

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

Hon. John C. Hayes, III
Presiding Circuit Court Judge

Consolidated case no. 2013-000-327

Juontonio Pinckney, et al. Appellants,
v.

Epcon Communities, Inc., Epcon Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser Property Group, Inc.,
Stonecrest Villas of Tega Cay, LLC,
and

Stonecrest Villas of Tega Cay Owners' Association, Inc. Respondent

SUPPLEMENTAL RECORD ON APPEAL
VOLUME 5
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1 of homes that are leaking water - I'll focus on my twelve -
2 however in looking at all the facts and all the inferences
3 we've got construction defects and the drawings, the
4 architectural drawings, and again you're not taking our
5 word for it, you're taking their experts word for it and as
6 built in the actual construction product out there. So
7 it's been two years there was a transition of the
8 community. All the experts at this point go over many
9 deficiencies in the construction but it's their expert that
10 says these are defects. These are actual defects as drawn
11 so in viewing all the facts and inferences we'd ask for
12 summary judgment. There is no issue here, we've got homes
13 at least by twelve that have construction defects.

14 THE COURT: You're not asking for an amount, you're
15 just asking for summary judgment on the issue of liability?

16 MR. HALFORD: That is correct, Your Honor.

17 THE COURT: All right. Mr. Powell.

18 MR. POWELL: May it please the Court.

19 Your Honor, may I approach?

20 THE COURT: Yes, sir.

21 MR. POWELL: Your Honor, I've handed up a copy of our
22 Memorandum in Opposition to the Plaintiff's Motion. I
23 represent as you know three defendants in the case.

24 THE COURT: This is a memorandum in support for your
25 motion.

1 MR. POWELL: All right. I handed up the wrong one.

2 THE COURT: I'm not begging for another tone but -

3 MR. POWELL: That's coming later. More like reading.

4 As the court is aware I represent three defendants,
5 Stone Crest Villas of Tega Cay, LLC, which was the
6 developer, Fankhouser Property Group, Inc., also known as
7 FPG who was the general contractor. And I represent Brock
8 Fankhouser individually, and the plaintiff's motion for
9 summary judgment on their causes of action for breach of
10 fiduciary duty and what they call construction defect which
11 I take is a negligence cause of action are directed to all
12 three of those parties.

13 First as to the breach of fiduciary duty cause of
14 action. Really in order to assess that you look at the
15 plaintiff's various memoranda of which there are several
16 that have been filed. The breach of fiduciary duty claim
17 falls into two distinct categories. You have their
18 argument that there has been a breach of a fiduciary duty
19 owed with respect to the manner in which the common
20 elements were tendered. And then you have a claim that
21 they have raised with regard to a breach of fiduciary duty
22 that they maintain that Brock Fankhouser owed by virtue of
23 his service on the board. So where I'm going with this I'm
24 going to address first their claims that pertain to breach
25 of fiduciary duty and specifically as to the failure to

1 tender the common elements in good repair, and then after
2 I've done that I will address their breach of a fiduciary
3 duty claim as it pertains to Mr. Fankhouser's service on
4 the board.

5 I'm not surprised. First, dealing with the tender of
6 common elements issue the first thing I noticed if you look
7 at the plaintiff's third cause of action, its not pled. No
8 where in their cause of action for breach of a fiduciary
9 duty do they allege anything having to do with tendering
10 the common elements. Now elsewhere in causes of action
11 with which I think there are fifteen, sixteen, maybe more.
12 They deal with allegations of problems with the buildings
13 and they claim damages for those things. But it's not pled
14 here in their cause of action for breach of fiduciary duty.

15 What it addresses, and I'll get to it later, are
16 matters have to do with the way the association was run,
17 how it was run by Brock Fankhouser and how it's run now.
18 You will see that the HOA Stone Crest Villas of Tega Cay
19 Owners Association is included in that cause of action and
20 to go through it in it's entirety that's Exhibit A to my
21 memorandum, excerpts from the plaintiff's third amended
22 complaint which is the most recent dated from September of
23 2011, there was nothing pled from having to do with the
24 common elements claims as it pertains to breach of
25 fiduciary duty.

1 This case, or these cases, started out as four
2 separate law suits. They were filed back in June of 2010.
3 There were four plaintiff's at that time and they were
4 subsequently - these cases were subsequently consolidated
5 and now there are twelve plaintiffs. But no where is this
6 pled in the cause of action for breach of a fiduciary duty
7 going back to the four complaints that were filed on June
8 2nd 2010. An amended complaint filed in October of 2010, a
9 second amended complaint filed in July of 2011, and this
10 their most recent pleading which is the third amended
11 complaint filed September the 26th, 2011.

12 Assume that they did plead breach of a fiduciary duty
13 as it pertains to the common elements. Mr. Halford cite
14 the Queens Grand case. The Queens Grand case is not on
15 point. The two cases that Your Honor may want to review
16 that are the seminal cases that have to do with the
17 fiduciary duty that a developer owns to an association are
18 the *Goddard versus Fairways* case and the *Concerned Dunes*
19 *West versus Georgia Pacific* case.

20 Both of those address what duties are that are owed,
21 not the Queens Grand case as he pointed out. That case
22 deals with what responsibility an association has to
23 individual unit owners if an association fails to assert a
24 claim against a potentially culpable contractor as the duty
25 and obligation that an association has to bring suit on

1 behalf of the owners which of course has happened here
2 because Mr. Dressler's client has brought suit against my
3 folks and others.

4 Neither the *Goddard* case nor the *Concerned Dunes West*
5 *Residence* case talks about or finds a duty that is owed by
6 an individual as opposed to a developmental entity. This
7 is set forth more substantially in our brief. In the
8 *Goddard* case which is called the Fairways Development
9 Partnership, in the *Concerned Dunes West Residents* case it
10 was Georgia Pacific and it's various affiliates. But no
11 where do they find that an individual such as Mr.
12 Fankhouser in this case owe a fiduciary duty to the
13 plaintiff's or the association pertaining to tendering the
14 common elements.

15 And if you think about it it makes sense, and as the
16 court in those two cases the way they address it, Mr.
17 Fankhouser didn't own the property, he never owned the
18 property. Stone Crest Villas of Tega Cay LLC, owned the
19 property. It was that entity that sold the property to the
20 plaintiff's just like it was the entities in *Goddard* and
21 *Concerned Dunes West Residents* cases that owned common
22 elements and tendered them to the various associations. So
23 as it pertains to tendering common elements Mr. Fankhouser
24 owes no duty to the plaintiff's.

25 Now I think it's undisputed in this case that Mr.

1 Fankhouser did not in fact own the property. He was not
2 the developer in his individual capacity. It was Stone
3 Crest but in case we needed to make that more clear for
4 purposes of our memorandum in opposition to Plaintiff's
5 motion we have an affidavit a portion of which is
6 highlighted there, it's attached as Exhibit B to our
7 memorandum and separately filed which states as such.

8 Before I get to that, the same logic would apply to
9 FPG. FPG never owned the properties, Stone Crest owned the
10 property. There can be no liability for FPG as the general
11 contractor that pertains to even if it had been pled a
12 breach of fiduciary duty associated with the failure to
13 tender common elements in good repair when it never owned
14 and never sold the common elements just as Fankhouser never
15 did in his individual capacity.

16 Even if the court finds that it's pled and that there
17 is a duty owed, the same kind of issue we've been dealing
18 with in terms of whether or not it can be recovered, I
19 understand that the plaintiff's here are only seeking
20 summary judgment. I say only as to the existence of the
21 duty and it's breach. But what they would then do is leave
22 only the issue of damages for a juror assuming they prevail
23 on their motion as its plead.

24 Well if the plaintiff's in this case are unable to
25 recover damages for common elements, the common elements

1 are an essential element of the claim. It's not prudent
2 for the court even if it were to find that it's properly
3 pled and there is a duty owed and breached to go to a jury
4 on damages just to common elements that they cannot
5 recover. I know Your Honor's familiar with it but also
6 attached to our Memorandum and I highlight Section 5.4 of
7 the Master Deed which shows that the Association is
8 responsible for the maintenance and repair of all common
9 elements. There is no corresponding language in the Master
10 Deed that has to do with what plaintiff's can and cannot
11 do. We know three things basically about this case that
12 has to do with this issue, that hasn't changed once it
13 started and won't change between now and trial and wouldn't
14 change after three weeks at trial. That's Number One.

15 But the only document that governs the relationship
16 between the parties is this Master Deed and it's
17 unambiguous. Number Two: The plaintiff's all of them own
18 an undivided interest in the common elements. And Number
19 Three: The association has the sole obligation and
20 responsibility and it's alleged by the plaintiff's they're
21 in breach of it if they don't make the repairs. If
22 hypothetically a judgment were to be entered against my
23 folks for damages as to common elements, and paid to these
24 plaintiff's, and this is nothing against these folks, but
25 what might they do with it? And what rights might the

1 other unit owners have to that pot of money if they don't
2 spend it and fix the buildings, versus the governing
3 document for the association that vest responsibility for
4 maintenance and repair for the OOA where if a judgment was
5 entered and paid to the COA, if the COA doesn't do what
6 it's supposed to do with those funds in damages of that
7 judgment they have a mechanism by law to - to be made whole
8 not using the funds as intended.

9 And this just highlights Your Honors order from
10 earlier pointing out two people can't own the same thing;
11 two people can't recover damages for the same thing. We
12 know that there is a gap in the law, we know that it's an
13 issue of law and not one for the jury. And whenever Your
14 Honor decides to call it a ball or a strike for purposes of
15 this motion here where they're trying to go straight to
16 damages as to common elements claims we believe in defense
17 of this motion only is inappropriate for this reason, that
18 they don't have standing A, or, if Your Honor hasn't
19 decided yet whether or not they can recover damages its
20 inappropriate to grant summary judgment as to the other
21 elements to the cause of action.

22 As to the issue of standing, and I may be wrong about
23 this and I'm glad to have it pointed out to me by Mr.
24 Halford, here a list, a partial list of plaintiff's. There
25 you see Mr. Musgrave, Mr. David Musgrave listed as the

1 owner of 748, Ledgestone Court. It appears from my review
2 of the documents that Barbara Musgrave, his wife,
3 presumably as the actual title owner of the property.
4 Certainly summary judgment can't be entered in favor of Mr.
5 Musgrave and no duties are owed to Mr. Musgrave when he
6 doesn't own the property. He's one of twelve. Another
7 one, Mr. Pinckney, 809. We looked and it appears as if he
8 doesn't own it. I'm not sure how to pronounce, Cella
9 Pinckney who I believe from his deposition is his aunt. It
10 does not appear and I'm glad Mr. Halford pointed out
11 definitely they own the property therefore they don't have
12 standing. They certainly are not entitled to summary
13 judgment.

14 Alright, here's where it gets tricky. We've talked
15 about the issue of tendering common elements and who owns
16 them. You know that the owners own the common elements
17 undivided interest joint tenancy, et cetera, et cetera.
18 You also know that the COA although they have the duty and
19 obligation of the Master Deed and the ability to effectuate
20 repairs, don't actually own the common elements. So the
21 plaintiff's motion is based on this notion that there is a
22 date, and Mr. Halford gave it to you as I think June 1,
23 July 1, 2010, the date on which the common elements were
24 tendered. Today is December 19 yesterday is December 18th
25 I own the common elements here on December 19th, I

1 developer owner give you homeowners association the common
2 elements. That's not the way this community works, not the
3 way this Master Deed works which is unlike the cases I
4 referenced earlier, the *Goddard* case and the *Concerned*
5 *Dunes West Residents* case.

6 There you have the homeowners association that
7 actually own the common elements. Unit owners that own
8 what are defined in the Master Deed as their units
9 typically the walls inward. And so the unit owners would
10 buy the units so they would own paint and walls and floors
11 and then there would come a day where the developer
12 tenders, i.e., transfers title to and the HOA owns that
13 property. Mr. Halford would have you affix that date as
14 June 1, 2010, July 1, 2010. I may be mixed up. Where does
15 he get that from? He gets that from language in the Master
16 Deed that has to do with the declarant control period.
17 Under the Master Deed the declarant Capital D is Stone
18 Crest. They were the developer, they were the owner, they
19 were also the seller of the property of these individual
20 units at various times to these unit owners.

21 There is a declarant control period and the entire
22 Master Deed is attached, there are various provisions in
23 the bylaws and in the Master Deed Section 9.3 that explains
24 to you what that means. And it means exactly what it
25 sounds which is just a period of control where he gets to

1 start off by appointing out other board members then after
2 some period of sale there have to be one or two elected
3 folks. And ultimately there's a date based on one of I
4 think four trigger mechanisms where the developer/board
5 president has to get out. What happened here is that that
6 declarant control period ended and expired; Brock
7 Fankhouser said all right time to transition the board.
8 And at that time demands were made of him and Stone Crest
9 to fix things that needed to be fixed. Some were fixed,
10 some as Mr. Halford would point out were not. But there
11 was no tender date of property. There were sales by Stone
12 Crest at various times to these unit owners conveying a
13 portion of the common elements that those folks own but not
14 tendered date so Mr. Halford can't pin point July 1 or June
15 1 whenever the expiration of the declarant control period
16 was as that was the tendered date and the common elements
17 were bad on that date.

18 And in fact all of the planned units have not yet been
19 built. There is still a lot, Lot 20, Building 20 owned by
20 Stone Crest that at this point is a slab, not a building.
21 So argument can be made that all the common elements have
22 not yet been tendered because that building has not yet
23 been finished nor has it been sold to any potential future
24 owners at Stone Crest. That's how this community works,
25 that's how it's distinguishable from *Goddard* and from

1 *Concerned Dunes West Residents.* And I don't know to what
2 extent in the end game that really matters other than the
3 plaintiffs aren't right about it. And I'm trying to
4 address their motion but there is no tender to the HOA.
5 Excuse me, COA. I just point out Section 9.3 you see the
6 declarant control period and I'm giving you exerts of
7 exerts, the Master Deed is attached to our Memorandum in
8 Opposition.

9 This just shows by way of example this is an exhibit
10 to the Master Deed how - and I highlighted Unit 730. They
11 start out with a certain value, they start out with a
12 certain percentage - percentage ownership. And then as the
13 Master Deed is amended, and additional phases are submitted
14 to the horizontal property regimen, they actually own less
15 and less. They have undivided interest but their
16 percentage interest decreases when you submit new phases
17 under the Master Deed which I think has happened from our
18 9th Amendment to the Master Deed. All right.

19 Mr. Halford states - And we're not standing up here
20 and saying there's no problem with these buildings nor have
21 we ever nor are we ever. It's not a matter for summary
22 judgment. In the plaintiff's motion is not properly
23 supported in a number of respects. Mr. Halford says well
24 it's just undisputed by everybody that there are all kinds
25 of problems with these buildings and therefore we're

1 entitled to summary judgment, damages need to be submitted
2 to the jury. Meanwhile there is no affidavit from any
3 expert. Mr. Halford's expert, they retained an architect
4 named Dennis Hall out of Charlotte, who you may get the
5 pleasure of meeting at some point, he didn't submit an
6 affidavit saying that all these reports that Mr. Halford
7 referenced in the footnote to his motion are in fact his
8 opinions. There is no testimony, there is no affidavit
9 anywhere filed in support of this motion. And in that
10 event all of the - all of the reports of course are
11 hearsay.

12 Those reports by the various authors, the various
13 experts in the case, they themselves are not verified.
14 They are not submitted by way of affidavit. Not only does
15 he not verify the reports, he doesn't even have an
16 affidavit from his own expert saying that he agrees that
17 the reports say what they say. So it's just straight
18 hearsay, it's not even under Rule 703 his expert being able
19 to rely on reports that are themselves unverified.

20 And I just - This is part of - You may remember, Your
21 Honor, in addressing one of the COA's motions, you attached
22 what's known as a Catch 22 Order, the Parades Order, and
23 you incorporated it by reference where applicable this part
24 wasn't applicable but this issue did come up in that case,
25 Where one of the parties moved for summary judgment and had

1 the affidavit of their expert. And their expert attached
2 reports and said I agree with what those reports say. And
3 what you said there was, great that gets you past 703,
4 that's permissible. But the reports themselves are not
5 verified so they're not testimony and they are also subject
6 to later cross examination. I did that to highlight what
7 has happened here which is they didn't even jump through
8 that hoop. They haven't even gotten an affidavit from
9 anybody saying that the unverified reports they agree with.
10 And even had they, based on the same reasoning here, they
11 are not entitled to summary judgment because it does not
12 establish the sufficiency of the unverified reports.

13 Let's assume they pled it, let's assume they owed a
14 duty, assume that the common elements were tendered, assume
15 they actually support their motion with anything that
16 borders on being admissible there are genuine issues of
17 material fact. Before I go through these, my dog and pony
18 show here is part and partial of one of the big books in
19 front of you, where I've got with reference to various
20 expert reports and documents I'm about to go through large
21 or either exerts or those documents in their entirety and
22 better brief what I'm gonna do now, but I'll try to move
23 through this quickly in the interest of time, but it's not
24 going to be quick.

25 THE COURT: Why don't we take a short break then if

1 its not gonna be quick? I can use a break.

2 (COURT IN RECESS AT 10:43 A.M..)

3 (COURT BACK IN SESSION AT 10:56 A.M..)

4 THE COURT: Thank you, take your seats.

5 Mr. Powell, you may proceed.

6 MR. POWELL: Thank you, Your Honor.

7 We left off again dealing with this breach of
8 fiduciary duty issue of the common elements tender
9 specifically. As I go through these, I'm not going to do
10 it twice, these will also bear later on plaintiff's motion
11 for summary judgment as it pertains to what they call
12 construction defect or negligence.

13 But when you review what's been submitted to you there
14 are twelve plaintiff's and twelve units. This is not a
15 class action. It's not only that the plaintiff's did not
16 plead it, not only do some of them not own it and not only
17 is it not supported by the admissible evidence some of the
18 stuff they reference by footnote if you go look at the
19 reports don't deal specifically with these units which I
20 submit to the court in order to have summary judgment
21 granted to each of these twelve, they would need to do.
22 Following the way that the plaintiff's laid out their
23 argument as to the existence of common elements tendered in
24 disrepair, they're in four categories. Number One, they
25 deal with stone veneer cladding siding and landscape. Then

1 in another section of their memoranda, they deal with
2 windows. In another section of their memoranda, they deal
3 with what is labeled as unknown soil issues/compaction. And
4 in the Fourth, they claim that there is an absence of
5 gravel underlayment underneath concrete slab.

6 I'd like to go through those and again as I mentioned
7 before break, I'll show you a few slides here but there are
8 more substantial material included in our brief. One point
9 that needs to be made about the way that these buildings
10 were built is that every component was performed by
11 subcontractors. None was self performed. Stone masonry,
12 veneer contractor was hired to do that component of it.
13 Concrete guy hired to do that component of it and so on and
14 so forth. A lot of these construction cases, what the
15 plaintiff's do is they sue the general contractor claim
16 that they're responsible for everything and do a little bit
17 of discovery and or cooperate with whoever is gonna
18 represent the GC to figure out who the culpable subs are
19 and then later amend and assert claims directly against
20 those subcontractors. That didn't happen here. One reason
21 the plaintiff's lawyers do it is a better way to get money,
22 one reason is insurance. Another reason is that when
23 you've got - It doesn't want to work I'll turn it off.

24 This case - A builder serving as a general contractor
25 is not automatically responsible for the negligence of the

1 subcontractors. What the plaintiff's have done here is
2 submit various materials even if you find that they are
3 competent to support the motion that amounts to a res ipsa
4 type argument without showing in any manner that the
5 general contractor failed to supervise those subcontractors
6 or is guilty of any act or omissions specific to it. They
7 just say there is damage therefore the general contractor
8 is responsible. We'll try to go through some of these.
9 Obviously we brought the subcontractors into the case, they
10 all went and got their own experts and those experts issued
11 reports. This is an exert from the expert for the stone
12 masonry veneer siding contractor Skip Lewis of H2L.

13 THE COURT: Is he from Greenville?

14 MR. POWELL: He is. He says a lot of things but - and
15 those are attached to the report. Ultimately though he
16 concludes the installation of the adhered masonry veneer
17 complied with generally recognized installation protocols
18 are contemporaneous with permitting the construction
19 period. And here I'm just responding to what the
20 plaintiff's have submitted. Here is a report prepared by
21 Hill International on behalf of AL-MEGA. AL-MEGA was the
22 siding subcontractor. The plaintiffs argue in sum as to
23 siding that there was a failure to install a layer of
24 weather resistant barrier or WRB behind the siding. They
25 say that violates the building code, that violates the

1 manufacturer installation instructions. This expert on
2 behalf of AL-MEGA, Hill reviews the installation
3 instructions, has conversations as he indicates here with
4 the code official, and finds out that at the time of these
5 buildings were permitted that they were not required. And
6 actually that the contractors, mainly my folks,
7 specifically requested information and were told that it
8 was not required. And here again this is a conclusive
9 paragraph, same report. He says that the siding work meets
10 the standard of care in the contract documents. That's
11 stone and siding.

12 Landscaping: This is an exert from the report
13 prepared by a company called Powered Engineering on behalf
14 of the landscaping contractor which is called Lucas Lawn.
15 The jest of what he says is you can't figure out whether or
16 not you did a bad job with the landscaping without
17 referring to the manner in which the concrete was set
18 because the landscaping guy works off of where the concrete
19 guy does his work. He says you got to have topographic
20 survey and only with reference to that can you determine
21 whether or not there are any deficiencies in the
22 landscaping. So in the first category stone siding and
23 landscaping, we believe that we submitted sufficient
24 information for Your Honor to find that there is this
25 genuine issue of material fact.

1 The next category is windows. Again the plaintiffs
2 have to meet their burden in regard to all twelve. In
3 their memorandum, they reference one unit, the Shocka unit,
4 Unit 717. The gist of the argument as to defective window
5 installation as I read it in their memoranda is that Ms.
6 Shocka had defective window in her unit that was leaking.
7 That leaking window was subsequently repaired. Ms. Shocka
8 still has a leak in her unit but now it's not occurring at
9 the window, it's occurring at the foundation level below
10 that. All fine and good I just do not see how there is any
11 nexus, how it supports a motion for summary judgment on the
12 installation of windows where all they're telling us in
13 their motion is that there's been a window that's been
14 fixed and no longer leaks. And there's nothing else on
15 that issue in any of the memoranda filed by the plaintiff's
16 as to defective window. And just in case, we have attached
17 a copy of the exerts from the expert for the window
18 installer. The window installer was also the framer, it's
19 called Procar II. Procar II hired as it's expert in this
20 case the Warren Group. The conclusion that they reach is
21 that there are no construction defects that are the
22 responsibility of the insurer. Referencing insured there
23 he means in part Procar II. They haven't shown it but if
24 you believe in some form or fashion they have some genuine
25 issue of material fact.

1 The third component of what they argue as I understand
2 it are what they label unknown soil conditions, unknown
3 soil compaction. How something that is unknown to the
4 moving party at summary judgment entitles them to summary
5 judgment as to another party is beyond me. But let me tell
6 you what they argue. I should mention here that the
7 plaintiffs have past the deadline to name any additional
8 experts and submit any additional expert reports. No
9 expert has been designated by the plaintiffs nor was any
10 geo-technical engineer or soils engineer designated by any
11 other party to this case. Nor was any report submitted in
12 conformance with the scheduling order the most recent
13 version which Your Honor just signed and kept those
14 deadlines in tact. In part - And the plaintiffs
15 specifically requested additional time but you didn't allow
16 them to do it. Nonetheless to the extent that they raise
17 unknown soil conditions in their motion for summary
18 judgment, they attached this report from PSI. PSI was the
19 soils engineer on the project and what the plaintiffs say
20 in their brief is that the contractor was warned of
21 "ominous - there were ominous warnings of problems with the
22 soil." Or the report they attached this August 29, 2006
23 has to do with a retaining wall. Its called a MSE wall.
24 MSE just means mechanically stabilized earth. And they
25 cite this portion of this report and attach it to their

1 brief stating sum that it looks like when PSI looked at
2 that particular section of retaining wall on that or on a
3 date it was not satisfactory.

4 Well as we highlighted in our same brief and in this
5 same document I'm just gonna scroll down and highlight the
6 next section below. That same document says "following the
7 completion of the above recommendations made." What the
8 plaintiff's highlighted in their brief "the foundation
9 subgrade soils were reevaluated and the results indicated a
10 foundation barrier materials underlying MSE retaining wall
11 number four appeared satisfactory." So the same document
12 that they used to support this theory that there is this
13 problem indicates in the next paragraph down that what they
14 highlight was addressed. So I don't see how that makes
15 their no genuine issue of material fact as to quote unquote
16 unknown soil conditions.

17 This here is just a reference to the deadlines back on
18 March the 31st 2012. In case there is still any issue as
19 to this MSE wall or retaining wall this is a report, this
20 is attached also to our Memorandum in Opposition. This is
21 from Summit Engineering. It wasn't timely prepared and the
22 COA said they were not trying to make this part of the law
23 suit but even if they were their expert is the only geo-
24 technical quote, unquote expert who has looked at it. It
25 doesn't find a problem with the same retaining wall the

1 plaintiffs cite as problematic. We believe there exist
2 genuine issues of material fact as to unknown soil
3 conditions, if that makes any sense.

4 The forth category is the hardest to unravel. That
5 was a poor choice of words because it has to do with
6 gravel. But the over all contention by the plaintiff's is
7 that there is a lack of gravel underneath the concrete
8 slabs beneath the units that they believe may be causing
9 some kind of problems. Maybe not, they just believe its
10 not there. They believe its not there based first on this
11 fax. This is a fax from the architect back in April of
12 2006, to my client Brock Fankhouser.

13 It's attached to their memo, it's attached to ours,
14 but they say "in response to your request to eliminate
15 gravel we call for suitable fill you got to do what the
16 soils engineer told you to do." Now the plaintiffs hadn't
17 supported the background of this request how it was made,
18 why it was made, whether there was any confusion in the
19 manner in which it was made, but if you look at what the
20 architect is telling Mr. Fankhouser to look at the soils
21 engineering report which we've attached you see that it
22 addresses what's underneath the slabs in two different
23 areas. You got the gravel you're supposed to install and
24 then you got subgrade material.

25 And this reference Section 4.2 talks about fill, fill,

1 fill, fill, fill, fill to be used as subgrade material.
2 Then when you go to floor slab recommendations, you've got
3 to use well graded gravel or crushed rock base course. I
4 don't know what the architect was referring to specifically
5 when he wrote back to Mr. Fankhouser and said you got to
6 use the gravel. But it could have been a misunderstanding
7 by Mr. Fankhouser where he used fill in as a synonym for
8 this alternative to road grade gravel which is crushed rock
9 base course. Or he could have been referring to the fill
10 here that you use as compaction that also exist underneath
11 the slab.

12 But the important thing, look at this date, April 10,
13 2006. Let's just assume that there was no misunderstanding
14 that my client was trying to cheat or somehow just to
15 eliminate the gravel altogether back when this fax was sent
16 by Architectural Alliance to him April 10, 2006. We did it
17 - Did that actually happen? Did it lead to any harm? And
18 what we see is that there is an agreement with Procar the
19 concrete contractor dated June 23, 2006 which of course is
20 after April of 2006 when the fax was sent. So did Mr.
21 Fankhouser, did FPG, did they ultimately make the decision
22 to eliminate gravel? Did they ultimately make the decision
23 to ignore recommendations of the soils engineer and just
24 not install any gravel?

25 Well you look at what was required under the contract,

1 the concrete installer was also responsible for installing
2 the gravel I should say. Gravel prior to the concrete
3 placed the contractor provided and installed up to four
4 inches of pit gravel over subbase. So I also took the
5 deposition - the 30(b)6 deposition of Procar the concrete
6 installer and I ask him "Do you know whether Procar was
7 required to install the minimum of four inches of gravel
8 under ever slab? I believe so yes that's standard." So
9 post this supposedly smoking gun fax in April where the
10 architect tells the general contractor, you better make
11 sure you adhere to the soils engineer we got the contract
12 that requires it. We got the testimony of the 30(b) 6
13 witness for that contract saying who knew that they were
14 contractually required to provide it.

15 This is an exert we got in response to the plaintiff's
16 motion contacted Robert Brent McKinney, he is the president
17 of Procar. And we have filed, this is an exhibit to
18 Memorandum as well his affidavit. And what he did is he
19 went back and looked for gravel tickets from his supplier
20 that show how much gravel was installed out there. And not
21 only was he - has he testified that he's contractually
22 obligated to do it, he's gone back and looked at the gravel
23 tickets and here is his conclusion that it was in fact
24 installed.

25 So we believe it was, we believe there was tons of

1 gravel out there, that's figuratively and literally, and
2 Mr. McKinney states that in his affidavit that creates a
3 minimum genuine issue of material fact as to the plaintiffs
4 motion for summary judgment to the extent that they argue
5 that there is no gravel there.

6 Why did they think that there's not any gravel there?
7 Well, the COA and their expert whose name is Joe Whitley,
8 he's a structural engineer, he went out and he did some
9 boring cuts and he cut some holes in these floors to see if
10 there is any gravel, where gravel is supposed to be. And I
11 ask the concrete installer, generally my line of
12 questioning was to the guy who is responsible for the
13 gravel, if you put four inches of gravel down how come when
14 the COA's expert went out there and drilled a hole and
15 looked down under there, there was only a little bit and
16 not the four inches that was required to be? And with all
17 due respect to Mr. Whitley, Mr. McKinney for Procar said
18 that Mr. Whitley didn't know what he was doing because he
19 didn't drill in the right place. He didn't do his boring
20 in the middle of the floor where the gravel would be, he
21 did it on the footer. Let's see if I've got - Here is a
22 footing detail. See out here? Here's where the floor
23 extends so before is the gravel on and on and on and on.
24 What Mr. McKinney says the guy that's responsible for
25 putting the gravel down in response to Mr. Whitley's cut,

1 is that he did it here where there is not any gravel.

