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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF ISLAND

ROBERT WILBUR,)
)
Plaintiff,)
)
vs.)
)
ADMIRAL'S COVE BEACH CLUB, a)
Washington non-profit)
Corporation;)
)
Defendant.)

Cause No: 13-2-00741-4

SUE CORLISS,)
)
Intervenor,)
)
vs.)
)
DUSTIN FREDERICK, ROBERT)
WILBUR, ADMIRAL'S COVE BEACH)
CLUB, a Washington non-profit)
corporation, and its BOARD OF)
DIRECTORS,)
)
Defendants.)

Verbatim Report of Proceedings

BE IT REMEMBERED, that on Friday,
September 1, 2017, the above-named and numbered cause
came on regularly for hearing before the HONORABLE
ALAN R. HANCOCK, sitting as judge in the above-entitled
court, at the Island County Courthouse, in the town of

1 Coupeville, state of Washington.

2 The plaintiff appeared through his attorney,
3 Sarah E. Gruel;

4 The defendant Admiral's Cove Beach Club
5 appeared through its attorney, Christopher J. Nye;

6 The intervenor appeared through her
7 attorney, Jay Carlson.

8 WHEREUPON, the following proceedings were
9 had, to-wit:

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1 THE COURT: Welcome to Island County
2 Superior Court. This is Cause Number 13-2-741-4, *Wilbur*
3 *v. Corliss*. The Admiral's Cove Beach Club is also a
4 party, as are others, perhaps, and we are here this
5 morning for a hearing on the Admiral's Cove Beach Club's
6 motion for summary judgment regarding the validity of
7 the 2013 ballot to decommission the pool. I received
8 and read all of the papers and pleadings that have been
9 submitted in support of and in opposition to the motion.
10 Fortunately, we have some time here this morning so I
11 don't need to limit you in your arguments. And we'll
12 proceed at this time. Mr. Nye.

13 MR. NYE: Thank you, Your Honor. Good
14 morning.

15 THE COURT: Good morning.

16 MR. NYE: It's correct, we're here before
17 the Court on ACBC's motion for summary judgment which
18 essentially raises two separate issues. And at the
19 outset I want to be perfectly clear that these issues
20 are directly related to plaintiff Wilbur's original
21 claim for declaratory relief, not a proposed amended
22 complaint that was never filed; nothing like that, but
23 the original declaratory relief claim seeking a
24 declaration that the 2013 ballot was invalid because it
25 violated the club's governing documents.

1 THE COURT: One of the things I should
2 address here is a procedural issue that is raised by
3 Ms. Corliss. Ms. Corliss contends in her opposition to
4 this motion that it is premature for the Board to seek
5 summary judgment on claims that are not formally present
6 in this litigation. Has the defendant ever filed an
7 amended complaint or a pleading of some kind that would
8 raise the issues that it is now presenting?

9 MR. NYE: No, Your Honor, the Board has
10 never filed an amended complaint. However, if you
11 recall, at the time of the plaintiff's motion for leave
12 to amend he was seeking to add a new claim for
13 declaratory relief relative to the validity of the 2016
14 vote.

15 We're not here arguing for a finding of
16 validity or invalidity on the vote. Our argument is
17 that the original 2013 vote has been rendered invalid
18 because it has been superceded by the 2016 vote. And
19 Your Honor stated in his order for summary judgment that
20 there was nothing in the order that would prevent any
21 party from raising any new facts or issues that arose
22 after the date of that order when this vote which we're
23 arguing --

24 THE COURT: I understand that. I'm raising
25 a purely procedural question that Ms. Corliss may be

1 presenting to the Court and that is, can a party move
2 for summary judgment where there's no pleading that sets
3 forth a claim upon which a motion for summary judgment
4 can be brought?

5 MR. NYE: Your Honor, the -- we're moving on
6 the original claim; on the original claim, the validity
7 of the 2013 vote.

8 THE COURT: Mr. Wilbur raised that, but to
9 my knowledge the club itself has not raised a claim in
10 that regard. Can you make a motion for summary judgment
11 on a claim brought by another party?

12 MR. NYE: I'm not aware of any legal
13 authority that says we couldn't. Mr. Wilbur did in fact
14 join in this motion. So in a sense he has made the same
15 claim -- the same arguments on summary judgment. It's
16 just that the mouthpiece is a little different than
17 we're used to.

18 THE COURT: Proceed.

19 MR. NYE: Okay. Thank you.

20 At the outset I want to briefly address the
21 Court of Appeals decision, and the intervenor's
22 opposition is based, I believe, on a mischaracterization
23 of the effect of that decision.

24 She argues throughout her brief that in a
25 sense this case is over, that all of the issues have

1 been found entirely in her favor, and that is not the
2 case, Your Honor. Mr. Wilbur prevailed before this
3 court on summary judgment on a finding that he was
4 entitled to judgment as a matter of law. That went up
5 to the Court of Appeals and the Court of Appeals said
6 that's incorrect. He has not established he's entitled
7 to summary judgment as a matter of law for two reasons:
8 (1) the governing documents do in fact give the club the
9 general authority to dispose of the pool if it so
10 wishes, and, (2) the October 2012 motion did not
11 preclude the club from presenting the 2013 ballot to
12 club members.

13 So with the reversal of the judgment in
14 plaintiff's favor, we're back on even ground, we're back
15 before Your Honor for further proceedings consistent
16 with the Court of Appeals decision. And the two issues
17 we're raising today, I would argue, do not run
18 inconsistently to the decision. We're not here saying
19 the club does not have the general power to dispose of
20 the pool. That's been decided. What we're saying is,
21 even though it does, there are two new reasons, new
22 theories, for why plaintiff should prevail on his
23 original claim as to why that original vote in 2013 is
24 now invalid.

25 First, that it's been superseded by the

1 subsequent 2016 vote, and, second, because the ballot
2 presented to the members at that time did not afford the
3 opportunity for any members to vote no to a special
4 assessment, in violation of the club Bylaws.

5 So we're back -- we're on the playing field
6 again. I use the sports analogy in the briefing. And
7 we're free to argue -- I think both arguments are
8 properly before the Court in the current posture of the
9 case.

10 Now with respect to -- oh. And it is
11 important to note that the Court of Appeals did not,
12 when it reversed the judgment in favor of Mr. Wilbur,
13 didn't enter instructions for this court to enter
14 judgment in favor of Ms. Corliss. I think that's a key
15 fact here as to why we're just back where we started and
16 not now talking about all that's left to do is enter an
17 order enforcing the 2013 ballot.

18 In terms of the argument that the 2016 vote
19 supersedes the 2013 vote, as I said, I believe that
20 issue is properly before the Court because we're here
21 arguing about the same original complaint for
22 declaratory relief as it was originally pled by Mr.
23 Wilbur.

24 In essence, Your Honor, the club has simply
25 changed its mind three years after the fact. The

1 evidence before you shows that we've had some changing
2 demographics within the club. The evidence shows that
3 there have been four annual director elections since,
4 and unanimously, each and every time, every director
5 elected to this Board has run openly as pro-pool. The
6 Board senses that the club membership was in favor of
7 preserving the pool. It's a longstanding pool. It's a
8 valuable asset to the community. It's touted, as you
9 saw in all the real estate listings, pro-pool members,
10 anti-pool members, anyone that sells their home touts
11 the pool as a selling point.

12 So to avoid further delay, it would only
13 drive up repair costs, and because of this court's
14 original ruling, as well as the fact that the club had
15 its -- the Board had its finger on the pulse of the
16 community, they presented a new ballot, which was
17 absolutely their right to do.

18 As the Court of Appeals noted on page two,
19 the Board can present a special -- a proposed special
20 assessment at any time and so it did. And this time
21 there are open meetings -- and this goes directly to
22 intervenor's point that the vote was somehow tainted
23 because members were tricked into believing they had to
24 vote yes in favor of the repair assessment.

25 The actual overwhelming evidence shows

1 that's clearly not the case. There were open meetings,
2 membership meetings, board meetings, annual meetings,
3 where the issues about this ballot were openly discussed
4 and argued. And anti-pool members campaigned hard. You
5 saw the website postings where they were urging other
6 members to vote no to the special assessment.

7 More importantly, really, and I think maybe
8 the thing that brings this back -- went against that is
9 the face of the ballot itself. Unlike the 2013 ballot,
10 this ballot clearly had a "no" option on it. And
11 obviously the members were aware of that fact because
12 they did in fact vote down the second of the two
13 proposed repair assessments. So it's obviously clear
14 members were aware of that.

