

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

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Case No. 2016-CP-40-1536

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**SC Court of Appeals**

Raymond J. Malejko and Cristine Malejko, individually and in the interests of a  
minor child, Appellants,

v.

Todd Corley, Janet Loper, NextGen Real Estate, LLC, Thomas Humphries, Dr.  
Roofs, Inc., Ray Mooneyham, Mooneyham Solar & Electric, Professional Home  
Inspections, Inc., Corley Enterprises, Inc. of South Carolina, and DBR Franchising,  
LLC, Defendants,

Of whom Janet Loper and NextGen Real Estate, LLC are Respondents.

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SUPPLEMENTAL  
RECORD ON APPEAL

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<u>NO.</u>	<u>DESCRIPTION</u>	<u>I.D.</u>	<u>EVID.</u>
C-1	Deposition Excerpt-C. Segars		
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C-3	Deposition Excerpt-C. Segars		

## TRANSCRIPT OF RECORD

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(Whereupon, the proceedings were commenced at 2:05 p.m.)

THE COURT: All right. So we are on the record in 2016-CP-40-1536. This is Raymond -- and I believe there's a female's name -- Cristine Malejko -- I'm sorry if I said that wrong -- and this is against the defendants -- the case we're here on today is against the defendants, Ms. Loper and the real estate company. Is that right, Mr. Anderson?

MR. ANDERSON: That -- that is correct, Your Honor.

THE COURT: Okay. All right. And Mr. -- are you Mr. Bullard?

MR. BULLARD: Yes, sir, Your Honor.

THE COURT: All right. Mr. Bullard is here on behalf of the plaintiffs. Mr. Anderson's here on behalf of the defendants. So somehow the motion to compel got set at 11 this morning, and the motion for summary judgment got set at 2, so I called them and said: Instead of everybody coming up here multiple, different times, everybody just come up here at one time. So I hope that was okay with everybody. I was trying to do that as a convenience to the lawyers, as opposed to an inconvenience. That ---

MR. ANDERSON: We ---

THE COURT: --- was my goal.

1 MR. ANDERSON: --- certainly appreciate that, Your  
2 Honor.

3  
4 THE COURT: Okay. All right. Let's start with the  
5 motion for summary judgment; then we'll move to the motion  
6 to compel.

7 MR. ANDERSON: All right, Your Honor. May it please  
8 the Court: Your Honor, I'm -- for the record, my name is  
9 David Anderson, and I represent the defendants, Janet Loper  
10 and NextGen Real Estate, LLC, in this action.

11 Janet Loper is a broker-in-charge of NextGen Real  
12 Estate, LLC, in this case. And I've submitted, Your Honor,  
13 to the Court a -- a lengthy brief and ---

14 THE COURT: I got it.

15 MR. ANDERSON: --- and attachments.

16 THE COURT: I got it, and I've read it.

17 MR. ANDERSON: Okay.

18 THE COURT: So I have read your argument for summary  
19 judgment. The facts, as I understand them are, is the  
20 plaintiffs attempted to buy a house on Fox Crossing Drive.  
21 The husband was a licensed real estate agent in New Jersey  
22 or New York or somewhere like that. They entered into a  
23 dual representation, where Ms. -- Ms. Loper was  
24 representing the seller and they were representing her.

25 They got into the middle of buying the Fox -- Fox

1 Crossing house. They backed out of it. A few months went  
2 by. They decided to come back around to the Fox Crossing  
3 house, which they eventually closed on. And now there's  
4 all these issues with the house. They -- and they've filed  
5 multiple lawsuits against -- or got one lawsuit against  
6 different parties.

7 And Ms. Loper was the real estate agent. And her  
8 argument is: I was the real estate agent. I was the real  
9 estate agent. I was the real estate agent. I wasn't the  
10 inspector. I wasn't the plumber. I wasn't the heating and  
11 air guy. I wasn't any of those kind of things, and there's  
12 no evidence that I participated in any fraud upon anybody.

13 Is that right?

14 MR. ANDERSON: That -- that's correct, Your Honor.

15 THE COURT: Okay. All right.

16 MR. ANDERSON: Your Honor, now, if I may just briefly,  
17 procedurally, this case was mediated June 28th, with the

18 ---

19 THE COURT: Of this year?

20 MR. ANDERSON: Of this year.

21 THE COURT: Okay.

22 MR. ANDERSON: --- with the remaining parties that are  
23 -- are present that's represented by Mr. Lybrand and -- and  
24 Mr. Driggers. That's Dr. Roof entity and Thomas Humphries

25 ---

1 THE COURT: Got it.

2 MR. ANDERSON: --- by Mr. Driggers and Todd Corley,  
3 the previous owner of the ---

4 THE COURT: Right.

5 MR. ANDERSON: --- property ---

6 THE COURT: That was the seller, right?

7 MR. ANDERSON: That's correct.

8 THE COURT: Okay.

9 MR. ANDERSON: And so we were unsuccessful at -- at  
10 mediation. This case originally had a -- a scheduling  
11 order, which ran out, as far as this is going to be going  
12 forward on a date-certain trial July 31st, on -- on or  
13 after -- or after July 31st.

14 We had a status conference with Judge Manning. Judge  
15 Manning set this case for a date-certain trial October  
16 16th. And he also extended discovery so that we could  
17 clean up some discovery through September 18th.

18 Your Honor, in -- in preparation for this motion --  
19 and the -- the previous scheduling order had -- had, as of  
20 this date, plaintiff had an opportunity and a -- and a date  
21 to name experts. And -- and defendants had a -- a -- a  
22 time to name experts. That has been done.

23 It's just that plaintiff has not completed the  
24 depositions of all the defendants' experts. And we have  
25 some ten depositions that are set that are some fact

1 witnesses that have been named, neighbors. And then, we  
2 have the defendant experts that are yet to be taken.

3 Your Honor, I can go down and what I'd like to do is  
4 just briefly go through each of these causes of action.  
5 The Court certainly has a -- a -- a good understanding of  
6 -- of the posture that we're in with -- with this case.

7 The -- our -- it's our argument, Your Honor -- and I'd  
8 like to briefly hand up, if -- if the Court would not -- if  
9 the Court would bear -- and I've handed these to counsel.

10 THE COURT: Thank you very much.

11 MR. ANDERSON: These were not included in -- in my  
12 submission. Your Honor, we feel that it's -- it was a bit  
13 disingenuous for plaintiff to, after taking his deposition  
14 -- and he had some health issues that he had to take breaks  
15 on, so we had to reconvene his deposition a number of  
16 times. And then, this case was actually 40(j)'ed at -- at  
17 one point and -- and restored.

18 So we had the opportunity to talk extensively with  
19 plaintiffs' counsel to see what it is, is basically his  
20 complaints against Ms. Loper and NextGen Realty. We also  
21 had the opportunity to speak with Carlton Segars -- Segars,  
22 the plaintiffs' expert in real estate matters, that had  
23 examined this complaint and -- or examined -- or signed  
24 onto -- to take this -- this case on.

25 And so as we go through the -- the causes of action

1 that are -- are brought in this matter, there are six  
2 causes of action against Ms. Loper and NextGen. It's  
3 actual and constructive fraud, negligent misrepresentation,  
4 breach of contract, breach of contract accompanied by a  
5 fraudulent act, negligence, and breach of fiduciary duty.

6 All of these causes of action are the same against the  
7 other defendants, with the exception of breach of fiduciary  
8 duty. And so we are going forward and -- and asking Mr.  
9 Malejko what -- what his facts are that are supporting his  
10 causes of action against us. And we've also asked Carlton  
11 Segars that.

12 They've not identified any affirmative false  
13 representation made by the defendant realtors. And even  
14 with the supplemental affidavits that have been produced,  
15 we feel that they are disingenuous in that we -- we just  
16 simply don't have any representations that Ms. -- that the  
17 defendant realtors -- you know, any material reposition  
18 [sic] that they failed to disclose to Mr. Malejko.

19 We asked him numerous times; he did not know. We  
20 asked of Ms. Malejko numerous times; she did not know.  
21 They -- they just haven't provided any evidence to that --  
22 to that point.

23 The second thing is, Your Honor, in a -- in the -- in  
24 the cause of action as it relates to fraud, all of the  
25 elements have to be proven in fraud. And the sixth

1 element, Your Honor, the hearer's ignorance of its falsity,  
2 all the items that they are complained upon -- all the  
3 items that the plaintiffs have complained about was  
4 previous identified to the plaintiffs through their home  
5 inspector.

6 THE COURT: The Joe Blow home inspection that they did  
7 the first time they tried to purchase the home.

8 MR. ANDERSON: That's correct, Your Honor, all those  
9 items. And they had a -- an opportunity to look through  
10 each of those items. They had an opportunity to get their  
11 own inspectors if they chose to do so. There were some  
12 representations that prior to getting out of the first  
13 contract, they had family members and additional  
14 contractors come on board -- or come to the house and look  
15 at it. And they made a decision at that time to withdraw.  
16 And then, after a number of other contracts that were  
17 failed, they came back to this house and -- and -- and had  
18 it contingent upon the home inspector coming back and  
19 identifying those things.

20 One thing that my client, as a dual agent -- she told  
21 Mr. Corley that once they had a home-inspection report that  
22 was provided to them, of which what -- this was, that he is  
23 on notice then to correct those deficiencies; that they  
24 can't go forward without correcting those deficiencies.

25 And so Mr. Corley, through the contractors that he --

1 that he was dealing with, went through and was addressing  
2 each of those. Mr. Boyle came back out and evaluated, made  
3 another inspection of the property, and identified items.  
4 And they had those items repaired.

5 The next item where each representation alleged by  
6 plaintiffs were presented to them prior to closing. They  
7 cannot -- we just simply say when they knew about these  
8 issues, you can't come back in a fraud cause of action and  
9 say, "Well, we -- we -- we didn't know about that item." I  
10 mean, they -- they already knew about the item.

11 They've listed in the complaint -- and the complaint  
12 is very lengthy. It's attached in our memorandum. They  
13 provided a -- a -- a number of items. And so as you're  
14 trying to look through the complaint to see the items -- or  
15 alleged the items against NextGen and Ms. Loper, you're  
16 looking at such things as square footage. You're looking  
17 at such things as there -- there was alleged to be a  
18 square-footage deficiency.

19 But we could never discover, you know, what it is. Is  
20 it more or less than? Who -- who -- who told you that?  
21 Who didn't tell you that? That's all -- we just don't  
22 simply know at this point.

