

STATE OF SOUTH CAROLINA) TRANSCRIPT OF RECORD
COUNTY OF SPARTANBURG) CASE NO. 2019-CP-42-01854

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Dec 28 2022

September 12, 2022

SC Court of Appeals

BEFORE: The Honorable R. Keith Kelly

Chandelle Property Owners Association,
Plaintiffs,

vs.

James Douglas Armstrong, et al.

Defendants.

APPEARANCES:

Ryan McCabe, Esq.
Ely Grote, Esq.
John Harjehausen, Esq.
Attorneys for the Plaintiffs.

Wendell Hawkins, Esq.
Attorney for the Defendants.

Official Court Reporter,
Cynthia D. Weaver

1 (COURT REPORTER'S NOTE: Due to remote platform
2 interruption and audio interference throughout the
3 hearing, those instances are denoted with
4 (Inaudible) in the transcript.

5 P-R-O-C-E-E-D-I-N-G-S

6 THE COURT: Is everybody with us?

7 MR. HAWKINS: Yes, sir.

8 THE COURT: My law clerk and I have taken some
9 time to look at the motions, at least a good cursory
10 inspection and we set them this week to accommodate
11 everybody and everyone, including ourselves, because we are
12 in chambers this week, which means that we can dedicate
13 ourselves without being on the bench to deciding motions
14 after argument today.

15 May I ask this getting started here, is there
16 anything in the world that I can do to help everybody here
17 come to some kind of a mutual understanding?

18 MR. HAWKINS: Judge, I might say this if, if I
19 may.

20 THE COURT: Sure.

21 MR. HAWKINS: A little -- it's not my motion, but,
22 I think that there's no doubt that these defendants are --
23 they most likely fall within the definition of implied
24 convenience to restrict their lots.

25 I don't -- I don't know that that's really the

1 issue in this case. I think -- I think the issue is what the
2 ramifications of that are on. In our -- in our brief, we
3 pointed out the Shipyard case, wherein the Court said, Well,
4 you meet all of the -- all of the elements except for this
5 one, which is there has to be this common scheme of
6 development. And the restrictions have to tend to impose
7 the restrictions they're being sought to be imposed.

8 It's our simple argument, not it that we wouldn't
9 be subject to the restrictions, our argument is that we're
10 subject to the restrictions as they are written and
11 originally filed with the Register of Deeds. What this case
12 is trying to do is kind of envelope everything into one
13 cause of action, which would be the imposition of the
14 restrictions and, therefore, you are responsible for these
15 assessments and these late fees and these penalties.

16 I think there's ample evidence in the record that,
17 although John Stewart intended to restrict the property, and
18 my clients, at first felt like they were in the subdivision,
19 that these assessments did not fall within the definition of
20 what the assessments are in the original restrictions under,
21 I think it's Article -- Article 8 -- or Article 11, Your
22 Honor.

23 So that's the issue. And I know there's been a
24 lot of filings, a lot of exhibits, a lot of depositions,
25 plats, deeds, I don't -- I don't think that's really our

1 fight. I think that the evidence is going to prove that
2 they were subject to the restrictions, but the question
3 remains, and the real question is: What restrictions are
4 those? Are they the original restrictions and does the
5 plaintiff's position go so far as to be able to impose
6 something different, which is the variable rate assessment
7 in the Shipyard case. It's almost exactly analogous.

8 I don't think -- I don't think the case law says
9 that you have to meet -- if you don't meet all of this --
10 all of these elements, then you can't impose the
11 restrictions at all, because I don't think the cases were
12 ever presented to the courts in that way. I think the best
13 case law we have is probably Shipyard that says that the
14 covenants, which in that particular case, the defendants in
15 that case were -- they were restricted, but their
16 restrictions said they had fixed covenants. And there
17 were -- I think there were five or six other sections that
18 were developed with variable rate restrictions, and that was
19 the rub and it was a change of circumstances case, too,
20 which the court said there's no change in circumstance for
21 change in history, but that's the real issue.

22 If -- if we're subject to the restrictions, what
23 restrictions are we subject to and does that necessarily
24 meet that third element of implied restrictions?

25 I think the question here is to solve the first

1 problem, whether or not they're subject to, quote, the
2 original restrictions as filed, and then what do we do with
3 all of this other mess that comes later? If that makes
4 sense.

5 THE COURT: Yeah, it does make sense. Yes, sir.

6 Okay. But at this point, is there something I can
7 do with everybody to help us all agree and live in harmony
8 in Chandelle?

9 Mr. McCabe, do you want to be heard, sir?

10 MR. MCCABE: Yes, Your Honor. I guess I responded
11 to that. Today we were prepared to argue that we were
12 entitled to summary judgment that the remaining defendant's
13 property are subject to the restrictive covenants.

14 I think, if I understand Mr. Hawkins correctly, he
15 agrees that the lots are bound. I think maybe he's
16 saying he -- he's asking which covenants in the -- in the
17 particular case that was mentioned. The Shipyard case that
18 involved the scenario where there were 32 different
19 declarations filed. And, in this case, there is only one
20 declaration filed.

21 Now, it has been amended on some occasions, but I
22 don't think that there are any amendments, I'm not aware of
23 any amendments that would affect, you know, his clients, you
24 know, there's no -- there's nothing that would separate his
25 client's lots from the restrictions that are subject to the

1 rest. So maybe I don't understand specifically how this
2 is -- how this doesn't resolve the case.

3 Now, as far what assessments erode and that sort
4 of thing that, you know, that would be the natural next step
5 in this is if they're subject to the restrictions, then
6 obviously they're required to meet all of the obligations
7 and subject to all the requirements of the restrictive
8 covenants, which include the payment of assessments.

9 That provision hasn't been changed from the
10 original declaration. The owners have been required to pay
11 assessments to maintain the runway, the common areas, and
12 the functions of the association, for instance, the
13 architectural -- enforcement of the architectural functions
14 and that sort of thing. So that's always been a requirement
15 of the restrictive covenants.

16 So, it sounds like if -- if the defendant's lots
17 are bound subject to the declaration, then the remaining
18 issues are resolved as a result of that.

19 MR. HAWKINS: I disagree.

20 THE COURT: So who else needs to be heard?

21 Mr. Hawkins, you represent, is it Van Wieren,
22 Payne, Johnson, and Armstrong?

23 MR. HAWKINS: Yes, Your Honor.

24 THE COURT: Okay. Okay. I know who Ely's with.

25 John, are you with -- who are you with?

1 MR. HARJEHAUSEN: I represent -- I'm a co-counsel
2 for the Property Owner's Association as to the counterclaims
3 asserted against it. And also as to the counsel for the
4 third party defendants. So, to the extent that Mr. Hawkins'
5 clients have asserted counterclaims for third party claims,
6 we have a pending motion that I was prepared to argue today
7 to -- for summary judgment on those claims. I wasn't sure
8 what order the Court wanted to take the pending motions in,
9 whether they wanted to hear the affirmative motion of the
10 POA filed by Mr. McCabe and Mr. Grote.

11 Basically, I'm going to let them argue that as to
12 whether or not these lots are subject to the covenants, and
13 I think there's some other things that they're arguing as
14 well. But my concern and motion is related to the
15 counterclaims and third-party claims.

16 THE COURT: Okay. Well, yeah, I was going to
17 start with the summary judgment motion, but I don't have to,
18 it doesn't matter to me. As I indicated earlier, we're in
19 chambers and we set it here so we can give our undivided
20 attention to this, this week. So, we're kinda under a
21 timeline here. But, anyway, so we can hear them in any
22 order you want to. I will be taking it under advisement.
23 And Mattie (ph), and I will put our heads together later
24 today and tomorrow, Thursday, Friday, whatever it takes to
25 go through everything.

1 But I guess back to this, is there, anything,
2 anything, that I can do to help everybody live harmoniously?
3 And, maybe not, but I would love to.

4 MR. HARJEHAUSEN: Sure, Your Honor, at least. From
5 my perspective, I'd like to see the counterclaims and
6 third-party claims dismissed. And I'm sure that, speaking
7 for Ryan, they would like to have these lots subject to the
8 covenants and the assessments. But I'll let Ryan comment if
9 he has anything else.

10 MR. MCCABE: Well, I don't want to butt in
11 inappropriately. Ely was actually going to argue the
12 motion. I thought Mr. Hawkins just narrowed the issues.
13 Our motion for summary judgment -- our primary motion was to
14 have the -- was to ask the Court to grant judgment and find
15 that these lots were bound by the declaration. And, if I
16 understand correctly, I think he's conceding that point,
17 he's reserving some specific arguments beyond that.
18 But, if that's the case, then we don't -- we do not need to
19 be heard on that if there's -- if we've conceded that point.

20 I'm a little unclear. I believe that's...

21 THE COURT: I think -- I think Mr. Hawkins is
22 saying that, but Mr. Hawkins is certainly able to speak for
23 himself.

24 MR. HAWKINS: Thank you, Your Honor. I have to
25 raise one exception, which is Lot 51, which is Ken Payne's

1 lot, which there's evidence in the record that it was not
2 intended to be restricted.

3 So, you know, however, with, with respect to the
4 other lots I think that I'll take the opportunity on it, the
5 evidence would tend to show that my clients meet all of the
6 elements other than that particular element of the general
7 scheme of burdening the properties. To the extent it allows
8 for assessments outside of the provisions of Article 11,
9 which says that the assessments are to be used for
10 maintenance only, and I think there's ample evidence in the
11 file that that was not the case. But I don't think that --
12 you know, that's not -- that's not necessarily an argument
13 that we have to take up now, Your Honor.

14 I believe the majority of the plaintiff's motion
15 is devoted to proving that my clients are bound by the
16 restrictions under the negative covenants. And to the
17 extent the Court would find that -- well, there are -- there
18 are some imposition of -- well, the imposition of the
19 assessments we think is wrong. And that, because of that,
20 they don't meet the third element, which is that general
21 scheme burdening the properties, which has to be clear and
22 unmistakable. And I don't think that the language in the
23 restrictions as originally filed could meet that burden.

24 So, you know, to the extent we're bound by
25 original restrictions, yes. But to the extent those

1 restrictions and the way they are seeking to be imposed
2 satisfy that third element, I say, no. And that's -- there
3 are many other instances of the plaintiffs acting ultra
4 vires and it's in his deposition that's been submitted as an
5 exhibit. But, nevertheless, you know, it just seems like
6 there's a lot of time spending on trying to prove that
7 they're subject to the restrictions, that's not a problem,
8 with the exception of those caveats.