15 Many of the anti-pool members were present
16 in this courtroom on the date Your Honor ruled on
17 plaintiff's motion for summary judgment and basically
18 laid out a roadmap of how they might go about keeping
19 these repairs from happening because they had the right
20 to vote no to any proposed special assessment under the
21 Bylaws.

22 THE COURT: Let's talk about the vote for
23 special assessments. Clearly, there was such a vote in
24 2016. The membership, under an election or a vote
25 ballot called under the Bylaws of the association,

1 clearly made this vote, and this specifically authorized
2 the special assessment. That appears to be in contrast
3 to the 2013 vote. There was no assessment. It was
4 simply a vote, yes or no, on the two options that were
5 presented. What is the nature of that?

6 The Bylaws of the association provide that
7 the business of the association is managed by the Board
8 of Directors. So let's assume hypothetically that the
9 only thing before the Court, the association, whatever,
10 is that 2013 vote. Was that somehow binding on the
11 Board or could the Board just deem that to be an
12 advisory vote and do what it deemed appropriate? Who
13 has the authority to manage the business of the
14 association?

15 MR. NYE: That's correct, Your Honor. And
16 I'm mindful of the fact that, when we were back before
17 you in March, Your Honor even raised the possibility,
18 why doesn't the Board simply administratively declare
19 the 2013 ballot invalid? Why do we even have to be here
20 at all? Trust me, the Board has given a lot of thought
21 to doing just that because that does seem like a simple
22 and clean approach.

23 However, the nature of this dispute within
24 the community, it's very obvious that's not going to
25 resolve it. They could do that. Intervenor and her

1 supporters would march us right back before Your Honor.
2 That's why we're here.

3 The specter of this 2013 ballot has been
4 hanging over this club's head for four years, and
5 without a ruling from the Court, the people that are
6 dissatisfied with the outcome simply aren't going to let
7 the club live with it. And, unfortunately, that's the
8 case. That's why we're here. If the club -- believe
9 me, if the Board felt confident at all they could do
10 that and we wouldn't be back before Your Honor it would
11 do it in a heartbeat.

12 THE COURT: Well, my question, though, is a
13 hypothetical question concerning the authority of the
14 membership, if any, to make any binding decision on the
15 Board and the authority of the Board itself. The
16 affairs of the association are managed by the Board. Is
17 the Board required to adhere to a vote of the membership
18 such as the 2013 vote?

19 MR. NYE: I believe so, and I believe Your
20 Honor has stated in earlier rulings it's axiomatic that
21 the Board must adhere to the votes and to the motions of
22 its members.

23 THE COURT: That was my view, of course, at
24 that time. I made my decision. The Court of Appeals
25 has ruled that the 2012 vote that created the committee

1 and all the rest of it was not something that required
2 the Board to follow the 2013 vote. Does that change
3 things?

4 MR. NYE: Well, I'm not sure I understand
5 the question. Getting back to the original point of
6 whether the Board can disregard, the Board did propose
7 the assessment -- and I'm talking about now in 2016 --
8 and it was -- the club obviously did change its mind.
9 And in the 2013 ballot it -- they really were voting on
10 raising the funds to either, (a) repair the pool, or
11 (b), to decommission the pool, 650,000 versus 200,000.
12 So it was the type of vote that had to go to the members
13 under the Bylaws because it was proposing a special
14 assessment.

15 THE COURT: So you're -- are you conceding
16 that it was a vote to impose a special assessment?

17 MR. NYE: The 2013 ballot?

18 THE COURT: Yes.

19 MR. NYE: It was. I mean --

20 THE COURT: There was no indication of how
21 much the various property owners would have to pay such
22 as in contrast to the 2016 vote.

23 MR. NYE: Well, that --

24 THE COURT: Nobody would know how much they
25 had to pay under the 2013 vote. There would have to be

1 some further action to actually impose the assessment,
2 right?

3 MR. NYE: Well, all that was done on that
4 was the Board did send out invoices to the members for
5 their respective share.

6 THE COURT: Okay. I wasn't clear on that --

7 MR. NYE: Okay.

8 THE COURT: -- from the record. Is there
9 something in the record that indicates that the Board
10 actually followed through after the 2013 vote and sent
11 out --

12 MR. CARLSON: Yes. I'm sorry, Your Honor.
13 Yes. And in fact collected --

14 THE COURT: Let's take it one at a time
15 here.

16 MR. CARLSON: Sorry.

17 THE COURT: Let's hear from Mr. Nye.

18 MR. NYE: Yes, Your Honor. The Board did
19 take steps to collect the assessment. That's what led
20 to Mr. Wilbur even filing this lawsuit.

21 THE COURT: Okay. That clarifies that
22 issue.

23 MR. NYE: So we were dealing with a special
24 assessment in both ballots in 2013 and 2016. And so to
25 answer your question, I believe that is the type of

1 thing that must go to the membership for a vote under
2 the Bylaws.

3 But in any event, getting back to the 2016
4 vote itself, it was very clear on the face of the ballot
5 and in the materials, the Q&A that's been argued by
6 intervenor and submitted by both parties, the statement
7 they point to that they say was -- reflected this
8 court's erroneous ruling, the Court never said anywhere
9 that members must approve assessments for proposed
10 repairs.

11 What the ruling was, and I think it's
12 accurately stated in the Q&A that went with the ballot,
13 is that the club had an obligation to operate and
14 maintain its recreational facilities. That was an
15 absolutely true statement at the time it was made.

16 But in the same paragraph the Q&A goes on to
17 say, well, we can live with continued Band-Aid
18 approaches but that's not what we want to do. We want a
19 pool we can be proud of. So there's nothing about the
20 materials that went out, this court's ruling, the
21 arguments and debating that was going on in any of the
22 open meetings and open forums, the members were
23 obviously aware they had the power to vote no to this
24 repair assessment. Most important, the ballot itself;
25 yes/no for each proposed assessment. And clearly they

1 knew they could vote no because they did on the second
2 of the two assessments.

3 As far as allegations of collusion, again,
4 the information that's just kind of been thrown out
5 there to suggest this raises no issues of material fact.
6 It's what you see reflected in those emails is that you
7 do have current Board members who, back in 2013, did
8 contribute funds to plaintiff for him to pursue this
9 case. They were at all times openly and honestly
10 pro-pool people, and it was their right to do that.
11 They were not Board members at the time they ever
12 contributed any funds. Once these individuals became
13 members of the Board, they contributed no more funds.
14 And then what you do see -- the emails are two parties
15 to a legal dispute trying to find a way out of it in a
16 way that will honor fiduciary duties to all members of
17 the club, the cheapest, most streamlined method of
18 getting the club out of this dispute once and for all.
19 That's all those emails show. And the law favors
20 parties trying to pursue settlements.

21 The club -- there were some ideas battered
22 around that the club didn't feel comfortable with, which
23 is what led to ACBC refusing to take a position on
24 plaintiff's motion. And we've known all along what we
25 really need is Your Honor to straighten this out for us

1 so we can go forward once and for all. Otherwise, we're
2 going to be bugging you for a long time. So there was
3 no collusion. There was no improper financial dealings.

4 Dustin Frederick. Of course he's going to
5 be on emails with Mr. Wilbur discussing case strategy.
6 He was the original plaintiff right along with
7 Mr. Wilbur in this case. He subsequently got elected to
8 the Board and he thereafter withdrew from this case as a
9 plaintiff and the Board continued to exclude him from
10 all executive sessions involving the pool discussions,
11 the litigation discussions. I never spoke to him. He
12 was excluded from my communications with the Board. So
13 I think the Board has done an admirable job -- admirable
14 job -- of recognizing its duty to all club members and
15 trying to be transparent, open and honest, be fair to
16 all members.

17 In terms of the argument that voting -- that
18 the 2016 vote is invalid -- is invalid because of
19 disenfranchisement of members, the same rules were
20 followed in the 2016 vote that were followed at the time
21 of the 2013 vote. And that is to even have a right to
22 vote from which you can be deprived of, you have to be a
23 member in good standing. The Bylaws are very clear on
24 that point and both Boards -- both -- at the times of
25 both votes recognized that fact and only members in good

1 standing were permitted to vote. That's right there in
2 the Bylaws.

3 And in fact, in the declaration submitted by
4 intervenor in her opposition, several of those anti-pool
5 members acknowledge the fact that they on purpose
6 refused to pay their dues out of protest and they know
7 -- they know what the outcome of that is, that they're
8 not going to have the right to vote in subsequent
9 elections. It's an unfortunate case of cutting off your
10 nose to spite your face, but that's clearly what the
11 Bylaws state. And so there has been no
12 disenfranchisement of any members.

