

21251

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

RECEIVED  
SC Court of Appeals  
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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

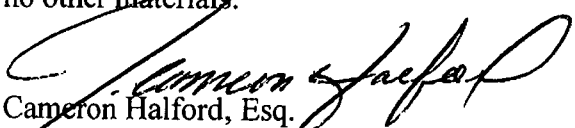
Stonecrest Villas of Tega Cay Owners' Association, Inc. ....Respondent

SUPPLEMENTAL RECORD ON APPEAL

Volume IV

000753-000963

Pursuant to SCACR 201(g) the undersigned here certifies that the Record on Appeal contains all  
material proposed to be included by any of the parties and no other materials.

  
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1       this case, seven forensic reports, all that go into some  
2       degree as to what is causing water intrusion. Specifically  
3       I think the two to best sum it up is FPG's experts. You  
4       don't have to take the plaintiff's word for it, you can  
5       take their experts word for it. And he basically states  
6       and follows up in both of these drawings, architectural  
7       drawings, and the asphalt construction have a lack of water  
8       management in the detail. By that I mean leaks, leaks  
9       spring, weather resistant bearer behind the party plaintiff  
10      - these are some of the things cited but Marshall Clark  
11      whose deposition occurred on November the 27th summed it up  
12      as basically a failure to provide water management detail.

13       My expert was deposed for two days last week, this is  
14      the second man being deposed. He describes the problem as  
15      the failure of the building envelope to provide a water  
16      tight enclosure. Meaning all the components working  
17      together whether you're looking at the gravel, the weather  
18      resistant bearer, the hardy plank siding, all the elements  
19      working together failed to provide a water tight bearer.  
20      The envelope of these homes is compromised, and I'll don't  
21      think any expert in the case argues that or disputes that.

22       So viewing all the facts and inferences in the light  
23      most favorable to the defendants I think we have not one -  
24      its not what is the precise construction defects, what is  
25      the construction defects in this case? And we have a lot

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 excerpts of  
7        excerpts, 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

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

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

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

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

1       forth no evidence of that. And there is an affidavit of  
2       Mr. Moscowitz, 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 the 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 had 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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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: 2-27 / 13

STATE OF SOUTH CAROLINA

COUNTY OF YORK

COURT OF COMMON PLEAS  
16TH JUDICIAL CIRCUIT  
CASE NO. 2010-CP-46-2326Juontonio 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., &amp; ASSOCIATES

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|--------------------------------|----------------------------------|---------------------------------|

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.

X

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,  
29 Fourth-Party Defendants.

X

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

36

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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?

1 STATE OF SOUTH CAROLINA

2 COUNTY OF YORK

COURT OF COMMON PLEAS

16TH JUDICIAL CIRCUIT

CASE NO. 2010-CP-46-2326

3  
4 Juontonio Pinckney, Josephine  
5 Sciacca, Addie Smith and  
6 James and Deborah Barone, et al.,

7 Plaintiffs,

8 vs.

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

15 Defendants.  
16 (CAPTION CONTINUED)

17 DEPOSITION OF: JOSEPHINE ANNA SCIACCA

18 DATE: March 15, 2012

19 TIME: 9:11 a.m.

20 LOCATION: 735 Ledgestone Court  
21 Tega Cay, SC

22 TAKEN BY: Counsel for the Defendants

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

25 A. WILLIAM ROBERTS, JR., & ASSOCIATES

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

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

7 Stonecrest Villas of Tega Cay Condominium Owners X  
8 Association, Inc.,  
Third-Party Plaintiff,

9 vs.

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

12 Exterior Expressions of North Carolina, Inc., X  
13 Fourth-Party Plaintiff

14 vs.

15 Marcos Gonzalez,  
Fourth-Party Defendant.

16 Procar, Inc., and Procar II, Inc., X  
17 Fourth-Party Plaintiffs,

18 vs.

19 Marco Zertuche, David Carbajal, Victorina Cortez,  
20 Balanos Construction Co., Balanos Framing, Inc.,  
Ricardo Hernandez, and Silverio Cortez,  
Fourth-Party Defendants.

21 Al-Mega Construction, Inc. X  
22 Fourth-Party Plaintiff,

23 vs.

24 Noe Perez, Juan Abundez Saucedo and Moises  
Chavarra Hernandez,  
25 Fourth-Party Defendants

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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

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

6 Plaintiffs,

7 vs.

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

11 Defendants.

12 (CAPTION CONTINUED)

13 30(b)(6)

14 DEPOSITION OF: LOUIS C. MOSCOWITZ

15 DATE: March 12, 2013

16 TIME: 9:00 a.m.

17 LOCATION: 735 Ledgestone Court  
Tega Cay, SC

18 TAKEN BY: Counsel for the Plaintiffs

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

21 A. WILLIAM ROBERTS, JR., & ASSOCIATES

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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  
Southeastern Group, Inc., Lucas Lawn and Landscape,  
Inc., and Jose Simenez, Individually and d/b/a M&L  
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7 Stonecrest Villas of Tega Cay Condominium Owners  
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21 Al-Mega Construction, Inc.  
22 Fourth-Party Plaintiff,

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24 Noe Perez, Juan Abundez Saucedo and Moises  
25 Chavarra Hernandez,  
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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. Fankouser., )

Defendants. )

March 20, 2013  
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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Wanda Nelson, CVR-M  
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I-N-D-E-XWITNESSBY:PAGE NO.

No Witnesses were examined.

E-X-H-I-B-I-T-SNO.DESCRIPTIONID.EVD.

No Exhibits were received into the record.

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

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

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

20 MR. POWELL: Good morning, Your Honor.

21 THE COURT: Good morning, Mr. Powell.

22 All right, to start off for the record, I don't know  
23 the exact date the Notice of Appeal was filed but it had to  
24 before January 15th I would think based on the last order  
25 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. Moscowitz 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 resole 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. Moscovitz, 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 EPG 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 - whey 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 these 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

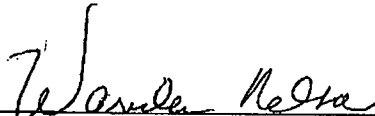
State of South Carolina )

)

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.

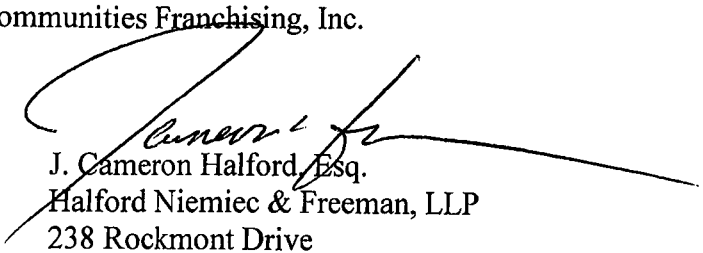
I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

  
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

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## PROOF OF SERVICE

I hereby certify that I am the attorney for the Appellants in the above captioned matter and that I did on September 10, 2013 serve a copy of one copy of the RECORD ON APPEAL and CERTIFICATION OF APPELLANT COUNSEL on counsel for the parties listed below by U.S. mail, postage prepaid, and addressed as follows:

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