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Nov 17 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY CIRCUIT COURT

DeAndrea Gist Benjamin, Circuit Court Judge
Case No.: 2019-CP-40-00919

Appellate Case No. 2022-001434

Emad Tadros, as Trustee of the Grace Living Trust dated October 12, 2010, as amended, Appellant,

v.

Holder Properties, Inc., John R. Holder, Individually, ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association, Defendants,

of which

ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association are the Respondents.

Respondents' Petition for Rehearing or for Clarification

Respondents, by and through their undersigned attorneys, petition this Court for a rehearing of its November 6, 2023 Order remanding the appeal. In the alternative, Respondents request this Court clarify its Order.

Introduction

This petition for rehearing concerns this Court's recent order remanding the case to the circuit court to reconstruct the record. A year after Appellant noticed his appeal, he moved this Court to remand the case because the transcript of the underlying hearing—in which Judge Benjamin granted Respondent summary judgment—*allegedly* contained errors making

meaningful review on appeal impossible. **Appellant neglected to file the transcript with his motion and the transcript is not otherwise on file with the Court of Appeals.** Although the Court of Appeals did not have the transcript to evaluate whether the errors made meaningful review impossible, it found meaningful review impossible due to the transcript errors—adopting Appellant’s conclusory, unsupported position and remanding the appeal. Respondents request this Court rehear the motion to remand and deny it, forcing the appeal to move forward. In the alternative, Respondents provide the underlying transcript so this Court can actually review whether meaningful review is impossible (it is possible and the appeal should go forward). Last, in the event this Court maintains its remand order, Respondents request this Court clarify its order so that Judge Newman has authority to determine reconstruction is not necessary and the appeal can move forward.

Background

Appellant Emad Tadros owns two commercial properties comprising four individual units within the Adesso Columbia mixed-use condominium development (Adesso) that he purchased in December 2014. He filed suit in February 2019 against Respondents—the Homeowners’ Association, Horizontal Property Regime, and the former owner of Adesso—challenging the parking allocation for his units and arguing Respondents violated the Adesso Master Deed and City of Columbia zoning restrictions. Appellant also asserted the Homeowners’ Association improperly charged him costs and expenses under the Master Deed, and had made misrepresentations to him.

Respondents moved for summary judgment, arguing Appellant’s claims were time-barred by the three-year statute of limitations. The circuit court agreed with Respondents, granting them summary judgment on September 21, 2021, on the grounds Respondents argued in their

motion. Appellant appealed, ran into issues ordering the transcript, and decided he could not continue the appeal once he received the transcript based on errors in the transcript. Detailed facts are contained in Respondent's Return to the Motion to Remand, along with exhibits, which are expressly incorporated herein.

Argument

- I. This Court should rehear the Motion to Remand because it overlooked or misapprehended Appellant's burden and obligation to file the transcript with the motion and the Court had no basis upon which to find remand was necessary.**

When the record on appeal has not been filed or when the facts relied on in support of a motion are not in the record, a party filing a motion must file affidavits or other documents in support of their position. Rule 240(c)(3), SCACR. If a moving party fails to perform an act required by Rule 240, the moving party has abandoned the motion. *See* Rule 240(g).

Further, on a motion for reconstruction, if the record with the omissions is sufficient to allow for review, then remanding for reconstruction is unnecessary. *See, e.g., Sweat v. Crawford*, 292 S.C. 324, 327, 356 S.E.2d 147, 149 (Ct. App. 1987) (finding the circuit court did not err in using a transcript with omissions, and refusing to remand, when reviewing an appeal from a referee because the evidence in the record sufficiently supported the findings of fact made by the referee); *Koon v. State*, 358 S.C. 359, 368, 595 S.E.2d 456, 460-61 (2004) (denying the appellant's request to remand to the PCR court for reconstruction of a PCR hearing when the entire transcript was missing because, while reviewing the record before it, the Court found the appellant did not provide specifics on how counsel was ineffective or whether the issue was preserved for review), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

Appellant moved to remand, claiming the *transcript* contained 54 instances of “inaudible” and “noise interference” that made meaningful review of the appeal impossible and reconstruction was necessary. Appellant was obligated to provide documents in support of his motion under Rule 240(c)(3), i.e., provide the transcript. Appellant did not do so. Because the transcript was not part of the record, and it was unquestionably necessary to determine whether reconstruction was required, Appellant abandoned his motion under Rule 240(g).

Even if the failure to provide the transcript does not amount to abandonment of the motion, it certainly deprived the Court of the ability to evaluate whether the errors in the transcript—in conjunction with other information expected in the record and filed with Respondents’ Memo in Opposition to Remand—made review impossible and reconstruction necessary. This Court must have overlooked Appellant’s failure because it would be impossible without the transcript to determine whether the errors in the transcript required remand for reconstruction. By ordering reconstruction without any factual basis, this Court has relieved Appellant of his burden to support his motion; and the order indicates that any appellant can obtain a remand for reconstruction just by asking for it. This Court should rehear the motion to remand and deny it, requiring Appellant to prosecute his appeal as is.

II. This Court should rehear the Motion to Remand and deny it because Appellant failed to identify what specific claims the Court could not review based on the current record and, now having the benefit of the transcript, the Court can actually review it and find the errors are insubstantial and the appeal should continue.

After this Court remanded the appeal on November 6, Respondents were finally provided a copy of the transcript that Appellant has had since early August 2023. It is enclosed as an exhibit. **Ex. 1 (Transcript)**. Appellant did not meet his burden to identify precise claims that cannot be reviewed due to the errors in the transcript, or that it would be prejudicial to proceed

with the current transcript. If the Court evaluates the transcript, it will determine the errors are insignificant, and this Court can evaluate the issues on appeal even with the “inaudible” sections.

The inability to prepare a complete transcript does not necessarily present a ground for reversal or remand for reconstruction. *State v. Ladson*, 373 S.C. 320, 325, 644 S.E.2d 271, 273 (Ct. App. 2007). To warrant remand for reconstruction, the appellant must identify specific claims the court would not be able to effectively review. *Id.* at 325, 644 S.E.2d at 273. When the omissions or errors in the record do not prejudice the appellant, remand for reconstruction or a new trial is not necessary. *See Sweat v. Crawford*, 292 S.C. 324, 327, 356 S.E.2d 147, 149 (Ct. App. 1987). Furthermore, the party requesting remand must establish prejudice. *See Ladson*, 373 S.C. at 325, 644 S.E.2d at 273. Most cases around the country dealing with transcript issues on appeal involve only a portion of the transcript missing and meaningful appellate review is still possible without prejudicing the parties. *Id.* at 326-27, 644 S.E.2d at 274.

Here, if the Court reviews the transcript, it is clear that Appellant did not meet his burden to obtain reconstruction and that the appeal can move forward despite the errors. Appellant claims there are 54 notations of “inaudible” or “noise interference.” **Mot. for Remand, at 4.** Appellant asserts he argued at the hearing that he “was threatened to execute the Release and Settlement under duress” and that argument is “completely missing from the transcript.” *See Mot. for Remand, at 4.* Appellant asserts he also argued at the hearing over the regime fees charged to his commercial units, but there are five “inaudibles” in the three pages of that argument. *Id.* These are the only two specific issues that Appellant argues warrant remand.

Appellant’s claim that his argument on duress is “completely missing” from the transcript, referencing “inaudible, sound cut out,” is false. The transcript contains detailed arguments on duress, with references to case law. There are three references to “inaudible,

sound cut out” in the transcript. The first instance is contained within the arguments by counsel for the Holder Defendants who are not involved on this appeal, and the arguments on duress span three pages of the transcript. **Ex. 1 (Transcript – 15:17 - 17:23)**. The third instance occurred during Respondents’ counsel’s arguments not about duress. **Ex. 1 (Transcript – 38:22-23)**. Because these two instances are not Appellant’s arguments, involve a party not on the appeal, and the arguments are contained in the transcript, they cannot support remand for reconstruction.

The second instance of “inaudible, sound cut out” occurs in Appellant’s arguments countering the Holder Defendant’s argument and do not involve duress. **Ex. 1 (Transcript – 28:4)**. Regardless, Appellant made arguments about duress that are reflected in the record. **Ex. 1 (Transcript – 30:25 – 32:7)**. Also, Appellant’s memorandum in opposition to summary judgment contained detailed arguments and references to submitted evidence on “undue influence” and the settlement agreement. **See Resp. Memo in Opp. to Remand (Ex. 7 at 5 (Pltf’s Memo. In Opp. to MSJ))**. Because the transcript and the submissions at summary judgment belie Appellant’s position that his arguments on duress are completely missing from the transcript, this Court should rehear the motion to remand, deny it, and find the appeal can move forward.

Further, this Court can review Appellant’s “regime fees” argument even with the transcript notations of “inaudible.” The transcript makes clear that Appellant’s counsel was able to make his regime fees argument and this Court can review that argument from the present transcript. **Ex. 1 (Transcript – 57:19 – 60:4)**. Similar to the duress arguments, the regime fees arguments are well represented in Appellant’s memorandum in opposition to summary judgment. **See Resp. Memo in Opp. to Remand (Ex. 7 at 12-13 (Pltf’s Memo. In Opp. to MSJ))**.

Because the transcript with the omissions allows this Court to meaningfully review the two specific arguments Appellant claims are missing and warrant reconstruction, and because those arguments were made in writing in Appellant's submissions to the circuit court, this Court should rehear the motion to remand and deny it, requiring the appeal to move forward. Remanding the case for reconstruction under the circumstances is unnecessary, a waste of judicial resources and time, and only further delays the appeal.

III. If the Court maintains the remand to Judge Newman for reconstruction, this Court should clarify its order on the scope of the reconstruction and Judge Newman's authority.

This Court's order to remands the case to Judge Newman for "reconstruction of the record" and states: "If Judge Newman determines reconstruction is not possible, she shall notify this court and all parties. If the record is reconstructed, Appellant's counsel shall immediately notify this court so that the appropriate appellate timelines can be set."

The order is unclear. Although Respondents disagree, the only matter that arguably could need reconstruction is the hearing transcript—not the entire record. In addition, the order appears to give Judge Newman only two options: (1) reconstruct the record, or (2) find that it is not possible. It should be clarified that Judge Newman has the authority to determine reconstruction is not necessary—that the record that will be before the Court of Appeals will be sufficient to review Appellant's position. Without this option, Judge Newman may be forced to conclude she cannot reconstruct the record based on insignificant transcription omissions.

Conclusion

This Court should rehear Appellant's motion to remand for reconstruction because it overlooked the fact that Appellant failed to file the transcript with his motion, and overlooked that reviewing the transcript itself would be required to determine if remand for reconstruction

was necessary. Respondents, having been provided the transcript AFTER the Court ordered remand, files it with this petition so that the Court can review Appellant's arguments he asserts warrant remand and come to the inescapable conclusion that reconstruction is not necessary and the appeal should progress. If the Court maintains its order for remand, it should at least make clear Judge Newman has the authority to determine reconstruction is not necessary.