13 There's no evidence in this case that any
14 members that have a right to vote were deprived of that
15 right or furthermore that any of those people who didn't
16 vote because they weren't in good standing would have
17 voted no or would have voted yes. We simply don't know.
18 Only the members in good standing were allowed to vote
19 and clearly the outcome of that vote was in favor of
20 repairing the pool.

21 And so we are at a point now where the club
22 has simply changed its mind. A majority of the
23 membership wants to keep this pool, wants to pay for it.
24 Most of the funds that were part of this assessment have
25 been collected. And that's true -- been collected from

1 both pro-pool members, been collected from anti-pool
2 members.

3 You've seen in the declaration of Kurt
4 Blankenship that the percentage of members in good
5 standing has been steadily growing since the time of
6 this vote. People are paying this assessment. They're
7 ready to move on. They're ready to repair this pool and
8 put this issue behind the club once and for all.

9 Now, with respect to the other grounds of
10 our motion, and that is the technical invalidity of the
11 2013 ballot. You know, I'm sensitive to what Your Honor
12 ruled back in March on plaintiff's motion for leave to
13 amend. That was a procedural ruling that resulted in
14 plaintiff not being able to amend his complaint to add
15 additional language.

16 I've tried to set forth in good faith in our
17 brief why, despite the lack of that amendment -- that
18 whole hearing kind of became meaningless in any event
19 because plaintiff never even followed through and filed
20 an amended complaint. This case has always been
21 proceeding under the original complaint and the original
22 claim for declaratory relief.

23 THE COURT: One of the points about the
24 Court's previous ruling about the 2013 vote and the
25 inability to raise new issues has to do with this

1 claim-splitting concept that I pointed out in my
2 decision in that regard. And there's been arguments
3 back and forth about that. We'll hear from Mr. Carlson
4 here in due course about that issue.

5 Was there anything in Mr. Wilbur's
6 complaint, that you seem to be piggybacking on at this
7 point, that raised an issue with regard to the lack of
8 any option to vote no on the 2013 vote? The reason I
9 ask that question is that there's kind of a subtle
10 distinction here between this claim-splitting idea that
11 if you raise a number of different claims in a pleading,
12 you can then move for summary judgment on one of those
13 claims, and if that's determinative, that's the end of
14 it. That wouldn't necessarily result in a waiver of the
15 ability to bring those other claims that are brought in
16 a pleading theretofore.

17 On the other hand, it seems to me, at least
18 it seemed to me previously under the case authority,
19 that if one was moving for summary judgment on the
20 claims that then existed in a prior pleading and there
21 was no other pleading that raised a different issue that
22 wasn't addressed in the motion for summary judgment,
23 that that might be a waiver.

24 MR. NYE: Well --

25 THE COURT: What's your response to that?

1 MR. NYE: My response to that -- and I'm
2 trying to be very careful not to conflate the concept of
3 a claim with a theory for why a party is entitled to
4 prevail on that particular claim.

5 We've always had a claim for declaratory
6 relief seeking a declaration that the 2013 ballot was
7 invalid because it violated the governing documents of
8 the club. And that was the general statement. I
9 believe it's paragraph 4.8.1 of plaintiff's original
10 complaint. And my point is, subsumed within that
11 umbrella of this ballot is invalid because it violates
12 the governing documents, is every argument as to why, in
13 what respects did that ballot violate the Bylaws, the
14 governing documents?

15 Now, on round one, plaintiff asserted the
16 grounds that the club doesn't have the authority -- the
17 governing documents do not bestow upon the club the
18 authority to get rid of the pool at all, and that
19 argument prevailed at the time, and the Court of Appeals
20 said that's incorrect.

21 However, also under that umbrella of the
22 original pleading is there might be a technical
23 deficiency with the ballot that was presented because it
24 doesn't afford the members an opportunity to vote down
25 the proposed special assessment. That was not raised in

1 plaintiff's original motion for summary judgment.
2 However, that issue and that theory for why plaintiff
3 should prevail on the claim for declaratory relief has
4 always been an issue in this case. It's just that it
5 wasn't mentioned in the original motion for summary
6 judgment.

7 Just as if a party may have a viable statute
8 of limitations defense as to why it should be prevail on
9 a negligence or breach of contract claim, that party can
10 move quickly for a motion for summary judgment asserting
11 the claim was not brought within applicable statute of
12 limitations. That may prevail or not. It may go up.
13 It may get reversed and remanded and now we're back.
14 And now there may be additional theories of why
15 plaintiff's entitled to prevail on that same claim, such
16 as the other party didn't fulfill their condition
17 precedent to performance under a contract. Whatever it
18 may be. It's -- I'm not aware of any legal requirement
19 that the party is required to assert in a motion for
20 summary judgment on a particular claim every single
21 legal basis or theory on which they're entitled to
22 prevail.

23 THE COURT: In any event, we have the fact
24 that happened after the previous case, the 2016 vote and
25 all, and the Court could reach the merits of that and

1 not address this other issue if it deemed appropriate.

2 MR. NYE: That is true, and we point that
3 out in our brief, and I've been prepared as I stand here
4 today not to even mention the second of two arguments.
5 I honestly meant no disrespect to Your Honor by even
6 putting it in the brief. I just felt that we had a
7 good-faith basis for why the argument is still properly
8 before the Court.

9 THE COURT: Does it make any difference that
10 the club is now asserting this argument as opposed to
11 Mr. Wilbur himself?

12 MR. NYE: Well, that is seriously one of the
13 stranger aspects of this case. I fully admit that. I
14 think we can all agree on that. It's not the usual
15 course of lawsuits. However, what this club has always
16 done, what the Board has always done since the outset of
17 this case, is try to fulfill the clear wishes of its
18 members. It just so happened in 2013 the members voted
19 to decommission the pool. The Board at that time took
20 steps to collect that money, to fill the pool with sand.
21 Mr. Wilbur cried foul, asserted this lawsuit, prevailed
22 on his motion for summary judgment. The case went up on
23 appeal. The Board felt like demographics have changed.
24 The members want this -- to save this pool. It's just
25 going to cost more money the longer we wait. We have

1 the right, as the Court of Appeals said, to present the
2 special assessment at any time. It was a perfectly
3 valid reason for them to do so. They did. They gave
4 the members another opportunity to be heard on this
5 issue. This time, the club clearly stated, no, we want
6 to keep the pool.

7 And now this Board has been trying -- has
8 taken the position that the wishes of the membership
9 should be enforced and that's why we're now here, kind
10 of standing in the shoes of Mr. Wilbur at the outset of
11 this case, saying the pool should be preserved. We have
12 a clear statement through a valid democratic vote from
13 the membership to that effect. So at all times the
14 Board has been trying to uphold the wishes of its
15 membership. It just so happens that those wishes have
16 changed.

17 And so just to conclude, Your Honor, I think
18 both bases for this motion are properly before the
19 Court. I think they both have merit. The Board has
20 done nothing to run afoul of the Bylaws or the decision
21 of the Court of Appeals in this matter. The relief
22 being sought now is entirely consistent with the Court
23 of Appeals ruling. It's just two new specific bases for
24 why plaintiff is entitled to recover.

25 This has been going on for four years.

1 We're almost at the four-year anniversary of the 2013
2 vote. It would be nice if there were a way for this
3 club to sort this out without Your Honor's help. It
4 would be nice. I think everybody would prefer we could
5 do that. But every time we've been before the Court and
6 every submission to the Court you've seen the dissension
7 over this issue. It's not going to happen. Someone's
8 always going to be dissatisfied and they're going to do
9 everything they can to prevent the other side. But
10 there's no question now that the majority of the members
11 want to see this pool sedate, and the Board is trying to
12 do that and the means by which it's doing it this
13 morning are perfectly legitimate and perfectly before
14 the Court and it's just not true that the membership has
15 abandoned this Board or has abandoned this pool cause.

16 You've got some declarations from some very
17 vocal anti-pool people, but if you look at the actual
18 evidence before the Court, members in good standing
19 steadily increasing because people are paying the dues.
20 People have paid their share of the assessment imposed
21 by the 2016 vote. The majority passed. People touting
22 the pool. People using the pool. It's really time to
23 put this behind everybody once and for all and let this
24 club go about the business of implementing the wishes of
25 its members and repairing this pool. Thank you.

