

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

AUG 07 2023

Honorable R. Ferrell Cothran Sr. Circuit Court Judge

SC Court of Appeals

Appellate Case No.: 2019-CP-07-00554

Nicholas Sanfilippo Appellant

v.

Estate at Westbury Horizontal Defendant
Property Respondents Regime
(a multifamily real estate community)
and High Tide Associates

**DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL**

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DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

1. Introduction

This is an action sounding in negligence under the South Carolina Residential Landlord and Tenant Act (SCRLTA). Watson v. Sellers, 299 S.C. 426, 385 S.E. 2d (Ct. App. 1989). As with any common law negligence action, it is incumbent upon the Plaintiff to, first, prove a duty of care on the part of the landlord to the Plaintiff; next a negligent breach of that duty and, finally, damages to the plaintiff as a result of the breach.

Pursuant then to the duty of care under the SCRLTA Section 27-40-(a)(3), a landlord shall keep all common areas of the premises in a reasonably safe condition, and, for premises containing more than four dwelling units keep [it] in a reasonably clean condition.

On October 27, 2019 Mr. Nicholas Sanfilippo, a seventy-five (75) years old retiree went for a stroll on the walkway that ran about the curtilage of the Estate at Westbury in Bluffton, South Carolina. After walking for only a short period of time, the toe of Mr. Sanfilippo's left foot caught on the raised edge of a concrete segment causing him to pitch heavily forward onto his face, hands, forearms and knees. Because of the excruciating pain in his left knee, Sanfilippo knew he had broken his left knee cap. What followed was months of rehabilitation and recuperation and even today, at the time of this writing, Mr. Sanfilippo is in chronic pain and cannot walk without a cane.

This case is unique in that there is no real disagreement as to the facts — only the interpretation and conclusions thereof. There is, for example, no dispute that the 1

Estate at Westbury and or High Tide Associates failed to either repair the dangerous conditions or even warn the plaintiff that dangerous conditions existed. On the other hand the defendant maintains that, because the plaintiff was presumably a licensee and the dangerous conditions were “open and obvious,” there was no need to warn or repair. With all of the above, there may be only one conclusion remaining herein—that while the plaintiff and defendants agree on the facts, they are greatly variant as to the interpretation of the same. Because these fact questions exist, summary judgment is not correct and the questions herein must be submitted to a jury.

Further to the above, it is important to note here that the Court below has made a fundamental mistake in classifying plaintiff Sanfilippo as a licensee. In doing so, the Court misunderstood the special status of tenant created by the South Carolina Residential Landlord and Tenant Act (SCRLTA) and the fact that, while at least in common areas, tenants are afforded due care and are “analogous invitees.” Hubbard and Felix, South Carolina Law of Torts, 2d Edition, p. 127. This view is echoed by Matthew Lincoln in “Landowners’ Duty to Guests and Tenants: Vogt v. Murraywood Swim & Racquet Club and Goode v St. Stephens United Methodist Church,” South Carolina Law Review, Vol. 57 Issue 2 [2005] Art.6, Page 387. “South Carolina courts recognize the common area exception holding that lessors have a duty of due care to maintain common areas when they retain control of them — thereby classifying tenants as invitees when the tenant is in a common area.”

With this said, Appellant proposes that the following materials be included in the Record on Appeal:

2. Summary Judgment Motions

- a. Notice of Appeal (11/08/22)
- b. Order Denying Plaintiff's Motion for Reconsideration (10/04/22);
- c. Order Granting Defendants' Joint Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment (08/16/22);
- d. Plaintiff's Motion to Reconsider (08/25/2022)
- e. Plaintiff's Addendum to Plaintiff's Motion for Summary Judgment; (07/28/22)
- f. Defendants Response to Plaintiff's addendum to Summary Judgment Motion. (07/29/22)
- g. Defendant's Memo of Law in Support of Renewed (07/19/22); Motion for Summary Judgment
- h. Defendant's Reply Memorandum of Law in Support of Motion for Summary Judgment
- i. Plaintiff's Notice of Motion for Summary Judgment (06/22/22);
- j. Motion for a Hearing in Opposition to Defendant's Second Motion for Summary Judgment; (06/22/22)
- k. Defendant's Motion for Summary Judgment (05/17/22);
- l. Statement of Nicholas Sanfilippo in Response to High Tide. Associates' Motion for Summary Judgment (06/04/21);
- M. Statement of Nicholas Sanfilippo in Response to Estate at Westbury Homeowners Motion for Summary Judgment (06/04/21);
- N. Plaintiff's Response to Defendant's Motion for Summary Judgment (06/02/2021);
- O. Co-Defendant Estate at Westbury Homeowners Notice of Motion And Motion for Summary Judgment (03/08/21);
- P. Co-Defendant High Tide Associates Notice of Motion and Motion for Summary Judgment (03/08/21);

3. Source Material

Text

The South Carolina Law of Torts, 2nd Ed., F. Patrick Hubbard and Robert L. Felix, pp. 120, 121 (lessor's duty to maintain common areas); 122 (tenant's safety unmaking improvements); 123 - 124 (tenant's obligation to keep premises in fit and habitable condition); 12 Id. (two federal court opinions take the view that South Carolina limits the landlord's duty in common area to situations where the conditions directly injure the tenant ...); Cramer v. Balcor Property 848 Fed. Supp. 1222 (D.S.C. Cooke v. Allstate Management Corp., 741 F.Supp 1205 (D.S.C, 1990); Landry v. Hilton Head Plantation Property Property Ass'n. Inc. 317 S.C.200, 452 S.E.2d 619 (Ct. App. 1994)(Here, the property owner had the status of an invitee and was owed a duty of due care by the association paid to maintain the common area). **"..... [T]he lessee and others rightfully using the common areas are analogous to invitees and that tenants in common area are entitled, like invitees, to reasonable protection from the foreseeable misconduct of others."** (my emphasis). South Carolina Courts recognized this common area exception and hold that lessors have a duty to use due care to maintain common areas. In the matter at hand, they retain control of the outside common area.

Law Review

South Carolina Law Review, "Owners Duty to Guests of Invitees and 4

Tenants: Vogt Murraywood Swim & Racquet Club and Goode v. St. Stephens United Methodist Church.” South Carolina Law Review, Vol. 57 Issue 2, 2005; see also Hoover v. Broome 342 S.C. 531, 537-538, 479 S.E. 2d 62, 66 (S.Ct. App. 1996). In discussing the duty of the landlord, “[w]here there is conflicting evidence as to whether one is a licensee or an invitee, the question is one of fact and is left properly to the jury.

Restatement

Restatement 2nd of Torts, Section 343 (A) 1965. A property owner is liable to pedestrian invitees for injuries taking place in open and obvious conditions if because of notice or previous incident it is foreseeable someone would encounter the dangerous condition and be injured.

4. Restatement 2nd of Property: Landlord and Tenant, Section 173 1977.

A landlord who leases a part of his property and retains another part that the Tenant is entitled to use as appurtenant to the part leased to him is subject to liability to his tenant and others lawfully upon the property with the consent of the Tenant for physical harm caused by a dangerous condition on that part of the leased property under the landlord’s control if the landlord by the exercise of reasonable care could have discovered the condition and made the condition safe.

Federal Case Law

Federal District Opinions

Two Federal district court opinions take the view that in South Carolina liability 5

attaches to landlord where defective conditions in the common area causes injuries to a tenant Cramer v. Balcor Property Management, Inc., 848 Fed. Supp., 1222 (D.S.C.1994); Cooke v. Allstate Management Corp., 741 Fed. Supp. 1205 (D.S.C. 1990). South Carolina Law of Torts, supra. It appears here, as in Cramer and Cooke, the duty of a landlord is limited to where the conditions in the facility caused harm.

Statutes

South Carolina Residential Landlord and Tenant Act; South Carolina Code of Laws, Section 27-40-440 et seq

South Carolina Horizontal Property Act; South Carolina Code of Laws, Section 27-31-120

Tenant's Right to Recover Damages. South Carolina Code of Laws, Section 27-40-610(b) (Section 27-40-610(b)) Provides for action in Tort after failure to fulfill obligations to lessee by lessor. "A property owner is liable to pedestrian invitees for injuries in open and obvious conditions if, because of notice or previous incidents is foreseeable that someone would encounter the dangerous condition and be injured.

Relevant Case Law

1. Neil v. Byrum 288 S.C. 472, 343 S.E. 2d 615, 616 (1986).The standard in South Carolina for differentiating the standards of care for a licensee and an invitee.

2. Cramer v. Balcor Property Management, Inc. 848 Fed. Supp. 1222 (D.S.C. 1990) A female guest at a hotel was killed by a criminal who entered her room. An action was brought against the hotel under the SCRLTA. The Court ruled against the Plaintiff on the basis that the SCRLTA is not a criminal statute.

3. Cooke v. Allstate Management Corp., 741 Fed. Supp. 1205 (D.S.C. 1990). Court found against the Plaintiff on more or less the same basis as Cramer v. Balcor.

4. Connors v. Farmers & Merchants Bank, 243 S.C. 132, 139; 132 S.E. 2d 388 (1963) The landlord has no duty to repair absent an agreement with the tenant. (The remainder touches on other matters).

5. Timmons v. Williams Wood Products Company, 164 S.C. 361, 162 S.E. 2d 329 (1932) Personal Injury claim for breaching contract by failure to make repairs were not recoverable unless special circumstances existed that enabled the Court to conclude that such consequential losses were foreseeable because they were within the contemplation of the parties.

6. Pryor v. Northwest Apartments, Ltd. 630 S.E. 469, 469 (Ct. App. 1996) Woman who fell outside of hotel on a wet and muddy path sued the hotel for negligence in failing to maintain the common area and failure to warn the Plaintiff on a dangerous condition. Court found there was no evidence of a breach of a duty of care.

7. Hancock v. South Management Co., 381 S.C. 326, 673 S.E. 2d 801 (2009)

Our court said that despite the "open and Obvious condition of the public

jury could determine that the owner should have anticipated that such a condition would cause someone to fall and injure themselves. Even if the defect is obvious, there may still be a duty to repair if it is foreseeable that the pedestrian would nevertheless encounter the defective condition.

8. Creech v. South Carolina Wildlife and Marine, 328 S.C. 24, 491 S.E. 2d 571, 75 (1997) Action brought under the S.C. Torts Claim Act. Creech fell from a viewing platform and brought an action against the state for negligence for not having a protective rail on a viewing platform. State defended that the condition was open and obvious. The Court determined that the State should have anticipated that the type of accident experienced would take place despite the open and obvious condition. While the State would defend on the open and obvious claim, Sanfilippo as a tenant / invitee on the sidewalk would argue that the HTA and EAW should have anticipated the fall and, in fact did anticipate the fall because of the old lady's fall in the wheel chair and because of the talk of the fall at the board meetings.

9. Durkin v. Hansen, 313 S.C. 343, 437 S.E. 2d 550, 553-544. Where landlord has no duty of repair to tenants, when he undertakes to hire a contractor, he is liable to the Tenant for the actions of the contractor.

10. Young v. Morrissey, 285 S.C. 236, 242; #29 S.E. 2d 426. A person who delegates to an independent contractor has an absolute duty to another person and is liable for negligence as if the independent contractor were an employee

Affidavits and Exhibits

1. Tony Pinto affidavit
2. Management Agreement Estates at Westbury (4 page)
3. Hospital Radiology
4. The old lady falling on the sidewalk discussion at the EAW meeting;
note from Dunlap deposition
5. MAJ Estimate (7 pages)
6. The September 26, 2017 meeting of EAW before the injury of Sanfilippo
7. Section 27-40-440 South Carolina Code of Laws
8. Affidavit of Bryan R. Durig
9. Affidavit of Diane Lewis
10. Theresa Childers from Karla Patterson
11. Kathleen Davey Sanfilippo
12. Hospital billing
13. Transcripts of the Depositions of the following:
 - a. Nick Sanfilippo
 - b. Bryan Durig, M.E.Ph.d.
 - c. Rocky Dunlap, V.P. retired of the Board of Directors of the Estate
At Westbury
14. Transcripts of Summary Judgment hearings in the Court of Common Plea
 - a. The Honorable Carmen T. Mullen
 - b. The Honorable R. Ferrell Cothran, Jr.
15. Notice & Motion to Reconsider and Alter and Amend Summary Judgment. 9

Transcript of Summary Judgment Hearing

June 7, 2021 Transcript of a Summary Judgment Hearing. Sanfilippo vs. Estate at Westbury. Pp. 1-10 Defendant's attorney Mr. Ledbetter makes the argument that High Tide Associates is the successor property manager to Horizon Property Managers and should be the Defendant instead of EAW. The Court moves past this issue and to the question as to whether the plaintiff is a licensee or an invitee. Coggin says that . is a tenant and that under Section 27-40-440 the SCRLTA he is a separate animal and has definite stated rights under the act. Here, Coggin references Lincoln and Felix, and states that when Sanfilippo is in the common area he is analogous to an invitee and "since no individual tenant can control the common area, South Carolina may join the growing number of courts that hold that tenants in a common area are entitled like invitees to reasonable protection from the foreseeable misconduct of others." (Felix and Lincoln Supra at 2) After much back and forth, the Court advised Mr. Coggin to get an expert say that there was a code violation or something to defeat summary judgment.

Transcript of Second Summary Judgment Hearing

On July 21, 2022 on Defendant's argument that, because an expert witness had come into the case on behalf of the Plaintiff and had presumably brought with him new information, the Defendant had the right to bring a second motion for summary Judgement. Unfortunately, there were no discussions re the opinions or new information provided by mechanical engineer expert Dr. Bryan Durig. Instead Defendant's arguments were a reprise of his position before the previous judge, the Honorable Carmen Mullin who had denied Defendant's motion for summary judgment.

This time, the Defendant's "second bite of the apple" was before a more receptive audience and the Plaintiff's status of a tenant in the common area, the notice of dangerous conditions in the walkway by a previous accident, a proposal to repair the dangerous conditions, failure to repair and the South Carolina Residential landlord and Tenant Act had little effect and the Court awarded a summary judgment to the Defendant.

The Court said on 20:L 2-6 that the SCRLTA may not apply (to the case at hand)

Depositions

Deposition of Nicholas Sanfilippo

August 6, 2020 Transcript of a video conferenced deposition of Nicholas Sanfilippo:

pp. 17 - 29 background and accident; 30-34 recovery, high blood, second fall, Dr. Tobin, medications; 36 - 39 sidewalk conditions, payment of rent, etc.; 40, 41 report fall and Accident; 42, 43 kidney problems, dialysis, dietary changes; 45 can walk 60 feet comfortably today with a cane; 46 moved from Estate at Westbury to independent living on Main Street in Hilton Head;

Deposition of Rocky Dunlop

pp. 1 The population of the Estate at Westbury was approximately 400 people when he served on the Board of Directors, five people were on the board, pp. 11; Whoever got the most votes was on the board; 13 at the time that Mr. Dunlap was on the board the property manager was High Tide Associates; 16 Debbie Shumann took the minutes of the board meetings, she was from off site and would tape the meetings; 20-23 cameras were installed around the complex by HTA for security; 23-25 There were 11

about twenty cameras installed. The one who knew the most about the cameras was Debbie Schumann an HTA Employee from Georgia who is no longer around. 25, 26 Rocky did not think there was a tape re plaintiff's fall. Rocky said that the news of Nick's falling was new to him; 29 Rocky then talked about the lady in the wheel chair falling on the sidewalk; 32 Doug Skelly was the owner of High Tide. 34 The board of High Tide would pay for the camera installation and maintenance fees; 38 MAJ Concrete; 39 Lady In the wheel chair; 42 the use of a grinder on uneven concrete edges; 44 Discussion of Sanfilippo's fall; 50 Talked about the uneven segments of concrete. The Defendants claim that the condition of the sidewalk where the Plaintiff tripped and fell was open and obvious and therefor Defendant's liability should be denied. Plaintiff's deny this assertion for the following;

- a. Defendant had notice of the conditions and failed to act.
- b. Under the rule of Collander v. Charleston Donut, Creech Wildlife and Marine, Hancock v. Mid-South Management and Padgett v. Collation County, if an owner knew of the obvious and dangerous condition of a place and, in addition, ***should have anticipated the condition would cause someone to hurt themselves and a jury could find against the Owner.*** 5 through 8

Deposition of Expert Durig

Pp. 6-9 education, work experience and day to day; 10 - 12 Durig is a forensic engineer because he determines what happens. He does about 150 premises cases annually. about 20% of his cases go to trial; 14-17 worked with Coggin law about 10 years before

on a bicycle case. His case load is 75% plaintiff and 25% defendant; 18 he prepared for deposition by reviewing the material of the case; 18-20 discussion about using quarter to determine depth of cracks; 22 Durig d/n know when the pictures that were provided were taken. 32 He said the fall took place close to plaintiff's residence; 32 Discussed how the accident took place; 33 talked about the scene of the fall; discussed his review of the accident scene. It had been repaired; 34 Durig described the scene; 36, 37 talked about how the scene looked after repair; 38 discussion of possession of The photos; 39 Ms. Lewis saw where he fell. He pointed out to Ms. Lewis where he fell just after he fell.; 40 Durig explained to attorney the dynamics of a trip; 41 Durig said There was a change in elevation at the injury site between a 1/2 inch and 1 inch; 42 During said that it was over six months from the time of identification until the time of Repair and Sanfilippo tripped before it was repaired in December of 2017. 43-45 Discussion of various ways of measuring; 52 the slope in the walkway does not comply With ASTM F1637 standard because of the change in elevation. The you have the ADA and the ANSI which do apply and these would violate those standards because the vertical change in elevation is excessive. He is mostly concerned about the change in elevation in the walkway. There is also IPMC, ASTM ADA and ANSI 117. ANSI A 117.1 is the standard in South Carolina. ASTM and ICC. 57 IPMC has been adopted in Beaufort County nor the City of Hilton Head Island; 61 you can have vertical 1/4 inch w/o treatment. 63 The handicapped spot has no. 1001 on it so Sanfilippo may be handicapped. 72 3/4 inch change is a trip hazard. 71 Did Sanfilippo ever complain about the hazard where he fell? 71 - 92 more or less review of material.

Complaint and Answer Pleadings

1. Sanfilippo Complaint 03/13/2019
2. Estate at Westbury Answer 05/09/2019
3. Sanfilippo Response to Answer 06/05/2019
4. Estate at Westbury Amended Answer 06/05/2019
5. Sanfilippo Response to Amended Answer 06/17/2019
6. Sanfilippo Amended Summons and Complaint 07/05/2019
7. HighTide Associates Answer to Amended Complaint 09/13/2019
8. Sanfilippo Response to Amended Complaint 09/19/2019
9. Sanfilippo Motion to Amend Complaint 02/14/2020
10. High Tide Associates Brief in Opposition to Motion to Amend Complaint 05/18/2020
11. Sanfilippo Summons and Second Amended Complaint 06/02/2020
12. High Tide Associates Answer to Amended Complaint 06/29/2020
13. Reply to Answer to 2d Amended Complaint 07/02/2020

Out of concerns for time and space, Plaintiff's attorney has not included copies of the pleadings. As this Court is aware, all the filed documents of this case are available through the Beaufort County Public Case Index.