This 17th day of November, 2023.

Respectfully submitted,

s/Skyler C. Wilson

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STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

COUNTY OF RICHLAND

Civil Action No. 2019-CP-40-00919

EMAD TADROS, et al,)	
)	
Plaintiff,)	TRANSCRIPT
vs.)	OF
)	WEBEX
)	PROCEEDINGS
HOLDER PROPERTIES, et al,)	
)	
Defendant.)	

-----/ January 7, 2021

B E F O R E:

HONORABLE DeANDREA BENJAMIN
RICHLAND COUNTY COURTHOUSE
COLUMBIA, SOUTH CAROLINA

A P P E A R A N C E S:

For the Plaintiff:

CHARLES G. BLACKBURN, Attorney at Law

For the Defendant:

KEVIN K. BELL, Attorney at Law and
MICHAEL C. MASCIALE, Attorney at Law

BY: Karen A. Kocsis, CCR

1 THE COURT: All right. We're on going to go on
2 the record.

3 Again, this is the case of Emad Tadros versus
4 Holder Properties, 2019-CP-40-00919.

5 And if you can, if everyone please say your
6 appearances and who you represent for the court
7 reporter. Thank you.

8 MR. MASCIALE: Judge, may it please the Court.

9 Judge, I'm Michael Masciale, I represent the
10 ADESSO Horizontal Property Regime and the ADESSO
11 Homeowners Association.

12 MR. BELL: And Your Honor, Kevin Bell, and with
13 me is Paul Heffer, representing Holder Properties
14 and ADESSO/COLUMBIA LLC.

15 MR. BLACKBURN: Good morning, Judge.

16 THE COURT: All right. Good morning.

17 All right. And this is a motion for summary
18 judgment filed by Defendant Holder Properties; is
19 that correct?

20 MR. MASCIALE: That's correct, Your Honor.

21 And Your Honor, before we begin, just one
22 housekeeping matter I wanted to bring to the Court's
23 attention. The ADESSO HOA and Horizontal Property
24 Regime filed a motion for summary judgment back on,
25 I believe, December 28th, which would have been at

1 least ten days before this hearing. We gave notice
2 of the date and time of the hearing, as required
3 under the rule, to hear our motion for summary
4 judgment today as well.

5 THE COURT: It is not noticed for today. So if
6 everyone consents, I'll hear it considering we have
7 y'all, I guess the last ones. But that will require
8 a consent of all parties.

9 MR. BLACKBURN: Plaintiffs consent, Your Honor.

10 MR BELL: Certainly we do as well. Doesn't
11 affect us.

12 THE COURT: All right. All right. I'd be glad
13 to get some background. I'll be glad to hear it. I
14 guess, (inaudible) is it Mr. Bell, is it your motion
15 about -- yes, on behalf of the defendants.

16 (Loud background noise interference.)

17 THE REPORTER: Judge, could we get everybody
18 else to mute first?

19 THE COURT: Can we get everybody to mute so we
20 won't have any background noise, and we'll do the
21 same. They're working on the light post or
22 something outside my office, so there's a lot of
23 noise outside.

24 All right. Here we go.

25 Yes, sir, Mr. Bell.

1 MR. BELL: Okay. Thank you, Your Honor.

2 As mentioned, I represent Holder Properties,
3 ADESSO/COLUMBIA LLC. I'll refer to those today just
4 as Holder. John R. Holder was also named --
5 (inaudible) -- the fact that he was never served so
6 he is not a party to this action.

7 And with the Court's permission, I'm going to
8 share my screen. I have a PowerPoint that I think
9 will help facilitate the argument today.

10 THE COURT: Yes, sir. My law clerk will have
11 to give you -- share something with you in order for
12 you to do that.

13 MR. BELL: Okay.

14 THE COURT: You still there, Mr. Bell?

15 MR. BELL: Yeah. I'll stop -- I hit the wrong
16 button, instead of share I hit cut off video.

17 THE COURT: Okay. There you go.

18 MR. BELL: Okay. There we go.

19 Okay. As Your Honor requested of me, I'll give
20 you a little background about the motion and then
21 the case before we get to the merits.

22 The nature of this dispute is this,
23 ADESSO/COLUMBIA is a mixed-use residential and
24 retail development here in downtown Columbia. Your
25 Honor may be familiar with it. It is across

1 Assembly Street from the coliseum. It also fronts
2 South Main Street below the old law school. It has
3 ground floor retail, several floors of residential
4 condominiums above it, has a pool, garage. A
5 typical mixed-use retail -- a big mixed-use
6 residential/retail development that we see here
7 (indicating.)

8 The plaintiff is the owner of the ground floor
9 retail units at ADESSO. There are four of them. He
10 alleges that he does not have the number of parking
11 spaces for his retail units that he's entitled to
12 have under the master deed and he claims damages
13 from it.

14 All of the defendants dispute this allegation,
15 defendants say he does have exactly the parking he's
16 supposed to have. But the City of Columbia, who is
17 in charge of enforcing zoning, plat and parking at
18 ADESSO says the plaintiff has all of the parking to
19 which he's entitled to.

20 I know it just sounds like a buildup to a
21 parking dispute today. This motion is not concerned
22 with who is right or wrong about parking. But this
23 motion for summary judgment is because Plaintiff's
24 claims were released in a prior lawsuit that
25 Plaintiff brought against Holder and 38 other

1 defendants. And the prior settlement is the only
2 focus of our motion today as opposed to the
3 substance of Plaintiff's claims.

4 To give you a few dates and facts to put this
5 in perspective. From 2008 to 2013 Holder served as
6 the developer and the property manager for ADESSO,
7 because it was developer that also controlled the
8 homeowners association.

9 In 2013, April of 2013, after the target number
10 of units had been sold, Holder released control of
11 the HOA. He did, however, continue to be the
12 property manager.

13 In December 2014, Plaintiff purchased all four
14 of the retail units at ADESSO. He did not purchase
15 those from Holder, he purchased them from the
16 original purchaser of the retail space.

17 In February 2016 the owners of the ADESSO
18 residential and retail units filed suit against
19 Holder and 38 additional defendants. This was a big
20 lawsuit here in Columbia. The residential owners
21 asserted their claims through a class action.
22 Plaintiff was not in the class action.

23 Plaintiff's claims relating to the retail units
24 were served -- (inaudible) -- and the causes of
25 action were widespread, breach fiduciary duty,

1 unfair dealing, breach of contract, improper
2 management, negligence. You name it, it was all in
3 there.

4 In May of 2016 Holder was terminated as the
5 property managers. And after that point Holder had
6 no involvement with ADESSO/COLUMBIA. They were out
7 at that point.

8 In May of 2017, a full year later, the
9 plaintiff settled all claims against Holder and the
10 38 additional defendants. Plaintiff's individual
11 settlement is a separate document, captioned Retail
12 Settlement Agreement and Release, it only applies to
13 Plaintiff's claims. The class action settlement was
14 separate.

15 The release was executed by Plaintiff and all
16 39 defendants, including Holder. And there was a
17 stipulation of dismissal with prejudice that was
18 entered as to all claims, quote, that were or have
19 been asserted, end quote. And I underlined that
20 because -- we'll discuss it shortly -- but that
21 alone is dispositive of this motion. But we will
22 get to that in just a few minutes.

23 Now I'd like to turn to the substance of the
24 arguments. There's four issues today. The first
25 one involves the settlement agreement documents.

1 There are three provisions of that document, the
2 release provision, a waiver provision and a warranty
3 provision, which all indicated that the plaintiff's
4 claims are conclusively barred.

5 The prelude to those provisions is that the
6 settling parties that are entering this agreement
7 which will bring about the whole, complete, final
8 resolution of all matters to Plaintiff. This is the
9 release provision: (Reading)

10 Tadros does fully and completely
11 release and discharge the settling
12 defendants from any and all claims
13 and action, causes of action whether
14 known or unknown, including the
15 claims made in the action or that
16 could have been made in the action
17 arising out of or relating to any
18 work performed by settling
19 defendants --

20 THE REPORTER: Wait, wait, wait. There's some
21 kind of feedback.

22 THE COURT: Hold on.

23 (Off-the-record discussion.)

24 THE COURT: All right. Mr. Bell, can you go
25 back --

1 MR. BELL: Sure.

2 THE COURT: -- to -- no, no, no, I don't
3 want -- not all the way back. Just you were -- go
4 back to the next slide. No, no, no, go forward, I
5 guess. I'm sorry.

6 MR. BELL: This is -- this is where I stopped.

7 THE COURT: Okay. So just start at the
8 beginning of this again. Okay.

9 (Noise static.)

10 MR. BELL: Okay. This is about the release
11 document. There's three provisions, the release
12 provision, the waiver provision and a warranty
13 provision. The preface to those provisions was that
14 this was to bring about the full, complete and final
15 resolution of all matters between the parties.

16 And the release -- it's the middle paragraph
17 where: (Reading)

18 Tadros does fully, completely
19 release and discharge the settling
20 defendants from any and all claims,
21 actions, causes of actions known or
22 unknown, including any claims arising
23 out or relating to any work performed
24 by the settling defendants.

25 The only limitation on scope of that release is

1 arising out of or related to any work performed by
2 the settling defendants. Dr. Tadros, in his
3 testimony, brings his current claims within the
4 scope of that. Because he agreed at his deposition
5 that management of ADESSO in assigning parking was
6 part of Holder's work at ADESSO/COLUMBIA. So
7 there's no question, the allegations that are being
8 made were within the scope of the release that was
9 entered in 2017.

10 There is a separate waiver provision that the
11 settling parties expressly waive. There's damages
12 which exist as of this date.

13 There's no limitation on scope. All claims for
14 damages were -- for damages which exist as of this
15 date. Plaintiff agreed at his deposition that all
16 actions by Holder, that are the subject of the
17 complaint, occurred prior to Holder being dismissed
18 in 2016. And that was a year prior to settlement.
19 And Plaintiff acknowledged that he and his counsel
20 were fully aware of the parking issues at the time
21 of the settlement, in May of '17.

22 So, again, it's a separate provision of the
23 settlement document that also says we waive any
24 claims that exist as of today.

25 The warranty provision, it's going to come back

1 around in connection with attorneys' fees.

2 First, just to say what a release is, it is to
3 abandonment or relinquishment of a right or claim.

4 And that concept is embedded in this provision.

5 (Reading)

6 Tadros warrants and represents
7 that he's the owner of all claims for
8 lost rents, lost profits and all of
9 the personal damage claims related to
10 or associated with the retail or
11 commercial units at ADESSO, and that
12 such claims are released, cannot be
13 asserted against the settling
14 defendants.