1 THE COURT: Thank you very much. I see
2 Ms. Gruel here, Law Office of Christon Skinner,
3 representing Mr. Wilbur. Ms. Gruel is here presumably
4 for Mr. Wilbur. Did you have anything to add,
5 Ms. Gruel?

6 MS. GRUEL: No, Your Honor. We concur with
7 ACBC's motion and we just request that the Court
8 determine the 2013 ballot is invalid.

9 THE COURT: Thank you very much.
10 Mr. Carlson.

11 MR. CARLSON: Thank you, Your Honor. I
12 guess I'll start by just pointing out that the sole and
13 only reason that this has been hanging around for four
14 years is because this court wrongfully enjoined the 2013
15 vote for a number of years. We had to go through a
16 full-merits appeal to get a ruling that the injunction
17 was wrongfully entered.

18 All the bases for the Court's prior summary
19 judgment in favor of the Board were overturned by the
20 Court of Appeals. So in terms of why we're still here,
21 why it took four years, that's why. Has nothing to do
22 with the behavior of the anti-pool faction, if you want
23 to call it that. Has to do with the fact that Wilbur
24 chose to come in to court, get a wrongfully entered
25 injunction, and that process took this long to resolve.

1 As to the argument that you should address
2 again the absence of a no vote option on the 2013
3 ballot, I continue to be surprised that it continues to
4 be argued before Your Honor. Because when we had a
5 hearing on that exact issue, all of the arguments
6 Mr. Nye made today were presented to you as to why you
7 should consider that argument. And you said, quote, "So
8 I rule that the portion of the amended complaint that
9 would challenge the 2013 ballot on the grounds that it
10 didn't include the no-action alternative cannot be
11 permitted."

12 This should have been raised in the previous
13 matters that were heard by the Court that resulted in a
14 final judgment by this court, and the Court of Appeals
15 has issued its decision. Of course, that's binding on
16 this court and the Court will follow that, naturally.

17 So I've been acting on the assumption that I
18 could rely upon the prior ruling of this court on this
19 exact issue and that I wouldn't have to continue to
20 spend money and time responding to it.

21 So I guess I will state before you the
22 objection I stated in my briefing, which is that I do
23 feel it's improper when a court has made a clear ruling
24 on an issue that was argued by Mr. Nye, he was here at
25 the hearing, I should be able to rely on that ruling.

1 THE COURT: I understand. I asked Mr. Nye
2 this question. Does it make any difference that the
3 club itself is now raising this issue and took no
4 position previously? Would the club be obligated to
5 have brought that claim -- or theory, as it might be
6 characterized -- prior to the Court's decision
7 previously in this regard?

8 It's a little incongruous in the sense that
9 the club had been taking no position, neither the
10 decision about the nature of the 2013 vote, and now that
11 we have the 2016 vote the club is taking the position
12 that that should be enforced as opposed to the 2013
13 vote.

14 Is the club, as opposed to Mr. Wilbur, now
15 able to bring other arguments that might exist with
16 regard to the 2013 vote?

17 MR. CARLSON: In my view, no. The club
18 doesn't have a complaint. So this feeds into my
19 judicial estoppel argument. We have -- Mr. Nye said
20 that this is not the usual course of lawsuits. That's
21 true because it's unlawful to do what they're doing.

22 The doctrine of judicial estoppel, which we
23 spelled out in the brief, rather strictly prohibits a
24 party from making directly contradictory arguments
25 during litigation. They've gone beyond that. They're

1 not making -- just making directly contradictory
2 arguments in litigation, they've actually gone from
3 being the defendant -- the Board, remember, was sued by
4 Wilbur and came before this court defending the validity
5 of the 2013 vote because, as a fiduciary for the
6 community which had made that vote, it was their
7 obligation to defend it. They didn't choose to come
8 here. They came here because they were a defendant.
9 They were sued by Wilbur.

10 Mr. Nye acknowledged that the Board is
11 obligated to implement votes of the membership, and I
12 think that's clear from the governing documents, and I
13 think we agree on that. So they are now the plaintiff.
14 They have now decided to act as the plaintiff in this
15 case. The Board is suing itself, as the plaintiff,
16 arguing directly contradictory positions about the 2013
17 vote.

18 THE COURT: Well, let's break this down here
19 a minute. Both the parties here acknowledge that the
20 Board should follow votes of the membership.

21 MR. CARLSON: (Nods head.)

22 THE COURT: There was a 2013 vote. Now we
23 have the 2016 vote. Under what legal authority is the
24 Board required to ignore the 2016 vote and follow the
25 2013 vote? There have been changed circumstances. You

1 acknowledged that the Court needs to address the
2 validity of the 2016 vote. Let's hear your response to
3 that.

4 MR. CARLSON: It's *res judicata*, Your Honor.
5 So the opponents of the pool chose to --

6 THE COURT: Well, let's talk about that.
7 *Res judicata* is bringing the same claim and want a
8 different decision essentially. We have a new set of
9 facts here that have to be addressed. Why would it be
10 *res judicata* with regard to the 2016 vote because there
11 was a contradictory vote in 2013?

12 MR. CARLSON: Because the Court of Appeals
13 has ruled that the original 2013 vote -- there was no
14 validity to the challenge to the 2016 vote. Let me just
15 read to you what the -- when they had the 2016 vote, we
16 asked the Court of Appeals for an injunction and the
17 Court of Appeals granted that with the caveat that we
18 post a bond, which we didn't do, but this is what they
19 said: "If appellant Corliss prevails on appeal and this
20 court reverses the trial court order invalidating the
21 vote to decommission the pool, the initial vote to
22 decommission the pool would be upheld." That's just --
23 as I understand the law, from the operation of the law,
24 that is the reality now on the ground and --

25 THE COURT: We have a new set of facts. I'm

1 having difficulty understanding how there is no possible
2 way in which the membership could change its view, in
3 effect, and make a different decision on a different
4 vote.

5 MR. CARLSON: The Board, in my view, is now
6 bound to follow the results of this litigation, which is
7 the 2013 vote is valid. There is no remaining basis to
8 conclude that that 2013 vote which occurred is invalid.
9 So let's look back to 2013. Vote occurred. It had a
10 result. It was wrongfully enjoined. During the period
11 of wrongful enjoinder, they orchestrated a change of
12 facts on the ground and now that they lost the
13 litigation, which Wilbur chose -- Wilbur chose to bring
14 these matters to the courts. Now that they've lost,
15 they want to say, well, we changed the circumstances.
16 No. They are obligated to follow the law and to
17 implement the original vote of the membership which came
18 first in time. And that obviates and moots the 2016
19 vote.

20 THE COURT: That seems a little incongruous
21 to the Court that the 2013 vote would have to be
22 enforced under all circumstances. Take a hypothetical
23 example, perhaps. Let's say that we have the 2013 vote.
24 The membership voted to decommission the pool. Let's
25 say that some legislation was passed at the state or

1 federal level that provided funding for community
2 improvements, something of that nature, and there was
3 now funding available to fix the pool. Would it be
4 impossible for the Board then to say, Well, we can't
5 accept these grant funds. We have to decommission the
6 pool. There's nothing we can do about it. That's done
7 forever.

8 It seems incongruous to me that there could
9 never be a set of changed circumstances that would allow
10 the Board to do something different than the 2013 vote
11 provided.

12 MR. CARLSON: Well, you know, I don't know
13 about the hypothetical, but, you know, here, look at
14 what they did to change the circumstances. They
15 switched positions in the lawsuit. All right. And,
16 again, I'd like to just point out that the doctrine of
17 judicial estoppel prohibits that. I don't know how
18 they're going to get around that. But you cannot switch
19 positions in a lawsuit. So they've switched positions.
20 They put before the community a ballot that said, as the
21 very first point, the Court has ordered us to not just
22 -- not just maintain and operate, but to repair the
23 swimming pool. So the entire basis presented to the
24 community, the primary point that they made was this
25 court's order. Okay. That order was erroneous. That's

1 just the fact.

2 So is this court still going to enforce the
3 2016 vote over the now -- we know now -- valid 2013 vote
4 under those circumstances? It strikes me that -- you
5 know, it may be that there's an alternative resolution
6 which it would be some sort of third vote under the
7 supervision of this court where both parties are allowed
8 to submit material to the community. And I'll remind
9 you that in the declarations it's very clear anti-pool
10 members asked to submit material with that ballot and it
11 was rejected. The Board refused to allow it. And
12 instead what the Board did was it told the community the
13 judge has ordered us to repair the pool. And on that
14 basis --

15 THE COURT: Any person who followed this
16 litigation and the history of this dispute would know
17 that that was disputed by Ms. Corliss, that was going up
18 on appeal, and it's obvious from the record that the
19 anti-pool forces attempted to persuade the membership
20 not to vote to repair the pool.