23 There -- Mr. Corley never lived in the home. And  
24 there were some issues about a property-disclosure  
25 statement. The -- the state statutes require a property-

1 disclosure statement, with the exception of 13 exceptions.  
2 And one of the exceptions is if the parties agree not to  
3 have a property-disclosure statement.

4 Since Mr. Corley had never lived in the home, he  
5 didn't have the requisite knowledge of the home. And that  
6 was explained to both -- both individuals. And they both  
7 agreed, by the contract that they both entered into,  
8 signed, and initialed, to waive that. And so that was  
9 waived.

10 But -- and -- and so if you go through and look at --  
11 there's -- there's a -- this home does not have a septic  
12 tank. And originally, the MLS said that it had -- it was  
13 city water and city sewer. Well, that was a -- an error.  
14 That was a mistake. Mr. Corley didn't know, because he  
15 didn't live there. My client had -- didn't know that.

16 When it was identified to my client, she immediately  
17 went back to the Malejkos and said, "Listen, this is --  
18 this is -- you can back out now, if you choose to back out,  
19 or we can go and inspect this and make sure that the septic  
20 tank is okay. This was prior to closing.

21 But yet now in this complaint, they're arguing that  
22 this was somehow a fraud upon them; that it was represented  
23 as having -- having a septic tank, when -- represented not  
24 having a septic tank, when actually, it did have a septic  
25 tank.

1 But they went out. They paid for a -- an inspector to  
2 go -- they were satisfied that -- with that. They moved  
3 forward with the closing.

4 There's a case on point with this case. It's the  
5 McLaughlin case, Your Honor. And the McLaughlin case is  
6 cited in my brief. And I've got a copy of it here if the  
7 Court so desires to look at it. McLaughlin case -- in -- in  
8 -- was a cause of action brought against a number of  
9 realtors, a number of vendors in -- in a real estate  
10 transaction. The -- the party purchased the house, and  
11 then they complained of termite damage. They complained of  
12 this damage, water-intrusion damage after getting into the  
13 house.

14 And the Court very clearly stated that the realtors --  
15 defendant, when you had an opportunity and -- to have the  
16 home inspected and these things were pointed out to you,  
17 that that's -- you -- you can't support the causes of  
18 action of fraud, negligent misrepresentation against the  
19 realtor vendors.

20 I've also cited in -- in the brief, Your Honor,  
21 statutory provisions which indicate that the homeowner  
22 themselves taken on a statutory responsibility to complete  
23 inspections of the property that they are purchasing, not  
24 -- not the realtor. There's simply been no evidence that  
25 the defendant realtors had any knowledge of a specific item

1 that was defective or that they withheld or -- or tried to  
2 not work with both of her clients to -- to pursue --  
3 proceed with this property transaction.

4 Now, I'd briefly just like to close by going over a  
5 few of the things here that counsel has -- has provided in  
6 opposition two affidavits, one from Carlton Segars, the --  
7 their expert; and one from Mr. Malejko. And -- and these  
8 affidavits are much more in-depth than the opportunity,  
9 when I deposed both of these individuals. And I think it's  
10 important for the Court to understand what we're faced with  
11 when I received your -- just this week the affidavit of Mr.  
12 Malejko and -- and -- last week, the filed affidavit of  
13 their expert.

14 And I -- I've given the Court a -- a -- an excerpt of  
15 this. This is the Raymond Malejko deposition. It was  
16 August 26th. It's on -- I'll just start on page 76. But I  
17 just want to briefly highlight a couple of these things.

18 "All right. You knew that Ms. Loper was a dual  
19 agency" ---

20 THE COURT: Okay. When you -- when you read, you read  
21 faster. And it gets a little bit too fast.

22 MR. ANDERSON: I understand. All right.

23 THE COURT: And everybody does it. That -- it's  
24 completely and totally normal. Just read a little bit  
25 slower that Ms. Nevers can make sure she gets it down

1 correctly, please.

2 MR. ANDERSON: Okay.

3 "All right. You knew that Ms. Loper was a dual  
4 agent with this matter?

5 "Yes.

6 "In fact, you signed the dual-agency agreement,  
7 did you not?

8 "I did.

9 "You knew that she was representing Mr. Corley as  
10 well, regarding this home?

11 "Yeah.

12 "And had a full duty of disclosure, as far as the  
13 condition of the home?

14 "I'm sorry?

15 "She had a full duty of disclosure. In other  
16 words, if she knew that the roof was leaking, she  
17 needed to tell you that, right?

18 "Yes.

19 "All right. You -- do you know any knowledge  
20 today that she didn't share with you something  
21 that she knew about?

22 "I don't know. I don't know.

23 "Well, you sued her in this case. What did you  
24 sue her for?

25 "I don't know."

1 MR. ANDERSON: Then, if you go on to the deposition on  
2 page 100 [sic]:

3 "Do you think that Ms. Loper had anything to do  
4 with hiring that particular roofer?

5 "I really don't know. But I know that she gave  
6 the names of other roofers -- or the names of  
7 other inspectors."

8 On page 121:

9 "Well, as we sit here today, do you have any  
10 understanding of what you're suing for?

11 "I don't know."

12 Okay. On page 142:

13 "All right. What are you claiming Ms. Loper or  
14 NextGen Realty did that was not per your  
15 instructions, you or your wife's instructions?

16 "I don't know.

17 "What did you claim that she did not disclose to  
18 you as it relates to this property that she knew  
19 or that NextGen Realty knew of?

20 "This is all lawyer stuff. I don't know. I  
21 don't know.

22 "Well, tell me: AS you sit here today, what do  
23 you want Ms. Loper to do to make you whole?

24 "I don't know."

25 Okay. So you go to 150:

1 "All right. Do you know anything that Ms. Loper  
2 or NextGen -- as we sit here -- was she trying to  
3 keep something from you or was she trying to  
4 steer you to Mr. Mooneyham because he was not  
5 going to do a good job or was going to give you a  
6 passing grade? I mean, do you have any evidence  
7 of that?

8 "I don't know.

9 "You don't" -- and the question -- "you don't  
10 know. Does anybody know?

11 "I don't know."

12 On page 155:

13 "What false and misleading statements were made  
14 by NextGen and Ms. Loper?

15 "I don't know.

16 "You don't know. Would you have written them  
17 down somewhere?

18 "I don't remember. I don't know."

19 On 156:

20 "Are those items listed A through H, do -- do  
21 they total \$62,000?"

22 And here, we're talking about a -- a discovery  
23 response of 62.

24 "I don't know.

25 "All right. Ms. Loper, I'm assuming, took the

1 word of your home inspector and the word of Mr.  
2 Corley that the repairs were made to your home to  
3 your home's inspector's satisfaction, okay? If  
4 she took that at face value, do you have any  
5 information that -- are -- are you aware of any  
6 information that she had any knowledge about that  
7 that was false or that -- that they hadn't made  
8 repairs?

9 "I don't know. I have no idea. I don't know."

10 Again, on page 157:

11 "Do you have any reason to believe NextGen Realty  
12 or Ms. Loper suspected any of the information she  
13 was telling you was false?"

14 "I don't know."

15 On page 161:

16 "Okay. All right. Let's go to the next cause of  
17 action, then, as to NextGen and Loper, breach of  
18 contract. What contract did NextGen and Loper  
19 breach with you -- with you, your wife, and  
20 daughter? What contract did she breach with you?"

21 "The attorney filled this out -- did this. I  
22 don't know what these terms mean.

23 "You don't know what these terms mean?"

24 "No.

25 "What terms, breach of contract?"

1 "Yes.

2 "You don't know what breach of contract means?

3 "No.

4 "Were you ever in the service?

5 "No, sir.

6 "So you don't know what contract we're talking  
7 about. You know -- you don't -- you know what  
8 the term contract means or agreement?

9 "Yes.

10 "Is there any agreement that you had with Ms.  
11 Loper or NextGen that you feel was breached?

12 "I don't remember."

13 And finally -- well, I'll -- one -- two -- two  
14 additional pages here. 175:

15 "You were the sole person to enter into that  
16 contract. Your wife didn't, did she?

17 "No. She didn't sign any of this.

18 "All right. In fact, she didn't sign the  
19 purchase agreement either, did she?

20 "I don't know. She might have.

21 "Well, let's look at the -- designated in  
22 Paragraph 2, if you look at Paragraph -- I mean,  
23 correction -- Exhibit No. 2, the designated-  
24 agency agreement, that's your only name and your  
25 signature. The dual-agency agreement is only

1 your name and your signature. And the contract  
2 of sale, which is for this particular property,  
3 if you will bear with me a moment -- let me find  
4 out which exhibit it is -- which is Exhibit No.  
5 7, it's just you and Mr. Corley. So one of these  
6 contracts have your wife listed; is that  
7 correct?"

8 "She's not on there, but we bought it together.

9 "I'm sorry. I couldn't hear you.

10 "She's not on there, but we purchased the  
11 property together."

12 On 70 -- 177:

13 "Well, let's look at the seventh cause of action,  
14 then, because it looks as if we were the only  
15 ones that you're claiming breach of contract  
16 accompanied by a fraudulent act. Because I'm not  
17 aware of any contract with any other plaintiff  
18 with my client. Okay? So the breach of contract  
19 accompanied by a fraudulent act -- what act did  
20 NextGen Realty or Ms. Loper do that was  
21 fraudulent?"

22 "I just don't think that she represented us the  
23 way she was supposed to. I don't know. I'm  
24 sorry. I don't remember.

25 "Okay. Paragraph 86 says" -- and that's looking

1 at the complaint -- "NextGen and/or Loper had and  
2 maintained a fraudulent intent relating to the  
3 breach of contract. Do you know what -- do you  
4 have any evidence or can you explain any of that?

5 "No. I don't know.

6 "Okay. Paragraph 87, it says: NextGen and/or  
7 Loper committed and engaged in fraudulent acts

8 ---

9 "I have no idea where you are.

10 "It's page 14 of 37, Paragraph 87. It states:  
11 NextGen and/or Loper committed and engaged in  
12 fraudulent acts accompanying the breach of  
13 contract, as enumerated elsewhere, herein  
14 including but not limited to advising plaintiffs  
15 to proceed with the purchase of the property,  
16 knowing repairs had not been properly performed.

17 Do you see that?

18 "I don't know what it means. I don't know.

19 "So you don't know what that means?

20 "No."

21 So, Your Honor, as far as Mr. Malejko, his deposition  
22 went on and on. And that -- that's not all. I -- I only  
23 highlighted for the Court my portion of the deposition, not  
24 Mr. Lybrand's or -- or -- or Mr. Driggers or the other two  
25 party defendants at that particular time when the

1 deposition was taken.