Pleading Comments

1. In Sanfilippo's initial Complaint 03/13/2019 and Second Amended Complaint he pleads all the elements of the cause of action of negligence including notice against the Defendants Estate at Westbury and High Tide Associates. (Page 1 - 7 First and Second Amended Complaint)

Summary Judgment Pleadings

1. Estate at Westbury Motion for Summary Judgment 03/08/2021
2. High Tide Associates Motion for Summary Judgment 03/08/2021

3. Sanfilippo Response to Motion for Summary Judgment
4. Estate at Westbury Memo in Support of Motion for SJ 06/03/2021
5. Sanfilippo Response to EAW Memo in Support of Motion for Summary Judgment 06/04/2021
6. Sanfilippo Response to High Tide Associates Motion for Summary Judgment 06/04/2021
7. Sanfilippo Exhibits in Response to motion for SJ 06/04/2021
8. Affidavit of Durig 07/07/2021
9. Reply Memo in support of summary judgment 07/09/2021
10. Order denying Motion for summary judgment 11/15/2021
11. Motion for summary judgment 05/17/2022
12. Memo in opposition to motion for summary judgment 07/19/2022
13. Memo of law to Judge Cothorn.
14. Response to addendum.
15. Order Granting Summary judgment.
16. Order denying Plaintiff's Motion to Reconsider.
18. Notice of appeal.

Again, out of concerns for time and space, Plaintiff's attorney has not included copies of the Defendant's Summary Judgment Motions. As this Court is aware, all the filed documents of this case are available through the Beaufort County Public Case Index.

Comments On Plaintiff's Motions for Summary Judgment

2. First, pursuant to the Residential Landlord and Tenant Tenant act and the Horizontal Property Act, the Appellant enjoyed the possessory rights, common area rights, privileges and protections of a tenant and not a licensee particularly when he was in the common areas at the Estate at Westbury.

For example, pursuant to the Horizontal Property Act, Section 27-31-120 of the South Carolina Code of Laws, “[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements both general and limited to the apartment.¹ Also, please be aware that during his entire residence at the “Estate,” the Plaintiff paid all of the lessor’s extraneous costs and charges. (See the Pinto affidavit contained herein as Exhibit 1 where Pinto avers that fees, charges and extraneous charges for the property in questions were billed to Mr. Sanfilippo so that, in effect, Sanfilippo paid both the rents and the fees for the property

Moreover, in addition to the above and perhaps overlooked by the Defendant, is that fact that the Plaintiff also had the status of a tenant on the property under the statutory protections of the South Carolina Residential Landlord and Tenant Act (RLTA), particularly Section 27-40-440(a) of the Act which requires that the Defendants keep all common areas of the premises in a fit and habitable conditions for lessors/tenants such as the Plaintiff.

Finally, please be aware that no less an expert as Professor Felix has stated that Sanfilippo’s status in the community of the estate at Westbury was equivalent of an invitee. Hubbard and Felix, South Carolina Law of Torts, Second Edition, Page 127; See also Matthew Lincoln, “Landowners’ Duty to Guests of Invitees and Tenants: Vogt v. Murraywood Swim & Raquet Club and Goode v. St. Stephens United Methodist Church,” South Carolina Law Review Vol. 57:387. Lincoln states that, “South Carolina courts recognize the common-area exception, holding that lessors have a duty to use due care to maintain common areas when they retain control of them — thereby 16

classifying tenants as invitees when the tenant is in a common area.”

South Carolina Residential Landlord and Tenant Act

As a longtime lessee/tenant at the Estate at Westbury, Plaintiff Sanfilippo came under the statutory protections of the South Carolina Residential Landlord and Tenant act, particularly Section 27-40-440(3) which required the Defendants High Tide Associates and the Estates at Westbury to keep all common areas of the premises in a fit and habitable condition for residents such as the Plaintiff. In addition, the statute also required that that Defendants comply with all applicable building codes materially affecting tenant’s health and safety and to make necessary repairs and to keep the buildings and common areas in a reasonably safe and clean condition. There is also a tort action available under the RLTA for lessor’s violation of ints duty of care to the tenant.

Licensee & Open and Obvious

The Defendants, Estate at Westbury and High Tide Associates have, during the case at hand, been represented by three law firms. The second firm filed a motion for summary judgment which was been continued by the third law firm. Said motion makes two arguments: first, because the Plaintiff is a lessee at the Estates, he carries the designation of a licensee and, as such, has few if any rights. Next, in addition to the licensee misnomer, Defendant argues that the Plaintiff was wholly at fault in his accident because the raised edge of concrete over which he tripped was “open and obvious” and Plaintiff had traversed the spot on numerous occasions.

In classifying the Plaintiff as a licensee, current attorney as well as his predecessor

attorneys and the Court, have ignored the fact that Plaintiff, as a lessee of Unit 1001 of the Estate was, under the settled law of this jurisdiction, entitled to and should have been allowed to enjoy the possessory rights, privileges and protections of the lessor Angelo Pinto, while he was in the Estate's common areas.

In support of the same, please look to South Carolina Code Section 27-31-120, the Horizontal Property Act and Section 27-40-440(a) of the South Carolina Residential Landlord and Tenant Act. Both statutes offer statutory protections to the Plaintiff. While Section 27-31-120 conveys the undivided interest of the owner of the common elements both general and limited, the RLTA requires that the Defendant keep all the common areas of the premises in a fit and habitable condition for lessors like the Plaintiff. (Page 1 to 3 of Plaintiff's Notice and Motion pursuant to Rule 59(e) SCRCPP to Reconsider and Alter and Amend Judgment of Summary Judgment Against the Plaintiff. This document is included herein as an Exhibit) Please. See Pages 3 through 5 regarding the following:

- a. Plaintiff's status as an invitee in the common area;
- b. That the negligence of the Defendant was greater than Plaintiff's;
- c. That the question of licensee or invitee designation is a jury question;
- d. That breach of duty of care is a fact question for the jury;
- e. If the condition of the sidewalk was a latent dangerous condition was a fact question for the jury;
- f. That Defendant produced no evidence that Plaintiff was a licensee;
- g. That Defendant presented no evidence to the Court that the condition of the side walk was an open and obvious condition;
- h. That whether the condition of the sidewalk was "open and obvious" was a jury question. Exhibit

The Defendants claim that the condition of the sidewalk where the Plaintiff tripped and fell was open and obvious and therefor Defendant's liability should be denied. Plaintiff's deny this assertion for the following;

- a. Defendant had notice of the conditions and failed to act.
- b. Under the rule of Collander v. Charleston Donut, Creech Wildlife and Marine, Hancock v. Mid-South Management and Padgett v. Colleton County, if an owner knew of the obvious and dangerous condition of a place and, in addition, ***should have anticipated the condition would cause someone to hurt themselves and a jury could find against the owner.*** 5 through 8

Order

Unfortunately, in the matter at hand, the Court decided a complicated question on the basis of two erroneous conclusions of law. First, it made the determination that because the Plaintiff, Nicholas Sanfilippo, was an elderly, long-time lessee at the Estate at Westbury, he had the status of a licensee — the lowest social rung of apartment dwellers.¹ Second, the Court ruled that because the dangerous conditions of the walkway — the uneven edges of the sidewalk segments — were open and obvious, Sanfilippo's trip and fall was, in effect, the result of Sanfilippo's failure to watch where he was walking.

Further, according to the Court, Mr. Sanfilippo was on the property by virtue of the consent of the Estate at Westbury and because Sanfilippo was a licensee on the property, the Estate only had to use reasonable care to warn Sanfilippo of any

unreasonable risks or concealed dangerous conditions on the property.² According to the Estate, the raised edges of concrete segments did not reach the standard of a concealed dangerous condition. The Estate, in fact, was of the opinion that because the raised edges of concrete were so “open and obvious” the residents of the Estate did not need to be warned of they were dangerous conditions.

Prior to the October 26, 2017 trip and fall accident, Mr. Sanfilippo had resided at Unit 1001 on Kensington Boulevard for six years. He leased this unit from Frank Pinto. As part of his monthly lease payments, Mr. Pinto also paid an amount to cover Mr. Pinto’s fees and extraneous costs. This had been part of the lease arrangement for the entirety of Mr. Sanfilippo’s leasehold.

As a retired businessman and military veteran, Mr. Sanfilippo very much enjoyed living at the Estates at Westbury. One of the activities that he greatly enjoyed, weather permitting was taking a walk two or three times weekly within the curtilage of the Estate at Westbury. He did not walk fast, he just enjoyed being out and seeing his neighbors and the neighborhood.

Suddenly, as Mr. Sanfilippo was nearing the end of his walk, his left foot caught on a raised segment of concrete and he pitched forward onto his face, hands, arms and Knees. Because of the intense pain in his right knee, he suspected that he had broken his left knee.

What occurred next was a visit to the hospital and a diagnosis of a three part, Y-shaped comminuted fracture. The injury was realigned and cast and the next year was filled with physical therapy and learning how to walk with a walker, crutches and finally a cane.

Sanfilippo is of the opinion that his injury and subsequent arduous recovery was due wholly to the negligence of the Estate at Westbury and High Tide Associates. He has brought an action against the Estate and High Tide Associates sounding in negligence. The Estate and High Tide has defended on the basis that Sanfilippo was a "licensee" and that the sidewalk defect where he fell was "open and obvious."

In response to the above, it is sufficient to state that the Plaintiff is a tenant, not a licensee. He is designated a tenant by the South Carolina Residential Landlord and Tenant Act, Section 27-40-10 et. seq. As a tenant, he is entitled to all of the rights and protections under the act. This includes the duties to comply with the safety codes of the South Carolina Residential Landlord and Tenant Act (Section 27-40-440(a)(1) and the Act requires the Estate at Westbury to do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition (Section 27-40-440(a)(2) and to maintain certain facilities and appliances in reasonably good and safe working condition. (27-40-440(a)(5).

As a tenant, Sanfilippo had, when he was in the common areas of the Estate at Westbury, a status "analogous to invitees." Also, look to Landry v. Hilton Head Plantation Property Ass'n Inc. 317 S.C. 200, 452 S.E. 2d 452 S.E. 619 (Ct. App. 199) which ruled that a property owner had the status of invitee and was owed a duty of due care by Association paid to maintain the common area). Similarly, the SCRLTA, section 27-40-440 et. seq. states that the landlord must keep the premises including the common area in fit and habitable condition.

In support of the same, please look to South Carolina Code Section 27-31-120, the Horizontal Property Act as an adjunct to Section 27-40-440(a) of the South Carolina

Residential Landlord and Tenant Act. Both acts offer statutory protections to the Plaintiff. While Section 27-31-120 conveys the undivided interest of the owner of the common elements both general and limited, The RLTA requires that the Defendant keep all the common areas of the premises in a fit and habitable condition for lessors like the Plaintiff.

The Defendants claim that because the condition of the sidewalk where the Plaintiff tripped and fell was "open and obvious" the Defendant's Estate at Westbury has taken the position that the trip and fall was Sanfilippo's fault and that he should have been watching where he was walking.

The Plaintiff's denies this assertion for the following reasons;

- a. The Defendant had notice of the conditions because an old lady had been Knocked out of her wheel chair when she had hit a raised concrete edge.
- b. That many residents had complained about the condition of the walkways.
- c. The board of directors of the community had requested and received a quote from MAJ Concrete to repair nearly 100 segments of walkway.
- d. That a period of eight months had passed between the the wheel chair accident and Sanfilippo's fall without any action to repair the walkway.
- e. That a period of seven months had passed from the time of the wheel chair accident and Mr. Sanfilippo's trip and fall.

There have been many trip and fall accidents in the State of South Carolina. Many of these accidents have similar fact patterns to the Nicholas Sanfilippo's accident. In several of the accidents, the owner or manager of the facility knew for a long period time that there was an and obvious dangerous condition in his store or facility but did nothing about it. And eventually, in each of the situations, just like in Sanfilippo, where the Owner knew of the dangerous condition and should have anticipated the condition

would cause someone to hurt themselves, an accident happened and someone was seriously injured.

Under the rule of Collander v. Charleston Donut, Creech Wildlife and Marine, Hancock v. Mid-South Management, Padgett v. Colleton County, Davenport v. Cotton Hope, if an owner knew of the obvious and dangerous condition of a place and, in addition, ***should have anticipated the condition would cause someone to hurt themselves and a jury could find against the owner.***

Briefly, in Collander an elderly man sat on a stool in a donut shop that did not have a seat; in Creech, a lady fell off a viewing platform that did not have a safety rail; In Hancock a person fell in a hole in the concrete in a parking garage that everyone knew about for weeks and no one repaired; in Padgett a man took a short cut around the Courthouse and fell in a hole beside the building; in Davenport v. Cotton Hope no one repaired a light in a stair well and one night someone fell.

In Sanfilippo, the case at hand, there were many cracks, holes, disintegration and raised edge of concrete in a walkway. An elderly lady in a wheelchair hit a raised edge of concrete in a walkway and her wheel chair flipped over. There was a board meeting shortly thereafter where it was decided to get bids to repair the walkway. A short time later a bid came in From MAJ Concrete to make nearly one hundred repairs in the walkway for a reasonable price. Nothing was done and seven months later Nicholas Sanfilippo tripped and fell on a raised edge of concrete in the walkway and shattered his left knee.

Defendants Estate at Westbury and High Tide Associates have defended on the

basis of two erroneous arguments. First, they believe Sanfilippo has the status of a licensee instead of an invitee or a tenant at the Estate at Westbury. The Estate claims That because Sanfilippo is a licensee, he is owed something less than a duty of due care and is only required to be warned of concealed dangerous conditions. Neil v. Byrum 288 S.C. 472, 473; 434 S.E. 2d 615 (1986). The Defendants have maintained that the conditions of the walkways at the Estate at Westbury are not concealed. Not surprisingly, they maintain that the dangerous conditions of the walkways were “open and obvious.” By claiming the conditions of the walkways were “open and obvious” the lessors / managers did not have to change any of the activities conducted on the premises. They only had to use due care to discover the licensees and to warn them of unreasonable risks known to the lessors/managers but unknown to the licensees. Smiley v. Southern Railway, 184 S.C. 130, 191 S.E. 895 (1937).

Undisputed facts for presentation at a hearing or the trial of this case

1. Approximately six to eight months previous to Plaintiff’s October 26, 2017 trip and fall over an uneven segment of sidewalk in the common area of the Estate at Westbury. As a result of this fall, the Plaintiff sustained a comminuted, split y-shaped fracture of his left knee cap. Hilton Head Hospital, Diagnostic Radiology, Nicholas A. Maranino MD. Exhibit 3

2. At least six (6) months previous to Sanfilippo’s trip and fall accident, an elderly woman in a wheel chair hit an uneven section of concrete walkway within the curtilage of the Estate of Westbury walkway and her wheelchair flipped over onto the sidewalk.

Deposition of Rocky Dunlap, Vice President of the Estate at Westbury Board of Directors, August 6, 2020, P. 38 L:1 to page 40 L:1.

3. Shortly after this accident involving the elderly woman and her wheel chair, at the next meeting of the Board of Directors, the matter of the deterioration of the walkways was discussed. It was determined to get a proposal from a concrete / cement specialist for repairs on the walkway
4. The proposal named approximately eighty 80 conditions in the walkway that needed Repair. At least forty-four of these conditions were uneven concrete segments in the walkway. They were described by MAJ Concrete as "trip hazards."
5. Nothing was done to repair the hazards in the walkway until after the Plaintiff tripped over an uneven segment in front of his house and fractured the patella of his left Knee.
6. Plaintiff's recovery and rehabilitation took well over a year. His medic bills were over \$225,000.00.

The several law firms that have represented High Tide Associates and the Estates at Westbury have consistently argued the same defenses. First, they have claimed that the Plaintiff had the residential status of a licensee. On the social scale of the Estates and High Tide Associates, he was just above a trespasser and treated much the same, to wit he was owed something less than a duty of due care. He could not enter upon property without the possessor's consent. The possessor had no duty to him but to discover him and avoid injury to him and to warn him of any concealed dangerous conditions.

For someone such as Sanfilippo, the South Carolina Residential Landlord and Tenant Act has drastically changed the relationship between the possessor of property and the tenant. For purposes here, under the Act, particularly under code Section 25

27-40-440(a), RLTA has imposed the duty to maintain the common areas on the on lessor / owner. Most importantly the he must perform his duties with "due care" and can be liable if he breaches this standard.

In the matter at hand, in addition to labeling the Plaintiff as a licensee, the lessors have also claimed because the sidewalk defect where Plaintiff fell was open and obvious, liability does not attached to the Estate or to High Tide Associates. Here, the Plaintiff argues that under the law of Creech, Padgett and Calendar, where the owner had notice of the dangerous conditions and, dispite his anticipation that an injury could take place, did nothing, this is sufficient to get the dispute before a jury.

In the matter of Sanfilippo, the lessors were aware of the dangerous conditions because of a wheelchair accident and the subsequent examination and quote for repairs. However they did nothing and Sanfilippo was ultimately severely injured.

By S/Gary Coggin
Att. # 10758
P.O. Box 7092
Hilton Head Island, SC 29938

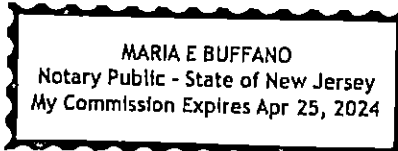
September 29, 2023

Affidavit of Frank D. Pinto

1. My name is Frank Pinto. I live at 3 Cosden Lane in Wayne, New Jersey. In addition to my home in Wayne, New Jersey, I have several other properties in my investment portfolio.
2. For several years I leased one of my properties in the Estates at Westbury in Bluffton, South Carolina to Nicholas and Kathryn Sanfilippo.
3. The monthly rental that I charged the Sanfilippo's to live in Unit 1001 in the Estates included therein a number of fixed costs such insurance payments, property taxes, HOA/POA fees and property management charges.
4. I considered the Sanfilippo's to be very good tenants

BY 
Francis D. Pinto

Sworn to before me on this 10th of December,
2021 by Mario Buffano
Notary Public for the State of New Jersey
My Commission Expires: 4/25/24



ESTATES AT WESTBURY PARK

MANAGEMENT AGREEMENT

5

This Agreement made and entered into effective the _____ Day of _____ By and between Estates at Westbury Park Owners' Association on behalf of ESTATES AT WESTBURY PARK, hereinafter referred to as the "Association" and SKELLY SERVICES, INCORPORATED, a South Carolina corporation, 55 New Orleans Road Suite 211 / PO box 7665, Hilton Head Island, South Carolina 29928, doing business as HIGH TIDE ASSOCIATES and hereinafter referred to as the "Agent".