15 So as to the release to claims, he gives the
16 warranty --

17 THE REPORTER: Please do not read so fast.

18 Excuse me, please just -- slow down, please.

19 MR. BELL: I can.

20 THE REPORTER: Thank you.

21 MR. BELL: All right. Sorry.

22 In this provision Dr. Tadros has given a
23 warranty that the claims that are released cannot be
24 asserted against the settling defendants, those
25 would include the claims that he's brought in this

1 action.

2 The scope of the release was discussed between
3 Dr. Tadros and his counsel. Plaintiff complained to
4 his counsel about the scope of the release before he
5 executed it. Plaintiff states in his affidavit, as
6 I mentioned, that he was -- that counsel was fully
7 aware of issues he had with parking that were
8 supposed to be for his use and his view.

9 And this was the response by counsel. And
10 he -- (Reading)

11 As it relates to what we're
12 being asked to sign, the release is
13 very broad at the defendants'
14 request. They want to make sure they
15 are protected from any future claims
16 from the HOA or any others.

17 And he goes on to say: (Reading)

18 They only want to ensure they
19 get a complete release.

20 Further to this point, Plaintiff requested
21 modifications to the release as to Holder, which did
22 not occur. The release was signed as it was
23 presented.

24 South Carolina law on release of contracts, a
25 release is a contract just subject to general rules

1 of contract. The Court must enforce an unambiguous
2 contract according to its terms, regardless of the
3 contract's wisdom or the parties failure to guard
4 their rights secured.

5 We believe as a settlement document, the
6 unambiguous release, waiver and warranty provisions
7 must be enforced as written. And they are -- they
8 entitle Holder to judgment as a matter of law as
9 such.

10 There is a second issue that is related to the
11 settlement, but it is separate because there is a
12 separate body involved that applies to us. The
13 federal civil action was ended with broad
14 stipulations, dismissed with prejudice. Here it is:
15 (Reading)

16 There were or that could have
17 been asserted by or between any or
18 all parties in the referenced action
19 are dismissed and forever ended with
20 prejudice.

21 Here's what that means under federal law. Sort
22 of an obvious housekeeping point, because it was a
23 federal action that was dismissed, federal law has a
24 preclusive effect of any stipulation of dismissal.
25 And what that preclusive effect is, is that a

1 dismissal with prejudice constitutes a final
2 judgment with the preclusive effect, a res judicata,
3 not only as to all matters litigated and decided by,
4 but as to all relevant issues litigated in the suit.

5 And that's interesting, because in federal
6 court if you just stipulate to dismissal with
7 prejudice and say no more, the effect is all claims
8 that are or could have been litigated. But in this
9 case, of course, the document says that as well. So
10 it's both under the law and the document.

11 But to give you a couple of -- or a few
12 examples of how the federal courts have dealt with
13 this. In the major case itself, which is the second
14 bullet point, he contended that his counsel didn't
15 envision such a broad stipulation in that report.
16 And the Court said in the Second Circuit -- that had
17 intended to preserve that right, he should not have
18 entered this type of risk with prejudice
19 stipulation.

20 Ellis is very similar. Ellis said -- tried to
21 advance the point that, well, the parties who
22 created the stipulation, their intent controls. And
23 the Ninth Circuit said there's no authority for
24 that, that stipulation with prejudice means what it
25 means.

1 And, finally, relevant here, this is a Citibank
2 versus Data Lease. That's a somewhat notable case
3 that's cited very frequently for: (Reading)

4 -- represented by counsel
5 entered into the stipulation
6 dismissing its claims against the
7 agent, directors with prejudice.
8 Represented by new counsel Data Lease
9 cannot avoid the consequences of such
10 a prior act.

11 So that is a second basis, Your Honor, that all
12 claims -- there's no inference that Plaintiff
13 couldn't have brought his parking claims in the
14 prior lawsuit, all about it. Those claims have
15 been -- they are res judicata at this point because
16 of the stipulation dismissal.

17 Plaintiff has made allegations of duress,
18 notably the duress is by his own counsel in the
19 earlier case. Counsel threatened a lawsuit by the
20 HOA, which was also his joint client in that case.
21 This is the threat of the lawsuit, which I won't
22 read, but I'll give you the backstory on it.

23 Plaintiff and the HOA had entered an agreement
24 pursuant to which the HOA agreed to indemnify the
25 plaintiff against certain claims by its tenants.

1 And in exchange the plaintiff agreed to sign the
2 settlement agreement release. And so what his
3 lawyer was telling him is, if you don't do that, I
4 expect the HOA will sue you. And so the
5 consequences of his action is duress, but that's not
6 an issue in our motion.

7 What is at issue is the law of duress that
8 renders that allegation a moot point as to Holder.
9 So the law of duress, *Williams* is probably the best
10 case on that. It says: (Reading)

11 If one of the parties to an
12 agreement is in a position to dictate
13 its terms, then it's not a mutual or
14 voluntary agreement.

15 And I'm going to come back to why I underlined
16 one of the parties to the agreement. *Williams* is
17 cited for the proposition that if a party's
18 manifest -- (inaudible, sound cut out) -- by an
19 improper threat by the other party, then the
20 contract is voidable, or can be voidable if there is
21 no reason to apply.

22 Why does that -- how -- why does that language
23 matter. Plaintiff admits that his counsel, and
24 perhaps indirectly the HOA, was the only source of
25 duress. Plaintiff's counsel and the HOA were not

1 parties to the commercial settlement agreement. The
2 only parties were the Plaintiff and the
3 39 defendants. The plaintiff admits he did not
4 inform Holder or anyone else that he was executing
5 the release under duress. Plaintiff admits he did
6 not speak to Holder during settlement.

7 What that adds up to is that because Holder was
8 not a party to this alleged duress by somebody who
9 wasn't a party to the agreement, the claims of
10 duress at the hands of some counsel are inapplicable
11 to Holder as a matter of law. It simply doesn't
12 match up to that.

13 And so that's our motion as it relates to the
14 plaintiff's complaint. The summary judgment in
15 Holder Properties in Plaintiff's complaint are the
16 first claims are barred by release, waiver and
17 warranty provisions of the settlement agreement.
18 Under federal law, Plaintiff's claims are barred by
19 the preclusive effects of the stipulation of
20 dismissal with prejudice. And duress is
21 inapplicable because Holder was not involved in the
22 alleged duress by a non-party. So that -- that is
23 that portion of our motion.

24 The final issue, Your Honor, is liability of
25 Plaintiff for attorneys' fees incurred by Holder in

1 this action. Holder has asserted counter-claims
2 seeking attorneys' fees, breach of contract, and
3 pursuant to the frivolous Civil Procedure Sanctions
4 Act. The contract portion is the partial settlement
5 agreement has attorneys' fee provision. The motion
6 for summary judgment today is only concerned with
7 the breach of contract, not -- we're not here for
8 you on the frivolous Civil Procedure Sanctions Act.

9 Here is the provision, LinkPage: (Reading)

10 In the event of a breach of any
11 party and its obligations under this
12 agreement, the prevailing party in
13 any action or proceedings in any
14 other party in connection therewith
15 shall be entitled to recover such its
16 costs and expenses to a reasonable --
17 (inaudible) -- degree and extent
18 expenses.

19 That's the provision we're counter-claiming
20 under. How that adds up, as we discussed
21 previously, in the personal settlement agreement
22 Plaintiff gave Holder a warranty that he could not
23 bring this action. (Reading)

24 Tadros warrants and represents
25 that such claims released cannot be

1 asserted against a settlement claim.

2 We have requested Plaintiff, on multiple
3 occasions, to dismiss his lawsuit -- (inaudible) --
4 the cause of the commercial settlement agreement.
5 And by our presence here today, you can tell that he
6 has declined. But he has breached the warranty
7 provision in the commercial settlement agreement,
8 and that entitles Holder to summary judgment,
9 non-liability for attorneys' fees and costs.

10 We are not asking you to set the amount of
11 attorneys' fees today. We are only asking that the
12 complaint -- that judgment as a matter law be
13 entered against Dr. Tadros on his complaint, and
14 that the Court rule that Holder is entitled to his
15 attorneys' fees. And we will address the amount of
16 if that's necessary.

17 That is our motion today. I will unshare my
18 screen. And if the Court has any questions for me,
19 I'll be happy to address those. It's pretty
20 straightforward. But, otherwise, I will step back
21 and let Mr. Blackburn respond on behalf of the
22 plaintiff.

23 THE COURT: All right. Mr. Blackburn, do you
24 wish to -- is -- Mr. Masciale, is your motion
25 similar in nature? I can let you present and then

1 Mr. Blackburn to do them individually, or would you
2 respond to them jointly?

3 MR. MASCIALE: Your Honor, my motion is
4 slightly different and goes to the substance of the
5 case. So I'm happy to wait and let Mr. Blackburn
6 respond to Mr. Bell's motion, or however the Court
7 would like.

8 THE COURT: All right. Yes, sir,
9 Mr. Blackburn. Okay. Let's unmute him.

10 Can you hear him now -- hold on one second.
11 There you are. My law clerk -- okay. Now. All
12 right.

13 MR. BLACKBURN: Thank you, Your Honor. May it
14 please the Court.

15 Mr. Bell proposed an argument that left out
16 some -- (inaudible) -- such as the 2017 settlement
17 agreement arose out -- it's in my memorandum, and
18 I'm sure Your Honor had a chance to read all the
19 briefs and memorandums afforded in this action --
20 but included in Mr. Bell's memorandum is a 2016
21 complaint. That's how this whole action started.
22 It was amended on the Fourth Amended Complaint, it
23 was also attached to Holder's memo, Exhibit
24 Number 2, Fourth Amended Complaint, to request a
25 jury trial.

1 The master deed, which was included -- I
2 opposed Mr. Holder's, HOA's memo, which I've agreed
3 to here today, it's included in Exhibit 3. The
4 HOA's master deed is a contract too, it requires
5 arbitration right there on the top. And it's --
6 it's conspicuous and noticeable. Nobody -- and they
7 filed this 2016 complaint, by the way, with not
8 complying with arbitration provisions in the master
9 deed, which is contract, and not giving my client
10 notice of the 2016 complaint, which by the way he is
11 a named party on that complaint.

12 And Your Honor, I -- maybe you have, but I
13 never heard of bringing a complaint on somebody
14 without their consent or knowledge, which is exactly
15 what Frank Smith, the HOA's attorney -- which
16 Mr. Bell's talking about -- did. He filed this
17 complaint three months before Holder left. Holder
18 left because of Exhibit A to my memo, which is an
19 engineering report performed in 2015 outlining all
20 of the construction defects, in anticipation of the
21 2016 lawsuit. And by the way, none of those damages
22 have been corrected to date.