2 I'd like to briefly go over with the Court Carlton  
3 Segar [sic], Jr., affidavit. And that's Carlton Segars --  
4 S-e-g-a-r-s -- Jr. His deposition was taken on April 3rd.

5 And when I got to the deposition, I asked Mr. Segars  
6 is he -- if he had read the complaint, and he had not. And  
7 I provided him a copy of the complaint that morning.

8 On page 5:

9 "Okay. Have you completed your investigation as  
10 it relates to what you have been asked to  
11 accomplish with this?

12 "Barring any further new information, I believe I  
13 have.

14 "What's the opinions" -- on page 13 -- "what's  
15 the opinions you have reached -- rendered" --  
16 excuse me -- "what -- what's the opinions you  
17 have rendered as it relates to Mr. [sic] Loper's  
18 work on this matter?

19 "The opinion I have come to is that she did not  
20 exercise reasonable care and diligence in her  
21 fiduciary duties to the Malejkos.

22 "Okay. In what way? What's an example of why  
23 she did not? What did you base that assumption  
24 on?"

25 He goes on -- "She had a duty to disclose items to

1 them, anything that she knew about. And it appears, after  
2 briefly going through the information that you've provided  
3 me this morning" -- which was the complaint -- "it's my  
4 understanding that she was acting as a dual agent. I have  
5 not seen the dual-agency property. If y'all have that, I'd  
6 like to see it."

7 All right. I went on to question him:

8 "Did you review the work file that she has --  
9 that she maintained on this case?

10 "No, sir. I have not seen her work file."

11 On page 20:

12 "Well, what did she -- are you trying to testify  
13 or imply that she did not disclose everything she  
14 knew about this property?

15 Answer: "From the information that I had read in  
16 the deposition that she had given, it did not  
17 appear -- it appeared that there were some  
18 issues. I don't have the documentation right  
19 here to cite specifically."

20 Question: "But if we sit here today, you don't  
21 know what that is?

22 "The form that I read, the information you  
23 provided me here with ---

24 "Let's be clear on what information I provided  
25 you. I gave you a copy of the complaint ---

1 "Yes, sir.

2 "--- summons and complaint this morning.

3 "Yes, sir.

4 "But could I -- because I had asked you whether  
5 or not you -- whether or not you -- that -- you  
6 had read that or not.

7 "And I had not."

8 On page 35:

9 "And you have seen her real estate file?

10 "No, sir.

11 "And would seeing her real estate file perhaps  
12 change any of your opinions in this matter?

13 "It may or may not. I have no idea until I see  
14 it.

15 "Do you plan to review her real estate file?

16 "If y'all need me to review that real estate  
17 file, I'll be happy to go through it.

18 "This is my only opportunity, Mr. Segars, to get  
19 an understanding of what you're going to testify  
20 to at trial in this matter.

21 "Yes.

22 "And if you are identified as an expert to  
23 testify as to standard of care, I want to make  
24 sure that we've gone through everything that  
25 you're going to testify to. Do you understand

1 that?

2 "Yes, sir.

3 "So as we sit here today, you have indicated that  
4 you feel that she breached the standard of care  
5 as it relates to a dual-agency agent?

6 "Yes, sir, subject to any new information.

7 "Is there any other item that you're going other  
8 than testify to as it relates to NextGen or Janet  
9 Loper as a licensed real estate professional?

10 "Not that I know of at this time."

11 Finally, on page 40:

12 "Is there anything wrong with this contract that  
13 you're looking at, Exhibit No. 7?" -- which was  
14 the purchase contract.

15 "Not that I know of. I'm not an expert in  
16 contracts.

17 "Okay. So you won't be rendering any testimony  
18 as it relates to whether or not this contract is  
19 appropriate or not?

20 Answer: "No, sir."

21 Your Honor, we have sufficiently briefed through the  
22 various causes of action in this matter extensively. And  
23 the briefings were done with the evidence that was on hand  
24 at the time. Since that time we've gotten two affidavits  
25 that have gone into great detail regarding -- from Mr.

1 Malejko and Mr. Segars.

2 Mr. Malejko that was provided this week, I think, is  
3 telling that -- on Paragraph 18 of his paragraph, he says  
4 -- he states: "I believe the actions and inactions of Ms.  
5 Loper that I have described in this affidavit constitutes  
6 bad conduct by her, but I don't understand exactly how each  
7 supports the legal causes of action raised in this action.  
8 I'm not an attorney and do not understand how the facts  
9 support the elements of each of these causes of action."

10 But yet when I was asking him specifically time and  
11 time again to respond and provide these things, he could  
12 not do so. He did not know.

13 So we would respectfully ask the Court to grant our  
14 motion for summary judgment. And we'd further ask the  
15 Court to -- to -- to note that the two affidavits that were  
16 provided here within the last two weeks were made in an  
17 attempt to -- to delay the process or to cause additional  
18 depositions to be taken. And we'd ask that they not be  
19 considered.

20 THE COURT: All right. Mr. Bullard?

21 MR. BULLARD: Thank you, Your Honor. I think it bears  
22 some merit to discuss a little bit more the underlying  
23 facts of the case. I -- it's a complicated case. And I  
24 think it's a complicated -- that complicates as our causes  
25 of action and the facts supporting it.

1           But as -- as you've heard, the Malejkos came in  
2           January of 2014, put an offer on this house, and a home  
3           inspection done. The home inspector recommended that the  
4           roof be checked by a licensed roofer and that the HVAC  
5           system be checked by licensed HVAC inspector because the  
6           home inspector was not making any, you know, warranties or  
7           any -- he wasn't making any opinion or having any opinion  
8           on the roof and the HVAC. He said, "You need to get  
9           somebody -- contractors that are licensed to do that work  
10          to check it for you and give you -- you know, give you the  
11          yay or nay on it."

12          So they looked at the home inspection and backed out  
13          of that deal. The seller agreed. They signed a waiver --  
14          or not a waiver, but a release of the contract. And the  
15          Malejkos went about looking at other houses.

16          While they were looking at other houses, they saw that  
17          Mr. Corley, the owner of the house, was making some of the  
18          repairs that -- or appeared to be to them -- he was making  
19          some of the repairs that were in that January home  
20          inspection.

21          So in March they come back. They're interested in the  
22          house still. And they enter into a new contract. And as  
23          part of the new contract -- I think the first one was an  
24          as-is contract. The second was -- had a repair addendum;  
25          said seller is going to repair all the items that were

1 listed in the home inspection. So this one's a little bit  
2 different in that he's going to make repairs -- everything  
3 that was identified.

4 But again, we have the need for a roof inspection and  
5 an HVAC inspection. And that sort of, I think, causes some  
6 of the issues here. What Mrs. -- what the Malejkos are  
7 saying, at least partly, is Mrs. Loper brought the roof --  
8 not the roof inspector -- but the HVAC inspector. Said,  
9 "I've got a guy. He'll come in. He's good. He's great.  
10 He's a great guy."

11 And I've got deposition excerpts from her testimony,  
12 the Malejkos' testimony, and -- oh, sorry -- both of the  
13 Malejkos testifying that that's what she told them: "I've  
14 got a guy. Don't worry about it. He's a good guy. He's  
15 the best guy."

16 So they rely on her. They've got somebody coming in  
17 and doing HVAC. The seller brought the roofer to the site  
18 to repair a leak that was noticed in the inspection report  
19 in January. So there's a roofer on site to do this work.

20 Mrs. Loper is there while the guy is there to do  
21 repairs. And while he's there doing repairs, say -- "Well,  
22 you check the roof. Make sure everything's okay up there."  
23 Essentially, "Do an inspection for us."

24 He says, "Fine." And he does it. And he says,  
25 "There's nothing wrong with this roof. You got a great

1 roof here, except for this stuff that I'm working on. I'm  
2 -- I'm repairing those leaks. But otherwise, you got a  
3 great roof, nothing to worry about."

4 And so he makes that representation. And then Mrs.  
5 Loper continually makes that representation to my clients:  
6 "You got a great roof here. It's a great roof, nothing to  
7 worry about. He's inspected it. It's fine."

8 The issues we have with regard to those people is it  
9 turns out the roofer's not licensed personally. Mr.  
10 Humphries isn't licensed. And at the time he did this  
11 inspection, he'd never done one before.

12 And he says -- testifies -- and again, this -- that's  
13 part of the stuff I've handed up to you -- in his  
14 deposition: "I've never done one, and I haven't done one  
15 since for a real estate transaction. No one's ever asked  
16 me to do this before."

17 So what we're saying is Ms. Loper breached her duty.  
18 And that's what Mr. Segars says. And that's the facts that  
19 are in Mr. Malejko's affidavit, is: I think what she did  
20 by asking a guy she'd never met to do an inspection without  
21 knowing his credentials was a violation of her duty.

22 And that's what Mr. Segars says. And that's what Mr.  
23 Malejko says. And that's what Mr. Segars said in his  
24 deposition. And I'll be happy to read those portions of  
25 his transcript. This is not new information in these -- I

1 mean, in these affidavit. This is stuff culled from the  
2 transcript, really to give the judge that might be hearing  
3 this motion a shorter version of what happened. Because  
4 Mr. Malejko's deposition is four days long. And it's  
5 hundreds and hundreds of pages.

6 But the same with the HVAC guy: He goes in. He  
7 looks. Now, he observes a hole in the one of the duct --  
8 in the duct work in one of the ducts. And there's an duct-  
9 work line that's down. And he tells the Malejkos, "There's  
10 a hole in the duct work, and there's a line down."

11 Now, in his deposition he tells us, "Well, I thought  
12 an animal had made those holes."

13 And I said, "Did you tell anybody that?"

14 "No, I didn't tell anybody that."

15 It turns out the HVAC inspector is not licensed. He's  
16 been sent a cease and desist letter, which is in the  
17 materials that I gave you, from LLR saying, "Don't do  
18 inspections. Don't do this work. You're not licensed."

19 Mrs. Loper testified -- again, this deposition is in  
20 the materials I've given you -- testified, "I never asked  
21 him if he was licensed. I never ask anybody if they're  
22 licensed. I just assume they're licensed."

23 So she's recommended an HVAC inspector who's not  
24 licensed and who does a substandard job. Now we have  
25 learned, since they moved into the house -- again, that's

1 part of the materials I've handed up to you -- that there  
2 were animal feces in the duct work and it blew into the  
3 house for several months before they got a qualified HVAC  
4 guy out there to tell them, "You've got a problem. This  
5 stuff needs to be replaced. You've got feces and who knows  
6 what else blowing through your house."