9 And I don't know, you know, you do you take one
10 before the other? I think you have to, but I can clear the
11 path to get to the point to where we start to interpret
12 those restrictions and the application of those
13 restrictions.

14 THE COURT: Okay. But the question about how the
15 money was used and, I mean, I've read that. I understand
16 that the defendants, the subject defendants, we'll call them
17 that, it's what's called in a brief. So the subject
18 defendants didn't like the way that the funds were being
19 used. But that's a separate issue as to whether or not, is
20 it not, it's a separate issue as to whether or not they're
21 restricted?

22 MR. HAWKINS: I believe that's correct, Your
23 Honor. And to the extent we can hold that in abeyance and
24 work it out, litigate it, whatever we got to do, that's
25 fine. I don't want to belabor the time with proving that

1 they're subject to the restrictions as originally filed.

2 THE COURT: Okay. Then you don't have to do that.

3 Mr. Grote.

4 MR. GROTE: Okay. Your Honor, can you hear me all
5 right?

6 THE COURT: Yes, sir.

7 MR. GROTE: That all sounds fun to me. He
8 mentioned lot -- Mr. Hawkins mentioned a Lot 51. Lot 51 is
9 not part of our motion, that specifically was taken out.
10 Lot 51 is part of the lawsuit, but we recognize that there
11 is a question of fact as to Lot 51, therefore, we didn't
12 include it in the motion.

13 So, it is not part of the motion, but the rest of
14 the lots of Mr. Hawkins' clients are in the motion. Those
15 are specifically mentioned in the brief that we submitted.

16 Now, as far as, you know, I'm not going to waste
17 time going through all of this then, because we've all, you
18 know, I guess agree that they're at least subject to the
19 restrictive covenants. One thing I would note with regard
20 to, you know, Chandelle versus something like the Shipyard
21 case that was referenced, the Shipyard case, dealt with, you
22 know, each section had its own set of restrictive covenants.
23 This case there's only one set of restrictive covenants,
24 there's an amendment provision. There were several
25 amendments filed to it.

1 I guess, really the question in my mind here is,
2 you know, is there a particular amendment that they're
3 objecting to that we need to litigate? I know that there
4 was a series of them. I think the only one that I'm aware
5 of that they're truly disputing is an amendment that was
6 filed in 2012 that was signed by the board of directors,
7 rather than the developer. And, if that's the issue, I
8 mean, we can certainly have testimony or a trial on the
9 legitimacy of that amendment.

10 But if there's some other, I guess, amendment out
11 there that they're challenging as part of this, I mean, I'm
12 just trying to clarify the issue here as far as, you know,
13 what is left to fight about. We've got the original
14 covenants. There are a series of amendments by the
15 developer, including annexations, and then I think there's
16 one final amendment to the covenants, which Mr. Hawkins'
17 clients were aware of and raised objection to that being
18 done by the board without a vote of the membership.

19 THE COURT: Mr. Hawkins, I read that.

20 So, what about that?

21 MR. HAWKINS: You know, I'm not at a point to
22 consent to any of the amendments. I think there are some
23 fact issues with respect to whether the board -- or, excuse
24 me let's start with the declarant. The declarant was
25 authorized at the time to make those amendments because of

1 the switch of the share class and the timing on that. And I
2 further think, you know, there are other issues with respect
3 to anything that the board of directors has tried to make
4 amendments on for a number of reasons, probably, the biggest
5 reason is that the restrictions don't allow them to
6 unilaterally amend the restrictions. So, another -- we're
7 just not going to consent to that.

8 Those are issues that are easily proven on a more
9 microscopic level, but, I can't consent to that. I'm
10 consenting to my client's being bound by the original
11 restrictions. Whatever was done after that, I think is
12 still an issue, because it's -- it's pertinent to basically
13 the relief that they seek.

14 THE COURT: Okay. Anybody want to be heard on
15 that?

16 MR. GROTE: Yes, Your Honor. I mean, simply, I
17 mean, I guess what we're -- our motion isn't about whether
18 the, I guess amendments, per se, are valid, except, you
19 know, some of those so-called amendments included
20 annexations attempt.

21 So, to the extent that they're consenting to be
22 bound by the covenants, our motion was simply they're bound
23 by the covenants as lawfully amended. If there's some
24 question of fact, and if they're disputing the amendments
25 or, you know, I guess that's something that we can

1 potentially get into. Leading into this, I think the only
2 amendment that I was really aware that they'd ever raised an
3 issue with was this one done by the board in 2012 and I
4 think one of the annexations was signed by the board in
5 2011, but they're already consenting to be bound by the
6 covenants. So that's kind of a nonissue.

7 Again, you know, if they're now going back and
8 challenging the amendments that the developer did, I don't
9 know that that's ever been asserted in their pleadings, I'm
10 just aware of the 2011 one. But as long as we're clear on,
11 I guess, what they're challenging then we can certainly
12 address those specific amendments or whatever specific
13 defects that they're claiming there.

14 THE COURT: Okay. So you -- Mr. Hawkins, so I got
15 the part about what you've conceded to. But you're not
16 conceding to any of the amendments being valid at this
17 point?

18 MR. HAWKINS: Well, I think any amendment
19 concerning annexations that that's moot by the fact that,
20 you know, we've agreed that we're subject to the original
21 restrictions. I do know -- I would say this, that we would
22 take issue only with the amendments that were purported to
23 be done by the board of directors.

24 THE COURT: Do you have numbers for those, sir?

25 MR. HAWKINS: They've made them exhibits, Your

1 Honor. And I couldn't follow their exhibits. So, I
2 believe -- let's see -- hold on a second.

3 Let's see. There was an amendment filed November
4 2nd of 2011, in Deed Book 99-L, Page 999, that was an
5 amendment to add lots. I think that point would be moot as
6 to my clients. However, there were some subsequent
7 amendments to that that attempted to change some substantive
8 provisions in the restrictions. So, to the extent, even the
9 board made amendments to annex, that's moot as to my
10 clients. But any other amendment that they made not
11 specifically dealing with annexation we would take issue
12 with. And I can't tell you how many were done right off the
13 top of my head.

14 MR. MCCABE: I think if you give me a second I can
15 give you the specific -- there's one amendment that's --
16 that I believe he's referring to. It was one where at that
17 time in 2011/12 the developer -- it was believed by all
18 involved that the developer still had the unilateral
19 authority to amend and the board signed an amendment by the
20 developer and I can give that -- I think that's what he's
21 referring to. I can give you --

22 MR. HAWKINS: What I'm -- what I'm referring to is
23 in the general, because I don't know every specific one
24 that's out there right now. So I would make that concession
25 in the general sense of if there's anything out there that

1 deals with anything other than annexation I'm not going to
2 concede to that being a valid amendment.

3 MR. GROTE: And you're talking about the one
4 signed by the board of directors rather than the developer?

5 MR. HAWKINS: Correct.

6 MR. GROTE: Okay. And, Your Honor, as far as the
7 amendments to the declaration signed by the board, I'm aware
8 of two. One is that 2011 annexation attempt that
9 Mr. Hawkins referred to which is kind of a moot issue.
10 There was -- I don't have the book and page, but there --
11 I'm more of one other amendment and it was filed in 2012
12 that was signed by the board of directors and that seems to
13 be a point of contention for the defendants.

14 I think, since that time, the board has filed some
15 amendments to the bylaws, because the bylaws do allow the
16 board to unilaterally amend those. But I don't think
17 there's any other annexations attempts. I'm not asking
18 Mr. Hawkins to accept my word for that, but if we're clear
19 that if it's any amendments to the declaration signed by the
20 board of directors, I think that's clear enough, and I
21 believe that's only one.

22 The affidavit of Billy Israel is Exhibit 4 to our
23 memorandum. Exhibit A to that includes all of the original
24 declaration and all of the amendments that we're aware of.
25 I can certainly pull that up if we need to.

1 THE COURT: I think -- I understand where we are
2 on that. Okay. All right. And the next issue?

3 MR. HAWKINS: Well, I think they're -- I'm sorry,
4 Judge, there are too many speaking.

5 THE COURT: Okay. No, no, no. I think we're
6 clear about which one we're that we're talking about now, at
7 least I am, and I can pull that up, because I read some of
8 that earlier today and I'm familiar with the affidavit that
9 Mr. Isreal gave, too. And the excerpts from the depositions
10 that were given. So, we got a couple of concessions here.

11 All right. Anything else that we can agree on?

12 MR. GROTE: I think the next question really is
13 the assessments you know. To my knowledge, the assessment
14 provisions I don't believe have been amended. And so I
15 think what we're dealing with is the original provisions.

16 THE COURT: Okay. How about that, Mr. Hawkins?

17 MR. HAWKINS: Well, the original -- Mr. Grote,
18 yes, I -- yeah, I think so. I mean, I think the original
19 provisions contain the language upon which we rely which is
20 what the assessments may be used for. It's fairly clear
21 from Billy Israel's deposition that the assessments that
22 have been assessed from inception this case have not been
23 expanded on maintenance in the subdivision at all. I
24 believe that even -- there's even a \$2,000 assessment my
25 client's paid for runway repair and they've applied those to

1 back assessments. So it's clear that the purpose of the
2 assessment was in 11.2 A through H, I think it's clear that
3 they weren't assessed in that manner or for that purpose.
4 And that the restrictions are clear and unambiguous with
5 respect to that. So the attempt to impose those assessments
6 on my clients is unrightful.

7 And secondly, you know, I just want to say this is
8 that prior to -- prior to scheduling this deposition, I
9 mean, this hearing, we were to take the deposition of Jeff
10 Cooper, I think that's his name, who's the treasurer, who
11 was, I think, the right person to testify as to the money.
12 we haven't been able to do that, the deposition was change.
13 And we have a right to discovery before we decide those
14 issues if it gets to that. I think Jeff Cooper is more of a
15 non-partisan party, Your Honor.

16 So before we would even get to those damages, I
17 would say it would be improper on the discovery issue alone.
18 However, I haven't seen the affidavit of debt. They said
19 they were going to enter, I'm sure it's consistent with
20 information that I have, I suppose. Right now, I think my
21 clients, they assert about \$250,000 between them in
22 assessments and fines and penalties. The fines and
23 penalties are another issue as well. Evidence in the record
24 they're trying to charge 15 percent. The restrictions allow
25 for Prime +2. In 2016 I don't think that Prime +2 is

1 anywhere near 15 percent. So I think their calculations on
2 anybody that's going to testify based on the evidence in the
3 record are suspect and I think the treasurer needs to
4 testify about it.

