

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III,  
Circuit Court Judge

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COURT OF APPEALS

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Case No.: 2012-213730

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Juontonio Pinckney, Josephine Sciacca, Addie Smith, James Barone, Deborah Barone,  
Ismael Gonzalez, Valerie Gonzalez, Joe Moore, and Sandra Moore, Plaintiffs

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., Defendants,

Of whom Epcon Communities, Inc. and Epcon Communities Franchising, Inc., are the  
Respondents,

And Fankhauser Property Group, Inc. is the Appellant.

Fankhauser Property Group, Inc., Third Party Plaintiff,

v.

Architectural Alliance, Ltd., Exterior Expressions of North Carolina, Inc., Al-Mega  
Construction, Inc., Procar, Inc., Procar II, Inc., The Southeastern Group, Inc., Lucas  
Lawn and Landscape, Inc., Jose Simenez, individually and d/b/a/ M&L Roofing Co.,  
LLC and/or MB Roofing Company, Third Party Defendants,

Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., Third Party  
Plaintiff,

v.

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

Exterior Expressions of North Carolina, Inc., Fourth Party Plaintiff,

v.

Marcos Gonzalez, Fourth Party Defendant

Procar, Inc. and Procar II, Inc., Fourth Party Plaintiffs,

v.

Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Construction Co., Balanos Framing, Inc., Ricardo Hernandez, and Silverio Cortez, Fourth Party Defendants.

Al-Mega Construction, Inc., Fourth Party Plaintiff,

v.

Noe Perez, Juan Abundez Saucedo, and Moises Chavarra Hernandez, Fourth Party Defendants.

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FINAL BRIEF OF RESPONDENTS  
EPCON COMMUNITIES, INC. AND EPCON COMMUNITIES  
FRANCHISING, INC.

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## STATEMENT OF ISSUE ON APPEAL

**WAS THE CIRCUIT COURT CORRECT IN FINDING AS A MATTER OF LAW THAT FPG IS REQUIRED TO DEFEND AND INDEMNIFY EPCON PURSUANT TO THE INDEMNIFICATION CLAUSE IN THE FRANCHISE AGREEMENT BETWEEN THE PARTIES?**

## STATEMENT OF THE CASE

Pursuant to Rule 208(b)(2), SCACR, Respondents Epcon Communities, Inc. and Epcon Communities Franchising, Inc. (collectively, “Epcon”)<sup>1</sup> elect to adopt Appellant’s statement of the case for purposes of this appeal.

## ARGUMENT

**THE CIRCUIT COURT CORRECTLY FOUND AS A MATTER OF LAW THAT FPG IS REQUIRED TO DEFEND AND INDEMNIFY EPCON PURSUANT TO THE FRANCHISE AGREEMENT BETWEEN THE PARTIES.**

**A. THE ISSUE OF WHEN THE CAUSE OF ACTION FOR INDEMNITY ACCRUED WAS NOT PRESERVED FOR APPELLATE REVIEW AND CANNOT BE CONSIDERED.**

The circuit court found FPG was obligated to defend and indemnify Epcon under the terms of the Franchise Agreement. (Order Granting Epcon Summary Judgment, R. pp. 20-30). FPG raises for the first time in its Initial Brief the argument that the cause of action for indemnification has not yet accrued under Ohio law. Because FPG did not advance this argument before the circuit court, this Court cannot consider it. *Wilder Corp. v. Wilkie*, 330 S.C. 71, 76, 497 S.E.2d 731,733 (1998) (“it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”). *See also Creech v. S.C. Wildlife & Marine Resources Dep’t.*, 328 S.C. 24, 491 S.E.2d 571 (1997).

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<sup>1</sup> For convenience, Respondents adopt the definitional convention Appellant Fankhauser Property Group, Inc. (“FPG”) used in its initial brief by referring to Epcon Communities, Inc. (“ECI”) and Epcon Communities Franchising, Inc. (“ECFI”) collectively as “Epcon.” As an affiliate of ECFI, ECI also is entitled to indemnification from FPG under the Franchise Agreement. Otherwise, ECI denies and disputes any involvement in the activities giving rise to the allegations in Plaintiffs’ Complaint.