2 Not out here. Had he done it out here he would have
3 been able to figure out whether four inches of gravel was
4 installed and in particular whether four inches of gravel
5 was installed where it was supposed to have been installed.
6 So here I'm asking Mr. McKinney about it.

7 "Why didn't he find any gravel?"

8 "That's on the edge of the footer. He drilled the
9 core right on the edge of that, that's why the cord is ten
10 inches and seven inches, it's on the downward slope. I'm
11 surprised there was any gravel at all." I'm surprised
12 there was any gravel there. Probably wasn't it was
13 probably dirt and not loose."

14 Where would you need to do a core sample in order to
15 show whether or not there's four inches of gravel or not?

16 "Out in the middle two to three feet away from the
17 wall."

18 If you look at Mr. Whitley's report; this is his
19 letter to Mr. Dressler. That's what he's talking about
20 back on March 15th of 2012.

21 "Did a sample ten inches deep at the front, seven
22 inches deep at the rear indicative of this sample being
23 taken from the rear edge of the mono-slab footing along the
24 front wall."

25 There it is. What they haven't done, the plaintiffs,

1 is any coring samples of their own in any of their units at
2 any location where gravel is supposed to be in order to
3 attempt to prove their theory of the gravel is not there.

4 THE COURT: All right. So the Whitley report was -
5 that sample was not taken from one of the twelve
6 plaintiffs?

7 MR. POWELL: It was.

8 THE COURT: It was? Okay.

9 MR. POWELL: It was.

10 THE COURT: Go ahead.

11 MR. POWELL: But neither Whitley nor anybody else came
12 back out and took a sample that wasn't on the footer.

13 I'm almost finished with the gravel issue.

14 Besides the facts and the Whitley boring the
15 plaintiffs believe there is no gravel based on some
16 photographs that their expert took of this uncompleted lot,
17 20 that I referenced earlier. Here you see the condition
18 of the lot. This is roughly what it looks like now. You
19 see the date of the photograph from March of 2012.
20 Presumably the plaintiffs offer this photograph to show
21 there is no gravel underneath the slab. How you could
22 figure that out from these photographs I have no idea. But
23 in general you cannot determine whether or not there is
24 gravel under a poured slab. I ask Mr. McKinney about this,
25 this is in his affidavit we filed contemporaneously with

1 our Memorandum in Opposition to the Plaintiffs motion to
2 the extent that the photograph is meant to show the absence
3 of the gravel under Lot 20, the photograph depicts a poured
4 concrete slab and the gravel installed under the slab would
5 not be visible once the slab is poured.

6 As a side and I indicated to you earlier, that lot is
7 not even a part of this case. None of the twelve - I mean
8 nobody lives in it but nor do the twelve unit owner
9 plaintiffs have a stake in it, as owners of undivided
10 interest in common because my folks don't. It hasn't been
11 sold to anybody. I want to be done with the gravel as much
12 as everybody else, but this is the other photograph the
13 plaintiffs use attached to their memoranda. Again without
14 any affidavit from any expert to reach any conclusions
15 about it.

16 But they show this photograph and say oh that proves
17 that there is no gravel underneath the slab. I ask Mr.
18 McKinney about this photograph. And the same affidavit to
19 go back to it, he says that that undated photograph
20 assuming it shows Lot 20 shows, construction in progress
21 before the gravel would have been installed. They got a
22 picture of the dirt before the slab is poured and they
23 assume that no gravel was installed before the concrete is
24 poured. There aren't any borings. They don't own that lot
25 and they don't have any other evidence that there is no

1 gravel there.

2 To the extent that it needed to be done in response to
3 the plaintiffs motion I think we've shown genuine issues of
4 material fact as to the existence of alleged defects. And
5 this in fact has not pled so we don't know that and the
6 motion is not supported by any competent evidence.

7 I told you at the beginning that we talked about two
8 components of the fiduciary duties that the plaintiff's
9 alleged that were owed and breached entitling them to
10 summary judgment. First it had to do with the tender of
11 the common elements issue, I'm finished with that. The
12 other has to do with a fiduciary duty owed by Brock
13 Fankhouser due to his service on the board.

14 Now there are several cases that are instructive. One
15 is the *Queens Grand* case. *Queens Grand* case I referenced
16 earlier but it talks about what obligation the Homeowner's
17 Association has to unit owners with respect to filing suit
18 against going after any culpable contractors. What it says
19 is, if they don't do it they can be liable to the unit
20 owners. But it doesn't - The *Queens Grand* does not address
21 any fiduciary - it doesn't describe that duty as a
22 fiduciary duty, One. Two: it doesn't impose any liability
23 on any individual board members. It just says that the
24 association on whose behalf the board makes decisions can
25 be liable to the unit owners for failure to bring suit. So

1 to the extent that the twelve plaintiffs here would argue
2 that pre June 1, 2010 when Mr. Fankhouser served on the
3 board, he failed to file suit against his own companies on
4 their behalf. That's not a duty that he owed at any point
5 in his individual capacity. Moreover, the contractor
6 didn't sue. Mr Dressler client the COA have brought that
7 suit against my folks so there is no duty owed by him
8 individually and there is no breach. If there was a breach
9 there is no harm no foul because ultimately the suit did
10 get brought which is why we're here.

11 The other case is constructive is the *Goddard* case I
12 referenced earlier. This is the only case that I have
13 found that talks about what duties a developer/board member
14 has while he is still the developer and serving on the
15 board. I have found no case, and I'd be glad for Mr.
16 Halford or anybody else to show me one, that says that the
17 duties that are owed by a board member to unit owners are
18 fiduciary duties. Take whoever sits on the board today, if
19 they failed to approve the installation of a satellite dish
20 or they fail to do their due diligence and they over pay
21 for the pool cleaning guy or they do anything else that's
22 not consistent with the Master Deed, have they then
23 breached a quote, unquote fiduciary obligation to the unit
24 owners? Or they simply failed to act in accordance with
25 the Master Deed. Anyway, the only case I found that has

1 anything to do with the duties that the declarant or a
2 principle of a developer in terms of the fiduciary duty
3 owed while serving on the board has to do with failing to
4 access unit owners the proper amount to make to the
5 repairs. That's what happened in that *Goddard* case. There
6 was an allegation that the principle developer, while he
7 served on the board, should have required an assessment of
8 all the unit owners in order to fix the buildings. They
9 pay the money and then go chase it later. Well the
10 developer still owned a unit and the allegation among the
11 other unit owners was you didn't want to assess all of us
12 and make the repairs because you would have to go out of
13 pocket to make the repairs in the first instance and then
14 we when went to chase the money down you'd be on the hoof.

15 Well, one reason *Goddard* is important is, it uses and
16 applies the business judgment rule which is in play any
17 time a board member makes any decision on behalf of the
18 association. Any conduct that the plaintiffs would say is
19 a breach by Mr. Fankhouser has to be evaluated under that
20 rule. And here there is no evidence that there was any
21 failure by Mr. Fankhouser while he controlled the board to
22 assess the unit owners to make repairs. Nobody came to him
23 and said we demand that you charge each of us Thirty
24 Thousand Dollars so that we can get this fixed. And when
25 Mr. Fankhouser when he had a controlling interest on the

1 board said no we're not going to do that. That never
2 happened and there's no other evidence that has been
3 submitted by the plaintiffs that has anything to do with
4 any breach of any fiduciary duty that Mr. Fankhouser may
5 have had. And I don't know what really what fiduciary
6 duties they are alleging that he had in his individual
7 capacity while he served on the board. That does it for
8 breach of fiduciary duty.

9 Let's go to structural defects and I'm not going to
10 be nearly as long. As a matter of fact I'm gonna be really
11 brief.

12 This is the negligence cause of action as I read it.
13 If you read the plaintiffs various memoranda it looks like
14 their seeking relief from all three of my clients, those
15 being Stone Crest Villas Developer, FPG as general
16 contractor Mr. Fankhouser individually. If you look at the
17 thirteenth cause of action construction defect see who its
18 pled against it's just against Mr. Fankhouser and
19 Fankhouser Property Group, Inc. There is no claim against
20 the developer so they are not entitled to relief against
21 the developer when they didn't sue them for that.

22 With regard to Mr. Fankhouser individually as it
23 pertains to construction defects, plaintiffs have not
24 clearly set forth the duty that he owed. The argument as I
25 understand it is FPG you were the general contractor and

1 Mr. Fankhouser you are the sole share holder of FPG
2 therefore you are liable for any construction defects.
3 What - And that paragraph kind of sums up as best as any in
4 that cause of action. Brock Fankhouser and Fankhouser
5 Property Group Construction practices led to construction
6 defects, water intrusion and so on and so forth.

7 What they haven't done in terms of their pleading and
8 what I think they need to do, is they haven't pled the
9 piercing the corporate veil. Nor have they made any effort
10 to establish any of the eight factors. I won't read them
11 to you, I know you are familiar with them and as you can
12 see their set forth in our brief. But they haven't pled
13 this in the developer in with regard to Mr. Fankhouser and
14 they have neither pled nor submitted any evidence that
15 would support any finding that he was negligent,
16 particularly if you look at it in view of this veil
17 piercing standard.

18 For those reasons, Your Honor, we respectfully request
19 that you deny the plaintiffs' motion for summary judgment.

20 THE COURT: Mr. Halford.

21 MR. HALFORD: Just briefly in response, Your Honor,
22 and I will try to be brief.

23 I concede to Mr. Powell, maybe my date's incorrect.

24 July 1, 2010 builder resigns the board officially and
25 makes that relinquishment control to the board. But I'll

1 accept his argument as valid that maybe transition of these
2 common elements occurred well before that time. Under the
3 Master Deed when you buy a condominium the developer is
4 divested in that title of that condominium and ultimately
5 all the owners end up owning the common elements together
6 as joint tenants in common. So if he wishes to choose a
7 date before July 1, June or July 1 of 2010 I think that
8 works against him. It's still evidence that absence of
9 material fact that there has been a transition of the
10 common elements. The only lot remaining he's told you
11 about is Lot 20. I would imagine that lot is going to come
12 under some degree of scrutiny under motions. I think we
13 can test that slab and find out about these concrete issues
14 in the future. I don't imagine his clients will like it
15 too much but it was photographed by my expert under
16 construction. So they poured the concrete it stands to
17 reason that it will be there.

18 That's going somewhere in the future. Let's talk
19 about the breach of duty. You are aware that Mr.
20 Fankhouser in this case wore many hats. He was the
21 controller of this COA, this owner's association. He was
22 the controlling vote of that. He was the sole member of
23 Stone Crest Villa's of Tega Cay LLC., the developer that
24 they reference. He's the sole shareholder of FPG the
25 General Contractor. So in essence when he alleges we

1 should pierce the corporate veil and allege facts for
2 piercing the corporate veil, well we've already beat that
3 horse on the amount of summation already months earlier in
4 this case. He was occupying many roles and the question
5 comes whether or not he had a duty and as the developer at
6 some point he did transition in his company that he was the
7 sole owner. As the developer, the COA, and the seller, he
8 transitioned these common elements to my twelve people and
9 they have water intrusion. There is no dispute about that
10 from any expert in this case.

11 So which ever date you chose, July 1, 2010 or whatever
12 date he began selling units, it's their expert that says -
13 Well, let me take that back. There is somebody yet to be
14 deposed but the problems appeared to had been existing at
15 the time of construction. And Mr. Powell just spoke to the
16 Court and I need to correct a few material inaccuracies
17 that there is no affidavits in this case.

18 Their expert submitted an affidavit in this case. It
19 was Marshall Clark, and I won't pass it up to Your Honor,
20 it's a deposition exhibit in this case but it was submitted
21 as early as September the 7th, 2010. At that time they
22 were taking an architect record, Architectural Alliance,
23 but their own expert submits an affidavit to this case that
24 details some of the deficiencies in the things that Mr.
25 Powell has illustrated for the court. Let's turn to

1 cultured stone, paragraph 15(b) of Marshall Clark's
2 affidavit says that basically the architectural drawings
3 required the stone masonry veneer to be installed two
4 inches below grade. It cites it as a defect. Pretty
5 specific about that so that's the first affidavit of record
6 in this case.

7 We turn to the Master Deed, we want to use the Master
8 Deed here as a shield when it works for us but the point is
9 all the elements of the Master Deed have been ignored to
10 this point, and the Master Deed was from the declarant, In
11 this case it was Stone Crest Villas of Tega Cay, again the
12 sole owner being Brock Fankhouser. None of these people
13 had a right to negotiate the terms of that Master Deed and
14 you bought a lot you got the Master Deed with it. But when
15 they failed, when the homes failed under the duty to
16 repair regardless of who in the COA Board was at the time
17 the duties are firm and it's not ambiguous. It's an
18 affirmative duty that says you shall promptly repair. And
19 we're two years later with water intrusion at least in my
20 twelve units.

21 So beside with these cases I think the only person who
22 could have owned a duty was Mr. Brock Fankhouser whether
23 the court chooses to view that as him individually or as
24 amalgamated him functioning as anyone of three entities he
25 was the person who pulled the permits on this job, this was

1 his baby. We can blame the subcontractors all day long,
2 but if there was an error committed by the subs then Mr.
3 Fankhouser was the General contractor on this project, or
4 at least the Fankhouser Property Group was. The twelve
5 plaintiffs, Mr. Pinckney - I was running late this morning
6 and I didn't bring my computer but I wanted to point out
7 some other inaccuracies. He points out - Pulls up the
8 court web site, the property parcel is in his name, its in
9 his revokable trust but it's in his name. The point is, it
10 serves as his primary home, Judge. And so we were trying
11 to create inconsistencies of fact where he owns the house.
12 Soil compaction, November 7th, it was November the 7th of
13 this year the COA has a crew come out and drill and test.
14 He's focused on this retaining wall that appears to have
15 some compaction issues that we did plead. That report came
16 back and said the earth, the soil adjacent to the
17 foundational sides is not sufficient to support a typically
18 residential structure.

19 That's their report, not an expert. I'm past time to
20 get an expert, they're past time to get an expert I concede
21 to that. But that report comes back and all of a sudden we
22 want to ignore the issues. We talked about the slab. My
23 people volunteered their units. Mr. Gonzalez which is Unit
24 709, Ms. Vicari which is Unit 830; they permitted the COA
25 to come in and drill cores through their slab which is

1 evidence a lack of gravel, a lack of four inches of crushed
2 rock gravel course. Now it's Oh you tested in the wrong
3 area. We'll let them do the testing. Again we've got Lot
4 20 sitting out there with no home, inconvenience to no
5 person and we go and find out this later, that those two
6 slabs got drilled, my clients, and came up with absence of
7 gravel. So with regard to piercing the corporate veil, I
8 don't think you have to go there. This gentleman was
9 functioning with three hats simultaneously and what he had
10 done under the business judgment rule it might be you know
11 incompetence or bad faith.

12 You've already heard the board, it took them some
13 time, Fifty Five Thousand Dollars in assessments went out
14 the door to some Master Association when homes were
15 suffering water intrusion? That's about as bad a faith as
16 it gets. Under the Master Deed this COA even with this
17 existing board can't fix homes without the money. Where
18 did the money go? Now these are assessments that are
19 required of everybody including my clients under the Master
20 Deed. So they want to use the Master Deed as a shield when
21 it works for them and ignore the duties that were imposed
22 upon the developer and the declarant and the COA for that
23 matter and remedy the water intrusion problems.

24 It really comes down to we now have a board of
25 directors, twelve plaintiffs, fifty-three homes and I

1 represent twelve of those I acknowledge it to you, but we
2 have a lot of homes suffering from water intrusion and
3 nobody can precisely finger the one smoking gun. His
4 expert says it best and that's been cited in my Memorandum
5 but it says basically and I'll quote from it. Page 194
6 when ask about it I said "what is it that you and other
7 experts are saying exactly?" And he says "the water
8 management system of these buildings has not been solved
9 and their getting built out there and if they're being
10 built by these plans in dealing with the water management
11 which is what we a problem with, they're not going to
12 work." So his expert submitted the affidavit in this case.
13

14 And I'm taking the plaintiff's word for it there is a
15 construction defect, it's his experts testimony. And then
16 lastly our expert I think defines it best. The envelope of
17 these homes fails to provide a weather resistant type
18 barrier. That's obvious because we have water intrusion,
19 all twelve of them. We have a lack of gravel in two of my
20 mine that we've tested. So are these things defects? I
21 think clearly at this point we don't have to have a
22 smoking gun. It would be different and I understand the
23 building code may be a series of guidelines that you should
24 go by but you can't depart from the guidelines that far.
25 And there have been a number of deficiencies cited that

1 aren't just his expert refers to them as building code
2 violations as drawn or as constructed.

3 So I think what the court has to ask here is was there
4 a transition of the common elements and logically at some
5 point there has to be. Maybe with the exception of one lot
6 left, that's a single family home that appears but there is
7 a lot out there that is a concrete slab. It would be easy
8 enough to find out if we did some testing. Secondly in
9 that transition, were the common elements tendered in
10 disrepair?

11 Again its their people that says that these problems
12 are probably likely to have been ongoing since the time of
13 construction. But we got twelve homes in my case,
14 unanimous all twelve have water intrusion that hasn't been
15 solved. And this community whatever date Your Honor
16 chooses to view that there was a transition whether you're
17 talking about July 1, 2010 or sometime earlier than that,
18 the question becomes is, do we have a transition of the
19 common elements? And you can look to the common - Excuse
20 me. You can look to the Master Deed that they cite in this
21 case and see what a common element is. It includes the
22 slab, it includes the stone exterior, it includes the hardy
23 plank siding.

24 We own from the skins in but there are homes
25 nonetheless and they are leaking. And all experts in here

1 would not disagree on this point. These homes were
2 tendered in a damaged state, they remain to date in a
3 damaged state. And leaving that I would say, we don't have
4 to have a smoking gun. There is no question of fact there
5 is construction defects here.

6 THE COURT: Let me ask you, you brought it up, and the
7 reason I infer that you plan to have someone inspect this
8 Lot 20?

9 MR. HALFORD: It's recently come up in a deposition as
10 of last week. The lot that he showed you in the power
11 point - I can flip back to it.

12 THE COURT: Well I just ask you one question.

13 MR. HALFORD: Yes, sir. I didn't mean to disagree.

14 THE COURT: Do you plan to run test on -

15 MR. HALFORD: We would like to. I've not even
16 discussed it.

17 THE COURT: Well then if you drill down and find four
18 inches of gravel are you going to abandon your claim on
19 four inches of gravel under your clients?

20 MR. HALFORD: I'd be willing to bet the farm on it.

21 THE COURT: You would be willing to bet the farm on
22 it. So what you're saying is there is four inches of
23 gravel under Lot 20 then any claims to your clients that
24 there is lack of four inches of gravel is moot?

25 MR. HALFORD: I need to discuss it with my clients.

1 THE COURT: I mean you - I'm just - You raised the
2 inference that you were going to test that and you bet the
3 farm now that -

4 MR. HALFORD: I can only test it with the courts
5 permission.

6 THE COURT: Well I understand that, but I mean you
7 hadn't ask for that and you can do it with the court's
8 permission or with the permission of the owner of that lot
9 which I guess it's still Stone Crest Villas.

10 MR. HALFORD: It is.

11 THE COURT: Okay. All right. Now any followup and
12 then we move to Mr. Powell's Motion for Summary Judgment.

13 MR. POWELL: I don't have much, Your Honor, other than
14 I'm not hearing any response as to the failure to plead -

15 THE COURT: The pleadings.

16 MR. POWELL: I don't think that the Pinckney Trust
17 issue resolves our issue with the claim ownership as their
18 motion for summary judgment against my folks. Fred
19 Pinckney or Musgrave. I do believe that in order for Your
20 Honor to grant summary judgment on either of the claims,
21 there would have to be properly supported evidence as to
22 all twelve units. Again we're not in a class situation of
23 what the problems are or where they are, that they exist,
24 and that they are in fact the problems in order to grant
25 partial summary judgment. I believe that only the issue of

1 damages for a jury even in the event the plaintiffs can
2 claim those common elements damages which of course we say
3 they don't.

4 THE COURT: All right. Now do you have a motion for
5 Summary Judgment?

6 MR. POWELL: I do, Your Honor.

7 THE COURT: All right. Do you want to move to that?

8 MR. POWELL: Sure. This is not particularly brief
9 either but I'll go as fast as I can.

10 THE COURT: We got people leaving. You've had enough,
11 Ms. Burton?

12 MS. BURTON: Not particularly brief.

13 THE COURT: You had enough?

14 MR. DRESSLER: On behalf of the Association I will
15 stay if you think you need me here but I don't want to bill
16 these folks for something that I don't have a real fight
17 with.

18 THE COURT: I haven't read their little memo or seen
19 the presentation. I don't know whether you need to be here
20 or not. I mean I can't answer that.

21 MR. DRESSLER: I'll stay.

22 THE COURT: I don't have an answer. I enjoy your
23 company but I don't -

24 All right.

25 MR. POWELL: May it please the Court.

1 THE COURT: Yes, sir.

2 MR. POWELL: Your Honor, we filed this Motion for
3 Summary Judgment as to the plaintiff's claims. We also
4 filed a Memorandum in Support which I have submitted up to
5 the court. There is no file stamp on it however it has
6 been filed and submitted to counsel. We have not gotten
7 any reply to that motion.

8 THE COURT: Your motion in support does have a file
9 stamp of December 10th. Your opposition motion did not.

10 MR. POWELL: Apparently I've gotten them backwards
11 twice in both handing it up and referencing whether or not
12 it got filed and stamped.

13 THE COURT: Okay.

14 MR. POWELL: That's very impressive.

15 THE COURT: What's impressive is I noticed it.

16 MR. POWELL: Again the plaintiffs here do not set the
17 representative for capacity and this is not a class action.
18 We move for summary judgment with respect to all causes of
19 action against these twelve plaintiffs.

20 First the plaintiffs have alleged they are entitled to
21 summary judgment. We're entitled to summary judgment as to
22 the cause of action for rescission. But the plaintiffs
23 have argued rescission in conjunction with a number of
24 other claims. The claim for rescission in conjunction with
25 other claims is problematic because whereas rescission

1 seeks to void the contracts in some and the relief
2 requested which is an equitable relief would restore the
3 parties to their status quo, other causes of action such as
4 breach of contract, breach of contract accompanied by
5 fraudulent act, et cetera. Assume that the contract exist
6 and forms the basis of at least in part those claims, we
7 believe the plaintiffs cannot simultaneous argue the
8 contracts which are between Stone Crest and each plaintiff
9 should be rescinded and at the same time receive as if the
10 contract do and should exist.

11 What we pointed out in our Memoranda in addition is
12 that the plaintiffs have to show in order to support the
13 cause of action - and I start here. Here is a list of
14 twelve plaintiffs from the most recent complaint. I showed
15 you a portion of this earlier. I'm going to highlight the
16 point that again Mr. Musgrave is not a proper plaintiff
17 based on the title that we've seen, nor is Mr. Pinckney.
18 And I know that Mr. Halford's pointed out a discrepancy
19 there and has indicated that the actual title may be in the
20 name of a trust. But that's not the way the case is pled
21 so we believe we're entitled to summary judgment as to
22 those two plaintiffs as to all claims because they don't
23 have a claim. They don't own the property.

24 That's a little bit out of bounds but what it
25 indicates there is simply the case law. This is cited in

1 brief that in order to grant the equitable remedy of
2 rescission both parties have to be returned to the status
3 quo and we cited that. We haven't gotten any response from
4 the plaintiffs but we don't believe here that both parties
5 can be returned to the status quo. Presumably what they
6 request is a complete refund of their purchase price in
7 exchange for giving the building back. Here we've got a
8 passage of time in some instances since 2007. We pointed
9 out the plaintiffs cannot show or we don't think they can
10 show that there have been no changes in market conditions
11 since that time.

12 The Stone Crest you can't just - you just can't say
13 pay us our money back. If you paid the money back, Stone
14 Crest would have lost the time value of that money over
15 time, over a substantial period of time. They believed to
16 invest it that the interest that would otherwise have
17 accrued. You can't return parties to the status quo under
18 that - under this scenario on this case based on everything
19 that's happened. You - This would be something that the
20 court would have to do as an equitable remedy in factoring
21 all of these things in. The plaintiffs certainly have some
22 value, they live there and they have lived there and they
23 still live there. How do you value over time monthly what
24 the value of that would be which is what the court would be
25 required to do in order to establish the status quo.

1 in looking at both sides of the equation and whether or not
2 it's possible to go essentially back in time to restore
3 both parties to the condition they would have been in but
4 for these real estate sales. You can't do it for the
5 reasons that were mentioned and pointed that out to the
6 plaintiffs. We haven't gotten any response to them as to
7 the manner in which they contend that it is possible to
8 restore them to the status quo.

9 They filed this reply memorandum on Monday, it looked
10 more like a - it's couched as a reply to our motion for
11 summary judgment and the motion that Mr. Dressler argued
12 earlier this morning. And it doesn't really contain
13 anything having to do with the things that was pointed out
14 in this case such as with the cause of action for
15 rescission, that ours can't be restored to the status quo.
16 We get a response that says the buildings are leaking but
17 we understand that that's the plaintiffs contention. But
18 why are we not entitled to summary judgment on our cause of
19 action for rescission when we contend and we believe and
20 you have given us no evidence to suggest or any mechanism
21 under which the parties can be restored to the status quo.
22 You can't rest on their pleadings when we've gotten no
23 response.

24 This slide just illustrates the total purchase price
25 of all the units. You can't say - I think it's accurate it

1 may not be. It's taken from the HUD's and those would be
2 confusing but it basically shows the dollar amount
3 essentially what Stone Crest would have to pay back to the
4 plaintiffs or their lenders or their combination of lenders
5 in order to return the parties to their status quo which
6 can't be done. Plus you can't make Stone Crest whole which
7 is I know it's the plaintiffs claim here, they're the ones
8 with the problems and the damages but the law says that if
9 you're going to use the equitable remedy of rescission
10 you've got to put both parties back in the position that
11 they would have been in. As I indicated earlier Stone
12 Crest would have lost over time in staggered areas of time
13 from March 2, 2007, et cetera, the time value the
14 investment possibilities and the interest on that amount.
15 We simply point out, you can't do it.

16 This is attached to the memorandum it says the assets
17 of Stone Crest. This is more to the same point. This is
18 an updated balance sheet that shows that they've got Two
19 Hundred and Ten Thousand Dollars in what they consider to
20 be assets. I won't belabor the point and this is attached
21 as an Exhibit but none of that's cash. And most of it is
22 that lot we talked about, Lot 20. I think he's carrying it
23 at a Hundred and Sixty-five Thousand Dollars laying under
24 those lots. In summary we're entitled to summary judgment
25 because there is no genuine issue of material fact but that

1 the parties cannot be returned to the status quo.

2 The next cause of action. And here again the
3 plaintiffs didn't respond to us. And there is a case that
4 points out what I indicated earlier which was in this
5 instance this is the *Turner versus Cary* case cites fraud
6 and misrepresentation but it goes for other causes of
7 action that have their basis in contract as well. The
8 plaintiffs can't claim inconsistent remedies and rescission
9 inconsistent with most of what's been pled here.

10 Slander of title. The basis for the plaintiffs claim
11 for slander of title has to do with a mortgage that Stone
12 Crest took out on a building that is known as Building 8.
13 And what the plaintiffs alleged in sum is that like a lot
14 of Master Deeds, there is language in the Master Deed that
15 says that nobody can encumber the property without the
16 permission of the COA. You don't want people who own the
17 same thing who own the common elements having rogue unit
18 owners go out and take out loans and that kind of problems
19 and the Master Deed contains that language.

20 The mortgage that the plaintiffs referenced in regard
21 to Building 8 was taken out before that property was
22 submitted to a horizontal property regime and master Deed
23 and before it was sold to any unit owners. So it was owned
24 by Stone Crest when it was mortgaged and it was not subject
25 to the restriction under the Master Deed requiring that any

1 mortgages be approved by the association or the board.

2 None of the plaintiffs also live in Building 8 but it's
3 kind of beside the point.

4 We set forth in our Memoranda, this is just a brief
5 summary of what's required in order to prove a cause of
6 action for slander of title. One thing you know is that
7 they have to own it, it has to be derogatory to their
8 title. They didn't own it. It has to cause special
9 damages as a result of diminished value of the property in
10 the eyes of a third party so they have to show that they
11 owned it. That Stone Crest somehow mortgaged it without
12 their permission and that then some third person saw it and
13 that has somehow caused them damage. They haven't done any
14 of that. We set forth this brief; we got no response to
15 how it is that we supposedly slandered title.

16 Here's the mortgage at issue. The same book, page
17 number and date February 15th, 2010 referenced in the
18 plaintiffs complaint. Here is just an exhibit to that. I
19 think the whole thing is attached to our motion but you see
20 there it deals with Building 8 as I indicated. And on top
21 of everything else it's been satisfied so the mortgage no
22 longer exist. So they didn't own it, it wasn't improper,
23 it didn't violate the Master Deed, none of them live there,
24 there is no proof that any third party saw it and some how
25 they've been specially damaged because that third party saw

1 it. If they did they'd have to prove that they were
2 damaged somehow between the date of the mortgage and when
3 it was filed and when this satisfaction was filed when in
4 fact it has been satisfied. It no longer exist to slander
5 their title if any they had. And we pointed that out and I
6 haven't gotten any response to why that is.

7 We been through breach of fiduciary duties and my
8 argument is much the same. Mr. Halford and the plaintiffs
9 point out some of the more interesting facts perhaps in
10 terms of where there are alleged problems and what those
11 problems are. But they got to meet every element of every
12 cause of action. They got to do it with respect to all
13 twelve parties. There could be twelve lawyers up here and
14 Mr. Halford represents them all but they've got to show the
15 existence of a duty and they've got to show some breach of
16 some damage.