21 MR. CARLSON: Your Honor, the Board members
22 are fiduciaries for the entire community for both the
23 pro and anti-pool. And the characterization that
24 there's -- that there's clear consensus now in the
25 community and, Your Honor, just please let us implement

1 the consensus, that's absolutely not true. Very close
2 vote in 2013. Very close opposite vote in 2016. When
3 the opposite vote was taken, they didn't tell -- they
4 didn't mention about, by the way, the Court's ruling is
5 on appeal and might be overturned. That's not what they
6 told the community. The one piece of information we
7 know that every voter got was what's on that ballot. I
8 don't know who looks at the websites. I don't know who
9 goes to the Board meetings. But I know that every
10 single person that voted was told, point one, the judge
11 has ordered us to repair the pool. And it was under
12 those circumstances and refusing to allow opposing
13 viewpoints to be presented to the community that the
14 community very narrowly voted yes. Okay. We'll switch
15 our -- they switched the vote very narrowly. It wasn't
16 an overwhelming vote at all. So --

17 THE COURT: You've cited no legal authority
18 for this proposition. Do you have any legal authority
19 that would require the Court to invalidate the 2016 vote
20 because there wasn't material submitted by the Board to
21 the membership that set forth the anti-pool positions?

22 MR. CARLSON: I don't know about legal
23 authority, Your Honor, but I think that the Court is
24 searching for a way to resolve the discrepancy. I mean,
25 let's at least acknowledge there's a discrepancy. We've

1 got a 2013 vote which has now been affirmed by the Court
2 of Appeals. There --

3 THE COURT: Well, the Court of Appeals said
4 that the membership, and ultimately the Board, had the
5 authority to decommission the pool.

6 MR. CARLSON: Right, which is the --

7 THE COURT: There's no order that the Board
8 must now decommission the pool.

9 MR. CARLSON: That's true.

10 THE COURT: It's just a decision that, yes,
11 the club through its Board and membership has the
12 authority to decommission the pool.

13 MR. CARLSON: Right. So there are no
14 remaining legal bases in this case to conclude that that
15 vote was invalid, so -- and this is why I've asked you
16 to simply grant the motion for summary judgment, which
17 we fully briefed, argued to the Court, and the Court
18 declined to rule on it because it was moot because you
19 were granting Wilbur's motion. We're back.

20 There is no -- there are no remaining legal
21 claims challenging the validity of the 2013 vote.
22 There's no factual issues. And if the judge views
23 factual issues having to do with 2013, then I think you
24 have to acknowledge there are factual issues having to
25 do with 2016. And remember they are seeking a judgment

1 as a matter of law. Again, this isn't a trial. They're
2 seeking a ruling that there is no issue of fact at all.

3 THE COURT: Well, what are the -- are you
4 saying there are issues of fact?

5 MR. CARLSON: I believe that evidence of
6 collusion is an issue of fact as to whether or not --
7 and I haven't --

8 THE COURT: You haven't presented any legal
9 argument that that would cause -- that there would be
10 any legal basis to overturn the 2016 vote.

11 MR. CARLSON: Well, I didn't bring the
12 motion. I'm simply opposing. So I'm not trying to get
13 you to rule on a motion having to do with 2016, but I
14 think in the fullness of discovery -- and I just would
15 point out that on the day the mandate came back I asked
16 the parties to supplement their discovery to bring it up
17 to date. I got the supplemental discovery like three
18 weeks ago from Mr. Nye. I mean, obviously, we haven't
19 had an opportunity to fully develop it. But I think the
20 evidence of collusion provides the basis for a challenge
21 that the 2016 vote was brought in bad faith, that it
22 could be challenged on that basis, that the violation of
23 fiduciary obligations by directors, which is what I'm
24 alleging in the collusion -- and I'm not just alleging
25 it, there's evidence of it, and I -- at some point

1 would, you know, disagree with the characterization. I
2 don't know if you've read Exhibit 4, but, anyway, that's
3 an issue of fact.

4 I think the disenfranchisement that -- even
5 the Board president himself -- so it's not just me
6 making some crazy argument. I put before you an exhibit
7 where the Board president himself, pro-pool, says, this
8 is a big problem, and what we really should do is send a
9 postcard to members before we ask them to vote reminding
10 them to pay their dues so then they are in good standing
11 to vote. For whatever reason -- and if -- I'd like an
12 opportunity to understand what the reason is -- they
13 didn't do that. Instead they plowed ahead. Days later
14 they sent out the ballot and knowing full well
15 40 percent, 36 percent of our voters are
16 disenfranchised. If we wait -- as he's admitted, you
17 wait later in the year, you got more voters. Is that a
18 basis to challenge the validity of the vote? I think it
19 could be. I think it raises fact issues.

20 THE COURT: Let's talk about procedure again
21 for a moment. One of the things I'd like to avoid, all
22 things being equal, is a ruling that might be
23 characterized as procedurally incorrect and have a
24 decision made, potential appeal to the Court of Appeals,
25 the Court of Appeals potentially sending it back to the

1 trial court because there was a procedural error.

2 So I asked Mr. Nye about this issue of
3 whether it's necessary for the Board to file a pleading
4 that gives it then the authority to make this motion for
5 summary judgment as opposed to filing a motion for
6 summary judgment because Mr. Wilbur raised a particular
7 claim or theory.

8 Are you saying that it is not proper for
9 this court to entertain the club's motion for summary
10 judgment because it doesn't have a pleading?

11 MR. CARLSON: Well, yes, but really what
12 that argument is is my judicial estoppel argument. They
13 become the plaintiff --

14 THE COURT: Well, I need to know whether
15 you're objecting to the Court hearing this motion on the
16 merits because the club does not have a claim in some
17 pleading that asserts this position that it is now
18 asserting on summary judgment. Yes or no?

19 MR. CARLSON: Yes.

20 THE COURT: Okay.

21 MR. CARLSON: But, again, the real basis of
22 that is that I don't believe they can file a complaint
23 in this case and become the plaintiff.

24 THE COURT: I understand.

25 MR. CARLSON: And so it does -- it is

1 related to my judicial estoppel argument that's in the
2 briefing, but, yes, Your Honor, I don't -- I would point
3 out also, Wilbur's never filed an amended complaint that
4 conforms with your court's prior order on the amended
5 complaint. So in reality the 2016 issues haven't been
6 formally presented to the Court. And I'm of the view
7 that they cannot formally present them. I -- Wilbur's
8 the plaintiff, and if he wants to, I suppose, file an
9 amended complaint that conforms with this court order on
10 amendment that would allow me to see what the language
11 of the claims are. It would allow me to do discovery
12 based on the language of those claims. So I do think
13 it's premature. And I -- again, I don't think the Board
14 can become the plaintiff suing themselves.

15 THE COURT: You've answered my question.

16 MR. CARLSON: Thank you.

17 THE COURT: You do object to that. I would
18 point out to you that, to the best of my knowledge,
19 Ms. Corliss never actually filed her pleading in
20 intervention.

21 MR. CARLSON: She did, Your Honor. We
22 discussed this issue previously in this case.
23 Ms. Corliss did file a pleading in intervention.
24 Ms. Corliss was granted her request to intervene and
25 it's in the case file.

1 THE COURT: Well, I went back and looked at
2 it -- and correct me if I'm wrong, I'm just raising a
3 question here -- but the Court entered an order granting
4 motion of Susan Corliss to intervene pursuant to CR 24.
5 The order was that her motion to intervene is granted.
6 And the pleading in intervention submitted by intervenor
7 Corliss is accepted for filing. I looked through the
8 record, and again, correct me if I'm wrong, there is no
9 pleading in intervention that has ever been filed.

10 MR. CARLSON: There has been a pleading in
11 intervention filed. We filed it as required with our
12 original intervention motion.

13 THE COURT: When was that?

14 MR. CARLSON: I can't remember, two, three
15 years ago.

16 THE COURT: Before we leave here this
17 morning, I need to know whether that's true or not. As
18 I looked through the Laserfiche copies of the -- all of
19 the pleadings in the case which are on file I have
20 access to, I haven't looked through the paper files, I
21 did not find any pleading in intervention --

22 MR. CARLSON: Chris, you want --

23 THE COURT: -- or anything else.

24 MR. NYE: Honestly, I don't remember an
25 actual pleading in intervention being filed, but if

1 you're saying you did when you filed your motion to
2 intervene, I think that was about November of 2014.