5 THE COURT: Okay. Mr. Grote, you want to be heard
6 on that?

7 MR. GROTE: Yes, Your Honor. I mean, my
8 understanding of their real dispute on the issue is whether
9 attorney's fees -- whether you can assess for attorney's
10 fees. And I think that's really a legal question based on
11 the declaration, which is part of the record. And our
12 contention is, is that by law and by the declaration, the
13 answer simply, yes.

14 Now, they -- there's obviously a disagreement that
15 these defendants didn't necessarily agree with the lawsuit
16 and therefore they don't want to pay any part of the money
17 that goes towards the lawsuit. But that objection aside,
18 the law and the documents would allow for this. For
19 example, the Nonprofit Act 33-31-302, specifically,
20 enumerates the powers of a nonprofit corporation and one of
21 those is specifically the power to sue or be sued. And
22 thus, you know, a corporation can and will incur attorney's
23 fees. Of course, this is a corporation, so a corporation so
24 cannot -- it has to have an attorney in circuit court,
25 right?

1 So, you know, principles of contract construction,
2 simply say that you can't construe a contract in a way that
3 would lead to absurd results. So, taken to this extreme to
4 say that the association cannot incur attorney's fees, you
5 know, look, somebody -- you get into a dispute with a
6 vendor, the vendor sees the corporation in circuit court
7 under their interpretation, then the board couldn't hire an
8 attorney to defend them and they would have to default and
9 every lawsuit brought against them or maybe they get into a
10 dispute with a defender -- excuse me, a vendor and then, you
11 know, they can't pursue any legal remedies against that
12 vendor because they can't incur attorney's fees, and
13 that's -- that's simply not what the documents contemplate.
14 And that's simply kind of an observed result that would go
15 for it, or would flow from that type of rationale.

16 Not only that, the documents themselves do
17 contemplate the attorney's fees will be incurred and can be
18 incurred. For example, Section 11.9 and 11.1 of the
19 declaration contemplate attorney's fees. They talk about
20 attorney's fees being part of the assessments part of the
21 lien. The ability to recover attorney's fees.

22 Also this Section 13.3 and 13.9 of the covenants
23 also say the same thing that, you know, if there is a
24 dispute under the covenants, the prevailing party can
25 recover attorney's fees. So, obviously, it is contemplated

1 under law and these documents that attorney's fees can be
2 incurred.

3 Plus, I think Section 2.1 of the bylaws says, you
4 know, the association and the board has the general
5 powers -- corporation, and they do provide broad powers to
6 the corporation. There's a couple other provisions as well
7 that I'll cite for you, this isn't really specifically
8 addressed in the brief, but it appears to be a point of
9 contention here.

10 And to back up a second, as far as the amount of
11 the debt, we did submit the affidavit of Billy Israel, that
12 is Exhibit 4 to the memorandum. There are a series of
13 exhibits to that, one of those, I believe it's Exhibit E to
14 that, is a spreadsheet that specifically sets forth the
15 amount of the debt owed and how it was calculated, and it
16 says forth the amount. And so it does give the interest
17 calculation in there.

18 So going back to the attorney's fees issue,
19 Section 1.6 of the declaration defines assessments that
20 says, They mean and refer to the annual special and default
21 assessments, levied pursuant to Article 11 to meet the
22 estimated cash requirements of the association. Obviously,
23 assessments are a cash requirement of the association.

24 There is reference to a maintenance fund in the
25 documents, Section 1.18 of the declaration does define that

1 maintenance fund, and it defines it as the fund created by
2 assessments and fees levied pursuant to Article 11 below to
3 provide the association with the funds required to carry out
4 its duties under the declaration.

5 So, obviously, it encompasses more than just
6 maintaining the property it's generally to fund the duties
7 of the corporation, Article 11, Section 11.1 also provides
8 authority to incur and assess for attorney's fees that deals
9 with special assessments for capital improvements and other
10 purposes as stated in this declaration. Article 11, Section
11 11.2, gives the general purposes of the assessments. And
12 it's specifically enumerates some specific items, but it
13 says generally without limitation, they are used to promote
14 the recreation, health, safety, and welfare of the owners
15 and occupants of Chandelle.

16 So, obviously, pursuing a lawsuit like this and
17 other litigation for the benefit of the community is
18 promoting the health, safety, recreation, and welfare of the
19 owners in the community. Section 11.4 of the declaration
20 provides kind of similarly, as well, it talks about budgets
21 and it talks about, you know, budgets including things such
22 as replacements and maintenance and things like that, but it
23 also talks about for other purposes as well.

24 So it's contemplated in that section, the budget
25 is going to include amounts other than just only for

1 maintenance. Section 11.5 of the declaration also talks
2 about special assessments, I believe. And, you know, they
3 can be used to make up shortfalls in the association's
4 budget and things like that.

5 So to the extent that there's any disputes or any
6 allegation that, you know, assessments can't be used for
7 attorney's fees, I think the documents clearly speak to that
8 and the Nonprofit Act would authorize that as well.

9 THE COURT: Okay. Mr. McCabe? Anybody else?

10 MR. HAWKINS: I would like to be heard on that,
11 Your Honor.

12 THE COURT: Okay.

13 MR. HAWKINS: The Nonprofit Corporation Act does
14 not set aside the documents that the cooperation has adopted
15 to govern itself. And the corporation is bound by those
16 documents. Certainly, you know, there are instances where a
17 nonprofit corporation may have no documents and have to
18 result of those duties. But to the extent those duties are
19 defined, that's the standard that they're bound by.

20 The imposition of attorney's fees, Your Honor only
21 presumes that the plaintiff prevails on its arguments on the
22 imposition of the restrictions, or which we've taken that
23 off, but the imposition of the assessment. If the
24 assessment is not authorized, then the assessment is not --
25 is not proper. And if we prove that is not proper, they're

1 not entitled to attorney's fees and costs, and arguably we
2 may be.

3 Secondly, in the imposition of restrictions and
4 covenants, the Shipyard case, I believe it's the Shipyard
5 case, makes it very clear, it's either Shipyard or Bomar,
6 that -- no, I believe it's Shipyard, those restrictions are
7 to be -- are to be imposed prospectively and not
8 retroactively, meaning whatever was done beyond the official
9 gavel falling that there was an imposition, the restrictive
10 covenants, the complaining party can't get the bounty of
11 what's behind it is what they're trying to do, they can only
12 apply things forward. So that's a further argument against
13 the attorney's fees.

14 Secondly, there's a point at which the association
15 borrowed greater than \$50,000, or subjected the HOA to debt
16 and did not receive the HOA's permission or they did not
17 take the vote of the HOA, which I believe was a 75 percent
18 vote, and that was in -- that's Article 8, as well, 8.2I,
19 which says that if the board is going to incur more than
20 \$50,000 in debt, it has to take a vote of the association
21 and it's a 75 percent vote to do that. It's pointed out in
22 our brief, clearly Billy Israel didn't do that, he just did
23 what he wanted to do, because he had adversaries that he
24 didn't want to -- he didn't want to tell, basically. He
25 kept the whole entire association in the dark about

1 incurring the debt. And right now I don't know whether the
2 attorney's fees they're claiming have been paid or not, who
3 knows until I actually talk with Jeff Cooper. I don't know
4 whether they've been paid.

5 So, you know, I'm not agreeing that just because
6 my clients are subject to restrictions, they got to pay
7 attorneys fees, because he's got to prevail on his issue.
8 And, secondly, even if it does prevail, then the fees -- the
9 restrictions are only to be applied prospectively, which
10 means he may not be entitled to money either.

11 And, you know, this is an equitable cause of
12 action, Your Honor, and we've had these equitable defenses
13 about all this -- all these bad acts that have been going
14 around and equitable estoppel, and my clients were told the
15 day they were sued by Mr. McCabe that this wasn't a case
16 about money and they're not going to ask for money. And
17 here we are right now and they're asking for at least
18 \$250,000 of back dues, assessments, fees, everything else.
19 And now they want to come ask for attorney's fees as well.

20 Well, my clients knew if they signed that consent
21 agreement, that's what was going to happen anyway. That's
22 why we didn't sign the consent agreement. There was
23 never -- these are all equitable arguments -- there was
24 never an offer to join the association to sign a consent
25 that says we'll be bound by the restrictions. There was a

1 consent that said we'll be bound by the restrictions, plus
2 all of these other things they're going to put my clients at
3 incredible risk. And right now we can tell it's at least
4 250-some-odd-thousand dollars. And that doesn't even
5 include the attorney's fee they're going to try to add on to
6 it for this particular part of the action. That's -- we
7 don't even know what that is yet.

8 So, you know, it's -- it's -- it's our argument,
9 you know, we're asking the Court to come up with some
10 equitable relief and at least some assignment of, you know,
11 we've got an argument of unclean hands. Unclean hands is a
12 complete bar -- it's a complete bar to the action, the
13 unequitable action -- or the equitable action. If, in fact,
14 there's unclean hands, then they get nothing.

15 MR. HARJEHAUSEN: Could I make a comment?

16 THE COURT: Sure.

17 MR. HARJEHAUSEN: I'm sorry, Wendell, I'm sorry go
18 ahead, I cut you off.

19 MR. HAWKINS: No, you go ahead.

20 MR. HARJEHAUSEN: I understand we're discussing
21 the Property Owners Association's Affirmative Motion for
22 Summary Judgment, but to the extent that Mr. Grote's
23 argument on attorney's fees overlaps my motion for summary
24 judgment, I want to adopt those arguments. I mean, one of
25 the issues with respect to the defendant's counterclaims is

1 that money that was paid as assessments was used to fund
2 litigation and not for maintenance. I just want to make it
3 clear that I'm adopting Mr. Grote's arguments that we
4 believe that the Nonprofit Act and with the language of the
5 covenants themselves allow assessments to be used for the
6 purposes of enforcing the covenants and for litigation, if
7 necessary. I think that that's clear. And I just wanted to
8 make sure that that was on the record. Thank you.

9 THE COURT: Yes, sir. Thank you. Okay.

10 Mr. McCabe, anything?

11 MR. MCCABE: I did want to just add a couple of
12 thoughts. You know, this argument about on this 50 percent,
13 that's not something that can be argued as a defense to your
14 property being bound by the restrictive covenants or
15 something that can be argued or asserted by an individual,
16 the nonprofit corporation -- and I think Mr. Harjehausen
17 will go into greater detail -- requires that something like
18 that be brought in the form of a derivative action.