If the Court considers FPG's argument concerning the accrual of the indemnification cause of action, it should affirm the circuit court's grant of summary judgment in favor of Epcon, because it was proper under the law governing the contract at issue in this case. Section 20.2 of the Franchise Agreement between ECFI and FPG provides that "this Agreement shall be deemed to have been entered into under, and for all purposes shall be interpreted, construed, and governed by, the local laws of the State of Ohio, without application of its conflicts of laws principles." (Epcon Motion for Summary Judgment, Franchise Agreement, Exhibit A, R. p. 145)

The indemnification clause at issue in this case is set forth in its entirety in Section 16.1 of the Franchise Agreement and reads as follows:

[FPG] shall indemnify and hold harmless, to the fullest extent permitted by law, [ECFI], its directors, officers, employees and agents, entities affiliated with Franchisor through common ownership [i.e. ECI], and directors, officers, employees and agents of such affiliated entities, from and against any and all claims, debts, liabilities, losses, expenses, lost profits, attorney's fees, court costs, settlement amounts, and judgments, incurred in connection with any action, suit, proceeding, claim, demand, investigation, or inquiry (formal or informal), or any settlement thereof, arising directly or indirectly from, as a result of, or in connection with, [FPG's] ownership or operation of its business hereunder and/or its use or utilization of the Development System, including without limitation the use of any architectural plans and designs provided by [ECFI]. In the event that any action, suit, proceeding, investigation or inquiry is instituted, or any claim or demand is asserted against or involving [ECFI], [FPG] shall resist and defend such action, suit, proceeding, investigation, inquiry, claim or demand at [FPG's] sole cost and expense or shall cause it to be resisted or defended by an insurer. [FPG] shall also make every reasonable effort to seek to have [ECFI] dismissed or released from liability in the event of such action, suit, proceeding, investigation, inquiry, claim or demand. [ECFI] shall have the right to resist and defend itself in and/or against any such action,

suit, proceeding, investigation, inquiry, claim or demand, and, upon receipt of written notice from [ECFI] of the amount expended by [ECFI] in such defense, [FPG] shall, within ten business days of such receipt, reimburse [ECFI] in full for the total amount of such expenses.

In its brief, FPG cites *Stengel v. Columbus*, 74 Ohio App.3d 608, 613, 600 N.E.2d 248, 251 (Ct. App. 1991), to support its argument that Epcon's cause of action has not yet accrued. FPG misinterprets *Stengel*. *Stengel* specifically provides that the language of the contract controls the accrual of the right to indemnity when an express contract is involved. *Id.* 74 Ohio App.3d at 613, 600 N.E.2d at 249. Explaining further, the court noted:

If the contract provides indemnity against loss, the alleged indemnitor becomes liable and the cause of action accrues when the person seeking indemnity suffers a loss. If the contract provides indemnity against liability, the indemnitor becomes liable and the cause of action accrues when the liability of the indemnitee arises.

*Id.* (citing *Firemen's Ins. Co. v. Antol*, 14 Ohio App.3d 428, 471 N.E.2d 831 (Ct. App. 1984)). A plain reading of the indemnification clause above reveals that: (a) Epcon and FPG intended the indemnification clause to provide coverage to the fullest extent permitted by Ohio law; and (b) the indemnification clause requires FPG to indemnify and hold harmless Epcon for losses as well as liabilities. Under Ohio law, then, the cause of action under the indemnification agreement between the parties accrued when Epcon suffered a loss. *Id.* So far in this lawsuit, Epcon has suffered loss in the form of attorneys' fees and costs. Therefore, it was proper for the circuit court to enter summary judgment in Epcon's favor on the contractual indemnification claim and to award attorney's fees and costs incurred as of October 3, 2012 in the amount of \$210,864.04. (Order Granting Epcon Summary Judgment and Order Awarding Epcon Attorneys' Fees

and Costs, R. pp. 38-40). If Epcon ultimately incurs further liability in this case and/or additional costs or expenses, it would move the circuit court for an additional order awarding the appropriate damages.