7 The roof, after they move in, leaks. And it continues  
8 to leak. And it leaks so much that it causes mold to form  
9 in certain areas of the house, which Mr. Malejko is  
10 allergic to -- particular types of mold, penicillium being  
11 one of them. And he suffers health effects because of  
12 that; had to go to a doctor. And the doctor has indicated  
13 that he needs all this treatment, other than what he's had  
14 so far. And so that's a major part of what we're suing  
15 about.

16 But there are other things in the case. And it's -- I  
17 think the underlying or the overriding issue is the  
18 Malejkos did not have -- or didn't have enough information  
19 about the true condition of this house. And the reason  
20 they didn't is because of Ms. Loper and others. Because  
21 the home inspector told them to do things, have inspections  
22 done.

23 And they did them, and they were assured repeatedly  
24 about how good these guys were by Mrs. Loper. I won't get  
25 into the other defendants, since they're not part of this

1 motion. But she said, "You got a good roof there. It's a  
2 good roof." But again, she didn't check the guy. She  
3 didn't know his qualifications.

4 And she asked him to do it and did not tell -- that's  
5 the important thing -- did not tell the Malejkos, "Look, I  
6 don't know anything about this guy. I don't know whether  
7 he's doing a good job or not. You can go and get another  
8 guy if you want to do it."

9 I mean, there's testimony to that effect, again,  
10 passed up to you, where they say, "She never told us we  
11 should go get somebody else."

12 Again, we got an HVAC guy. He gives them a report.  
13 He doesn't tell them that there's a potential problem with  
14 animals in the duct work. He doesn't mention it to anyone.  
15 Had they had this information -- that the roofing guy was  
16 not licensed, that she didn't know anything about his  
17 credentials, that the guy that's doing your HVAC is not  
18 licensed -- they would've made sure they had some people  
19 that were licensed doing that -- or at least had another  
20 one -- I mean, they -- they keep -- the -- the -- the  
21 defense continues to posit that they should've had these  
22 inspections done or they should've had it -- they did have  
23 inspections done. They had a roof inspection and an HVAC  
24 inspection done. But they say they should've had another  
25 one done.

1           But why? They're being assured by their realtor that  
2 these guys know what they're doing, being assured that the  
3 roof is great, and the HVAC inspector is great, when it  
4 turns out, neither one's licensed; one's never done one  
5 before -- the roof; and the guy in the HVAC saw animal  
6 issues and didn't report them -- have led to problems for  
7 the Malejkos.

8           But beyond that, let me first state -- because it's  
9 been mentioned that Mr. Malejko is a real estate agent.  
10 Mr. Malejko has a real estate license in New Jersey. And  
11 he's not sold more than three houses, and they are all  
12 relatives so he could get, you know, some commission or  
13 they could get some reduction in the price.

14           He retired on disability after working 20 years as a  
15 garbage man. That's what he did. He was a garbage man.  
16 He's on disability now from New Jersey for being a garbage  
17 man, not a realtor. He's not a realtor.

18           THE COURT: Well, he ---

19           MR. BULLARD: He has ---

20           THE COURT: --- is a ---

21           MR. BULLARD: --- a real ---

22           THE COURT: --- licensed real estate agent in New  
23 Jersey, right?

24           MR. BULLARD: Right.

25           THE COURT: And he ---

1 MR. BULLARD: To ---

2 THE COURT: --- got a cut of this commission on this  
3 house, right?

4 MR. BULLARD: He did. But from 20 years ago. But  
5 again, Ms. Loper testified in her deposition: "That  
6 doesn't relieve me of my duties to him and my duties to  
7 disclose things I know and to represent him" ---

8 THE COURT: Well, I ---

9 MR. BULLARD: --- "my fiduciary" ---

10 THE COURT: Where's the evidence that she knew  
11 anything that you just said?

12 MR. BULLARD: That -- well, it's -- it's -- it's an  
13 omission or a failure to vet the people she's recommending.

14 THE COURT: So the answer is: There is no evidence  
15 that she knew anything negative about that roofer or the  
16 heating and air guy?

17 MR. BULLARD: No. And that's not what we're claiming.  
18 We're claiming that she didn't exercise her duty to make  
19 sure that those people were properly qualified. And that's  
20 what Mr. Segars says.

21 THE COURT: That's what ---

22 MR. BULLARD: That's his ---

23 THE COURT: --- Mr. Segars says in his affidavit.

24 MR. BULLARD: That's what he says in his -- I'll read  
25 his deposition testimony if you'd like. I mean, I

1 understand there -- every deposition, there are questions  
2 by counsel and there -- you know, cross-examination. So my  
3 understanding is at summary judgment, it's a scintilla of  
4 evidence and, if there is evidence to support causes of  
5 action, that -- that we should be able to survive it.

6 I'll -- I'll be happy to read this. This is my  
7 questioning of Mr. Segars at his deposition:

8 "Is it customary for a realtor to recommend  
9 inspectors to their clients?

10 "Yes. Typically" -- I'm sorry. I'll read  
11 slower. "Typically, we tell the agents, when  
12 we're going through the classes, not to recommend  
13 one specific person, but to provide them with a  
14 list of people that they can choose from."

15 So -- and we have, like I said, deposition excerpts up  
16 there and affidavits to the effect that Mrs. Loper brought  
17 people to do the inspections -- didn't vet them -- brought  
18 them; didn't give Malejkos choices to pick from.

19 "In that list of people that you suggest" ---

20 THE COURT: I mean, what -- what -- where -- where  
21 does the law require a duty for the -- a real estate agent  
22 to give them anything? It's their house. If they want to  
23 buy it, why did they not have the obligation to go figure  
24 out who to use and who not to use? What -- what imposes  
25 the duty of the real estate providing the buyer or the

1 seller with any inspector at all?

2 MR. BULLARD: I don't know that there is a duty. But  
3 when you assume that duty, you must not exercise it  
4 negligently. She assumed the duty and brought these  
5 people.

6 THE COURT: Okay.

7 MR. BULLARD: "In that list of people that you  
8 suggest that they choose from, should these  
9 individuals be licensed to do the work that they  
10 are being recommended for?"

11 "Yes, sir.

12 "Is Ms. -- if Ms. Loper recommended an expert to  
13 perform an HVAC inspection on the house, would  
14 that have violated her duty of care if he was not  
15 licensed?"

16 "If she recommended one individual, ideally, she  
17 should have presented them with a choice, a list,  
18 as I mentioned, not just one specific person.

19 "If she recommended someone who did not hold a  
20 license to perform an HVAC inspection, would that  
21 have violated her duty of care?"

22 "If she knew that person was not licensed.

23 "Did she have a duty to determine whether or not  
24 someone she's recommending is licensed or not?"

25 "That's what we tell the agents in training: to

1 be sure they check their licenses and make sure  
2 they are qualified.

3 "So if, in fact, an HVAC inspector was  
4 recommended by Mrs. Loper and it turns out he was  
5 not licensed, would that have violated her duty  
6 of care?

7 "It could have.

8 "By the same token, if a fellow came -- in this  
9 particular case, let's say Mr. Humphries -- came  
10 to do a roof repair, just to repair a roof, and  
11 while he's on the roof, if Ms. Loper asked him  
12 would he mind doing an inspection while you're  
13 here, is it proper for her to be asking someone  
14 to do an inspection who she has just met for the  
15 first time, standing on the roof?

16 "You could ask, but there's -- the agent needs to  
17 check and make sure that the person that is doing  
18 that inspection is qualified to do that, to do  
19 the inspection.

20 "And would you agree with me, if you just met  
21 someone for the first time, you wouldn't have an  
22 -- any idea what their qualifications were, would  
23 you?

24 "I wouldn't have any idea as to what their  
25 qualifications were.

1 "So you think it's okay for Mrs. Loper to go  
2 ahead and recommend this guy do an inspection  
3 that she had just met for the first time?

4 "Personally, I wouldn't do that.

5 "Do you think it's a violation of her duty of  
6 care to do so?

7 "Personally, I do.

8 "If the roofer who did the inspection sent Ms.  
9 Loper an e-mail that contained a written  
10 explanation of the work he had performed, would  
11 it be proper for Ms. Loper to copy that e-mail  
12 into a document and put her own letterhead on it,  
13 purporting to be from the roofer, basically  
14 creating a document that didn't exist, and then  
15 handing it to her clients?

16 "I think that would be improper if she created a  
17 document.

18 "Would it be a violation of her duty of care?

19 "I would consider it a violation of that.

20 "If Ms. Loper informed both the buyer and the  
21 seller that the seller was exempt from filing --  
22 filling out a property-disclosure form prior to  
23 them contracting, would that be a proper  
24 statement for a realtor to make? I mean, this  
25 seller was not exempted in any way unless the

1 parties agreed to it in the contract, right?

2 "Right.

3 "So if she told them before the contract, 'Y'all  
4 don't have to enter into a property disclosure  
5 because you're exempt,' that's not proper, is it?

6 "Would she have known that they would not -- that  
7 the seller was exempt? What would she be basing  
8 that on?

9 "Let me show you this. This is Exhibit No. 37.  
10 It says 'Residential Input Sheet.' It's dated  
11 11/30/13, isn't it?

12 "Yes, sir.

13 "And it says 'Exempt from Property Disclosure,'  
14 doesn't it?

15 "Yes, sir.

16 "So Ms. Loper had decided in November of 2013  
17 that Mr. Corley was exempt from filing a property  
18 disclosure, hadn't she?

19 "That's what it appears.

20 "And that's not proper, is it?

21 "No, sir.

22 "It's not correct, is it?

23 "No, sir.

24 "And it's a violation of her duty of care to tell  
25 the seller and the buyer that he's exempt, isn't

1 it?

2 "She's to inform them of what that property  
3 disclosure is and tell them what the exemptions  
4 are and, if they meet them, then mark this  
5 accordingly.

6 "But they didn't meet them. The only one they  
7 met is that the voluntarily agreed to accept one,  
8 right?

9 "Yes, sir.

10 "Now, if Ms. Loper was aware that the person who  
11 lived in the property from 1989 to 2010 was the  
12 mother of one of her friends, should she have  
13 disclosed that to the buyers?

14 "If she was aware of that person that lived  
15 there?

16 "If she was aware that -- if there was  
17 information available from the property owner --  
18 because we know that Mr. Corley didn't live there  
19 -- but the person who did for the past 20 years  
20 was the mother of a friend, shouldn't she tell  
21 the buyers, 'Hey, I know who used to live here.  
22 We might be able to ask her some questions'?