WHEREAS, the size and extent of the said condominium project and the complexity and burden of the duties and responsibilities of the regime require the employment of an administrator; and

WHEREAS, the orderly and uniform administration of the regime, as an entity, is necessary and essential for the promotion and preservation of the condominium method of ownership in this regime and the protection of property values therein; and,

WHEREAS, the regime has a duly constituted board of Directors, elected by the co-owners, (hereafter "Board") which Board has certain responsibilities and authority as set forth in the Master Deed and By-Laws;

NOW, THEREFORE, in consideration of the premises and the mutual promises and covenants and other consideration herein contained, the receipt and sufficiency of which is acknowledged, the parties agree as follows:

1. **Definitions:** The terms used herein shall have the meanings set forth in the Horizontal Property Act of South Carolina.
2. **Employment:** The Regime does hereby employ HTA as the exclusive administrator of the regime's operations within the condominium project and as administrator of the Regime's property appurtenant thereto and HTA hereby accepts such employment.
3. **Term:** Unless sooner terminated, as elsewhere herein provided, this agreement shall commence on January 01, 2015 and shall continue thereafter for a period of one (1) year. Thereafter, this agreement shall continue to renew itself for successive one (1) year periods up to a total of five (5) and month to month thereafter until renewed. Each party shall have the right to terminate this agreement, without cause, upon thirty- (30) day's written notice to the other.
4. **Powers and Duties of the Agent:** The Agent, to the exclusion of other persons including the regime and its members, shall have all the powers and duties as set forth in this agreement, exempting only such powers and duties as are specifically reserved to and required to be exercised by the directors or members of the Association. The Association hereby expressly grants and delegates to the Agent the following authority, power and duties:
 - (a) **Confer:** Confer freely and fully at reasonable times and upon reasonable notice with the Association's directors when so required by them in conjunction with the performance of its duties. The Association shall give sufficient notice of and invite the Agent to attend all of the Association's directors, members and committee meetings.
 - (b) **Employees/Contractors:** Select, employ, supervise, direct, and discharge in its name or the name of the Association as the Agent shall determine, such persons, either as the Agent's employees or independent contractors, as it may require fulfilling its duties hereunder.
 - (c) **Collect Assessments:** Collect from Association members all regular assessments, which have been set or levied by the Association. The Association hereby authorizes the Agent in, accordance with agreed guidelines, to request, demand, collect, receive, and receipt for any and all assessments and charges which may be due the Association and to take such action in the name of the Association by way of making, recording, satisfying, foreclosing, the Association's lien therefor, initiating legal process or taking such other action as the Agent may deem necessary or appropriate for the collection of such assessments. The Agent shall furnish the Board with an itemized list of all delinquent accounts being overdue more than 30 days immediately following the twentieth (20 Th) day of each month, if such a list is requested.
 - (d) **Unleaved:** Subject to available funding, cause the grounds of the common elements and limited common elements to be kept in conformity with good landscaping practices. Further, the Agent will cause to be performed any repairs, replacements, refurbishment or maintenance brought to the Agent's attention by the Association involving specialty work, including but not limited to electricians, plumbers, carpenters, etc. Provided, however, that the Agent shall not be responsible for any pre-existing conditions of any common or limited common elements or for discovering any such condition, which would require maintenance. Provided further, the Agent shall not obligate the Association for any single item wherein the cost thereof would exceed the sum of Fifteen Hundred (\$ 1,500.00) Dollars without the specific approval of the Association, excepting only emergency matters involving manifest danger to persons or property, or immediately necessary for the preservation and safety of the condominium property or for the safety of persons or required in order to avoid suspension of any necessary services to the condominium all of which may be made or authorized by the Agent, without regard to the cost thereof.
 - (e) **Purchaser:** Purchase equipment, goods, supplies, services and materials as shall be reasonably necessary to perform its duties as set forth herein. Purchases shall be made in the name of the Agent or in its discretion, in the name of the Association. When making purchases the Agent shall make a reasonable effort to obtain the best price available, all factors considered, and disclose to the Association all discounts, commissions and rebates. On routine repair / maintenance items, the Agent may utilize its own employees and in-house inventory of supplies, in its discretion so long as the resulting cost to the Association is competitive, or better, than outside vendors / contractors.
 - (f) **Insurance:** In the absence of the required action by the Association as set forth in paragraph 10, the Agent may cause to be placed or kept in force all insurance required or permitted by the Master Deed and the By-Laws of the Association to be kept or placed by the Association; the Association shall cause said insurance to have the Agent named as co-insured in the policy; and further the Agent is empowered to otherwise exercise all the rights, powers, and privileges of the Association under such insurance proceeds under minor losses payable to the Association under its Master Deed and By-Laws.
 - (g) **HTA's Records:** Maintain records sufficient to describe its services hereunder and keep financial records in accordance with prevailing accounting standards, sufficient to identify the source of all funds collected and disbursement thereof. Such current records shall be kept in the

office of the Agent and shall be available for inspection by the Association's director's at all reasonable times. The Agent shall perform a continual internal audit of the Agent's financial records relative to its services for the purpose of verifying the same, but no independent or external audit shall be required of it. The Association shall have the right to an annual external independent audit provided the cost thereof is borne by the Association directly and not by the Agent, and the external auditor shall be acceptable to the Agent whose acceptance shall not be unreasonably withheld. Such independent audit shall be at the office of the Agent. The Agent shall make the Association's records available for any independent audit as may be required by the Board of Directors or Association Documents and shall cooperate with the auditors who perform such audit. The cost of any audit of the Association records will be kept and stored by Agent. The Board or its legal counsel shall determine which records shall be available to Homeowners. The Board shall, at Association expense, appoint a monitor to oversee document review and protect the documents from alteration, destruction or removal.

(h) Reserves: As part of the budgetary process and at the direction of the Board, the Agent shall assist the Association in the qualification and establishment of reserves. Said reserves may be for the payment of general operating and/or capital expenditures, or for special and specific purposes. In either event, the Agent shall collect and account for such funds and disburse the same at the direction of the Association.

(i) Funds: Deposit all funds collected from Association members or otherwise accruing to the Association in a special bank account or accounts, in banks and/or savings and loans associations or other financial institutions, separate from similar funds collected by the Agent for other condominium regimes. The Agent shall at all times account for such funds separately.

(j) Budget: Prepare recommended operating budget setting forth an itemized statement of the anticipated receipts and disbursements for the new year based upon the then current schedule of monthly assessments and taking into account the general condition of the Association which shall comply with the requirements of the by-laws. Said budget, together with an explanatory statement, shall be submitted to the Association in final draft form at least 30 days prior to the commencement of the year for which it has been made. Upon approval thereof by the Association, the budget shall serve as a supporting document for the schedule of monthly assessments, and serve as a limiting factor in which the economic guidelines are established for those Association operations administered by the Agent as outlined in this agreement.

(k) Experts: Retain or employ, with prior board approval, attorneys-at-law, tax consultants, certified public accountants, health consultants, and other such experts and professionals whose services the Agent may reasonably require to effectively perform its duties and exercise its powers hereunder. The Agent shall retain such professionals and experts as it may hire on such basis, as it deems most beneficial. The foregoing shall not be a limitation upon the right of the Association to employ other such professionals and experts on its own account as it may desire. But the employment of the same by the Association shall neither effect the Agent's rights to employ and continue employment of the professionals and experts, nor relieve Association of its obligation to pay its share of the cost of professionals and experts retained by the Agent, as elsewhere provided.

(l) Access: The Agent shall have access to the common elements and limited common elements of the condominium at all times and further the Agent shall have access to each condominium unit during reasonable hours as it may be necessary for the upkeep of any common element or limited common element contained therein or be accessible therefrom, or for the making of emergency repairs therein necessary to prevent damage to the common elements or to the limited common elements or to any other condominium unit or units; provided however that this right of access shall not be deemed to confer on the Agent any affirmative obligation for inspection of, and resulting responsibility for, any repairs to ordinarily inaccessible limited common elements (e.g. balconies). The parties understand that this right of access must be tempered with the desire of individual owners and their guests for privacy and tranquility.

(m) Accounting: By way of summary to certain of the functions described above, the Agent's general accounting responsibilities pursuant to this agreement are as follows: (i) Monthly Financial Statements (profit & loss, balance sheet, Accounts Receivable, Collections Report); (ii) Monthly Association billing of common monthly expense; (iii) Collection and posting of payments on account; (iv) Disbursement of funds; (v) Periodic placement of surplus funds in interest bearing accounts; (vi) Initiate preparation of Association state and federal income tax returns; (vii) Other duties which properly fall within an accounting function and are performed routinely for the majority of the Agent's clients.

(n) General Administration: The Agent shall assist the Board in its organization of the meetings of the Association owners including the preparation and delivery of the notice of the meeting, and the preparation of proxy forms. The Agent shall assist the Board in the preparation of the agenda for the meeting and in conducting of the meetings. The Agent shall further assist the Board in the election of the Board of Administrators at the Board meetings. Thereafter, the Agent shall assist with the meetings of the Board, including the election of officers. If requested by the Board, the Agent shall keep all records of the affairs of the Association, including but not limited to minutes of meetings, correspondence, modification of by-laws, regulations, etc.

5. Application of Collections: All assessments and other revenues, if any, of the Association which the Agent shall collect shall be applied and disbursed and otherwise expended or reserved by the Agent to pay all expenses of the Association and costs and expenses of the services rendered by the Agent under this agreement. "Costs and expenses of services" as herein used is defined to include any and all cost, compensation or expense incurred by the Agent in the performance of any of its duties or the exercise of any of its powers. By way of illustration and not of limitation said cost and expenses shall include:

(a) Insurance/Utilities: The Association's obligation for premiums of insurance policies and any utilities chargeable to the Association.

(b) Recreational Facilities: The Association's obligation on recreational facilities for upkeep and utilities.

(c) Private Roads: The Association's cost of upkeep including repaving and re-landscaping of any and all Private roads, walkways, and planting areas.

(d) Association's land and buildings: Cost and compensation attributable to the upkeep of the Association's lands, Apartment buildings and appurtenances.

(e) Materials and supplies: The cost of all machinery, tools, equipment, goods, wares, materials and supplies of every kind and description required by the Agent in and about the performance of its services and the operation of the Association.

It is recognized that the services to be expended by the Agent in its performance hereunder are limited necessarily by budgetary constraints and therefore the level of, e.g. upkeep and landscaping, can only be as high as the Association's funds will allow.

6. **The Agent's Compensation:** (a) It is specifically understood and agreed that the Agent shall perform all of the services required hereunder at no cost or expense whatsoever to itself other than its own office overhead and expenses. It is further agreed that as part of the Agent's overhead expense, normal administrative costs are included; such administrative costs are those which the Agent would have were it in any business but would not have occurred if the Association were not its client per this Agreement. However, any costs and expenses incurred by reason of special mailings, newsletters, polls, and the like, either requested by or specifically used by the Association will be considered costs included above in paragraph 5(e).

(b) The Association agrees to pay the Agent as its compensation for services performed under this Agreement (except for additional costs which are specified elsewhere in this Agreement), a fee of \$12.00 per unit or \$3,840 per month.

(c) In the event of any special projects that arise which are outside the purview of the budget and if the Agent is requested by the Association or Board to supervise it, the Agent shall be entitled to reimbursement of all expenses plus the parties will mutually agree upon a supervision fee or administration fee for the Capital Improvement work. Examples of such a special project would be a renovation project such as re-roofing, painting, or resurfacing of roads or parking lots whereby the Agent would have certain responsibilities in overseeing the bidding and letting of contracts and / or supervising and coordinating the actual work. Also included in this special project category would be additional accounting services required of the Agent to implement special assessments, including e.g. separate accounting when separate checking accounts are required, special billing which are not included with regular billings, and analysis and feasibility studies for special assessments.

(e) Finally, it is recognized that the Association's budget cannot always address all potential contingencies and, much the same as special projects referenced herein, from time to time, to testify, provide information, and / or consultation. In such event the Agent shall be entitled to recoup, at the rate of 1.5 times the actual employee expense, for any time spent by the Agent employees on Association matters. The Agent shall keep hourly records when such a situation arises and shall provide monthly statements to the Association for reimbursement.

7. **Employment of Personnel/Payroll Expenses:** The Agent shall select, employ and supervise any and all on-site employees, for the Association's benefit. All expenses related to the employment of such personnel will be borne by the Agent, and charged back to the Association as a budgeted expense of Association, at the rate charged by the Agent. Those expenses are: State and Federal Unemployment Taxes, F.I.C.A., Workers' Compensation Insurance and Bodily Injury and Property Damage Liability Insurance. Said payroll and incidental expenses shall be paid in advance of payroll to the Agent via electronic transfer of funds from the Association's designated bank account in accordance with the Agent's payroll schedule. Benefits consistent with the employment of quality personnel such as health insurance, are considered incident to the employment of such personnel and shall be a budgeted expense of Association. All employees will be subject to employment policies established by the Agent. Paid vacation policy for regular full-time employees is one week after one year, two weeks after two years, three weeks after six years and four weeks after eleven years. Scheduled holidays are New Year's Day, Memorial Day, July 4th, Labor Day, Thanksgiving, the day after Thanksgiving and Christmas. Other days following or preceding a holiday are at the discretion of the Agent. All regular full-time employees are eligible for sick leave benefits. Employees receive one-half day's sick leave credit for each month of continuous employment for a maximum total of six days per calendar year. From time to time, company policies and rates may be revised at the discretion of the Agent. All state and federal employment laws, such as the Family Medical Leave Act, shall be followed.

8. **Condominium Units:** This agreement neither contemplates, nor is the Agent responsible for or required to perform, the upkeep and repair of those portions of the condominium, the responsibility for which under its master deed is that of the Condominium owner. However, the Agent in its absolute discretion, may perform such maintenance and repair services of unit as an accommodation to the Association or to such unit owner and charge such unit owner who shall have requested said service of the Agent a reasonable charge in connection therewith.

9. **Default:**

(a) **By the Association:** If the Association or its members interfere with the Agent in the performance of its duties, the exercise of its powers hereunder, or if the Association shall fail to promptly pay any of the things required of it hereunder, including but not limited to the assessments of its members of amounts sufficient to defray in full the Agent's costs and expenses as herein defined, and to otherwise pay all the sums mentioned herein, then the Agent, Thirty (30) days after have given written notice to the Association of said default, by delivering said notice to any officer of the Association, or in their absence, to any member of the board, may declare this agreement in default. Unless such default is cured by the Association within (30) days after such notice, the Agent may, in addition to any other remedy given it by agreement, bring action for damages and / or specific and / or for other such rights as the law may provide. All of such rights of the Agent in the event of Association a default shall be cumulative, and the exercise of one or more remedies shall not operate to exclude so as to constitute a waiver of any other additional remedy. In the event of any action reason of any breach by the Association of its duties hereunder, the Agent shall be entitled, in the event it shall prevail in such litigation, in addition to any other relief provided by law, to the recovery of reasonable attorney's fees and court costs incurred in connection therewith.

(b) **By the Agent:** Failure by the Agent to perform its duties and obligations under this agreement for a continuous period of thirty (30) days after written notice of default from the Board specifying the default, shall be grounds for the Association's cancellation of this agreement.

10. **Held Harmless:** The Association agrees to save the Agent harmless from all damage suits in connection with the administration of the herein described property and from liability from injury suffered by any employee or other person whomsoever, and to carry or cause to be carried, necessary public liability (of not less than one million dollars per occurrence) and workmen's compensation insurance adequate to protect the Association, and will name the Agent co-insured. The Agent shall not be liable to the Association or to any person or entity claiming by, through or against the Association for any error of judgement or for any mistake of fact or law, or for anything which it may do or refrain from doing hereafter, except in cases of intentional misconduct. Any required Agent Fidelity Bonds will be at the expense of the Association.
11. **Severability:** If any section, sentence, clause or phrase or word of this agreement shall be for any reason held or declared to be inoperative or void, such holding will not affect the remaining portions of this agreement and it shall be construed to have been the intent of the parties that the remainder of this agreement, after the execution of such parts, shall be deemed and held to be as valid as if such excluded parts had never been included herein.

12. Successors and Assigns: This agreement shall inure to the benefit of and be binding upon the parties hereto and their respective legal representatives, successors and assigns.
13. Duplicate Originals: For the convenience of the parties hereto, any number of counterparts hereof may be executed and such counterpart shall be deemed an original instrument.
14. Governing law: This agreement shall be governed and construed in accordance with the laws of the State of South Carolina.
15. Classification of Headlines: Titles of the paragraphs and subparagraphs included herein have been inserted as a matter of convenience of reference only and shall not affect the meaning or construction of any terms or provisions hereof.
16. Entire Agreement: This agreement and all documents and instruments incorporated herein by specific reference are intended by the parties hereto to be the final expression of their agreement and constitute a complete and exclusive statement of the terms thereof notwithstanding any representations or statements to the contrary heretofore made.
17. Horizontal Property Act: HTA agrees that it will comply with all legal requirements set forth in the Horizontal Property Act of South Carolina pertaining to the administration and operation of the Horizontal Property Regime.
18. Waiver: Waiver of either party at any time or times to demand strict performance by the other of any terms, covenants, or conditions set forth herein shall not be construed as a continuing waiver or relinquishment thereof and each may at anytime demand strict and complete performance by the other of said terms, covenants and conditions.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be duly executed as of the date first herein above written.

WITNESSES:

ASSOCIATION:

ESTATES AT WESTBURY PARK OWNERS ASSOCIATION:

By: _____

SKELLY SERVICES, INCORPORATED dba
HIGH TIDE ASSOCIATES

By: _____
Douglas N. Skelly President

Hilton Head Hospital
 25 Hospital Center Boulevard
 Hilton Head Island, SC 29926-2738

Patient:	SANFILIPPO, NICHOLAS C	Attending Provider:	CLODFELTER MD, ROBERT L
MRN #:	381239	Admission Date:	10/26/2017
Account #:	9447598	Discharge Date:	10/26/2017
DOB/Age/Sex:	2/20/1944 / 73 years / Male	Lab Medical Director(s):	Allan Bennett, MD

Diagnostic Radiology

Accession #:	Exam Date/Time:	Procedure:	Ordering Provider:
711-XR-17-021926	10/26/2017 11:46 EDT	XR Knee 4 View Minimum Left	MARANINO MD ED, NICHOLAS A

Report

CLINICAL HISTORY: Knee Pain

COMPARISON: None.

TECHNIQUE:

XR Knee 4 View Minimum Left

FINDINGS:

The osseous structures show a split fracture of the patella which is not significantly displaced. This appears comminuted and Y-shaped. A small hemarthrosis is present.

The joint space shows chondrocalcinosis in the lateral meniscus..

There is no soft tissue abnormality. Specifically, no foreign body is seen.

IMPRESSION:

1. Nondisplaced Y-shaped midline fracture of the patella with small hemarthrosis.

Peter Britt MD, 10/26/2017 11:47 AM

*****Final Report*****

Dictated: 10/26/2017 11:46 am Dictated By: BRITT MD, PETER
 Electronic Signature: 10/26/2017 11:47 am Signed By: BRITT MD, PETER

Transcribed: 10/26/2017 11:51 am

From: Theresa Childers <theresa@hightideassociates.com>
Sent: Wednesday, September 27, 2017 2:25 PM
To: info@majenterprisesinc.com
Cc: EAW Manager; EAW Admin
Subject: RE: EstateatWestbury.HighTideAssoc.sidewalkrepairs.4-5-17

Theresa Childers
Association Manager
Estate at Westbury
85 Kensington Blvd
Bluffton, SC 29910
(T) 843-706-4763
(F) 843-706-4766
theresa@hightideassociates.com

~~I have a BOD meeting next week. Is it possible to get me the updated quote before Tuesday?~~

10/9 weel ✓ white
mailed
Black & B

~~B / 100~~

~~SOD part + rub out~~

inc.com]

~~140 copy + rub out~~

to x 250

+ honey

~~rub out~~

~~1st 3rd~~

~~Rub 120 - 110~~

~~putt cut out~~

~~Back 120 rub out~~

10/13 or 14/17

~~10/13~~

~~10/13~~

me the updated quote before Tuesday?

~~10/13~~

~~10/13~~

~~10/13~~

9/20/12

⑤
TERESA CHILDERS, ESTATE @ WESTBURY PARK, BFTN
843-706-4763

ADDENDUM - ASPHALT REPAIRS AROUND
MAILBOX KIOSK @ REAR OF COMPLEX

REPAIR POTHOLE, 3 AREAS

ESTIMATE 72 SF

Alan

PROPOSAL

6
M A J ENTERPRISES, INC.
PO Box 21564
Hilton Head Island, South Carolina 29925
(843) 681-7474
Fax (843) 689-3062
majentinc@hargray.com

09.14.17

To: High Tide Associates
PO Box 7665
Hilton Head Island, SC 29938
Attn: Teresa Childers

Job: Estate at Westbury Park
Westbury Park
Bluffton, SC

September 25, 2017

REVISED

WE HEREBY SUBMIT SPECIFICATIONS AND ESTIMATES FOR ALL LABOR, MATERIALS, TAXES, INSURANCE, AND CLEANUP NECESSARY TO PERFORM THE FOLLOWING ITEM(S):

(1) Sidewalk repairs as marked on site.