17 And we're moving for summary judgment as to any
18 fiduciary duty owed by Mr. Fankhouser individually. Mr.
19 Fankhouser is not the developer and never sold the common
20 elements and he doesn't owe any fiduciary duty under
21 *Goddard*, under *Concerned Dunes West Residents* to quote,
22 unquote tender the common elements in the state of good
23 repair. He's not a party to that sale contract, it's not
24 tendered in the HOA. He doesn't owe any fiduciary duty by
25 virtue of service on the board generally because I've seen

no South Carolina case that says that the duty that a board member owes to some other board member is a fiduciary one.

Its simply these poor souls sign up to serve on a board on behalf of others and are elected to do so and they are bound to act in accordance with the Master Deed but there's nothing that says that that relationship is a fiduciary one or a special type of a relationship under South Carolina law. They're just a board member. They owe a responsibility to the Association.

The only other duty that can be argued that Mr. Fankhouser may have owed is as a developer/board member. And as the *Goddard* case points out in the context of the failure to assess other unit owners in order to implement repairs, which *Goddard* by the way assumes without calling it a fiduciary duty, in which *Goddard* finds no breach thereof by virtue of no violation of the business judgment rule. But if he owes any fiduciary duty what is it and what is it he did wrong?

And the only South Carolina case I've seen that talks about some special duty, some fiduciary duty, is that *Goddard* case, the failure to assess. Did he fail to assess the unit owners while he was there? No. There is no evidence that came up in a board meeting of Mr. Fankhouser said I'm gonna use my superior voting power and we're not going to assess everybody. And the plaintiffs have put

1 forth no evidence of that. And there is an affidavit of
2 Mr. Moscovitz, I think its filed, it's also attached to the
3 plaintiff's memoranda, its dated September the 25th of
4 2012. But what he says is since this law suits been going
5 on, the board has made the decision to chase after and sue
6 these defendants and try to recover damages from them
7 instead of assessing what he believes would be
8 approximately Thirty Thousand Dollars per unit that it
9 would take to fix the buildings.

10 And the point being that that is some evidence of the
11 fact that had that come up previously when Mr. Fankhouser
12 was in charge of the board, wouldn't likely to have gotten
13 through to them because it hasn't gotten through now. And
14 there is certainly no evidence that he used his own voting
15 power to shoot it down because there is no evidence that it
16 came up in the first place. But it's come up since then
17 and they are not doing it now so I'm not sure how they can
18 say he's guilty of some breach of fiduciary duty for
19 failure or exercise of his superior voting power not to
20 assess unit owners.

21 Here are the points so clear as to Mr. Fankhouser.
22 There is no case holding board members owe other board
23 members where it calls for fiduciary duties. Goddard
24 they've got to show - that's the only one I'm aware of -
25 duly assess and subject to the business judgment rule. He

1 has no fiduciary duty on tendering common elements because
2 he's not the developer. And you know my position as to the
3 Master Deed. It's not tendered, it's not tendered to the
4 Association. It's sold to the unit owner. He doesn't sell
5 it, Stone Crest does, and it's not pled. We didn't get any
6 response to that.

7 Breach of fiduciary duty as to Fankhouser Property
8 Group. I don't want to belabor this I went through it
9 earlier. They are the General Contractor. Fankhouser
10 Property Group is an entity, it obviously did not serve on
11 the board. They did not sell any of the property. They
12 did not tender the common elements. They were the builder
13 and the plaintiff's have other causes of action against FPG
14 of course including construction defects. If they can show
15 and prove that cause of action maybe they can recover. But
16 what is the fiduciary duty that is owed by a General
17 Contractor to the individual? They may owe a negligence
18 based duty. They may owe - There may be certain implied
19 warranties but there is no fiduciary duty that runs between
20 the General Contractor and purchasing. None that I've seen
21 under South Carolina law and I'm glad to have somebody
22 point out a case that says so. We - No longer on board,
23 don't tender of the common elements, and not pled, and we
24 didn't get any response to that.

25 With regard to Stone Crest we will not belabor this

1 again but no duty and there is no tender. And the
2 plaintiffs have not responded back and we don't have any
3 affidavits or any testimony either except that they
4 attached portions of Mr. Clark, our architect and design
5 expert's deposition. But it doesn't go - It doesn't go to
6 any of these issues that I've discussed and it doesn't show
7 that with respect to each of the twelve units that there's
8 been some breach of a fiduciary duty.

9 If I may incorporate with the Court's permission my
10 argument on standing -

11 THE COURT: Sure.

12 MR. POWELL: --- previously set forth for the record
13 in opposition to the plaintiff's motion for summary
14 judgment. Its an essential element; we don't think they
15 can prove it.

16 All right, Breach of Contract. As I pointed out
17 earlier, it's an inconsistent cause of action for
18 rescission because one seeks to void and the other seeks
19 the existence of the contract. But at any rate there are
20 no contracts between Mr. Fankhouser individually and
21 Fankhouser Property Group, Inc., and these plaintiffs. You
22 need to have a contract in order to have a cause of action
23 to breach a contract and there are none so they are
24 entitled to summary judgment as to that cause of action.
25 They do exist with regard to Stone Crest Villas of Tega Cay

1 LLC.

2 But they argue that there exist a contractual - a
3 contract and a breach of contract as between themselves and
4 FPG by virtue of the franchise agreement between FPG and
5 EPCON. I know Your Honor is familiar with that because I
6 know that you've addressed it in other motions. We do not
7 believe that plaintiffs are third party beneficiaries of an
8 agreement between FPG and EPCON. This is a little bit out
9 of focus but C in our brief and in the cases that are cited
10 - and the court's are very specific about this - without
11 fail and including the Fourth Circuit ----- South
12 Carolina law. In order to find that a party is a third
13 party beneficiary you have to have some kind of intent hat
14 is shown between the parties to the contract. And you look
15 to the four corners of that agreement in order to figure
16 out whether or not there was any intent to confer any
17 benefit on any third party. In this case, if Your Honor
18 examines the franchise agreement between EPCON Communities
19 Franchise Inc., and FPG, you will see that it's clear that
20 there is no intent on behalf of either of those parties
21 that that franchise agreement benefit any third parties
22 including the plaintiffs.

23 We don't believe that there is any basis for them to
24 argue that they are a third party beneficiaries of that
25 agreement in order to try to assert a breach of contract

1 cause of action against FPG because that would be their
2 only basis for doing it. As I pointed out they have no
3 contract with FPG. The entire basis for their breach of
4 contract action has to be they are alleged third party
5 beneficiaries of that agreement between FPG and EPCON.
6 If you look at the agreement between FPG and EPCON they are
7 not. We pointed that out but didn't get any response to
8 it.

9 Breach of contract accompanied by fraudulent acts,
10 again inconsistent with the remedy of rescission.
11 Obviously in order to have a cause of action it's
12 important that one, the breach of the contract accompanied
13 by fraudulent acts there must first be a contract. As I've
14 pointed out to you with respect to Mr. Fankhouser
15 personally and FPG they are not. More importantly perhaps
16 and what I think the plaintiffs have not shown and cannot
17 show is that there has to be not just some type of
18 fraudulent conduct in the manner in which the contracts
19 were formed. That's fraudulent inducement and what the
20 plaintiff's are arguing essentially is, you told us that
21 you were gonna sell us these wonderful buildings, you
22 showed us models of them and you induced us to sell them.
23 That turned out to be right. It turned out not to be right
24 because they now leak. That fact pattern, that scenario is
25 insufficient to support a cause of action for breach of

1 contract accompanied by fraudulent act because you can't
2 just have fraud as it pertains to the making of the
3 contract. You have to have some independent fraudulent act
4 associated with the breach. You can't just have what they
5 claim are misrepresentations about what the buildings were
6 going to be like and then later they leaked. It doesn't
7 fit the fact pattern very well of a construction case nor
8 do I think that it belongs here. But they have to show,
9 and prove that Stone Crest essentially sabotaged the sale
10 agreement by going and doing something else.

11 And the case I cited in my brief is one of yours, it's
12 the *Mentor versus GOCT*, to kind of illustrate that fact. I
13 don't know if you remember this one or not. This is -
14 This was the case where you had an agreement between a
15 developer and an oil change franchise. And the developer
16 was supposed to get or did have a right of first refusal in
17 the contract with the oil franchisee where if the oil
18 change franchisee was going to go set up in a new location,
19 he had to check back with the developer. They didn't do
20 that and the developer alleged he breached our agreement
21 because you didn't provide a right of first refusal. Then
22 you directed a verdict in favor of the oil change facility
23 on both the breach of contract and breach of contract
24 accompanied by fraudulent act causes of action.

25 The court reversed you on the breach of contract issue

1 but affirmed you on the breach of contract accompanied by
2 fraudulent act issue and they did it for the reason I just
3 indicated here, which is that yet they breached the
4 contract, they breached the agreement. The oil change
5 facility was supposed to touch bases with the developer
6 because the developer has the right of first refusal and
7 they could not have then gone - could not have then gone
8 and set up another oil change facility. They breached that
9 contract but there was no fraud connected with the breach.
10 That's what I'm trying to illustrate here. You got a
11 contract with Stone Crest, we admit that. There is no Mr.
12 Fankhouser nor FPG because there is nothing that they did
13 that was fraudulent connected with the breach. The
14 plaintiff's theory is just that they leak. And that's
15 insufficient in and of itself to support a cause of action
16 for breach of contract accompanied by a fraudulent act.
17 And we didn't get any response from them on that one.

18 Fraud and misrepresentation: The elements I'm sure
19 are well known to the Court, and I'll move quickly through
20 that and just point out here again that the plaintiffs
21 cannot rest on their pleadings. We pointed out the absence
22 of any proof of these elements - and again, it has to be
23 all twelve - and have not had with respect to all twelve
24 anything presented to us to suggest that the plaintiffs can
25 meet these twelve elements. Fraud is a serious claim but

1 as I understand and believe the plaintiff's cause of action
2 for fraud, is that they believe that these defendants are
3 responsible for what they call deviating from the EPCON
4 system, which is taking the plans and everything involved
5 in the franchise agreement between EPCON Communities
6 Franchising Inc., and FPG and some how fraudulently
7 violating that agreement, injuring them. And here again it
8 goes back to the fact they are not third party
9 beneficiaries of it. But they can't meet these other
10 elements as it pertains to that theory as well.

11 And Your Honor can review there, their cause of action
12 for fraud as it's written. It's unclear to me, and maybe I
13 likely should move to dismiss it, but it's not clearly set
14 out with respect to all twelve of them what the alleged
15 representations were, how they were material, and how they
16 were relied upon, and how they were relied upon to the
17 detriment of these plaintiffs. And I point out that in
18 each of these purchase agreements you've got a clause that
19 says that the agreement's complete, that it fully and
20 completely sets forth the entire agreement between the
21 parties, all previous understandings of the agreements are
22 merged herein.

23 So if they were other communications, representations
24 made to these plaintiffs in advance of the sell, they agree
25 that those don't exist, that the only ones that they agree

1 to are set forth in the purchase agreements themselves.
2 And if there are others, again, we've ask what they are,
3 and how they meet the other elements of fraud and have not
4 had it demonstrated to us that fraud is a viable cause of
5 action.

6 One issue that you heard earlier is this issue of the
7 fact that there exist a Master POA. I refer to Stone Crest
8 as a COA, Condominium Owner's Association. It sits in a
9 development that is a master development that has other
10 properties within it. And it's one component of each of
11 these unit owner's dues, their over all COA dues, there's a
12 portion that's paid towards the upkeep of this master POA.
13 And what the plaintiffs say in sum in support of their
14 cause of action for fraud is that you didn't tell us about
15 it, and if you told us about it we wouldn't have bought it,
16 and therefore you're liable for fraud.

17 And that theory - And none of them argue I do not
18 believe but there was an affirmative representation by
19 anybody that there was not a Master POA. But the
20 distinction I'm drawing there is that nobody has said that
21 a sales agent, any representation was made by anybody
22 connected with Stone Crest except trust me there's no
23 Master POA here. What bothers everybody is that the
24 existence of this Master POA was not disclosed. It's filed
25 with the court and so everybody is by law on constructive

1 notice of it. And if you go through - Some I've seen and I
2 can't state all because I haven't looked specifically at
3 this issue. I don't think we have to get behind - Get
4 beyond the fact that this is filed document to show that
5 the plaintiff's have no viable theory of fraud based on
6 alleged fraudulent non-disclosure for a document that's
7 filed giving notice to the world that it exist with the
8 Clerk of Court. And here's case on that. I looked to see
9 well just because it's filed does that mean that somebody
10 legally necessarily has notice of it and they do.

11 You would imagine this has come up in the most
12 easement of real estate other issues. Well you didn't tell
13 me that in conjunction with this real estate transaction,
14 you didn't tell me about this easement with this prior
15 owner, this right of first refusal, well that's fraud.
16 Well it's not particularly if there is no affirmative
17 representation it can't be fraud and nondisclosure when
18 they're on constructive notice.

19 The other theory the plaintiff's advance for fraud as
20 I read their complaint is the issue of encumbrance. It's
21 the same issue we went through earlier having to do with
22 what they allege as an illegal ordinance in violate of the
23 Master Deed on Building 8. I went through it and I won't
24 do it again. The property is mortgaged by Stone Crest when
25 it owned the property. The plaintiffs don't live in the

1 building nor do they own it. They can't show any damage
2 and the mortgage has been satisfied. It sat there he
3 doesn't support the cause of action for fraud. We pointed
4 that out we didn't get any response. I'm almost finished.

5 You okay if I keep going?

6 THE COURT: Sure.

7 MR. POWELL: I say that. You want to know how many
8 more I've got?

9 THE COURT: Well why don't we take a short break.

10 Mr. Halford also has his response time.

11 MR. POWELL: Five or six more.

12 THE COURT: Five or six more what?

13 MR. POWELL: Causes of action to go through.

14 THE COURT: All right. Let's take a break.

15 (COURT IN RECESS AT

16 (COURT BACK IN SESSION AT

17 THE COURT: All right, take your seats. Thank you.
18 Equitable accounting.

19 MR. POWELL: May it please the court.

20 THE COURT: Yes, sir.

21 MR. POWELL: Your Honor, we left off with this cause
22 of action and the way it reads is the request by the
23 plaintiff's really for an accounting as to COA funds. And
24 you may remember that that issue is largely been addressed.
25 I thought it had been addressed and Mr. Halford and I

1- agreed off the record that that cause of action is in fact
2 has been dismissed. We would request that the order
3 reflect that.

4 THE COURT: I remember Mr. Dressler had - and you and
5 Mr. Halford came to some sort of --

6 MR. HALFORD: Are you asking me to speak?

7 THE COURT: No. No I'm just - I think I - I'm just
8 recalling whether or not I...

9 MR. HALFORD: There was a series of motions to compel.
10 It's been over a year.

11 THE COURT: Okay.

12 MR. POWELL: The next one following that one, Your
13 Honor, is the plaintiff's cause of action for conversion.
14 As I understand it and read the complaint that's pled, the
15 allegations as to conversion really have two prongs. One
16 as we've seen before is the violation of the Master Deed by
17 wrongfully encumbering the property with that mortgage on
18 Building 8 and we discussed that it's not wrongful, they
19 didn't own it, it's satisfied, there is no damages that
20 flow from that. And also conversion is not - Conversion
21 doesn't apply to real property. Conversion only applies to
22 illegal use or misuse of another's personal property.

23 The other allegation that they make is that Mr.
24 Fankhouser while he was sitting as the head of the board,
25 while he was in control of the board, he took their money

1 and misused it for other purposes. I don't know what other
2 purposes those may be. There's no evidence that we have
3 seen that Mr. Fankhouser ever - call it what it is - stole
4 any money from the association and used it for any other
5 purpose. We've ask them to tell us what that is. We have
6 not seen any evidence of that. The allegation may be, and
7 maybe I'm reading too much into it, that they contend -
8 There is this issue you heard Mr. Halford reference and
9 there is an affidavit that they have filed where there is
10 an issue having to do with the COA being over charged by
11 the Master POA to the tune of some Fifty-five Thousand
12 Dollars.

13 Well the POA if they didn't calculate what the COA
14 owed properly and over charged them then that's the fault
15 of the POA not anybody that sits on the board now for
16 paying what they were invoiced, nor Mr. Fankhouser while he
17 was sitting on the board for paying what they invoiced. It
18 is whoever is affiliated with the POA over invoicing the
19 COA. And in fact Mr. Dressler's firm and Mr. Sellers with
20 his firm has been retained by the COA with regard to that
21 over payment also known as over charging by the POA and
22 they have engaged in a letter writing campaign and the COA,
23 not as part of this law suit, but is separately chasing the
24 POA to recover that money that they were supposedly over
25 charged.

1 But that's not anything that Mr. Fankhouser or any of
2 these defendants did. And if portions of that over payment
3 occurred while he was on the board, its still not anything
4 they did because they were getting over charged by the POA.
5 Not intentionally writing checks for too much to the POA
6 and certainly not converting these twelve folks property
7 for their own independent use.

8 THE COURT: As to - I'm trying to anticipate argument,
9 but as to the POA did Mr. Fankhouser have any control over
10 it?

11 MR. POWELL: I don't believe that he has any control
12 over -

13 THE COURT: Is there any evidence of that? I probably
14 ought to stick to the record. Is there any evidence that
15 he had control over the POA with the theory maybe being
16 that the POA needed money and they looked at the COA over
17 charged them to the benefit of the POA.

18 MR. POWELL: I don't know what interest or voting
19 power the PO - the COA has within the POA. I want to say
20 none but I don't know that. I know that Mr. Fankhouser
21 personally didn't have anything to do with and there is no
22 evidence he had anything to do with the amounts that the
23 POA charged the COA. And to the extent that the
24 plaintiff's alleged there is some kind of conversion by
25 over payment, he had nothing to do with that other than

1 writing the checks in the amount that the POA over charged
2 the COA. He certainly didn't convert their property
3 illegally pursuant to some wrongful act for his own use.
4 And we pointed that out in our Memoranda to the plaintiffs
5 that we don't believe they can meet those elements and
6 we've not received a response as to what they maintain the
7 basis for the conversion action actually may be.

8 Civil Conspiracy: Fairly quickly through that one.

9 It involves the combination of two or more people. So
10 the plaintiffs have to show with whom Mr. Fankhouser
11 presumably conspired for the purposes of injuring the
12 plaintiffs. And all twelve of them - I hate to beat a dead
13 horse - they've all got to prove it. How did Mr.
14 Fankhouser conspire against Plaintiff Number One and with
15 whom and doing what and causing what damage? And there is
16 simply no evidence that he conspired with anyone. The only
17 - The way that I read the complaint the best guess is that
18 the plaintiff's maintain that some unit owner's units were
19 repaired while others were not. And that it was random and
20 or that there was some favoritism shown by the board in
21 making some limited repairs to board members units but not
22 to these twelve unit owner units.

23 And there is simply no evidence that happened based on
24 some conspiracy by Mr. Fankhouser or others while they were
25 on the board. You are by now kind of familiar with the

1 chronology of the way this case stated and you got major
2 problems becoming known in the November of 2009 time frame
3 with the stone work. And then subsequent to that you got
4 claims being filed with insurers. People like me getting
5 involved, experts getting involved, and various tarp's
6 being installed in various units and some patch work, work
7 being done to badly damaged units. But there's certainly
8 nothing that amounted to a conspiracy by Mr. Fankhouser
9 where he said well you're my buddy so you get this limited
10 fix, but you're not so you don't.

11 And I think in order to show that there was some kind
12 of act. It can't be an act or omission, it has to be an
13 affirmative act. They have to show that Mr. Fankhouser
14 intentionally caused the plaintiffs not only damages and
15 special damages but did so in a combination of some other
16 person, and there is simply no evidence of that. We don't
17 know who that other person or persons may be and the
18 plaintiffs haven't come forward with that. And we haven't
19 gotten any response. They certainly haven't done it with
20 respect to all twelve.

21 I point out here that what Your Honor already knows in
22 terms of what are general versus special damages... And with
23 regard to a cause of action for a civil conspiracy you have
24 to show special damages. But they are different than the
25 other damages that are alleged in the other causes of

1 action and not a mere recitation. Well if you look at the
2 plaintiff's cause of action for civil conspiracy and
3 compare it with the other causes of action and other facts
4 and other means by which the plaintiffs would endeavor to
5 recover in this action you will see that the very same
6 things that are set forth in connection with the alleged
7 civil conspiracy are set forth elsewhere.

8 I won't bother you with this here, but I did go
9 through all the other causes of action to see where they've
10 alleged the same things with regard to civil conspiracy.
11 So that it is in fact a mere recitation of the causes of
12 action set forth elsewhere and would not support an award
13 of special damages. And those are set forth in our brief.
14 But it appeared to me that with regard to those two
15 instances the alleged wrongful encumbrance based on the
16 mortgage. And with regard to the unauthorized payments
17 that those were set forth at least four other places.
18 Unauthorized use of association funds and unauthorized
19 repairs. Those are set forth in the brief. We believe
20 we're entitled to summary judgment as to the cause of
21 action for civil conspiracy for those reasons.

22 Breach of Expressed Warranties: I'm getting ready to
23 get into several different warranty claims. Some of these
24 we're dealing with warranties are semantics. And I want to
25 start with - I know Your Honor knows what an expressed

1 warranty is but I started there in evaluating the
2 plaintiffs claim and tried to figure out what an expressed
3 warranty is. Is it just something said to some other
4 person that is relied upon? But is it in any way
5 distinguishable from - If that's the case is it any way
6 distinguishable from what a negligent misrepresentation
7 would be? And what exactly is a warranty?

8 In all of the cases I've reviewed, an expressed
9 warranty arises in connection with the sale of some item.
10 I didn't see any cases that addressed expressed warranties
11 that were made that were not in the context of a sale.
12 Here of course the sale that occurred is the sale of a
13 home. And you've got certain warranties that arise under
14 the UCC, and the UCC does not apply here because it does
15 not apply to the sale of a home. So what we would be
16 dealing with here, I think, based on my review of the law
17 is some expressed warranty, some representation made in
18 connection with the sale of the unit and what those were
19 and how those came about.

20 And in that vein, again, Mr. Fankhouser personally is
21 not the seller and so I don't think he can be liable for
22 breach of expressed warranty connected with the sale of a
23 unit. Nor can FPG be liable for a breach of expressed
24 warranty because it think expressed warranty has to be tied
25 to the sale. But what were the warranties that were made

1 as simply a sets forth a general case citation as to what a
2 warranty is, its an affirmation with respect to the thing
3 to be sold and the intention of the buyer to rely on it in
4 making a purchase. So I wondered what are they, are they
5 connected with the sale, if not are they actionable? I've
6 gone through that. You've seen this slide before. This is
7 attached to all of the purchase agreements. It wasn't
8 always paragraph 26 because they were varies for the
9 purchase agreement forms but it says the same thing. All
10 the purchase agreements which the agreement is fully set
11 forth herein. There are no other warranties that have been
12 extended.

13 And I'm sure the plaintiffs want to say well that's
14 boil a plate, you can't do that and that kind of disclaimer
15 never holds up. I'm sure Your Honor is familiar with the
16 line of cases that talks about disclaiming warranties. And
17 in particular warranties in conjunction with purchase of
18 real estate. And there are certain things that cannot be
19 disclaimed such as for example the implied warranty of
20 having billed which is not raised as a cause of action
21 here. But what case law says is you can't disclaim implied
22 warranties like that without at least proving there was
23 additional consideration. It doesn't matter what the
24 consideration is. So, if you purchase a home for Two
25 Hundred Thousand Dollars and you put in there - though the

1 seller you put in there I disclaim all implied warranties,
2 that's not gonna hold up. If you are the seller and you
3 put in there for the sum of an additional Five Thousand
4 Dollars the parties agree that there is a disclaimer
5 involved - implied warranties - well then you can disclaim
6 implied warranties. We're here talking about expressed
7 warranties and here are no cases that I found that have
8 said unlike those implied warranty claims that would
9 require additional consideration in order to be effectively
10 disclaimed by a seller. But you can't just say in an
11 agreement this is it, this is the purchase agreement this
12 is what we're selling you, any other expressed warranties
13 don't exist.

14 And here we understand what the plaintiffs theory is
15 with regard to expressed warranties that are set forth in
16 the purchase agreement. What we don't understand is what
17 other representations were supposedly made in conjunction
18 with the sale as they must be in order to be expressed
19 warranties in the first place. And to whom they were made,
20 what was said, and how they are not assumed within this
21 agreement in this clause that says that these purchase
22 agreements represent the full understandings of the
23 parties. And so what we said is we don't see any evidence
24 of any expressed warranties being made, what they are, how
25 they are breached, any damages that were from that, and we

1 haven't got any response to that.

2 I'm handling these two together. Breach of implied
3 warranty merchant ability and breach of implied warranty
4 and fitness for a particular purpose. I think Your Honor
5 may have even addressed this within the context of this
6 same case. Both of those are UCC remedies, both of them
7 apply only to the context of the sale of a good. There's
8 - I thought I had the two sections right, I think they're
9 right. Both are UCC remedies. There is a case that says
10 where I indicated earlier which is a home is not a product
11 under the UCC therefore it's not subject to the implied
12 warranties that only arise by virtue of those statutory
13 sections and therefore as to both of those causes of action
14 all of these defendants are entitled to summary judgment.

15 Construction defect we went through at length earlier
16 in opposition to when I was discussing our opposition to
17 the plaintiffs motion for partial summary judgment. But I
18 will reiterate here, I don't know that its proper for us to
19 move for summary judgment and point out that if something
20 is not pled in the first place, but the plaintiff's do
21 indicate in their motion for summary judgment that they're
22 seeking the entry of judgment against the developer for
23 construction defect which is their negligence cause of
24 action. And again, it's not pled. The thirteenth cause of
25 action is directed only to Mr. Fankhouser individually and

1 Fankhouser Property Group Inc.

2 With regard to FPG as I pointed out earlier, no
3 construction self performed by FPG; it's all performed by
4 subcontractors. The general contractor is not
5 automatically liable for the negligence of the
6 subcontractors so the plaintiffs can't say we have damage,
7 you're the general contractor you're on the hook without
8 more. There's got to be some facts and evidence, some
9 scintilla that shows not just you're the general contractor
10 we got water intrusion problems, we don't care if you've
11 got subcontractors or not because we can seek the entire
12 amount of any judgment through you because you're the GC.

13 They have to show there was some negligence
14 supervision, some instance where someone didn't watch
15 somebody doing something right and that therefore they were
16 damaged. You might say well that's inferred anytime you
17 got water in the house. Well it's not inferred by us, it's
18 not inferred at summary judgment. And when we point out
19 the fact that you can't rest on your pleadings to show us
20 where there was some such negligence supervision that would
21 hold the general contractor liable under that theory, we
22 don't get any response, we think we're entitled to summary
23 judgment.

24 Finally what we went over earlier as to construction
25 defect is again the lack of duty owed by Mr. Fankhouser

1 personally. The plaintiffs again haven't pled, this is the
2 same provision you saw earlier having to do with
3 construction defect cause of action claimed against Mr.
4 Fankhouser, against FPG for construction practices. Again
5 they haven't pled nor have they put forth any proof.
6 Including in response to this motion for summary judgment
7 as to how their entitled to recover against Mr. Fankhouser
8 personally, why he gets no corporate chief.

9 In response to our motion we've gotten nothing that
10 would satisfy all those factors. We got nothing more
11 importantly to satisfy all those factors as to all twelve
12 plaintiff's and we're moving as to all twelve claims.

13 The last cause of action is under the South Carolina
14 Unfair Trade Practices Act. The construction of a building
15 that later leaks, does not in and of itself constitute an
16 unfair trade practice. You got to have under the Unfair
17 Trade Practices Act in the first place some - something
18 devious, something - some intentional malicious conduct
19 directed towards another party that triggers the act,
20 otherwise things like bath construction fails and other
21 accidents would be subject to the Unfair Trade Practices
22 Act. That's not the case. The fact that the defective
23 units were sold, does not in and of itself constitute an
24 unfair trade practice.

25 At best the Unfair Trade Practice is my guess is that

1 they will counter along the same lines as been stated
2 earlier. We came onto your property, you showed us models
3 you said everything was gonna be great. You said it was
4 gonna look like this, but it looks like this. We're
5 suffering as a result. But all of those things may be true
6 and the Court may take those as true. We submit and
7 evaluate whether or not they have a viable Unfair Trade
8 Practices Act claim because it all just goes to the same
9 thing, it's just that our folks tried to set up a community
10 that worked. They don't have any incentive to set up any
11 community that does not work. And based on poor
12 performance of other contractors and the plaintiffs would
13 say on ours as well some had failed in some locations and
14 some have leaked but that does not constitute an unfair
15 trade practices violation. Nor is it capable of
16 repetition. The plaintiffs haven't shown that these
17 defendants have gone off and built in some other community
18 and they're doing the same thing and that can mean even
19 that they did here. All the units that have been built
20 have been sold. Some of the later buildings or at least
21 one is built differently in response to things that have
22 been pointed out. I think that in order to show there is
23 some type of unfair trade practices act violation that the
24 plaintiffs have to show there is something devious about
25 the construction in the first place.

1 But let's just assume that they don't, that they just
2 have to show you built it bad, it leaks and you're doing it
3 elsewhere. I still think they have to show that you're
4 doing it elsewhere in some other community and that you're
5 doing it in the same way, you're making the same mistakes
6 with stone veneer, you're putting the roof upside down,
7 you're landscaping in the wrong way. There is no evidence
8 that this has happened or is going to happen again in some
9 other community in order to support this cause of action.
10 We pointed that out in our Motion Memoranda that there is
11 an absence of any proof of that and haven't received any
12 response and we believe we're entitled to summary judgment
13 on that cause of action as well.