23 "That might be some useful information to pass  
24 on, that you know more about the property.

25 "Would it be proper to withhold that information

1 from the buyers?

2 "If there were -- if there -- if there was  
3 information in that knowledge that she had of  
4 anything wrong with the property, material  
5 defects or anything like that, then she would've  
6 had prior knowledge of it and she would need to  
7 disclose that.

8 "But her knowledge of the fact that the prior  
9 owner was living with their daughter and that she  
10 knew the daughter, she should have brought that  
11 to the attention of the buyers or at least  
12 mentioned it to them?

13 "Yeah. If -- that would indicate that she knew  
14 about the property and was familiar with it.

15 "Knew something about the history of the  
16 property, right?

17 "Yes, sir.

18 "That would've been a violation of her duty of  
19 care?

20 "Yes, sir. If she knew any issues with the  
21 property that she should have -- had the prior  
22 knowledge of, as you said, the history of the  
23 property.

24 "Now, I think we saw that there was a dual-agency  
25 agreement entered into January 2014, right?

1 "Yes, sir.

2 "That's something they showed you today in your  
3 deposition. I think we talked about the fact  
4 that the January 2000 [sic] contract that the  
5 parties signed terminated; is that right?

6 "Yes.

7 "And then, I think that there was another  
8 contract, the one that you've been shown, which  
9 is Exhibit 5?

10 "Yes.

11 "That's the March 5th contract?

12 "Yes.

13 "And it looks like Exhibit 7. I'm sorry.

14 "Yes.

15 "In your opinion, should a second dual-agency  
16 agreement have been entered into when this March  
17 contract was entered into?

18 "I believe the termination of that first  
19 contract, that would -- and I would have to go  
20 back and research this. I believe that that  
21 would make the other agreements that were in  
22 effect null and void. And I would -- I could be  
23 corrected on that, if you will.

24 "Have the opinions you've given me to -- been  
25 based on a reasonable degree of professional

1           certainty?

2           "Yes, sir.

3           "On Exhibit No. 49 -- I believe the property-  
4           disclosure statement is included in Exhibit 49,  
5           isn't it?

6           "Yes.

7           "I think the original is over there with the  
8           court reporter. But on this property-disclosure  
9           statement, there are three choices when the  
10          seller is asked about whether they know of  
11          problems, aren't there -- yes, no, and no  
12          representation -- right?

13          "Yes, sir.

14          "So if nobody has ever lived in the property,  
15          they could just check no representation, couldn't  
16          they?

17          "Yes, sir."

18          So I would submit to you that if we read Mr. Segars  
19          affidavit and the information he has in his affidavit as to  
20          how he believes Ms. Loper has violated her standard of  
21          care, you will see that those were testified to by him in  
22          his deposition.

23          He may have testified to other matters as well that  
24          don't necessarily support his statements as well as they do  
25          as to what I just read to you. But again, that's an issue

1 of fact. That's something they can argue to the jury, they  
2 can cross-examine him on.

3 But he has stated, as I read to you, how he feels that  
4 she's violated her duty of care. And again, it's not  
5 always just a misrepresentation. But in certain instances,  
6 it is.

7 Ms. Loper said, "This is a three-year-old roof. She  
8 repeatedly told our clients that. Again, I've got the  
9 deposition cites in here -- not cites, but the actual pages  
10 from her deposition where she says that and where the  
11 Malejkos say that she said that.

12 She created -- when the roofer did his work -- and  
13 that's part of what I was reading. And I apologize for  
14 just reading that, but I didn't know a better way to do it.

15 But she created a document. She typed a letterhead  
16 that said "Commercial Services Company." That was Dr.  
17 Roof's for -- former name. She created this document,  
18 pasted words into it, and then put the wrong person's name  
19 at the bottom, Thomas Hamilton, and handed it to my client  
20 and says, "Here's your roofing letter."

21 And my clients looked at it. And a couple days before  
22 closing, they said, "Who's Thomas Hamilton?"

23 And she said, "Oh. Oh." And then she forwarded him  
24 the e-mail that -- that Mr. Humphries had sent her at some  
25 point. But they didn't know about that when we filed the

1 complaint. That's something that Mrs. Loper and Thomas  
2 Humphries both testified -- testified to in their  
3 depositions. We didn't know that she had done that.

4 But that's another overt act where she's trying to  
5 mislead them and saying, "This is a roofing letter from the  
6 roofer." She didn't say, "I created this." And she didn't  
7 -- she didn't retract it until they called her on it. I  
8 mean, that's -- I think that's ---

9 THE COURT: And did they ---

10 MR. BULLARD: --- the fraud ---

11 THE COURT: --- call her on it prior to the closing?

12 MR. BULLARD: They did.

13 THE COURT: And then ---

14 MR. BULLARD: But ---

15 THE COURT: --- they went through with the closing?

16 MR. BULLARD: Right. Again, you have to go back to  
17 the fact that they're being told they had their inspections  
18 done like they were told they needed to have. And they're  
19 being told that the inspector is good; your roof is good;  
20 everything's fine.

21 And what we're saying is: Ms. Loper breached her duty  
22 by having -- asking this guy -- and that's what Mr. Segars  
23 says -- asking this guy she ---

24 THE COURT: He doesn't ---

25 MR. BULLARD: --- had never ---

1 THE COURT: --- ever ---

2 MR. BULLARD: --- met ---

3 THE COURT: --- really say anything definitively,  
4 based on the testimony you just read to me.

5 MR. BULLARD: Okay.

6 THE COURT: I mean ---

7 MR. BULLARD: Well ---

8 THE COURT: --- it -- right here in his deposition, he  
9 -- they say:

10 ""What's the opinion you have rendered as it  
11 relates to Ms. Loper's work?"

12 "Is that she did not exercise reasonable care and  
13 diligence in her fiduciary duties.

14 "In what way?

15 "She had a duty to disclose items -- anything she  
16 knew about."

17 He never answers the questions.

18 MR. BULLARD: Well, that's what I was reading to you,  
19 Your Honor, is I came in after those questions and asked  
20 him follow-up questions.

21 THE COURT: He never ---

22 MR. BULLARD: And he ---

23 THE COURT: --- answers any of your questions  
24 directly.

25 MR. BULLARD: Well, I -- I ---

1 THE COURT: And he ---

2 MR. BULLARD: --- I understand ---

3 THE COURT: --- I mean ---

4 MR. BULLARD: --- you say ---

5 THE COURT: --- in the amount ---

6 MR. BULLARD: --- that.

7 THE COURT: --- of times he says "yes" or "no" are --  
8 are extremely limited in the testimony that you just read  
9 to me. So your clients knew that the letter from the  
10 roofer was false prior to the closing and then still went  
11 through with the closing.

12 MR. BULLARD: No. They didn't know it was false. She  
13 ---

14 THE COURT: Because it ---

15 MR. BULLARD: --- just said ---

16 THE COURT: --- wasn't false. It -- she had just  
17 created it.

18 MR. BULLARD: Okay. Well, I think it's -- the -- of  
19 course, the -- I think you understand what our argument is.  
20 It was improper for her to create that and try and pass it  
21 off as if it were some legitimate letter that had been ---

22 THE COURT: And the ---

23 MR. BULLARD: --- created by ---

24 THE COURT: --- your clients ---

25 MR. BULLARD: --- the roofer.

1 THE COURT: --- still went through with the closing

2 ---

3 MR. BULLARD: Yes, sir.

4 THE COURT: --- which they could have backed out at  
5 that very moment and said, "We're not doing this. Time  
6 out. Something's wrong. Give us our money back."

7 MR. BULLARD: I suppose they could've tried that. But  
8 they were being assured that everything was fine, like I  
9 said, and that the ultimate issue, even though -- I  
10 understand your ruling on that and what you're saying.

11 THE COURT: I haven't ruled anything. I'm just ---

12 MR. BULLARD: Well ---

13 THE COURT: --- talking through it.

14 MR. BULLARD: --- I understand -- I'm sorry. I  
15 mischaracterized ---

16 THE COURT: I haven't -- I'm not ---

17 MR. BULLARD: --- it.

18 THE COURT: --- I'm not -- I haven't ruled. I'm just  
19 saying, you know -- I don't know what I'm saying. All  
20 right.

21 MR. BULLARD: Well ---

22 THE COURT: But ---

23 MR. BULLARD: --- I'm just -- I -- what I'm just  
24 trying to say is ---

25 THE COURT: When -- when Mr. Malejko -- and I'm sorry

1 if I'm saying his name wrong ---

2 MR. BULLARD: No. You're ---

3 THE COURT: --- deposition ---

4 MR. BULLARD: --- saying it fine.

5 THE COURT: --- is taken in April of 2016 -- excuse me  
6 -- in April of -- is it 2015 or 2016 that his ---

7 MR. BULLARD: I think it's '16 for April. There were  
8 some taken in '15. There were four different days.

9 THE COURT: When Mr. Malejko's deposition is taken in  
10 August of 2015 and September of 2015, I mean, he has no  
11 clue why he sued Ms. Loper.

12 MR. BULLARD: Yes, sir. And if I may address that,  
13 when you -- when you ask, I think they'll -- I think  
14 defense counsel will agree with me -- Mr. Malejko is not  
15 the most intelligent person, obviously. He was having very  
16 much difficulty, such that we had to stop -- he had a  
17 doctor's note that said: "He cannot be deposed for an  
18 indefinite period of time till I can get him back medicated  
19 so that he can sit for these depositions." And he came  
20 back for a fourth day and did that.

21 But when they asked him, you know, what's fraudulent  
22 intent? What are fraudulent acts? What ---

23 THE COURT: They -- they say ---

24 MR. BULLARD: --- breach of ---

25 THE COURT: --- what is "breach of contract"?

1 MR. BULLARD: Right. He -- what he's saying is, "I  
2 don't understand all those legal terms." And I included  
3 ---

4 THE COURT: Well, I mean, but they're saying, "Why --  
5 what is your issue with Ms. Loper?" And ---

6 MR. BULLARD: Well ---

7 THE COURT: --- he ---

8 MR. BULLARD: --- I don't ---

9 THE COURT: --- so my -- my question is: I'm trying  
10 to figure out how the lawsuit against Ms. Loper and NextGen  
11 was even filed, based upon the information that Mr. Malejko  
12 gave in his early depositions. I don't even know how they  
13 were named as a party, based on the plaintiff, who signed  
14 the contract's, own testimony in their deposition.