- Replacement includes sawcut as necessary, remove and replace with concrete finish to match existing as closely as possible; rebars under adjacent concrete to prevent settling; backfill and cleanup of site. Work has been estimated at 37 locations.

- Install missing section of walkway Building 2 as above

- Grind for smooth transition between sections of walk and cut roots outside walkway where present. Work has been estimated at 44 locations. TOTAL: \$7,700.00

(B) Add to #1 above for 16 additional locations replaced identified and marked and 66 additional locations identified to be ground to eliminate trip hazards.

TOTAL: \$2,700.00

(2) Replace approximately 16' of sunken sidewalk on side of office. Price includes new concrete and grading to provide positive drainage using 4" pipe and catchbasin for collection from downspout. TOTAL: \$2,100.00

We propose hereby to furnish material and labor – complete in accordance with above specifications, for the sum of: Amount dependent upon number removed.

Payment to be made as follows: Payment in full upon satisfactory completion and billing.

Thank-you!

Authorized Signature:

M A Zukofsky

This proposal may be withdrawn if not accepted within 60 days.

Acceptance of proposal:

Date _____

Signature _____

Print Full Name _____

09/25/17

PROPOSAL

M A J ENTERPRISES, INC.
PO Box 21564
Hilton Head Island, South Carolina 29925
(843) 681-7474
Fax (843) 689-3062
www.springfieldhawaii.com

To: High Tide Associates
PO Box 7665
Hilton Head Island, SC 29938
Attn: Teresa Childers

Job: Estate at Westbury Park
Westbury Park
Bluffton, SC

April 5, 2017

WE HEREBY SUBMIT SPECIFICATIONS AND ESTIMATES FOR ALL LABOR, MATERIALS, TAXES, INSURANCE, AND CLEANUP NECESSARY TO PERFORM THE FOLLOWING ITEM(S):

- (1) Sidewalk repairs as marked on site.
- Replacement includes sawcut as necessary, remove and replace with concrete finish to match existing as closely as possible; rebar under adjacent concrete to prevent settling; backfill and cleanup of site. Work has been estimated at 37 locations.
- Install missing section of walkway Building 2 as above
- Grind for smooth transition between sections of walk and cut roots outside walkway where present. Work has been estimated at 44 locations. TOTAL: \$7,700.00
- (2) Replace approximately 16' of sunken sidewalk on side of office. Price includes new concrete and grading to provide positive drainage using 4" pipe and catchbasin for collection from downspout. TOTAL: \$2,100.00

We propose hereby to furnish material and labor - complete in accordance with above specifications, for the sum of: Amount dependent upon number removed.

Payment to be made as follows: Payment in full upon satisfactory completion and billing.

Thank-you!

Authorized Signature:

M A Jukofsky

This proposal may be withdrawn if not accepted within 60 days.

Acceptance of proposal:

Date _____

Signature _____

Print Full Name _____

2417

STATE OF SOUTH CAROLINA)

COURT OF COMMON PLEAS

BEAUFORT COUNTY)

CASE NO. 2019-CP-07-00554

NICHOLAS SANFILIPPO,)

Plaintiff,)

v.)

AFFIDAVIT OF M.A. JUKOFSKY

HIGH TIDE ASSOCIATES,)

Defendant.)

My name is Michael A. Jukofsky am over the age of 18 years. I have examined the attached Proposal. This is true and accurate proposal by MAJ Enterprises for sidewalk repairs and replacement at the Estate at Westbury in Bluffton, South Carolina. This Proposal was provided to High Tide Associates via Teresa Childers on April 5, 2017. The proposal was sent via (fax / Email).

I declare to the best of my knowledge that the information sworn to herein

Is true and accurate.

M.A. Jukofsky

Sworn to before me this 30th day of June by M.A. Jukofsky

By Molly A. Posthauer

My Commission Expires: 5/23/28

MOLLY A POSTHAUER
Notary Public-State of South Carolina
My Commission Expires
May 23, 2028

Statement of M A Jukofsky

My name is M A Jukofsky. I am the owner of MAJ Enterprises, Inc.

On April 5, 2017 MAJ Enterprises made a proposal to High Tide Associates for a concrete job at the Estate at Westbury.

I have initialed a copy of that April 5, 2017 proposal and state it is a true and accurate copy of the original proposal.

Sworn to before me

X MAJukofsky
MA Jukofsky

Executed this 30th day of June 2022

Molly L. Roth

Notary State of South Carolina

My Commission Expires 5/23/2028

9/20/17

Estate at Westbury Park

Sidewalk Repairs – EXPANDED SCOPE FROM 8/17/17 PROPOSAL

Walked property with 2 representatives from Estate office

1. Sidewalk Repairs as marked

- Removal/Replacement of marked sections – 53 locations marked with red dot/other red indicator or white "X" (16 more than previous proposal)

Estimate 1190 SF

$$+ 300 \times 7 = 2100$$

- Trip Hazards for grinding - 110 locations marked with green dot or white line @ joint (66 more than previous proposal)

Estimate 500 LF

$$+ 400$$

2700

- Install missing section of walkway @ Bldg 2 (no change from previous proposal)

Estimate 125 SF

OK

2. Repair sidewalk and fix drainage issues @ side of office – same as previous proposal

OK

Dean Roberts

NOTE: ADDENDUM ATTACHED FOR REQUESTED
ASPHALT REPAIRS

JUSTIA

4

[View the 2019 South Carolina Code of Laws](#) | [View Previous Versions of the South Carolina Code of Laws](#)

2013 South Carolina Code of Laws

Title 27 - Property and Conveyances

CHAPTER 40 - RESIDENTIAL LANDLORD AND TENANT ACT

SECTION 27-40-440. Landlord to maintain premises.

Universal Citation: SC Code § 27-40-440 (2013)

(a) A landlord shall:

- (1) comply with the requirements of applicable building and housing codes materially affecting health and safety;
- (2) make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition;
- (3) keep all common areas of the premises in a reasonably safe condition, and, for premises containing more than four dwelling units, keep in a reasonably clean condition;
- (4) make available running water and reasonable amounts of hot water at all times and reasonable heat except where the building that includes the dwelling unit is not required by law to be equipped for that purpose, or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant and supplied by a direct public utility

connection;

(5) maintain in reasonably good and safe working order and condition all electrical, gas, plumbing, sanitary, heating, ventilating, air conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him. Appliances present in the dwelling unit are presumed to be supplied by the landlord unless specifically excluded by the rental agreement. No appliances or facilities necessary to the provision of essential services may be excluded.

(b) If the duty imposed by paragraph (1) of subsection (a) is greater than any duty imposed by any other paragraph of that subsection, the landlord's duty must be determined by reference to paragraph (1) of subsection (a).

(c) The landlord and tenant of a single family residence may agree in writing that the tenant perform the landlord's duties specified in paragraph (5) of subsection (a) and also specified repairs, maintenance tasks, alterations, and remodeling, but only if the transaction is entered into in good faith and not for the purpose of evading the obligations of the landlord.

(d) The landlord and tenant of any dwelling unit other than a single family residence may agree that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling only if:

(1) the agreement of the parties is entered into in good faith and not for the purpose of evading the obligations of the landlord;

(2) the work is not necessary to cure noncompliance with subsection (a)(1) of this section;

(3) the agreement does not diminish or affect the obligations of the landlord to other tenants in the premises.

HISTORY: 1986 Act No. 336, Section 1.

Disclaimer: These codes may not be the most recent version. South Carolina may have more current or accurate information. We make no warranties or guarantees about the accuracy, completeness, or adequacy of the information contained on this site or the information linked to on the state site. Please check official sources.

RECEIVED ELECTRONICALLY FILED - 2019 JUL 09 6:53 PM - BEAUFORT - COMMON PLEAS - CASE#2019CP005554

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS

CASE NO.: 2019-CP-07-0554

Nicholas Sanfilippo

Plaintiff,

v.

Affidavit of Bryan R. Durig Ph.D., P.E.

Estate of Westbury Horizontal Property
Regime aka Estate at Westbury Owners
Association (a multifamily real estate
community) and Hugh Tide Associates

Defendants.

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

PERSONALLY APPEARED BEFORE ME, Bryan R. Durig, Ph.D., P.E., who,
first being duly sworn deposes and says:

1) My name is Bryan R. Durig. I am fifty-seven (57) years old and reside in Lexington County in South Carolina. I have obtained a B.S., M.S., and Ph.D. in mechanical engineering from the University of South Carolina. I also have obtained a Masters degree in Business Administration from the University of South Carolina. A copy of my CV is attached hereto. I am a licensed engineer in the state of South Carolina as well as numerous other states.

2) I am a consulting engineer with Summit Engineering, L.L.P. in Columbia, South Carolina. I specialize in the area of engineering analysis of accidents. Over the last 30 years, I have conducted numerous fall incidents dealing with changes in elevation along sidewalks and parking lots. I am familiar with applicable building codes and industry

safety standards and guidelines. I have been qualified as a mechanical engineering and safety expert in numerous state and federal courts.

3) I have been retained to review the facts of this case, including the Summons and Complaint, photographs taken after Mr. Sanfilippo's fall incident, inspection and measurements of the current condition of the sidewalk, building codes, industry standards and industry guidelines.

4) Summit Engineering, L.L.P. has conducted an engineering investigation of a fall incident involving Mr. Nicholas Sanfilippo as he was walking on a sidewalk to his residence in the 1000 Building at the Estate at Westbury in Hilton Head Island, South Carolina on October 26, 2017. Reportedly, Mr. Sanfilippo tripped and fell at a change in elevation in the sidewalk due to the concrete sidewalk sections being at different elevations. This change in elevation between the two concrete sidewalk sections created a fall hazard for all patrons walking on that side of Building 1000. The purpose of this investigation has been to review available information to evaluate if a hazardous condition existed with the sidewalk at the Estate of Westbury facility that contributed to Mr. Sanfilippo's fall.

5) I have reviewed photographs taken after Mr. Sanfilippo's incident and have taken measurements of the change in elevation between the two concrete sections of the sidewalk in 2021. The subject change in elevation in the sidewalk was identified as the area here Mr. Sanfilippo fell while walking back to his residence - Unit 1001. Photographs taken shortly after Mr. Sanfilippo's fall incident show a blue painted mark on the sidewalk where the subject change in elevation existed. Photographs with a US quarter shown vertically show the change in elevation was in the neighborhood of $\frac{1}{4}$ inch to 1 inch based on where the US quarter was placed. The largest changes in elevation were along the left side of the sidewalk - away from Building 1000. The center part of the sidewalk had a change in elevation in the neighborhood of $\frac{1}{2}$ inch. At the time of my inspection, the change in elevation had been ground down to eliminate the trip hazard. I was able to use a aluminum ruler to extend out the original sidewalk surface and measure down to the lower sidewalk surface - yielding a change in elevation between $\frac{3}{4}$ inch and 1 inch -

depending on the location the measurement was taken on the left side of the sidewalk. The sidewalk was measured to be 48 inches wide. The change in elevation was between two sections of concrete - essentially at a joint in the concrete sidewalk. The change in elevation I measured is consistent with the measurements obtained by analyzing the photographs taken after Mr. Sanfilippo's incident with the US quarter present. This change in elevation (1/2 inch to 1 inch along the sidewalk) created a trip hazard for patrons walking on the sidewalk adjacent to Building 1000.

6) In the photographs taken after Mr. Sanfilippo's, one can see a blue paint mark at the subject change in elevation. It is unclear at this time if that paint mark was there to signify a repair was needed before Mr. Sanfilippo's fall incident or if the paint mark was placed there after his fall incident to mark an area that needed repaired. Deposition testimony of HOA members and/or employees of High Tide Associates may provide details of when, who and why the blue paint mark was placed on the trip hazard.

7) The International Property Maintenance Codes states: "The owner of the premises shall maintain the structures and exterior property in compliance with the requirements..." The IPMC also states in Section 302.3 Sidewalks and driveways "All sidewalks, walkways, stairs, driveways, parking spaces and similar areas shall be kept in a proper state of repair, and maintained free from hazardous conditions." The vertical change in elevation between the sidewalk sections adjacent to Building 1000 in the Estate of Westbury created a fall hazard and was not being maintained in accordance with the International Property Maintenance Code.

8) The ASTM F1637 discusses numerous safe practices and "minimum maintenance criteria" concerning walking surfaces. Section 5.1 states "Walkways shall be stable, planar, flush, and even to the extent possible. Where walkways cannot be made flush and even, they shall conform to the requirements of 5.2 and 5.3." Section 5.2.4 states "Changes in levels greater than 1/4 in. (12 mm) shall be transitioned by means of a ramp or stairway that complies with applicable building codes, regulations, standards, or ordinances, or all of these." Section 5.7.1 states "Exterior walkways shall be maintained

so as to provide safe walking conditions." Section 5.7.1.2 states "Exterior walkway conditions that may be considered substandard and in need of repair include conditions in which the pavement is broken, depressed, raised, undermined, slippery, uneven or cracked to the extent that pieces may be readily removed." Section 5.7.2 states "Exterior walkways shall be repaired or replaced where there is an abrupt variation in elevation between surfaces. Vertical displacements in exterior walkways shall be transitioned in accordance with 5.2." The vertical change in elevation (measured to range between 1/4 inch and 1 inch) between the sidewalk sections adjacent to Building 1000 in the Estate of Westbury created a fall hazard and was not being maintained in accordance with ASTM F1637.

9) The ADA and ANSI A117.1 have similar requirements for level walking surfaces. Both standards require that changes in level over 1/2 inch must be transitioned with a ramp or curb ramp (for accessible sidewalk). The vertical change in elevation of 1/2 inch to 1 inch in the subject sidewalk adjacent to Building 1000 would be a violation of the ADA and ANSI A117.1.

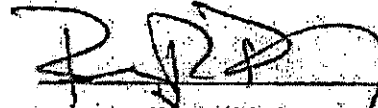
10) H. Harvey. Cohen and Jake Pauls wrote a chapter in The Handbook of Warnings (Edited by Michael S. Wolgaster in 2006) that states "When walking, pedestrians generally expect the walking surface to remain uniform (Cohen & LaRue, 2005). If a hazard exists in the walking surface, it must be perceived or recognized as a hazard by the pedestrian to decrease the likelihood of a fall incident occurring." In addition, their chapter states "Generally, the fall is initiated when the condition violates a pedestrian's normal expectations or when sufficient sensory cues (usually visual or tactile) are not available" Furthermore, the chapter states "Given no other visual cues, a pedestrian expects a level walking surface to remain level. Pedestrian missteps occur when there is some form of change in level of the walking surface that catches the pedestrian unaware." The change in elevation between the sidewalk sections adjacent to Building 1000 in the Estate of Westbury created a fall hazard and should have been repaired to eliminate the hazardous condition which would have prevented Mr. Sanfilippo's fall incident.

RECEIVED ELECTRONICALLY FILED - 2022 JUL 07 09:53 PM - BREAKPOINT - CLOUDWON FILEXES - CASE#201910707005564

10) In summary, the vertical change in elevation between the sidewalk sections adjacent to Building 1000 in the Estate of Westbury created a fall hazard and is considered the cause of Mr. Sanfilippo's fall incident. The change in elevation between the concrete walking surfaces varied between ½ inch and 1 inch, depending on the location along the width of the sidewalk, and was not being maintained in accordance with the ADA, ANSI A117.1, IPMC, ASTM F1637 and industry guidelines. There were feasible and economical alternatives (simply grinding out the change in elevation to eliminate the fall hazard) that should have been performed on this area of the sidewalk to eliminate the fall hazard associated with the change in elevation adjacent to Building 1000 which would have prevented Mr. Sanfilippo's fall incident.

UNDER PENALTY OF PERJURY, I DECLARE THAT THIS STATEMENT CONSISTING OF FIVE PAGES IS TRUE AND CORRECT:

FURTHER AFFIANT SAITH NOT


Bryan R. Durig, Ph.D., P.E.
Summit Engineering, L.L.P.

SWORN TO BEFORE ME THIS
7 day of July, 2021


Notary Public for South Carolina
My Commission Expires: 4.8.2025

Affidavit of Diane Lewis

1. My name is Diane Lewis. I am over twenty-one years of age and I am of sound mind.
2. I am the sister of Kathleen Davey Sanfilippo. Kathleen Davey Sanfilippo is wife of Nicholas Sanfilippo who is the Plaintiff in the lawsuit Nicholas Sanfilippo v. High Tide Associates and Estate at Westbury 2019-CP-07-00554.
3. I live at 109 Regent Avenue in the Estate at Westbury Park in Bluffton, South Carolina. At the time of his accident, the Plaintiff, along with his wife Kathleen, lived at the Estate at Westbury Park which is adjacent to the Estate at Westbury in Bluffton, south Carolina.
4. On October 26, 2017 at around 10:00 A.M. to 10:15 A.M. Nicholas called me on his cell phone. He told me that he hated to bother me but that he had just injured himself while walking and needed help to get to the hospital. He told me that he called me because Kathleen, his wife, was working and that he was on the side-walk a short way from where he and Kathleen lived.
5. I left 109 Regent immediately and parked my car in a parking sport close to Nicholas' condominium unit.
6. As soon as I exited my vehicle, I could see Nicholas sitting on the sidewalk. Where he was injured was close to where he lived. He appeared to be in great pain.
7. I walked to where Nicholas was sitting. He pointed to where he tripped

and told me that, while he was walking, his left toe caught on a raised segment of concrete. He said he fell forward onto his face hands and knees and that his shoes had come off when he fell.

8. After we got his shoes on and got his to his feet, we went to Hilton Head Medical Center. On the way to the hospital, Nicholas did not talk much. He told me his left knee was broken in several places and that it was hurting worse and worse.

9. We went to the emergency entrance at the hospital and Nick was taken in almost immediately. I waited for him over three hours. During that time he was examined, x-rayed and casted.

10. Afterwards, I took Nicholas home. He said he was in terrific pain. In the parking lot at his condominium, he was able to get in his wheel chair with great difficulty. We went slowly back towards his condominium.

11. When we passed over the segment of concrete where he had fallen,

Nicholas said, "This is where I fell."

By Diane Lewis
Diane Lewis

Sworn to before me this 15th

Day of June, 2021.

Diane Lewis
Notary Public for State of South Carolina

Commission Expires 10/10/25

Affidavit of Kathleen Davey Sanfilippo

1. My name is Kathleen Davey Sanfilippo. I am over twenty-one years of age and I am of sound mind.
2. I am the wife of Nicholas Sanfilippo who is the Plaintiff in the lawsuit Nicholas Sanfilippo v. High Tide Associates and Estate at Westbury 2019-CP-07-00554.
3. At the time of Nicholas Sanfilippo's trip and fall on October 26, 2017, he and I lived in unit 1001 in the Estate at Westbury Park in Bluffton, South Carolina. I am currently living with my sister, Diane Lewis in Westbury Park which is adjacent to the Estate at Westbury in Bluffton, South Carolina.
4. On October 26, 2017 at around noon I received a call on my cell phone from my sister Diane Lewis. She told me that she was at the Hilton Head Medical Center with my husband Nicholas who had tripped and fallen and had badly injured himself while he was taking a walk earlier that day.
5. She told me that Nicholas said he had called her because I was at work and he needed to get to the hospital as soon as possible.
6. I later determined that at the hospital Nicholas had his left knee examined, x-rayed and casted before being released.
7. When I got home from work, Nicholas was resting in bed. I could tell when he talked that he was in terrific pain.