**B. THE CIRCUIT COURT CORRECTLY GRANTED EPCON'S MOTION FOR SUMMARY JUDGMENT REGARDLESS OF WHETHER PLAINTIFFS' ALLEGATIONS AGAINST EPCON ARE INDEPENDENT.**

FPG seeks to skirt the indemnification clause by attempting to draw a hollow distinction between FPG's conduct and Epcon's conduct. As the trial judge stated in his summary judgment Order, "[t]he crux of this action is alleged defective construction in the Project." (Order Granting Epcon Summary Judgment, R. p. 27). FPG does not contest the fact that Epcon was not involved in the construction of Stonecrest Villas of Tega Cay (the "Project"). FPG argued, however, that its indemnification obligation was not triggered, because Plaintiffs asserted direct allegations against Epcon. (R. p. 28). Rejecting FPG's argument, the circuit court invoked the old proverb "in for a penny, in for a pound" and held the "indemnity clause provides...indemnification for any and all claims to which Epcon has been exposed by virtue of conduct which in any way relates to the Franchise Agreement. Here, but for FPG's proceeding under the Franchise Agreement, Epcon would not have any exposure to Plaintiffs." (R. p. 28). The court's ruling comports with Ohio law inasmuch as it found that, notwithstanding allegations of direct liability against Epcon, all of Plaintiffs' claims arose from activities under FPG's contractual control under the Franchise Agreement. *Kovach v. Warren Roofing & Illuminating Co.*, 2007 Ohio App. LEXIS 2314. As such, independent allegations of

negligence are not sufficient to “preclude an otherwise enforceable obligation to indemnify or defend.” *Id.*, 2007 Ohio App. LEXIS at P17.<sup>2</sup>

The Franchise Agreement grants FPG the right to use a bundle of intellectual property rights collectively defined as the “Development System.” (Epcon Amended Memo in Support of Summary Judgment, Exhibit A (Franchise Agreement), R. pp. 234-235). Specifically, Section 2.1.1 of the Franchise Agreement defines “Development System” as:

[ECFI’s] method, pattern documents, materials, know-how, knowledge, process, and procedure used for development, construction, and marketing of the residential, multi-family community using a unique architectural design, as well as other proprietary and confidential information, including copyrighted and patented material, and material for which the copyright registration or patent is pending, including, without limitation, all architectural plans and specifications for two- and four-unit buildings, architectural plans and specifications for the clubhouse, site planning guidelines, and sample condominium association materials provided by [ECFI]. The Development System shall be deemed to include any method, pattern, process, or procedure used by [FPG] during the term of this Agreement, along with any modifications or changes thereto.

In addition to granting FPG the right to use the Development System, the Franchise Agreement imposed upon FPG the obligation to ensure the plans and specifications comprising a portion of the Development System conformed to all applicable legal requirements. (Order Granting Epcon Summary Judgment, R. pp. 25-26; Epcon Amended Memo in Support of Summary Judgment, R. pp. 225-226).

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<sup>2</sup> FPG also asserts that the Stonecrest Villas of Tega Cay Condominium Owners Association’s (“COA”) claim against ECFI for breach of express warranty should preclude enforcement of the indemnification clause. The trial court granted ECFI’s Motion for Summary Judgment on this claim. (Order Granting ECFI’s Motion for Summary Judgment on COA’s Third-Party Complaint dated August 27, 2010, R. pp. 3-8). The Court should apply the *Kovach, supra*, analysis to the COA claim as well and find that the COA’s express warranty claim arose from activities under FPG’s contractual control and does not defeat Epcon’s contractual indemnification claim.