23 The main point is arbitration provision was
24 completely violated and ignored by the HOA's --
25 class counsel. It also seeks a jury trial, which is

1 not allowed in this action -- and that's in the
2 bylaws, that anyone who -- and it's in my memo, Your
3 Honor -- to my memo, and I'll pull out my memo if I
4 can find it -- it's in my memo where under
5 miscellaneous provisions in B: (Reading)

6 Anyone who attempts to bring a
7 jury trial will be barred.

8 "Will be barred." And that's exactly what
9 Mr. Bell's client allowed to be done. And in
10 those -- and under B it says: (Reading)

11 Holder -- Mr. Bell's client --
12 will fully-enforce the provisions of
13 the master deed.

14 So how -- my question, Judge, is how can he
15 come in and say my client breached the commercial
16 settlement agreement, which he didn't know anything
17 about until May '17. That's in the e-mails that
18 Mr. Bell referenced. He left out a lot of things in
19 that nice presentation he gave. A lot of issues
20 that arise through questions of fact, but it should
21 be submitted to this jury.

22 And it -- a lot things, including the
23 arbitration provision was not invoked, including the
24 fact that while Holder owned the property he leased,
25 parking spaces, which is violative of the master

1 deed itself. That's another violation. They didn't
2 invoke the arbitration provision.

3 They also -- if you look at Section 7 of the
4 master deed -- restriction -- (inaudible) --
5 separate conveyance of the common elements. And
6 goes on to Page 16 and it says, including parking
7 spaces, commercial parking spaces.

8 And so they try to argue about constructive
9 notice -- we'll bounce around on that -- but
10 constructive notice of what? The commercial
11 spaces -- I'll get to that later -- it came back to
12 seven -- I don't want confuse, Your Honor -- seven,
13 on page 16 says: (Reading)

14 May not be subject to a lease
15 between the unit owners or the
16 association and another party.

17 Loren Smith, who worked for Holder, sent my
18 client demanding e-mails -- the last one is
19 March 31st. It's uncontroverted that Mr. Holder was
20 gone in May, but yet, Loren Smith on behalf of
21 Holder Properties, Inc., was sending my client
22 invoices demanding payment for the three parking
23 spaces that were part of one of his units that were
24 controlled and rented through the Marine Corps,
25 which is right up there on Blossom Street, as you're

1 going up Blossom, on the left, there's that Marine
2 recruiting station. (Inaudible) -- involved in this
3 lawsuit, that and three others on top of that.

4 And the Marines had an agreement with Holder
5 that included three spaces, okay, it's Exhibit 22 to
6 Mr. Holder's deposition. Mr. Holder claimed
7 ignorance of a lot things when I took his
8 deposition. As a matter of fact, when asked about
9 the master deed, he said, you know, I had my
10 attorneys read it to me. I'm kind of familiar with
11 it, but not really.

12 You would think that an attorney, such as Frank
13 Smith, would -- we'll get to Frank Smith in a
14 minute -- you would think an attorney would say,
15 hey, Mr. Holder, guess what, this master deed --
16 (inaudible) -- or miscellaneous deed 4, he entered
17 in this master deed so that the arbitration would be
18 instituted or brought. That's why he did a master
19 deed.

20 And then he also found himself to defend the
21 jury trial actions, which are fraud. He did
22 neither. Especially in the 2016 complaint, which is
23 Mr. Holder's memo, which he didn't mention.

24 2016 -- February 9th, 2016, he filed a
25 complaint against Holder because of all these

1 deficiencies outlined in the ABS report. So the HOA
2 filed a suit through ultra vires actions, pursuant
3 to my expert, Mike Paradis, which is included in my
4 memorandum. Mr. Paradis opines that Defendants'
5 motions for summary judgment should be vacated
6 because it's based on settlement agreements that
7 should be vacated due to being obtained through
8 ultra vires actions taken by Mr. Masciale's clients
9 in addition to Holder.

10 So Holder not only violates -- talk about
11 violating a contract -- and I appreciate all the
12 case law -- but when it talks about breach of
13 contract and you're talking about a master deed, its
14 strict compliance. That's what the HOA statute
15 says, any violations to the bylaws, regulations --
16 I've got it somewhere around here, again as cited in
17 my brief. Strictly complied with. Strict
18 compliance with the master deed.

19 Well, when the master deed says this is subject
20 to arbitration, and neither Holder or any other of
21 the 38 defendants invoke arbitration provisions,
22 that's a violation right there. He let it go
23 through a settlement, a settlement.

24 Then when it came time to settle it, he came to
25 my client and said, by the way, you got to sign the

1 commercial release agreement -- and that's included
2 as Exhibit 9 to Mr. Bell's argument. And then he --
3 you know how it goes. Mr. Smith and Mr. Therow, I
4 appreciate ADESSO e-mailed me for the first time --
5 this is May 21st, 2017 -- Mr. Bell made several
6 references to '17 -- well, my client responds to
7 you, I appreciate for the first time e-mailing me
8 the ABS report. He looked at it, because Mr. Smith
9 said, you got to sign it, you got to sign it. You
10 have an obligation under the master deed. Master
11 deed says you got to sign it, have all unit owners
12 sign it or you will get sued. Right.

13 Mr. Smith conveniently forgot to mention to my
14 client, by the way, that a master deed requires
15 arbitration, binding arbitration. Mr. Smith didn't
16 tell that to my client, because Mr. Smith wanted my
17 client to sign the commercial settlement agreement
18 so they could settle the case. And they settled it
19 in 2017, but my client said -- (inaudible) --
20 affidavit, which is attached to my memorandum.

21 He struck through the first one. He got an
22 indemnification provision because the building still
23 leaks. It leaks all into the Marines and it leaks
24 into the three units above that, because the HOA --
25 now run by Mr. Masciale's client -- hasn't done

1 anything to stop the roof leaks that were known in
2 2015. It still leaks causing -- giving my client --
3 my client's failure of business, lease turnover is
4 unbelievable because it still leaks as of today.

5 So the indemnification that my client got from
6 Mr. Smith is totally protected from all damages
7 through the construction repairs. That was back in
8 2017, almost four years ago.

9 And now the HOA -- just to bring you current to
10 it -- the HOA is trying to put an assessment on
11 those unit owners for almost \$16 million, and they
12 entered into a settlement agreement for \$7 million
13 of which unit owners only got 4.8 million.
14 Mr. Smith walked away with the balance.

15 And now the unit owners over there are left
16 with a building that is in the same --
17 (inaudible) -- as before. No repairs have been
18 done. And so now they come back, and say, well, we
19 got to fix these repairs. It's going to cost
20 somewhat similar to the estimate that Mr. Smith
21 produced in the construction repair defect claim
22 brought in 2016. And the repairs still haven't been
23 done. My client still has an indemnification
24 provision that protects him -- and it's in the
25 contract too, signed.

1 So -- and the other things that Mr. Bell
2 conveniently forgot in his PowerPoint presentation
3 is this fourth amended complaint -- (inaudible,
4 sound cut out) -- already testified, it's the fourth
5 amended complaint. Mr. -- the Plaintiff's counsel,
6 Mr. Smith -- never seen anything like this either --
7 he includes that -- he includes negligent
8 misrepresentation -- which we'll get into in
9 Mr. Masciale's argument. But he also includes a
10 provision barring the defendants from invoking any
11 of their rights pursuant to the master deed.

12 And that gets back to the start. Mr. Smith
13 says he's going to waive -- and this is in his
14 fourth amended complaint -- you're going to waive
15 any arguments as to delay or statute or repose --
16 and I can get to that part -- it's -- again, it's in
17 Exhibit 2 to Mr. Bell's memorandum.

18 Not only has Mr. Smith tried to strip
19 provisions of the arbitration provision in the
20 contract, master deed, he also says both defenses
21 are relied upon using statute of limitations,
22 statute arose as a defense.

23 So it's almost what my expert, Mike Paradis
24 says, incredulous that Mr. Bell and Mr. Masciale can
25 come before this Court and say that that commercial

1 settlement agreement is of any force or effect. And
2 meanwhile, my expert, Mike Paradis, who hasn't been
3 deposed yet, he says settlement should be vacated,
4 the entire lawsuit should be vacated, because it's
5 brought about by breaches of the master deed and
6 ultra vires actions taken on behalf of the HOA.

7 The HOA knew about the arbitration provision in
8 their own master deed. They didn't invoke it.
9 Mr. Holder, yeah, he -- I didn't name him
10 individually, I took his deposition where he
11 testified, yeah, I kind of read the master deed, and
12 my attorneys explained to me the important parts.
13 But that's not enough, he got sued.

14 What about the important parts? The important
15 parts where he agreed to hold Defendants to the
16 arbitration provision, which Mr. Smith tried to
17 strip from the defendants of which Holder was one.
18 He never came forward and said, oh, by the way,
19 guys, this lawsuit is pursuant to arbitration, not a
20 jury trial. And the fourth amended complaint
21 demanded a jury trial by class counsel, Mr. Smith.

22 So it's all through the master deed, which is
23 included as Exhibit 3, I believe, from
24 Mr. Masciale's argument. The whole master deed.
25 And -- all of these. So not only did Mr. Holder

1 breach his contract by not invoking arbitration, he
2 also breached it by not enforcing arbitration, which
3 was incumbent upon him pursuant to the contract. He
4 also leased, according to Article 7, commercial
5 parking spaces and got money as of late.

6 So, Your Honor -- and I could go on -- this
7 argument would take all day, because, you know --
8 (inaudible) -- it involved that Mr. Bell and
9 Mr. Masciale failed to acknowledge.

10 And Mr. Bell's associate, Mr. Heffer, called me
11 when I first filed this lawsuit in 2019, well,
12 Holder's gone. And I had to show him these e-mails
13 from Holder's own representative, Mr. Loren Smith.
14 Mr. Loren Smith saying they're still charging my
15 client for parking spaces, which is violative of the
16 master deed.

17 It took this for me to give them -- which I
18 produced to them a long time ago -- by the way, we
19 beat the statute by three months. You're still
20 invoicing my client in March of 31 (sic). Holder
21 left in May of 31 (sic). I know, Judge, this is
22 some -- and it is -- it's incredulous to me that it
23 comes to this. So there's issues of fact all
24 throughout this.

25 And by the way -- and I'll address this

1 later -- but Mr. Bell's argument is all about the
2 breach of the commercial settlement agreement, which
3 was brought about by undue influence. Read the
4 affidavit of Darrell Carey that is included in my
5 memo. Mr. Carey signed the release agreement.
6 Mr. Carey was very well-versed in that master deed.

7 Mr. Carey said: (Reading)

8 To the best of my knowledge,
9 none of us as owners, including
10 Dr. Tadros, were given the
11 opportunity to exempt ourselves from
12 the lawsuit or settlement. Me,
13 myself, and other owners, including
14 Dr. Tadros, might have other claims,
15 but no other recourse but to sign the
16 settlement agreement and release.