19 And there's -- you know, there's policy reason for
20 that under the act and under the common law and that an
21 owner can't any type -- or a member of any nonprofit
22 corporation unhappy with the decision assert some
23 distinction or some action of the board of directors as an
24 excuse to not comply with the restrictive covenants.

25 So, I don't think using this -- the statute

1 clearly provides that this has to be used as a cause of
2 action. They can either seek an injunction or sue the
3 directors derivatively and receive a money judgment and that
4 would be their remedy. And that's under, I think it's
5 33-31-304, you can see the statute is very clear on that and
6 the comments actually provide some good detail.

7 As far as this argument about the Court cannot
8 enforce the restrictions, I don't believe that's what the
9 case says. I think what the case -- this the Shipyard case
10 dealt with a scenario where there's several sets of
11 covenants and what the association was trying to do in
12 Shipyard is ask the Court to make everyone pay the same
13 assessment, which was a variable rate of assessment. And
14 the Court said, Well, the restrictive covenants -- it met
15 three of the four requirements of reciprocal negative
16 easements and the Court said we need to go look back at the
17 scheme of development and restrictions can't be retroactive.

18 So when the Court went back, it said the first
19 three -- the first three declarations that were recorded
20 provided for a fixed fee. And so the Court said you can't
21 take something later and make it retroactive, the original
22 scheme of development in that case happened to be a fixed
23 fee structure, fixed fee assessments.

24 And so what the defendants are arguing is
25 something different from that. They're taking that

1 principle and they're saying you, Judge, don't have a right
2 or the Court doesn't have the authority or the power to --
3 to -- when you -- at the moment in time where you issue a
4 judgment, you can't make someone pay assessments, back
5 assessments. And that's -- it isn't some limitation on a
6 remedy, it's that the cut -- it has specifically to do with
7 when the easements or the original restrictions and
8 covenants arose, its says it can't be -- you can't,
9 obviously, by the definition of the elements of reciprocal
10 negative easements a restriction can't arise before the
11 property is commonly held or there's a scheme of
12 development. It's talking about that. It's not a
13 limitation on a -- on a remedy provided by a Court, if I'm
14 making myself clear.

15 Judge, I just wanted to clarify that retroactive
16 had nothing to do with a remedy available through the Court.

17 MR. HAWKINS: I don't think the case says that. I
18 don't think it says much about it. All I can do is take the
19 case by the plain meaning of the words. And I don't see
20 your explanation in the case. I understand that it may be
21 your theory, but I don't see that.

22 And let me say, secondly, you guys raise these --
23 these statutes regarding derivative actions, but those
24 derivative actions presume that the -- that the board or the
25 directors are acting intra vires not ultra vires. And if

1 the board does something that is not within its power or
2 authority, that doesn't act ultra vires. And Billy Isreal
3 testified, at least on one occasion and so the other is to
4 be proven, that he's done things ultra vires. And if it's
5 determined that the imposition of these assessments is
6 something that was not authorized, because it wasn't
7 maintenance, then that's an act ultra vires and you don't
8 get that protection.

9 So, you guys make a lot of assumptions about your
10 arguments and then go forward with it but you never back
11 those assumptions up.

12 MR. HARJEHAUSEN: If I could comment on that
13 briefly?

14 THE COURT: Sure.

15 MR. HARJEHAUSEN: Again, back to using assessments
16 to pay attorney's fees to enforce the covenants, I think
17 it's clear under the law, as well as the covenants that, to
18 retain council and pay that attorney fees is an intra vires
19 virus act, an authorized act.

20 Now, that's something I'll reiterate regarding
21 counterclaims. I understand that Mr. Hawkins has an
22 argument regarding whether or not the board exceeded a debt
23 limit, but when we get to the counterclaims, Mr. Hawkins
24 client's arguments is, Hey, you used these assessments to
25 hire attorneys, or to pay attorneys instead of maintenance.

1 That decision is an intra vires act. In other words, it's
2 under the Nonprofit Corporation Act, it's appropriate to
3 hire attorneys under the covenants, it's appropriate to hire
4 attorneys, and it's appropriate to pay those attorneys. And
5 there is nothing ultra vires about that.

6 THE COURT: Okay. I think I got that issue.

7 MR. MCCABE: Judge, do you mind if I clarify
8 something if I do it briefly?

9 THE COURT: Sure, go ahead.

10 MR. MCCABE: I was -- on the testimony that was
11 referred to that Mr. Isreal testified, admitted -- what he
12 admitted is that at some point the association spent more
13 than the 50,000. He was -- the testimony as submitted is
14 pretty -- he wasn't admitted that he -- that he violated
15 the -- committed some type of ultra vires action.

16 And, further, you know what we're dealing with
17 here this was -- this was -- this \$50,000 problem is because
18 the -- the -- the defendants, in essence, created this
19 problem that they're blaming on the board by not paying
20 their assessments.

21 So, they create a shortfall in funding and then
22 blame the association, same thing we're dealing with on the
23 attorney's fees, refuse for six years to admit that they're
24 subject to the restrictive covenants until today and the
25 association is forced to spend years of litigation to get to

1 this point. These debts and the shortfalls in the funding
2 were actually created by the defendants.

3 MR. HAWKINS: I don't think that's true and I
4 don't think you can prove that. That shortfall was long
5 before my defendants would have ever racked up that kind of
6 money. In fact, I don't know when Billy Israel's deposition
7 was taken, but it's pretty easy math. I think it was right
8 out the gate, but it's pretty easy math to look at when his
9 deposition was taken and the amount of money that you're
10 claiming from our clients and you can see that it's not
11 \$50,000.

12 So, you know, all of these arguments are
13 predicated -- even. Mr. Harjehausen, your argument is
14 predicated on the fact that the assessments are proper. I
15 mean, you got to prove that before you can even play ball.
16 We say they're not proper, therefore, it's ultra vires,
17 therefore, you're out of your -- you know, you're -- you're
18 out of your argument, if there are lack of other arguments,
19 I don't think there are. But you just you're playing field
20 has never been established here because of the challenge to
21 the actions. But if we never clear up the challenge to the
22 actions, we can't clear out the rest of it.

23 I mean, there's so many balls in the air that you
24 have to prove to assume your positions that it's kind of
25 hard to do it all one fell swoop. But, you know, you guys

1 say a lot of things and they're not substantiated.

2 THE COURT: Okay. I believe we've heard enough
3 about that one. Anything else from Mr. Hawkins?

4 MR. HAWKINS: No, Your Honor.

5 THE COURT: Okay. Mr. Grote, anything?

6 I think you might be muted, sir, I'm sorry.

7 Go ahead.

8 MR. GROTE: Yes just one brief thing. I think
9 there was a comment made about whether the Nonprofit Act
10 applies or not, or, you know. The provision I cited from
11 the Nonprofit Act I believe was Section 302. It says,
12 Unless the Articles of Incorporation provide otherwise, the
13 corporation has these powers. The Articles of Incorporation
14 for this association are just a standard form, there's no
15 limitation on the associations power in them. So, by law,
16 they have those powers. There's no -- no restriction in the
17 covenants themselves that would prohibit the association
18 from engaging in litigation.

19 Plus, like I said, I cited to some of them,
20 there's probably more in the covenants and bylaws that do
21 support the position of those to allow the association to
22 incur attorney's fees. And I do think there needs to be
23 some clarification of two issues, though, as it goes to
24 attorney's fees, because I think there's been a lot of
25 confusion of that in this case.

1 One, what we're referring to in the motion and in
2 the affidavit of Billy Israel are the assessments levied by
3 the association under the declaration of covenants and
4 bylaws. Those are assessments that are levied on all of the
5 owners and those are for the common expenses and for the
6 common benefit of the members of the association.

7 And so, as this lawsuit has gone on, as you can
8 imagine, the association was charged legal fees, those legal
9 fees then in turn, you know, the corporation itself doesn't
10 have money by itself but for assessing its owners.

11 So yes, by incurring that expense, that expense
12 has to be passed along in the way of assessments. So, yes,
13 these assessments that are talked about in the motion are
14 especially uniformly across the owners and some portion of
15 that does include the cost of this lawsuit. It includes
16 other costs like, whatever maintenance was performed, what
17 other legal services they've received. There was a
18 bankruptcy action, they hired separate legal counsel to deal
19 with that bankruptcy action.

20 So the very nature of a homeowner's association,
21 and a corporation like this is that whatever cost that that
22 corporation incurs has to be passed along, and so that's one
23 issue.

24 The second issue then is, you know, under the
25 covenants can the homeowner's association then recoup some

1 of that specific portion of the attorney's fees against
2 Mr. Hawkins' clients, either on the basis of the Article 13
3 that allows the prevailing party to prevail or on the basis
4 that we sent requests to admit about four years ago to admit
5 this issue that they were bound and there's been expenses
6 incurred and having to prove that up to this point, too.

7 And so the question is then whether some of that,
8 you know, general expense can be then shifted back to them,
9 which would then benefit the rest of the members of the
10 community, just to clarify that.

11 THE COURT: Okay. All right.

12 Well, go head, Mr. Hawkins, then we can move up.

13 MR. HAWKINS: Okay. With respect to any equitable
14 considerations, Your Honor, my clients were given an
15 ultimatum. They were told they were not part of the
16 community by Mr. Israel and his lawyers and they -- the
17 consent to be bound by the restrictions was sprinkled with,
18 you know, items in that consent agreement that my client
19 felt like if they signed that thing and they incurred
20 250-some-odd thousand dollars in attorney's fees, they were
21 going to have to pay it, because they agreed to it in a
22 contract. We did not agree to that in the restrictions,
23 Your Honor. And, you know, for them to say, you know, my
24 clients caused all of this mess, you know, I don't think
25 it's fair and equitable to assume that and I think it's

1 quite the contrary. It -- if the request was so simple to
2 sign a consent to be bound by those restrictions as filed,
3 this case would have never been where it's at or maybe it
4 would, I don't know. But you certainly can't -- you can't
5 sit there and say that if you denied that you're part of the
6 community.