14 Thank you, Your Honor.

15 THE COURT: Mr. Halford.

16 MR. HALFORD: That was a lot of ground that we just
17 covered. First of all I'll go back and start with the
18 rescission cause of action that they pleaded. I didn't
19 know two years ago how serious this case would be, but
20 rescission with a standard, a legal standard of rescission
21 is whether or not the breach in contract is so substantial
22 that it defeats the purpose for which the contract was
23 entered. All of my twelve plaintiffs entered into a
24 contract to purchase a residential condominium home, and
25 they expected it I think is without saying to be able to

1 protect them from the elements, to be constructed in a
2 workman like manner.

3 With regard to the rescission claim, I don't disagree,
4 I've not seen any case either. I don't disagree that there
5 would be a equitable remedy but I think whether or not they
6 would be entitled to it under that standard, standard
7 again, whether the breach in the contract is so substantial
8 that it would defeat the purpose for the contract that
9 would be a question of fact for the jury. And here we've
10 got twelve homes, twelve out of twelve leaking water. I'm
11 going to focus on my twelve only during the course of this
12 argument, but all of them ended up with problems with their
13 home that was sold to them by Stone rest Villas of Tega
14 Cay, LLC. And I'll turn to the point again that Mr.
15 Fankhouser was the controlling interest of all these
16 entities.. Brock L. Fankhouser was the sole shareholder of
17 FPG, the General Contractor. He was the sole member and
18 owner of the selling entity Stone Crest Villas. And he
19 also served as - was the only owner and served as the only
20 director for some time of the condominium board.

21 So going to rescission, I just think it's a factual
22 question. It would have to be passed on by somebody. We
23 can plead it and they can deny it and it creates a factual
24 question is the breach so substantial. I don't see how
25 that's a equitable determination, I think it's a question

1 of fact for a person who views the person's circumstances.

2 Moving on. Whether or not the parties can be returned
3 to the status quo. I don't disagree. We've had a bad
4 economy and you know if the prevailing economy is so severe
5 where everybody's homes have been taken a loss in some form
6 of value. However the passage of time doesn't underscore
7 that these persons' homes, my twelve and many others I
8 might add the entire community, were reduced in value by
9 the county assessor as each of these people went to the
10 county to do it, and not just my people, but other people
11 did too. This gentleman's deposition will come up short,
12 for they had literally sold homes that are functionally
13 obsolete to a degree of about twenty-five percent according
14 to his affidavit.

15 So if we go into the fourth cause of action a little
16 bit later I will get there but the status quo, it would be
17 impossible to return the parties precisely to the status
18 quo. The question is how these people purchased in a
19 condominium community it was represented to be maintenance
20 free whether the board or whether an association would take
21 care of maintenance and it appears that the association
22 cannot repair them or at least not easily.

23 I'm going to turn to - I'm going to jump ahead to the
24 Unfair Trade Practices argument, his last real quick. The
25 Court brought up, are the mortgage holders necessary

1 parties? Some of these people, some of my people bought
2 with cash. Ms. McCarty bought with cash, some of our
3 people had mortgages, I think that satisfies the Court's
4 inquiry there satisfies does this affect commerce? It
5 does. Was it repeated? My clients represent purchasers who
6 came along from years 2007, Judge, to 2010. And its their
7 expert again that cites the plans and the buildings and as
8 constructed are code violations. So the point I would make
9 and we survive this with the EPCON defendant's early on
10 this year if you remember that with the nine elements of
11 fraud they've repeatedly sold building code violations in
12 this community and its hurt a lot of people and a lot of
13 these people's homes have been compromised but had very
14 expensive problems.

15 So I would argue not only is it repeated, there are a
16 lot of purchases, the problem with it the purchasers come
17 along, Judge, at some point in the year 2008 Tracy Vann
18 identified it and in 2008 there were some knowledge of
19 water intrusion. In 2009 it become somewhat wide spread
20 and there is a report commission, an insurance report; it's
21 called the Philadelphia Report, December the 18th, 2009.
22 At that point they had actual knowledge of serious
23 problems. But it wasn't good enough for the builder. The
24 builder then in January of 2010 went to the building
25 diagnostics another company that did the building

1 diagnostics report, he had two reports at that time telling
2 him how serious the problems were. Then he commenced what
3 he described as repairs to one of the board members units.
4 There is a photograph somewhere and I can show you in Mr.
5 Clark's deposition where they retrofit these units, and
6 you've already seen the email in the Court's file, in an
7 attempt to find the repairs scope that's gonna be different
8 than that proposed by his insurance company, and we're
9 starting to see why. It states in that email, its in the
10 Court's file somewhere, I know you have a lot of documents,
11 that it may be both financially and logistically impossible
12 to achieve the result that is being recommended by my
13 insurance company, but nevertheless, sales of these Stone
14 Crest condominium homes continue throughout the year 2010.

15 I'm gonna help the Court if I can clean up just a
16 little bit. The slander title issue that he brought up,
17 those were EPCON shareholders; they were the parents of
18 Brock Fankhouser, Philip Fankhouser and Kathleen
19 Fankhouser. And Mr. Fankhouser testified at his deposition
20 that that was not used specifically. The mortgage does
21 apply. He is correct to Building 8, but Mr. Fankhouser
22 testified that that money was used for construction.
23 Judge, we're in the year 2010. You saw the date of the
24 mortgage. At this date we know we got water intrusion and
25 we know that its widespread but he's continuing to build

1 and he's doing so with EPCON shareholders money which
2 happen to be his parents. So that mortgage now has now
3 been satisfied, its not a big going concern in this law
4 suit. But the point is, again, they want to use the Master
5 Deed in this community as a shield when it works for them,
6 here it certainly cuts against them. After he exceeded
7 what they had described to you as the declarant control
8 period, they had to have the vote of everyone of these
9 people to put that mortgage on common elements and they
10 didn't have that vote. So what did Mr. Fankhouser do that
11 was wrong is he pulled out - and I understand why he did
12 it. Construction financing was drying up in these years
13 with the economy but the Master Deed says that once the
14 seventy-five percent of this community was sold out there
15 is a declarant control period which comes to the end. Mr.
16 Fankhouser stayed on as you know through June or July of
17 2010.

18 Point is that mortgage was placed on the common
19 elements of this project without a vote of these people.
20 Some of them may not care. We pleaded it in there because
21 as we were looking at a time - the time the law suit was
22 drafted from the aspect of whether or not EPCON was
23 financing this project or not, and it did turn out to be
24 the two of EPCON's share holders, his parents, that lent
25 that line of credit for construction purposes as testified

1 to by Mr. Fankhouser in his deposition.

2 So they've argued we didn't own the common elements.
3 Who does own the common elements? If we don't own the
4 common elements who does? Everyone of these people out
5 there own this legal estate. Now that's the one case that
6 I've cited for the Court and I told you I looked forever on
7 West Law trying to find that case of law which gives you
8 the answer and never found it. I don't think any of us
9 did. I've quoted the Queens Grand decision. He's quoted
10 the Goddard decision. The state of the law has been in
11 conflict, you've got two parties with equities and no real
12 clear guidance so I refer the Court over to equity. I
13 found it in a CLE last week. I'm not sure it's dead on,
14 you'll have to decide, but where there are parties with
15 equal equities obviously the person with the legal estate
16 controls. And he's argued - I don't mean to cross
17 defendants here - but he's argued that we don't own the
18 common elements. Well if we don't who does? We're - We
19 get common elements when we buy that condominium like
20 anybody else out there. And so at some point in going back
21 before my motion there was a transition of the common
22 elements.

23 The fiduciary duties note that as to the existence,
24 breach or damage is what he cited to the court basically
25 that Mr. Fankhouser owed no fiduciary duty. Mr. Fankhouser

1 was in control of this board and made a lot of money and we
2 stopped chasing it after a year and half of motions before
3 the court to get records compelled to show the finances of
4 the corporation which dues and assessments, Judge, are used
5 for the maintenance and repairs. Fifty Five Thousand: We
6 just quite chasing it at a point because ultimately there
7 is an affidavit from Mr. Moscovitz which I will point out
8 that never got filed with the court, that states a lot of
9 money went out the door. It didn't happen under Mr.
10 Moscovitz, it did happen under the existing board, it
11 happened under Brock Fankhouser. The problem with it is it
12 happened in years when water intrusion is becoming very
13 bad. They can't have it both ways. They've over paid the
14 Master Association now we want to go chasing them for that
15 money or we're gonna get into a letter writing contest.
16 2013 the budget just came out, they're being assessed for a
17 Master Association again. For the last two years they
18 haven't paid the Master Association so they can't seem to
19 decide what's going on here. And the point is all of my
20 clients said in deposition, we had no idea of a Master
21 Association, the COA being a part of the POA. I'll answer
22 the Court's question that I know Mr. Fankhouser's
23 enterprise Stone Crest Villas of Tega Cay LLC, is a member
24 of that property owner's association. I've seen the
25 records. But they seem to take a --

1 THE COURT: What do you have to do - What do you say
2 about the record notice?

3 MR. HALFORD: Well I was just going there. Thanks for
4 asking.

5 THE COURT: Okay.

6 MR. HALFORD: It is recorded of record. But these
7 people of purchase got a Master Deed for the COA only. So
8 it's kind of the excuse is to be don't ask and we don't
9 have to tell you.

10 THE COURT: Well no I'm not asking about an excuse,
11 but when - Seems like everything we're dealing with today
12 is stuff I didn't really do when I practiced law, but I
13 didn't do a lot of property work but when you check a title
14 and if there is something in the chain you report it and
15 then you're - at least you're on notice whether it's
16 reported or not, but if it's not reported then it's not the
17 person - it's not the recorder of the deeds problem it's
18 the title search person if they miss something in the chain
19 of title.

20 MR. HALFORD: I don't know if they missed it or they
21 didn't go back far enough. I can't answer those questions
22 for you.

23 THE COURT: I know you can't answer but I'm saying
24 what - It's kind of - I'm trying to figure out how you lay
25 that at somebody else's door when it's record notice and

1 the whole purpose of record notice is that the whole world
2 knows. When you buy a piece of property you hire an
3 attorney or go check yourself and anything that's in that
4 chain whether you find it or not is in that chain and its
5 functional as to your property. Go ahead.

6 MR. HALFORD: I would argue that that's material to my
7 client because we're paying the Master Association dues
8 unknowingly.

9 THE COURT: I didn't say it was material. I was just
10 saying how - You're claiming that you didn't know about it,
11 your clients didn't know about it and that's the first
12 point, not the effect its having on them now. But you're
13 saying they had no idea this even existed?

14 MR. HALFORD: They're claiming it was undisclosed yes,
15 sir.

16 THE COURT: Well you're saying - using the word
17 undisclosed, but isn't that the reason we put stuff on the
18 record is to disclose to the world? And that would include
19 your client's I would think. But go ahead.

20 MR. HALFORD: I kind of lost my -

21 THE COURT: I'm sorry.

22 MR. HALFORD: That's okay. You know as to where we
23 were, were the existence of the breach and the damages
24 cause. As to the developer whether or not he has duties to
25 board members. Judge, he was the seller of residential

1 homes to this entire community including my twelve clients.
2 So, Goddard would assume, you know, according to Mr. Powell
3 what it is and what he had to do would have been a failure
4 to assess. There are assessments now which have recently
5 come out. There were no assessments - your normal
6 assessments - but repairs need to be made. Certainly they
7 can be made prior to his resignation from the board. And
8 they have been collecting assessments from all unit owners
9 this entire time and apparently homes have not been
10 repaired. Mr. Powell's correct, we didn't file a four
11 hundred page brief or two series of four hundred page
12 briefs. I got those while I was in depositions last week,
13 Your Honor, but where he said it was no tender, its pretty
14 clear from the complaint in this action we were buyers of
15 condominium properties within a horizontal properties
16 bought from Stone Crest Villas of Tega Cay LLC.; the sole
17 controlling member of that again is Brock Fankhouser so I
18 don't know that they make it there. I think certainly that
19 the complaint describes that we were buyers of condominium
20 properties in a condominium association.

21 Lack of standing, that is the next area that Mr.
22 Powell had. I think the lack of standing is defeated right
23 there. They keep alleging that the plaintiffs don't have
24 lack of standing. This court has found both parties have
25 standing here as to your order September the 27th of 2012.

1 You then ruled likewise against plaintiffs in October, I
2 believe it was October the 27th, 2012, roughly thirty days
3 later and then denied a motion to reconsider. This has
4 been decided. It's been argued many times and decided on
5 already so I'd say that they're - That's probably the
6 biggest question of fact we have in this case right now.

7 Breach of contract: Again Mr. Fankhouser wore many
8 hats here. He was the developer, he was the owner of the
9 GC, FPG, he was the only shareholder there. The franchise
10 agreement you referenced, we actually lost that one with
11 EPCON a while back. What we were expecting was the homes
12 that they were showing us to be built in a workman like
13 manner for they would serve the purpose for which they were
14 buying the homes.

15 So I understand the third party argument, third party
16 beneficiary argument. The Court's already ruled on that as
17 well by the way in the EPCON motions that occurred earlier
18 this year. So was there an intent to benefit the third
19 parties? Every contract that you saw up here has an EPCON
20 Community stamped across it as the logo, as the trade name.
21 You know did our people understand that they were buying
22 EPCON homes? I think we survived summary judgment on that
23 with EPCON many months past as well. So what do they
24 expect? Well they didn't expect to be sold building code
25 violations which is what they're expert says they were

1 sold, both the architectural drawings and the as built
2 construction. And that's again their experts words, not
3 mine, that they were sold code building code violations
4 that still haven't been remedied.

5 Let me address how it hasn't been remedied. There has
6 been a re-roofing at this entire project. November 2011
7 re-roofed of this entire project to hail casualty claims.
8 And Mr. Powell ask my expert last week about conditions
9 still existing. We re-roofed over code violations. We
10 didn't do that. We stood out of the way because frankly
11 those repairs probably needed to take place and they were
12 done under a contract with the COA through a company called
13 Winkco. The problem is some of the original defects in the
14 construction never got corrected. The OSB sheeting doesn't
15 extend off the roof properly. Flashing and guttering which
16 is cited by their experts is a very serious problem and it
17 never got fixed. And so again, we've got the ongoing
18 construction that's not - on going repairs that's not
19 repairing any code violations that's still existent. I'm
20 sure we can't find a building in York County that's ideally
21 code complaint but you can't depart this far from the code
22 and disclaim responsibility for it. It's just the same as
23 EPCON can't claim that their plans - They're not
24 responsible because their plans were placed in this
25 jurisdiction.

1 Your Honor, I argue in the law that they've implied
2 warranty and plans and so does FPG. He built their plans
3 and they turned out to be the plans were defective
4 according to their expert they lacked water management
5 detail. Things like a weep screen, weep holes, and weather
6 resistant barrier behind the plank siding, flashing at
7 windows. All these things come together to form water
8 intrusion problems, ultimately. My expert describes it as
9 failure of the construction to produce a weather tight or a
10 water tight building envelope and that's what we're talking
11 about. The envelope is my client's homes. Its everybody's
12 homes but I represent twelve. And the environment that has
13 been created is whether it's one component or several,
14 they're not working together. We have bad problems and one
15 of which is the water penetrates the interior of the home.

16 And we've been over grading this morning. Certainly
17 grading is decided by every expert as a problematic. We've
18 been over the stone exterior walls this morning. They were
19 drawn like that. That's how the EPCON plans arrived here
20 to FPG, they were drawn extending the stone exterior into
21 the subgrade by two inches. Every time we find a gravel
22 problem they all want to duck because we had two slabs
23 tested of my units with no gravel that shows up. We've had
24 a report go out on behalf of the COA to find deficient
25 support adjacent to slabs. I'm not talking about a big

1 retaining wall. I'm talking about directly under homes.
2 Seven of nine homes failed. And then we want to duck our
3 heads in the sand and say oh we're gonna fight this some
4 other day. It was pleaded in this law suit and we're both
5 we're missing in that case because Mr. Dressler and I both
6 don't have experts at this point, but he did ask my expert
7 last week, are you capable of rendering an opinion with
8 regard to gravel defects? And my expert said that he was.
9 I understand it would be a qualification issue later.

10 I'm gonna move on. Breach of Contract accompanied by
11 fraudulent act: He said first there must be a contract.
12 Well we bought EPCON designs from Stone Crest Villas of
13 Tega Cay, LLC., Judge. He said we have to allege more than
14 just that they leak and we have. Viewing all facts and
15 inferences in the light most favorable to the plaintiffs
16 under this motion, there are code violations. And you
17 don't have to take my word for it, you can take Mr.
18 Powell's experts word for it.

19 Lastly on the EPCON motions, you recall the fraud and
20 misrepresentations, we survived all nine points. This
21 builder openly told this community via email that your
22 homes are not designed to withstand outside raining at two
23 inches per hour. That's in the record. Whether or not he
24 deviated we have with experts demonstrated he deviated from
25 the development system. Not huge code violations.

1 Switching out OSB board from half inch to seven sixteenth
2 inch you can make changes, but when you violate the
3 building code that's damage and it's resulted in water
4 intrusion.

5 So the fraud misrepresentation, Judge, is he was still
6 building these plans after he was well aware of the water
7 intrusion. My people span years from 2007 to 2010. One of
8 the first 2007 buyers was Mr. Gonzales whose slab they have
9 been unable to fix after four attempts it's split. That's
10 one of the ones that got tested for concrete absence and
11 gravel absence too. But the point is they've been aware of
12 that being ongoing for some time. It's not just FPG they
13 complain to, my people went to Brock's father in written
14 form. They've had awareness for a long time that the slabs
15 were compromised and nothing happened. They replaced his
16 tile four times and it's still cracking. Is there any
17 wonder that there is water coming through it? And if we're
18 missing any gravel and weather resistant barrier water is
19 gonna penetrate the slab. But we all want to duck when we
20 hear slab concerns because there may be just as Brock
21 Fankhouser described in that email I told you about. It
22 may be logistically impossible, maybe even financially
23 impossible to properly repair these units. But that's a
24 question of fact for somebody other than me. For the jury.

25 The master development: I'm trying to go through the

1 issues that Mr. Powell has hit upon. Again I recognize the
2 court's points of record. All of my people say that it
3 wasn't disclosed to them whatsoever, they didn't know that
4 they would be paying monies to a Master Association.

5 The Equitable Accounting that he went over, that's
6 largely addressed, we can clean up the law suit right
7 there. We stopped chasing it when we proved that there was
8 what they described as an over payment. I don't know if it
9 was an over payment or not. All we know is money left the
10 COA under Mr. Fankhouser. It left the COA during the years
11 when there were a lot of episodes of water intrusion so
12 it's no wonder we don't have the money to fix homes. Why
13 are we supporting the Master Association and Wal Mart and
14 roadways and commercial shops if the primary purpose of the
15 Master Deed that we bought for Stone Crest COA says that
16 your dues and assessments are being used to administer and
17 maintain your common elements? And that it's the COA's job
18 to promptly - It's an affirmative obligation, it's not
19 ambiguous - promptly restore the common elements. We
20 shouldn't a been using those dues for any other reason.
21 And to - If we can clean up the equitable accounting,
22 Judge, that has been resolved.

23 But the Conversion, going there has a combination of
24 two or more people. There's Stone Crest Villas of Tega
25 Cay, LLC., there is the master - Member of the master

1 association, there is Mr. Fankhouser who is running the COA
2 Board and there is the COA, and money is disappearing.
3 It's going out the door whether proper or improper.
4 Question is where's that money used to repair homes and
5 clearly it wasn't because we still have twelve homes
6 leaking water profusely.

7 Civil Conspiracy I just addressed against who would be
8 the parties. Mr. Fankhouser - I don't mean to beat - a
9 amalgamation horse to death but he again had all these
10 hats. He had duties under these various entities and
11 whether they bought construction that was done by FPG or
12 the development of slabs that was done by Stone Crest
13 Villas his other entity, obviously with the number of hats
14 that he wore we would argue that they were all one.

15 THE COURT: Well if you argue they're all one how can
16 you conspire with somebody?

17 MR. HALFORD: Well the conspiracy side to it when you
18 come between Fankhouser and the COA entity and the Master
19 Association.

20 Breach of Expressed Warranties: A lot of these people
21 in addition to literature you were shown, the diagrams that
22 we shown, they were shown actual models so they were really
23 taking models in other communities and were shown models
24 here. And the expressed warranty would be made as part of
25 the sale. He's right, these are homes, these are real

1 properties in a condominium regimen. What would be the
2 affirmative representation? The affirmative representation
3 they would be constructed like all other EPCON homes in a
4 workman like manner and they would be suit for - you know
5 fit for the person to which they were sold which is a home.

6 Again these were EPCON plans and they were sold as a
7 maintenance free design, Your Honor. They were not sold
8 by EPCON, they were sold by EPCON's franchisee.

9 Breach of Implied Warranty of Merchant Ability, Your
10 Honor, in viewing all facts and inferences in the light
11 most favorable to non moving - There are components sold as
12 part of these homes. You've heard things like the hardy
13 plank, you've heard things about the trim, you've heard
14 about things like the gravel.

15 Probably the most blaring example is the adhered
16 concrete, masonry veneer stone; all those products combined
17 together to form the envelope to my clients home. Are they
18 now purchasable? If you took them off I personally looked
19 at the OSB board in some of these units and it is black.
20 It has been penetrated by water, it's rotten, so that's
21 whether or not these homes can be sold I would argue I
22 guess you can sell anything as is to the lowest bidder
23 which is what we're getting under these circumstances but
24 they're not purchasable in their current state. And again
25 how would you sell something like this to a third party?

1 You're problem is gonna become something you have to
2 disclose because there are construction defects and you're
3 not taking my word for it, you're taking his experts word
4 for it.

5 The common areas, Judge, were also matters that were
6 constructed. It's not just the building or the exterior of
7 a house. You've heard about the retaining wall, you've
8 heard about the slabs, the gravel, the grounds, there is a
9 pool; but it's not just the homes and that's why we don't
10 think this global settlement that was proposed, Your Honor,
11 would work. You can't wrap off code violations, de-skin
12 the units and put them back up - the code violations its
13 not gonna work. And you need to take their experts word
14 for it, not mine. If you don't fix the water management
15 detail, and that's where his expert is better than mine,
16 they are gonna leak again. And that's why the Court, you
17 know, in the construction defect cause of action we move
18 for summary judgment on that. Its not a matter of whether
19 or not the plans that he used to build from, the building
20 code violations, their expert says it's not a matter of
21 whether or not the actual construction out there was a
22 violation of the building code; their expert says so. No
23 experts in this case deny that.

24 One of the things that's missing is the water
25 management detail - no weep screen. And by the way, we

1 attempted to install a weep screen in August of 2010, and
2 our first attempted repair the board members unit. Yes
3 there were some board members who let their units serve as
4 a test case unit as we heard through discovery. It didn't
5 work. It still leaked. So by retrofitting a unit with a
6 weep screen, which is a water management detail, it didn't
7 work. And now we're gonna do it again? You got to fix -
8 If there are building code violations (in viewing all facts
9 and inferences its certainly a question of fact here, you
10 got to fix the building code violations, and that's what's
11 not occurring here.

12 I've gone as far as the Unfair Trade. I think I
13 addressed that earlier. You're not dealing with one
14 contractor. You're dealing with twelve. You're not
15 dealing with one lender although a lot of these were Chase
16 loan originations but you're dealing with commerce. A lot
17 of these people came from up north. Some people paid cash,
18 some people paid with a mortgage. All these people were
19 buying primarily resident homes and they had no idea.
20 People with a superior knowledge in this case were the
21 developer and the franchisor, so if there were a problem
22 with their plans and I don't believe for a second there is
23 another EPCON Community out there without problems, but if
24 there were problems with the plans they had and were in a
25 superior position to know about it, more importantly,

1 Judge, at the point that they know that there is water
2 intrusion, and at the point that they know that it is wide
3 spread and that's November 2009 I think by all accounts,
4 the point they commissioned a forensic report that tells
5 them how bad it is, and then get a second report that
6 confirms the first report, they shouldn't be selling these
7 units. They should be fixing these units and that's never
8 occurred to date.

9 THE COURT: I thought you said your clients bought
10 before that date?

11 MR. HALFORD: No. Some of my clients - -

12 THE COURT: One bought in 2010. You're right.

13 MR. HALFORD: Mr. McCarey who bought in May of 2010.
14 My people span '07 to '10 and some people purchased after
15 that point. In discovery we've ask Mr. Fankhouser
16 personally about other people who bought who we picked up
17 on because of public record but I don't represent those
18 people. So that's what I have. I don't need to belabor
19 the summary judgment standard. The Court knows it better
20 than I do. In viewing all the facts and inferences here we
21 got building code violations and they're serious, so we're
22 asking for summary judgment or else ask for summary
23 judgment to be denied.

24 THE COURT: All right. And let me, just one that kind
25 of falls into housekeeping, as to Mr. Pinckney you've

1 indicated that he does have title but what about - is it
2 Mr. Musgrove or Musgrave?

3 MR. HALFORD: The title is currently - I'm not sure
4 what they're showing the court is accurate - titled to my
5 knowledge - and we can look it up right now.

6 THE COURT: I don't need - At some point that's got to
7 be resolved.

8 MR. HALFORD: Ms. Musgrave is the owner of the unit,
9 her husband doesn't own it.

10 THE COURT: Is she a party?

11 MR. HALFORD: I would move to substitute her as the
12 real party in interest but it's a family unit and I used
13 Dave Musgrave versus Barbara Musgrave.

14 THE COURT: I mean I've got to address these issues
15 with the parties that are in it now.

16 MR. HALFORD: And if you really want to know what's
17 happening with that unit, they're elderly father is the
18 owner. His name is Lauren Musgrave.

19 THE COURT: I really don't - I don't mean to cut you
20 off but I'm concerned from the legal aspect, not how its
21 being used or who's living there. The only person that has
22 a right to, if depending on who has rights you would go
23 back to standing and all those things. But nobody but the
24 title owner will have right to seek any kind of relief on
25 behalf of the COA or themselves personally as to the

1 property at Stone Crest.

2 MR. HALFORD: Yes, sir. I think it becomes who's the
3 real property and who's the real party in interest.

4 THE COURT: Well I think the answer to that is under
5 South Carolina real estate law the real parties interest is
6 the person who owns the property. I may be wrong on that
7 but I'd be shocked to find out somebody who rented my house
8 could bring some sort of suit like this in their name and
9 not the owner of the property.

10 MR. HALFORD: My understanding is it's under the name
11 of Barbara Musgrave but David Musgrave is named in my
12 complaint.

13 THE COURT: All right. Any last brief response?

14 MR. POWELL: May I very briefly, Your Honor. I will
15 be as brief as possible. I know everybody in the room
16 including the bench would appreciate that.

17 Just in general a word about the counsel's statement
18 and characterizations of evidence is that they may exist
19 and some may not. There were particular references to
20 opinions and testing performed by our experts that they say
21 its not. We filed this motion for summary judgment and
22 pointed out the absence of evidence and have received no -
23 nothing filed in response that we believe creates a genuine
24 issue of material fact as to some of these issues. We're
25 less concerned with the factual issues than we are with the

1 legal relationship between the parties. Those which really
2 support a motion for summary judgment rather for example
3 there was actually a contract with someone with whom their
4 - against whom there is a breach of contract cause of
5 action.

6 Very briefly in response to Mr. Halford on rescission
7 is that we demonstrated initially that there were awarded
8 contracts to all twelve plaintiffs. I think there are not
9 and that we've already pointed that out that there are
10 problems with two. Trust. Trust we're not.

11 Mr. Halford pointed out the fact on the issue of
12 rescission that there has been a tax assessor who has gone
13 out there and because of problems that exist out there has
14 assessed the tax values at a lesser value. Well even
15 assuming that the contracts have and so breached and
16 frustrated so as to remove on purpose for them, our point
17 for summary judgment is that we've gotten no good response
18 to it. There is no way to restore the parties to the
19 status quo. And I think the facts that the tax assessor
20 devalued the property only goes to highlight that point
21 that the parties cannot be returned to the status quo.

22 The responses as I understand to the ETPA claim is
23 that some folks mortgaged and some folks paid cash. We
24 don't dispute that there is commerce going on, that there
25 is a sale. What we dispute is that there is any evidence

1 that there is any unfair trade practice act going on. And
2 if their basis of that is the sale of units after
3 knowledge, then when did they consider us to have had
4 knowledge of water intrusion problems and what happened
5 after that? What is the earliest date that they say we
6 knew about all these problems that we still sold, what is
7 that date, and how many of their folks of whom there are
8 twelve purchased after that date? I understood it's a 2010
9 purchase. If that's their position and they've got a
10 scintilla on that then fine. If they don't have a
11 scintilla under that theory when they all purchased before
12 any date that anybody could possibly have notice of
13 problems, and there again is not a recognizable Unfair
14 Trade Practices Act claim by the mere fact that there are
15 problems with these buildings.

16 THE COURT: Well isn't their position more than - a
17 little more than - deeper than there are problems its just
18 that when they were built you can anticipate there would be
19 problems because they weren't built right so it's not - I
20 guess it is a point of demarcation when they actually had
21 the two inches of rain or whatever, but if I follow their
22 theory is that they were built this way and almost a theory
23 of inevitability.

24 MR. POWELL: And we'll look at that, and if you look
25 at some of these Unfair Trade Practices Act cases. Take

1 for example, you knew - if you didn't know how to follow
2 the plan and you didn't follow the plans you should have
3 known that this was going to happen. That's a subject of a
4 lot of those cases where there were bad decisions made.
5 People frankly doing dumb things. And what the cases apply
6 in the Unfair Trade Practices Act say, not distinguishing
7 this jurisdiction but all others, is that's not the design
8 intent of that. It's designed to curb any conduct that is
9 really really bad and it doesn't include a confidence which
10 is designed to deter it from happening elsewhere.