FPG concedes the Franchise Agreement's indemnity clause requires FPG to indemnify Epcon for claims related to: (1) FPG's ownership or operation of its business under the agreement; (2) FPG's use of the Development System; or (3) both. (FPG's Initial Brief, p. 8). FPG was the general contractor for the Project. (Order Granting Epcon Summary Judgment, R. p. 26; FPG Initial Brief, pp. 1-2). Stonecrest Villas of Tega Cay, LLC was the developer for the Project, which marketed and sold individual units in the Project to purchasers, including Plaintiffs. *Id.* The gravamen of Plaintiffs' Complaint is that a deviation from the plans and specifications and model home designs used to advertise, market and sell units in the Project caused recurring water intrusion and construction defects. (Order Granting Epcon Summary Judgment, R. p. 27). Epcon did not engage in the construction, marketing or sale of any units in the Project. (Epcon Amended Memo in Support of Summary Judgment, R. p. 221). FPG admits Epcon fulfilled its obligations under the Franchise Agreement and is unaware of any facts to support FPG's failure to defend and indemnify Epcon in this matter. (Order Granting Epcon Summary Judgment, R. p. 28). All of the claims against Epcon relate to the allegedly defective construction. (Plaintiffs' Third Amended Complaint ("Complaint"), R. pp. 41-78). In other words, if Plaintiffs were satisfied with the units they bought in the Project, this lawsuit would not have been filed. It is axiomatic, then, that the claims against Epcon arise "directly or indirectly from, as a result of, or in connection with, [FPG's] ownership or operation of its business [under the Franchise Agreement] and/or its use or utilization of the Development System." (Order Granting Epcon Summary Judgment, R. pp. 27-28).

Epcon agrees with FPG's characterization of the Complaint as cumbersome. (FPG's Initial Brief, p. 12) It is clear, however, that Plaintiffs do not assert any causes of action against Epcon that they do not also assert against FPG. (Complaint, R. pp. 41-78). The converse is not true. Plaintiffs assert several causes of action against FPG which are not directed at Epcon, including: Slander of Title, Breach of Fiduciary Duty, Breach of Contract Accompanied by Fraudulent Act, Accounting, Conversion, Civil Conspiracy and Construction Defect. (Complaint, R. pp. 41-78). FPG correctly asserts that Plaintiffs are masters of their own Complaint and FPG has no control over it. (FPG's Initial Brief, p. 9). Just as FPG cannot control Plaintiffs' Complaint, Epcon cannot, either. Epcon, therefore, allocated its legal risk, among other risks, in the Franchise Agreement by negotiating the indemnification clause. Risk allocation between commercial enterprises is acceptable and enforceable under Ohio law. *See Glaspell, infra*.

In several material respects, the case of *Glaspell v. Ohio Edison Co.*, 29 Ohio St. 3d 44, 505 N.E.2d 264 (1987) is instructive and supports the circuit court's entry of summary judgment in Epcon's favor. *Glaspell* turned on the court's interpretation and application of an indemnification clause in a licensing agreement. *Id.* Both the indemnification clause and the type of agreement which were the subject of *Glaspell* are analogous to the clause and agreement at issue in this case.

The plaintiff in *Glaspell* was a cable company employee. *Id.* The cable company possessed the right to use utility poles owned by two utility companies pursuant to a "Joint Use Agreement," which was tantamount to a licensing agreement. *Id.* While performing work on behalf of the cable company, the employee was injured in a fall from one of the utility poles. *Id.* The employee sued the owners of the utility poles, alleging

negligent maintenance of the poles or the willful, careless and wanton conduct<sup>3</sup> of the utility pole owners. *Id.* The utility companies asserted claims for contractual indemnification against the cable company-employer. *Id.*