3 MR. CARLSON: Yes. And, Your Honor, I'll
4 just represent to you, when this came up before I
5 checked very carefully. The pleading in intervention
6 was filed when we filed the motion to intervene. I've
7 been relying on the Court's order saying that that's
8 accepted. I'd be happy to pull the hardcopy file and
9 see if it's in there. If it's not in there, I would
10 suspect it was actually some sort of filing error, but I
11 am a hundred percent certain that I filed it. I checked
12 this very carefully when this came up before.

13 THE COURT: It's possible it could have been
14 a filing error, that's true. I raised the question
15 before. You said it had been filed. I just simply
16 accepted that. But again, I do want to avoid procedural
17 issues so that I can get to the merits of this whole
18 thing and make a decision on the merits. So --

19 MR. CARLSON: It's not --

20 THE COURT: -- we'll take a recess at some
21 point this morning and have the files checked, and if
22 for some reason it's not there, that needs to be
23 filed --

24 MR. CARLSON: Yeah.

25 THE COURT: -- so we have something that

1 shows what Ms. Corliss' official position is in the
2 pleading.

3 MR. CARLSON: Understood.

4 THE COURT: So let's move on.

5 MR. CARLSON: Well, so --

6 THE COURT: And, by the way, just on the
7 last point there, I went back and looked at the actual
8 motion, and there might have been some reference in the
9 motion to intervene that referred to a pleading. I
10 could be wrong about that. There is no pleading
11 attached to the motion itself --

12 MR. CARLSON: Yeah, there was probably --

13 THE COURT: -- as well.

14 MR. CARLSON: I believe that a declaration
15 filed with the motion that attached as an exhibit the
16 pleading in intervention, but I'm happy to pull the
17 hardcopy file and check. It's not an objection the
18 parties have raised, so --

19 THE COURT: I'm just -- you're making a
20 claim about the club not filing a pleading. I'm just
21 pointing out that there might be some issue in that
22 regard with regard to Ms. Corliss.

23 MR. CARLSON: Well, Ms. Corliss has
24 prevailed on an appeal to the Court of Appeals. I'm
25 sure if that was a live issue, the parties would have

1 raised it.

2 THE COURT: Well, that may be right.

3 MR. CARLSON: Yeah. So the 2016 vote's
4 hopelessly tainted by the error of this court's ruling
5 which was overturned by the Court of Appeals. That's
6 number one. We've got serious issues of collusion that
7 I don't think they can be so easily dismissed. For
8 example, if you read Exhibit 4, you'll see that it's not
9 just a good-faith effort of the parties to resolve a
10 lawsuit amongst themselves. In fact, you've got Wilbur,
11 who is suing the Board, actively communicating with
12 current Board members, such as Suzy Palmer, Ed
13 Delahanty, about how -- about strategy for this case, in
14 particular.

15 There's two things that came up. One is,
16 they hatched a plan where they were going to -- Wilbur
17 was going to file a motion for summary judgment. The
18 Board was going to come before this court and say, Your
19 Honor, in the fullness of consideration, we have no
20 opposition to the motion so please sign an order
21 proposed by Wilbur.

22 They weren't going to tell you, by the way,
23 we've arranged this by ourselves in secret behind the
24 scenes without telling you. They weren't going to tell
25 you that, and when they came before the Court and

1 attempted that, which is when Susan Corliss intervened
2 because she recognized, well, no one's defending the
3 Board anymore, they attempted to get you to do that. So
4 that's not proper.

5 THE COURT: What is -- is there some case
6 authority or statute or regulation that prohibits that?

7 MR. CARLSON: Candor to the tribunal. There
8 are RPCs that prohibit it. And I'm not saying that
9 Mr. Nye knew about these communications, because if you
10 look at Exhibit 4, I don't see him on there, but there
11 is an obligation to be candid with the tribunal, and if
12 the plaintiff and defendant are colluding behind the
13 scenes in secret and talking amongst themselves about,
14 okay, you bring the motion, this is how I'll respond,
15 and we'll get the judge to sign an order, I would be
16 surprised if that doesn't trouble Your Honor because
17 that is an abuse of the litigation process. The parties
18 were here representing themselves as a plaintiff and a
19 defendant, adverse parties.

20 The other thing --

21 THE COURT: Well -- go ahead.

22 MR. CARLSON: The other thing it shows is
23 that you've got the current Board president, who is
24 Mr. Nye's boss in this case, who funded Wilbur's
25 litigation. I mean, he was a member of what they called

1 the \$1,000 club. And he -- Mr. Nye point outs, well,
2 when he ran he ran as pro-pool. To my knowledge, he
3 never disclosed to the community that, "I've been
4 funding litigation against this Board."

5 THE COURT: Are you saying that the Board --
6 you're saying the Board was not candid with the
7 tribunal; is that right?

8 MR. CARLSON: Correct.

9 THE COURT: The Board did not have a
10 position to present to the Court and the Court did not
11 make any decision about the Board's position or lack of
12 a position. There was the litigation between Wilbur and
13 Corliss which the Court ruled on.

14 I'm not sure how candor to the tribunal
15 would enter into this whole thing since the club did not
16 have a position it was advocating one way or the other.

17 MR. CARLSON: If Corliss had not intervened,
18 what was before Your Honor was a motion brought by
19 Wilbur in cooperation with the party he was suing. The
20 party he was suing coming forward and saying, you know,
21 we've considered it, we don't oppose entry of the order,
22 and Your Honor would have signed that order.

23 THE COURT: Well, I can tell you -- I'm not
24 required to reveal my thought process, but I was, in all
25 probability, going to decline to consider any further

1 matters in this case, until Ms. Corliss intervened,
2 because there didn't appear to be any actual and
3 existing controversy before the Court because pro-pool
4 Board members had gained the majority on the Board. And
5 it was my tentative view at that point that there was no
6 -- it was not appropriate for the Court to make a
7 decision about illusory issues where the Board agreed
8 with the pro-pool forces, and I was prepared to dismiss
9 the case because it was moot. And then Ms. Corliss
10 intervened and off we went.

11 MR. CARLSON: Well, that may be the case.
12 We didn't know that, obviously. I don't think you can
13 blame Ms. Corliss for intervening --

14 THE COURT: Of course not. I'm not saying
15 that.

16 MR. CARLSON: -- given that the Board was
17 abandoning its defense of itself. If parties want to
18 settle a dispute properly, absolutely that's fine.
19 That's -- I'm not objecting to communications to settle
20 a dispute. That's not what they did.

21 They came up with a plan because they knew
22 the community has voted to decommission the pool. That
23 was the circumstances at the time. I, Wilbur, don't
24 like that. They were coming to you to get you to sign
25 an order invalidating the 2013 vote of this community

1 because Wilbur was going to present the motion and the
2 Board was going to come forward and say we don't oppose
3 it. And whether or not your judge would -- you would
4 have signed it, that was their scheme. And that strikes
5 me as not being candid to the tribunal. If they came
6 forward and said, Your Honor, we've had discussions
7 amongst ourselves, and, I don't know, here's a
8 stipulated order we'd like you to sign. That would have
9 been one thing. That's not how they postured it because
10 they didn't want the community to know that the Board
11 was in cahoots with Wilbur. So what they wanted was an
12 order from the judge to say, aha, see, the Court has
13 ordered it so the 2013 vote is invalid.

14 So it was a way for the Board to avoid
15 taking the heat for essentially going against the vote
16 of its own membership, and they were putting Your Honor
17 in the position of being the instrument for that.

18 THE COURT: That didn't happen.

19 MR. CARLSON: That didn't happen, in my
20 view, because Corliss intervened and took on the defense
21 of the 2013 vote. There was no one else --

22 THE COURT: I can tell you that I would not
23 have signed such an order because there didn't appear to
24 be an actual and existing controversy at that point.

25 MR. CARLSON: And again --

1 THE COURT: Just so you know that.

2 MR. CARLSON: Sorry, Your Honor.

3 That doesn't excuse the conduct, right.

4 The other thing -- the other thing we see is
5 that, you know, you have, like I said, the Board
6 president, current Board president, running this
7 litigation, who funded the litigation. So that was
8 never disclosed to the community when he ran and that
9 prior to me submitting those materials has never been
10 disclosed to this court. He has never recused himself
11 from decisionmaking about the pool or the pool
12 litigation. Is that kosher? That's a conflict of
13 interest of the president of the pool, an undisclosed
14 conflict of interest. I believe it should trouble Your
15 Honor that the pro-pool Board members who funded the
16 lawsuit against themselves never disclosed that to this
17 court or to the community. I believe those kinds of
18 things raise real issues of fact about the validity of
19 the whole process that put the 2016 vote in front of
20 this community.