15 MR. BULLARD: Well, there's more than just that  
16 testimony obviously, Your Honor. And there's more  
17 testimony from Mr. Malejko. There's four days' worth of  
18 testimony.

19 And again, I have included excerpts from his  
20 deposition, where he does testify to things that he thought  
21 she did wrong, although he couldn't phrase it very  
22 logically, and couldn't -- I mean, he couldn't say, "This  
23 is how she breached the contract; these were her fraudulent  
24 acts; this is how she breached her fiduciary duty." He was  
25 never going to be able to phrase it in those terms. But he

1 would say and explain to them how she recommended an  
2 unlicensed HVAC guy. We didn't know he was unlicensed.  
3 And he didn't tell us things, and she didn't give us -- she  
4 just brought the guy.

5 She didn't give us a choice. She didn't -- she didn't  
6 check on him to see if he was licensed. And it turns out  
7 he wasn't, and he didn't do a very good job. He was  
8 negligent in his performance too.

9 And it's her fault for bringing this guy. She brought  
10 him; didn't give us a choice. Didn't tell us, and didn't  
11 ---

12 THE COURT: Didn't. ---

13 MR. BULLARD: --- vet him.

14 THE COURT: --- didn't give them a choice?

15 MR. BULLARD: Right. She brought him in; said he's a  
16 great guy. He gives them a clear letter and ---

17 THE COURT: And how does that not present them with a  
18 choice?

19 MR. BULLARD: She didn't -- well, I don't understand  
20 your question.

21 THE COURT: Okay. I mean, we've all bought and sold  
22 houses. We're all adults.

23 MR. BULLARD: Oh, yeah.

24 THE COURT: We've ---

25 MR. BULLARD: Okay.

1 THE COURT: --- all used real estate agents. They  
2 come in and say, "I think you should use Inspector XYZ."

3 MR. BULLARD: But she didn't say that. According to  
4 the Malejkos, again -- according to the Malejkos, what she  
5 said was, "Don't worry about that. I got a guy." And she  
6 brings him out.

7 THE COURT: That's great. She -- she can go do that  
8 if she wants to do that. I have real estate agents tell me  
9 that all the time. And I say, "I'm not using that person.  
10 I don't want them. This is the person I'm using to inspect  
11 my home."

12 And they have -- and -- and where, under their  
13 contract with her, does it say that she is an inspector or  
14 they have a right to rely on what she says in regards to  
15 inspections or who she recommends or anybody else? I --  
16 I'm ---

17 MR. BULLARD: Well ---

18 THE COURT: --- pretty sure the agency contract says  
19 the opposite of that.

20 MR. BULLARD: Well, the law in South Carolina is a  
21 realtor owes a fiduciary duty to their client. And ---

22 THE COURT: Right.

23 MR. BULLARD: --- if they know information and they  
24 don't disclose it or if ---

25 THE COURT: And name ---

1 MR. BULLARD: --- they under ---

2 THE COURT: --- something that she knew that she did  
3 not disclose ---

4 MR. BULLARD: All right.

5 THE COURT: --- that you can prove.

6 MR. BULLARD: That I can prove. All right. The  
7 seller of the house was Todd Corley. The previous owner  
8 for the last 20 years was Clementena Garvin. Clementena  
9 Garvin's daughter is Lori Corley, who's related to Todd.

10 And they are very close; they talk every week. They  
11 have -- they text. I mean, this is from Todd Corley's  
12 deposition and her deposition. They text; they talk to  
13 each other on the phone. They see each other personally.

14 All right. So they know each other. They're related  
15 to each other by marriage. Todd's the owner of the house.  
16 Janet Loper knows Lori Corley. She used to work for Lori  
17 Corley. They all know each other.

18 Janet Loper doesn't disclose to my clients, "I know  
19 Lori Corley." Her mother owned this house for 20 years.  
20 She has power of attorney over her mother. Her mother  
21 lives with her. And she's been dealing with this house --  
22 you know, dealing with repairs and trying to sell this  
23 house for several years.

24 She's not the seller. She doesn't represent her. But  
25 she knows all this information and does not disclose it to

1 my clients. They could've called Lori Corley, found out  
2 more about it.

3 THE COURT: What about that, Mr. Anderson?

4 MR. ANDERSON: Your -- Your Honor, I -- this is, again  
5 -- she knew Lori Corley. Lori Corley was Corley  
6 Enterprises that was a part of this suit. It's her  
7 husband's company. They have since settled out of this  
8 suit.

9 But there's no evidence that -- that -- that was  
10 somehow withheld from Malejkos on -- in an intentional  
11 basis. Ms. -- Ms. Loper was originally contracted by Todd  
12 Corley to market their home. Then the Malejkos see the  
13 sign out front, contact Ms. Loper, and ask whether or not  
14 she can represent them.

15 And she asked them, "Do you have a realtor?" They had  
16 a realtor at that time. And -- and they wanted Ms. Loper  
17 to be their -- their realtor. They had a realtor with the  
18 Mungo Home house that they purchased and then got out of  
19 because of alleged mold issues in that home, of which they  
20 didn't disclose to Ms. Loper that information, which Ms.  
21 Loper may have said -- suggested to them, "Well, why don't  
22 we have a -- a mold inspection done with this? If you're  
23 allergic to it in that house and you got out of that  
24 contract, why don't we do it with this house?"

25 So she didn't -- there -- there's no evidence that

1 there was -- that -- that Ms. -- the previous owner of the  
2 home or that Ms. Corley had any issues with the home.  
3 There's no evidence of that.

4 And so that's just a -- a -- you -- or, you know,  
5 there's no duty to tell everybody that you know in -- in  
6 ---

7 THE COURT: So -- so ---

8 MR. ANDERSON: --- that -- that ---

9 THE COURT: --- under your theory, if a real estate  
10 agent knows who the past three owners of the house are,  
11 they have a duty to tell everybody that information?

12 MR. BULLARD: I'm saying in a case ---

13 MR. ANDERSON: Well, I ---

14 MR. BULLARD: --- where ---

15 MR. ANDERSON: --- I'm not ---

16 THE COURT: Hold on.

17 MR. BULLARD: Oh.

18 MR. ANDERSON: --- aware ---

19 THE COURT: I'm not ---

20 MR. ANDERSON: --- of any ---

21 THE COURT: --- saying ---

22 MR. ANDERSON: --- statute ---

23 THE COURT: --- I'm not -- I mean -- I mean, I -- I  
24 mean, that's the plaintiffs' theory. If they -- I mean,  
25 under -- under that theory -- I mean, the Malejkos could've

1 gone on public record and determined who the previous  
2 owners of the house were and contacted them themselves.

3 MR. BULLARD: But ---

4 THE COURT: Where is the evidence that Ms. Loper knew  
5 -- and I mean knew -- that there was some defect in the  
6 house and she failed to disclose that to the Malejkos?

7 MR. BULLARD: We're not arguing that she knew there  
8 was a defect in the house and failed to disclose it.

9 THE COURT: Because she didn't.

10 MR. BULLARD: No. We're not arguing that. That's ---

11 THE COURT: Right.

12 MR. BULLARD: --- not our claim.

13 THE COURT: Your argument is that it's this omission?

14 MR. BULLARD: Well, there are some omissions and some  
15 commissions. Again, failure to vet people that she brings  
16 to the house and does not recommend ---

17 THE COURT: Okay. We're not -- we're not on that  
18 issue.

19 MR. BULLARD: Oh, I know.

20 THE COURT: We're -- we're on ---

21 MR. BULLARD: But that's ---

22 THE COURT: --- the -- we're on the prior owner ---

23 MR. BULLARD: Okay.

24 THE COURT: --- who's the ---

25 MR. BULLARD: Well, if they ---

1 THE COURT: --- sister of somebody or whatever.

2 MR. BULLARD: Well, I know it's complicated, Your  
3 Honor. And ---

4 THE COURT: It's not complicated.

5 MR. BULLARD: It's ---

6 THE COURT: This is -- this is a very simple case.  
7 This is not complicated. I'm not making it complicated.  
8 The issue that we're on is: You just stood up and said:  
9 Ms. Loper knew that Lori Corley, who is related to Todd  
10 Corley by marriage and their -- her mother was in the  
11 house; Ms. Corley had power of attorney over that person  
12 and knew about all the problems with the house.

13 And you never said Ms. Loper knew that. But you  
14 opined that Ms. Loper knew that information and should have  
15 told the Malejkos so that in somehow, they can reach out to  
16 Ms. Corley to determine issues that were ultimately  
17 discovered in an inspection that the Malejkos decided to  
18 buy the house on anyway. It's not complicated.

19 MR. BULLARD: I'm -- I'm sorry, sir. I -- I'm not  
20 exactly saying that. What I'm saying is: The -- that the  
21 -- during the time of the purchase of this house, the ---

22 THE COURT: Which -- the first or the second time?

23 MR. BULLARD: There is only one purchase in March.  
24 They backed out of the first one. But the ---

25 THE COURT: Right.

1 MR. BULLARD: --- whole -- the whole -- the whole ---

2 THE COURT: I mean, but the -- the ---

3 MR. BULLARD: --- time period.

4 THE COURT: --- clearly, the knowledge that they  
5 gained in the first purchase that they backed out of is  
6 imputed to them when ---

7 MR. BULLARD: Yes.

8 THE COURT: --- they go to buy it the ---

9 MR. BULLARD: Yes, sir.

10 THE COURT: --- second time.

11 MR. BULLARD: Yeah. I'm not -- I'm not saying that.

12 THE COURT: Right.

13 MR. BULLARD: I'm -- I'm just saying that throughout  
14 this process, from the first contract to the second and the  
15 ultimate closing, the Malejkos are being told by their  
16 agent, "Mr. Corley doesn't have any information on the  
17 house. He doesn't have to give you any information on the  
18 house." So basically, you're going to have to rely on this  
19 home inspection.