8. A day or so after he got home from the hospital, Nick was able to go out on his with me in his wheel chair and show me what happened and where he had fallen.

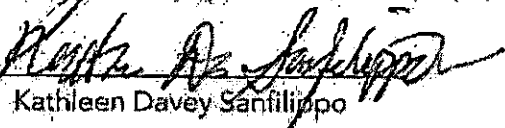
9. Where he had tripped and fallen was only one hundred or so feet from where we lived. Nick showed me where he had tripped on the uneven edge of a segment of concrete.

10. Later, sometime in November I showed two young ladies from the law Office of Bauer and Metro where Nicholas had fallen. They took as many as twenty-five or so photographs of the scene.

11. My attorney has shown me the photographs of the scene where Nicholas fell and I can verify and otherwise certify that this is where Nicholas indicated to me that he had fallen.

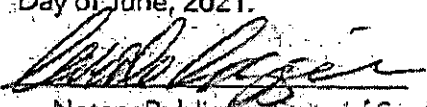
12. My sister Diane Lewis has also indicated that the section of sidewalk that was photographed is where she saw Nicholas sitting when she came to pick him up and take him to the hospital on October 26, 2017.

By


Kathleen Davey Sanfilippo

Sworn to before me this 15th

Day of June, 2021.


Notary Public for State of South Carolina

Commission Expires 10/10/22

Thank you,

Theresa Childers
Association Manager

Estate at Westbury

85 Kensington Blvd

Bluffton, SC 29910

(T) 843-706-4763

(F) 843-706-4766

theresa@hightideassociates.com

From: Karla Patterson [<mailto:info@majenterprisesinc.com>]

Sent: Friday, April 07, 2017 11:24 AM

To: Theresa Childers <theresa@hightideassociates.com>

Subject: EstateatWestbury.HighTideAssoc.sidewalkrepairs.4-5-17

Please find your requested proposal attached.

Thank you for the opportunity!

Please contact Mike with any questions at 843-684-0074.

Respectfully,

Karla

Administratce Assistant

Affidavit of Kathleen Davey Sanfilippo

1. My name is Kathleen Davey Sanfilippo. I am over twenty-one years of age and I am of sound mind.
2. I am the wife of Nicholas Sanfilippo who is the Plaintiff in the lawsuit Nicholas Sanfilippo v. High Tide Associates and Estate at Westbury 2019-CP-07-00554.
3. At the time of Nicholas Sanfilippo's trip and fall on October 26, 2017, he and I lived in unit 1001 in the Estate at Westbury Park in Bluffton, South Carolina. I am currently living with my sister, Diane Lewis in Westbury Park which is adjacent to the Estate at Westbury in Bluffton, South Carolina.
4. On October 26, 2017 at around noon I received a call on my cell phone from my sister Diane Lewis. She told me that she was at the Hilton Head Medical Center with my husband Nicholas who had tripped and fallen and had badly injured himself while he was taking a walk earlier that day.
5. She told me that Nicholas said he had called her because I was at work and he needed to get to the hospital as soon as possible.
6. I later determined that at the hospital Nicholas had his left knee examined, x-rayed and casted before being released.
7. When I got home from work, Nicholas was resting in bed. I could tell when he talked that he was in terrific pain.

8. A day or so after he got home from the hospital, Nick was able to go out on his with me in his wheel chair and show me what happened and where he had fallen.

9. Where he had tripped and fallen was only one hundred or so feet from where we lived. Nick showed me where he had tripped on the uneven edge of a segment of concrete.

10. Later, sometime in November I showed two young ladies from the law Office of Bauer and Metro where Nicholas had fallen. They took as many as twenty-five or so photographs of the scene.

11. My attorney has shown me the photographs of the scene where Nicholas fell and I can verify and otherwise certify that this is where Nicholas indicated to me that he had fallen.

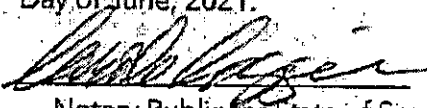
12. My sister Diane Lewis has also indicated that the section of sidewalk that was photographed is where she saw Nicholas sitting when she came to pick him up and take him to the hospital on October 26, 2017.

By


Kathleen Davey Sanfilippo

Sworn to before me this 15th

Day of June, 2021.


Notary Public for State of South Carolina

Commission Expires 10/10/22

Medical Bills

Brookdale Senior Living \$905.81
Bluffton, South Carolina

Coastal Carolina Medical Center \$7207.04
Okatie, South Carolina

Beaufort County EMS \$347.80
Beaufort, South Carolina

Tobin Bone & Joint Surgery \$4071.00
Hilton Head Island, SC

Hilton Head Medical Center \$4623.61
Hilton Head Island, SC

Long Island Community Hospital \$202,491.11
East Pathogue, NY

Long Island Cardiology \$328.40
East Pathogue, New York

St. Joseph Hospital \$5457.00
Bethpage, NY

Bay Orthopedics and Rehab \$113.78
East Bay, NY

Expenses \$3880.30

Total \$230,342.18*

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

NICHOLAS SANFILIPPO,

Plaintiff,

v.

ESTATE AT WESTBURY &
HIGH TIDE ASSOCIATES,

Defendants.

2022 AUG 25 PM 1:47

JERILYN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

COURT OF COMMON PLEAS

CASE NO.: 2019-CP-07-00554

Notice and Motion Pursuant to
Rule 59(e) SCRPC to Reconsider
and Alter and Amend Judgment
of Summary Judgment Against
the Plaintiff

COMES NOW the Plaintiff Nicholas Sanfilippo and by and through his undersigned counsel and pursuant to Rule 59(e) of the South Carolina Rules of Civil procedure and the Common Law of South Carolina, motions this Court to reconsider, amend and alter the Order this Court entered on August 16, 2022 granting the Defendant's Motion for Summary Judgment.

Motion

This motion, filed on behalf of the Plaintiff Nicholas Sanfilippo, seeks an Order altering or amending the Order pursuant to Rule 52(b) is based on the pleadings, submissions, documents, depositions of the case, case law, hearings and errors and omissions in the factual finding and conclusions of law upon which this Court relied in granting this herein complained of Order Granting Defendant's Motion for Summary Judgment.

1. In the complaint Sanfilippo v. Estate at Westbury and High Tide Associates, the Plaintiff was mischaracterized by the Defendants as a licensee. To the contrary, at all times during this claim the Plaintiff had a status analogous to that of an invitee while in the common area of the Estate at Westbury

Throughout the lengthy litigation of Sanfilippo v. the Estate at Westbury and High Tide Associates, Defendants' numerous counsels have consistently and perhaps deliberately mischaracterized Plaintiff Nicholas Sanfilippo as a "licensee" while he was within the curtilage of the Estate at Westbury. With the labeling of Sanfilippo as a licensee, the Defendants have made much of the fact that, in their view, the Plaintiff was on the land by virtue of the possessor's consent and, accordingly, the Defendants had no duty of care to the Plaintiff except to warn him of concealed dangerous conditions and or dangerous activities on the property.¹

In classifying the Plaintiff as a Licensee, the Defendants have conveniently ignored the fact that the Plaintiff, as a lessee of unit 1001 of the Estate at Westbury was, under the settled law of this jurisdiction, entitled to and should have been able to enjoy all the possessory rights, common area rights, privileges and protections of the lessor/property owner Angelo Pinto from whom he had leased unit 1001 in the Estate for six years. In support of this, please look to Section 27-31-120 of the S.C. Code of the Horizontal Property Act which states that "[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements both general and limited to the apartment."²

Moreover, in addition to the above and perhaps overlooked by the Defendant, is the fact that the Plaintiff also had the status of a tenant on the property under the statutory protections of the South Carolina Residential Land Lord and Tenant Act (RLTA), particularly Section 27-40-440(a) of the Act which requires that the Defendants to keep all common areas of the premises in a fit and habitable condition for lessors/tenants like the Plaintiff.³ (Also important to this claim is that pursuant Code 27-40-610(b)(4) of the Act provides that the tenant may recover actual damages for any noncompliance by the landlord of his statutory duties).⁴

With the above said, and given his lessee/tenant/invitee status at the Estate, it should be obvious to the Court that the Plaintiff should not have been saddled with the status of a licensee. Rather, according to Professor Robert Felix who obviously agrees with this analysis, Mr. Sanfilippo's status in the community of the Estate at Westbury was equivalent of an invitee and, as such, he should be afforded the rights and privileges of an invitee by this Court. 5, 6

If, following Professor Felix' directive, the Plaintiff's status herein is most likely of an invitee, then the Estate at Westbury and High Tide Associates had a duty of due care to the Plaintiff to discover risks and take safety precautions to warn of and eliminate unreasonable risks.⁷

2. The Plaintiff's status in the common area of the Estate at Westbury was that of an invitee.

Defendants' labelling of Plaintiff Sanfilippo as a licensee is clearly wrong. It follows, for the purposes of the claim herein, that the Plaintiff must be afforded the status of an invitee when he was in, on or about the common areas of the Estate at Westbury.

In support of this argument, please be aware that by settled law, as a leaseholder at the Estate at Westbury, the Plaintiff enjoyed all the rights and privileges of the owner of condominium unit 1001.⁸ This included the owner's possessory interest in clean and safe common areas of the estate. For example, even where the danger was obvious, the landlord would have had the duty to make repairs if it was foreseeable that the invitee would encounter the dangerous condition.⁹ Similarly, the landlord had the duty of due care to discover risks and take safety precautions to warn or and eliminate any unreasonable risks.¹⁰

Also, where, as herein instantly, the Plaintiff had a handicap that was known by the Defendants, the degree of care extended to Nicholas Sanfilippo must be commensurate with

the circumstances involved, including the age and capacity of the Plaintiff. This is an affirmative duty and includes the refraining from any act that would render the walkway more dangerous and result in injury.¹¹

Further to this argument that Sanfilippo's status at the Estate at Westbury was that of an invitee rather than that of a licensee, a comparison of a lease and license may be instructive. A lease, by statute and settled law, is an agreement between the lessor (owner) and lessee (tenant) whereby the owner's possessory interest in the property including the common area, is transferred to the lessee for a period of time and for an agreed consideration. Section 27-31-120, as quoted immediately above, defines this transaction, the most important part of which, for our purposes, is the lessee's entitlement to the lessor's share of the common area. A party that acquires an interest in property via a lease is a "lessee." An invitee is on the property for the benefit of the owner/landlord and is entitled to a duty of due care.

3. Absent negligence, the lessor has no liability to the invitee. A plaintiff in a negligence action may recover damages if the plaintiff's negligence is not greater than that of the Defendant.¹²

On the other hand, a licensee is one who must seek permission (license), either express or implied, to enter upon a property owned by another. In addition, the licensee enters the property for his own benefit and at the sufferance of the owner or tenant and/or lessee.¹³ In any event, the possessor of the property is under no obligation to make the premises safe for the licensee and only has to use reasonable care to warn him of any dangerous conditions and risks on the premises which are known to the possessor.¹⁴ The licensee must accept the premises as it is presented and, as he is on the property for his own purposes, he is owed a duty of less than due care for the time he is on the property.¹⁵

Finally, a license is, by nature and definition, a temporary designation and is given the rights and protections afforded a visitor to the property who is there for his own purposes and for his own benefit.¹⁶

4. **Conflicting evidence as to the question of whether one is a licensee or an invitee on the property is a question of fact for the jury.**
5. **Whether the Defendants breached their duty of care to the Plaintiff under the common law is a question of fact for the jury.**
6. **Whether the condition of the sidewalk where the Plaintiff tripped and fell was a latent dangerous condition was a question of fact for the jury.**
7. **The Defendant's argument to the Court that the Plaintiff was a licensee was not supported by affidavits, evidence, deposition testimony, witness testimony or case law and should be denied by the Court.**
8. **The Defendant's claim that the condition of the sidewalk where the Plaintiff tripped and fell was "open and obvious" was not supported by photographic evidence, expert testimony, measurements or witness testimony and should be denied by the Court.**
9. **Whether the condition of the sidewalk where the Plaintiff tripped and fell was an open and obvious condition is question of fact for the jury.**

Open and Obvious

The Defendants have claimed that the condition of the sidewalk where the Plaintiff tripped and fell was open and obvious and that liability for the same should be denied. The Plaintiffs deny this assertion and state that in the case at hand there is ample evidence that the landlord and the management company had been warned, as per the "wheel chair accident"¹⁷ and the subsequent remedial proposal¹⁸ by MAJ Concrete, that the uneven concrete edges in the walkways in the estate at Westbury posed a dangerous condition to pedestrians. Business and property owners are liable for open and obvious conditions if, whether by notice or previous

incidents, they anticipated that the Plaintiff would encounter the condition and be injured. Callander v. Charleston Donut Company, 305 S.C. 123; 406 S.E. 2d 361, 362 (1991).¹⁹ (An owner may be required to warn or take other reasonable steps to protect if the possessor has reason to expect that [Plaintiff's] attention may be distracted, or that he will not discover what is obvious) Id. A salient example of this argument is found in Creech Wildlife and Marine Resources, 328 S.C. 24, 491 S.E.2d 571 (1997). In Creech, the Plaintiff argues that the county had been given written notice of the dock's dangerous condition and that "even assuming the danger was open and obvious, [the] county should have "anticipated and prevented the harm despite such knowledge or obviousness."²¹ Similarly, in Hancock v. Mid-South Management Company, 381 S.C. 326, 673 S.E. 2d 801, 803 (2009), our Supreme Court opined that, despite the open and obvious disrepair of the public parking lot, a jury could determine that the owner should have anticipated that such a condition could cause someone to fall and injure themselves.²² Even where a defect is "obvious" there may still be a duty to repair or warn if it is foreseeable that the invitee will nevertheless encounter the defective condition.²³ Further, be aware that, at the time of the accident, the Plaintiff was in his mid 70's – a disability according to the ADA.²⁴ (Again, please note the Plaintiff was afforded handicap parking at the Estate. Obviously, the Estates and High Tide Associates were aware of his disability. Also, instructive here is Graham v. Whitaker, 282 S.C. 393, 398, 321 S.E.2d 129; Frankel v Kurtz, 269 F. Supp. 713, 720, 721 (D.S.C. 1965)).

Finally, as per the above, it is necessary at this point to draw attention to the fact that the Defendants have not supported their "open and obvious" argument with any evidence in its memo or during oral arguments, i.e. there was no evidence affidavits, case law, deposition

testimony witnesses, photographs, expert testimony or evidence presented in support of Defendant's open and obvious claim.

In his proposed "Order Granting Defendants' Joint Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment" the Defendant states the Plaintiff, "walked across that specific part of the sidewalk "often", that it was a clear day and that nothing obstructed his view of the sidewalk. Finally, Defendants pointed out that Mr. Sanfilippo had complained about the condition of the sidewalk in a deposition he gave in August of 2020:

Q. What is the condition of the sidewalk over there. Is it well maintained?

A. Honestly, I don't think so.

Q. Okay. Have you ever made any complaints to the home owners association or or to the owners of the property or anyone about the condition of the sidewalks there?

A. I believe I did. And I think a lot of people at that point – somebody said that they were all complaining about, you know, the way it was being maintained.²⁵

10. Application of the South Carolina Residential Landlord and Tenant Act and the Common Law to Sanfilippo v. Estate at Westbury and High Tide Associates

During oral arguments in support of the Plaintiff's Motion before this Court, the Plaintiff stated that, pursuant to Section 27-40-440 SCRLTA, the Defendants had a duty to use due care to maintain the common areas of the Estate. Further to this, our Court of Appeals in 1989 in *Watson v. Sellers*, 299 S.C. 426; 285 S.E. 2nd stated, ".... the RTLA by express words created a cause of action in tort in favor of a tenant of residential property against his landlord for the landlord's failure, after notice, to make necessary repairs and to do what is reasonably necessary to keep the premises in a habitable condition ..."26

reasonably necessary to keep the premises in a habitable condition ...”²⁶

In Plaintiff’s attorney’s oral argument before this Court pursuant to his motion for summary judgment, plaintiff stated that under the common law of this jurisdiction, an action sounding in negligence required three elements: duty of care, breach of duty of care and damages to the plaintiff. Similarly, while an action for damages under the SCRLTA requires the identical first three elements as common law negligence, case law requires that it also requires the additional element of notice of a defective /dangerous condition.²⁷ In the matter at hand, this element of notice was satisfied, first, by virtue of the Plaintiff’s complaint and his neighbor’s complaints re the maintenance of the walkways and, secondly, by the proposal for repair of the walkways made by the Defendants to MAJ Concrete on in late February, 2017.²⁸

All the elements necessary for a cause of action against the Estate at Westbury and High Tide Associates pursuant to the Common Law and South Carolina Code of Law Section 27-40-400 et al, have been satisfied in the Plaintiff’s action against the Defendants.

11. The Defendants did not provide proofs for its assertion that it did not have to warn the plaintiff of latent/hidden dangerous conditions.

Throughout much of the Order presented to this Court, the Defendants have made the argument that, because the Plaintiff was a licensee at the Estate at Westbury, the Defendant only had the duty to warn the Plaintiff of any hidden/latent dangerous conditions in the walkways.²⁹ Then, without the presentation of any authority in support of this assertion, the Defendants unilaterally adjudged the sidewalk conditions to be open and obvious and because of this “open and obvious” condition, the Defendants had no duty to warn the Plaintiff because he was a mere licensee while in the common area of the complex.³⁰

a latent condition is "[a] hidden or concealed defect. One which could not be discovered by reasonable and customary inspection."³¹

Putting aside for a moment the Defendants arguments that the walkways at the Estate at Westbury abounded with open and dangerous conditions, an argument must be made that these dangerous conditions in the sidewalks may have been were actually concealed, hidden and dangerous. In support of this statement, please note that before and after Plaintiff's trip and fall injury, thousands of pedestrians had traversed the Estate sidewalks without incident. This was not because the sidewalks were safe--they weren't. Indeed, they were in need of repair and people had complained about their condition, particularly about the cracks.³² While, in fact, the walkway cracks were dangerous, by far the most dangerous places in walkways were the raised edges of the segments of concrete. These raised edges were not easily discernable, particularly by the predominantly elderly population of the Estate. Absent proper maintenance and repair, the only protection the elder population of the Estate at Westbury had from the sidewalk dangers would have been notice and warnings from either the Estate at Westbury or High Tide Associates to be on the lookout for the uneven raised concrete edges while the residents were out walking. These warnings could have taken many forms e-blasts, door to door hand outs, announcements during board meetings, postings in prominent areas throughout the plantation or even formal letter to the residents.

Unfortunately, no warnings were forthcoming.

While the Plaintiff, a man of nearly 75 years at the time of the accident, has stated that, while he was aware the sidewalks had numerous cracks and were in disrepair, he had no idea as to the real danger his tri-weekly walks throughout the Estate posed until the day his left toe

caught onto a raised edge of sidewalk, causing him to pitch forward onto the concrete, striking his head, arms and knees and fracturing his left kneecap.³³

Surprisingly, or perhaps not so surprising, at the time of the Plaintiffs fall, the Defendants were very much aware of the dangerous conditions present in Estate at Westbury sidewalks. Eight months before the Plaintiff fell and broke his knee, an elderly woman in a wheel chair hit a similarly raised edge of concrete in the plantation and was knocked out of her wheel chair onto the concrete.³⁴ Shortly after that accident, in late March 2017, the Defendants decided to have the sidewalks repaired by a concrete company. Within a week or two, on April 6, 2017, Defendants received a proposal for the walkway repair from the MAJ Concrete Company. The proposal identified the walkway hazards within the complex and had the effect of serving notice to the Defendants that there were nearly ninety conditions in the sidewalk that needed repair. Forty-four of the conditions needing repair were raised edges of concrete segments in the walkways.³⁵ (This estimate was later increased to sixty-six raised segments). The proposed repair bill for repair of defects and and raised concrete was a reasonable \$9800.³⁶

Unfortunately, this proposal was ignored and no warning notices were given to the residents or visitors on the property until after October 26, 2017 – the date that the Plaintiff tripped on an identified raised edge in the walkway and broke his left knee.³⁶

Finally, it must be pointed out that the Defendant provided no proofs to the Court to buttress his claim that there were no hidden dangerous conditions in the walkways. He has not presented the statement of an expert to the Court. Similarly, he has not provided any photographs, measurements, witness statements, affidavits or other evidence re his claim that there were no latent dangerous conditions in the walkways of the Estate at Westbury

11. The Expert Witness Opinion stated that the vertical change in elevation in the sidewalk section was the cause of Mr. Sanfilippo's fall incident.

