo Del Mar Homeowners' Ass'n*, 41 Cal. App. 4th 863, 48 Cal. Rptr. 2d 758 (1996) the court held that "a homeowners association has no duty to tell a prospective purchaser about construction defects or the existence of a civil action against the developer to repair the defects." *Kovich*, 41 Cal. App. 4th, at 865, 48 Cal. Rptr. 2d at 759. *Kovich* involved a factual situation and statutory provisions similar to those in the instant matter. The plaintiffs had discovered construction defects after they purchased a townhouse in a common interest development, and sued the seller and the homeowners' association for negligence, fraudulent concealment, and intentional misrepresentation. *See id.*, 48 Cal. Rptr. 2d at 759. The applicable provisions of the California Civil Code enumerated the documents and information the selling owner was required to provide prospective purchasers, which the association was obligated to provide the seller within 10 days of a written request. *See id.*, 48 Cal. Rptr. 2d at 759-60 (citing Cal. Civ. Code §1368). Those statutory provisions did not include latent construction defects among the information required to be provided by the association. Accordingly, the court held that the homeowners' associations did not have a duty to disclose construction defects to prospective purchasers. *See id.*, 48 Cal. Rptr. 2d at 760.

In *Smith v. Aramark Corp.*, 2014 Tex. App. LEXIS 8258 (Tex. App. July 31, 2014), plaintiffs sued their homeowners' association and its agent for negligence, negligent misrepresentation, common law fraud, civil conspiracy, and fraud by nondisclosure, among other claims. They contended the association and its agent, who completed a re-sale certificate, breached their fiduciary duties by failing to disclose latent defects to prospective purchasers. *See id.* at *7.

The Court analyzed the provisions of the Texas Property Code governing disclosures by homeowners' associations and stated: "When a member of an owners' association is selling property to a prospective purchaser, Texas law only imposes a duty on a homeowners' association to disclose information listed in Texas Property Code section 207.003(b), which does not include latent defects." *Id.* at *9-10. It was therefore held that the association and its agent did not have a duty to disclose the existence of the latent defect. *See id.* at *10.

These analogous cases clearly demonstrate that a homeowners' association does not owe prospective purchasers a duty to disclose construction defects, and the Circuit Court properly followed them. *See* A.R. 5547-5548. Prospective purchasers are not yet members of the association and therefore, any duties the association owes to its members do not extend to them. Further, where an association's disclosure obligations are expressly defined by statute, courts do not impose greater duties upon an association than what is required by the statute.

In the instant case, the Association's disclosure obligation was expressly provided by statute in the UCIOA. The West Virginia Legislature declined to require design and construction defects to be disclosed, and the Circuit Court correctly rejected Petitioners' interpretation of the statute and declined to read into the statute terms that are "conspicuously absent." *McCoy v. Vankirk*, 201 W.Va. 718, 727, 500 S.E.2d 534, 543 (1997). *See* A.R. 4553-4554. Petitioners herein sought to have the Circuit Court impose a greater obligation on the Association and expand its duties to prospective purchasers beyond what the law provided. *See* A.R. 5548-5549. After the Circuit Court correctly declined to do so (*see id.*), they now seek the same relief from the ICA (*see* Petitioners' Brief, p. 38-39). Such a result is neither supported by West Virginia law, nor is it countenanced by appellate decisions in other jurisdictions. The Circuit Court's Order awarding

judgment as a matter of law on Petitioners' claim for fraud against the Association should be affirmed. *See* A.R. 5550.

2. Petitioners offer no argument in support of their contention that the Circuit Court erred in its analysis of W.Va. Code §§36B-1-111 and 36B-1-113.

In Assignment of Error No. 2, Petitioners state that the Circuit Court erred in its dismissal of their claims for statutory duties for violations of West Virginia Code §36B-4-109, 36B-1-111, and 36B-1-113. *See* Petitioners' Brief, p. 28. However, they have made no argument in support of any error in the Circuit Court's analysis and application of West Virginia Code §§36B-1-111 and 36B-1-113. Petitioners' failure to set forth any basis for the argument in this regard contained only in their Assignment of Error No. 2 justifies this Court's rejection of the contention. *See, e.g., State v. Iseli*, 2016 W.Va. LEXIS 682 at *16 (2016).