17 So Mr. Bell talks about substituting someone's
18 mind with somebody else's, Mr. Herring, who's a
19 board -- on the board at that time and a board
20 president: (Reading)

21 We were left no other choice.

22 I don't know what -- I don't know what duress
23 could be other than that. And I think the Williams
24 case that Mr. Bell quoted talks about substituting
25 one's mind for another, giving them no other choice,

1 so -- but duress active, it's viable and there's so
2 many issues of fact that if the Court rules
3 consistent with the case law, a scintilla of
4 evidence, there's way more than a scintilla of
5 evidence in this case that I could talk about that
6 narrow's Mr. Bell's request. I ask that Mr. Bell's
7 motion be denied. I also request, before
8 Mr. Masciale even talks about his arguments, because
9 I can address those too -- because there's issues of
10 fact in his. For instance, had Dr. Tadros, when he
11 first became aware -- this will go into my estoppel
12 argument. My estoppel argument is, based on
13 Defendants' conduct, Holder knew arbitration, Holder
14 knew -- Holder posted signs similar to this as the
15 City of Columbia came out there in 2018 and took
16 down. Which was (inaudible) until the City came out
17 there and changed the sign and that is consistent
18 with the master deed -- exclusive use of the
19 commercial tenants. They changed it. Because it
20 says -- yes -- and this is Exhibit 4 to Mr. Holder's
21 deposition -- they changed the signs to correctly
22 reflect retail parking only.

23 So if you go into a McDonald's and you want to
24 buy a Big Mac. And you go in and they tell you, no,
25 no, this isn't a McDonald's, this is Hardee's, we

1 don't serve Big Macs here. Similar to the signage
2 that says Guests/Retail, what are you going to
3 think? Is that ambiguous or vague? I think
4 Mr. Paradis addresses that and other things in his
5 affidavit.

6 In addition to the settlement of 2016, which
7 wharfed into a fourth amended complaint in 2017,
8 which arose in 2016, three months before Holder
9 left. And Holder knew about that lawsuit and still
10 failed to invoke the arbitration provision. Clearly
11 violative of the contract, master deed. Clearly
12 violative of leasing the parking spaces, like Loren
13 Smith was trying to do, and Mr. Holder did up until
14 he left in May of 2016.

15 So there's so many breaches. And I can go into
16 a lot more breaches in that master deed, if the
17 Court wants. But, clearly -- not clearly -- it's up
18 to a jury trial to determine if that commercial
19 settlement agreement, which Mr. Bell hangs his hat
20 on, is legitimate. Not in my expert, Mr. Paradies'
21 opinion.

22 He says it was obtained by A) ignoring the
23 arbitration provision. It was also obtained by
24 improper actions of the HOA board, the board
25 control, Mr. Masciale's client. It was never -- the

1 settlement was never approved. There was never a
2 vote to approve the settlement. There was never --
3 the Court took it upon themselves just to do it in
4 their own time. They never told the board.

5 And by the way, the board is over there right
6 now, in addition to being hit with a potential
7 \$16 million assessment, there's several of those
8 unit owners over there in ADESSO right now that are
9 upset.

10 Mike Munson is the property manager now. And
11 Mike Munson has been trying to attempt to buy this
12 ABS report and repair contract. Which if you read,
13 Mr. Paradies' affidavit, the repair contract right
14 now they're trying to hit them with is something
15 they should have settled for in 2017.

16 But they fast tracked -- I've been doing
17 construction litigation for over 20 years, I've
18 never seen a horizontal property regime case brought
19 in 2016 -- February in 2016, and settled about a
20 year-and-a-half later for \$7.5 million.

21 I just found out the other day, yeah, they took
22 a couple depositions, but they never invoked the
23 arbitration provision. And Mr. Holder just rode
24 along with it the whole time and never said, oh, by
25 the way, this is subject to arbitration. And also,

1 I have the duty to Defendant to make sure it's
2 invoked.

3 THE COURT: All right, thank you. All right.
4 Mr. Bell, any reply? Brief reply?

5 MR. BELL: Briefly, Your Honor.

6 We're not here on the substance of what
7 happened way back when. But there was no argument
8 that the release doesn't say exactly what we said it
9 says. It's a general release, very common. As
10 Mr. Smith noted, Defendants want a complete release.

11 The arguments about arbitration, here's what
12 I'll say about that. Arbitration can be waived. We
13 all know that. She's engaged in the civil court
14 process with -- with the Court Common Pleas in the
15 District Court. You waive the right to compel
16 arbitration.

17 The plaintiff is subject to the same
18 arbitration provision and jury trial waiver that
19 everyone else is, yet, here we are in this lawsuit
20 with a jury demand. So that's little out there.

21 I feel obligated to -- even though I have to
22 take it as true today, I feel obligated to defend
23 Frank Smith. I've known him as a lawyer for
24 29 years. I don't think he did the things he's
25 accused of doing, but we have to take it at face

1 value.

2 But what matters for purposes of Holder's
3 motion is that the release is a contract. He
4 acknowledges he signed it. And duress doesn't apply
5 to Holder. He can say whatever he wants. He can
6 sue Frank Smith. He can sue the HOA, as he has.
7 It's all immaterial to Holder. He cannot sue Holder
8 because he released him. And under South Carolina
9 law, acts of alleged duress by Frank Smith and the
10 HOA do not have anything to do with Holder.

11 We would ask that the release be -- and
12 stipulation of dismissal be enforced as written.
13 That Holder be handed judgment as a matter of law.
14 And that the Court enter an order finding that
15 Dr. Tadros is liable to Holder for attorneys' fees
16 that will be determined later. That's all I have.

17 MR. MASCIALE: Your Honor, if I may reply to
18 that. I've known Frank Smith for 20 years. He's a
19 fine lawyer. I get along with Mr. Smith. He just
20 so happened to be the attorney representing the HOA.
21 So Mr. Smith is as well-versed or more than I am in
22 construction litigation. (Inaudible) Mr. Smith
23 didn't invoke arbitration. He didn't. And he let
24 it run to a jury trial.

25 And we're not -- Mr. Smith is just Mr. Smith.

1 I mean, he came -- he came to my client and said,
2 You need to sign it or you're going to get sued. He
3 did that. He didn't talk about what other parts of
4 the master deed were involved, like arbitration.

5 In essence, what we're here right now, Judge,
6 is to have that settlement, that settlement and
7 release agreement voided, set aside, because it was
8 obtained by ultra vires actions. It's also
9 obtained -- it breached the master deed --
10 (inaudible) -- of which provision Mr. Smith knew the
11 arbitration provision, and he -- he violated that.
12 And the commercial release and settlement agreement
13 was just a natural process of the settlement.

14 He already signed a release of settlement
15 agreement. Mr. Smith deemed -- and Dr. Tadros
16 didn't -- he didn't know about it until May of 2017
17 when Mr. Smith said, Hey, you need to sign this.
18 Dr. Tadros said, Wait a minute, hold on. I never
19 knew anything about this. He -- Mr. Smith said,
20 well, we'll -- you know, you need to sign it or
21 you're going to get sued.

22 And by the way, he'll -- (inaudible) -- so he
23 got Dr. Tadros to sign it. But he didn't -- didn't
24 bring up the fact that it was subject to
25 arbitration.

1 And yes, we -- I'm glad Mr. Bell brought that
2 up. Yeah, we're -- we're -- as the holding in the
3 *Gates* of the Williams-Brice case I cited in my memo,
4 the *Gates* case held that arbitration provisions are
5 enforceable. And it was set aside because -- I know
6 the plaintiff's lawyer in that one, from Charleston,
7 and a Howard Van Dine of Nelson Mullins. After --
8 (inaudible) -- ruled on the lower court, circuit
9 court, the court of appeals overturned it saying the
10 arbitration provision is valid. But the plaintiff
11 is entitled to a non-jury trial. And we'll be --
12 we'll be more than happy to have this matter heard
13 before a non-jury.

14 THE COURT: All right. Let's hear from
15 Mr. Masciale, because I know you all requested
16 30 minutes --

17 MR. BLACKBURN: Yes.

18 THE COURT: -- and we're over that time.

19 Mr. Masciale, I'll be glad to hear from you,
20 and then, Mr. Blackburn, I'll hear from you.

21 MR. MASCIALE: Thank you, Your Honor. May it
22 please the Court. I will try -- (inaudible, sound
23 cut out)

24 It's a simple lawsuit with -- (inaudible) --
25 despite what Mr. Blackburn has told you. And I

1 don't use this word lightly, but this is a frivolous
2 lawsuit in which the plaintiff and his
3 hired-representative failed to do, really, any due
4 diligence at the time the plaintiff purchased these
5 commercial units at the ADESSO in 2014.

6 Which, I would add, the purchase price was
7 slightly under \$2 million, so this was a substantial
8 purchase. And now because the plaintiff's units,
9 some of his -- (inaudible) -- the plaintiff regrets
10 his purchase. I think he's having some buyer's
11 remorse. And he's seeking to blame anyone other
12 than himself for failing to do his own due
13 diligence.

14 So some additional factual background --
15 Mr. Bell did a good job with most of the facts --
16 but just to give you kind of context of the dates
17 we're talking about.

18 The master deed that established the ADESSO
19 Horizontal Property Regime was recorded in 2008 in
20 the Richland County Register of Deeds office. And
21 in the master deed, specifically Section 5(C)5, it
22 allocates that a specific amount of commercial
23 parking spaces. In the initial master deed it was
24 17, that's's since been bumped up to 21. But,
25 anyway, it allocates those as limited common

1 elements which specifically benefit only the
2 commercial units, and they're reserved only to their
3 use.

4 So it's stated clearly in the master deed that
5 those specific spaces are only supposed to be
6 allocated to the commercial units. And that was
7 recorded in 2008.

8 Now, in 2013, which was a year before the
9 plaintiff purchased his units, the owner of the
10 ADESSO, ADESSO/COLUMBIA, LLC, recorded a fourth
11 amendment to the master deed which reallocated those
12 same spaces -- and as Mr. Blackburn said -- to the
13 use of both the commercial and residential guests.

14 So it effectively contradicted the master deed
15 and -- such that the commercial spaces were no
16 longer used -- or no longer dedicated solely to the
17 use of the commercial units. And that was
18 commercial spaces 1 through 17, 108, 157, and then
19 220 through 221.

20 Now, in 2008 Holder, as the developer of the
21 property, submitted an amendment to the planned unit
22 development documents on file with the City of
23 Columbia zoning, which, as the zoning administrator
24 testified, controls the parking allocation for the
25 ADESSO. The normal City of Columbia zoning does not

1 apply when there is a PUD document which
2 specifically references parking requirements.

3 So Holder submitted that to the city based an
4 assumption of about 4,000 square feet for the
5 commercial units, which would entitle the plaintiff
6 to 17 spaces -- oh, no -- oh, I'm sorry, 19 spaces
7 within the ADESSO itself and seven on-street
8 parking, public parking, which could be used to
9 satisfy that requirement.