In summary, the vertical change in elevation between the sidewalk sections adjacent to Building 1000 in the Estate that Westbury created a fall hazard and is considered the cause of Mr. Sanfilippo's fall incident. The change in elevation between ½ inch and 1 inch, depending on the location along the width of the sidewalk, and was not being maintained in accordance with ADA, ANSI, A117.1, IPMC, ASTM F1637 and industry guidelines. There were feasible and economical alternatives (simply grinding out the change in elevation to eliminate the fall hazard) that should have been performed on this area of the sidewalk to eliminate the fall hazard associated with the change in elevation adjacent to Building 1000 which would have prevented Mr. Sanfilippo's fall incident.³⁷

12. During the Plaintiff's attorney's oral arguments the Court posed the following threshold question: Whether the lessee of a living unit in a condominium complex bring an action against the condominium complex?

Plaintiff's attorney initially answered that Landry v. Hilton Head Plantation would be an example but recalling that Hilton Head Plantation was "stand alone" and not a condominium, he answered that he did not know and asked if the Court knew the answer. When the Judge said he did not know, attorney said he would find the answer and report back to the Court. This colloquy extended the hearing in a limited manner until the query was answered several days later with a memorandum of law to the Court and opposing attorney that discussed the Horizontal Property Act, Murphy v. Yacht Cove and Davenport v. Cotton Hope Horizontal Property Act. This material is presented in pertinent part below:

1. Section 27-31-120 of the South Carolina Horizontal property act states that

"[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements

2. In *Murphy v. Yacht Cove Homeowners Association*, 289 S.C. 367; 345 S.E. 2d 709, 710 (S.C. 1986) our supreme court held that, "[A] member of a condominium association as established pursuant to the horizontal Property act may bring an action in contract or tort against the association."

3. In *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 714 82 S.E.2d 569 (Ct. App. 1997) the lessee brought an action against the Condominium association after he fell down a stairway at night in an area where the lights were not working. Our Appellate Court concluded that a lessee member of a condominium association could, under the rule of Section 27-40-610 bring an action in tort against the property regime for its failure to maintain its common areas.

4. The answer to the Court's threshold question is that pursuant to S.C. Code Section 27-31-120 Horizontal Property Act a, lessee assumes all of the rights of his lessor for the duration of the lease. *Murphy v. Yacht Cove Homeowners Association* Section provides that an owner in the complex can bring an action against the complex and *Davenport v. Cotton* Owner of the authority for this Court to hear the case of *Nicholas Sanfilippo v. Estate at Westbury and High Tide Associates*. Also, the ruling of the Court in *Davenport v. Cotton Hope* provides the authority for lessee *Sanfilippo*, who holds all the rights in the complex as his lessor, to bring an action against the condominium complex

In summation, Plaintiff is of the opinion that, at minimum, this Court should reconsider, amend and alter its Order of Summary Judgment for the Defendant. While the reasons for this

request are many and have been briefly and hurriedly outlined in this missive, I believe it is sufficient to say that, by both statute and the common law, the Plaintiff in this herein matter is entitled to have his complaint heard by a jury of his peers.

Consider this. The Estate at Westbury was developed and built under the authority of the Horizontal Property Act which contains Section 27-31-120 that states "[a]ny Conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements. A few years later in *Murphy v. Yacht Cove* our Appellate Court ruled that "[A] member of a condominium association as established pursuant to the Horizontal Property Act may bring an action in contract or tort against the association." Then, in the case *Davenport v. Cotton Hope*, our Appellate Court concluded that a lessee member of a Condominium association could, under the rule of Section 27-40-610, bring an action in tort against the property regime for its failure to maintain its common areas.

I believe that this Court should reconsider, amend and reverse its decision to award summary judgment to the Defendants and award summary judgment to the Plaintiff or in the alternative permit the controversy to go to trial.

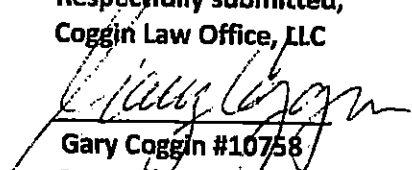
Notes

1. *Neil v. Bynum*, 288 S.C.472, 343nd S.E.2d (1986); *Frankel v. Kurtz*, 239 F. Supp. 713 (D.S.C. 1965).
2. South Carolina Code of Laws, Section 27-31-120 Horizontal Property Act.
3. South Carolina Code of Laws Section 27-40-400 (a)(3) South Carolina Residential Landlord and Tenant Act (RLTA)
4. South Carolina Code of Laws 27-40-610(b) RLTA

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5. F. Patrick Hubbard & Robert L. Felix, The South Carolina law of Torts (2nd. Ed. 1997) P. 127
6. Id. at 2
7. Landry v. Hilton Head Plantation Property Owners Association, 317 S.C.206, 452 S.E. 2d 619, 389 (CT. App. 1994). See also Lincoln: Land owners duty to Guests of Invites and Tenants: Vogt v. Murraywood Swim and Racquet Club and Goode v. St. Stephens United Methodist Church. Lincoln states that South Carolina Courts recognize the common area exception, holding that lessor have a duty of due care to maintain common areas when they retain control of them, thereby classifying tenants as invitees when the tenant is in the common area.
8. Supra at 2
9. Collender v. Charleston Donut Corp., 305 S.C. 123, 406 S.E. 2d 361 (1991); Meadows c. Heritage Village Church and Missionary Fellowship, 305 S.C. 375, 409 S.E.2d 309.
10. Supra at 7; Force v. Richland Memorial Hospital, 471 S.E. 2d 714 (Ct. App. 1996).
11. Graham v. Whitaker, 321 S.E. 2d 40, 43 (S.D.1984). Defendants were well aware that the Plaintiff had a handicap parking sign on the property close by the accident site.
12. Nelson v. Concrete Supply Company, 399 S.E.2d 783 (S.C. 1991).
13. Supra Neil v. Bryum at 616.
14. Supra. Landry v. Hilton Head Property Owners Association.
15. Supra Bryum.
16. Id.
17. Deposition of Robert Dunlap, pp. 37 to 44, July 1, 2020.
18. Copy of an exhibit of a proposal by MAJ Concrete to repair the concrete walkways within the curtilage of the estate at Westbury, April 6, 2017.
19. Collander v. Charleston Donut Company, 305 S.C. 123, 125; 406 S.E.2d 361 (1991).
20. Id. at 361.

21. Creech Wildlife and Maine Resources, 328 S.C. 24, 491 S.E. 2d 571 (1997).
22. Hancock v. Mid-South Managment Co., 381 S.C. 326, 330, 676 S.E. 2d.
23. Supra Collander at 362.
24. Deposition of Brian Durig re Sanfilippo handicap parking near accident site at the Estate at Westbury.
25. Deposition of Nicholas Sanfilippo, Page 37.
26. South Carolina Code of Laws Sections 27-40-400 and 27-40-610.
27. Watson v. Sellers, 299 S.C. 426, 432; 285 S.E. 2d 369 (1989)
28. Supra at 25.
29. Supra at 1.
30. Id.
31. Supra at Blacks Law dictionary, 5th edition, P. 794.
32. See Sanfilippo Deposition, Supra at 24.
33. See Plaintiff's Complaint.
34. Supra at 17.
35. See Plaintiff's Complaint; see Supra at 18.
36. Id.
37. Plaintiff's Complaint

Respectfully submitted,
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STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

NICHOLAS SANFILIPPO,

Plaintiff,

v.

ESTATE AT WESTBURY &
HIGH TIDE ASSOCIATES,

Defendants.

2022 AUG 25 PM 1:47

JERILAH ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

COURT OF COMMON PLEAS

CASE NO.: 2019-CP-07-00554

Notice and Motion Pursuant to
Rule 59(e) SCRPC to Reconsider
and Alter and Amend Judgment
of Summary Judgment Against
the Plaintiff

COMES NOW the Plaintiff Nicholas Sanfilippo and by and through his undersigned counsel and pursuant to Rule 59(e) of the South Carolina Rules of Civil procedure and the Common Law of South Carolina, motions this Court to reconsider, amend and alter the Order this Court entered on August 16, 2022 granting the Defendant's Motion for Summary Judgment.

Motion

This motion, filed on behalf of the Plaintiff Nicholas Sanfilippo, seeks an Order altering or amending the Order pursuant to Rule 52(b) is based on the pleadings, submissions, documents, depositions of the case, case law, hearings and errors and omissions in the factual finding and conclusions of law upon which this Court relied in granting this herein complained of Order Granting Defendant's Motion for Summary Judgment.

1. In the complaint Sanfilippo v. Estate at Westbury and High Tide Associates, the Plaintiff was mischaracterized by the Defendants as a licensee. To the contrary, at all times during this claim the Plaintiff had a status analogous to that of an invitee while in the common area of the Estate at Westbury

Throughout the lengthy litigation of Sanfilippo v. the Estate at Westbury and High Tide Associates, Defendants' numerous counsels have consistently and perhaps deliberately mischaracterized Plaintiff Nicholas Sanfilippo as a "licensee" while he was within the curtilage of the Estate at Westbury. With the labeling of Sanfilippo as a licensee, the Defendants have made much of the fact that, in their view, the Plaintiff was on the land by virtue of the possessor's consent and, accordingly, the Defendants had no duty of care to the Plaintiff except to warn him of concealed dangerous conditions and or dangerous activities on the property.¹

In classifying the Plaintiff as a Licensee, the Defendants have conveniently ignored the fact that the Plaintiff, as a lessee of unit 1001 of the Estate at Westbury was, under the settled law of this jurisdiction, entitled to and should have been able to enjoy all the possessory rights, common area rights, privileges and protections of the lessor/property owner Angelo Pinto from whom he had leased unit 1001 in the Estate for six years. In support of this, please look to Section 27-31-120 of the S.C. Code of the Horizontal Property Act which states that "[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements both general and limited to the apartment."²

Moreover, in addition to the above and perhaps overlooked by the Defendant, is the fact that the Plaintiff also had the status of a tenant on the property under the statutory protections of the South Carolina Residential Land Lord and Tenant Act (RLTA), particularly Section 27-40-440(a) of the Act which requires that the Defendants to keep all common areas of the premises in a fit and habitable condition for lessors/tenants like the Plaintiff.³ (Also important to this claim is that pursuant Code 27-40-610(b)(4) of the Act provides that the tenant may recover actual damages for any noncompliance by the landlord of his statutory duties).⁴

With the above said, and given his lessee/tenant/invitee status at the Estate, it should be obvious to the Court that the Plaintiff should not have been saddled with the status of a licensee. Rather, according to Professor Robert Felix who obviously agrees with this analysis, Mr. Sanfilippo's status in the community of the Estate at Westbury was equivalent of an invitee and, as such, he should be afforded the rights and privileges of an invitee by this Court. 5, 6

If, following Professor Felix' directive, the Plaintiff's status herein is most likely of an invitee, then the Estate at Westbury and High Tide Associates had a duty of due care to the Plaintiff to discover risks and take safety precautions to warn of and eliminate unreasonable risks.⁷

2. The Plaintiff's status in the common area of the Estate at Westbury was that of an invitee.

Defendants' labelling of Plaintiff Sanfilippo as a licensee is clearly wrong. It follows, for the purposes of the claim herein, that the Plaintiff must be afforded the status of an invitee when he was in, on or about the common areas of the Estate at Westbury.

In support of this argument, please be aware that by settled law, as a leaseholder at the Estate at Westbury, the Plaintiff enjoyed all the rights and privileges of the owner of condominium unit 1001.⁸ This included the owner's possessory interest in clean and safe common areas of the estate. For example, even where the danger was obvious, the landlord would have had the duty to make repairs if it was foreseeable that the invitee would encounter the dangerous condition.⁹ Similarly, the landlord had the duty of due care to discover risks and take safety precautions to warn or and eliminate any unreasonable risks.¹⁰

Also, where, as herein instantly, the Plaintiff had a handicap that was known by the Defendants, the degree of care extended to Nicholas Sanfilippo must be commensurate with

the circumstances involved, including the age and capacity of the Plaintiff. This is an affirmative duty and includes the refraining from any act that would render the walkway more dangerous and result in injury.¹¹

Further to this argument that Sanfilippo's status at the Estate at Westbury was that of an invitee rather than that of a licensee, a comparison of a lease and license may be instructive. A lease, by statute and settled law, is an agreement between the lessor (owner) and lessee (tenant) whereby the owner's possessory interest in the property including the common area, is transferred to the lessee for a period of time and for an agreed consideration. Section 27-31-120, as quoted immediately above, defines this transaction, the most important part of which, for our purposes, is the lessee's entitlement to the lessor's share of the common area. A party that acquires an interest in property via a lease is a "lessee." An invitee is on the property for the benefit of the owner/landlord and is entitled to a duty of due care.

3. Absent negligence, the lessor has no liability to the invitee. A plaintiff in a negligence action may recover damages if the plaintiff's negligence is not greater than that of the Defendant.¹²

On the other hand, a licensee is one who must seek permission (license), either express or implied, to enter upon a property owned by another. In addition, the licensee enters the property for his own benefit and at the sufferance of the owner or tenant and/or lessee.¹³ In any event, the possessor of the property is under no obligation to make the premises safe for the licensee and only has to use reasonable care to warn him of any dangerous conditions and risks on the premises which are known to the possessor.¹⁴ The licensee must accept the premises as it is presented and, as he is on the property for his own purposes, he is owed a duty of less than due care for the time he is on the property.¹⁵

Finally, a license is, by nature and definition, a temporary designation and is given the rights and protections afforded a visitor to the property who is there for his own purposes and for his own benefit.¹⁶

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Open and Obvious

The Defendants have claimed that the condition of the sidewalk where the Plaintiff tripped and fell was open and obvious and that liability for the same should be denied. The Plaintiffs deny this assertion and state that in the case at hand there is ample evidence that the landlord and the management company had been warned, as per the "wheel chair accident"¹⁷ and the subsequent remedial proposal¹⁸ by MAJ Concrete, that the uneven concrete edges in the walkways in the estate at Westbury posed a dangerous condition to pedestrians. Business and property owners are liable for open and obvious conditions if, whether by notice or previous

incidents, they anticipated that the Plaintiff would encounter the condition and be injured. *Callander v. Charleston Donut Company*, 305 S.C. 123; 406 S.E. 2d 361, 362 (1991).¹⁹ (An owner may be required to warn or take other reasonable steps to protect if the possessor has reason to expect that [Plaintiff's] attention may be distracted, or that he will not discover what is obvious) *Id.* A salient example of this argument is found in *Creech Wildlife and Marine Resources*, 328 S.C. 24, 491 S.E.2d 571 (1997). In *Creech*, the Plaintiff argues that the county had been given written notice of the dock's dangerous condition and that "even assuming the danger was open and obvious, [the] county should have "anticipated and prevented the harm despite such knowledge or obviousness."²¹ Similarly, in *Hancock v. Mid-South Management Company*, 381 S.C. 326, 673 S.E. 2d 801, 803 (2009), our Supreme Court opined that, despite the open and obvious disrepair of the public parking lot, a jury could determine that the owner should have anticipated that such a condition could cause someone to fall and injure themselves.²² Even where a defect is "obvious" there may still be a duty to repair or warn if it is foreseeable that the invitee will nevertheless encounter the defective condition.²³ Further, be aware that, at the time of the accident, the Plaintiff was in his mid 70's – a disability according to the ADA.²⁴ (Again, please note the Plaintiff was afforded handicap parking at the Estate. Obviously, the Estates and High Tide Associates were aware of his disability. Also, instructive here is *Graham v. Whitaker*, 282 S.C. 393, 398, 321 S.E.2d 129; *Frankel v Kurtz*, 269 F. Supp. 713, 720, 721 (D.S.C. 1965)).

Finally, as per the above, it is necessary at this point to draw attention to the fact that the Defendants have not supported their "open and obvious" argument with any evidence in its memo or during oral arguments, i.e. there was no evidence affidavits, case law, deposition

testimony witnesses, photographs, expert testimony or evidence presented in support of Defendant's open and obvious claim.

In his proposed "Order Granting Defendants' Joint Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment" the Defendant states the Plaintiff, "walked across that specific part of the sidewalk "often", that it was a clear day and that nothing obstructed his view of the sidewalk. Finally, Defendants pointed out that Mr. Sanfilippo had complained about the condition of the sidewalk in a deposition he gave in August of 2020:

Q. What is the condition of the sidewalk over there. Is it well maintained?

A. Honestly, I don't think so.

Q. Okay. Have you ever made any complaints to the home owners association or to the owners of the property or anyone about the condition of the sidewalks there?

A. I believe I did. And I think a lot of people at that point – somebody said that they were all complaining about, you know, the way it was being maintained.²⁵

10. Application of the South Carolina Residential Landlord and Tenant Act and the Common Law to Sanfilippo v. Estate at Westbury and High Tide Associates

During oral arguments in support of the Plaintiff's Motion before this Court, the Plaintiff stated that, pursuant to Section 27-40-440 SCRLTA, the Defendants had a duty to use due care to maintain the common areas of the Estate. Further to this, our Court of Appeals in 1989 in *Watson v. Sellers*, 299 S.C. 426; 285 S.E. 2nd stated, ".... the RTLA by express words created a cause of action in tort in favor of a tenant of residential property against his landlord for the landlord's failure, after notice, to make necessary repairs and to do what is reasonably necessary to keep the premises in a habitable condition ..."26

reasonably necessary to keep the premises in a habitable condition ...”²⁶

In Plaintiff’s attorney’s oral argument before this Court pursuant to his motion for summary judgment, plaintiff stated that under the common law of this jurisdiction, an action sounding in negligence required three elements: duty of care, breach of duty of care and damages to the plaintiff. Similarly, while an action for damages under the SCRLTA requires the identical first three elements as common law negligence, case law requires that it also requires the additional element of notice of a defective / dangerous condition.²⁷ In the matter at hand, this element of notice was satisfied, first, by virtue of the Plaintiff’s complaint and his neighbor’s complaints re the maintenance of the walkways and, secondly, by the proposal for repair of the walkways made by the Defendants to MAJ Concrete on in late February, 2017.²⁸

All the elements necessary for a cause of action against the Estate at Westbury and High Tide Associates pursuant to the Common Law and South Carolina Code of Law Section 27-40-400 et al, have been satisfied in the Plaintiff’s action against the Defendants.

11. The Defendants did not provide proofs for its assertion that it did not have to warn the plaintiff of latent/hidden dangerous conditions.