21 And I'd like an opportunity -- they're
22 asking -- this isn't -- they're asking for judgment as a
23 matter of law, again, that there's no possible fact --
24 you know, fact that could challenge the validity of that
25 vote, and I just -- I disagree with that. And I think

1 that in fairness, and given what's happened on the first
2 appeal, we should at least have an opportunity to test
3 through discovery their current claims, their current
4 position.

5 And a motion -- a ruling as a matter of law
6 won't allow that to happen. We'll be back up on appeal.
7 I think we'll get the injunction that the Court of
8 Appeals previously granted on exactly this issue and
9 then we'll have a merits appeal. So I believe there are
10 factual issues.

11 I'm going to wrap up very soon. I'm sorry.

12 On the 2013 --

13 THE COURT: We have time. Go ahead.

14 MR. CARLSON: Well, on the 2013 vote, again,
15 just as I understand the legal situation, it occurred,
16 it was challenged and enjoined, but now the Court of
17 Appeals has ruled all the bases for that order were
18 error, which means that it's valid. There's currently
19 nothing rendering invalid the 2013 vote. There's
20 nothing rendering it invalid. And Mr. Nye said today,
21 and I think rightly, the Board's obligated to follow the
22 votes of its membership. And the first-in-time vote
23 that now there's no basis to conclude it was invalid
24 legally, it's been decided it was valid and it should be
25 enforced. What happened later is now moot. It is

1 mooted by the reversal of the Court of Appeals.

2 THE COURT: So you are contending that there
3 are no possible circumstances under which the Board
4 could adhere to a subsequent vote of the membership that
5 was contrary to a prior vote of the membership?

6 MR. CARLSON: Well, I'm not -- I don't want
7 to go so far into the hypothetical as that. What I am
8 saying is that this vote, given the circumstances and
9 the timing of the decisions in this case, is moot and it
10 can't be enforced.

11 And I would just posit this as my last
12 point. The Board, the pro-pool Board, understood the
13 circumstances of this litigation when it decided to go
14 forward with that 2016 vote. It understood it. Didn't
15 spell it out fully to the community with the ballot, but
16 it understood there's an appeal pending. It's being
17 contested and there's a very good chance that this
18 ruling will be reversed on appeal. They knew that.

19 Rather than respect the process, which they
20 are now before the Court asking for relief -- Wilbur
21 came before the Court asking for relief. Rather than
22 respect the outcome of that, they decide to plow forward
23 with the second vote because they saw an opening sort
24 of, and it was a way of hedging their bets.

25 Well, if we are going to lose the appeal,

1 let's go before the community now, tell them the Court
2 has ordered us to repair the pool and see if we get a
3 different result. And if we do, then we'll argue, well,
4 if we lose the appeal, well, forget the appeal, forget
5 the vote and, frankly, forget the litigation. And we'll
6 just go forward with that.

7 So in trying to weigh 2016 versus 2013,
8 which I understand under these facts is a difficult --
9 it's hard to figure out where to go, I would use that as
10 the -- in my mind that's the hook. They chose the
11 process that created these inconsistent results. They
12 explicitly chose to go forward in a manner that created
13 these inconsistent results. And now that we have the
14 inconsistent results, the Board, who's now the
15 plaintiff, the Board should bear the risk of having
16 chosen that process, not intervenor. That's how I think
17 the Court should resolve the 2013 versus 2016. They
18 didn't have to do what they did. They chose to do it
19 and that created this problem in the first place.
20 That's all. Thank you, Your Honor.

21 THE COURT: Thank you. Back to Mr. Nye for
22 any rebuttal.

23 MR. NYE: Well, on that last point, I
24 certainly appreciate Mr. Carlson's confidence in his
25 pending appeal at the time. Certainly, when the Board

1 went forward with the vote in 2016 there was no
2 indication that the deal was going to turn out the way
3 it did. But I admire that kind of confidence.

4 The -- first of all, just once and for all,
5 this idea that Kurt Blankenship being a member of the
6 \$1,000 club, I'll say it again, he contributed that
7 money before he was ever on this Board. There's -- and
8 he's always run openly as a pro-pool member. There's
9 certainly nothing untoward or nefarious about
10 contributing money to a cause he supported when he was a
11 member at large. It's a ridiculous insinuation,
12 frankly. There is no evidence that any active Board
13 members from ACBC funded Mr. Wilbur's litigation at all.
14 Because there isn't. It didn't happen. Period.

15 Two, as far as this collusive settlement,
16 we've always been upfront with the Board -- or with the
17 Court about our position on a particular matter and the
18 reasons for it. Those emails in Exhibit 4 -- and we've
19 already explained this. This was talked about at the
20 last summary judgment motion.

21 Mr. Wilbur and the then-Board were
22 contemplating ways of resolving the case, one of which
23 -- and it's mentioned in our materials -- one of which
24 was figuring out a way to potentially stipulate to
25 permanent declaratory relief. In other words, can we

1 stipulate that the club is required. The club didn't do
2 that. The club realized that could have some potential
3 problems with fiduciary duties to anti-pool members.
4 Told Mr. Wilbur we aren't going to do that. We don't
5 feel we can do that. It's certainly going to invite
6 litigation. It's not in keeping with our duties to all
7 club members. So they didn't do it. And in many of
8 those emails you see Mr. Wilbur was rather upset about
9 that, particularly with me. But it's fine and I stand
10 by the Board's decision. I think they acted honorably
11 throughout this thing. But that's all there was.

12 It was two parties looking for a way out of
13 this. And when the motion for summary judgment was
14 presented, the Board never asked Your Honor to sign an
15 order in plaintiff's favor. We simply took no position.
16 And you're right, were it not for Ms. Corliss
17 intervening in this case, we -- there would likely have
18 been no judicable controversy that would have warranted
19 a ruling at all.

20 But her coming into this case, in one sense,
21 maintained the status quo of the dispute. You have
22 pro-pool, you have anti-pool, both arguing over the
23 validity of that 2013 ballot which was the original
24 claim.

25 It is correct that the Board has never

1 asserted any claims of its own in this case. However,
2 the -- what our motion before the Court is arguing is
3 that plaintiff should prevail on his claim for
4 declaratory relief related to the validity of the 2013
5 ballot. Not that the Board should. Not stating that we
6 are moving on some claim that we have asserted. It's
7 simply advancing the same arguments that plaintiff would
8 make. And in fact, plaintiff joined on it. So he's --
9 plaintiff is technically here on his own substantive
10 motion as well.

11 In terms of judicial estoppel -- well, first
12 of all, this idea that because the 2013 vote -- the
13 decision that it was invalid because it violated the
14 governing documents that didn't allow the club to
15 decommission the pool, that that decision got overturned
16 on appeal is not the same thing.

17 The Court of Appeals did not rule the 2013
18 ballot was valid and enforceable in every respect.
19 That's clearly not the decision. But when it came back,
20 the decision there -- and I'm losing my train of thought
21 on this point, but the validity -- let me come back
22 around to it in another way.

23 I'm trying to get back to this idea that the
24 first vote -- first in time takes precedence over the
25 later vote. That's an absurd position. I mean, there

1 would be no reason to ever vote again on whether to
2 propose repairs to decommission the pool if the club
3 were to be stuck with a vote in which members spoke one
4 way. That's absurd.

5 The Court of Appeals even noted the Board
6 can present ballots for a special assessment at any
7 time. Mr. Carlson cites no legal authority for why the
8 first vote is the one that the club has to live with
9 forever, and he can't because there isn't any law to
10 that effect. Clearly, the club can change its mind and
11 clearly the club did change its mind in this case.

12 On the argument about *res judicata*, I think
13 we briefed that fairly clearly. To have -- for
14 *res judicata* to apply they ought to have a final
15 judgment on the merits. There was one at one time in
16 favor of plaintiff. That's been reversed. We're back
17 before Your Honor. No party enjoys a final judgment at
18 this point. *Res judicata* simply does not apply.

19 Judicial estoppel. It is true that the
20 Board, with respect to the validity of the 2013 ballot,
21 has taken on a different position today that it did at
22 the outset of the case when it was made up of different
23 Board members. However, at all steps throughout the
24 case -- (phone ringing) has the Board simply been trying
25 to enforce the wishes of its members at the time

1 pursuant to whatever vote (phone ringing) was out there.