11 THE COURT: Like building a house as is.

12 MR. POWELL: Its worse than that. I submit to you
13 that just building a house at least does not rise to the
14 level what can be considered Unfair trade practices. It
15 has to be more than that. What I was addressing then is
16 what I understand the plaintiff's to contend which is the
17 sale of units after knowledge. Well if so with these
18 twelve plaintiffs who does that apply to, and when? We
19 haven't gotten that back but I submit to you it's not the
20 folks that were back in 2007 which constitute the majority
21 of them. And I think you can't just again you don't have
22 to have a representative case, we don't have a class
23 action, but we move for summary judgment and there is no
24 issue of fact coming back our way that would preclude us
25 from obtaining it.

1 Slander of Title very briefly. The plaintiffs say
2 it's not a big concern but it's still a concern. Is it or
3 is it not? Are they pursuing a cause of action for slander
4 title or are they not. Mr. Halford made a point that he
5 believed that the mortgage was a mortgage on property which
6 is a common element and that we some how dispute the tender
7 of the common elements. It's not a mortgage on a common
8 element. It was a mortgage on a building that had not yet
9 been sold. It was owned by us, it does not become a common
10 element owned by the collective owners until it is sold.
11 When it was mortgaged it was owned out right by the
12 developer so there was never any encumbrance of any common
13 element because there was never any encumbrance of property
14 that had been sold to any unit owner and that's the
15 distinction.

16 And the point that I made earlier about the tender of
17 the common elements was not that the common elements are
18 never sold. It was quite the opposite and I'm trying to
19 show how they were sold and their sold with each unit. The
20 point was that there was no tender date per se like there
21 was in those other cases, and certainly not entitled to
22 declarant control period. Control mechanism only has
23 nothing to do with tender of the common elements to the
24 association.

25 Breach of fiduciary duty issues, Mr. Halford said we

1 got money coming in and we got money coming out and we're
2 tired of chasing it. I want to know what fiduciary duty is
3 supposedly owed and why Mr. Fankhouser by virtue of the
4 service on the board supposedly breached it? Under the
5 *Goddard* opinion, it is the failure to assess the dues.
6 Here I think as I understand the plaintiff's argument,
7 anything that was an error that occurs when somebody served
8 on a board can be a breach of fiduciary duty. Anyone who
9 sits on a home owners board owes fiduciary duties to the
10 unit owners to do stuff right and if you don't do it right,
11 you violate. I argue that's not the case. I argue that
12 based on the absence of any authority under South Carolina
13 law. And I argue that the one duty that is owed is that
14 set forth in the *Goddard* opinion and I urge you to read
15 that. And it is then subject to the business judgment rule
16 so we're back to this money going in and money going out
17 argument of counsel. Please tell us in reply and submit to
18 us competent evidence that establishes or, in case law
19 establishes the existence of a duty and any recognizable
20 breach there of. I don't think it exist.

21 With regard to the breach of contract action, Mr.
22 Halford argued again that Mr. Fankhouser personally wore
23 many hats. Well even if that's the case that doesn't break
24 the contract between himself and these folks that doesn't
25 exist. The only contract is with Stone Crest; there is

1 none with Mr. Fankhouser nor FPG to the extent that
2 argument works.

3 Breach of contract accompanied by fraudulent act. The
4 response to that was that we've got a lot of code
5 violations and a lot of problems. And in fact that's the
6 plaintiff's position with regard to a number of these
7 items. And I told you earlier today that we are not
8 standing here today saying that there are no problems. But
9 we are trying to figure out, what theories are there
10 recognizable and assert against whom. And for breach of
11 contract accompanied by fraudulent act, actually I looked
12 the case up, and I urge you to read that case and look at
13 it in connection with this one and determine whether or not
14 the fact that they are leaks associated with the sale of a
15 unit arises to the level of a breach of contract while
16 breach of contract accompanied by fraudulent act. There
17 must be a fraudulent act in connection with the breach.
18 The code violation that they're talking about happened when
19 it was constructed and manifest itself later. That is not
20 a fraudulent act. Some act, some act by Mr. Fankhouser
21 geared towards these folks with whom Stone Crest was
22 already contracted for the purchase of homes.

23 Equitable accounting. I thought and still think that
24 we're done with that.

25 THE COURT: I think so.

1 MR. POWELL: This civil conspiracy of argument I think
2 Your Honor touched on it and the quote unquote amalgamation
3 theory. I don't think that the fact that Mr. Fankhouser
4 served different roles makes it such that he can be two
5 people for purposes of civil conspiracy nor that they have
6 put forth any evidence in response to our motion pointing
7 out that there is none that would support a cause of action
8 for civil conspiracy. The record is devoid of anything
9 that would support that and we're entitled to summary
10 judgment. There is no conspiracy.

11 The same is true of conversion. I understand
12 counsel's argument as to breach of implied warranty of
13 merchant's ability to be that he still considers the sale
14 of a home to be good and mostly because the home
15 incorporates other goods. The case that I pointed out to
16 Your Honor earlier which at this hour on this day I can't
17 remember the name of, I think it was the Fields versus
18 Walter Hanes case, addresses that. The UCC does not apply
19 to a home. I doubt the home in that instance was any
20 different than those at issue here which is sort of by the
21 definition in their nature are in fact a grouping of other
22 goods that does not make the transaction that sells the
23 home, the finished product, a contract of sale of goods. I
24 don't think he can address fitness for a particular purpose
25 for that as I addressed them together earlier also apply to

1 that cause of action because both are dependent upon the
2 UCC. Thank you, Your Honor.

3 THE COURT: Let me just throw one more thing out, and
4 I know we all been here a long time, this fiduciary duty of
5 the COA and bless the hearts of the people who chose to
6 allow themselves to take over those functions, they are not
7 easy. And I'm not ready to find that there is some sort of
8 fiduciary duty. Whenever one person takes somebody else's
9 money in trust to be used for certain purposes, does that
10 not in and of itself create some sort of a fiduciary duty
11 that it be used properly?

12 MR. POWELL: Good question. I don't think that it
13 does. The cases that -

14 THE COURT: I'm not going to let you take my money
15 then.

16 MR. POWELL: The cases that I cite first indicate
17 generally with respect to a fiduciary duty cannot be based
18 upon the unilateral act of one party.

19 THE COURT: I don't want to interject with you. I
20 think that - these things -

21 MR. HALFORD: I would like briefly to respond.

22 THE COURT: All right. Let's have a brief response
23 then and get ready for the holiday.

24 But go ahead.

25 MR. POWELL: I want to be clear about what fiduciary

1 duties do and not exist. Number One: Under the Queens
2 Grand case duty by the association to sue responsible
3 contractors if they don't they can be liable to the owners.
4 That's not described as a fiduciary duty. Number two:
5 Under Goddard you got two fold, the developmental entity,
6 not the developer principle personally has the duty to
7 transfer or tender common elements to good repair. And if
8 they've got voting control not to use that superior voting
9 control to the detriment of the home owners association
10 when it comes to their obligation to access and make
11 repairs.

12 No where have I seen any case that says that a board
13 member simply by virtue of being a board member owes any
14 duty that is described as a fiduciary one to the other and
15 whether that be based upon the fact that one of the
16 functions of the board is to collect and chase after
17 assessments or anything else. There is no case out there
18 under South Carolina that refers to it is that I think
19 that's for good reason. People have remedies you can
20 force the master deed and someone's failure to abide by it
21 based on the language in the master deed and the bylaws.
22 You ran for, we elected you to this position, you have to
23 adhere to what you said you would adhere to. But I don't
24 think when somebody hires one person to clean the pool or
25 let's the grass get too high they violated a duty that

1 should be or has ever been described as fiduciary.

2 THE COURT: Sort of an analysis to run for office, if
3 you get elected and you say you're gonna do something you
4 don't do it, then you just not elected the next time.

5 MR. HALFORD: I'll be real brief, Judge.

6 With regard to what fiduciary duty, I would hate to
7 impose upon the court order exact but you have to read the
8 master deed. I've read it over several times but the one
9 thing it does provide for is the primary purpose - It's in
10 the first page of the master deed - is for the
11 administration and maintenance of the common elements. And
12 until some point - again you can pick the date - he keeps
13 arguing there is no transition when the common elements
14 have transitioned. I think you can find that as a matter
15 of fact in law with the exception of Lot 20. But what
16 fiduciary duty existed? What special confidence was
17 reposed in a party? These persons were reposed to certain
18 confidence in the CO by paying dues and assessments if they
19 were going to act according to their bylaws and repair my
20 home if it leaked. Mr. Pinckney back here has been in Lot
21 4 since November of 2009. Why we fix another persons'
22 homes, whose home leaked later but the person how wore that
23 hat, it may have been the duty of the COA, the person in
24 charge, was Brock Fankhouser. He failed in that duty.

25 THE COURT: All right. Well I'll take this under

1 advisement. With the holidays and some other commitments I
2 can't promise that I will get this back real quick but I
3 will get on it as quick as I can.

4 MR. HALFORD: Thank you, Your Honor.

5 THE COURT: I hope you all have a good holiday.

6 MR. POWELL: You do the same.

7 (END OF TRANSCRIPT OF RECORD)

8 (COURT IN RECESS AT 02:00 P.M..)
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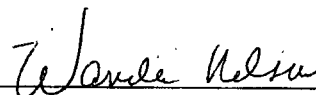
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County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 30th day of July, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



Wanda Nelson, CVR
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: 2-27 / 13

STATE OF SOUTH CAROLINA

COUNTY OF YORK

COURT OF COMMON PLEAS

16TH JUDICIAL CIRCUIT

CASE NO. 2010-CP-46-2326

Juontonio Pinckney, Josephine
Sciacca, Addie Smith and
James and Deborah Barone, et al.,

Plaintiffs,

vs.

Epcon Communities, Inc., Epcon
Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser
Property Group, Inc., and Stonecrest
Villas of Tega Cay Homeowners
Association, Inc.,

Defendants.

(CAPTION CONTINUED)

DEPOSITION OF: JOE MARVIN MOORE.

DATE: March 19, 2012

TIME: 9:08 a.m.

LOCATION: 735 Ledgestone Court
Tega Cay, SC

TAKEN BY: Counsel for the Defendants

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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Columbia, SC	Greenville, SC	Charlotte, NC
(803) 731-5224	(864) 234-7030	(704) 573-3919

1 Fankhauser Property Group, Inc.,
2 Third-Party Plaintiff,

3 vs.

4 Architectural Alliance, Ltd., Exterior Expressions
5 of North Carolina, Inc., Al-Mega Construction,
6 Inc., Procar, Inc., Procar II, Inc., The
7 Southeastern Group, Inc., Lucas Lawn and Landscape,
8 Inc., and Jose Simenez, Individually and d/b/a M&L
9 Roofing, Inc. and/or MB Roofing Company,
10 Third-Party Defendants.

X

11 Stonecrest Villas of Tega Cay Condominium Owners
12 Association, Inc.,
13 Third-Party Plaintiff,

14 vs.

15 Stonecrest Villas of Tega Cay, LLC and Epcon
16 Communities Franchising, Inc.,
17 Third-Party Defendants.

X

18 Exterior Expressions of North Carolina, Inc.,
19 Fourth-Party Plaintiff

20 vs.

21 Marcos Gonzalez,
22 Fourth-Party Defendant.

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23 Procar, Inc., and Procar II, Inc.,
24 Fourth-Party Plaintiffs,

25 vs.

26 Marco Zertuche, David Carbajal, Victorina Cortez,
27 Balanos Construction Co., Balanos Framing, Inc.,
28 Ricardo Hernandez, and Silverio Cortez,
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30 Al-Mega Construction, Inc.
31 Fourth-Party Plaintiff,

32 vs.

33 Noe Perez, Juan Abundez Saucedo and Moises
34 Chavarra Hernandez,
35 Fourth-Party Defendants

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(INDEX AT REAR OF TRANSCRIPT)

1 construction problems out in this community?

2 A. The HOA didn't build the home, but it's
3 their responsibility to maintain the home, and I
4 don't believe that has happened.

5 Q. So what I'm trying to find out from you
6 is, I know you're saying that you fault them for
7 not repairing the homes, but why is it that you
8 fault them for not repairing the homes?

9 A. That's their mandate.

10 Q. And you know you are the HOA, correct?

11 A. 1/89th.

12 Q. 1/89th.

13 So now, if the HOA was to make a
14 special assessment of whatever Mr. Hall said -- for
15 example, if it was 6, 7, 10 million --

16 A. Right.

17 Q. -- then you're okay with that special
18 assessment and you paying whatever 1/89th of that
19 is?

20 A. Obviously, I'm not. I filed a lawsuit.

21 Q. So you don't want the special
22 assessment?

23 A. Why should I pay for someone else's
24 crap? I didn't -- I thought I was buying a luxury
25 ranch condo. I got a waterlogged tent. I got a

1 white elephant. I cannot sell it.

2 Q. Do you know if some of the Plaintiffs
3 would -- like Mr. Vesting -- would prefer, Let's
4 just pay 1/89th of whatever the costs would be,
5 would you agree with that position?

6 A. I have no clue what Mr. Vesting's
7 theory is, but I would not think that's my
8 responsibility.

9 Q. Do you think, based on you knowing a
10 lot of the people out here, that they would like a
11 special assessment of some enormous amount to fix
12 the construction problems?

13 A. They would hate it. They couldn't do
14 it.

15 Q. Is it fair to say a lot of the people
16 out here are retired, living on fixed incomes?

17 A. That would include me.

18 Q. Are you aware that the HOA has brought
19 a lawsuit to try to recover from various parties,
20 monies to fix and correct problems out here?

21 A. If you're asking me if I had heard, I
22 have heard.

23 Q. Do you fault the HOA for seeking to get
24 a recovery from various parties for the
25 construction problems in this community?

1 you and the HOA be?

2 A. I do not know.

3 Q. Do you know if the HOA has committed
4 any fraudulent acts, which you contend are
5 fraudulent acts?

6 A. Do I personally -- have I seen it?

7 Q. Sure.

8 A. I have not personally seen it. I do
9 not know.

10 Q. Do you know Mr. Moscovitz?

11 A. I know who he is, yes.

12 Q. Would you know him if you saw him walk
13 in?

14 A. Absolutely.

15 Q. And what about Dave Cook?

16 A. I know Dave Cook.

17 Q. And Ms. Iadanza?

18 A. I do.

19 Q. Do you have any -- well, let me ask
20 you, is this a volunteer position that they have,
21 or are they paid?

22 A. I would not think they would be paid.

23 Q. Do you fault any of those three
24 individuals for anything they have done as board
25 members for the HOA?

1 A. I don't know anything that they've
2 done. I think they're in the middle of a
3 maelstrom, can't escape from it.

4 Q. It's hard to know if something is
5 hidden from you, but do you believe something has
6 been hidden from you by any board member from the
7 HOA?

8 A. I don't know about the board member,
9 but I do know that the berm situation and the money
10 paid to Stone Development, that those things were
11 not disclosed to me personally.

12 Q. Have you -- I know you said, I think,
13 sometime in February you were in a meeting and you
14 got a copy of the 2012 budget, correct?

15 A. Yes, I'm sure I did.

16 Q. I know the 2012 budget is out.

17 A. Sure, sure.

18 Q. Now, some of this, with the master
19 association, is that what you're talking about?

20 A. That would be correct.

21 Q. Fees paid to them.

22 On the 2012 budget, did you look at
23 that closely enough to see what the master
24 association -- the approximate amount would be
25 under them?

STATE OF SOUTH CAROLINA

COUNTY OF YORK

COURT OF COMMON PLEAS
16TH JUDICIAL CIRCUIT
CASE NO. 2010-CP-46-2326

Juontonio Pinckney, Josephine
Sciacca, Addie Smith and
James and Deborah Barone, et al.,

Plaintiffs,

vs.

Epcon Communities, Inc., Epcon
Communities Franchising, Inc.,
Brock L. Fankhauser, Fankhauser
Property Group, Inc., and Stonecrest
Villas of Tega Cay Homeowner's
Association, Inc.,

Defendants.

(CAPTION CONTINUED)

DEPOSITION OF: JOSEPHINE ANNA SCIACCA

DATE: March 15, 2012

TIME: 9:11 a.m.

LOCATION: 735 Ledgestone Court
Tega Cay, SC

TAKEN BY: Counsel for the Defendants

REPORTED BY: Susan M. Valsecchi, RPR, CRR
Certified Realtime Reporter

A. WILLIAM ROBERTS, JR., & ASSOCIATES

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1 Fankhauser Property Group, Inc.,
Third-Party Plaintiff,

2. vs.

3 Architectural Alliance, Ltd., Exterior Expressions
of North Carolina, Inc., Al-Mega Construction,
4 Inc., Procar, Inc., Procar II, Inc., The
Southeastern Group, Inc., Lucas Lawn and Landscape,
5 Inc., and Jose Simenez, Individually and d/b/a M&L
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18 Marco Zertuche, David Carbajal, Victorina Cortez,
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(INDEX AT REAR OF TRANSCRIPT)

1 problems.

2 Q. Understood.

3 But I'm saying, if someone made a
4 motion at your next homeowners meeting to do a
5 special assessment where everybody in the
6 association was going to have to pay \$250,000, a
7 one-time special assessment, and that was going to
8 fix everything out here, how would you vote?

9 A. I wouldn't vote for it.

10 Q. Okay. So would it be fair to say that
11 in your estimation, that nobody would vote for
12 that?

13 A. I can't answer for anybody else. Only
14 for myself.

15 Q. Okay. But you would vote no?

16 A. That's correct.

17 Q. And if everybody votes like you, it's
18 not going to pass, correct?

19 A. I guess not.

20 Q. And therefore, there would not be the
21 money to fix all of these problems?

22 A. I guess not.

23 Q. So the only option at that point, then,
24 is to sue the people that really were responsible
25 for the problems, correct?

1 MS. NICHOLS: Object to the form.

2 BY MR. STRICKLAND:

3 Q. You still answer.

4 A. I'm sorry, yes.

5 Q. And in your mind, who is
6 responsible -- primarily responsible -- for all of
7 these defects out here?

8 A. The builder who built these houses, the
9 HOA, who neglected to fulfill their part of the
10 bargain.

11 We pay dues. And for our dues, for the
12 amount of money that they get for our dues, they're
13 supposed to maintain the community that they're
14 responsible for.

15 We maintain -- we are responsible for
16 paying. They are responsible for fixing and
17 maintaining. So they are responsible, the
18 developer is responsible.

19 Q. All right. Now, let's follow that
20 logic a little further.

21 You say the homeowners association is
22 responsible for the problems out here, even though
23 they didn't build anything and even though they
24 didn't develop anything. That's your story?

25 A. Well, they took on the responsibility

1 STATE OF SOUTH CAROLINA

2 COUNTY OF YORK

COURT OF COMMON PLEAS
16TH JUDICIAL CIRCUIT
CASE NO. 2010-CP-46-2326

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4 Sciacca, Addie Smith and
5 James and Deborah Barone, et al.,

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7 vs.

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9 Communities Franchising, Inc.,
10 Brock L. Fankhauser, Fankhauser
11 Property Group, Inc., and Stonecrest
12 Villas of Tega Cay Homeowner
13 Association, Inc.,

14 Defendants.

15 (CAPTION CONTINUED)

16 30(b)(6)

17 DEPOSITION OF: LOUIS C. MOSCOWITZ

18 DATE: March 12, 2013

19 TIME: 9:00 a.m.

20 LOCATION: 735 Ledgestone Court
21 Tega Cay, SC

22 TAKEN BY: Counsel for the Plaintiffs

23 REPORTED BY: Susan M. Valsecchi, RPR, CRR
24 Certified Realtime Reporter

25 A. WILLIAM ROBERTS, JR., & ASSOCIATES

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ALSO PRESENT:

PAULETTE A. IADANZA

(INDEX AT REAR OF TRANSCRIPT)

1 showed a number of people complaining of water
2 intrusion in year 2009. Do you recall that?

3 MR. POWELL: Object to form.

4 THE WITNESS: I don't remember. You
5 might have said something like that. I'm sorry.
6 Oh, 2009, yes, I'm sorry.

7 BY MR. HALFORD:

8 Q. I wasn't referring to 2008.

9 In 2009 there are several complaints of
10 water intrusion.

11 A. Yes, there's quite a few, in November
12 of 2009, yes.

13 Q. And you don't remember the number, but
14 you said it was over 20?

15 A. Over 20.

16 Q. And these complaints are being filed
17 with your board. Who is telling you about it? Are
18 the homeowners going to Henderson, or are they
19 coming to the board?

20 A. Both.

21 Q. Is the board still sending this money
22 to the master association?

23 A. Well, we haven't paid them. In those
24 three years, we paid based on billings, based on
25 budget. And then in 2011, we didn't pay them, nor

1 2012. And we're trying to resolve the original
2 overpayments.

3 Q. Who came up with the term overpayment?

4 A. Me.

5 Q. And how did you determine it was an
6 overpayment? You said this master --

7 A. I compared budget with that, against
8 the actual expenses.

9 Q. So what creates the necessity of paying
10 the association this money?

11 A. The master deed for the master
12 association.

13 Q. And this is the same master deed that
14 you didn't get a copy of?

15 A. That's correct.

16 Q. Did you ever ask Brock why?

17 A. I believe that Larry McCarty did.

18 Q. Do you have any understanding of -- I
19 can tell you that none of my Plaintiffs reported
20 getting a copy. But do you have any understanding
21 of why that was not disclosed?

22 A. I believe Mr. Fankhauser said at a
23 meeting that it was filed -- filed in the book, and
24 it was public record.

25 Q. I agree with you. Were you at this

State of South Carolina.,)

In the Common Pleas Court
of York

County of York.)

Case No.: 2010-CP-46-02326

Juontonio Pinckney., et al,)

Plaintiffs,)

-vs-)

Transcript of Record

Brock L. Fankhouser.,)

Defendants.)

March 20, 2013
York, South Carolina

B E F O R E:

Honorable John C. Hayes, III, Judge.

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Wanda Nelson, CVR-M
Official Court Reporter
Sixteenth Judicial Circuit
To the Honorable John C. Hayes, III

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I-N-D-E-X

WITNESS

BY:

PAGE NO.

No Witnesses were examined.

E-X-H-I-B-I-T-S

NO.

DESCRIPTION

ID.

EVD.

No Exhibits were received into the record.

(ON THE RECORD IN THE MATTER OF JUONTONIO PINCKNEY
VERSUS BROCK L. FANKHOUSER, MEMORANDUM IN SUPPORT OF
DEFENDANT STONECREST VILLAS OF TEGA CAY CONDOMINIUM OWNERS
ASSOCIATION, INC.'S., MOTION FOR SUMMARY JUDGMENT AS TO
PLAINTIFF'S CLAIMS, WEDNESDAY, MARCH 20, 2013, AT 09:15
A.M..)

THE COURT: Good morning. Thank you. Take your
seats. We're on Pinckney versus Fankhouser, et al, et al,
and we've got several motions. We have limited time, I am
in the middle of a trial, a young man for armed robbery,
attempted armed robbery, attempted murder and conspiracy
who has spent a lot of time in jail. If he's found guilty,
and we've already had a jury impaneled and we're getting
ready to close.

I'll take suggestions as to where to start. I'm going
to suggest that we start with the motion to stay because if
this matter is stayed then we - even though it may not be
the one in priority it will bring everything to a
screeching halt.

MR. POWELL: Good morning, Your Honor.

THE COURT: Good morning, Mr. Powell.

All right, to start off for the record, I don't know
the exact date the Notice of Appeal was filed but it had to
be before January 15th I would think based on the last order
regarding that was December 13, and my recollection is that

1 at that time I raised the issue of whether or not that
2 would create a stay and nobody seemed to be excited about
3 trying to stay at that time. Here we are.

4 MR. DOWLING: Your Honor, just on the order of things,
5 I would like to of course I'll do whatever you - however
6 you want to handle this, but the Motion to Stay I
7 understand we could address that but I still would like to
8 have a hearing on the Motion for Summary Judgment if
9 possible. I don't know how the two would relate.

10 THE COURT: You mean the COA?

11 MR. DOWLING: Oh, the COA yes.

12 THE COURT: Well if the action - Here's the kind of
13 deal. If in fact their right in this motion and the action
14 is stayed, then I don't have jurisdiction to anything in
15 this case. And if they're right - While I'm on that, if
16 I'm stayed in this case and say that the automatic stay
17 applies, then the automatic stay is pretty much retroactive
18 until - to the time that the Notice of Appeal was filed.
19 This court either today lost jurisdiction based on that
20 event.

21 MR. DOWLING: Yeah, it's my understanding it wasn't an
22 automatic stay, they were just asking to stay it. But are
23 you saying its an automatic stay?

24 MR. POWELL: No. We're arguing that the Court should
25 use it's discretion to stay the trial in the underlying

1 case based on the impact the automatic stay has on the
2 case.

3 THE COURT: All right. Well the reason I - Okay.

4 MR. DOWLING: I agree if it had been an automatic
5 stay.

6 THE COURT: All right, then --

7 MR. POWELL: Then that changes the order, that's fine;
8 however you want to take it up.

9 THE COURT: Why don't we do the COA's Motion for
10 Summary Judgment first.

11 MR. WILKES: Your Honor, may it please the Court.

12 THE COURT: Yes, sir.

13 MR. WILKES: I'm Michael Wilkes, I represent the EPCON
14 Communities, may I hand up briefs in opposition to this
15 motion to Stay ---

16 THE COURT: You may.

17 MR. WILKES: --- so you will have that? Thank you,
18 Your Honor.

19 (DOCUMENTS RECEIVED UP BY THE COURT:)

20 MR. POWELL: Your Honor, you have a copy of our Motion
21 to Stay?

22 THE COURT: I do. I do, right here.

23 MR. POWELL: We will stand down.

24 THE COURT: Okay. Get Mr. Halford back up. All
25 right, let's start off then with the Motion to Stay on

1 Behalf of the Condominium Owners, and that's for Summary
2 Judgment as to all Claims. Right?

3 MR. WILKES: Summary Judgment as to All Claims, Your
4 Honor.

5 THE COURT: All right, you may proceed.

6 MR. DOWLING: Your Honor, my name is Curtis Dowling, I
7 represent Stonecrest COA which I'm probably gonna refer to
8 as just the COA.

9 THE COURT: Yes, sir.

10 MR. DOWLING: Sometimes as Stonecrest COA. I
11 represent the COA along with Matt Gerrald who is here with
12 me.

13 Your Honor, we submitted a very detailed Memorandum
14 and a number of exhibits which we emailed I think Monday
15 but apparently it went to your former law clerk, to the OB
16 mail address so I believe it's just been handed up. I
17 think everybody else has received it. Cam Halford has
18 submitted a Memorandum; he's handed it to us this morning
19 so you do have those two memo's. We have a --

20 THE COURT: I have them both.

21 MR. DOWLING: We have a somewhat of a power point
22 presentation which is up there. I don't know if you can
23 see it from here.

24 THE COURT: I'm gonna move down here if you don't
25 mind.

1 MR. DOWLING: All right.

2 THE COURT: It's a little difficult - I can see it but
3 it's a little --

4 MR. DOWLING: It's probably not that important.
5 There's nothing great --

6 THE COURT: I'll just sit here. I can read it. If it
7 gets too detailed I'll have to move. Go ahead.

8 MR. DOWLING: It just sort of hits on some of the
9 highlights that would be contained in the - within the
10 brief. The amended complaint which was filed September
11 16th of 2011 is the current active pleading that we're here
12 under and there are twelve causes of action which have been
13 asserted against the COA. And you see up there each cause
14 of action that is outstanding against us. I will say that
15 there was an accounting - See Number Seven, which has been
16 withdrawn. And also under the - there is two causes of
17 action that really are the same thing, Breach of Expressed
18 Warranties and Breach of - Breach of Expressed Warranty.
19 So we - We're gonna address those together as one so it's
20 kind of really limited as to all the different causes of
21 action. But you will see the remaining causes of action
22 that is out here.

23 Before we get into each cause of action and why they
24 failed individually we can address the reason why they
25 would all fail all together. But before we do that I want

1 to just address one of the plaintiffs which is David
2 Musgrave. And also the standard of summary judgment,
3 you're familiar with the standard of summary judgment.

4 THE COURT: Let me interrupt real quick on that
5 because we now have a motion - a double motion sort of from
6 plaintiff to basically pointing out - I may be incorrect as
7 the Pinckney defendant plaintiff but as to substitute
8 Barbara Musgrave I think you're right that David Musgrave
9 and keep that in mind too.

10 MR. DOWLING: Oh absolutely. Absolutely. And we
11 understand. I think that the court was right in the
12 previous order granting as to David Musgrave and how you do
13 that really we're right on everything else that doesn't
14 matter. But as for the standard of summary judgment, I
15 think its important here and based on some things that I've
16 seen argued previously, at this point we can't just rest on
17 - the plaintiff can't just rest on the allegations that
18 they have in the complaint. People know how to put
19 allegations in the complaint to state a cause of action for
20 whatever it is alleged the elements.

21 Okay, say well we allege these elements. At this
22 point you got a - you got to do more, you got to show the
23 specific facts showing that there's some genuine issue for
24 trial and that's where they would fail later on when we get
25 to each of the individual causes of action.

1 Now as to Mr. Musgrave, you see that he owns the Unit
2 - He doesn't own the Unit 748 and we've got the courthouse
3 records that do reflect that and as we're not going to
4 continue to beat on that, it's just if you're right on the
5 previous order, which we think you were, then Mr. Musgrave
6 would no longer be the plaintiff. Now I will say this
7 about Mr. Pinckney. If you're right on that, we're not
8 joining in on that. We just - We're not - saw issues with
9 Pinckney. I'm not coming in to try to say something is
10 when it isn't. This is. Pinckney, that may be a different
11 issue.