Throughout much of the Order presented to this Court, the Defendants have made the argument that, because the Plaintiff was a licensee at the Estate at Westbury, the Defendant only had the duty to warn the Plaintiff of any hidden/latent dangerous conditions in the walkways.²⁹ Then, without the presentation of any authority in support of this assertion, the Defendants unilaterally adjudged the sidewalk conditions to be open and obvious and because of this “open and obvious” condition, the Defendants had no duty to warn the Plaintiff because he was a mere licensee while in the common area of the complex.³⁰

a latent condition is "[a] hidden or concealed defect. One which could not be discovered by reasonable and customary inspection."³¹

Putting aside for a moment the Defendants arguments that the walkways at the Estate at Westbury abounded with open and dangerous conditions, an argument must be made that these dangerous conditions in the sidewalks may have been were actually concealed, hidden and dangerous. In support of this statement, please note that before and after Plaintiff's trip and fall injury, thousands of pedestrians had traversed the Estate sidewalks without incident. This was not because the sidewalks were safe--they weren't. Indeed, they were in need of repair and people had complained about their condition, particularly about the cracks.³² While, in fact, the walkway cracks were dangerous, by far the most dangerous places in walkways were the raised edges of the segments of concrete. These raised edges were not easily discernable, particularly by the predominantly elderly population of the Estate. Absent proper maintenance and repair, the only protection the elder population of the Estate at Westbury had from the sidewalk dangers would have been notice and warnings from either the Estate at Westbury or High Tide Associates to be on the lookout for the uneven raised concrete edges while the residents were out walking. These warnings could have taken many forms e-blasts, door to door hand outs, announcements during board meetings, postings in prominent areas throughout the plantation or even formal letter to the residents.

Unfortunately, no warnings were forthcoming.

While the Plaintiff, a man of nearly 75 years at the time of the accident, has stated that, while he was aware the sidewalks had numerous cracks and were in disrepair, he had no idea as to the real danger his tri-weekly walks throughout the Estate posed until the day his left toe

caught onto a raised edge of sidewalk, causing him to pitch forward onto the concrete, striking his head, arms and knees and fracturing his left kneecap.³³

Surprisingly, or perhaps not so surprising, at the time of the Plaintiffs fall, the Defendants were very much aware of the dangerous conditions present in Estate at Westbury sidewalks. Eight months before the Plaintiff fell and broke his knee, an elderly woman in a wheel chair hit a similarly raised edge of concrete in the plantation and was knocked out of her wheel chair onto the concrete.³⁴ Shortly after that accident, in late March 2017, the Defendants decided to have the sidewalks repaired by a concrete company. Within a week or two, on April 6, 2017, Defendants received a proposal for the walkway repair from the MAJ Concrete Company. The proposal identified the walkway hazards within the complex and had the effect of serving notice to the Defendants that there were nearly ninety conditions in the sidewalk that needed repair. Forty-four of the conditions needing repair were raised edges of concrete segments in the walkways.³⁵ (This estimate was later increased to sixty-six raised segments). The proposed repair bill for repair of defects and and raised concrete was a reasonable \$9800.³⁶

Unfortunately, this proposal was ignored and no warning notices were given to the residents or visitors on the property until after October 26, 2017 – the date that the Plaintiff tripped on an identified raised edge in the walkway and broke his left knee.³⁶

Finally, it must be pointed out that the Defendant provided no proofs to the Court to buttress his claim that there were no hidden dangerous conditions in the walkways. He has not presented the statement of an expert to the Court. Similarly, he has not provided any photographs, measurements, witness statements, affidavits or other evidence re his claim that there were no latent dangerous conditions in the walkways of the Estate at Westbury

11. The Expert Witness Opinion stated that the vertical change in elevation in the sidewalk section was the cause of Mr. Sanfilippo's fall incident.

In summary, the vertical change in elevation between the sidewalk sections adjacent to Building 1000 in the Estate that Westbury created a fall hazard and is considered the cause of Mr. Sanfilippo's fall incident. The change in elevation between ½ inch and 1 inch, depending on the location along the width of the sidewalk, and was not being maintained in accordance with ADA, ANSI, A117.1, IPMC, ASTM F1637 and industry guidelines. There were feasible and economical alternatives (simply grinding out the change in elevation to eliminate the fall hazard) that should have been performed on this area of the sidewalk to eliminate the fall hazard associated with the change in elevation adjacent to Building 1000 which would have prevented Mr. Sanfilippo's fall incident.³⁷

12. During the Plaintiff's attorney's oral arguments the Court posed the following threshold question: Whether the lessee of a living unit in a condominium complex bring an action against the condominium complex?

Plaintiff's attorney initially answered that Landry v. Hilton Head Plantation would be an example but recalling that Hilton Head Plantation was "stand alone" and not a condominium, he answered that he did not know and asked if the Court knew the answer. When the Judge said he did not know, attorney said he would find the answer and report back to the Court. This colloquy extended the hearing in a limited manner until the query was answered several days later with a memorandum of law to the Court and opposing attorney that discussed the Horizontal Property Act, Murphy v. Yacht Cove and Davenport v. Cotton Hope Horizontal Property Act. This material is presented in pertinent part below:

1. Section 27-31-120 of the South Carolina Horizontal property act states that

"[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements

2. In *Murphy v. Yacht Cove Homeowners Association*, 289 S.C. 367; 345 S.E. 2d 709, 710 (S.C. 1986) our supreme court held that, "[A] member of a condominium association as established pursuant to the horizontal Property act may bring an action in contract or tort against the association."

3. In *Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 333 S.C. 714 82 S.E.2d 569 (Ct. App. 1997) the lessee brought an action against the Condominium association after he fell down a stairway at night in an area where the lights were not working. Our Appellate Court concluded that a lessee member of a condominium association could, under the rule of Section 27-40-610 bring an action in tort against the property regime for its failure to maintain its common areas.

4. The answer to the Court's threshold question is that pursuant to S.C. Code Section 27-31-120 Horizontal Property Act a, lessee assumes all of the rights of his lessor for the duration of the lease. *Murphy v. Yacht Cove Homeowners Association* Section provides that an owner in the complex can bring an action against the complex and *Davenport v. Cotton* Owner of the authority for this Court to hear the case of *Nicholas Sanfilippo v. Estate at Westbury and High Tide Associates*. Also, the ruling of the Court in *Davenport v. Cotton Hope* provides the authority for lessee Sanfilippo, who holds all the rights in the complex as his lessor, to bring an action against the condominium complex

In summation, Plaintiff is of the opinion that, at minimum, this Court should reconsider, amend and alter its Order of Summary Judgment for the Defendant. While the reasons for this

request are many and have been briefly and hurriedly outlined in this missive, I believe it is sufficient to say that, by both statute and the common law, the Plaintiff in this herein matter is entitled to have his complaint heard by a jury of his peers.

Consider this. The Estate at Westbury was developed and built under the authority of the Horizontal Property Act which contains Section 27-31-120 that states "[a]ny Conveyance or lease of an individual apartment is deemed to also convey or lease the undivided interest of the owner of the common elements. A few years later in *Murphy v. Yacht Cove* our Appellate Court ruled that "[A] member of a condominium association as established pursuant to the Horizontal Property Act may bring an action in contract or tort against the association." Then, in the case *Davenport v. Cotton Hope*, our Appellate Court concluded that a lessee member of a Condominium association could, under the rule of Section 27-40-610, bring an action in tort against the property regime for its failure to maintain its common areas.

I believe that this Court should reconsider, amend and reverse its decision to award summary judgment to the Defendants and award summary judgment to the Plaintiff or in the alternative permit the controversy to go to trial.

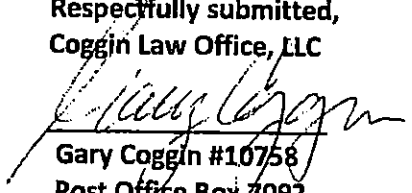
Notes

- 1. Neil v. Bynum, 288 S.C.472, 343nd S.E.2d (1986); Frankel v. Kurtz, 239 F. Supp. 713 (D.S.C. 1965).**
- 2. South Carolina Code of Laws, Section 27-31-120 Horizontal Property Act.**
- 3. South Carolina Code of Laws Section 27-40-400 (a)(3) South Carolina Residential Landlord and Tenant Act (RLTA)**
- 4. South Carolina Code of Laws 27-40-610(b) RLTA**

4. South Carolina Code of Laws 27-40-610(b) RLTA
5. F. Patrick Hubbard & Robert L. Felix, The South Carolina law of Torts (2nd. Ed. 1997) P. 127
6. Id. at 2
7. Landry v. Hilton Head Plantation Property Owners Association, 317 S.C.206, 452 S.E. 2d 619, 389 (Ct. App. 1994). See also Lincoln: Land owners duty to Guests of Invites and Tenants: Vogt v. Murraywood Swim and Racquet Club and Goode v. St. Stephens United Methodist Church. Lincoln states that South Carolina Courts recognize the common area exception, holding that lessor have a duty of due care to maintain common areas when they retain control of them, thereby classifying tenants as invitees when the tenant is in the common area.
8. Supra at 2
9. Collender v. Charleston Donut Corp., 305 S.C. 123, 406 S.E. 2d 361 (1991); Meadows c. Heritage Village Church and Missionary Fellowship, 305 S.C. 375, 409 S.E.2d 309.
10. Supra at 7; Force v. Richland Memorial Hospital, 471 S.E. 2d 714 (Ct. App. 1996).
11. Graham v. Whitaker, 321 S.E. 2d 40, 43 (S.D.1984). Defendants were well aware that the Plaintiff had a handicap parking sign on the property close by the accident site.
12. Nelson v. Concrete Supply Company, 399 S.E.2d 783 (S.C. 1991).
13. Supra Neil v. Bryum at 616.
14. Supra. Landry v. Hilton Head Property Owners Association.
15. Supra Bryum.
16. Id.
17. Deposition of Robert Dunlap, pp. 37 to 44, July 1, 2020.
18. Copy of an exhibit of a proposal by MAJ Concrete to repair the concrete walkways within the curtilage of the estate at Westbury, April 6, 2017.
19. Collander v. Charleston Donut Company, 305 S.C. 123, 125; 406 S.E.2d 361 (1991).
20. Id. at 361.

21. Creech Wildlife and Maine Resources, 328 S.C. 24, 491 S.E. 2d 571 (1997).
22. Hancock v. Mid-South Managment Co., 381 S.C. 326, 330, 676 S.E. 2d.
23. Supra Collander at 362.
24. Deposition of Brian Durig re Sanfilippo handicap parking near accident site at the Estate at Westbury.
25. Deposition of Nicholas Sanfilippo, Page 37.
26. South Carolina Code of Laws Sections 27-40-400 and 27-40-610.
27. Watson v. Sellers, 299 S.C. 426, 432; 285 S.E. 2d 369 (1989)
28. Supra at 25.
29. Supra at 1.
30. Id.
31. Supra at Blacks Law dictionary, 5th edition, P. 794.
32. See Sanfilippo Deposition, Supra at 24.
33. See Plaintiff's Complaint.
34. Supra at 17.
35. See Plaintiff's Complaint; see Supra at 18.
36. Id.
37. Plaintiff's Complaint

Respectfully submitted,
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1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF BEAUFORT

3 NICHOLAS SANFILIPPO,

CERTIFIED COPY

4 Plaintiffs,

5 vs.

CASE NO. 2019-CP-07-00554

6 ESTATE AT WESTBURY HORIZONTAL PROPERTY
7 REGIME, AKA ESTATE AT WESTBURY OWNERS
8 ASSOCIATION (A MULTIFAMILY REAL ESTATE
9 COMMUNITY); HIGH TIDE ASSOCIATES (A
PROPERTY AND MANAGEMENT COMPANY,

10 Defendants.

11 V I D E O C O N F E R E N C E
12 D E P O S I T I O N

13 WITNESS: NICHOLAS SANFILIPPO

14 DATE: Thursday, August 6, 2020

15 TIME: 11:40 a.m.

16 LOCATION: 130 La Bonne Vie Dr. W. Apt D
Patchogue, NY 11772

17 TAKEN BY: Attorneys for Defendants

18 REPORTED BY: CAROLL ANNE BOUTAHAR
19 Certified Verbatim Reporter
20 (Appearing by videoconference)

21 -----
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Atlanta, Georgia 30327
404.662.2333
Doug@GWDlawfirm.com
(Appearing by videoconference)

ALSO PRESENT:

NICOLE SANFILIPPO
PETER TOBIN

(INDEX AT REAR OF TRANSCRIPT)

1 NICHOLAS SANFILIPPO, being first duly
2 sworn, testified as follows:

3 EXAMINATION

4 BY MR. LEADBITTER:

5 Q. Mr. Sanfilippo, My name is Doug Leadbitter,
6 and I am the lawyer for The Estate at Westbury and for
7 High Tide Associates.

8 How are you today?

9 A. Pardon?

10 Q. How are you today?

11 A. I'm fine. How are you?

12 Q. I'm doing great.

13 Can you hear me okay through the...

14 A. I can hear you fine.

15 Q. Awesome. I appreciate you helping us out by
16 participating by this teleconference over the Internet.
17 Based on the current situation and everything with the
18 COVID virus, it's probably a really good thing.

19 I found out yesterday that one of my fianc e's
20 relatives may possibly have exposed us three or four
21 days ago because he was feeling sick.

22 A. Oh. Wow.

23 Q. Yeah. So we don't know what the status of
24 that is right now, but so far, I'm not feeling any ill
25 effects, so I think we're good. But it's probably a

4

1 good thing that we're not in person.

2 A. Better be careful. It takes about seven days
3 before you start really feeling it.

4 Q. Right. Exactly. And he just started showing
5 some symptoms. So we're keeping our fingers crossed
6 that he's just having a little allergy or something.

7 So have you ever had your deposition taken
8 before?

9 A. Yes, I did.

10 Q. Okay.

11 So you're familiar with the process and
12 everything. I don't need to go through all that.

13 A. Right.

14 Q. I just have -- there's a couple of background
15 things.

16 If I ask you a question and you don't
17 understand it, just let me know. I'm pretty --
18 sometimes I have breaks in my conversation and, plus,
19 we've got this issue with a little bit of a delay in the
20 Internet. So sometimes it's kind of hard to understand
21 each other. So if you can't hear me or you don't
22 understand, just let me know and then we'll try to slow
23 it down.

24 A. I will.

25 Q. One of the things about the Zoom meeting that

1 I've found is that when two people are talking over each
2 other on this thing, you know, in a conversational
3 manner, sometimes it just shuts down and nobody hears
4 anything.

5 So if you would, bear with me and let me get
6 all my questions out all the way and stop before you
7 start answering. It's kind of a hassle but -- and I'll
8 extend that same kind of rule to you as well. I'll let
9 you finish saying what you're going to before we go on
10 to the next thing.

11 Plus, it helps the court reporter too. She's
12 taking everything down to make a clear transcript and
13 all that. It's just better if we don't try to talk over
14 each other.

15 Obviously, we also need to make sure that all
16 of your answers that you make are verbal. Sometimes,
17 you know, in normal conversations, we just do head nods
18 or that kind of thing. And we also tend to use some
19 words that sometimes aren't exactly clear, things like
20 uh-huh or uh-uh. It makes it kind of tricky for the
21 court reporter. And we want to make sure our transcript
22 is absolutely accurate. So if you would, try to use yes
23 or no rather than uh-huh or uh-uh and make sure that all
24 your answers are verbal.

25 If you need to take a break at any time,

6.

1 please, just let us know. I'm happy to accommodate you.
2 I understand -- you know, we're probably going to be
3 sitting here about 45 minutes to an hour, maybe a little
4 bit longer depending on the circumstances.

5 But if you need to take a -- go get some water
6 or take a bathroom break, anything of that nature, it's
7 fine. You know, we're here at your convenience and it's
8 not a problem whatsoever for us to take a break. Okay?

9 A. Okay.

10 Q. All right. So if you understand all those
11 kind of background rules with the deposition, let's get
12 started.

13 Have you taken any kind of medication, whether
14 prescription or over-the-counter, that would impair your
15 ability to understand my questions or to answer
16 truthfully?

17 A. Well, I just took Tylenol.

18 Q. Okay. All right.

19 So does Tylenol affect your ability --

20 A. No.

21 Q. -- to answer? Okay.

22 And it's not going to make you sleepy or
23 anything like that, right?

24 A. No.

25 Q. Okay. Very good. All right.

1 So, if you would, just to make sure that we
2 have all the information correct, would you say and
3 spell your full name for the court reporter so we make
4 sure we've got it right?

5 A. Okay. Nicholas, N-I-C-H-O-L-A-S, Sanfilippo,
6 S-A-N-F-I-L-I-P-P-O.

7 Q. Very good.

8 And have you ever gone by any other names?

9 A. No. Excuse me. Just Nick.

10 Q. Okay. That's fine.

11 Where were you born?

12 A. Brooklyn, New York.

13 Q. And what's your date of birth?

14 A. XX/XX/44.

15 Q. All right.

16 And what's your present address?

17 A. 130 La Bonne Vie Drive, Patchogue, New York,
18 Apartment D.

19 Q. Oh. You're in New York right now.

20 A. I'm in New York. Yes. I'm at my daughter's.

21 Q. How long have you been at that address in New
22 York?

23 A. I've been here for about a year.

24 Q. Okay.

25 Why did you move to -- leave South Carolina

8

1 and go back up to New York?

2 A. I just came up to see my children and decided
3 to stay here.

4 Q. And what was your address prior to that August
5 of last year, of 2019? Where did you live before that?

6 A. In -- I'm trying to think -- 100 Kensington
7 Boulevard, Bluffton, New York, Apartment 1101.

8 Q. Is that Bluffton, New York, or Bluffton, South
9 Carolina?

10 A. I'm sorry. South Carolina.

11 Q. Okay.

12 A. Yeah. Really.

13 Q. That's okay. That just kind of threw me for a
14 loop there. I thought, Oh. They've got a Bluffton up
15 there too. Okay.

16 And how long were you there at that Kensington
17 address?

18 A. Approximately five, six years.

19 Q. So at the time of this -- of the accident,
20 were you -- at The Estate at Westbury, were you living
21 at the Kensington --

22 A. Yes.

23 Q. -- address? Okay.

24 Have you ever actually owned a house or lived
25 in The Estate at Westbury before?

1 A. No.

2 Q. When you were at The Estate at Westbury back
3 on the date of the -- when you fell over there, what was
4 the -- what was your address? It was this Kensington
5 address?

6 A. The Kensington address, 100 Kensington
7 Boulevard.

8 Q. Okay. And what was your purpose of being at
9 The Estate at Westbury on the day that you fell?

10 A. I lived there.

11 Q. Okay. I thought you said a second ago that
12 you weren't living there at The Estate at Westbury.
13 Sorry about that. I may have misunderstood you.

14 A. No. I don't believe I said that.

15 Q. Okay. I'm sorry.

16 How long did you live in there?

17 A. About six years.

18 Q. Okay.

19 This area in front of the -- where you fell
20 there in front of the 1000 building, had you been in
21 that area before? Had you walked on that part of the
22 property before?

23 A. Yes.

24 Q. How often did you walk on that part of the
25 property?

10

1 A. It just varied. When I went that way, I
2 walked there. It's hard for me to say because I guess I
3 didn't walk there every day but I walked there often.

4 Q. That's fair enough. All right. And I want to
5 get a little bit more information about your background
6 just real quickly.