10 Now, the plaintiff takes issue -- and I think
11 his memorandum -- or his affidavit from his
12 purported expert also takes issue with what they
13 call the fraudulent conversion -- or fraudulent
14 alteration of the PUD to reduce the amount of square
15 footage that the commercial units comprise.

16 However, the PUD amendment, which is -- I
17 believe it's an -- (inaudible) -- I think it's
18 Exhibit 2 -- or Exhibit 5 to the deposition of
19 Rachel Bailey, the zoning administrator, which is
20 Exhibit 7 to my memo. The PUD provides a formula
21 for scaling to determine the required parking
22 requirements, based on increases or decreases in
23 square footage.

24 So I will get -- I'll get to that more later,
25 but suffice it to say there was no -- there was no

1 fraudulent concealing or alteration of the square
2 footage. This is a baseline requirement for --
3 (inaudible) -- as this increases, this is how the
4 parking will be calculated moving forward. So just
5 to -- I wanted to address that.

6 But, as I said, both the master deed, the
7 fourth amendment to the master deed, and the 2008
8 PUD amendment were all public records and matters of
9 public knowledge by the time Dr. Tadros, the
10 plaintiff, purchased his units in 2014.

11 So under -- under the equitable statute of
12 limitation Dr. Tadros would have to have brought his
13 claims within three years of their -- (inaudible).
14 The plaintiff is -- or what Mr. Blackburn is
15 attempting to argue that Dr. Tadros' actual
16 knowledge is not necessarily or not particularly
17 relevant to a discovery rule analysis under the
18 statute of limitations.

19 The test for when a cause of action accrues is
20 when a person of common knowledge and experience in
21 the exercise of reasonable diligence should have
22 known or would have known the operative facts giving
23 rise to their claim.

24 And it's interesting to note that in their memo
25 they cite a case, which I believe -- (inaudible) --

1 is *Cerone versus Kressler* case, which stands
2 directly against the proposition they're trying to
3 make, that is, his actual knowledge is what governs
4 here. And the case specifically states, the Supreme
5 Court said, the appellate time starts at the time of
6 discovery, the time the -- and this is a med mal
7 case -- when the treating physician's actual
8 negligence becomes known.

9 We rejected the same contention. It's not a
10 subjective inquiry, Your Honor, it's an objective
11 standard applied to the facts of the case. And
12 here -- (inaudible) -- with constructive notice of
13 the documents that are in the public record at the
14 time he purchased his units.

15 He purchased them in December of 2014, and as I
16 said, those three documents -- which Dr. Tadros
17 testified before that he understood the fourth
18 amendment to the master deed violate both the ADESSO
19 master deed and the ADESSO PUD documents. When he
20 finally looked into them in 2017, there was nothing
21 prohibiting him from examining those records in 2014
22 when he purchased the property.

23 And, in fact, anybody who's purchasing
24 commercial property, especially of that -- that
25 significant of -- (inaudible) -- of title, zoning

1 and other related documents. However, that was just
2 simply not done. Dr. Tadros testified that he
3 personally did not review any of those documents,
4 and that his agent, hired to help with the
5 transaction, also didn't review any of those
6 documents.

7 In fact, it should be noted that Dr. Tadros is
8 currently in a lawsuit against that agent for the
9 very same negligence, essentially, that occurred
10 here, where he did not review any of those relevant
11 documents.

12 So -- (inaudible) -- that the fourth amendment
13 violated all of those documents. And that he had or
14 his agent looked into those before he purchased the
15 units in 2014, he would have been made aware of
16 those violations, and would have been able to either
17 not purchase the units or he would have been in a
18 position after to pursue those claims.

19 And it's interesting to note that prior to the
20 2014 transaction, Dr. Tadros has testified he had --
21 he had purchased another four commercial properties.
22 I believe three of which were for investment
23 purposes before this. So he was not --
24 (inaudible) -- so-to-speak. He was relatively
25 sophisticated and experienced, but for some reason

1 chose not to review any of these title, zoning or
2 parking issues when he purchased the units in 2014.

3 In fact, he testified that he didn't even
4 personally visit these units until 2016 or 2017,
5 which would be two to three years after he bought
6 them. And that's the constructive knowledge piece
7 of that. So he's charged with knowledge of all
8 those facts, which if he had investigated, he would
9 have found out his claims.

10 But it gets even -- we can go even further than
11 that. And I think as Mr. Blackburn had mentioned,
12 in early 2015 -- (inaudible) -- that there might be
13 some issues relating to the parking at the ADESSO.
14 He received notification from both Holder
15 Properties, the property manager, regarding the
16 leasing of three of the commercial spaces back to
17 him. Which he testified he knows now, now that he
18 looked into it, violates Section 7 of the master
19 deed which prohibits leasing of those spaces in that
20 manner. And he also received an e-mail from one of
21 his tenants, the United States Marine Corps,
22 threatening to vacate their space unless they were
23 given sufficient parking.

24 So he had actual notice, in addition to his
25 constructive notice, that there were some issues

1 with the parking that had he pursued those,
2 investigated them, he would have discovered those
3 claims, that the current -- or the allocation of the
4 parking spaces at the time violated the master deed
5 and City of Columbia zoning, the PUD requirements.
6 For some reason he didn't do that until 2017.

7 However, Your Honor, again, under the discovery
8 rule, the plaintiff's claims regarding parking
9 accrued at the latest -- we'll just say at the
10 latest -- by 2015. And so he was required to bring
11 an action to enforce those claims by 2018, at the
12 latest. As we've established, he didn't file his
13 complaint until February of 2019, one year after the
14 statute.

15 And so with regard to the parking, his claims
16 are barred by the statute of limitations. And so we
17 would ask the Court to add our judgment as a matter
18 of law in favor of the association and the
19 Horizontal Property regime on that basis.

20 There are no genuine issues of facts here that
21 he should have -- and there were facts existing at
22 the time he purchased the property and right
23 thereafter, that would have given him notice of the
24 claim -- his claims, and that he failed to bring his
25 claims within the required statute of limitations.

1 Now, briefly, with regard to his claims for
2 declaratory injunctive relief. We have testimony
3 from Rachel Bailey, again, the City of Columbia's
4 zoning administrator, who testified all to the
5 current parking requirements applicable to the
6 ADESSO commercial units.

7 Namely, that with the current square footage --
8 which the parties do not disagree about of
9 8,139 square feet, based on the formula contained in
10 the 2008 PUD amendment regarding parking spaces.
11 Now, under a city zoning ordinance applicable to
12 PUDs, as Rachel Bailey testified, up to 50 percent
13 of that requirement can be satisfied by public
14 on-street parking.

15 There's no genuine-issue of fact here, Your
16 Honor. That the plaintiff currently has 21 parking
17 spaces within the building itself for his commercial
18 units, and there are at least 17 public spaces along
19 Blossom Street on either side of -- or I'm sorry,
20 along Main Street within a hundred feet of the
21 building, which can be used to satisfy those parking
22 requirements.

23 So, according to Rachel Bailey's testimony,
24 which has not been controverted, the plaintiff has
25 at least 38 spaces that are devoted to his -- the

1 use of his commercial units.

2 So with regard to the standard for injunctive
3 relief, Your Honor, the appellate courts of South
4 Carolina have made clear that injunctive relief is a
5 drastic remedy that should be applied with caution.
6 And one of the things that courts should consider
7 would be weighing the benefits to the plaintiff of a
8 prospective injunction -- (inaudible) -- or to
9 Defendants.

10 Well, here the plaintiff would not get any
11 benefit with an injunction being imposed. He's
12 already gotten the relief he seeks, which is the
13 proper allocation of parking spaces under the master
14 deed and the PUD. And as we have, again,
15 uncontested testimony -- and I would note that if
16 the plaintiff is looking to use the affidavit of
17 their purported expert, Michael Paradis, I see
18 nothing in there that qualifies him as a zoning
19 expert competent to testify about any of those
20 matters, not to mention a lot of the --
21 (inaudible) -- just a lot of lack of secondhand
22 knowledge and do not assert things that would be
23 admissible evidence, which is required under
24 Rule 56.

25 But not withstanding that, there's been nothing

1 seriously controverting the City of Columbia's
2 zoning administrator's testimony about the spaces
3 meeting the zoning requirements and there being no
4 current zoning violation at the ADESSO. So, again,
5 the plaintiff would not have a benefit from
6 injunctive relief here.

7 And it's really the same argument for his
8 declaratory judgment claim, because to present a
9 justiciable controversy under the declaratory
10 judgment act, as Your Honor knows -- (inaudible) --
11 here that the claim is moot. The plaintiff has the
12 relief he's seeking. He has the spaces he's
13 entitled to. And there's no genuine issue of facts
14 about that.

15 Moving on to the plaintiff's claims for
16 negligent misrepresentation and constructive fraud,
17 and this seems to be a point on which the plaintiff
18 and the ADESSO defendants agree. Your Honor, an
19 essential element of both claims is that a false
20 representation has to be made.

21 The ADESSO defendants never were in contact
22 with the plaintiff when he purchased his units and
23 that -- (inaudible) -- my clients made
24 representations to him that had induced him into
25 purchasing the commercial units. The plaintiff

1 admitted in his deposition that he never spoke to
2 either -- or to the ADESSO defendants and nor did
3 his agent, before the transaction.

4 So there's no genuine issue of facts here.
5 That one of the essential elements of these two
6 torts is -- is missing. There were no
7 representations, at all, made to the plaintiff that
8 induced him into purchasing these units.

9 The plaintiff, as was said earlier, purchased
10 them from the prior owner, which was a man named
11 Ford Elliott who was not associated with the ADESSO
12 defendants. The Plaintiff's memo -- memorandum,
13 which he submitted, admits the same. He stated as
14 much by saying he never -- he didn't purchase the
15 units from my clients.

16 And to the extent that -- if the plaintiff --
17 if Plaintiff's counsel here is trying to argue that
18 somehow leaving the retail/guest size in place until
19 2018 somehow constitutes the negligent
20 misrepresentation or the constructive fraud, one of
21 the elements of both of those torts is that the
22 plaintiff has to justifiably rely on any such
23 representations.

24 And as I stated before, everything that would
25 show the plaintiff that he had these claims related

1 to parking were all matters of public record since
2 2013. And where the party has the means -- or he
3 has actual knowledge of the falsity of a statement
4 or the means of obtaining that knowledge, the party
5 can't justifiably rely on any of those
6 representations. And that's -- that's *Quail*
7 *Hill, LLC versus County of Richland*, which was
8 387 South Carolina reports 223.

9 So to the extent they're trying to argue that
10 somehow leaving those signs up misled the plaintiff
11 into not bringing claims or anything to that effect,
12 he had no right to rely on any of that.

13 First of all, we don't contend there were any
14 representations about that. But even if there were,
15 he had the means to know that -- the errors of
16 those, quote, unquote, representations as early as
17 2014.