The *Glaspell* court upheld the validity of the indemnification clause. *Id.*, 29 Ohio St. 3d at 48, 505 N.E.2d at 268. Noting Ohio law generally allows enforcement of indemnity agreements, the court proceeded to analyze the issue of enforceability of indemnification agreements that purport to protect an indemnitee from the financial consequences of his own negligence. *Id.*, 29 Ohio St. 3d at 46, 505 N.E.2d at 265. In doing so, the court reached the conclusion that the typical rule requiring strict construction of such agreements was unnecessary under the facts of the case because “the burden of indemnification was assented to in a context of free and understanding negotiation.” *Id.*

The court, further explaining its analysis, stated:

The parties in the case before us are commercial enterprises of sufficient size and quality as to presumably possess a high degree of sophistication in matters of contract. They all provide services to the general public as their means of producing income and customarily rely on contracts. Each has the financial power to provide against loss by insurance or other means.

*Id.* 29 Ohio St. 3d at 47, 505 N.E.2d at 267.

Simply put, the court determined that the indemnity clause upon which the parties agreed in *Glaspell* was a reasonable allocation of the risks of doing business among fellow businesses, which did not necessitate a narrow and strict construction of the language. *Id.* It noted:

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<sup>3</sup> Because FPG argues that allegations of “intentional” or “willful and wanton” conduct defeat Epcor’s claim for indemnification in this case, Epcor notes that such allegations were asserted in *Glaspell* and did bar the indemnitee’s contractual indemnification claim.

Even a cursory review of the clause at issue demonstrates that it is not an attempt to exculpate appellants for their actions under all circumstances. Rather, the thrust of the agreement is to allocate the burden of additional risk, which risk of harm comes into existence solely as a result of the grant to appellee of rights to access and use appellants' property.

*Id.*, 29 Ohio St. 3d at 48.

For the reasons the *Glaspell* court upheld and required the enforcement of the indemnification clause, so should this Honorable Court affirm the circuit court's order granting Epcon summary judgment on its cross-claim for contractual indemnification against FPG. FPG and Epcon freely entered into the Franchise Agreement and assented to its terms, including the indemnification provision. Epcon and FPG are commercial enterprises. FPG, as a general contractor, certainly is familiar with contracts, both in construction and development of real estate for sale to the general public by and through itself or affiliates, and dealing with vendors, subcontractors and purchasers during the development process.

Furthermore, in accordance with the *Glaspell* analysis, Epcon does not seek to exculpate itself for its actions under all circumstances. *Glaspell, supra*, 29 Ohio St. 3d at 48, 505 N.E.2d at 267. Through the indemnification clause in the Franchise Agreement, Epcon, as franchisor, allocated to FPG, as franchisee, the additional risk associated with FPG's use of the Development System in the development and construction of the Project. As it turns out in this case, the additional risk manifested itself in the form of water intrusion issues, which Plaintiffs allege is caused by construction defects. FPG and Epcon, through the Franchise Agreement, allocated to FPG the risk that Epcon would be exposed to litigation as a result of FPG's use of the Development System. In other

words, Epcon and FPG allocated to FPG the additional risk that came “into existence solely as a result of the grant to [FPG] of rights to access and use [Epcon’s] property.” *Glaspell*, 29 Ohio St. 3d at 48. Such an allocation of risk through the indemnification clause is permissible under Ohio law; the circuit court recognized as much in granting Epcon’s motion for summary judgment; and this Court must affirm the circuit court’s decision.

**C. FPG’S ARGUMENT THE CIRCUIT COURT’S SUMMARY JUDGMENT ORDER REQUIRED FPG TO INDEMNIFY EPCON FOR EPCON’S ALLEGED INTENTIONAL CONDUCT IS WITHOUT MERIT AND DOES NOT CONSTITUTE A BASIS FOR REVERSING THE CIRCUIT COURT.**