12 The issue we got here with the plaintiff's whether
13 it's ten, eleven, or twelve plaintiffs that are left suing
14 the COA, they're suing themselves. That is what's going
15 on. The plaintiffs are suing themselves. I don't know if
16 they've recognized that, I really - because I've deposed
17 most of them, not all of them, and I don't think they're
18 grasping that. It's just where is when you're doing that
19 when you're suing the COA, who is the COA? The COA is the
20 members. The members are the ones that's called on to pay
21 things, to pay for whatever it is if it's special
22 assessments or otherwise. So what the plaintiff's have
23 done is sue themselves. And really their theory in doing
24 this is based on the Master Deed and bylaws. And they
25 contend throughout that the Association, the COA, them

1 through the Board has violated their obligations to either
2 maintain or repair the common elements. That's what it is,
3 that's what this case is about, you failed to maintain the
4 common elements and therefore common elements and are
5 called water leaks, they've got some interior damage, as do
6 a number of people out there. There's eighty-six, I think
7 eighty-six properties out there, and I've heard maybe
8 forty, fifty of the homes have the same type of claims that
9 the plaintiffs have. The plaintiffs are not, they're not
10 alone in this.

11 There is a lot of people in the community whose homes
12 are damaged. We all agree these homes are damaged and have
13 a lot of issues. So, you look at the Master Deed and
14 bylaws and what they're contending and they say that the -
15 under the Master Deed statement of Purpose; and we hear
16 this a lot, that the declarant has deemed it desirable to
17 create a nonprofit incorporated owner's association which
18 will be delegated and assigned powers of maintaining and
19 administering the common areas and facilities of the
20 properties.

21 And so they're basing their case on this. Yes the
22 Master Deed says that the Association should maintain the
23 common areas.

24 Also under Section 5.4 of the Master Deed it states in
25 part "that the Association shall be responsible for the

1 maintenance and repair of all the common elements including
2 the limited common elements." Nobody disagrees with that.
3 There's no issue on that. And then under 13.1 of the
4 Master Deed which - I'm just stating it because they say
5 this is relevant, I don't, but it says "in the event of the
6 damage - in the event of the damage to or destruction of
7 any building as a result of fire or other casualty which is
8 not the situation we have, I mean we have addressed the
9 maintaining and repair of the common elements but now under
10 13.1 we have an issue where there's fire or other casualty
11 which is not - This is a construction defect situation,
12 this is not fire or casualty.

13 It says the Association shall arrange for the - Here's
14 the word we hear a lot and been hearing it for a while,
15 prompt restoration. Now when you hear restoration you know
16 that's fire restoration, storm, you know those type of
17 issues. That's not what we have here either. But it all
18 goes down to what ----- what do you do to go about
19 maintaining and repairing the common elements?

20 Also Section 2.1 of the bylaws which states "except as
21 otherwise specifically provided in the condominium
22 documents the Association shall be responsible for
23 administering, operating, and managing the common
24 elements." And we agree, that's what the COA is out there
25 to do. And then Section 5.13 then Letters A through D and

1 Letter K, and all of this is contained within the memo you
2 have on Page 5. It says that the Stonecrest COA's bylaws
3 state in part "the powers and duties to be exercised by the
4 executive board shall include" and if you look at A through
5 D and then Letter K like in the letter K, "making of
6 repairs, additions or improvements to or alterations or
7 restoration of the condominium in accordance with the
8 provisions of the bylaws and the Master Deed."

9 That's all, that is what we are supposed to do. We
10 maintain, we repair. And if it's a fire or a casualty it
11 says you still got to do it and you do that promptly.

12 All right, they contend, the plaintiff's contend that
13 we some how violated the COA from suing themselves saying
14 we violated these duties to maintain and repair the common
15 elements. All right. Well we believe the evidence is
16 quite contrary. We acted swiftly and efficiently and fact
17 is we obtained a monetary recovery from the parties who we
18 believe were responsible for the state of the common
19 elements which were all the third party defendants, other
20 defendants in the case because we were sued for that
21 recovery, and you're very familiar with that.

22 We did that in order to be able to finance the
23 repairs, everything that's been done, and I think 2.62
24 Million that we were able to recover.

25 Now it seems I believe everybody would agree that

1 there was a transition of the COA from Fankhouser as the
2 board, to the new board on July 1 of 2010. And I believe
3 that there is no one - Well there may be some people in the
4 room, but it wasn't the COA and it wasn't the plaintiff who
5 believed that these common elements were not in a state of
6 good repair at that transition period. There were issues,
7 there were water issues certainly on July 1 of 2010 when
8 the transition took place. And what that was that is when
9 Fankhouser turned everything over to the new board, was
10 there after appointed, and that board was elected by a vote
11 of all the members in the community, the eighty-six;
12 however may showed up there was a quorum they voted. Names
13 I think some of the plaintiffs were on the list to be voted
14 in or out and the board went in.

15 Now, and keep in mind that's July 1 of 2010. Now I
16 think importantly is you look at some previous orders that
17 you've put out that, or that you've issued in this case
18 that talked about when the Fankhouser Groups, there's all
19 kinds of Fankhouser, you know, this that and the other, the
20 developer, the builder, the - you know getting into EPCON
21 about when they knew that there was some water problems out
22 there. And in your orders you stated and probably
23 correctly so that by maybe the summer of 2008 - I don't
24 have that right in front of me - but I think it was in that
25 time period that you know people knew there were water

1 issues out there. Plaintiffs were complaining, other
2 people were complaining. At that point it was Fankhouser
3 who was also on the board.

4 Now when the COA officially took over in July 1 of
5 2010 really there's two options you can do. Yeah were
6 there problems? Yeah. Did some of the board members know
7 there were problems? Absolutely, because their homes were
8 leaking probably worse than anybody else out there. And
9 they've got a number of issues and they were at least one
10 or maybe two of them were on a water intrusion committee
11 which was trying to get to the bottom even before July 1 of
12 2010, you know a lot earlier they're trying to figure out
13 what's going on so it was actually a water intrusion
14 committee that Mr. Fankhouser had set up.

15 So yeah, I mean when the board, acting board, current
16 board took over on July 1 of 2010 they recognized there
17 were these issues out there and they were already moving
18 promptly to try to see what we could do to resolve that.
19 And what can you do in this situations? You either impose
20 a large special assessment, okay; which nobody likes those.
21 And the second thing is to pursue a recovery from the
22 general contractor and developer and that's it. And that's
23 pursuant to - if you see the *Concerns Dunes West Residence*
24 *versus Georgia Pacific Corporation* case, and that is the
25 law in South Carolina cause the *Goddard* case which I think

1 we're all familiar with or some of the parties should be
2 familiar with to understand and maybe if they don't
3 understand those cases may be the reasons why the COA is in
4 this case right now.

5 But the developers under the South Carolina law that
6 existed at all time relevant to this case, the developers
7 are held responsible for the condition of the common areas
8 at the time the areas are deeded to the POA. So we got a
9 situation where the developers are the ones that are
10 responsible or the ones responsible for the condition of
11 the common areas. So looking at this do we impose a large
12 special assessment? No. Do we try to pursue a recovery?
13 Yeah, yeah. And actually within - just within this is
14 July, July 1, I think by August 6 we already had a pleading
15 in effect where we were suing responsible parties and
16 here's the answer, cross claim, you know, third party
17 complaints were pursuing that just six weeks at the most
18 after the transition.

19 Looking at it from a liability of the COA because the
20 cases against the COA, the plaintiff's are suing
21 themselves, all right. You either do what South Carolina
22 law says and you go after the wrong doer's or you impose
23 the special assessment. We ask several of the plaintiff's
24 - We ask several of the plaintiff's what they - you know
25 what would they like. And that - Nobody wanted to really

1 have a special assessment. I think one of them I wasn't
2 sure, I don't think he knew what he was talking about, yes
3 assess us, assess us all, fifty, sixty, seventy, eight
4 thousand dollars let's do that. There are certain ways
5 that even the COA could have gone about this.

6 But pursuant to 8.1 of the COA bylaws and assessments
7 it's gonna have to be approved by sixty-seven percent of
8 the community. Do we really think that a special
9 assessment was going to do that? I don't think so. I
10 think under the bylaws and Master Deed that what we could
11 have done if the one's that you know if there's thirty
12 homes, forty homes, we could have assessed them. And if
13 you have the plaintiff's you believe what they were trying
14 to push as being a six million dollar fix, let's get
15 twelve, fifteen, twenty houses to come up with six million
16 for an assessment. No, sir. Well let's do all eighty-six.
17 Fifty houses that are not leaking. We gonna assess them
18 fifty thousand to fix their neighbors? No. You know that
19 was not the way - That's not the way to go about that and
20 that's not the way that the board chose to go about this.

21 When ask in Joe Moore's, one of the plaintiff's
22 deposition, his comment was you know "so you don't want" -
23 it's up here - "do you want this special assessment?" "Why
24 should I pay for someone else's crap?" That was his
25 response. "I thought I was buying a luxury ranch condo, I

1 got a water logged tent. I got a white elephant, I can't
2 stand it." Now we ask, you know there were people out
3 there that are on - Well, a lot of them are retired people,
4 individuals who are on fixed incomes who couldn't stand,
5 they couldn't afford, they couldn't tolerate a special
6 assessment. Joe Moore said that includes me, that includes
7 me, I can't do that. Also you see that there was another
8 plaintiff that we were asking about it and she says "no,
9 you know, we can't do this."

10 What I did in asking these plaintiff's in the
11 depositions, "What did you want?" I'm trying to figure out
12 what did you want from us? What would we have done? Well
13 they said we been paying monthly assessments, we been
14 paying all this money and it should have been fixed. Well
15 how much you been paying? You know they can scratch their
16 heads and no we don't know how much we paid. You can't get
17 that answer out of them. But it was basically two hundred,
18 two twenty, two thirty a month.

19 And times twelve if it was two hundred and forty-two,
20 two hundred and fifty dollars a month, maybe three
21 thousand, three thousand dollars a year per individual, and
22 they're looking at according to them a six million dollar
23 fix. And if it were eighty-six homes and of course it
24 wasn't back at the start when this was going through, you
25 know they're getting maybe two hundred thousand dollars a

1 year is what the COA was getting, okay. Every expense that
2 they had, had to come out of that money. They had to pay
3 legal fees because they're getting sued so that's taking
4 money away when they shouldn't be. And who pays for that
5 because it's an assessment that's gonna go back to them and
6 they gotta pay. Then it's the power bill, the light bill,
7 they got a nice club house, they got pools, they got a
8 management company, they got landscaping. Give them the
9 budget and they can go show up at meetings and the annual
10 meetings they got copies of budgets out there that show
11 about what goes in with their two hundred and forty bucks,
12 gets used and spent. And there's not much money left over
13 at the end to carry over. So they think that money, yeah
14 that money's out there and you need it to. Remember
15 promptly, it says promptly, fire casualty, promptly you got
16 to go out and fix it. Those are special assessment per
17 suit. We did that in six weeks.

18 So just thirty six days after the transition they did
19 bring the law suit. That's the answer counter claim, cross
20 claims, third party complaints. And of course when we did
21 this you know you're talking about the timeliness, what did
22 we do wrong? I mean we're well within the statute of
23 limitations. It's well within the statute of limitations,
24 no delay there. You want to fault us for being slow? You
25 know you want it faster? Everybody wants their houses

1 fixed but you got to figure it out. Judge, you know how
2 many experts, how many different opinions on what's right,
3 wrong, what's right what's wrong with it whether it's the
4 roof or if it's flooring or whether it's cement or
5 concrete, is it stone, is it the hardy plank? Oh fast get
6 it done do something fix it. It takes time.

7 There's still disputes today about what is wrong.
8 There's still other matters to get into about foundation
9 issues. But they want it sort of like that cartoon faster
10 is better put a cheetah, strap a cheetah to grandma's back
11 and maker her go faster. Well I think we went plenty fast
12 enough. And we pursued and certainly within the statute of
13 limitations who we felt were the responsible parties and
14 ultimately entered into a settlement with Fankhouser
15 defendants and everybody else.

16 And you know, Your Honor, even that was a battle.
17 Even that was a battle with the plaintiffs who were saying
18 the exterior damages of their claims. And I know and Mr.
19 Dressler in addressing that and we didn't want to beat him
20 up too much on that but my goodness even if that was
21 their's it's derivative claims. There's ways to go about
22 it which they didn't even try to do that in the correct
23 manner. You got to do all the demands under Rule 23. They
24 didn't do any of those things. So the court has ruled on
25 that.

1 And I think what's important on there when you
2 approved the settlement which you found to be reasonable
3 and held that the COA exercised sound business judgment
4 when it entered - when it agreed to the settlement. And
5 that's an important issue, okay. That's important. They
6 exercised sound business judgment. And that you see in
7 your order up there on the board under paragraph 14.

8 Now I don't think when we're being sued for fraud and
9 we're being sued for breach of contract, accompanied by a
10 fraudulent act and conversion and conspiracies and
11 everything else, I don't think on one hand we can be
12 exercising sound and acting reasonably under the business
13 judgment rule and still be found to have acted
14 fraudulently. And converting and conspiracies and
15 everything else.

16 And I know a lot of those causes of action were
17 dismissed against Fankhouser Group and others, and we're
18 entitled to a dismissal for the same reason. But we're
19 entitled to a dismissal as to all causes of action based on
20 the business judgment rule. You found - You know, you
21 specifically found in your order all the different things
22 that the COA did in acting reasonably which you know
23 including, going out and consulting with licensed
24 contractor - contractors to determine the scope of the
25 works that's gonna be required. You know specifically

1. listing the individuals we talked with. We talked about
2 all the bids that we obtained to try to determine what is -
3 you know what do we go with. You know we looked at the
4 insurance issues; what's recoverable out there.

5 You know the timing on when damages were and who was
6 on the project, what could be out there. You know it's
7 great knowing that you may have a claim against somebody
8 but if that person doesn't have the assets or the
9 wherewithal, insurance policies to cover that it's not
10 gonna be a lot of good. We can go out and say great we got
11 a Fifteen Million Dollar judgment against, you know, Mr.
12 Memendez. Okay. Well that's wonderful. Were you gonna
13 get the money from? It's kind of like in this case. Where
14 you gonna get the money from? You think we did all these
15 bad things where's it gonna come from? You're asking your
16 neighbors to step in. And they says well okay we been
17 alienated, we - people in the neighborhood don't like us.
18 I think the other people recognize that the neighbors are
19 suing them trying to get their hands in their pocket, get
20 their money to fix their things, knowing that they've
21 slowed down the process of trying to move forward to get
22 the community, the entire community fixed.

23 Yeah I think a lot of the problems and losses that are
24 out there with the homes they're economy driven just like
25 everybody else. You and I and anybody else who bought

1 homes in the past, you know, the price has went down. Are
2 there problems with the plaintiff's homes? Yeah. There's
3 problems with a majority of the homes out there and that's
4 got to be fixed and certainly that will affect the value of
5 the plaintiff's homes. For we want to get these things
6 fixed, we want to get it done. You've approved the
7 settlement and that's what we want to go forward with and
8 try to get that done.

9 But truthfully they're still second guessing that
10 because they deposed the 30(b)(6) deposition of our - the
11 COA last week. And truthfully it seemed to me like it was
12 an interrogation about the reasonableness of the settlement
13 and what are you bids and how did you come up with this and
14 how are you going to get this done and when are you going
15 to get started. Things that don't have anything to do with
16 this law suit. It's the business judgment rule but that
17 seemed to be the focus of their attention is still back
18 about the settlement, how can you get this done, we think -
19 I guess in their mind it's gonna be Six Million Dollars,
20 but we're past that.

21 So when you addressed all this stuff in your order,
22 and again, the court finds that the board's reasoning and
23 it's conclusion to settle the matter to 2.6 as opposed to
24 pursuing further litigation to be an exercise of sound
25 business judgment under the circumstances. And that's in

1 your order.

2 Now under the business judgment rule "a court will not
3 review the business judgment of a corporate governing board
4 when it acts within it's authority and acts without corrupt
5 motives and in good faith." That's the *Kuznik* case that
6 you see upon the board. "In fact the business judgment
7 rule precludes judicial review of actions taken by a
8 corporate governing board absent a showing of lack of good
9 faith, fraud, self dealing or some unconscionable conduct
10 or acts." We don't have that.

11 What that means is that the court's default position
12 you got to defer to the decisions of the corporate board
13 unless the challenging parties, the plaintiff's in this
14 case, can produce evidence of bad faith. There's no
15 evidence, there's no evidence of bad faith here. And it
16 gets back to what we said at the very beginning about it's
17 time, you're past the pleadings okay. Bad faith; you acted
18 in bad faith. Where is it, what is it? And there is no
19 evidence, there is no evidence. In fact, it couldn't be or
20 you couldn't have already ordered that we acted reasonably
21 under the business judgment rule.

22 Also I referred earlier to the *Goddard* case, *Goddard*
23 *versus Fairways Developments General Partnership* case. You
24 know it's - And it's very similar to the case we've got.
25 And what we did here we ultimately recovered a multi-

1 million dollar judgment to settle in lieu of imposing this
2 large special assessment which if you take under what their
3 theory was and six million divided by eighty-six, it's - I
4 don't know, seventy thousand dollars. Or you know if you
5 take the 2.6 is a thirty or forty thousand dollars per unit
6 what it would be. Nobody wants to do, nobody wants
7 anything like that.

8 In the *Goddard* case the South Carolina Court of
9 Appeals held that the decision by the director of the Home
10 Owner's Association - Home Owner's Association not to raise
11 assessments for the purpose of repairing common elements
12 was protected by the business judgment rule. That's what
13 we got here. I mean we're protected by this. And the
14 decision by Stonecrest to pursue and ultimately recover a
15 multi-million dollar court approved settlement in lieu of
16 that was unquestionably reasonable exercise of corporate
17 discretion. It is absolutely protected by the business
18 judgment rule and entitled to judicial deference.

19 Now we're asking some of the plaintiffs; for example,
20 and I know I've got it cited in the brief on Page 11, I was
21 asking Mr. Moore you know, "do you know the board members?
22 Do you know Mr. Moscovitz who was on the board? Do you
23 know David Cook who is on the board? Do you know Paulette
24 Iadanza who is on the board?" And, "oh yeah, oh yeah, I
25 know 'em, absolutely know them all." "Do you fault them

1 for anything?" "No, no, their just mixed up in this stuff
2 just like the rest of us."

3 What they - the plaintiffs would like for you to do is
4 just its incorrect is that they want us - They associate
5 Fankhouser, we're sort of the co-attorneys with the
6 attorneys for the Fankhouser defendants. That's it. All
7 right. But they've sued the COA. If they sue that's not
8 suing Fankhouser; that's suing themselves. We don't like
9 Brock Fankhouser and we're gonna sue him because he one
10 time was involved in the COA and we're suing us because of
11 that. It makes no sense. It makes absolutely no sense.

12 Who pays for that? Them? That's what we tried to
13 tell them. Plus under the *Goddard* case under the *Concerned*
14 *Dune West Residents* case our courts have held - I think
15 *Goddard* was a Court of Appeals case but the Supreme Court
16 took not the *Goddard* case but from Federal Court where they
17 ask that - The Federal Court that had the *Dunes West* case
18 said, is *Goddard* the law? We want to make sure, is *Goddard*
19 the law? And the Supreme Court said yeah, that's the law.
20 At the time that this is - you know when a builder develops
21 a property and there are things wrong with it there are
22 construction defects, there's things wrong with that,
23 that's the developer. It's not the COA. The developer has
24 that duty to fix. It's not the developer wearing a COA
25 hat. It's the developer. And that's what we did, we went

1 after them within six weeks to try to get the recovery and
2 that's what we did. So. What we have there under the
3 business judgment rule for all the causes of action but
4 there's twelve plaintiffs, eleven plaintiffs with Mr.
5 Musgrave gone, or ten plaintiffs as you previously ruled
6 with Mr. Pinckney gone. We're entitled to summary judgment
7 as to every one of those causes of action that I had upon
8 the screen a little while ago under our business judgment
9 rule.

10 Now the next thing that I want to do is get into -
11 which we don't need to get into because in the business
12 judgment rule everything's gone. We're not acting in bad
13 faith with malice or fraudulent intent. We can't. We
14 can't act reasonably and still have committed any of these
15 wrong acts. It's not Mr. Fankhouser wearing the hat of the
16 COA so you can't cut off and say the COA wasn't at one time
17 him. You can't go back and sue Fankhouser when Fankhouser
18 was the COA. He was the developer, he was the developer.
19 You can't now sue him and say, you know you should have
20 done something.

21 All he could have done, what he did at that point was
22 he was the developer who undertook things to try to figure
23 out what the problem was. He was doing - Fankhouser was
24 really doing - He was doing his due diligence. He had the
25 water intrusion committee, he had this. And finally I

1 believe even in meetings said you all are just gonna have
2 to sue me, we gonna have to transition this over so you can
3 sue me so we can get all the third parties and we get
4 everybody in here and that's what happened. That's what
5 happened.

6 You know we can't go back and single him out now
7 because - Okay, do we maintain it? Under the *Goddard* case,
8 under the *Concerned Residents* or the *Dune West Residence*
9 case what you can do is even with failing to maintain or
10 anything, that money, anything over the regular assessments
11 that are being made comes from whose pocket? It comes from
12 the developer's pocket. That's what the case law says; it
13 comes from the developer's pocket not from these
14 individuals. Not from these homeowners who are suing
15 themselves trying to have the twelve plaintiff's trying to
16 get into their neighbors pockets to get them to pay for
17 what they've also sued and going forward against the other
18 defendants. Let them go forward. They want to do they can
19 do it.

20 THE COURT: I'm gonna stop you at this point, since we
21 got a limit on time. I've looked at - it looks like you've
22 break down all of the particular causes of action and had
23 an argument on each one individually.

24 MR. DOWLING: As to why they failed.

25 THE COURT: As to why they failed.

1 MR. DOWLING: And, Judge, you never need to get there
2 to address that under the business judgment rule.

3 THE COURT: I understand your argument but we got a
4 limited amount of time ---

5 MR. DOWLING: I understand.

6 THE COURT: --- so I'm gonna ask if you'll just let me
7 refer and rely on what you have so we can hear Mr. Halford
8 and then maybe address just one other issue this morning.

9 MR. DOWLING: Can I say one other thing?

10 THE COURT: Yes, sir.

11 MR. DOWLING: Just on the breach of a fiduciary duty
12 the plaintiffs have moved for summary judgment. We moved
13 on summary judgment on that previously and you said we just
14 got to get a complete record which was right. And the
15 discovery has been completed so now the complete record.
16 Again you don't have to get that there but if that came up
17 you know that all you said is okay I'm gonna - I want to
18 look at it after everything is in. Everything is in there
19 so we believe on the business judgment rule we're entitled
20 to a dismissal as to all claims. Thank you.

21 THE COURT: Mr. Halford.

22 MR. HALFORD: May it please the Court. Cam Halford
23 for the plaintiffs, Your Honor, and I'll be as brief as I
24 possibly can given the time restraints.

25 We seem to be trying to pigeon hole today's argument

1 into pre Fankhouser and post Fankhouser control of the
2 board. And we seem to be over relying upon the business
3 judgment rule as to what this existing board has now done.
4 I will point out what the big scintilla in the room is
5 today. And that is until - Lets talk about what we can
6 agree upon - until July 1st, 2010, Brock Fankhouser was the
7 COA. He was the controlling interest of the COA.

8 Let's talk about the other facts we can agree upon.
9 There was a transition of some sort that occurred on July
10 1st, 2010. So they pointed out the business judgment rule
11 which is codified in the first page of our Memorandum and I
12 apologize it came late to the court, but that's in 33-31-
13 842. But there is a small sliver subparagraph in this
14 statutory code section that addresses the business judgment
15 rule in Subparagraph C.

16 Subparagraph C of that rule, Your Honor, is cited in
17 our brief at Page 6 but it states and I'm quoting from the
18 statute at this point, that the business judgment rule
19 Subparagraph C carves out an exception in the statute and
20 makes it clear that an officer, and the only officer we
21 have at this time is Brock Fankhouser, is not acting in
22 good faith.

23 There is your scintilla. "If the officer has
24 knowledge concerning the matter in question". In this case
25 we're talking about water intrusion affecting I believe Mr.

1 Dowling said over fifty homes. Actually sixty-five of
2 them, sixty percent of the community, sixty-five of them
3 petitioned the county to lower their taxes specifically due
4 to water intrusion causes. But neither here nor there, the
5 majority of the community.

6 But this code section makes it clear that an officer
7 is not acting in good faith if the officer has knowledge
8 concerning the matter in question that makes reliance
9 otherwise permitted under the business judgment rule
10 unwarranted.

11 So let's talk about what the board knew, cause I did -
12 I do believe we now have a complete record. I had the
13 pleasure of deposing the existing board last week as a
14 matter of fact. I can tell you that for those board
15 members they did inherit a mess from Mr. Fankhouser and
16 they were every bit as betrayed by Mr. Fankhouser as my
17 clients were.

18 But let's look at what the notice was. Let's look at
19 what they knew before the transition. And our brief, Your
20 Honor, I wish I had it put up on power point, we start with
21 Exhibit One. There are several. Exhibit 1(A) through (G).
22 1(A) is the email from Mr. Fankhouser that's been produced
23 in the case several time over. The subject is your help
24 and your investment at the Stonecrest Villas, meaning your
25 homes, and the big scintilla in the room here today, Your

1 Honor, is what you've already recognized in this case. Its
2 amalgamation. Mr. Fankhouser was the COA. So the test
3 case scenarios that we've discussed this Exhibit 1 (A)
4 references for the community. This is a business record
5 from him not only to my clients, to the existing board now
6 that said "remember the only reason we're contemplating the
7 scope of repair different than the one proposed by my
8 insurance carrier is that said scope may be impossible to
9 achieve both logistically and financially." That's what
10 these people knew.

11 I'm not faulting the board for transitioning Mr.
12 Fankhouser but let me be clear. He got notice under the
13 Notice to Cure Statute from plaintiffs as far back as
14 February 2010. Suits were filed in June, it's well over
15 ninety days later okay. If you come forward Exhibit 1(B)
16 let's talk about what else they had knowledge of that makes
17 their reliance on the business judgment rule unwarranted.

18 The COA's carrier, Mr. Dowling has said the COA, these
19 members are suing themselves. These members had no control
20 whatsoever because Fankhouser exceeded the declarant
21 control period in the Master Deed. He was in charge.

22 But let's talk about what they had as of December.
23 This is Number Two, second report. "As of December 2009
24 they've got the engineering design testing core forensic
25 report that goes on. I didn't include the entire report

1 because it's a very lengthy, Judge, but for date purposes I
2 put it as Number Two on 1(b) in my brief because it tells
3 them we got serious problems with the construction in
4 Stonecrest. And it goes on to talk about things that all
5 these experts have talked about. The adhered concrete
6 masonry, the stone; the failure to use weather resistant
7 barrier. That wasn't the first of the reports that this
8 board had.

9 Mr. Fankhouser, and this is directly referenced,
10 that's the reason I put that e-mail first, it references
11 both of them to this community. Coming forward to Exhibit
12 10, Mr. Fankhouser solicits a secondary report from
13 Building Diagnostics. This is the second forensic report
14 and that report goes on and on and included a lot of the
15 contents on that one because it identifies the windows, the
16 roofs, the flashing, weather resistant barrier, big culprit
17 here; the grading, the stone, all the things in the first
18 report.

19 Come forward then, Your Honor, and we're talking about
20 transition, whether or not the business judgment rule - And
21 we're referring and again the big scintilla in the room
22 here is Fankhouser, he is the COA. They are amalgamated I
23 would argue up until the point of at least July 1 of 2010.
24 But if you come forward to Exhibit Number 1(d) this is John
25 Peterson the real estate attorney over in Fort Mill who

1 practices in my area, Your Honor. This committee raises
2 money and in fact Mr. Fankhouser, which is who this is
3 addressed to, may go to Mr. Peterson on these transition
4 issues, and the big culprit in the room here and here again
5 is the scintilla, is transitioned. And a couple of things
6 referenced directly by Mr. Peterson - And by the way, both
7 board members acknowledge in their deposition they got
8 this, both board members acknowledge that they have
9 contributed financially to a fund for Mr. Peterson.

10 But this letter comes back with another answer that
11 arguably Mr. Fankhouser doesn't like says - addresses two
12 things "One: water intrusion. Two: No sufficient fund to
13 permit maintenance of the common elements. Three:
14 Fiduciary duty owed by the developer to the owners of the
15 Association." And it goes on to list a number of items by
16 which this attorney has advised presumably to the committee
17 that's taking over that "the transition is a good idea".
18 So these folks end up at the seller's firm and ultimately
19 there is a transition.

20 Let's talk again what we can agree upon. As of July
21 the 1st, Mr. Dowling said the - I believe his words were
22 the COA officially takes over. The COA had existed since
23 year 2007. It was incorporated by one member Brock
24 Fankhouser and it was assigned in fact created under the
25 Master Deed they referenced for one purpose. It's stated

1 under the purposes of the Master Deed. So from year 2007
2 to July 1, 2010, the COA has existed as a separate distinct
3 legal entity. The problem is it has only one owner and the
4 problem is it only has one controller. It has only one
5 master and that's the amalgamation.

6 But as we go on and transition - and I'm gonna pass
7 Mr. Peterson's letter to Number 1(e). Again we're pointing
8 back, Mr. Fankhouser and the board members were looking for
9 ways the scopes of repair different than the ones proposed
10 from my insurance carries so is there a scintilla of self
11 dealing. Is there a scintilla in the court today of
12 knowledge that there may have been something wrong and they
13 have filed two insurance claims but yet their looking and
14 in fact they are assisting the builder to find the cheaper
15 repair.

16 My client's houses have been leaking since at least
17 November 2009. And Mr Dowling is correct because your
18 former law clerk Tracy Vann who traced as far back to the
19 year 2008. That's how long the water intrusion had been
20 going on under Mr. Fankhouser's control of the board.

21 So we're not here to argue the funds they put together
22 or the business judgment rule as to the settlement that was
23 proposed. But let's go forward just a little bit more.
24 Exhibit 1(f). This is what the builder told the community
25 including the existing board members and all the owners.