7 Well, their -- their -- their cause of action was
8 implied covenants and if -- we didn't agree to that, we
9 didn't agree that we met all the elements of the implied
10 covenants. And, you know, that's basically what we felt
11 like they were asking. That seems to be the way it turns
12 out and it's just not fair and equitable for them -- for
13 them to start all this and then hold my clients accountable
14 when, in the beginning, they told them -- I mean, I
15 submitted my letter that I wrote to Mr. McCabe before the
16 ever started, that we'll sign something, but not with all of
17 that -- all of that fluff in there. And, you know, the next
18 thing we got hit with was a lawsuit. So, I just ask the
19 Court to keep that in mind and the equitable nature of the
20 action.

21 THE COURT: I certainly will. Okay.

22 What's the next matter we need to speak about?

23 MR. HARJEHAUSEN: I'm not sure if there's other
24 arguments, Your Honor, in support of the motion for summary
25 judgment filed by the POA, but I certainly have arguments in

1 regard to the counterclaim and third party claims.

2 THE COURT: Okay. We'll go there.

3 MR. HARJEHAUSEN: I'll try to be brief, Your
4 Honor. I mean, there's a -- you asked at the beginning of
5 this hearing if there was something that could simplify this
6 case. And I would submit to Your Honor that there are
7 parties in this case that should not be parties in this
8 case. And I will name those parties: George Lynn Fleming,
9 Bruce Goldberg, Cindy Goldberg. We have moved for summary
10 judgment on a number of the counterclaims and third party
11 claims that Mr. Hawkins' clients have asserted. And none of
12 the materials, zero, pertain to George Lynn Fleming, Bruce
13 Goldberg or Cindy Goldberg, either in their individual or
14 official capacities.

15 Now, that's a bit beyond the scope of my motion,
16 Your Honor. We did move on specific claims and causes of
17 action and as to those on behalf of the third party
18 defendants in their official and individual capacities. But
19 I would submit to you that they shouldn't be involved in
20 this case. To the extent Mr. Hawkins' clients have issues
21 with the governance and or the enforcement of the covenants,
22 really what you're going to see in the materials is they
23 take issue with Mr. Israel's leadership, and I'm not
24 conceding that Mr. Israel did anything, in fact it's my
25 position that everything that has occurred in this case

1 needed to occur. But I wanted to point out to the Court
2 that I believe these other entities and people are
3 superfluous to this dispute and really should have never
4 been sued.

5 First of all, there's nothing that's been
6 submitted by Mr. Hawkins to show that Billy Isreal, Bruce or
7 Cindy Goldberg or George Lynn Fleming did anything in their
8 individual capacity. In other words, not as a board member
9 on the POA.

10 There's nothing in the record which shows even
11 what position George Lynn Fleming had, when he served, what
12 decisions he made, and the same is true for Bruce and Cindy
13 Goldberg. So I'll get into the specific causes of action
14 for which we've moved, but it's certainly my contention in
15 this case that those folks are -- never should have been
16 joined to this lawsuit.

17 As to the claim for conversion, we've moved for
18 summary judgment on that. You've already heard arguments
19 that attorney's fees, according to Mr. Hawkins' clients,
20 were used for litigation not for maintenance.

21 First, I want to point out that there's really no
22 issue of fact here. To the extent Mr. Hawkins' clients paid
23 assessments, once they were paid the POA had the right to
24 possess them. Now, it's a separate issue, I understand he
25 has other claims as to how they were used, but once they

1 transferred possession and right, the POA had the right to
2 possess them, there's no conversion there, thereafter, Your
3 Honor. There might be, as Mr. Hawkins is going to argue
4 some sort of breach of fiduciary duty, a breach contract, or
5 something else, but there's no conversion. And I would
6 submit to you that there's no evidence that any money was
7 ever paid to Billy Isreal, Bruce or Cindy Goldberg, or
8 George Lynn Fleming, personally in their individual
9 capacities. So summary judgment should be granted at least
10 individually as to them on that ground.

11 One of the things --

12 THE COURT: I don't mean to interrupt you, but
13 let's do it this way: Let me hear from Mr. Hawkins on that,
14 we'll take them one at a time.

15 Mr. Hawkins, you have the floor.

16 MR. HAWKINS: Well, with respect to those
17 particular defendants, Your Honor, they are members of the
18 board and to the extent that they have engaged in ultra
19 vires acts, they're personal acts, and they're liable under
20 those causes of action, personally.

21 THE COURT: Okay.

22 MR. HARJEHAUSEN: Our response to that, Your
23 Honor, is the only two things that I have heard, and it
24 seems to be in the briefing, is that money was paid for
25 assessments and used for litigation or attorney's fees and

1 not maintenance. Again, I stand by the prior arguments that
2 using assessments to pay attorneys is valid and intra vires,
3 and we're going to talk about this issue of the \$50,000 debt
4 limit which, to me, pertains to a claim for breach of
5 fiduciary duty and an alleged dissipation of assets by the
6 association and has to be assertive deliberately.

7 So, again, I don't think that that limit really
8 applies to the conversion, I think it -- and we can talk
9 about that separately.

10 THE COURT: Okay. All right.

11 Go ahead, sir, you have the microphone.

12 MR. HARJEHAUSEN: Well, the next one I want to
13 talk about is this claim for breach of fiduciary duty. And
14 I think one of the things that's interesting to me is that
15 Mr. Hawkins' clients filed an affidavit and what struck me
16 is they say in that affidavit that it is clear in his
17 deposition testimony, referring to Mr. Israel, that he paid
18 for no maintenance in the subdivision since 2012, yet he
19 charged us with assessments. This claim is not for breach
20 of fiduciary duty.

21 If you look at Mr. Hawkins' complaint, it's -- and
22 or the claims that are, again, asserted against the POA and
23 the third party defendants, and I think it's important to
24 think of those, each, for each of these causes of action, is
25 there a valid claim against the POA and or is there a valid

1 claim against the third party defendants.

2 Here, they're going on the record saying they're
3 not asserting a breach of fiduciary duty claim. And if
4 that's the case, then that claim should be dismissed against
5 the POA and the third party defendants.

6 THE COURT: Okay. Mr. Hawkins.

7 MR. HAWKINS: What part of the affidavit are you
8 referring to?

9 MR. HARJEHAUSEN: I'm looking at Page 7 of the
10 affidavit, it's Paragraph 11, starts on Page 6, and goes to
11 Page 7. With respect to our cause of action for conversion,
12 Billy Israel charged us for assessments and use the money
13 for purposes other than what the restrictions allowed. It's
14 clear in his deposition testimony they paid for no
15 maintenance. The subdivision, since perhaps 2012, any
16 charges with assessments this claim is not for a breach of
17 fiduciary duty.

18 And I know that in their counterclaims, the third
19 party complaint, they're also alleging that the bylaws were
20 violated to the extent that the POA incurred more than
21 \$50,000 in attorney fee debt. But I would submit and rely
22 upon the arguments in the brief that this alleges an injury
23 to the community, which can only be asserted as a derivative
24 action. It's undisputed that there is no verified complaint
25 here. Mr. Hawkins' clients haven't even admitted that

1 they're members of the community. They needed to submit a
2 verified complaint admitting that they're members of the
3 community. And even today, there's a bit of equivocation
4 about that. He's going to allege that, well, we completed
5 it alternatively. And I don't think that that is true for
6 purposes of attempting to enforce an action against a
7 corporation.

8 Under Rule 23, you've got to state that you're a
9 member, you've got to file a verified complaint, you've got
10 to establish that you made a demand to the board of
11 directors, and none of those conditions or the rest of the
12 requirements of Rule 23 are satisfied here.

13 So, the breach of fiduciary duty claim either
14 should be dismissed because as the affidavit says, they're
15 not alleging that money used -- that was paid for
16 maintenance was used for attorney's fees is a breach of
17 fiduciary cause of action, but that's what their
18 counterclaims and third party claims explicitly state. And
19 it's in our brief, we quote what they state in their
20 counterclaims, that's -- but their affidavit is completely
21 contrary to that.

22 THE COURT: Mr. Hawkins.

23 MR. HAWKINS: Your Honor, I mean, that -- that is
24 a sentence in there, but it goes on to say it's the claim is
25 plead in the alternative, they took our money for

1 assessments and spent it for unauthorized purposes.

2 So, you know, again, I think it's just another
3 example of snatching things out of documents out of context.
4 Perhaps we foresaw his argument, I don't know. We didn't
5 bring it as a derivative action, Your Honor, because we
6 didn't feel like it met the definition, it wasn't our
7 purpose. We're suing solely for ourselves and nobody else,
8 we don't care about the rest of the members, we don't care
9 about the, you know, the rest of the association.

10 And, secondly, if you look at statute that
11 Mr. Harjehausen quotes, it says that is that it's actions
12 brought on behalf and third members -- by members, we don't
13 even fit in that -- we don't even fit in that category.

14 You know, I think that the -- I think that the
15 memorandum, again, it makes the presumption and it runs with
16 it. And the basis of all of the arguments is, this is a --
17 this is a cause of action disguised as this, and if it's
18 disguised as this, you can't fly because it's a derivative
19 action. It's just logic that goes down the road that starts
20 on a bad pretense and, therefore, it is, because I say it
21 is.

22 First of all, I don't think it meets the
23 definition of the statute for a derivative action. It
24 wasn't our attention. And, again, I don't see how you can
25 make some conclusion and then build on that conclusion to

1 make it true If you've never proven the conclusion or, you
2 know, the basis of your argument. There is no proof for the
3 basis of the argument.

4 Everything I believe that Mr. Harjehausen has
5 raised, other than there's some other surviving causes of
6 action, it all goes back to this pretense that it's an
7 action disguised as breach of fiduciary duty. And if you're
8 going to -- I don't think that his representation of the
9 meaning of our affidavit was correct. But, nevertheless, if
10 the basis of his motion for summary judgment is that these
11 are all derivative actions because breach of fiduciary duty,
12 and they're disguised is that, I just don't think that the
13 evidence is there prove it.

14 MR. HARJEHAUSEN: Your Honor, a brief rebuttal.

15 THE COURT: Yes, sir.

16 MR. HARJEHAUSEN: To the extent that Mr. Hawkins
17 essentially concedes that these lots are subject to the
18 original declaration of covenants, then these folks are
19 members of the development and, therefore, to the extent
20 they're challenging acts the corporation, they were required
21 to assert this as a derivative action. They haven't done
22 that. I'm going to move on to the next one.