FPG contends that because Plaintiffs have alleged “intentional tortious conduct” by Epcon in their causes of action of fraud/misrepresentation (“Fraud”) and violations of the South Carolina Unfair Trade Practices Act (“SCUTPA”), Epcon is prohibited from indemnification under the Franchise Agreement. (FPG’s Initial Brief, p. 15). FPG’s contention is erroneous. First, as noted in the discussion of the *Glaspell* case, *supra*, the Ohio Supreme Court upheld an indemnification clause between two commercial parties even when allegations of “willful, careless, and wanton” conduct formed the basis of the underlying complaint. *Id.* Second, the allegations asserted against Epcon in the Fraud and SCUTPA causes of action, to the extent they are asserted against Epcon itself, arise from activities for which FPG had contractual responsibility and control. Therefore, the analysis in *Kovach*, *supra*, should be applied to this case in upholding the circuit court’s decision. *Id.*, 2007 Ohio App. LEXIS 2314 at 13.

Epcon has consistently denied the substantive allegations against it, including the Fraud and SCUTPA claims. In fact, Epcon moved for summary judgment on all of

Plaintiffs' claims and was awarded summary judgment on Plaintiffs' claims for rescission, breach of contract, and breach of express warranties. (Order Re: Epcon's Motion for Summary Judgment filed August 27, 2012 ("August 27 Order"), R. pp. 9-19). An examination of the August 27 Order is necessary to evaluate FPG's claims vis-à-vis its obligation to indemnify and defend Epcon on the Fraud and SCUTPA claims. In denying Epcon's Motion for Summary Judgment for the Fraud and SCUTPA claims, the circuit court found issues of material fact, including issues underlying the theory of amalgamation and apparent agency. (August 27 Order, R. p. 17). On the other hand, the circuit court, in granting Epcon summary judgment on Plaintiffs' express warranty claims, found **no evidence of any affirmation by ECI or ECFI on which any Plaintiff relied in purchasing his/her unit.** (*Id.*, R. pp. 15-16 (emphasis supplied)).

To prevail on a fraud claim, a party must allege and prove: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity; (5) his intent that it should be acted upon by the person; (6) the hearer's ignorance of its falsity; (7) his reliance on its truth; (8) his right to rely thereon; and (9) his consequent and proximate injury. *Mutual Savings and Loan Assn. v. McKenzie*, 274 S.C. 630, 266 S.E.2d 423 (1980). The court found no evidence of any affirmation, or representation, on the part of Epcon. (August 27 Order, R. pp. 15-16). Thus, a direct claim for fraud and misrepresentation against Epcon cannot succeed, because the essential elements of representation and reliance are missing. If Epcon cannot be directly liable for fraud and misrepresentation, then the question of material fact that precluded a grant of summary judgment necessarily relates to the issue of derivative and/or vicarious liability for acts or omissions of FPG.

Examining the allegations in Plaintiffs' Fraud claim, it is clear that the acts or omissions Plaintiffs' allege as fraudulent were committed, if at all, by FPG. (Complaint, R. pp. 60-61). The following excerpts of allegations from Plaintiffs' Fraud claim are illustrative:

3. Defendant FPG, Inc., by and through its President Brock L. Fankhauser, is an Epcon Franchisee pursuant to that certain March 23, 2006 Franchise Agreement. FPG, Inc. and Brock L. Fankhauser was (sic) the developer and builder of these Plaintiffs' condominium homes under said Franchise Agreement.

4. As Franchisee, Defendants FPG and Brock L. Fankhauser were under a duty to strictly comply and adhere to the Epcon "Development System" and not deviate from the materials, procedures, and guidelines. Defendants materially deviated from the Epcon Developmental (sic) system and materially concealed these facts from Plaintiff buyers.

10. The homes purchased by Plaintiffs do not conform to Epcon standards of quality or Epcon specifications as they suffer from reoccurring water intrusion and deterioration due to builder deviations from the Epcon Developmental (sic) System, uniform plans, designs and construction specifications, and building code.

13. Defendants Brock L. Fankhauser and FPG, Inc. materially concealed deviation from the Epcon Developmental (sic) System, representing to Plaintiffs their homes were of the same uniform quality, design and specification as all Epcon Community homes and models. Defendants Fankhauser, FPG and SVTC, LLC knowingly sold homes to Plaintiffs under the Epcon trade name which materially and substantially differed in construction from Epcon guidelines and specifications published by Epcon and/or its affiliate Epcon Communities Franchising, Inc.