1 "In 2008", again identified as the trigger date for water
 2 intrusion in some cases. The fact of the matter is our
 3 homes are not designed - Who would know that other than the
 4 builder? "Not designed to prevent rain water intrusion
 5 during torrential rain falls." Now in questioning Ms.
 6 Iadanza I said "Did you ever see that e-mail or where the
 7 e-mail was?" At first she said no and then she changed.
 8 "Everybody in the community got it." This was the
 9 noreaster that came through in year 2008 and the first real
 10 incidents of water intrusion that occurred in the community
 11 that were serious.

12 Well let's go back as far again, and we're talking
 13 about Brock Fankhouser and we're talking about the
 14 scintilla of amalgamation here. What did he know in year
 15 2007? Okay. My client Mr. Gonzales had his floors removed
 16 four times. Exhibit 1(g): There is the self dealing.
 17 There is the scintilla of dishonesty. "First I want you to
 18 know that we're gonna make this right. While your new home
 19 which is what all" - They all bought new homes, new
 20 condominium homes. There has not been an example of our
 21 standards of quality" - I don't know who our is - "it will
 22 be and so will the other eighty-nine condominiums at
 23 Stonecrest Villas." Okay.

24 It goes on to state clearly there are no excuses for
 25 our poor performance today because they had been called

1 back four times to work on Mr. Gonzales' residence. If you
2 recall, and this goes way back in the case, Mr. Gonzales
3 actually had to go to EPCON, Brock's father, before he got
4 any response. But that's what they knew in 2007.

5 So coming forward and moving on. Remember I told you
6 here are the two things we could agree upon. July 1st 2010
7 there is a transition of control where Mr. Dowling says the
8 COA officially takes over. I would argue that's not
9 officially the case. The COA had been in existence since
10 2007. But Exhibit Two, Your Honor, this is supposedly Mr.
11 Fankhouser is no longer in control of the Board as of July
12 3rd, 2010. This is a correction to the Master Deed filed
13 in York County as of October, 2011, six months after his
14 resignation. Page Two of that shows he signs, it's a post
15 dated document, Brock Fankhouser signing for president
16 Stonecrest Villas of Tega Cay Condominium Owner's
17 Association - that Board.

18 When ask about this I questioned the Board treasurer,
19 Your Honor, and it is under Exhibit Three, Page 68 of his
20 deposition I said, "Did you know about this?" "No." I
21 said, "Was Mr. Fankhouser now on the Board?" "No, he
22 wasn't." "Who was? Were you on the Board Mr. Moscovitz?"
23 "Yes I was." "Who was on the Board with you?" "David Cook
24 and Paula Iadanza." And I ask him, "you don't see their
25 signature on that document do you?" They had no clue that

1 it had occurred. The only signature they could point to is
2 Brock Fankhouser individually. Again this is in 2011 after
3 resignation.

4 So I said, "It appeared that your signature doesn't
5 appear on this document does it?" And he says "No it
6 doesn't." "How about Ms. Mendonza?" There is nobody, only
7 Brock Fankhouser. So again amalgamation, Your Honor, there
8 is the scintilla in the room. Exhibit Four, Exhibit Four
9 under the Master Deed, here's what the builder knew because
10 this was produced by FPG and this was May, again, prior to
11 transition.

12 THE COURT: Back up again.

13 MR. HALFORD: Yes, sir.

14 THE COURT: I'm a little confused. Your Exhibit Two
15 you got Mr. Fankhouser signing and it looks to me like it's
16 dated February the 24th, 2009.

17 MR. DARLING: Your Honor, you feel my pain. This was
18 a lawyer that re-recorded something that was just signed in
19 2009. This is the stuff we are dealing with.

20 THE COURT: It looks like it was signed by him on
21 behalf of the COA prior to 7/1/10.

22 MR. HALFORD: Yeah, a correction to the Master Deed
23 filed in October 2011, Your Honor.

24 MR. DARLING: Your Honor, he knows that the lawyer, it
25 was refiled because what was the issue with that?

1 THE COURT: Well I'm not going to go into that.

2 MR. DARLING: I mean its just --

3 THE COURT: I just --

4 MR. DOWLING: I mean it had nothing to do with
5 Fankhouser. If anybody but the lawyer who realized -

6 THE COURT: It says filed for record in 2009. I can't
7 really read the date. It looks like judgment was filed
8 back in 2009 at least at some point. But anyway, go ahead.

9 MR. DOWLING: It was to correct typo's. Had nothing
10 to do with Mr. Fankhouser.

11 MR. HALFORD: Going forward, Your Honor, to Exhibit
12 Five. We've addressed David Musgrave and Your Honor is
13 correct we made a motion to reconsider both as to Mr.
14 Musgrave and Antonio Pinckney.

15 Your Honor, the reason we were asking the court to
16 alter or amend it's order by restoring these people to the
17 case is, at the last hearing and that occurred right after
18 Dennis Hall's deposition, we just came out of a two days
19 deposition, they put up the property records and Mr.
20 Pinckney, his property is deeded from Mr. Pinckney - and
21 this is attached to my motion ---

22 THE COURT: I looked at the quick claim deed.

23 MR. HALFORD: --- to Mr. Pinckney as the trust -

24 MR. DOWLING: Your Honor, I didn't address anything
25 about Mr. Pinckney.

1 THE COURT: I know you didn't.

2 MR. HALFORD: I'll move on to Mr. Musgrave then. I'm
3 not trying -- But under Exhibit Five, Your Honor, despite
4 the fact that David Musgrave has been under power of
5 attorney for his wife all this time, the representation to
6 the court was there was no privity, whether contractual privity
7 or whether privity by deed but there is a check there from
8 Mr. Musgrave signed, made payable to Stonecrest Villas
9 which is Fankhouser's Entity which was the developer.

10 Also, Your Honor, at Five (B) is the contract. And
11 the last page of that contract at 5(b) shows down on the
12 right hand corner name to appear on the deed Barbara J.
13 Musgrave. So they were planning on putting Barbara
14 Musgrave on the deed all along. The question was whether
15 or not he was the purchaser, whether or not he was in
16 contractual privity with Fankhouser and Fankhouser's Entity
17 Stonecrest Villas, LLC.

18 And these documents were produced two years ago, have
19 always been a record, so if the Court finds that Mr.
20 Musgrave - can't reverse your holding to that then I argue,
21 Judge, the defendant's have suffered no prejudice by
22 substituting the wife. They actually spent a little over
23 eight hours on January the - June the 15th deposing Ms.
24 Musgrave and the father who resides in the residence so
25 they suffer no prejudice. Our argument today is proper

1 under Rule 17, that's in my Motion to Reconsider. I'll
2 just peak at the end of this argument.

3 Judge, the Master Deed they cited for you, the
4 documents, he's right; a party has to come forward after
5 the pleadings and show some form of proof -- they can't
6 just rest on the allegations of their pleadings. What the
7 plaintiff's have produced is no less than four documents,
8 okay, that just make reliance upon the business judgment
9 rule. And I'm not referring to this Board, I'm referring
10 to the Board that was Brock Fankhouser as amalgamated. But
11 I produced four documents that shows what he knew at the
12 time. We've produced for the court the Master Deed in this
13 community and they cited all the provisions. It says you
14 will repair it.

15 THE COURT: You kind of lost me because you sued the
16 COA as the current COA. You keep referring back to Mr.
17 Fankhouser and I know he's - I'm familiar with the
18 amalgamation theory, I spent a good time in here, but I'm
19 still getting a disconnect as to what a judgment against
20 the current COA is gonna do as far as Mr. Fankhouser. If
21 your clients get a six million dollar verdict against the
22 COA because they're seeking damages directly against the
23 COA, tell me how you get there? I guess the current COA.

24 MR. HALFORD: Judge, we're not seeking - The
25 representation of the plaintiffs were trying to stick their

1 hands in the pockets of the other eighty-nine residents is
2 a little bit twisted. This -

3 THE COURT: It is. I mean you sued the COA.

4 MR. HALFORD: Yes, sir. The COA is covered by a
5 board's policy of insurance first of all and second it's a
6 legal distinct entity. Yes it's bad for the members. The
7 members by the way is where the COA gets its funding from
8 by way of -

9 MR. DOWLING: Your Honor, I think he knows better than
10 that. It's irrelevant. He's gonna come in and say
11 insurance with the coverage issue that's out there with the
12 disclaimer out there.

13 THE COURT: I got to deal with the named part.
14 Go ahead. We need to move along.

15 MR. HALFORD: I'm not trying to - The point is the
16 representation has been made that my client Mr. Pinckney
17 may be trying to sue Ms. Iadanza, Mr. Cook. This board,
18 you know, this corporation it's nonprofit, it's a separate
19 distinct entity. Whether it was under capitalized or not
20 or whether it made mistakes or not, point is, at some point
21 at least up until July of 2010, its clearly amalgamated
22 with the builder, the developer itself, so that's the
23 scintilla in the room. I've kind of lost my place now,
24 Your Honor.

25 THE COURT: I apologize. I try not to break in

1 because of that and particularly because we don't have a
2 lot of time but I'm having a little bit of a disconnect on
3 that. But go forward, I've got your briefs too.

4 MR. HALFORD: Well lastly, in some of these causes of
5 action, Your Honor, the point is the marketability of the
6 homes. You know I ask Ms. Mendonza about this. This has
7 gone on for quite some time. There is a board settlement.
8 You know we did ask questions. You know, is there an
9 anticipated start date? This has been going on for two
10 years now and undetermined. Has there been a general
11 contractor selected to do the job? We're in consultation
12 for that it's undetermined. We've got a settlement.
13 Clearly it was within their right to release the
14 subcontractors. They also released the GC, the developer.
15 And a lot of these problems again weren't caused by the
16 existing board. They inherited the nightmare that was
17 Brock Fankhouser so that's your scintilla in the room.
18 That's the cause, that's how we come forward with a showing
19 that survived summary judgment.

20 There is genuine question of fact of whether or not
21 under the Master Deed that the entity responsible couldn't
22 even carry out it's purpose. Not the lease of which is
23 these funding issues. And I know the court has heard
24 enough about this master association. We didn't pursue, we
25 had a motion to compel documents that's been pending for

1 over a year on that. They have produced the affidavit of
2 Mr. Moscowitz which I think is Exhibit 9 that said
3 somewhere about Fifty-five Thousand transferred out. The
4 point is, on each one of those years these people were
5 paying dues. They don't have a choice now. They're paying
6 dues under a Master Deed for a purpose of some sort and if
7 that money went to anywhere else than fixing their homes
8 then it shouldn't have. It should have stayed in the
9 community but they had no control over that. So the person
10 in charge at that time was Brock Fankhouser. And I will
11 rest with that, Your Honor.

12 There is a Master Deed that defines the purpose.
13 Repairs haven't commenced yet and they have taken steps to
14 hang tarps and plastic sheets hanging all over this
15 community. The point is the marketability of the homes is
16 being impacted, the point is the homes are deteriorating.
17 It's the same thing that Mr. Peterson warns the people
18 about. And when I say these people I'm referring to Brock
19 Fankhouser mainly because he was carrying the lead on
20 getting the transition done. The longer it goes by the
21 more deterioration there is gonna be and that's what's
22 occurring and that's what's wrong. Thank you.

23 THE COURT: Briefly and then I'll take a short break
24 and we'll hear on the Motion to Stay.

25 MR. DOWLING: Briefly, Your Honor.

1 Fankhouser during this time it's the way it always
2 works. The developer develops the property and he's the
3 Board and this is not unusual. This is a hundred percent
4 of the time this is the way it works. Right here case law,
5 the developers are held responsible for the condition of
6 the common area at the time these areas are deeded to the
7 POA. That's our South Carolina Supreme Court that's saying
8 that.

9 He keeps wanting us to be the attorney for Fankhouser
10 as the developer, as the builder, or whatever. We're not
11 attempting to put his hands into our pockets and saying you
12 oh we're not going to give it to the neighbors. That's
13 exactly what is going on here. When the developer - He
14 said all this stuff is pre this current board. It's still
15 its just the board, pre current board the transition it's
16 the developer who we went after. We've already said we
17 acted reasonably so this is the judgment rule. That's what
18 we've done.

19 I think we both addressed this issue that these side
20 issues about Fankhouser even had control afterwards with
21 the lawyer is the one that's filed that because of the
22 typo's. Stuff like that it just doesn't make sense. This
23 stuff about this Master Association this last time I know I
24 addressed it under the cause of action and, One: If they
25 think some money was going to some Master Association it

1 shouldn't have this is a derivative claim. They don't
2 have. Okay, its not them. Okay. Plus they were legally
3 obligated, the fact that maybe this money that's going out
4 they don't know where the money is going to this Master
5 Association; that maybe Fifty-five Thousand went out that
6 money should have been there fixin things, Fifty-five
7 Thousand is not gonna do much but that is our legal theory.
8 We - Our theory is, the COA's theory is yeah we been paying
9 when we've been assessed but we think maybe the Master
10 Association has charged us too much.

11 This Fifty-five Thousand we may get it back, we may
12 not. We're withholding payments on it. One: It's a
13 derivative claim, but it's just a theory. There is no
14 entitlement to the money. I mean it can't be conversion or
15 anything else. I mean we're obligated to pay it. Our
16 legal theory that we will maybe bring a law suit out, we're
17 trying to resale it, he knows that, is that there have been
18 over payments but we're just paying what we're supposed to
19 pay.

20 Judge, the Exhibits you referred - I mean he referred
21 to, is looking at; I don't have them, I didn't get them. I
22 know he handed me a memo today but we was talking about
23 what Fankhouser knew back in 2008. If you look at them it
24 says Brock Fankhouser developer. That's everything he's
25 showing is the developer. Judge, the COA is ready to move

1 forward and by moving forward, we would like this ended. I
2 think we're entitled to Summary Judgment for the reasons
3 stated. And also for every reason that's in the remainder
4 of the brief that we have. So I hope that after your
5 careful consideration you will grant us, the COA, motion
6 for summary judgment and dismiss the COA as a defendant in
7 this case. Thank you.

8 THE COURT: Brief response, Mr. Halford.

9 MR. HALFORD: Briefly in reply.

10 Mr. Moscowitz, the bookkeeper, his deposition occurs
11 on March the 12th and like my plaintiffs, he per unit --
12 assessments and basically what I ask him, you know in
13 regard to these transfers of money to the Master
14 Association, this is was the gentleman who figured out the
15 figure Fifty-five Thousand, plus it had gone somewhere, and
16 they are trying to get back. But I said how is an
17 Association supposed to function? How are you supposed to
18 maintain the common elements if you don't have that money?
19 And the answer was simply "it can't".

20 THE COURT: I thought we carved that claim out?

21 MR. HALFORD: No that was the common elements, soils,
22 gravel.

23 THE COURT: I thought we had an accounting. This is a
24 complex case and I don't have a complex mind but I thought
25 the claim for that had been carved out.

1 MR. HALFORD: No, the claim for accounting was settled
2 at the point they produced this information and we just
3 stopped going forward.

4 THE COURT: But when I say carved out, you're not
5 pursuing that Fifty-five Thousand Dollars, the COA is?

6 MR. HALFORD: No, sir, we are not pursuing. We agree
7 those dues were paid to the COA for a purpose. The point
8 is the purpose was for to enable the COA to repair the
9 homes and they're going out the door during the years of
10 water intrusion. There's your scintilla.

11 THE COURT: Well let's take a real short break and the
12 other lawyers come up and I think next we'll argue the stay
13 and the motion for substitution basically I call it that's
14 not technically what it is. It hadn't been ten days and my
15 suggestion to that would be that I ruled - Well I'll talk
16 about that when we come back in.

17 (COURT IN RECESS AT 10:24 P.M..)

18 (COURT BACK IN SESSION AT 10:29 P.M..)

19 THE COURT: You may take your seats.

20 The motion to stay, Mr. Powell.

21 MR. POWELL: May it please the Court. Your Honor,
22 good morning. This is a Motion to Stay brought by
23 Fankhouser Property Group, Inc. By now Your Honor is
24 familiar with the acronym FPG. The court may recall that
25 previously in this case the two what I will refer to as the

1 EPCON entities recognizing they are two entities. EPCON
2 Communities Franchising Inc., or ECFI and EPCON Communities
3 Inc, ECI. Both filed a motion for summary judgment against
4 FPG based on two claims, those being contractual indemnity
5 and equitable indemnity. Your Honor ordered in EPCON's
6 favor as to contractual indemnity claim and therefore did
7 not reach the equitable indemnity claim.

8 There was that judgment a subsequent denial of FPG's
9 motion to alter or amend and then another order as to
10 damages actually awarding damages that they incurred in
11 terms of attorney's fees up to this point pursuant to a
12 prior order. Those two orders all due effort to the court
13 that we move forward have been appealed by FPG and
14 consolidated.

15 The Appellate Court rule 241 automatically stayed what
16 we believed to be both those claims, contractual and
17 equitable indemnity. And how that impacts FPG moving
18 forward and the reason we filed this motion to stay is, if
19 not or the court's order. In the proceedings and in what
20 is presented and I understand one claim is equitable and
21 one claim has legal components but as to equitable claims
22 FPG presents it's defense which is unclean hands. It
23 presents to either Your Honor or to the jury that EPCON may
24 be responsible for some culpability, may have some conduct
25 that makes it have unclean hands and therefore it's

1 equitable claim is not viable. Given the order, that's not
2 relevant.

3 With regard to contractual indemnity, the way that
4 order reads and I'm not obviously rehashing the argument
5 but the way that the indemnity clause reads in the contract
6 between ECFI and FPG is, if ECFI is sued or there is a
7 claim against it or something that arises out of FPG's use
8 of the development system then FPG has to indemnify ECFI.
9 But for the order and if we assume that a jury would come
10 back this is for all the purposes of this motion let's
11 assume hypothetically a jury comes back with an award
12 against ECFI or ECI or both, we would be entitled to argue
13 and put forth evidence that - and ask the jury, whether
14 their award as to ECFI and ECI - the plaintiff's claims
15 arises out of FPG's use of the development system or not.
16 Or does it arise out of some conduct that went straight
17 from ECI, ECFI to the plaintiffs.

18 That allocation is gone. Those are the two
19 evidentiary concerns and how that impact the trial moving
20 forward. Generally speaking and EPCON opposes this motion
21 and it's kind of clear why that's the case from a trial
22 strategy standpoint. Before Your Honor's order, it might
23 not - it might be in FPG's interest to say EPCON's got a
24 little responsibility here. You know, ladies and
25 gentlemen, they did X Y and Z. They provided prototype

1 plans that show the stone masonry going into the ground.

2 What happened? It could be any number of things.

3 Right now it might not be in FPG's best interest to
4 say, you EPCON may be somewhat responsible for A, B and C
5 because the current law of the case as you ordered it is
6 whatever EPCON did wrong it doesn't matter, FPG has to
7 indemnify them no matter what they did. EPCON can come in
8 at trial and say, sure we did, yeah, we did this wrong, we
9 did this wrong, and we did this wrong. We got this piece
10 of paper and that doesn't matter.

11 And I understand EPCON's point. Mr. Wilkes and I have
12 spoken about it. He says yeah but the automatic stay still
13 doesn't impact the plaintiff's claims. The judge's ruling
14 is what it is and that can proceed on appeal and we move
15 forward. And I understand that argument as well. But
16 assume again hypothetically we try the case in April.
17 Assume hypothetically a jury awards a dollar against EPCON,
18 it awards a dollar against FPG. No appeal. Plaintiff's
19 come in and they want to execute against the judgment.
20 Say, Judge, here's our judgment against EPCON, here's a
21 judgment against FPG. What is the court gonna do with the
22 judgment against EPCON because Mr. Wilkes is gonna come in
23 and say, Judge, the rule of the case is, they got to
24 indemnify us, so you can't allow the plaintiff's to execute
25 a one dollar judgment against my clients. And we're gonna

1 come in and say, Your Honor, --

2 THE COURT: I think that bars them from collecting
3 against EPCON. EPCON will just have the right to go back
4 against you. I don't know that the fact that the indemnity
5 doesn't get EPCON off the hook by having damages
6 established against them. I don't think. Now I haven't
7 thought through it but it just seems to me that they're
8 still a party, they still got counsel, they'll still be
9 sitting at the table and they'll - if any damages or
10 assessments against them, they are collectible by the
11 plaintiff's and then it would be EPCON's right - my former
12 ruling - to turn to Fankhouser and FPG and say now you
13 didn't indemnify us of this dollar we had to pay to the
14 plaintiff's.

15 MR. POWELL: And that may be if we go through all
16 those hoops and that's how the court proceeds that's how
17 the court proceeds but those are our concerns, that's how
18 we view the impact of the automatic stay as to the
19 indemnity claims that's impacting this case. And the
20 obvious practical consideration is we don't want to come
21 back and do it again. And we think that with all due
22 respect to the court it goes the other way, that's gonna
23 have to happen based on the evidence that is not gonna be
24 presented to the jury that would otherwise be presented
25 given it.

1 THE COURT: Help me there a little bit. What kind of
2 evidence should not be presented simply because of this - I
3 mean you mentioned unclean hands. But that would be the
4 equitable not contractual.

5 MR. POWELL: Right. And we talked about that and I
6 recognize that and the Court can completely bifurcate that
7 aspect of the trial depending on how that proceeds. Again
8 as to the contractual indemnity, that's been taken away by
9 order of the court. We would be able to argue it appears
10 to me sorting through the plaintiff's pleadings which are
11 kind of hard to understand in some respects as they pertain
12 to allegations against EPCON and FPG; that's something we
13 argued earlier. But it looks like some of what they claim
14 are matters by EPCON directly against the plaintiffs.

15 THE COURT: I understand that theory.

16 MR. POWELL: Right.

17 THE COURT: I understand that. In for a penny in for
18 a pound was my lesson - legal comment on that.

19 MR. POWELL: And what I think we would otherwise be
20 entitled to is the jury's determination of whether they are
21 if in the first instance they found any fault on behalf of
22 one or both EPCON entities which would be a prerequisite to
23 their contractual indemnity claim, then we would then be
24 entitled to know from the jury whether the conduct they're
25 finding either EPCON entity responsible for falls under

1 that provision i.e., whether it is due to conduct by FPG or
2 just conduct by EPCON. And as it stands now that doesn't
3 matter.

4 THE COURT: I hadn't really thought through all of it
5 but couldn't it be special interrogatories that could -
6 that the jury that hears the principle case could carve
7 out? I said it sort of facetiously, sometime last spring
8 or fall we had one of these that I already tried to figure
9 out my twenty-six page verdict form but I don't like to
10 give lengthy "if you find this go to B, go to C." I don't
11 like to do that, I think it's confusing to a jury. But
12 couldn't it be special interrogatories to carve out who is
13 responsible for what?

14 MR. POWELL: I don't know that you - that you can do
15 that as to the indemnity claim specifically now given the
16 automatic stay. I was thinking more in terms of the
17 presentation of evidence and the argument we made to the
18 jury.

19 THE COURT: I understand but I'm talking about to that
20 jury ask to return a verdict in favor of the plaintiffs and
21 then - and I haven't thought through this - but then have
22 special interrogatories as to the various causes of action,
23 as to - Give me an example of one that you feel falls
24 outside. If I'm right on the contractual, tell me one that
25 should fall out and that is cause of action that fall

1 outside the contractual - assuming I'm right, having
2 trouble articulating this - but something that would be
3 personal so to speak to EPCON that Fankhouser shouldn't
4 have to indemnity.

5 MR. POWELL: Fraud. Is that left?

6 THE COURT: Fraud?

7 MR. POWELL: Yes, sir.

8 THE COURT: I envision perhaps being able to fashion
9 special interrogatory because everybody will be at the
10 table even though the indemnity that doesn't affect the
11 posture of the parties at the trial. Again I'm just
12 thinking out loud.

13 MR. POWELL: And that's what started this whole thing.
14 We've had this case as long as everybody else has. Your
15 Honor says get ready to go May 22nd we'll be ready to go.
16 But it seems to us that because of the fact the indemnity
17 claims are taken away by virtue of the order it's gonna
18 impact.

19 EPCON is going to object to arguments we made or
20 evidence we tried to present and it has to do with that
21 allegation which we would otherwise be able to present.
22 And depending on exactly what it is we try to present or
23 what their objection is, they may be right they may be
24 wrong, but that's gonna be in play and I think its gonna
25 impact the proceedings. I don't see how it cannot. And we

1 envision potentially having to be back here. That's the
2 basis for the motion.

3 THE COURT: Okay. Mr. Wilkes, you want to ...

4 MR. WILKES: May it please the Court, Your Honor.

5 I handed up a brief and I apologize I didn't hand it
6 in until this morning, this was just filed last week.

7 THE COURT: That's all right. I got an chambers I'll
8 be next week before I can read it and spend a lot of time
9 with it.

10 MR. WILKES: Understood, Your Honor.

11 Well from what I've heard orally it doesn't seem that
12 FPG argues that the automatic stay applies because the
13 plaintiff's case can be tried without reference to the
14 indemnity appeal that is pending. There is no aspect to
15 the plaintiff's case that cannot be tried because of any
16 element that is on appeal. That would be part of an
17 automatic stay that would deprive the court of jurisdiction
18 in this case. That's not the situation.

19 And I suppose that what FPG is arguing that under Rule
20 42 that you can really figure out the best way to try the
21 case. If you decided you wanted to hold the whole case
22 until this appeal came back and knew exactly where we stood
23 I suppose the Court could do that. But that wouldn't be
24 because of the automatic stay of the appeal except just
25 that circumstance that you would be considering as in

1 respect to trying the plaintiff's case.

2 The comments about the equitable indemnity; equitable
3 indemnity of course becomes moot when we won on contractual
4 indemnity. I suppose it would come back if somehow we were
5 reversed on appeal. I don't think that's gonna happen but
6 if there were to occur, and we had to try both equitable
7 and contractual, okay, fine, he would try to prove unclean
8 hands.

9 But in the plaintiff's case the plaintiff has pled
10 fraud and misrepresentation as to EPCON and has pled unfair
11 trade practices. So there's plenty of opportunity to
12 decide whether EPCON did something that might arise to the
13 level of having unclean hands. Is that going to become the
14 law of the case later on? Maybe. We just have to see how
15 it worked out. I certainly don't hope to loose on those
16 causes of action, we expect to prevail.

17 But, FPG I mean they're really arguing strategy and
18 they're arguing they don't want two trials. Well I don't
19 really want two trial either. I want to go have this trial
20 and be done with it. I hope I win at that level and then
21 we can just appeal the issue of what they owe us on
22 attorney's fees and see where that falls out.

23 As far as a second trial, those happen. I mean these
24 indemnity claims are often bifurcated because I cited in my
25 brief under Rule 52, 42(b) you could have decided to

1 bifurcate our cross claims. And that's in effect what we
2 have now. We have a bifurcation of cross claims. The
3 Court of Appeals may affirm and that will be the end of it.
4 If for some reason it doesn't or the Supreme Court changes
5 it, we come back and do what we have to do, that would just
6 be a bifurcated trial. There is no constitutional right to
7 having the same jury decide all the issues in one case but
8 that's clear from our rules.

9 So in this instance I don't believe there's any aspect
10 in the plaintiff's case that is - that is affected by the
11 appeal. The plaintiff can try all of it's issues and get a
12 decision. Fankhouser FPG is always going to have a dilemma
13 at any trial whether it's the one in April or whether they
14 got their - they won on appeal and we tried everything
15 together, they always have the dilemma of how bad do they
16 want EPCON to look, while they also have this indemnity
17 exposure. They want to be careful what they prove because,
18 you know, we believe they have full indemnity
19 responsibility and so this strategic issue I don't think
20 Your Honor, forms a very strong basis for you to exercise
21 your discretion to decide that we need to wait on the
22 appeal that the indemnity claim to have the entire case
23 tried.

24 And in fact I think there are a bunch of plaintiff's
25 that think they need to have their day in court and get on

1 with this and it suits EPCON to go ahead and have it's day
2 in court and hopefully successfully defend the plaintiff's
3 claims and then see where the appeal falls.

4 Thank you very much.

5 THE COURT: Mr. Powell.

6 MR. POWELL: I don't disagree with most of that other
7 than what EPCON argues that - and they've got an advantage
8 of going forward because of the issue on appeal, if we go
9 forward now because they've got the order in hand as
10 previously indicated. There is no dilemma from our
11 perspective in trying the case and dealing with the claims
12 against EPCON.

13 If EPCON is arguing equitable indemnity that they have
14 unclean hands they did something bad they don't prevail.
15 Under our view of the contractual indemnification
16 provision, not theirs, and not with all due respect the one
17 the Court has ordered is now the law of the case. If EPCON
18 does something bad that's directed toward the plaintiffs
19 that is not an indemnity obligation.

20 And under the rule of the case now, if EPCON does
21 something directly bad for the plaintiffs, no matter what
22 they do, there is an indemnity obligation. So there is a
23 dilemma based on the law of the case now, if FPG puts up
24 its unclean hands defense because if it says EPCON is bad
25 on the one hand in that defense, then everything EPCON is

1 responsible for FPG owes the indemnity obligation. Under
2 our view of the case and the reason that the appellate
3 issue impacts the proceedings, there is not that for them.

4 THE COURT: I follow you.

5 MR. POWELL: That's all. I agree with everything
6 else, Mike said and we will again do it however the Court
7 wants to do it but we definitely see this as an impact on
8 the proceedings.

9 MR. WILKES: Your Honor, just one brief comment.

10 As you know unclean hands has nothing to do with our
11 contractual indemnity claim. We might not even prosecute
12 contractual indemnity claim down the road if we actually
13 tried it. That's all. It's pled and it's there but it's
14 not required and it would be really difficult not to
15 recover something under the contractual indemnity claim. I
16 understand how he's trying to parse it out as best he can
17 and that hasn't worked and I don't think it will work later
18 on and my opinion doesn't matter. But I just wanted to
19 make that one comment. Thank you.

20 THE COURT: All right. Mr. Halford, you're not
21 directly I guess involved other than that your clients are
22 the ones looking for the trial.