18 So -- (inaudible) -- again, he knew that his
19 claims fail -- his claims for negligent
20 misinterpretation and constructive fraud fail as a
21 matter of law on those grounds as well.

22 And that -- regarding Plaintiff's claims about
23 the assessments. Your Honor, the master deed is
24 essentially a contract between the owners of the --
25 in the association. And the master deed states,

1 with regard to the calculation of assessments,
2 that -- and the bylaws also state this -- generally,
3 each unit owner is assessed a portion of the HOA's
4 total annual expenses in proportion to his interest
5 in the HOA.

6 Well, in Plaintiff's case, his two units
7 comprise a total of 8.544279 percent in the entire
8 HOA. But Section 5(A)(3) of the master deed also
9 states that: (Reading)

10 Separate budgets for the
11 commercial and residential units
12 shall be developed annually, and no
13 cost, expenses and budget items
14 specifically attributed to
15 residential units shall be
16 included -- (inaudible). So,
17 likewise, cost, expenses and budget
18 items which affect residential and
19 commercial units shall be
20 appropriately allocated in relation
21 to use by the owners of such units.

22 As set forth in the affidavit of Michael
23 Munson, who has over 30 years of property management
24 experience, and who also has personal knowledge of
25 the calculation of these budgets because he was

1 involved with them, these budgets to the plaintiff's
2 commercial units were calculated properly.

3 (Inaudible) -- which he should be assessed under the
4 bylaws. But because the master deed requires the
5 allocation of budget items between the residential
6 and commercial units, the plaintiff's annual
7 assessment is reduced by the budget items which are
8 only -- as per the master deed -- which are
9 specifically attributable to the residential units.

10 Anything else which benefits either of them,
11 which is the large majority of the common and
12 limited common elements at the ADESSO, are properly
13 attributable to the commercial use. And they have
14 to be further reduced in proportion --
15 (inaudible) -- of those.

16 And so using that formula as set forth in the
17 master deed, Mr. Munson calculated that, for
18 example, in the 2018 budget, the plaintiff was
19 assessed a total of slightly over \$19,000 -- and
20 this is paragraph 23 of Mr. Munson's affidavit.
21 That's a total of 2.77 percent of the total amount
22 of cost and expenses for the association that year.
23 Paragraph 24, 2019 is similar, 2.85 percent of the
24 total. And then 1 percent -- (inaudible).

25 But the point is, those -- the assessments

1 charged to Plaintiff's units are in compliance with
2 the master deed and the rest of the governing
3 documents for the ADESSO. Plaintiff pays
4 significantly less than the amount he should if
5 we're just going off of the -- his entire percentage
6 interest in the regime.

7 So, Your Honor, I know there's -- and I'm going
8 to wrap it up here pretty soon -- but there's really
9 no genuine issue here of fact that these comply with
10 the requirements of the master deed. And I know
11 that the plaintiff has the affidavit of Mr. Paradis.
12 However, he doesn't set forth a formula or any
13 conclusions about how these assessments should be
14 calculated instead.

15 In fact, he -- I think he just states something
16 to the effect of he thinks these assessments are
17 slightly high, or that some shouldn't be allocated
18 to the commercial use. But he doesn't say which
19 specific ones that he takes issue with, nor did the
20 plaintiff in his deposition.

21 All of their conclusions are based, really,
22 only on personal conjecture or the hearsay
23 statements that the plaintiff spoke with some of the
24 commercial tenants, which wouldn't know how they're
25 calculated anyway because they're not members of the

1 association.

2 And I know Mr. Blackburn will probably raise
3 the scintilla of evidence standard to try and oppose
4 our motion on this point. However, there is another
5 important point when reviewing -- or when taking
6 into consideration the standard for summary
7 judgment. And that is when the evidence is
8 susceptible of only one reasonable interpretation,
9 summary judgment may be granted.

10 And that's in the *Holmes versus East Cooper*
11 *Community Hospital*, 408 South Carolina 138. And
12 then that's cited in my memo under procedural
13 standard.

14 And based on the evidence we have, there's no
15 real genuine issue of fact on this point. We have
16 an affidavit of the property manager with personal
17 knowledge of how these budgets were calculated,
18 setting forth a formula of how they were calculated
19 based on the master deed. And so far the plaintiff
20 has only been able to put forth just speculation and
21 no real formula to counter that.

22 So we'd also ask the Court to enter summary
23 judgment on that point, that the association did
24 not -- (inaudible). Now, with regard to
25 assessments, did not breach any duty owed to the

1 plaintiff with regard to assessments, and that the
2 assessments comply with all the association's
3 governing documents.

4 And then on the last point, Your Honor, there's
5 a matter -- and I don't believe Plaintiff addressed
6 it in his memorandum, but I did want to bring up
7 that the plaintiff has -- has agreed to withdraw his
8 unfair trade practices claim as it relates to the
9 ADESSO defendants. And that's included in his
10 answer to Interrogatory -- our interrogatory No. 12,
11 which is Exhibit 9 to my memorandum. And he also in
12 his deposition, which Exhibit 8 in my memorandum.

13 So we would also ask the Court to dismiss that
14 claim on that basis, that he is withdrawing his
15 unfair trade practices claims.

16 And so, Your Honor, just in conclusion, based
17 on everything we have so far in discovery, there is
18 no genuine issue of facts, that all of these claims
19 are either barred by the statutes of limitations, or
20 the ADESSO defendants have complied with the
21 relevant provisions of the ADESSO governing
22 documents.

23 And for that reason, we would ask the Court to
24 enter a judgment as a matter of law on --
25 (inaudible) -- defendants on all of Plaintiff's

1 claims and to dismiss them with the prejudice. And
2 we reserve the right, as well, to visit the
3 attorneys' fees issues and South Carolina frivolous
4 civil proceedings sanctions issues at a later date.

5 Thank you.

6 THE COURT: All right. Mr. Blackburn, I'm
7 going to give you exactly 15 minutes to respond,
8 because we are way over the time that was requested.
9 And my court reporter has to take a lunch break, my
10 staff has to take a lunch break, and so do I. All
11 right.

12 MR. BLACKBURN: An hour.

13 THE COURT: This is only a 30-minute --
14 supposed to be a 30-minute hearing, and now we're
15 well over --

16 MR. BLACKBURN: An hour.

17 THE COURT: Yes. Maybe like an hour and a half
18 now. But go ahead.

19 MR. BLACKBURN: Your Honor, thank you. I
20 respect that. Great. And the 15 minutes --

21 And I'll start with Mike Munson, as reported
22 that Mike Munson's a property manager under CMM
23 Management at ADESSO right now. I issued a subpoena
24 to Mike Munson, and it was -- documents were due
25 December 30th.

1 Mr. Masciale called me that Monday, the 30th,
2 and he asked me for an extension of time for an
3 affidavit that was signed -- (inaudible).
4 Mr. Masciale asked me for extension of time to
5 respond to the subpoena for the documents I
6 requested from Mr. Munson, including the items that
7 my expert, my purported expert -- which I named by
8 the way -- Mr. Masciale's very well of aware that I
9 named Mr. Paradis as an expert.

10 Mr. Paradis said I need this, this and this
11 from Mr. Munson so I can further -- (inaudible) to
12 get into more detail on Mr. Munson's affidavit and
13 how it's improper. And Mr. Paradis did explain --
14 and I'll get my memo -- on page 13 of Document 8 --
15 (inaudible) -- Plaintiff relates to the monthly
16 assessment he's being charged by ADESSO HOA. It's
17 all in my memorandum.

18 He had asked -- he's asked repeatedly for an
19 explanation on how the commercial property budget is
20 determined and never got a response until the
21 affidavit from Michael Munson dated
22 December 28th, 2020. Okay. My response to the
23 subpoena issues were due December 30th.

24 Mr. Munson was preparing an affidavit and there
25 was -- in support of Mr. Masciale's client. It was

1 filed with a motion for summary judgment the day
2 after Mr. Masciale asked me for an extension to
3 respond to Mr. Munson's documents.

4 So for them to come in and claim that he's --
5 Mr. Paradis is not an expert and all that kind of
6 stuff. Mr. Paradis opined, and so did Mr. Holder
7 when I took his deposition, and so did Dr. Tadros.
8 You know, they're conveniently ignoring the fact
9 that Dr. Tadros was deposed right here, he brings
10 legitimate issues about the prices he was charged.
11 (inaudible) -- required by the master deed related
12 to the resident and commercial units.

13 Mr. Paradis says, I have reviewed the affidavit
14 and the information provided. Sadly, there is,
15 quote, all caps: (Reading)

16 No explanation of the
17 methodology used to establish the
18 various line item fees, only a
19 statement that they are consistent
20 year-to-year.

21 And I could go on, Your Honor, but I'd be using
22 my 15 minutes. But contrary to what Mr. Masciale
23 argues, Mr. Paradis does include in his affidavit
24 issues he has with Mr. Munson's calculation of the
25 operating budget, and in addition to my client's

1 questions. And that's why he didn't pay them. And
2 he was threatened with foreclosure because he was --
3 had questions, and he never could get a response
4 from the HOA.

5 And I'll move on from that. But as far as
6 negligent misrepresentation, again, the signs that
7 were kept there until 2018. Based on my client's
8 continued complaint through the HOA, CMM Management
9 had -- their misleading. It says, Guests and Retail
10 Customer parking only. Well, guests for what?
11 Guests for one of the other 110 units in there, or
12 just for the retail? So they changed those signs,
13 2018.

14 And so when I -- when we're talking about the
15 case law, there's the case that I'll cite to you,
16 *Hooper versus Ebenezer Senior Services*. This stands
17 for equitable estoppel of the statute of
18 limitations. (Reading)

19 The equitable estoppel (a)
20 permit sought through the statute of
21 limitations as a defense. The
22 Defendant will be estopped to assert
23 the statute of limitations and bar of
24 a Plaintiff's claim, or Defendants,
25 when the delay that otherwise would

1 give operation of the statute has
2 been induced by the defendant's
3 conduct.

4 Which it has been in this case.

5 I'll address one other significant point.

6 Mr. Masciale cited *Eman*. *Eman* is a medical
7 malpractice case. It also says this: (Reading)

8 When there is conflicting
9 testimony regarding time of discovery
10 of facts, including those of medical
11 malpractice claims, date on which
12 discovery should have been made
13 becomes an issue for the jury to
14 decide.

15 And, Your Honor, I'm going to finish within my
16 15 minutes, and I respect your time today. But I
17 would humbly request that the defendants' motions
18 for summary judgment to be dismissed, because
19 there's several issues of fact involved in this
20 case, pursuant to *Hancock* which -- and similar cases
21 of that ilk, that preclude summary judgment.

22 And I would respectfully request that Your
23 Honor enter a judgment by denying both defendants'
24 motions for summary judgments based on the matters
25 heard here and my memorandum and other supporting

1 documents.