14. Plaintiffs are informed and believe that Brock L. Fankhauser and FPG, Inc. deliberately deviated from the Epcon Developmental (sic) System, specifications and *materially concealed* deviations from the Epcon Developmental (sic) System, intending that Plaintiffs

purchase condominiums from Stonecrest Villas of Tega Cay, LLC (owned by Brock L. Fankhauser) believing they were buying Epcon standards and quality from an Epcon Developer and builder, Brock L. Fankhauser.

21. That as a direct and proximate result, Plaintiffs purchased homes from Defendants named in this cause which materially (sic) differ from Epcon specifications, suffer from re-occurring water intrusion, construction defect or design defect, and which continue to deteriorate, and which do not conform to Epcon standards or specifications due to builder deviations by FPG, Inc. and Brock L. Fankhauser as an “Epcon” developer and franchisee.

(Complaint, R. pp. 60-62).

To the extent the allegations in Plaintiffs’ Fraud claim allege liability on the part of Epcon, the liability is necessarily derivative, or vicarious, stemming from acts or omissions on the part of FPG and/or its principals, employees or affiliates. *Id.* It does not relate to any independent conduct Epcon undertook or failed to undertake. In fact, FPG concedes it is unaware of any involvement by ECI in the Project. (FPG’s Initial Brief, p. 1). Therefore, as a required indemnitee under the Franchise Agreement, ECI is clearly entitled to indemnification regardless of ECFI’s entitlement to the same.

Plaintiffs’ SCUTPA claim against Epcon is also a derivative claim because Epcon’s liability can only be established, if at all, by examining the activities of FPG and Stonecrest Villas of Tega Cay, LLC. (Complaint, R. pp. 75-78). Plaintiffs’ SCUTPA allegations pertain to activities for which FPG was responsible under the Franchise Agreement. *Kovach, supra*, 2007 Ohio App. LEXIS 2314 at 13. For example, Paragraph 8(a) of the SCUTPA claim in the Complaint reads as follows:

8. Plaintiffs have collectively suffered an ascertainable loss of money, property damages, diminution in value due specifically to reoccurring water intrusion, and special

damages legally and proximately caused by Defendants' deceptive and unfair trade practices, to wit:

- a. By Defendants falsely advertising, pricing, and offering for sale Epcon model homes and communities, yet selling Plaintiffs homes which suffer from construction defects or design flaws and which leak water and which are not representative of Epcon models or Epcon communities in terms of value or quality.

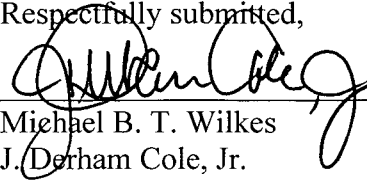
The allegations also pertain to the establishment and operation of the Condominium Owners Association, in which Epcon was not involved. (Complaint, R. pp. 75-78).

### **CONCLUSION**

For the reasons set forth above, Respondents Epcon Communities, Inc. and Epcon Communities Franchising, Inc. respectfully request that this Honorable Court affirm the circuit court's Order dated October 12, 2012, granting Epcon's Motion for Summary Judgment on Epcon's cross-claims for contractual indemnification against Fankhauser Property Group, Inc. Respondents also request this Honorable Court affirm the circuit court's award of attorneys' fees and costs to Epcon pursuant to its Order dated December 13, 2012. Respondents further request an award of the costs of this appeal, including attorneys' fees, and such other and further relief as the court deems just and proper.

September 25, 2013

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM YORK COUNTY  
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John C. Hayes, III,  
Circuit Court Judge

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Architectural Alliance, Ltd., Exterior Expressions of North Carolina, Inc., Al-Mega  
Construction, Inc., Procar, Inc., Procar II, Inc., The Southeastern Group, Inc., Lucas  
Lawn and Landscape, Inc., Jose Simenez, individually and d/b/a/ M&L Roofing Co.,  
LLC and/or MB Roofing Company, Third Party Defendants,

Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., Third Party  
Plaintiff,

v.