2 The -- although there was an inconsistent
3 position taken by the club (phone ringing) technically
4 on that first ballot, the other two factors, the core
5 factors that Mr. Carlson (phone ringing) cited to in his
6 brief, when you look at those and analyze those under
7 the facts of this case --

8 THE COURT: Sorry, Mr. Nye, for
9 interrupting. We have this -- better answer the phone
10 and see what that's all about. Sorry to interrupt.

11 Let's have Mr. Nye continue.

12 MR. NYE: It's usually some poor attorney's
13 cell phone that goes off, not another judge calling.

14 In any event, on the judicial estoppel
15 point, when you look at the last two core factors that
16 are raised, it's clearly -- we don't have a situation
17 that warrants imposition of judicial estoppel. There
18 has been no misleading of the Court. As I said, the
19 Board has been upfront at every step of this proceeding
20 about its position and its reasons for its position.

21 Two, there's been no unfair advantage here.
22 Intervenor has been arguing in favor of the validity of
23 the 2013 ballot from the outset. That's not changed.
24 She's litigated vigorously in favor of it, including an
25 appeal that succeeded on the issues before the Court at

1 the time. So I just don't think the factors warranting
2 the application of judicial estoppel are present. To
3 estop the Board from taking the position it's taking now
4 would basically be to chain the Board to Ms. Corliss at
5 the hip, requiring us to advance her position in this
6 case, which is clearly contrary to the most recent
7 expression of the wishes of the membership and not what
8 the Board is here to do.

9 I think, again, this idea of being -- having
10 to implement the 2013 ballot in light of everything that
11 happened is simply wrong, especially under that theory
12 that it was the first vote makes no sense. This Board
13 -- Mr. Carlson seems to raise the possibility this Board
14 could go out tomorrow and present a ballot to the club
15 if it wanted to under the Bylaws; that wouldn't be
16 violating any Bylaws.

17 If the anti-pool members could succeed
18 running as directors themselves, they would be free to
19 do that. These Bylaws provide for a democratic process
20 for this club to govern itself, and at all times that's
21 been the case. And right now this Board is just asking
22 the Court to uphold the wishes of its current membership
23 under the most recent vote.

24 And I think -- one second, Your Honor. Oh.
25 And with respect to this idea that the Board purposely

1 kept members from hearing the appeal, that's not true.
2 The members were well aware of the pending appeal at the
3 time. The Board has always posted the orders of this
4 court. If you go to the club's website, all the legal
5 documents are there and available for all members. It's
6 discussed openly in meetings. So to suggest that --
7 that club members in the 2016 vote were unaware of the
8 pending appeal, I think is simply incorrect.

9 And as far as this idea that the Board had
10 talked about -- were troubled perhaps by the percentage
11 of members in good standing and wanting to take steps to
12 remind the members that they needed to pay their dues to
13 be current if they want to vote, that did in fact
14 happen. I think if you look at the declaration of -- I
15 forget the first name -- Kobylyk supported in --
16 supported with intervenor's opposition, he discusses how
17 -- he sets forth in his declaration how it was discussed
18 and members were reminded in an open meeting before the
19 vote of the requirement to pay dues to be in good
20 standing if they were going to have the right to vote.
21 That comes right out of his declaration. So, you know,
22 while several facts have been raised -- I think Your
23 Honor asked Mr. Carlson. I agree. I don't see any of
24 them raise any genuine issues of material fact central
25 to the issues before the Court, and we would ask the

1 Court to grant the motion for summary judgment.

2 THE COURT: Thank you very much. I'm
3 prepared to make what many might view as an
4 anticlimactic decision at this time.

5 CR 56, which deals with summary judgment,
6 says that, "A party seeking to recover upon a claim,
7 counterclaim, or cross claim, or to obtain a declaratory
8 judgment may move for summary judgment." In my
9 judgment, the rule presupposes that the party that is
10 seeking to recover upon a claim, counterclaim, or cross
11 claim refers to a claim, cross claim, or counterclaim of
12 that party, not on a claim, cross claim, or counterclaim
13 of another party.

14 I don't think it is procedurally correct for
15 a party to bring a motion for summary judgment on some
16 other party's claim. Mr. Carlson, on behalf of
17 Ms. Corliss, has specifically raised this objection. I
18 do not want this case to be cited on some procedural
19 irregularity, and I think the best course of action
20 would be to decline to rule on this motion for summary
21 judgment until the club files the necessary complaint or
22 a pleading of some sort to raise this specific issue
23 that is now the position of the club and seek to prevail
24 on that.

25 I would hope that the parties could get

1 together to allow for such a complaint to be filed. If
2 we need to go through the formal motion process to see
3 if that could be filed, I understand that. Perhaps
4 Ms. Corliss has some opposition to that, and she's
5 welcome to raise any opposition to that, but we need to
6 have a particular claim brought by the club in order for
7 me to consider a motion based on any such claim. So I
8 decline to rule on the merits on this motion for summary
9 judgment.

10 As I said before, I do not want the parties
11 to leave here today until we find out whether
12 Ms. Corliss has or has not filed her complaint in
13 intervention. And if it's there, fine. If it isn't,
14 let's get that on file. It might have been a filing
15 error. We don't know. It might be there, I'm not sure
16 about that. But that needs to be cleared up.

17 And I was going to mention that I don't
18 think it's appropriate, at least in the circumstances of
19 this case, for the Court to make any decision on the
20 motion for summary judgment that Ms. Corliss made prior
21 to the appeal to the Court of Appeals because that
22 wasn't noted for a hearing. Again, I want this matter
23 to get before the Court on the merits. So if
24 Ms. Corliss wants the Court to consider her motion or
25 some amended version of that now that we have the

1 additional situation that now exists, then that needs to
2 be formally noted.

3 So let's see what you can do about getting
4 the pleadings in order such that these matters can be
5 presented on the merits to the Court. Any questions?

6 MR. NYE: One, Your Honor, and that is
7 whether the fact that plaintiff filed joinder in the
8 motion has any effect on the Court's decision not to
9 rule?

10 THE COURT: It does not.

11 MR. NYE: And could the plaintiff have filed
12 an identical motion and argued it here today?

13 THE COURT: I don't make advisory opinions.
14 Probably so. But perhaps Mr. Carlson has a comment on
15 that.

16 MR. CARLSON: Well, I would just point out
17 that he's never filed an amended complaint either, and
18 so from the procedural issue that Your Honor is raising,
19 which I understand completely, I think we might have the
20 same problem today.

21 THE COURT: Point well taken. I think that
22 would render moot any answer to Mr. Nye's question.
23 Mr. Wilbur needs to file the necessary amended
24 complaint. Anything else?

25 MR. CARLSON: I will go and see if I can

1 verify for you -- how would you like me to come back?

2 THE COURT: We can come back on the record
3 just to avoid correspondence or whatever it might be.
4 So why don't we take our 15-minute recess at this point.
5 Let's hear from you at 10:05 a.m.

6 MR. CARLSON: Thank you.

7 THE COURT: Thank you very much.

8 MR. NYE: Thank you, Your Honor.

9 (RECESS.)

10 THE COURT: Back in session. Your report?

11 MR. CARLSON: Your Honor, I'd like to
12 represent to you that the brief in intervention,
13 complaint in intervention, I forget the exact title, is
14 in volume four of the clerk's file. We flagged it for
15 you. It was stamped "scanned" so it's unclear why it's
16 not in the electronic system, but it is in the clerk's
17 court file.

18 THE COURT: I appreciate that. Thank you.
19 It's Document 97, I see here. Anything else?

20 MR. CARLSON: No, Your Honor.

21 THE COURT: Okay. Thank you all very much.
22 We'll see you next time. Thank you.

23 MR. NYE: Thank you.

24 (Whereupon, the proceedings in this matter
25 were concluded for the day.)

C E R T I F I C A T E

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5 I, JEANNE M. WELLS, do hereby certify that
6 the foregoing verbatim report of proceedings were taken
7 by me and completed on Friday, September 1, 2017, and
8 thereafter, transcribed by me by means of computer-aided
9 transcription;

10 That I am not a relative, employee,
11 attorney, or counsel of any such party to this action or
12 relative or employee of any such attorney or counsel,
13 and I am not financially interested in the said action
14 or the outcome thereof;

15 That I am herewith retaining the original
16 and emailing one copy to Christopher J. Nye.

17
18 _____
19 Jeanne M. Wells, RPR
CCR #: 2298

20 September 12, 2017
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