The Circuit Court correctly concluded that West Virginia Code §§36B-1-111 and 36B-1-113 do not support Petitioners' argument that additional duties exist outside of the plain language of West Virginia Code §36B-4-109. *See* A.R. 5549. Petitioners have offered no reason for this Court to find otherwise, and therefore the Circuit Court's Order should be affirmed.

3. Other filings incorporated by reference in Petitioners' Brief provide no support for their appeal to reverse the Circuit Court.

Petitioners incorporate by reference a number of their filings in the Circuit Court that they contend "must be considered in the *de novo* review of these issues" by the ICA. Petitioners' Brief, p. 29. These include Plaintiffs'/Petitioners' First, Second, and Third Motions for Summary Judgment, none of which provide any support for the arguments advanced in Assignment of Error No. 2. *See* A.R. 3282-3516. While their Third Motion for Summary Judgment (*see* A.R. 3422-3615) does at least mention West Virginia Code §36B-4-109, it does not address the conclusion of the Circuit Court that the Association did not breach any duty imposed upon it by West Virginia

Code §36B-4-109(a)(11) (*see* A.R. 5548).[10]

The Petitioners also refer (at Petitioners' Brief, p. 29) to their Reply and Supplemental Reply offered in support of their Motion for Reconsideration of Order from December 4, 2019, W.Va. Code §36B-4-109. *See* A.R. 5326-5330. However, those items should be summarily disregarded, as they were filed ***after*** the Circuit Court's original Order of September 5, 2019 awarding summary judgment in favor of the Association, and therefore were not considered in the Court's analysis.[11] *See* A.R. 5544-5554. Moreover, the Petitioners' Motion for Reconsideration was denied by separate Order entered on June 2, 2020, which is not the subject of the instant appeal. *See* A.R. 5331-5335.

C. Petitioners do not provide any justification to reverse the Circuit Court's Order in their discussion of Assignment of Error No. 4, and therefore the Order should be affirmed.

Petitioners' Assignment of Error No. 4 is a lengthy statement of the Petitioners' position on the allegedly erroneous conclusion of the Circuit Court with respect to the "statutory, contractual, [and] common law duties owed to the Petitioners" at the time of their purchase of Unit 27 and thereafter, and the impact they contend this conclusion has had on them. Petitioners' Brief, p. 34. However, Petitioners' brief fails to support that Assignment of Error in any substantive way, and therefore these contentions should be rejected.

[10] The West Virginia Supreme Court has cautioned petitioners in other cases who incorporated previous filings by reference that "a brief filed with this Court must set forth an argument that 'contain[s] appropriate and specific citations to the record on appeal, including citations that pinpoint when and how the issues in the assignments of error were presented to the lower tribunal.'" *State v. Jordan*, 2014 W.Va. LEXIS 484, n. 6 (2014) (alteration in original). In that case, the Court concluded that "Petitioner's incorporation by reference does not comport with the spirit of this rule inasmuch as he cast a broad net and failed to tailor his argument for this Court's consideration." *Id.*

[11] The Circuit Court's Order of October 19, 2022 amended the September 5, 2019 Order only to the extent that it was certified for immediate appeal under Rule 54(b) of the West Virginia Rules of Civil Procedure. The Circuit Court made no changes in its underlying analysis or conclusions.

1. Petitioners' Brief relative to Assignment of Error No. 4 contains no discussion of the basis for their contention that the Circuit Court erred.

Rather than explain the alleged error(s) committed by the Circuit Court, Petitioners chose to list over four hundred (400) pages of motions and responses previously filed below, some of which post-date the September 5, 2019 Order that was amended on October 19, 2022 to permit an immediate appeal. *See* Petitioners' Brief, p. 35. While Petitioners advise the ICA that they "cannot stress enough the importance of review of these pleadings as detailed support for this appeal," they do not direct this Court to any specific page on which they made any argument that should have been adopted by the Circuit Court. Instead, Petitioners' argument focuses on demonstrating that they have in fact "been damaged" by the Association and are "entitled to compensation and damages". Petitioners' Brief, p. 36. The Circuit Court's Order at issue in this appeal did not make any conclusions as to whether the Petitioners did or did not sustain damages related to Unit 27.[12] *See* A.R. 5544-5554. As such, this aspect of the Petitioners' argument in Assignment of Error No. 4 should be disregarded.