23 MR. HAWKINS: I didn't consent to that, just while
24 you're there, it's a point of contention.

25 THE COURT: Okay.

1 MR. HARJEHAUSEN: And that is -- as part of the
2 underpinnings of our motion for summary judgment as to a lot
3 of these causes of action. So, for instance, the breach of
4 contract of the covenants, if Mr. Hawkins' clients aren't
5 members, then we don't owe them any duties. They have no
6 rights or obligations. And they haven't even come in and
7 said we are members of the association. It seems they --
8 that's what they seem to say earlier today, that's what my
9 understanding was. But, in any event, the factual basis for
10 the breach of contract is the same as the breach of
11 fiduciary duty, it's, we paid assessments that didn't go to
12 maintain the runway, instead they were used to pay
13 litigation. It's very clear that an association can
14 lawfully use assessments that are assessed for common
15 purposes. The covenants are clear that there's no
16 limitation on what they can be used for, it's the general
17 welfare of the community.

18 So, again, we'll rely upon the arguments of the
19 brief for that, that basically the breach of contract claim
20 is indistinguishable from the breach of fiduciary duty
21 claim. It alleges the same factual basis and for that
22 reason it should have been asserted as a derivative action.

23 One of the claims that's been asserted by
24 Mr. Hawkins' clients is one for equitable indemnity and
25 we've moved for summary judgment on that. Notably, he's not

1 cited any provision in the covenants that would give the
2 members a right of contractual indemnity against the
3 association, because there is no such provision.

4 So, the real question here is, you know, do his
5 clients have a special relationship with the POA and or the
6 third party defendants?

7 Well, first, again, there's no evidence of any
8 relationship with the third party defendants in their
9 individual capacities. So, honestly, any and all claims
10 asserted against these folks in their individual capacities
11 shouldn't be a part of this lawsuit and should be kicked.
12 There's no evidence that these folks have taken any actions
13 in their official capacity other than serving as board
14 members. And there's nothing in the record particularly as
15 to Bruce and Cindy Goldberg and George Lynn Fleming.

16 Mr. Hawkins has filed the entire deposition
17 transcript of Mr. Israel and his brief incorporates some
18 provisions, which he suggests indicates ultra vires acts by
19 Mr. Israel. I don't, as Mr. McCabe pointed out, I don't
20 think the excerpt that he quoted stands for that
21 proposition.

22 I don't think it's either our responsibility or
23 the Courts to sift through an entire deposition transcript
24 to look for an issue of fact. I think Mr. Hawkins has the
25 burden of pointing out where in the deluge of documents

1 there's an issue of fact about these things.

2 But in any event, we don't believe there's any
3 basis for a special relationship giving rise to a claim by
4 Mr. Hawkins' clients for equitable indemnity. I'm not aware
5 of a case that says that merely by being a member of an
6 association that you have a special relationship with the
7 board of directors, or in their individual capacity, giving
8 rise to a claim for equitable indemnity. I haven't seen
9 anything cited in Mr. Hawkins' brief.

10 So there's not even a -- he doesn't even plead
11 that in the claim of the third party complaint that there's
12 a special relationship. And so, for that basis, we've moved
13 to dismiss and for summary judgment. And I do want to make
14 that clear ours is a motion in the alternative. It's a
15 motion to dismiss first, a motion for summary judgment,
16 second, on a lot of these things. And, particularly, as we
17 discussed with the arguments concerning filing as a
18 derivative action, but I do believe that a complaint must
19 state either or allege facts to support such claims and
20 there is no allegation of special relationship for equitable
21 indemnity.

22 Let me move on to fraud. This kind of comes full
23 circle to --

24 MR. HAWKINS: May I address these one at a time,
25 because there's a lot of -- of stuff there.

1 THE COURT: Yeah. Go around right ahead,
2 Mr. Hawkins. Go back indemnity, I understand about the
3 breach of contract and the breach of fiduciary duty being
4 pretty much this -- I mean, I got that.

5 MR. HAWKINS: And I figured it would get to this
6 point, because this is the way it's been all along. When
7 it's convenient for the plaintiff to say you're members,
8 they say you're members. And it's when -- when it's
9 convenient for the members to say that you're not members or
10 the plaintiff to say you're not members, then that's what
11 they say. You know, that's what the whole case has been
12 about.

13 And, secondly, to the extent that that has any
14 play in anything, I believe our defense of equitable
15 estoppel, which they can't claim both positions and advance
16 themselves on those positions, that defense alone should
17 somewhat quell those averments.

18 With respect to Billy Israel and where it's
19 buried, that Mr. Israel admitted to acts ultra vires, it's,
20 in our brief, Your Honor. And that -- I don't know if
21 Mr. Harjehausen saw it. But, okay, on our brief beginning
22 on Page 8 that begins to discuss that and if you start at
23 the bottom we asked: Did you ask for a vote from the
24 members? And this is \$50,000 issue. And he said, No.

25 Have you accumulated more than 50,000 in debt?

1 Yes.

2 And you won't even tell him what the debt is. And
3 then, of course, the objections.

4 And the answer is, I haven't -- I don't know about
5 the word won't, but I hadn't.

6 In your opinion, the way the bylaws are read, are
7 you committing, I think you said the word and Mr. Israel
8 brought it up, you said the word 'ultra vires'; right?

9 And the answer was, I learned that from a lawyer,
10 Yes.

11 What does that mean?

12 Operating outside of my authority as director.

13 So, ultra vires acts are there. For
14 Mr. Harjehausen to say that it's buried within the
15 voluminous amount of documents, I don't believe it is, I
16 think we've put it right in front of the Court.

17 Again, I think a lot of these arguments are based
18 on things that simply aren't true. Of course, you know, the
19 standard of proof is it has to be the record. But for those
20 things to be said at this hearing are just a little strange
21 to me.

22 THE COURT: Okay.

23 MR. HARJEHAUSEN: No, Your Honor, I concede that
24 he has quoted an excerpt from Mr. Israel's testimony. I do
25 not concede that that excerpt shows an ultra vires or an

1 admission of an ultra vires act. But moving on what the
2 Court doesn't have is any testimony from George Lynn
3 Fleming, Bruce Goldberg, Cindy Goldberg, and I reiterate
4 that they should not be in this case.

5 I haven't heard anything from Mr. Hawkins
6 indicating a factual basis for a right of equitable
7 indemnity flowing from either the POA or these individual
8 third party defendants to his clients.

9 So, I would be happy to move on to the next cause
10 of action, Your Honor.

11 THE COURT: Okay. Thank you. Go ahead, sir.

12 MR. HARJEHAUSEN: Next one is fraud. And I want
13 to come back to the affidavit that was filed by Mr. Hawkins'
14 clients. It's a joint affidavit, they all signed off on it.
15 And the language that seems to be in support of the claim
16 for fraud is that the association argues they exercise the
17 legal right to the funds they were given by us, but those
18 funds were obtained under false pretenses. They had no
19 legal right to use the funds for anything other than
20 maintenance, which they did not do.

21 And, again, Mr. Hawkins says all these causes of
22 action have distinct factual elements, but I would suggest
23 to the Court that that's belied by this affidavit and or any
24 deposition transcript that's in front of the Court.

25 They have always taken the position that their

1 main contention is essentially being concerned about being
2 assessed for attorney's fees to bring this litigation and or
3 that those funds haven't been used for maintenance.

4 So, my point here on the fraud is that there's no
5 facts supporting fraud either by the POA or by these
6 individuals. They're -- to the extent they're arguing that
7 fraud exists because, Hey, assessments were used to fund
8 litigation, I submit that that's insufficient. We've
9 already discussed that certainly my position that the POA
10 and or the board members had the right to use assessments to
11 hire an attorney or legal advice or to bring a lawsuit.

12 You know, even if Mr. Hawkins were successful in
13 this case, you know, on some cause of action, the fact that
14 the board hired an attorney to defend itself to
15 counterclaims or to bring claims, as long as in good faith,
16 that's an authorized action.

17 So the suggestion that the board did not have the
18 right to use assessments to fund or to pay attorneys fees I
19 think is just not supported. And we just don't believe
20 there's any evidence or facts to support the fraud claims
21 either against the POA or against the individual third party
22 defendants and would submit, Your Honor, that nothing has
23 been submitted by Mr. Hawkins which supports that.

24 THE COURT: Mr. Hawkins.

25 MR. HAWKINS: Your Honor, with respect to fraud,

1 the elements for representation, and that would be an
2 assessment, that's to be used for the purposes of assess --
3 what did -- what the restrictions say. It's a falsity, it
4 obviously it wasn't true, it was material, it forced my
5 client to give up his money. They had knowledge -- the
6 board had knowledge of the falsity and chose not to disclaim
7 it. And, in fact, it was intentional, which I would think
8 could go above reckless disregard. They intended that my
9 clients give them the money, that's the fifth element.

10 The sixth, my client's knew none the better.

11 The seventh, they relied on the truth. And if
12 folks are under -- acting under the guise of a board of
13 directors which, from the beginning my folks were paying
14 their assessments when they thought they would be used for
15 the right thing, and a right to rely on there, and then
16 their proximate injury, which would be the money. And if
17 one keeps another's money, the case law is in here and fails
18 to safeguard the money, then that's fraud.

19 THE COURT: Okay. Yes, sir.

20 MR. HARJEHAUSEN: Yeah, Your Honor, we also moved
21 for summary judgment on the claims against the Property
22 Owners Association and third party defendants for self
23 dealing. I haven't seen any evidence that's been submitted
24 by Mr. Hawkins that the POA's directors allegedly sacrificed
25 the POA's interest for their own interests.

1 Again, this is a summary judgment motion under
2 Rule 56, we can move for summary judgment with or without
3 supporting affidavits. These are Mr. Hawkins' clients'
4 affirmative claims against the POA and he can't simply rely
5 upon the pleadings or conjecture or argument to support
6 them, there has to be some facts. And I would submit to you
7 that there is -- there are no facts that these third party
8 defendants benefited themselves at the expense of the
9 corporation.

10 To the extent we've been talking about assessments
11 all day, everybody that's a member has been assessed the
12 same amount.

13 THE COURT: Mr. Hawkins.

14 MR. HAWKINS: Give me one second, Your Honor.

15 Well, I believe that the self dealing, Your Honor,
16 the self dealing in something that -- that -- that we've had
17 in our -- in our pleadings as an issue is Billy Israel and
18 it's supported by his -- the deposition on Page 209 through
19 211, which we briefed in this particular brief. There is
20 evidence that the taxiway was flipped. The taxi way and the
21 grass runway area for -- because Billy Israel was on a side
22 that he needed that and that it basically benefited Bruce
23 Goldberg who had put a pool out there and basically needed
24 that space in order to get his pool where it needed to be
25 because of some of the setbacks and other things associated

1 with that particular runway.