23 MR. HALFORD: At this time they want their day in
24 court.

25 THE COURT: All right. Let me take that under

1 advisement too. And I know time is of the essence as we
2 often say in our world. Now the motion to substitute -
3 Motion to Reconsider basically. I think I can handle that
4 without arguments unless everybody is ready to argue today
5 because ten days has not expired. But I do still have the
6 request for additional destructive testing.

7 MR. HALFORD: That one can wait, Your Honor, but we
8 would ask that the Motion to Reconsider on the Pinckney,
9 Musgrave be heard and I don't think it will take very long.

10 THE COURT: Any objection?

11 MR. POWELL: As to the Motion to Reconsider or the
12 Motion for Additional Testing? We actually request that
13 the Motion for Additional Testing go forward. We've had -
14 We're on the eve of trial and we want to - -

15 THE COURT: I don't understand how you can put that
16 off. Let's real quick, does anybody object - I looked at
17 the quick claim deed and I'm actually a little confused as
18 to Mr. Pinckney because it indicates that he deeded to
19 himself a life estate and it talks about a trust. Is the
20 title in the trust or is it a life, or is it a life estate?
21 And I don't know if that really matters because if we have
22 a life estate the fee simple is in the trust. I'm
23 absolutely lost on where that piece of property legally
24 stands.

25 MR. HALFORD: Yes, sir. And I went back and

1 researched it after the court's ruling. The title to the
2 property which is 809 Gladstone Court where my client lives
3 as his primary residence, is inside the Pinckney Living
4 Trust and Mr. Pinckney is the trustee. So what I argue to
5 the court was and I did not identify him in the caption as
6 the trustee Antonio Pinckney he's still authorized he's a
7 part of the capacity to bring suit and he lives there it's
8 his primary home.

9 Now I will bring up one thing that kind of hurts me.
10 His aunt signed the contracts with Stonecrest Villas. The
11 title was eventually taken into joint names and transferred
12 to a trust. Mr. Pinckney never the less under Rule 17 is
13 the trustee of an expressed trust which holds that home as
14 his primary residence. Now a lot of these claims go to
15 whether or not they're homes have construction defects so
16 I'm asking the court to reverse there if it will consider
17 us on that. And then I'll move again to Mr. Pinckney -
18 Excuse me.

19 THE COURT: Musgrove.

20 MR. HALFORD: Mr. Musgrove. Thank you. He's always
21 been - And again, I'll refer -

22 THE COURT: Does anybody object to that? They've been
23 - There's no prejudice. They've been battling it out
24 whether it's in a proper name or not. Anybody object to
25 that?

1 MR. POWELL: We do, Your Honor. I think that cuts
2 both ways. Procedurally we pointed out to the Court, and
3 you know we got the documents that said Mr. Pinckney's aunt
4 had title, all based on title. We pointed out to the court
5 that Antonio Pinckney, named plaintiff, does not have
6 title. In response to that the plaintiff's argue two
7 things and it was sort of unintelligible. They said well
8 it's in his name and they say well it's in the name of the
9 trust.

10 THE COURT: That's what's confusing me. I got a quick
11 claim deed ---

12 MR. POWELL: Correct.

13 THE COURT: --- that's dated 14th of April 2010, where
14 he quick claims to himself the life tenant the life estate.
15 And then it starts talking about the trustees of with the
16 Pinckney living trust dated March 16th, 2010, which is
17 right at a month before this.

18 MR. POWELL: I believe the intent was for Mr. Pinckney
19 to convey to himself a life estate with the remainder in a
20 trust. I don't think the language having to do with fee
21 simple applies. You either have a life estate or you
22 don't. And the position that they are now taking is that
23 its in the name of a trust. Procedurally they didn't pled
24 it that way. We filed a motion, and if they're gonna say
25 that Mr. Pinckney has standing in the name of a trust they

1 have to show that he's the trustee and we still haven't
2 gotten that. We didn't get that in discovery, we didn't
3 get that in response to our motion, so I think the Court's
4 order is proper. We said show us that he is the real party
5 in interest and they still haven't done that. We still
6 don't know that he's the trustee. Mr. Halford says that,
7 we haven't seen any documents that show that.

8 THE COURT: I hadn't seen Musgrave's power of
9 attorney.

10 MR. POWELL: That's a separate issue. I would just as
11 to the Pinckney thing no evidence in opposition showing
12 that he's the trustee and then that makes - that makes the
13 Rule 17 Motion to Substitute a party moot, because the
14 order is correct. As to Musgrave he's clearly not the
15 title holder. The plaintiff's still aren't saying that
16 he's the title holder. They say that he has the power of
17 attorney. Rule 17 does not speak to someone having power
18 of attorney being the real party in interest. It does not
19 say that if you have power of attorney you can bring an
20 action in the name of someone else who is the title holder.

21 THE COURT: The rule doesn't have to does it? The
22 power of attorney gives me the right to sue on behalf of my
23 wife, I got the right to sue on it whatever the rule says.

24 MR. POWELL: I don't believe so.

25 THE COURT: No?

1 MR. POWELL: Unlike the case in Pinckney, Rule 17
2 speaks to someone bringing an action in the name of a
3 trustee, et cetera, et cetera.

4 THE COURT: So all these power of attorneys that are
5 floating around where somebody gives the power, I mean
6 we've got another case that Judge Alford heard yesterday
7 that's about as complex as this one doubled. I've heard a
8 lot of it, unfortunately I didn't have to hear it
9 yesterday, where one of the most vociferous aggressive
10 litigators is operating under a power of attorney from his
11 demented mother and nobody's said he can't. For that
12 reason the demented mother would be - I know this isn't -
13 it doesn't involve dementia but nobody said he can't pursue
14 his litigation based on power of attorney that his mother
15 while lucid signed.

16 MR. POWELL: He may have the ability to pursue the
17 action on her behalf as it pertains to a relationship
18 between themselves based on whatever legal that document is
19 that has not been produced. But the action must be brought
20 in the name of the real party and interest. The rule
21 requires it, it hasn't been done. Procedurally we pointed
22 that out. It still hasn't been done and therefore summary
23 judgment is proper.

24 And nothing new has been presented pursuant to Rule 59
25 that changes the fact that she has title and he does not,

1 including the referenced power of attorney that Mr. Halford
2 says exist. Now they in summary judgment proper she can
3 bring a new action, she can bring a new action but
4 procedurally, it's correct. It's correct as to Mr.
5 Pinckney as well based on the record before the Court.

6 THE COURT: Well even though we hadn't been the ten
7 days if there is no objection I will take that under
8 advisement because I think everybody's position is spelled
9 out pretty well. Would you like to add a brief to that
10 issue or rely on your arguments? You can tell me if you
11 don't want me to rule because it's not ten days. I'm just
12 thinking we got a April 22nd date.

13 MR. POWELL: I consent to it. It's fine. I will put
14 something in writing. In fact if its all right with the
15 court in five days.

16 THE COURT: That's fine. I've got an in chambers week
17 next week and I hope to work on this so that will be fine.

18 Now the destructive testing. We still got twenty
19 minutes.

20 MR. HALFORD: Can I briefly respond to the Pinckney,
21 Musgrave situation?

22 THE COURT: You may.

23 MR. HALFORD: I just want to point out on Rule 17.

24 I mean power of attorney, the Court just hit it
25 straight on the head. It's a contract between you and your

1 spouse. Dave Musgrave is even authorized to bring the
2 statute and therefore under the rules of civil procedure is
3 a party capacity or he isn't. Well let's just say the
4 Court calls for this - lets say you go but procedurally we
5 didn't identify David Musgrave power of attorney because
6 you know bad the caption in this case is. What's the harm
7 in substituting Dave Musgrave? How can they assert any
8 prejudice whatsoever?

9 They deposed and I deposed the elder father for over
10 four hours. They deposed Barbara Musgrave but this went
11 back - why did they even do that? That occurred June 15th
12 of 2012, so they've had plenty of opportunity, they're not
13 prejudiced at all. Lastly with Mr. Pinckney. This is
14 simply an estate planning, it's for his family. He's
15 right, I didn't plead trustee Juontonio Pinckney, but if he
16 is a trustee of an expressed trust he is covered under Rule
17 17. So he lives there and nonetheless, you know, the trick
18 here is and it's more not like we're not candid with the
19 court. We all are doing our jobs of wrestling for our
20 clients.

21 The problem is we had a discussion about this, its
22 designed to make it appear there is no privy. All these
23 people live in homes purchased from his client. There is
24 your privy. So in the case that David Musgrave of showing
25 you I think its Exhibit Five that was the contract he wrote

1 a check, the contract actually told Stonecrest Villas of
2 Tega Cay, LLC., how they want to take title which was to
3 Barbara Musgrave. They suffered no prejudice here, Judge.

4 THE COURT: I'll take a look at it. What about
5 constructive testing?

6 MR. HALFORD: That motion was made before Your Honor's
7 order on the common elements and I have reviewed and I can
8 tell you my people would like to test. What we're talking
9 about is a lot in the community.

10 THE COURT: Lot 20?

11 MR. HALFORD: Yes, sir. Thank you, you're on target
12 there. It's an exposed concrete slab. We don't know what
13 the plans are. We know what the rumors are from
14 depositions and so forth but one of the major things and
15 again the plaintiff's haven't decided what they would do
16 with this issue involving the common elements.

17 I understand and respect the Court's ruling but the
18 gravel under the slabs and that was a big issue for my
19 client Mr. Gonzales. You remember he was the guy
20 referenced in the 2007 e-mail where the slab, the tiles had
21 to be replaced four or five times over. We got another -
22 I've got a series of four clients out there on slabs which
23 has suffered structural distress. Most of the community
24 along with the retaining wall that you're aware of,
25 Buildings One through Nine, eight of the nine buildings

1 according to the deposition of Ms. Mendonza failed. Now
2 they have in their business judgment carved out that issue.
3 We made the motion for constructive testing because that
4 Lot 20 is still in the name of Mr. Fankhouser's entity,
5 Your Honor.

6 My expert Dennis Hall got a photograph to know why we
7 did it. At the time the lot was under construction didn't
8 appear to show gravel. There is evidence in this case
9 going way back to '06 where Mr. Fankhouser at least
10 receives correspondence saying in response to your request
11 to eliminate gravel and use suitable fill. The architect
12 of record at that time advises him that we're required to
13 adhere to the recommendation of the soil issue. So later
14 in this case in February of 2010 that became an issue and
15 we agreed to do testing. The COA came in and tested two of
16 my client's units. One was Mr. Gonzales, the other one was
17 Ms. McCard. You recall Ms. McCard purchased her unit in
18 2010. Both units come up lacking four inches of gravel.
19 There was gravel found but the point is there wasn't the
20 requisite amount. This lot 20 now comes into play and I'll
21 be brief since we're running out of time.

22 THE COURT: Well I remember very well because part of
23 the issue was that where your clients testing was made the
24 plans don't show the gravel under that particular point or
25 pier or whatever it is. And my concern at that time also

1 as to what's happened on Lot 20 is not relevant to the
2 other lots and whether or not there is - and also sort of
3 factiously ask you if your client would abandon their
4 gravel claim if you found gravel in there. So I know the
5 issues very well. But I --

6 MR. HALFORD: So our point was that slab, Your Honor,
7 again the court has already ruled as to the common
8 elements. The slab can be tested straight through the
9 center without any prejudice to any party. And it's just
10 more approbative with the construction practices before the
11 court. And it affects a number of homes constructed over a
12 number of years. This last slab is nobody's home. It's
13 just a bare exposed concrete pad out there. And we didn't
14 do the testing now. The COA does that. Okay. But if in
15 fact the testing was off let's go find out, let's go
16 through the center of that slab.

17 MR. POWELL: May it please the court.

18 Your Honor, this is a motion pursuant to Rule 34 to
19 conduct additional discovery brought on behalf of the
20 plaintiffs. And our opposition to that is two fold.
21 Number One: It's not reasonably calculated to lead to
22 discovery of admissible evidence. And secondly and more
23 importantly, based upon where we are in this case and the
24 scheduling order that's in place.

25 As to the first issue it not being reasonably

1 calculated to lead to discovery of admissible evidence that
2 lot and that building pad unlike every other structure
3 that's out there has not yet even been submitted to the
4 horizontal property regime as an amendment to the Master
5 Deed in order for it to be sold because no structure has
6 been built upon it. And it is not now and has never been a
7 subject of this law suit. In Your Honor's order dated
8 January 13th of this year where you granted the COA partial
9 summary judgment as to the plaintiff's claims and approved
10 of the settlement, the settlement included all claims
11 involving the exterior envelop and common elements as
12 defined in the Master Deed.

13 And on Page 10 specifically included any and all
14 claims related to the alleged lack of gravel under the
15 pads. We submit that Building 20 is not part of this case,
16 never has been, and Your Honor's order gets rid of all
17 alleged quote unquote gravel to the plaintiff's. They are
18 a common element claims specifically included in the
19 settlement and included in Your Honor's January 13th order.

20 Secondly, the plaintiff's had the -----, they are the
21 masters of their complaint, they are the masters of their
22 claim, they had the burden of proof. Mr. Halford says well
23 the COA went out and tested our folks units. Well as you
24 know from this morning they sued the COA so there are
25 claims from the plaintiff's toward the COA. But if the

1 plaintiffs want to show that we did something wrong then
2 they have the burden of proof. And that burden of proof
3 through expert testimony to show that our folks did
4 something wrong. And they filed these - the first four
5 complaints subsequently to consolidate and amended in June
6 of 2010, and we are now scheduled for trial in April and
7 they're asking you today to conduct testing.

8 We had a status conference in this case back in
9 November and some issues came up where there was some
10 request for additional time. We didn't modify the dates
11 that were set forth in the previous scheduling order. The
12 prior order and the order that's in place now says with
13 respect to the plaintiffs they are to finalize
14 investigation. Finalize investigation and submit all
15 causation and liability pending by March 31st, 2012.

16 We had staggered dates, the plaintiff's go first.

17 The COA goes next. My folks went after that. The
18 third party defendant's went after that. The forth party
19 defendants went after that. What Mr. Halford is saying
20 what we think we show in our opposition to their motion for
21 Summary Judgment is the COA didn't do a good enough job of
22 proving that the plaintiff's claims are right and they
23 didn't. So now they say well the COA didn't prove our
24 claims for us, we want to go do some additional discovery
25 on the eve of trial to prove our own claims and we want to

1 drill on property that you own and hasn't been submitted to
2 the horizontal property regime. We are a year past the
3 deadline, we are thirty-two months into this case, it
4 violates the scheduling order. Even if there was no
5 scheduling order in place it would not be timely given the
6 posture of the case for trial.

7 THE COURT: Mr. Halford, anything else?

8 MR. HALFORD: Briefly. What are you submitting when
9 this pad Lot 20 transfers whether to the COA or to a new
10 owner? Those are the common elements. And I can tell you
11 that contractual distress in the slabs at least two of my
12 people in that perimeter wall, there has been a lot of
13 documentary evidence that suggest that the pads are not
14 constructed right, not the least of which is very bad
15 cracking and movement.

16 So it's again if, if they're right and the slabs were
17 just drilled in incorrect places, then who's gonna be
18 bothered by a vacant concrete slab that hasn't been built
19 upon and isn't more approbative than the building practices
20 that have been employed all along in this development
21 called Stonecrest because that lot is poured and the
22 concrete cured in the year 2010 well after the GCSC and
23 it's cracking, you can see it. So I'll leave it to the
24 Court's discretion.

25 THE COURT: All right. Now more confusing, but even

1 though the claim for damages for gravel has been excluded,
2 would not the plaintiff's still be able to bring up the
3 gravel issue if it's part of the causation of their
4 problem? Not to seek damages but as to causation?

5 MR. POWELL: Here's the way that I understand the
6 universal thought on the gravel issue. Our position was
7 that the plaintiff's if they will bring the quote unquote
8 gravel claim they have to bring it in this action. Our
9 position as to the COA was if you're gonna bring the gravel
10 claim bring it in this action. We had a disagreement about
11 that and we agreed to carve out but we don't agree that
12 they bring some later subsurface soil condition action that
13 its not subject to our absolute defense that it should have
14 and must have been brought in this case. So that's an
15 important thing for the Court to understand.

16 I don't know what Mr. Halford's really talking about
17 when he's talking about gravel. It's a different issue
18 than soil compaction. Soil compaction causing movement
19 which is what was carved out of the settlement, and is
20 carved out in your order, versus whether or not there is
21 four inches of gravel beneath the pad that the plaintiffs
22 have a theory, and we believe it's a very suspect one, that
23 the plaintiff's theory is that there is either not enough
24 or no gravel beneath the concrete pad so that water is
25 literally going around the footer up, through the ground

1 through a plastic sheet that they admit that is there and
2 then through a four inch slab and then up through a
3 hardwood floor, or whatever the floor cover is, and into
4 their houses.

5 Now if that's their theory, that's fine. If they want
6 to allege that, that's fine. If they want to investigate
7 it, that's fine. But look where we are? Look where we are
8 in the case. I really can't believe we're even talking
9 about it. And if they want to do additional discovery now,
10 and their theory is there is no gravel underneath their
11 units, it's not a class action. So whether there are ten
12 plaintiff's or twelve, go drill your own floors. That's
13 your theory there's no gravel underneath my unit, go test
14 it, and why haven't you done it so far?

15 I don't know the answers to those questions. Only
16 they know the answers to those questions. But we're very
17 late in the game to be asking for discovery a year after
18 their experts deadline for submitting opinions and for
19 finalizing investigations as the scheduling order reads.
20 And in the absence of an order as I indicated earlier I
21 think we're way beyond the time.

22 THE COURT: Well I'll take these under advisement and
23 I know we're getting close so I'll rule probably on the
24 stay first. I appreciate everybody digesting their
25 arguments down so we can finish within the time allotted

1 and we did. We'll take a short break and get the criminal
2 trial people back in posture and get an order out as quick
3 as I can.

4 MR. POWELL: Judge, I filed a motion for some writs of
5 commission in case we do go forward. Some witnesses in
6 North Carolina, if nobody has any objection I can handle
7 that later directly through your office. I don't want to
8 assume anybody has any objection to it. Or we can handle
9 that now if you're willing to sign off on it.

10 THE COURT: I'll sign off on it now. I mean I don't
11 have any problem with that. I don't know that anybody
12 objects to who you're gonna call as witnesses.

13 MR. WILKES: Are those for depositions, Graham?

14 MR. POWELL: They are to appear at trial on April
15 22nd. If we don't go forward then I will withdraw them but
16 they are to have the courts - the court's in North Carolina
17 where these witnesses reside appear at trial.

18 MR. WILKES: You think you can have a North Carolina
19 Court direct a North Carolina resident to come to South
20 Carolina to testify?

21 MR. POWELL: Yes.

22 THE COURT: We try that. It doesn't always work but
23 we try it.

24 MR. POWELL: If we're going to get them here we need
25 to start.

1 THE COURT: I know.

2 MR. POWELL: May I approach?

3 THE COURT: Yeah. We quite frequent are on the
4 receiving end of these. Have to send out witnesses as to -

5 (PAUSE.)

6 THE COURT: All right, we'll be at ease for about five
7 minutes and we'll get Mr. Maldonado and everybody.

8 We do have the jury?

9 THE BAILIFF: Yes, sir.

10 (COURT IN RECESS AT 11:12 A.M..)

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CERTIFICATE OF REPORTER

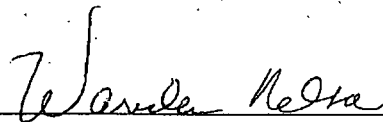
State of South Carolina)

)

County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 20th day of March, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



Wanda Nelson, CVR-M
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: 5-14 / 2013

State of South Carolina.,)

In the Common Pleas Court
of York

County of York.)

Case No.: 2010-CP-46-02326

Juontonio Pinckney.)

Plaintiff.,)

-vs-)

Transcript of Record

Brock L. Fankhouser.,)

et al.,)

Motion for Summary Judgment

On the Pleadings as to

Plaintiff's Claim for

Defendants.)

Exterior Damages

July 30, 2012

York, South Carolina

B E F O R E:

Honorable John C. Hayes, III, Judge.

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

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I-N-D-E-X

WITNESS

BY:

PAGE NO.

No Witnesses were examined.

E-X-H-I-B-I-T-S

NO.

DESCRIPTION

ID.

EVD.

No Exhibits were received into the record.

1 (ON THE RECORD IN THE MATTER OF JUONTONIO PINCKNEY
2 VERSUS BROCK L. FANKHOUSER, MOTION FOR SUMMARY JUDGMENT ON
3 THE PLEADINGS AS TO PLAINTIFF'S CLAIM FOR EXTERIOR DAMAGES,
4 MONDAY, JULY 30, 2012 AT 11:00 A.M..)

5 THE COURT: All right. The next motion, Stonecrest
6 Villas motion to partial summary judgment as to Plaintiff's
7 claims for exterior damage filed June 6.

8 MR. DRESSLER: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. DRESSLER: Brent Dressler for the Association. I
11 had actually framed that as a motion for a judgment on the
12 pleadings.

13 To the extent that it matters, --

14 MADAME COURT REPORTER: I'm sorry, Mr. Dressler, the
15 mower has got me back here. You're going to have to speak
16 up a little bit louder, okay.

17 MR. DRESSLER: Sure.

18 MADAME COURT REPORTER: Thank you.

19 THE COURT: We're going to try to get that stopped.

20 MR. DRESSLER: I'll wait then.

21 THE COURT: No, go ahead. Go ahead and speak loud but
22 we'll try to get them...

23 MR. DRESSLER: Well I think to the extent that it
24 matters, every lawyer in this courtroom is gonna be hanging
25 on your decision on this particular motion because we

1 cannot resolve this mess without some sort of definitive
2 guidance from the court as to who is gonna get the line
3 share of the money.

4 I have looked at your order and reviewed the case law,
5 I will try not to reinvent the wheel to the extent that we
6 have one already. But I will say this, it seems from your
7 order that you are suggesting through the case law that's
8 already been decided that ultimately the recovery goes to
9 the Association. And that is of course because, and Mr.
10 Halford has pointed out, we have the contractual
11 responsibility to repair this. And I'm not gonna get into
12 what all was just argued before, but we need the money to
13 do it, and we can't do it when we've got a dozen out of
14 eighty-nine homeowners claiming that they're entitled to
15 it.

16 Now if they're not claiming that they're not entitled
17 to it because quite frankly I can't tell. What prompted
18 this was a demand for policy limits from the plaintiffs for
19 unspecified damages. And I could not think to my self how
20 in the world they would be entitled to Two Million Dollars
21 in damages unless of course they're claiming for exterior
22 damages. Maybe they're not; maybe they have other damages.
23 But that certainly did spark the idea that hey we need to
24 clear up the air on this confusion.

25 Now the case law obviously says that the Association

1 has the right to pursue this. There is suggestion the
2 Plaintiffs also have the right to pursue this. I have
3 advanced an argument that under the most recent case
4 decided that it speaks the language that if the Association
5 fails to pursue developer, general contractor, whoever it
6 may be; then the Association then may be liable to the
7 owners. I'm suggesting that that language effectively
8 eliminates an owners ability to pursue a claim on exterior
9 damages for so long as the Association is pursuing that
10 claim which here we are.

11 Admittedly that's a novel argument and I don't know if
12 it's a position that you necessarily have to adopt. But I
13 have read - what I have read your order to suggest is that
14 even if the plaintiffs want to pursue this claim, if they
15 want to pay a lot of money to their expert to prove up
16 these exterior damages, that ultimately as long as the
17 money goes to the Association, I'm okay with that. We just
18 need an order that says that I have the right to go and
19 scream at Cam - not Cam, Graham, Mr. Powell and say give me
20 my money and he can't turn around and say well I'm multiply
21 exposed. I can have twelve additional claims from all
22 these other owners for exterior damages. We just need to
23 clear that up.

24 And so for that reason because I think you can decide
25 the issue on the pleadings, I'm suggesting you enter an

1 order that at a minimum declares that any money awarded by
2 a jury in this case for exterior damages will enure to the
3 benefit of the Association. And that if for some reason
4 the plaintiffs manage to put their hands on that money,
5 that there is a constructive trust on it, that it needs to
6 be paid over to the Association for the purposes of
7 effecting these exterior repairs and everybody wants to be
8 paid. Thank you, Your Honor.

9 MR. HALFORD: May it please the court. Briefly in
10 response, Your Honor. The plaintiffs have pleaded fifteen
11 causes of action and allege that the plaintiffs don't have
12 standing - and I reviewed - let the court decide with the
13 scarcity of the case law regarding this. The problem is
14 the plaintiffs here, the rest of these eighty-nine owners,
15 they hold the ownership interest. The common elements are
16 held in an undivided joint tenants in common interest okay.
17 And the problem is the COA has no interest, zero, none.
18 They have an obligation under the master deed to effect
19 prompt repair and they've aggregated that duty.

20 So I put it up a while ago on the screen, at some
21 point I don't care if you view it as agency control
22 amalgamation, the builder and the COA were one at one
23 point. And they were on notice in February of 2010 under
24 the Notice to Cure statute and the statute, and a letter
25 both, told them what to do. And so when we talk about this

1 right, we're suing the builder also for damages. They
2 aggregated that right, they had ample opportunities. In
3 fact they've known, and I think that we've established that
4 here this morning, since as far back as 2008, but did you
5 really expect a builder to file what's a multi-million
6 dollar law suit, a cause of action against themselves when
7 that conflict in fact existed?

8 So with regard to exterior damage claims, this is
9 going to be a costly project. We understand that there are
10 homes that have to be fixed, my plaintiffs haven't and
11 neither has our expert, haven't even conceded yet that
12 these repairs are practical. We're talking about taking
13 and deskinning the entire neighborhood, taking --

14 THE COURT: Well let me just stop you there because
15 this is where kind of the meat of the coconut is.

16 And I'm not telegraphing how I plan to rule, but I do
17 have some concerns if you read my previous order. How can
18 your twelve do anything to assist other than Number One to
19 contract to have anything done to their own units let alone
20 contract to have something done by a contractor for the
21 entire development? How can they contract with anybody to
22 do that? That is, if they get six million dollars, what do
23 they do with it?

24 MR. HALFORD: That is the catch twenty-two in this
25 case, Your Honor.

1 THE COURT: All right.

2 MR. HALFORD: We bought into a master planned
3 community where it's not our obligation to maintain the
4 repairs. And so when it's spun like the plaintiffs are
5 seeking this big sum of money this doesn't even come up
6 until the defendants in the case were given a type of
7 derivative demand by our claimants. And then the issue of
8 damages pops up and who's entitled to those damages.

9 My plaintiffs have not just pleaded let's repair the
10 common elements, in fact they've pleaded for many different
11 things. Punitive damages, unfair trade, rescission.
12 Frankly they take the position we shouldn't have to live
13 through what's coming. If it was built right in the first
14 place then maybe it wouldn't justify rescission. In this
15 case they think it does.

16 So, but to answer the court's question directly, there
17 is no way none of my plaintiffs can step outside and fix
18 the exterior of their units. So yes some of it is a
19 damages case that goes to how much money's gonna be there
20 to go around at the end of the day. But in terms of the
21 right to seek that money, plaintiff's claims came first in
22 time. As terms of whether or not there is a fact and a
23 right to pursue that money, I argue they completely
24 aggregated that right and they didn't timely do so. And
25 then again where I've tried to take the court during the

1 course of our argument all morning is you've got to look at
2 notice, a nonprofit notice, the shareholder notice.

3 At that point the law triggers a duty and even then
4 they didn't act. So at what point were the plaintiffs not
5 going to be able to exercise self help? Were we gonna sit
6 around and wait until October, November the following year?
7 We put them under notice under the statute which is what
8 the law requires us to do. It was actually hand delivered
9 to the builder in Matthews, North Carolina. The COA at
10 that time got notice too by registered mail.

11 And again I think they've aggregated that right, so to
12 say that we don't have standing in the suit. I can't find a
13 case that addresses it, Your Honor, you're aware of this
14 much more than I am. And the point is to actually say
15 we're not entitled to damages because of exteriors but what
16 these people were buying were homes, they were condominium
17 homes with common elements, but we have the ownership
18 rights. We own the common interest in an undivided estate.
19 The COA owns nothing. They own the contractual right to
20 repair and that's what gives the plaintiff's standing here.

21 MR. DRESSLER: Brief response.

22 He raises three issues. The first is what you
23 touched on is how can an owner do anything. You take away
24 the case law that gives the COA standing to file a claim
25 you got a real problem because you've got at least eighty-

1 nine tenants in common all of whom are arguably necessary
2 indispensable parties to the case. You can't have one
3 tenant in common file a law suit and dictate basically the
4 destiny of other tenants in common. The way the Supreme
5 Court has cured that problem is you give the COA's standing
6 to raise the claim because the COA effectively represents
7 the interest of all the eighty-nine owners.

8 As far as the statute goes we're not a builder
9 developer, the statute doesn't apply to us. And his last
10 point actually underscores, and I don't mean to help out
11 co-counsel or anything, but I do want you to appreciate
12 that his last point underscores why there is no fiduciary
13 duty here. I've got conflicts between these owners
14 potentially as to who wants what and when and where and
15 how. They want it now, they want it later, they don't want
16 to pay for it, they don't want to pay for it, they want
17 some of this money, they want some of that money. As the
18 Association I cannot be beholding to the individual desires
19 of eighty-nine individuals. That puts me in a potential
20 conflict of almost eighty-nine people.

21 I have a contractual obligation as the Association to
22 go get the money, make the repairs as best we can. And if
23 we can't get all the money because of covered issues, or
24 lord knows what else is gonna come up with this case, and
25 then they're going to get an attestation but it's all done

1 by contract, and we're trying to work through it and get
2 these folks down the road. Thank you, Your Honor.

3 THE COURT: All right. Next on my list is Al-Mega...

4 (END OF TRANSCRIPT.)
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CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for York County, South Carolina, on the 30th day of July, 2012.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda Nelson
Wanda Nelson, CVR
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: 4-29 / 2013