20 And so the home inspector says you got to get these  
21 other inspections. And they -- she brings those people to  
22 ---

23 THE COURT: Right.

24 MR. BULLARD: --- them and doesn't vet them. And she  
25 doesn't say, "By the way, I know who used to own this

1 house. We can give her a call. She's the one that called  
2 -- you know, she called me while she was trying to buy it  
3 for -- I mean, sell it by owner. And she's the one that  
4 recommended Todd contact me. So I can put you in touch  
5 with her. You can" ---

6 THE COURT: Do you think she has a duty to do that?

7 MR. BULLARD: I think she has a duty to disclose  
8 because it's material -- the condition of the house is a  
9 material item in this case. And she's telling -- "The  
10 seller doesn't know anything about it, but I know someone  
11 who does. I mean, I know someone. I used to work for her.  
12 We know" ---

13 THE COURT: And ---

14 MR. BULLARD: --- "each other."

15 THE COURT: --- and so where is the evidence that Ms.  
16 Loper knew the previous -- the condition of the house?

17 MR. BULLARD: Nothing -- there's no evidence that she  
18 knew the condition of the house, only ---

19 THE COURT: Okay.

20 MR. BULLARD: --- that she knew this previous owner,  
21 who ---

22 THE COURT: So ---

23 MR. BULLARD: --- who you ---

24 THE COURT: --- anything ---

25 MR. BULLARD: --- could ask ---

1 THE COURT: --- that we could've all gone and looked  
2 up on public record and discovered?

3 MR. BULLARD: They couldn't have discovered Lori  
4 Corley's connection with it because it was in her -- her  
5 mother's name, Clementena Garvin. And Clementena Garvin is  
6 not someone that they would've been familiar with.

7 I mean, it's a simple matter of she's got knowledge

8 ---

9 THE COURT: So if a real estate agent knows that  
10 somebody knows something about a house, they have an  
11 obligation to tell their client that? That's ---

12 MR. BULLARD: I think ---

13 THE COURT: --- that's the theory that you're asking  
14 me to put forward as law in this state? That's ---

15 MR. BULLARD: Well ---

16 THE COURT: --- like -- I mean, I remember Rhett  
17 Wolfe, Rhett Wolfe, who bought and sold every house I've  
18 ever owned. I mean, he would say, "I remember when Suzie Q  
19 used to live in this house." He would say, "My daddy built  
20 this house."

21 I mean, but how is -- are we putting a duty on real  
22 estate agents that if they know who the previous owner is,  
23 they have an obligation to inform the buyers?

24 MR. BULLARD: I think, under the facts of this case,  
25 if -- again, I think we agree a realtor has a fiduciary

1 duty. And if it's a ---  
2 THE COURT: Well, clearly ---  
3 MR. BULLARD: --- material ---  
4 THE COURT: --- a realtor has a fiduciary duty.  
5 MR. BULLARD: Yeah.  
6 THE COURT: We ---  
7 MR. BULLARD: All right.  
8 THE COURT: --- I mean ---  
9 MR. BULLARD: So she's ---  
10 THE COURT: --- that's ---  
11 MR. BULLARD: --- to put ---  
12 THE COURT: --- the law.  
13 MR. BULLARD: She's supposed to put her interests  
14 about that of her clients. So if her clients don't have  
15 any information, but she, readily available, knows here's  
16 someone that does, she just ---  
17 THE COURT: And what's ---  
18 MR. BULLARD: --- does not ---  
19 THE COURT: --- the proof ---  
20 MR. BULLARD: --- disclose ---  
21 THE COURT: What's the proof that Janet Loper knows  
22 that Lori Corley knows about something about the house?  
23 MR. BULLARD: That she knows about the house?  
24 THE COURT: Yeah.  
25 MR. BULLARD: She says she does. She knows that she

1 was trying to sell it by owner. She knew that she was  
2 taking care of it because her mother had moved out and her  
3 mother was living with her.

4 THE COURT: Okay.

5 MR. BULLARD: I mean, that's the information we're  
6 talking about.

7 THE COURT: That's nothing.

8 MR. BULLARD: That's not nothing. It's the previous  
9 owner, who's lived there for 20 years, who could tell you  
10 who put the roof on, how -- how ---

11 THE COURT: I mean, all those ---

12 MR. BULLARD: --- how is ---

13 THE COURT: --- are assumptions. Those are all  
14 assumptions. I mean, did -- has Lori Corley given a  
15 deposition where she says, "These were the 27 things wrong  
16 with the house and I told Janet Loper all that  
17 information"?

18 MR. BULLARD: No. No. Absolutely not. I won't say  
19 that.

20 THE COURT: Has Lori Corley given a deposition that  
21 says, "I knew everything that was wrong with the house"?

22 MR. BULLARD: No. But we have people that can testify  
23 that she did -- was in the house with her, with it rat-  
24 infested and feces all over it. I mean, we've done the due  
25 diligence and created the information that Ms. Loper had

1 readily available that just -- just didn't pass it along.

2 All she had to do was pass it along. That's all we're  
3 saying. That's not a high duty. "I know somebody who's  
4 lived here 20 years. I know the current seller doesn't  
5 know anything about the house. Here's somebody that might.  
6 And I know she's been taking care of the house. And she's  
7 somebody I know personally."

8 I think that is not a very high duty to -- I mean,  
9 it's certainly something a fiduciary should share. And  
10 it's ---

11 THE COURT: All right.

12 MR. BULLARD: --- material. The condition of the  
13 house is the most important thing. That's why we're doing  
14 all the inspections.

15 THE COURT: That's why you have an inspection.

16 MR. BULLARD: That's right. And the inspection said  
17 get these other inspections. And those people weren't  
18 qualified. Ms. Loper brought them. She assumed the duty  
19 to bring those there; didn't vet them; didn't know if they  
20 were qualified; says she never asks if people are  
21 qualified. That's her ---

22 THE COURT: And why does ---

23 MR. BULLARD: --- testimony.

24 THE COURT: --- the buyer not have a duty to make sure  
25 the people doing the inspections are qualified?

1 MR. BULLARD: I think they do. When their fiduciary  
2 tells them, "These guys are the best and they know what  
3 they're doing," they can rely on that.

4 THE COURT: And doesn't the contract say you can't  
5 rely on that, Mr. Anderson?

6 MR. ANDERSON: Yes, Your Honor. All ---

7 THE COURT: Go ahead.

8 MR. ANDERSON: --- the contracts ---

9 THE COURT: Hop back ---

10 MR. ANDERSON: --- have a ---

11 THE COURT: --- in, Mr. Anderson.

12 MR. ANDERSON: All the contracts have a -- have a  
13 disclaimer. The -- the purchase agreement has a -- a clear  
14 disclaimer that they are not making any representations,  
15 both broker -- both the purchaser and the seller, the  
16 brokers are making zero representations about the -- the  
17 property. And I've briefed that in the -- in the  
18 complaint.

19 THE COURT: I mean, I ---

20 MR. ANDERSON: I -- I just ---

21 THE COURT: --- thought -- I thought it went as far as  
22 to say, like, "Listen, we are not your inspector; we are  
23 not your builder; we are not your heating and air person;  
24 we're not your plumber; we're not your roofer. You know,  
25 we are the real estate agent. That's what we do. That's

1 all we do. And you can't rely on us for anything beyond  
2 that."

3 I -- and they say -- I know that's not a verbatim  
4 quote. But isn't there some paragraph in the ---

5 MR. ANDERSON: Your -- Your Honor, it's ---

6 THE COURT: --- the agreement ---

7 MR. ANDERSON: --- it's -- it's on ---

8 THE COURT: --- that says that?

9 MR. ANDERSON: --- page 32 of my brief: "Buyer and  
10 seller acknowledge that buyer and seller's brokers give no  
11 warranty of any kind, expressed or implied, as to physical  
12 condition of the property or as to condition of or  
13 existence of improvements, services, or systems, including  
14 but not limited to termite damage, roof, basement,  
15 appliances, heating and air conditioning systems, plumbing,  
16 sewer/septic, electrical systems, or to structure; (2)  
17 conditions of the property, any matters, which would be  
18 reflected by a current survey of the property or the  
19 accuracy of the square footage, heated or unheated."

20 And that's Exhibit A of the contract. Exhibit H --  
21 and it's a contract of sale, page 10, Your Honor.

22 THE COURT: All right. What else, Mr. Anderson?

23 MR. ANDERSON: Your Honor, just briefly, the -- Ms.  
24 Corley knew Ms. Loper because previous to being a real  
25 estate agent, they both worked in the cell phone industry.

1 So that's -- that's the nexus. I just want the Court to  
2 understand that it wasn't an -- an issue of just knowing  
3 her simply because of -- of real estate actions. Ms.  
4 Loper/NextGen never represented the owner of that property  
5 previous to the contract with Mr. Todd Corley.

6 THE COURT: All right. Anything else you want to  
7 follow up on that ---

8 MR. BULLARD: Yes, Your Honor. That's ---

9 THE COURT: --- Mr. Bullard?

10 MR. BULLARD: I mean, that's essentially why she had  
11 no -- there was no reason she couldn't tell her about him.  
12 She had never represented Lori Corley. Lori Corley was not  
13 the seller but did have information.

14 I just wanted to mention, you know, we've passed up  
15 for -- for you *Darby v. Furman* and *Ellie v. McEachin*, which  
16 basically is the real estate -- realtor's duty -- a  
17 fiduciary relationship, a duty of an agent to make full  
18 disclosure of all material facts relevant to the agency is  
19 fundamental to the fiduciary relationship. Silence may be  
20 -- may constitute fraud. Nondisclosure is fraudulent when  
21 there is a duty to speak.

22 And I think there's a duty to speak when the issue in  
23 this house is: What's the condition? They're making every  
24 effort to figure out the condition of the house. "And I  
25 know someone who knows about this house; have known about

1 it for 20 years. But I'm not going to let you know that."

2 THE COURT: All right. Anything else on summary  
3 judgment, Mr. Anderson?

4 MR. ANDERSON: Your -- Your Honor, I just would, just  
5 for the record, the two extracts that I handed up to the  
6 Court were not in my -- in my brief, the two deposition  
7 extracts. I'd like for that to be included in -- in my  
8 brief.

9 THE COURT: Okay.

10 MR. BULLARD: And if I could hand up the -- what I  
11 read to the Court as well.

12 THE COURT: All right. All right. What's the issue  
13 on this motion to compel? How many issues are there that  
14 have to be taken up?

15 MR. ANDERSON: It's just one issue, Your Honor.

16 THE COURT: Okay. And what is that?

17 MR. ANDERSON: It's a issue of we've asked plaintiffs'  
18 counsel to provide us information regarding the settlements  
19 that they went into with the other defendants. They have  
20 settled with the other defendants. This is solely up to  
21 the discretion of the Court.

22 There has been -- the federal court has ruled both  
23 ways on it. And as cited in my brief, Judge Harwell has  
24 ruled that it's -- that the matter is relevant -- it's  
25 relevant to setoff. Judge Anderson has ruled that -- he

1 failed to rule upon it at -- at that time; said it -- it  
2 may be relevant as we get closer to trial. He did not rule  
3 upon it.