2 So there is -- there is evidence in -- in the
3 record regarding that. And so you say there is no evidence
4 there, there's evidence in there.

5 THE COURT: Okay.

6 MR. HARJEHAUSEN: Your Honor, I'll just briefly
7 comment on that. I understand that that's Mr. Hawkins'
8 argument. I may have missed it, I know that there's a lot
9 of documents and exhibits that have been submitted, but I
10 don't know that I have seen any evidence entered into the
11 record in response to this motion for summary judgment in
12 that regard as to the unfair dealings. So, to the extent
13 that it's determined by the Court that there isn't any I
14 would reiterate my argument on that.

15 The last -- the last point, Your Honor --

16 THE COURT: Let me stop you right there.

17 Mr. Hawkins, how about that, where is it in the
18 record? Where am I going to find?

19 MR. HAWKINS: The assertion --

20 THE COURT: The pool and flipping the runway, the
21 taxi way and the pool where am I going to find it?

22 MR. HARJEHAUSEN: It's in Billy Israel's
23 deposition, Page 209 through 11.

24 THE COURT: Okay. Thank you. Okay.

25 Go ahead, Mr. Harjehausen.

1 MR. HARJEHAUSEN: Thank you, Your Honor.

2 Lastly, you know, we, as a -- basically as an
3 additional ground in the alternative for summary judgment, I
4 understand Mr. Hawkins' arguments. He suggests that we're
5 trying to combine all of his causes of action into one, but
6 I would submit to you that if you look at his counterclaims
7 and third party complaint, most of them share the same
8 factual pattern that assessments were obtained and then used
9 to fund litigation not for maintenance.

10 We would submit, Your Honor, that the record
11 establishes that there's -- there's no evidence the officers
12 acted in bad faith with dishonest motives. This litigation
13 has overwhelmingly resulted in clarification of the rights
14 and responsibilities of numerous individuals and subjecting
15 their lots through the covenants.

16 The only reason that this matter is still pending
17 is Mr. Hawkins' clients have disputed for 6 years that their
18 lots are subject to the covenants. And, oddly enough, they
19 paid assessments initially, but then they stopped paying
20 assessments and now are complaining that, Oh, we're having
21 an exposure to attorney's fees in this action for basically
22 disputing that we're part of the association.

23 So, I just don't feel that there's any evidence in
24 the record to establish that this action was brought in bad
25 faith or with dishonest motives. I understand Mr. Hawkins

1 is going to cite the Billy Israel's testimony regarding the
2 \$50,000 debt limit. But, again, to the extent that even if
3 that debt limit were exceeded it is an injury to the
4 corporation itself. They haven't admitted that they are
5 members of the association, they haven't asserted a
6 derivative action. They essentially want to bootstrap all
7 of these claims by saying, we're not a member, we sort of
8 are a member, we think we may be a member if the Court
9 decides that way.

10 But for purposes of bringing affirmative claims,
11 they have the burden of proof of showing they are a member
12 and that the board of directors and the POA owes them duties
13 and responsibilities. They've never admitted that, I
14 thought they had earlier this in this argument, and it
15 sounds like they're leaning toward that. But unless there's
16 evidence that they are, then they are not owed any duties by
17 the POA.

18 So my motion is on the counterclaims and the
19 third-party claims. They've got the burden of proof of
20 establishing at least a scintilla of evidence or fact
21 dispute and they're not even establishing, Hey, here's the
22 evidence that we are members and admitting that we're
23 members to bring these causes of action.

24 THE COURT: Mr. Hawkins, are they members?

25 MR. HAWKINS: Under the original restrictions

1 we've agreed that going forward we are members, and the
2 proof would probably tend to show that. What the problem
3 here is that my clients, and if you want to show bad faith,
4 my clients never said that they never wanted to be, nor
5 intended to be, a part of the association. My clients
6 weren't given that choice. My clients were given the choice
7 of, you can agree to be members of this association, and by
8 the way the plaintiffs asserted in their complaint that we
9 were members of the association and, therefore, the whole
10 problem the plaintiff takes inconsistent positions when it's
11 convenient for their case. But they asserted we're members.
12 We've agreed that we would come in under the implied or
13 reciprocal negative covenants, but that doesn't mean that
14 we've always asserted that we're members of the association,
15 because if we did that we lose all of these defenses,
16 because these plaintiffs are not going to take it with
17 conditions.

18 So, they've asserted we're members, we've asserted
19 we are not members. You know Mr. Grote and Mr. McCabe
20 assert that we are members so we have to pay -- we have to
21 pay all their fees, Mr. Harjehausen says we're not members,
22 so they can't bring these causes of action.

23 What I'll agree to is that under negative or
24 reciprocal negative covenants or implied covenants, whatever
25 you want to call them, that we would be bound by those

1 original restrictions. Whatever the ramifications of that
2 come out later, you know, I can agree to that because I
3 don't know -- I don't know what they are, you know.

4 We've raised at the arguments and I've raised my
5 defenses and what I'm going forward with but, you know, to
6 ask me blankly, they're members under the conditions of the
7 original restrictions as they're written. And it would be
8 my position that that would be prospective and not
9 retrospect.

10 THE COURT: I understand. Okay.

11 Mr. Harjehausen, anything?

12 MR. HARJEHAUSEN: Not really, Your Honor. I think
13 that it's taken six years to sort of get this concession and
14 I don't think that there's any bad faith or dishonesty in
15 the board initiating this litigation to get some sort of
16 either concession or declaration from this court that these
17 folks' lots are subject to the covenants, conditions, and
18 restrictions, when they were paying dues and assessments
19 prior to this litigation.

20 Then, six years later, are finally conceding that,
21 Yeah, we're bound by it. I think it's, they've taken the
22 inconsistent position. I think the POA has always been
23 consistent that Mr. Hawkins' clients lots have always been
24 subject to these covenants.

25 Now, do title issues need to be clarified?

1 Perhaps. But the POA's position has always been that these
2 lots were subject to the covenants and the assessments were
3 owed.

4 In contrast to Mr. Hawkins' clients who have said,
5 No, we don't want to be part of this. We're not going to
6 admit that we're a part of the association, but we
7 nonetheless want to sue the board and its officers as if we
8 were members of the corporation.

9 So, to me, I view the case a little differently
10 than Mr. Hawkins. He views it as we want to have our cake
11 and eat it too. I view it in the reverse that his clients
12 want to have their cake and eat it too.

13 THE COURT: Well, let me ask you this: What about
14 them being told that they were not part of the association?

15 MR. HARJEHAUSEN: I haven't seen any evidence that
16 they were told that they were not part of the association.

17 THE COURT: Well, let's talk to Mr. McCabe.

18 Mr. McCabe.

19 MR. MCCABE: Okay. So first of all, that's not
20 what was told to the members. When -- when we attended this
21 meeting -- and, you know, assuming for a moment that I had
22 said, no one's bound by these restrictive covenants, still I
23 didn't have the authority to set aside the restrictive
24 covenants and the instruments that had been filed.

25 What happened in the meeting is some issues were

1 brought up with the developer and the ownership of the
2 runway. And there were definitely no one -- I don't think
3 there was any dispute between the developer and the parties
4 at the time that there were definitely problems with the
5 covenants.

6 At the time the consent was presented to the
7 owners we, we clearly told the owners that there -- that
8 there were one, issues with the covenants, but that we
9 believe that they were bound either expressly or under
10 several implied theories, but because people were making
11 noise about this, and there was a lot of frustration about
12 issues with the runway and who is responsible the
13 association learned that the developer had conveyed the
14 runway without its knowledge to a separate entity, so there
15 were all these things going on.

16 So, but at the time, this consent was provided
17 some people were saying that the developer had appointed
18 these board members when he no longer had the authority and
19 that the developer had annexed additional property after his
20 time to expire. So a consent we said, Hey, well, there's a
21 simple solution to this, just sign this consent saying you
22 acknowledge that you are a member. I mean, all these people
23 built hangers onto the back of their house and were using
24 the runway and everything else, I mean.

25 So at the time we presented this -- this -- this

1 document, the consent, and it was modified for several
2 people, it's in the record, some people asked it some words
3 be changed and so it was changed for them, these consents.

4 But the reason it says to affirm and to ratify the
5 actions of the board it says clearly in the whereas clause
6 that the board had taken certain actions, entered into
7 contracts, levied assessments, entered into arrangements
8 with vendors, and the board did that in good faith believing
9 that they had been legitimately appointed by the developer.
10 So, what we were asking them to do is to ratify all those
11 actions and it was explained.

12 Interestingly enough, at some point when the story
13 became, Ryan McCabe went to this meeting and said none of us
14 were in there. And so, about three weeks ago, Mr. Johnson
15 was one of the people who said that, admitted that he had
16 the recordings of my presentation, that he had two
17 recordings that he hasn't even produced in six years of
18 discovery along with the file.

19 And, you know, if this recording said what the
20 defendant say it said -- I'm pretty sure the judge would
21 have seen a transcript to this by now -- but I absolutely
22 refute that I said the things that have been attributed to
23 me or to Mr. Israel at that meeting. Nevertheless, of
24 course, and we didn't foresee that six years later we'd
25 still be fighting over this issue because, I mean, like I

1 said, these houses were along the runway, they have hangers.
2 Most of these people either had planes or currently -- and
3 even some of them currently have planes.

4 So, it certainly never saw this thing playing out
5 this way. And what we thought was there was a very simple
6 solution proposed to the owner to deal with all these title
7 issues. And, quite frankly, a reasonable person would have
8 signed it or said, I'm not comfortable with this section,
9 will you modify it?

10 Well, yes, there were some people that said we're
11 not going to sign this, but there were other conditions such
12 as I don't want to pay my back assessments, I'll sign this
13 if. So, for a handful of people that became a negotiating
14 tactic which was unfair to the remaining owners.

15 And so, again, two years ago -- I got six years --
16 there was this bankruptcy that interposed itself in the
17 meantime. And, you know, another thing that gets left out
18 is that the board actually accomplished some pretty amazing
19 things considered what it was facing. They secured
20 ownership of the runway. They received a significant
21 payment of money out of the runway. There were some lots
22 owned by Mr. Brockman's family across the road. The
23 association secured making sure that those property were
24 subject to the restrictions so they weren't on this main
25 highway unrestricted as commercial lots. And, additionally,

1 they receive -- they're going to receive money when those
2 lots sells, a significant sum.