2 THE COURT: All right. Mr. Blackburn, just --
3 so on the question of statute of limitations that
4 Mr. Masciale brought up. How is this not -- on the
5 issue with the parking spaces, he is saying that --
6 that there is -- the statute is limited, you are
7 barred by the -- the client is barred on the parking
8 claims because of the statute of limitations. Can
9 you address that, briefly?

10 MR. BLACKBURN: Yes, Your Honor, briefly.

11 My client made several complaints after he
12 purchased it in December of 2014, about the parking.
13 And in 2017 -- just as in my memorandum -- a letter
14 dated February 15th, 2017, he brought those matters
15 directly to the attention of the ADESSO HOA,
16 Mr. Masciale's client. And that's what perpetrated
17 a changing of the signs.

18 So the defendants' conduct, similar to the
19 holding in *Hooper*, their conduct allowing these
20 signs to remain by charging him rent for the
21 Marines.

22 My client in his deposition, he testifies, who
23 would assume that they are in compliance. When he
24 found out they weren't, he wrote that letter on
25 February 15th, 2017 saying, Because I assume you're

1 an honest person, you're in compliance. He wrote
2 that letter when he found out they weren't in
3 compliance.

4 And, again, certain -- Mr. Holder -- to the
5 point of statute of limitations and actual
6 knowledge, those PUD documents are not --
7 (inaudible) -- and was not recorded. So what kind
8 of constructive knowledge must you have. Okay. I
9 asked Mr. Holder, I said, you can't -- you can't
10 think of an answer as to why the master deed
11 identifying anyone other than Mr. Hedges, who worked
12 for Holder, committed a minor amendment on
13 February 8th of 2008. So after the master deed had
14 been filed, Mr. Hedges missed a minor amendment,
15 assuming that it's 4,675 square feet, it was 8139.
16 But Mr. Hedges, who works for Holder, says, no, no,
17 no, let's assume -- let's make an assumption. And
18 it does give the calculation, any increase above
19 4675 shall result in three-and-a-half parking spaces
20 for the commercial unit.

21 And I asked Mr. Blackburn, I said -- I asked
22 Mr. Holder, I said does that make any sense to you,
23 Mr. Holder? And Mr. Heffer objected. Mr. Masciale
24 objected. So the witness says, again, Hell no. To
25 me, I don't know, does make any sense or not.

1 So based upon the equitable estoppel, you don't
2 have to say -- (inaudible) -- representation like
3 the signage, like my client's complaints through the
4 HOA, Mr. Masciale's clients, like Loren Smith's
5 continuing charges for Holder of the parking spaces.

6 I would respectfully request that -- or submit
7 that the statute of limitations began to toll in, at
8 least in '17, February 15th of '17, or at the latest
9 '18, when my client filed his suit in February of
10 2019.

11 And one other point too. When Mr. Bell says
12 this is a second action brought by Plaintiff, well,
13 that's only because he owned those units. He was
14 never made aware of that until 2017, tried to hold
15 to the commercial settlement.

16 And, hopefully, that answers your questions,
17 Your Honor. And I'll be glad to address any more
18 that you may have.

19 THE COURT: All right. And my next question is
20 regarding Holder. My understanding is Holder was
21 terminated as the property manager in 2016. Is that
22 correct?

23 MR. BLACKBURN: Yes. In May 2016.

24 THE COURT: All right. And they settled the
25 claims against Holder in May 2017?

1 MR. BLACKBURN: Yes, ma'am. And Mr. Holder
2 testified that he didn't even know if it settled.

3 THE COURT: All right. So, I guess what I'm --
4 I guess what I'm -- so the claim -- in the -- and
5 I'm -- in looking at the settlement agreement, and I
6 understand that there was an arbitration -- I know
7 you're going to start on the arbitration
8 agreement -- and you don't -- I'm guessing your
9 argument is you don't think the settlement is --
10 agreement is valid because they failed to follow the
11 mandatory arbitration agreement. Is that --

12 MR. BLACKBURN: Yes, ma'am. And that's very
13 similar to the *Gates* case, *Gates* at Williams-Brice.
14 It's right on point, like I've mentioned. And the
15 reason it was -- the circuit court was overturned by
16 the court of appeals, and then the plaintiff said,
17 oh, we'll -- we'll just go ahead and settle before
18 it was bumped from the supreme court. So they
19 entered into a settlement agreement. The *Gates* case
20 said that arbitration provisions are enforceable.

21 THE COURT: Okay. I understand they're
22 enforceable, but I'm guessing -- do you think that
23 by entering into the settlement agreement, then you
24 end up waiving your right to the arbitration? I
25 think that's what Mr. Bell asserted.

1 through December 31st, 2019.

2 So to the extent Plaintiff's counsel is saying
3 he needs the documents requested in the subpoena for
4 his expert to review, he's already obtained them and
5 his expert has already reviewed them in preparing
6 this affidavit.

7 Conflicting testimony about the -- when the
8 plaintiff discovered the violations. Again, there
9 is no conflicting testimony on this. We know
10 Plaintiff actually discovered these in 2017. But
11 under the discovery rule and the statute of
12 limitations for those purposes, it's essentially
13 irrelevant when he actually knew, it's when he
14 should have known.

15 And for the facts -- and under the facts of --
16 you know, as I've already laid out, he should have
17 known, at the latest, 2015. And he failed to bring
18 his claims within the time required by the statutes.

19 And then on -- to the equitable estoppel
20 argument. I believe equitable estoppel --
21 (inaudible) -- of the existence of those claims.
22 There was no evidence that the HOA concealed
23 anything. And the fact that they changed the signs
24 when requested to do so by the City of Columbia
25 zoning, to bring them into compliance with the

1 master deed and the PUD requirements, is not an act
2 of concealment of the claims at all.

3 And the fact is the plaintiff should have known
4 about his claims three years before that, and failed
5 to take any efforts to investigate them until 2017.
6 Almost three years after he purchased them.

7 So, again, Your Honor, we would ask the Court
8 to establish -- (inaudible) -- on all of Plaintiff's
9 claims. Thank you.

10 THE COURT: All right.

11 MR. BLACKBURN: Your Honor, one minute, one
12 minute.

13 THE COURT: Yes, sir.

14 MR. BLACKBURN: The documents I have obtained
15 were from Mr. Masciale's clients. They weren't from
16 Mike Munson. And, yes, my expert, Mike Paradis, did
17 review all those documents. They were incomplete.
18 It took me six months to get the HOA's documents. I
19 worked with Mr. Masciale, I gave extensions. Like I
20 said, it took me six months to get those documents.
21 So my expert says they're not complete, therefore I
22 need them from property manager, Mr. Munson. We
23 still haven't gotten them yet, Your Honor. And I so
24 appreciate your time today, Your Honor, but I
25 believe -- again, I'll reiterate, those motions for

1 summary judgment should be denied because there's
2 several issues of fact that need to be addressed to
3 a jury and they -- and -- (inaudible) -- therefore
4 results and the motion for summary judgment be
5 denied, in my opinion.

6 THE COURT: All right. Thank you.

7 And anything else from you, Mr. Bell? Since I
8 let everybody else speak, I believe in giving equal
9 time.

10 MR. BELL: I just want to say thank you, Your
11 Honor.

12 THE COURT: All right.

13 MR. MASCIALE: Thank you, Your Honor.

14 THE COURT: So what I want to do is take it
15 under advisement. I'd like to take a look at it.
16 I'll probably have my law clerk issue a Form 4 over
17 a -- and with directions regarding any proposed
18 orders to -- after I make a decision, I'll have the
19 direction in Form 4 requiring proposed orders.

20 MR. BELL: Your Honor, I appreciate your time.

21 MR. BLACKBURN: Yes, Your Honor. Thank you.

22 THE COURT: All right. Thank you.

23 (Matter concluded.)

24

25

1 CERTIFICATE OF REPORTER)
2 STATE OF SOUTH CAROLINA)
3 RICHLAND COUNTY)

4 I, KAREN ANN KOCSIS, a Certified
5 Court Reporter and Notary Public for the State of
6 South Carolina at Large, do hereby certify:

7 That the foregoing proceedings were
8 taken before me on the date and at the time
9 mentioned on Page 1 and the proceedings were
10 recorded stenographically by and were thereafter
11 transcribed under my direction; that the foregoing
12 transcript as typed is an accurate and complete
13 record of the proceedings io the best of my ability.

14 I further certify that I am
15 neither related to nor counsel for any party to the
16 cause pending or interested in the events thereof.

17 Witness my hand, I have hereunto
18 affixed my official seal on this 13th day of March
19 at Columbia, Richland County, South Carolina.

20

21

Karen A. Kocsis

22

Karen A. Kocsis, CCR

23

Notary Public

24

State of South Carolina at Large

25

My Commission expires August 9, 2031

RECEIVED

Nov 17 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY CIRCUIT COURT

DeAndrea Gist Benjamin, Circuit Court Judge
Case No.: 2019-CP-40-00919

Appellate Case No. 2022-001434

Emad Tadros, as Trustee of the Grace Living Trust dated October 12, 2010, as amended, Appellant,

v.

Holder Properties, Inc., John R. Holder, Individually, ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association, Defendants,

of which

ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and ADESSO Homeowners' Association are the Respondents.

PROOF OF SERVICE

I certify that I have served *Respondents' Petition for Rehearing or for Clarification* upon the parties below by depositing a copy of it in the United States Mail, postage prepaid and/or via electronic mail, on November 17, 2023, addressed as follows:

T. Jeff Goodwyn, Jr., Esq.
Charles G. Blackburn, Esq.
Goodwyn Law Firm, LLC
2309 Devine Street
Columbia, SC 29205
jgoodwyn@goodwynlaw.com
cblackburn@goodwynlaw.com
Counsel for Appellant

This 17th day of November, 2023.

COPELAND, STAIR, VALZ & LOVELL, LLP

By: s/Skyler C. Wilson
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Property Regime, and Adesso Homeowners'
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REPLY TO SC OFFICE

November 17, 2023

VIA EMAIL and REGULAR MAIL

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
ctappfilings@sccourts.org

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Nov 17 2023

SC Court of Appeals

Re: Emad Tadros, as Trustee of the Grace Living Trust dated October 12, 2010, as amended, Appellant,
v. ADESSO/Columbia, LLC, ADESSO Horizontal Property Regime, and
ADESSO Homeowners' Association, Respondents
Appellate Case No. 2022-001434

Dear Ms. Kitchings:

Enclosed for filing, please find *Respondents' Petition for Rehearing* in this case, together with Exhibits and Proof of Service. By copy of this letter, we are providing the Petition to Appellant's counsel. If anything further is required from these Respondents at this time, please advise. A hard copy will follow in the mail, together with our check for the filing fee.

Sincerely,

s/Skyler C. Wilson

DOUGLAS W. MACKELCAN
SKYLER C. WILSON

SCW:tjr

Enclosures

cc:

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Counsel for Appellant

via email only w/enclosures