2. Petitioners' limited discussion of legal authority fails to identify any error committed by the Circuit Court.

The only legal authority cited by the Petitioners in their Brief is limited to the cases of *Thacker v. Tyree* and *Chamberlaine & Flowers, Inc. v. McBee*. *See* Petitioners' Brief, p. 36. Petitioners apparently cite this authority for the contention that:

> 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 the purchase of Unit 27 and in finding that the Petitioners . . . have no right of claims or damages

[12] The Circuit Court did determine that the Petitioners could not recover monetary damages for repairs to the Common Elements of the Camp 4 Condominiums. *See* A.R. 5552-5553. However, at the hearing on the Association's Motion for Summary Judgment held on July 17, 2019, Petitioners conceded that they were not seeking to recover such damages. *See* A.R. 3589, 4653. Accordingly, Petitioners do not specifically assign error to this aspect of the Circuit Court's Order in their brief filed herein.

> prior to or following the purchase of Unit 27 and prior to and following the damages caused by the freeze event of January, 2015.

Petitioners' Brief, p. 36. These cases do not provide any support for the Petitioners' contentions insofar as they relate to contractual or statutory duties.[13]

The common law principles of liability for failure to disclose defects to a purchaser do not apply to the Association. The cases cited by Petitioners both state:

> Where a vendor is aware of defects or conditions which substantially affect the value or habitability of the property and the existence of which are unknown to the purchaser and would not be disclosed by a reasonably diligent inspection, then **the vendor has a duty to disclose the same to the purchaser**. His failure to disclose will give rise to a cause of action in favor of the purchaser.

Chamberlaine & Flowers v. McBee, 177 W.Va. 755, 758, 356 S.E.2d 626, 629 (1987) (emphasis added), quoting *Thacker v. Tyree*, 171 W.Va. 110, 297 S.E.2d 885 (1982). These cases place a duty to disclose defects on the **seller** of property, not on a homeowners' association. Thus, these authorities are inapplicable to the Petitioners' claims against the Association, and the Circuit Court correctly reached this conclusion. *See* A.R. 5550.

3. The Court's Order directing the Petitioners to file an Amended Prayer is not on appeal and any discussion related to it is wholly irrelevant to this proceeding.

The Petitioners submit a lengthy discussion of the Circuit Court's Order relating to the Amended Prayer for relief, asserting a claim for injunctive relief. *See* Petitioners' Brief, p. 37; A.R. 5558-5559. In response to the Amended Prayer, the Association filed an Answer and Counter-claim. *See* A.R. 5563-5574. The apparent purpose of this discussion is to demonstrate "the bad faith of Camp 4 and the continuing refusal of Camp 4 to acknowledge its statutory duties . . . ." Petitioners' Brief, p. 37. It is important to note that the Circuit Court's Order, which was a

[13] The correctness of the Circuit Court's rulings on the lack of statutory duties owed by the Association is discussed in response to Assignment of Error No. 2, *supra*.

separate Order also entered on October 19, 2022, is not part of this appeal and hence is not part of the appellate record. Therefore, the Petitioners' entire discussion relating to the Amended Prayer should be summarily disregarded.

V. CONCLUSION

The Circuit Court was clearly correct in holding that the Petitioners' tort claims were barred by the gist of the action doctrine because they were inextricably intertwined with, and duplicative of, the Petitioners' contractual claims. The Circuit Court was also clearly correct in holding that the provisions of the Uniform Common Interest Ownership governing the resale of condominium units do not impose a duty on a homeowners association to make direct disclosures to prospective purchasers of information that is not enumerated by the statute.

For these reasons, and for those set forth in Respondent's Brief, the judgment entered by the Circuit Court in favor of the Camp 4 Condominium Association, Inc. should be affirmed. Petitioners' request relief must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of *Respondent's Brief* was filed with the Court on the 6th day of April, 2023, using the File & Serve Express filing system, which will provide electronic notice to registered counsel, as follows:

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