3 So and there were -- and the common areas where
4 some of these were in the Brockman estate. None of the
5 common areas had been deeded to the association. And so all
6 of these things were obtained, much of it at unnecessary
7 time and expense. A lot of this has been fighting for no
8 good reason. But I absolutely deny ever saying that these
9 lots were not bound, that was not the opinion that was given
10 to the board, that was not what was told. And there were
11 recordings out there that I'm confident would vindicate
12 that -- obviously, we said there were problems with these
13 lots and we were very forthright about the issues with
14 regard to the annexation and that there was a plat that
15 wasn't recorded.

16 I mean, we did tell the owners that there were
17 problems. Because I felt like, you know, this wasn't
18 something to hold the cards on, we needed to be honest with
19 them. And we thought at that time we were meeting with all
20 the owners in that they were all on the same page to get
21 this done.

22 But even, had I said those things, I didn't have
23 the right to unilaterally amend the restrictions or to
24 unilaterally remove a lot. If I gave bad advice, then I
25 gave a bad -- I gave bad advice, but that wouldn't excuse

1 the owner from paying. And they quickly knew within a month
2 or two that the association intended to see this thing
3 through for the handful that refused to sign the consents or
4 bind them another way.

5 For instance, Mr. Galloway, the Galloways bound
6 their lot by just conceding to summary judgment on that
7 issue. And some of the other owners negotiated to remove
8 the language. And at some point the ratification was no
9 longer necessary because three boards have been elected
10 since that time and have maintained the course of action.

11 So, you know, it became a nonissue.

12 THE COURT: Mr. Hawkins.

13 MR. HAWKINS: Your Honor, if I may.

14 Our Exhibit B to our memorandum in opposition to
15 Mr McCabe's motion, is a transcript of a meeting that he
16 says he's never seen, I guess. However, this document, and
17 I intentionally did this, this was an exhibit from one of
18 their filings back in 2017. This document is replete with
19 representations by Mr. McCabe that my client's membership in
20 the association was suspect, and not, quote, ironclad. It
21 is replete with comments to that effect. It has a common in
22 there or Mr. McCabe says, I know I'm being recorded.

23 So this is a -- this is a 20-page 20 -- wait --
24 it's a 26-page document about that meeting, and I would just
25 beg the Court to read it. There's the representations,

1 We're never going to pay any money. It's not a lawsuit
2 about that, it's about this determination of who is subject
3 it to the restrictions. All of the reasons why my clients
4 may not be subject to the restrictions. Lot 1 through 26
5 were restricted when Brockman didn't sign the restrictions.
6 There's questions as to whether the -- whether the
7 declarants could even have filed any amendments because they
8 weren't really A members or B members or, you know, all the
9 shares converted.

10 There's every reason in the world in this exhibit
11 alone that the Court should look at to where these folks are
12 saying this is a necessary lawsuit and the only way for you
13 to get out of it is for you to sign this consent which, by
14 the way, opens you up and you are contractually now bound,
15 so do everything within this consent that you agree to. And
16 I believe it's even got a quote -- it's got a clause in
17 there, Irregardless of any court of competence -- competent
18 jurisdictions ruling. I mean, that's how bad it is.

19 We weren't given an alternative. My clients were
20 not given an alternative other than this consent. I wrote
21 Mr. McCabe a letter telling him that we would consent, but
22 not with all of this junk and that was right at the
23 beginning of this lawsuit. And that is an exhibit filed in
24 our memorandums as well, Your Honor.

25 As far as any negotiation goes --

1 THE COURT: I'm don't mean to interrupt you there,
2 Mr. Hawkins, tell me where I'm going to find that. I think
3 I've read that, but tell me where.

4 MR. HAWKINS: It is Exhibit B to our memorandum in
5 opposition to Mr. McCabe's motion.

6 THE COURT: Okay. Go ahead, sir.

7 MR. HAWKINS: As far as any modifications go to
8 the extent that's an excuse, it was late in the case where
9 they had these people on the ropes with all these fees. If
10 you look at the modifications, they're so -- they're so
11 benign in no way changes the ramifications of the execution
12 of the agreement. It was signed as part of the negotiation
13 and settlement, I'm sure. It's a totally different scenario
14 and it's disingenuous in the first place because there was
15 no material change whatsoever.

16 My clients weren't given that opportunity, despite
17 my letter in the beginning. So, they can't say -- well,
18 they can say anything they want to, but their main argument
19 on these equitable actions is, you know, we didn't do
20 anything wrong, you were subject to restrictions, you didn't
21 pay your fees. It's not true. There's a whole lot of
22 things that underlie this case and that's the reason it's an
23 equitable action and we have an equitable defense.

24 And I ask the Court just to take everything into
25 consideration. And especially this Exhibit B is where

1 everything started to fall apart and all of these
2 representations were made by Mr. McCabe and mainly Billy
3 Isreal.

4 MR. MCCABE: Judge, may I?

5 THE COURT: Yes.

6 MR. MCCABE: You know, this Exhibit B, correct me
7 if I'm wrong, Ely, but the first time this shows up is in
8 the motion for summary judgment and only because Mr. Johnson
9 and some of these parties who've taken this position
10 produced under examination by other documents, admitted that
11 there was a transcript --

12 MR. HAWKINS: There is.

13 MR. MCCABE: -- approximately a month ago.

14 Still don't have this transcript. Still don't
15 have the recordings. And so, for the first time in a case
16 has been going six years this, you know, this shows up.

17 Now, obviously -- so I don't know this is true. I
18 don't know who prepared this or anything else. Of course,
19 looking at it --

20 MR. GROTE: Let me make one correction here. And
21 while you all were -- and I hate to interject, but just -- I
22 was trying to look this up when there a representation that
23 the plaintiff had filed these at some point. And my
24 recollection was no. So I was trying to go back to some of
25 the pleading. And I think the answer is no.

1 The first time that these meet -- purported
2 meeting minutes show up are actually filed by Mr. Hawkins in
3 his motion in support of -- or in his memorandum in support
4 of a motion to dismiss, and I think that was in 2017. The
5 plaintiff did file a memorandum in opposition to that motion
6 to dismiss and that's Court Stamped filed March 1, 2017, and
7 specifically raised this meeting -- this issue at the
8 meeting minutes that those we're not the meeting minutes
9 that were prepared by the association, and we didn't know
10 where that came from.

11 So, to say that we've adopted those and filed
12 those I think is a misstatement. I'm looking at the
13 memorandum that we filed back in 2017, it says, As Reported,
14 to the May 12, 2016 meeting minutes attached to defendant's
15 memorandum. Plaintiff asserts that those are not even the
16 plaintiffs meeting minutes. And it raises the issue that
17 they appear to be somebody's attempt at transcription of a
18 recording of a meeting, there's no certification of
19 accuracy, they're not done by the association.

20 So there really -- there's no foundation for
21 those. And I think those actually came from Mr. Hawkins or
22 his clients. And, you know, that address -- that issue was
23 raised and I don't think that we actually filed those and we
24 disputed what they were back in 2017 and our memorandum
25 filed on March 1st, 2017.

1 THE COURT: (Inaudible) -- stuff that I remembered
2 that. I mean, I've been in this case as long as you folks
3 have, just about, so I remember seeing something. But is
4 there a recording of this Mr. Hawkins? Is there a
5 recording? I don't know about recording.

6 MR. HAWKINS: We have -- I have produced a
7 snippet, Your Honor, of a recording that was recently and I
8 think it was produced that -- it was -- it was the -- it was
9 a meeting, Mr. McCabe was there and basically the gist of it
10 was where Mr. McCabe said, Everybody's got to sign the same
11 thing. And that is actually in this Exhibit B, as well.

12 And I'll tell you that the plaintiffs have
13 produced documents which follow this Exhibit B. I've got
14 them in a different room set aside -- but they're -- well,
15 they're actually -- well, they're marked as plaintiff's
16 exhibits, I believe, which are the -- which are their
17 minutes from these meetings that have Attorneys Eye Only
18 written all over them. I don't -- I don't think there was
19 too much redacted from them, but I don't think that those
20 minutes are as replete as these, are as accurate as these.

21 THE COURT: Okay. Everybody give me just one
22 minute here, I'm going to chat with my law clerk for a
23 second. And I'll tell you what, let's everybody take about
24 a 10-minute break, okay? I gotta get some more water. I
25 know everybody here -- we've been running two hours. So

1 let's just all get some water. We'll be back in about
2 10 minutes. Can we do that? Everybody good?

3 MR. HAWKINS: Yeah.

4 MR. MCCABE: Yeah.

5 THE COURT: Ten minutes.

6 (WHEREUPON, a brief pause held.)

7 THE COURT: Okay. Okay. All right. Anything
8 further? I think we were down to finish -- about to finish
9 up where I can take things under advisement.

10 Does that sound about right? Where is Mr. McCabe?

11 MR. MCCABE: Yes, sir. Can I correct one thing?

12 THE COURT: Sure. Where is Mr. Hawkins? Okay. I
13 think Mr. Hawkins has already jumped off. He's gone.

14 Whatever that is, can we talk about it later,
15 Ryan?

16 MR. MCCABE: Yes, sir.

17 THE COURT: Okay. All right. Okay.

18 Everybody, it's under advisement. As I said, we
19 are going to, Mattie (ph) and I, are going to be talking
20 about this and discussing this tomorrow and the next couple
21 of days so we can get some rulings to you as fast as we
22 possibly can.

23 But thank you everyone for your attention.

24 END OF REQUESTED PROCEEDINGS

25

CERTIFICATE OF TRANSCRIBER

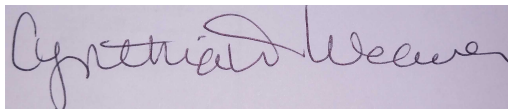
Case Name/Number: Chandelle Property Owners Association v.
James Douglas Armstrong, et. al.: 2019-CP-42-01854

Date of Hearing: September 12, 2022

Court Reporter/Monitor: WebEx

I, Cynthia D. Weaver, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither Counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

December 26, 2022

A rectangular box containing a handwritten signature in purple ink that reads "Cynthia D. Weaver".

Cynthia D. Weaver,
Official Court Reporter
State of South Carolina