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

Exterior Expressions of North Carolina, Inc., Fourth Party Plaintiff,  
v.

Marcos Gonzalez, Fourth Party Defendant

Procar, Inc. and Procar II, Inc., Fourth Party Plaintiffs,

v.

Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Construction Co., Balanos Framing, Inc., Ricardo Hernandez, and Silverio Cortez, Fourth Party Defendants.

Al-Mega Construction, Inc., Fourth Party Plaintiff,

v.

Noe Perez, Juan Abundez Saucedo, and Moise Chavarra Hernandez, Fourth Party Defendants.

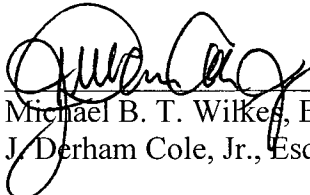
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CERTIFICATE OF COUNSEL

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The undersigned certify that this Final Brief complies with Rule 211(b), SCACR.

September 25, 2013



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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM YORK COUNTY  
Court of Common Pleas

John C. Hayes, III,  
Circuit Court Judge

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Case No.: 2012-213730

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Juontonio Pinckney, Josephine Sciacca, Addie Smith, James Barone, Deborah Barone,  
Ismael Gonzalez, Valerie Gonzalez, Joe Moore, and Sandra Moore, Plaintiffs

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., Defendants,

Of whom Epcon Communities, Inc. and Epcon Communities Franchising, Inc., are the  
Respondents,

And Fankhauser Property Group, Inc. is the Appellant.

Fankhauser Property Group, Inc., Third Party Plaintiff,

v.

Architectural Alliance, Ltd., Exterior Expressions of North Carolina, Inc., Al-Mega  
Construction, Inc., Procar, Inc., Procar II, Inc., The Southeastern Group, Inc., Lucas  
Lawn and Landscape, Inc., Jose Simenez, individually and d/b/a/ M&L Roofing Co.,  
LLC and/or MB Roofing Company, Third Party Defendants,

Stonecrest Villas of Tega Cay Condominium Owners Association, Inc., Third Party  
Plaintiff,

v.

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

Exterior Expressions of North Carolina, Inc., Fourth Party Plaintiff,

v.

Marcos Gonzalez, Fourth Party Defendant

Procar, Inc. and Procar II, Inc., Fourth Party Plaintiffs,

v.

Marcos Zertuche, David Carbajal, Victorina Cortez, Balancos Construction Co., Balanos Framing, Inc., Ricardo Hernandez, and Silverio Cortez, Fourth Party Defendants.

Al-Mega Construction, Inc., Fourth Party Plaintiff,

v.

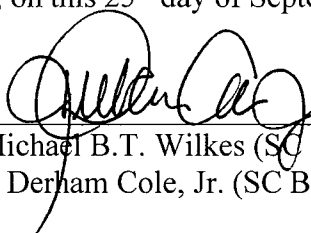
Noe Perez, Juan Abundez Saucedo, and Moise Chavarra Hernandez, Fourth Party Defendants.

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PROOF OF SERVICE

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The undersigned counsel for Respondents Epcon Communities, Inc. and Epcon Communities Franchising, Inc. certifies that he has served Respondents' Final Brief on counsel for Appellant Fankhauser Property Group, Inc., Graham P. Powell and Morgan S. Templeton, Wall Templeton & Haldrup, P.A., PO Box 1200, Charleston, SC 29402, as well as other parties' counsel set forth on the following page by depositing a copy of same in the U.S. Mail, postage prepaid, on this 25<sup>th</sup> day of September, 2013.

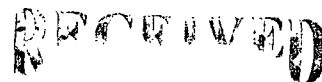


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SEP 26 2013

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