4 It's not directly on point. But our Court of Appeals  
5 just last week issued a -- an order where it -- where they  
6 -- where the issue was litigated and then there was a  
7 posttrial motion. And the Court overturned the -- the  
8 trial court, saying that the settlement amounts and the  
9 settlement should've been disclosed and should've been  
10 applied to setoff.

11 We're seeking information regarding -- it's Ms. Corley  
12 -- it's Corley Enterprises settled. The home inspector  
13 settled. The home inspector indicated in his deposition  
14 what he paid in settlement. So we feel okay with that.

15 But we're interested in -- in Corley Enterprises, what  
16 they settled for in -- in this action because it goes  
17 directly to setoff. Our cause of action is the same with  
18 all the other defendants, with the exception of breach of  
19 fiduciary duty. And we would -- and -- and counsel has  
20 indicated that, in his response back to us, that -- that it  
21 -- that it doesn't -- settlement -- or setoff would not  
22 apply in this case.

23 Well, until we know what -- what the settlement is and  
24 what -- what -- what the basis of that settlement is, he's  
25 saying we -- it should not apply until after a -- a trial

1 and after damages or set or -- or that we are found to be a  
2 tortfeasor in this matter; that it's not relevant until  
3 that time. And we'd respectfully say that it should be --  
4 it should be disclosed.

5 In all fairness, there's no reason why it should not  
6 be disclosed. And we're willing to go into any type of  
7 confidentiality agreement, if there -- if they so desire  
8 that. But we feel that we have a -- a -- in trying to  
9 understand this whole case, have a -- have a -- a -- an  
10 obligation and a -- a right to get the relevant evidence of  
11 what the settlement is.

12 THE COURT: Okay. All right. Why don't you want to  
13 turn over the settlement on Ms. Corley or ---

14 MR. BULLARD: Your Honor ---

15 THE COURT: --- Corley Enterprises?

16 MR. BULLARD: --- first, because what we responded to,  
17 the discovery request, was that (1) it's not the same  
18 injury. Corley Enterprises were -- was sued and settled  
19 with because they didn't repair what they said they were  
20 going to repair at the house. There were items they didn't  
21 repair. That's not the same causes of action as to them.  
22 It's not the same injury under the statute of joint  
23 tortfeasors.

24 But also, in the case that they're talking about, that  
25 -- from 2010, Judge Anderson, across the street, he

1 analyzed the same issue. It was somebody wanted --  
2 somebody wanted to know what the other defendant had  
3 settled for and codefendant had settled for. And -- and  
4 although they're entitled to setoff, that's a ministerial  
5 duty that the Court handles after a jury has rendered a  
6 verdict showing that -- if they were to render verdicts  
7 against them and say they were liable. Then the Court  
8 would have to know that to apply the proper standard.

9 Basically, it's just not relevant to the liability  
10 stage of this case. It's relevant at that point. And  
11 certainly, we have to disclose it then. It's just that we  
12 don't think it's relevant to any issues in this case at  
13 this point. How much we settled with another defendant  
14 doesn't affect whether they're responsible or have any  
15 liability to my clients.

16 I just want to read -- this is what Judge Anderson  
17 said: "The Court agrees that section should apply  
18 automatically as a credit, but only against a judgment.  
19 Accordingly, there is no reason, for the purposes of the  
20 section" -- and they're talking about our joint-tortfeasor  
21 statute -- "to -- to order the disclosure of the amount of  
22 the credit until a verdict finding liability on the part of  
23 Lilly" -- which was the person asking for the -- the  
24 settlement amount. "Even then, the settlement would not be  
25 evidence relevant to any issue in this case, other than the

1 ministerial apportionment of damages, a mathematical  
2 computation which the Court, rather than the jury, will  
3 perform. Hence, the amount of the settlement is not  
4 relevant to any issue in this case at this time."

5 Now, I think, under the discovery, you know, whenever  
6 -- I mean, there's a general provision that there's got to  
7 be some particularized showing of a likelihood that  
8 admissible evidence will be generated by the dissemination  
9 of the terms of the settlement agreement. I mean, there's  
10 no -- been no showing that they're going to come up with  
11 information that's going to help them as to the liability  
12 and damage issues in this case.

13 What we've settled for doesn't affect either of those,  
14 as far as it goes to the jury. Juries -- that evidence  
15 doesn't go to the jury. They're not going to be able to  
16 talk about that in front of the jury.

17 So it's not relevant at this time. It certainly is  
18 relevant -- and I grant that it's relevant if there is a  
19 finding of liability as to the defendants. I've got to  
20 tell them. I've got to disclose it at that time. And then  
21 it's relevant because then the Court has to determine who  
22 gets a setoff and how much.

23 But right now the jury doesn't do that. There's no  
24 reason for them to hear that. And there's no -- there's no  
25 reason for the request to be granted at this time.

1 MR. ANDERSON: Just briefly, Your Honor, Judge  
2 Anderson, in his opinion he -- he -- he cites, further goes  
3 on to -- says that: The Court notes that the full terms of  
4 settlement are likely admissible at trial and that the  
5 Court will examine the issue again closer to trial. He  
6 states that in his report.

7 The case that I cited in my brief with Judge Harwell  
8 is a 2015 -- this was a 2010. And then, we have the recent  
9 case from our Court of Appeals of last week. Finally, I've  
10 cited in my brief, Your Honor, a Northern District of  
11 Illinois case, noting that discovery of a settlement  
12 agreement could foster settlement talks, which in turns  
13 promote judicial economy. The -- that's all we're -- we're  
14 looking for in this, is to try to promote judicial economy  
15 and try to get the grounds of what it is -- because what he  
16 -- he has indicated, it's not as it relates to the damages  
17 asserted against our client. We're trying to find out what  
18 those damages are.

19 And -- and so if we go into settlement -- if we go  
20 into a mediation conference without knowing that two of the  
21 parties settled in the case, we could assume that they  
22 settled for their policy limits. And -- and therefore, the  
23 damages would be -- would've been met in -- in the matter  
24 and then would not -- if we did not provide funds during  
25 the settlement conference, saying that they settled for

1 policy limits, would -- would that promote judicial economy  
2 in this?

3 I think that the pendulum is swinging, at this case,  
4 with -- if you look at Judge Anderson's ruling, you look at  
5 Judge Harwell's ruling, and you look at the case that -- of  
6 last with -- with our Court of Appeals, it's a -- it -- it  
7 -- it -- it -- it just came out in the advance sheets of  
8 last week -- that we would be entitled to this and it  
9 doesn't prejudice the plaintiff one -- one iota. Thank  
10 you.

11 MR. BULLARD: Your Honor, if I could, first of all,  
12 when -- in the Judge Anderson -- first, I've given you  
13 seven different jurisdictions that have found the same as  
14 Judge Anderson, South Carolina being one of them,  
15 interpreting this type of request. And my cases say that  
16 disclosing that has a chilling effect on settlement  
17 negotiations. So you can find cases on either side of this  
18 issue.

19 In the South Carolina case that came out last week,  
20 the plaintiffs in that case didn't want to disclose it  
21 after a jury verdict. They wouldn't disclose it after a  
22 jury verdict because they said it was a mediation  
23 settlement and mediation terms were confidential. And  
24 that's what that case was about. It was after verdict.

25 And again, I'm not saying they're not entitled to it

1 after verdict. If they get a verdict against them, I will  
2 tell them everything we've collected. But it's after  
3 verdict. It has no bearing on what the jury hears. It has  
4 no bearing on the jury's decision and is not relevant.

5 They just ---

6 THE COURT: So ---

7 MR. BULLARD: --- want to ---

8 THE COURT: --- Ms. ---

9 MR. BULLARD: --- know it ---

10 THE COURT: --- Ms. Corley's not going to be a witness  
11 at trial?

12 MR. BULLARD: Well, she might be. I don't know.

13 THE COURT: Well, you just relied on her testimony to  
14 prove one of the elements of fraud against Ms. Loper.

15 MR. BULLARD: Well, no. Ms. Loper testified that she  
16 knew Lori Corley and that she knew her mother owned the  
17 house and that Lori contacted her and let her know she was  
18 felt -- selling it for sale by owner and she was taking  
19 care of her mother and she was taking care of the house.  
20 So I don't need Ms. Corley to prove that.

21 THE COURT: All right. How -- what you just said is  
22 hearsay.

23 MR. BULLARD: Ms. Loper said that.

24 THE COURT: Yeah, I know.

25 MR. BULLARD: She said that she knew. She's not going

1 to go -- she's -- "I knew that I -- I knew Ms. Corley. I  
2 mean, I've known her for years. I used to work for her. I  
3 know that her mother used to own the house."

4 I mean, I don't need Ms. Corley necessarily to testify  
5 to that. Ms. Loper's going to testify to it. She's  
6 already testified to it in her deposition.

7 THE COURT: Motion for summary judgment is granted.  
8 Motion to compel is hereby moot. Mr. Anderson, you have  
9 ten days to do an order. Court will start back at 3:30.

10 MR. ANDERSON: Yes, Your Honor.

11 MR. BULLARD: Thank you, Judge.

12 (Whereupon, the proceedings were concluded at 3:23  
13 p.m.)

14 --- END OF TRANSCRIPT OF RECORD ---

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**CERTIFICATE**

I, THE UNDERSIGNED MARYANN S. NEVERS, CERTIFIED  
VERBATIM REPORTER - MASTER, CERTIFICATE OF MERIT,  
OFFICIAL COURT REPORTER FOR THE EIGHTH JUDICIAL  
CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY  
CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND  
COMPLETE TRANSCRIPT OF RECORD IN THE HEARING OF THE  
CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT  
COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 26TH  
DAY OF JULY, 2017.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,  
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



---

MARYANN S. NEVERS, CVR-M-CM

COLUMBIA, SOUTH CAROLINA

DECEMBER 2, 2017

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2016-CP-40-1536

Raymond J. Malejko and Cristine Malejko, individually and in the interests of a  
minor child, Appellants,

v.

Todd Corley, Janet Loper, NextGen Real Estate, LLC, Thomas Humphries, Dr.  
Roofs, Inc., Ray Mooneyham, Mooneyham Solar & Electric, Professional Home  
Inspections, Inc., Corley Enterprises, Inc. of South Carolina, and DBR Franchising,  
LLC, Defendants,

Of whom Janet Loper and NextGen Real Estate, LLC are Respondents.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Supplemental Record on Appeal contains all  
material proposed to be included by any of the parties and not any other material.

  
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April 25, 2018.