7 Are you married?

8 A. Yes.

9 Q. Does your wife live with you there at -- in
10 Bluffton?

11 A. No. She's at her sister's right now.

12 Q. Okay.

13 Do you have any relatives down in the Beaufort
14 County area?

15 A. No.

16 Q. I see you're wearing glasses today.

17 Do you wear your glasses all the time?

18 A. No. They are really reading glasses.

19 Q. Okay.

20 Have you ever been in the military?

21 A. Yes.

22 Q. Tell me which one, what branch you were in and
23 when you served.

24 A. New York Air National Guard. I'd say it was
25 about '64.

1 Q. And where were you stationed?

2 A. Floyd Bennett Field, New York.

3 Q. And you say you were in the Air National
4 Guard.

5 What was your rank?

6 A. I was a sergeant, but I also was a flight --
7 what do you call it? A flight medic -- or air evac
8 specialist. That's what I was.

9 Q. And you said sergeant. I was in the Air
10 Force, so I know there's lots of different -- there's
11 technical. There's master. There's staff sergeant.

12 What was your -- in terms of your -- the E
13 number?

14 A. I was a staff.

15 Q. You were a staff, an E-5?

16 A. I believe so.

17 Q. Okay. I only made it to E-4. I got out.

18 A. Yeah. Well, you did the regular Air Force.

19 Q. Yeah. I was stationed in California. I was
20 in the band out there at that time.

21 A. Oh.

22 Q. Yeah.

23 A. Nice.

24 Q. Then I came back to South Carolina. I came
25 home.

12

1 A. Thank God for that.

2 Q. Yeah. That was during the -- I served during
3 the Desert Storm -- yeah.

4 A. Well, I served -- I was during Vietnam, so it
5 was kind of scary.

6 Q. Yeah. Let me see.

7 Do you belong to any kind of civic
8 organizations or clubs?

9 A. No.

10 Q. Okay.

11 And you don't go to church in South Carolina,
12 do you?

13 A. I did. Yeah.

14 Q. You do.

15 But you're not living here now, correct?

16 A. No.

17 Q. Okay.

18 A. Oh. I went there when I was there.

19 Q. Right.

20 Are you planning to come to South Carolina or
21 are you going to stay in New York?

22 A. I kind of am up in the air.

23 Q. Okay.

24 A. I might come back. I'd like to go back and
25 forth.

1 Q. All right. Okay.

2 It's a lot warmer down here in the winter
3 time, isn't it?

4 A. Exactly.

5 Q. All right.

6 What was the highest level of education,
7 formal education, that you have?

8 A. A couple of years of college.

9 Q. Okay.

10 And so you graduated from high school in what
11 year?

12 A. 1961.

13 Q. Okay.

14 And when you went to college, what school did
15 you go to and what were you studying?

16 A. I went to Pace University -- Pace College for
17 accounting and business, and then I transferred over to
18 teaching and I went to City College of New York.

19 Q. All right.

20 Have you ever been a teacher?

21 A. No. I subbed and -- but not -- for a couple
22 of times, but not as a teacher.

23 Q. Okay. There's something else we have in
24 common because my undergrad degree was in music
25 education so...

14

1 A. Oh. Nice.

2 Q. But I never taught. I went in the Air Force
3 and played in the band and then --

4 A. Right.

5 Q. -- my career changed. All right.

6 Are you currently working?

7 A. No.

8 Q. When was the last time you actually worked?

9 A. Probably about eight, nine years ago.

10 Q. And where was that when you were working?

11 A. New York.

12 Q. Okay.

13 And just briefly, a description of what your
14 job was?

15 A. I was a hairdresser.

16 Q. Okay.

17 Now, are you currently retired?

18 A. Yes.

19 Q. When did you officially retire?

20 A. Probably 66. I'm trying to think. I mean
21 when I was 66.

22 Q. Okay.

23 A. So that would be about 10 years ago.

24 Q. Okay. All right. I want to ask you a little
25 bit just about -- because this really about the only

1 chance I'm going to get to talk to you. I need to ask
2 you some more personal questions about various things
3 that you've been involved in.

4 Have you ever been involved in any other
5 lawsuits of any kind?

6 A. I think so, about 10 years ago.

7 Q. Just real briefly, tell me about that.

8 A. Well, I had fallen down a flight of stairs.
9 And it was kind of a weird suit because the other
10 people -- the landlord didn't fight it that much.

11 Q. Okay.

12 And where was that lawsuit filed?

13 A. Bayville, New York.

14 Q. Where did that fall occur?

15 A. Pardon?

16 Q. Where did the fall occur?

17 A. On a staircase going up to my apartment or
18 coming down from my apartment.

19 Q. And was that in New York where that happened?

20 A. Yes.

21 Q. Okay. And, obviously, if you were involved in
22 a lawsuit, I'm assuming that you had some personal
23 injuries from that.

24 Tell me what happened in that.

25 A. Well, I broke some ribs and I kind of wrenched

16

1 my back.

2 Q. Now, did you recover from those injuries or
3 did you have any kind of permanent impairment?

4 A. No. I recovered.

5 Q. All right.

6 Any other type of accidents of any kind,
7 slip/falls, workers' comp, car accident, anything of
8 that nature?

9 A. No.

10 Q. Do you currently have a South Carolina
11 driver's license?

12 A. Yes, an ID card, not a driver's license.

13 Q. Okay.

14 Did you ever drive when you were living down
15 here? Did you ever drive in South Carolina?

16 A. Yes.

17 Q. So I'm assuming, then, if you didn't have a
18 South Carolina license, you had your New York license
19 when you were driving.

20 A. Yeah.

21 Q. Have you ever file any workers' comp claims?
22 I'm sorry. I'm not sure if I asked that already.

23 A. Not to my knowledge. No.

24 Q. And the next couple questions I'm going to
25 apologize in advance for. These are all questions I ask

1 everybody. I don't want you to feel like I'm trying to
2 pick on you or be ugly about it.

3 But I just need to know, have you ever been
4 arrested for or convicted of any crime?

5 A. No.

6 Q. Okay. All right. Very good. That's it for
7 the background stuff.

8 I'd like to focus more on the incident that
9 occurred over at the Westbury Estate.

10 A. Okay.

11 Q. If you would, just kind of in your own words,
12 just tell me what happened.

13 A. Okay. I was walking on the walkway, and my
14 foot got caught in a separation between the two blocks
15 of cement, and I fell. And when I fell, I smashed and
16 came -- I came down on my knee and smashed it up pretty
17 bad.

18 Q. Which knee did you land on?

19 A. The left.

20 Q. Now, it's my understanding that you went to
21 the doctor's and you ultimately had a fracture of your
22 patella of your left knee.

23 A. Yeah. Well, I went to the hospital, and there
24 they found the crack in the -- several fractures in my
25 knee. And then I went to the doctor from there.

18

1 Q. Okay.

2 And do you remember the specific date of the
3 day that you fell?

4 A. I'm sorry. I don't.

5 Q. Okay.

6 Do you remember, like, what day of the week it
7 was, even, say, like, a Monday or a Tuesday?

8 A. I know it was weekday, but I'm not really
9 sure.

10 Q. And after you fell, how long was it before you
11 actually went to the hospital to seek medical treatment?

12 A. Almost immediately. It was that bad. I
13 tried, you know, to do something, and I couldn't put any
14 weight on it and I couldn't take the pain anymore.

15 Q. Okay.

16 I noticed in your medical records, because I
17 reviewed those -- we received most of your medical
18 records, I believe, if not all from your -- related to
19 your -- to this incident at Westbury. I saw in there
20 where one of the doctors noted that you had fallen a
21 couple of days before.

22 Is that consistent with what really happened
23 or is that, maybe, a typo in the records? Can you
24 explain?

25 A. I don't believe that's what happened. I know

1 when I fell, they -- through the hospital, they sent me
2 a home nursing setup. I don't know what that was. And
3 I was supposed to go to a doctor. And they recommended,
4 fortunately, the doctor I wound up with. And I went to
5 him, which might have been a couple of days later. But
6 at the hospital, it was on that day. And I couldn't get
7 in to get an appointment with an orthopedic for a couple
8 of days. So that's where the discretion might come in.

9 Q. Okay.

10 A. Because I was also put in a cast, and I had to
11 be -- you know, lay flat. I couldn't move.

12 Q. All right.

13 They immobilized your knee.

14 A. Pardon?

15 Q. They immobilized your knee, right?

16 A. Yes. Yes.

17 Q. Okay. I just wasn't sure about that. I
18 thought that was something that was just kind of odd
19 because I was under the impression that you had gone
20 straight to the hospital, so I was wondering --

21 A. I did. I went straight to the hospital, but
22 by the time -- it took me a few days to get to an
23 orthopedic --

24 Q. Right.

25 A. -- who, obviously, took care of me after that.

20

1 Q. Exactly. Got you.

2 Do you remember what the weather was like that
3 day when you slipped at the -- or tripped at The Estate
4 at Westbury?

5 A. Yeah. I don't think there was any rain or
6 anything. It was clear -- you know, a clear day, and
7 that's about it, no weather concerns on my part.

8 Q. Right. Was it -- a clear day.

9 What was the lighting like at the time of day
10 when you fell? Was it pretty -- were you able to see
11 everything?

12 A. Yes.

13 Q. Now, that day, I think you said you had been
14 out walking and everything.

15 Where had you been immediately before and
16 where were you going on that sidewalk that day?

17 A. Just taking a walk. And I was going to go
18 take a ride.

19 Q. Okay.

20 So you'd left your house and you were walking.

21 A. Yes.

22 Q. How long had it been since you'd been in your
23 house before you -- when you were out walking, how far
24 had you gone?

25 A. Whatever the distance was from my apartment to

1 where I fell.

2 Q. Give me -- I've never actually been there
3 so --

4 A. Oh. I'm sorry.

5 Q. -- if you --

6 A. I would say maybe a hundred feet.

7 Q. A hundred feet. Okay..

8 A. Right.

9 Q. So I'm assuming, then, that this sidewalk was
10 somewhere that was within a hundred feet of your actual
11 apartment where you lived.

12 A. It ran parallel to my apartment. It was the
13 walkway for all the apartments.

14 Q. Okay.

15 Now, the day of the accident, had you taken
16 any kind of medications, either prescription or
17 nonprescription, that could have impacted your ability
18 to walk and negotiate around outside?

19 A. No.

20 Q. You hadn't been drinking or anything that day,
21 had you?

22 A. No.

23 Q. Do you drink alcohol?

24 A. No. I'll have a drink at a wedding or
25 something. That's about it.

22

1 Q. And at the time of the accident, were you on
2 any kind of --

3 (Dog barking.)

4 BY MR. LEADBITTER:

5 Q. Sorry. That was my paralegal barking.

6 A. Very good. I like that.

7 MR. COGGIN: Good answer.

8 THE WITNESS: I was going to say, that's a
9 cute sound, but I guess I should leave it.

10 MR. COGGIN: I thought it was the police for a
11 minute.

12 MR. LEADBITTER: She tends to, like, get right
13 under my feet and she goes crazy when she hears
14 something outside. It's just part of practicing law
15 from home.

16 BY MR. LEADBITTER:

17 Q. Let me see. Where were we at? Oh. So you
18 said you were occasionally drinking.

19 Were you on any kind of medications at the
20 time, I'm not saying that you took right then but that
21 you take on a regular basis for any kind of medical
22 condition?

23 A. Yeah.

24 Q. Tell me what those are.

25 A. I take blood pressure and high cholesterol

1 medicine.

2 Q. Very good. Okay.

3 And, clearly, those things don't have any
4 effect on your mental status or anything like that, do
5 they?

6 A. No. I usually take them at night anyway.

7 Q. Right.

8 Have you ever had any issues with any type of
9 type 2 diabetes or anything like that that impaired your
10 blood glucose level?

11 A. No.

12 Q. Had you ever been in any kind of situation,
13 like, when you were in the Air Force, doing your job or
14 later on, that you'd done anything to your left knee
15 prior to the date that you fell?

16 A. No.

17 Q. Never had any problems at all with your left
18 knee, you know, just regular.

19 A. No.

20 Q. Okay. Sorry. I'm taking notes here. I'm
21 writing as we go here.

22 Now, I think it's been alleged that there was
23 someone at the accident scene that saw you fell or that
24 came over and helped you get up and everything.

25 Do you know who that person was?

24

1 A. No, I don't.

2 Q. You'd never seen him at the -- in the
3 community.

4 A. I'm not really sure who it was. I would
5 assume it was one of my neighbors that I see, you know,
6 often.

7 Q. But you don't remember -- you don't recall who
8 it was.

9 A. No. And I don't remember anything after the
10 fall.

11 Q. Okay.

12 You weren't using your cell phone while you
13 were walking, were you?

14 A. No.

15 Q. I know I've had one or two close calls trying
16 to talk and walk at the same time with my cell phone.

17 A. No. I can't do that.

18 Q. I hear you.

19 A. But I can chew gum and walk.

20 Q. There's nothing wrong with my knees. Okay.

21 Now, since your fall and since you've gotten
22 your medical treatment and everything, have you had any
23 falls since then or subsequent to this incident that
24 involved any kind of injury to your knee or any other
25 type of injury?

1 A. I did have a fall but it had -- I didn't do
2 anything to my left knee. I just fell, and I fell kind
3 of on my right side.

4 Q. Okay.

5 Approximately what year was that, and month
6 and year, if you can?

7 A. I would say it was close to a year after I
8 fell --

9 Q. Okay.

10 A. -- you know, after my incident.

11 Q. Right. I hear you.

12 And where did that happen?

13 A. That happened at Best Buy.

14 Q. Okay.

15 Just tell me real quick what the circumstances
16 were about that one.

17 A. They had one of those carts that you move the
18 refrigerators and the big TVs with. And as you walked
19 in, it was in front of the information counter. And I
20 kind of tripped over that.

21 Q. Okay.

22 Now, did you make any claim against Home Depot
23 for any problems from that?

24 A. No, not that I'm aware of. I kind of -- my
25 attorney handles any kind of problems that I have. I

26

1 might have mentioned it to him. I'm not sure.

2 Q. I don't want to know anything that you talked
3 about with your lawyer. Okay?

4 A. Oh. Okay. I'm sorry.

5 Q. Yeah. That would be attorney-client
6 privilege, and I can't ask you that and I don't want to
7 ask you that. But, I mean, I can ask you about the fall
8 and everything, just the facts about that, but nothing
9 that you discussed with your lawyer. Okay?

10 A. Okay.

11 Q. Is that something, then, that you're going to
12 pursue at some point in time?

13 A. Honestly, I'm not sure.

14 Q. Okay.

15 And when you fell on your right side, did you
16 hurt your knee or did you hurt your back or --

17 A. I -- I'm sorry. I hurt my knee. It was all
18 cut up. And I did hurt my back.

19 Q. Okay. And that time, you said, it was your
20 right knee.

21 Did you reinjure your left knee in that fall?

22 A. No.

23 Q. Okay. Now, I want to just kind of go over
24 your -- get a complete list so that we know exactly
25 everything that you -- all the injuries that you

1 sustained in the fall, in this fall, that one that we're
2 here about today where you injured your left knee.

3 Can you just kind of start at your toes and
4 work your way all the way up to the tip of your head and
5 tell me everything that you had any kind of injury to
6 from this slip and fall.

7 A. Most -- I'd say 99 percent of it was my knee
8 and maybe any discomfort that you get when you do take a
9 fall, a little, minor -- what do you call that -- soft
10 tissue injuries.

11 Q. Okay.

12 So you had some soft tissue, just muscle
13 soreness and that kind of thing.

14 A. Yeah. Yeah. Well, yes. I'm sorry.

15 Q. You're fine.

16 A. I'm trying to remember your rules.

17 Q. That one was pretty clear, so we're good on
18 that.

19 A. Okay.

20 Q. I think there's been some evidence that you
21 may have hit your head when you fell at The Estate at
22 Westbury.

23 Did you suffer any kind of a head injury?

24 A. I hit my face, you know, my head. My chin was
25 cut up a little bit. But I don't really think I had any

28

1 major issues from that.

2 Q. Okay.

3 A. And I was so concentrated on my -- the pain in
4 my leg that I couldn't really focus anywhere else.

5 Q. Got you.

6 Have you used any kind of a walker or a
7 wheelchair or anything to assist your mobility before
8 the accident? Had you ever needed to do that?

9 A. No. I have a cane that I use once in a while
10 just for -- keep me, you know, steady. I'm getting
11 older.

12 Q. Yeah. That's what I was asking. I mean,
13 that's what I kind of wanted to know.

14 Just describe your gait or the way you walked
15 or --

16 A. I'm sorry. Can you repeat that?

17 Q. Yes, sir. I'm sorry. I didn't ask that very
18 well.

19 What I'm trying to get at, I want to know what
20 your walking was like in terms of your gait of walking
21 prior to the time that you fell. Could you just
22 describe that to me? Was it a -- did you struggle at
23 all to walk? Your mobility, was it impaired in any way?

24 A. No.

25 Q. So you had no trouble getting around at all

1 anywhere. You just pretty much went wherever you wanted
2 to.

3 A. Pretty much.

4 Q. Okay. And I think you've already said this,
5 but I'm just going to ask again just to make sure.

6 You started having problems with your left
7 knee immediately upon the fall. Is that correct?

8 A. Pretty much.

9 Q. Okay. Now, I've been provided several medical
10 records from various and sundry doctors and everything
11 as we discussed a little while ago.

12 Can you just kind of list real quick what all
13 doctors have provided you treatment from this accident
14 just to make sure that we have all the information on
15 that?

16 A. Well, I was at the hospital, the emergency
17 room. That's where they cast my leg. And they gave me
18 some shots and pulled out some fluids.

19 And then, my next visit was to Dr. Tobin, my
20 orthopedic. And he basically took care of everything
21 from there.

22 Q. Okay. Very good. Okay.

23 And you had some physical therapy, right?

24 A. Yes.

25 Q. Okay.

30

1 Tell me about that. How did you do in
2 physical therapy?

3 A. Pretty good. It was home therapy. They
4 couldn't do much with my leg, but they worked on my
5 arm -- my core strength and my arms, which I had let go,
6 and just basically how to move around, how to get
7 around, and to use a walker rather than a wheelchair.
8 But I mostly used the wheelchair to get around.

9 Q. For how long do you recall that you were
10 actually using a wheelchair?

11 A. Months, probably about four or five months,
12 four months.

13 Q. Wow. Okay.

14 A. Yeah. I couldn't master the -- a walker or
15 anything because the way my leg was put, I just kept
16 falling forward.

17 Q. Right. I'm sorry to hear that.

18 A. Maybe -- yeah. I'd say probably close to four
19 months.

20 Q. Okay.

21 And where you were living at the time, was it
22 on the ground floor or were you having to try to
23 negotiate stairs and all that?

24 A. No. Ground floor.

25 Q. Okay.

1 We talked a little bit about the medication
2 that you had for high blood pressure --

3 A. Right.

4 Q. -- and for high cholesterol.

5 Have you ever had any other significant or
6 major health problems like a diagnosis for something
7 like cancer or anything of that nature where you had any
8 kind of serious illness other than just the typical cold
9 or flu or something like that?

10 A. I had -- I took medicine for my prostate.

11 Q. Okay.

12 A. I'm trying to think what else. I would take
13 allergy medicine as needed.

14 Q. You never had any kind of childhood illness
15 like chickenpox or anything like that, anything that may
16 have caused you problems later on.

17 A. Well, I had chickenpox, but I don't see it
18 causing me any problems later on --

19 Q. Okay.

20 A. -- like shingles if that's --

21 Q. That's where I was going to go because --

22 A. I figured you were going there because my
23 brother had them and they were horrible.

24 Q. Yeah.

25 A. I don't know --

32

1 Q. I had it too, and it sucks. I'll just put
2 that out there.

3 A. Really, really bad.

4 Q. Yeah. It lasted weeks. It was terrible.
5 Okay.

6 Now, when you had the fall at the Home Depot,
7 was that -- I'm sorry. You may have said this, but I'm
8 kind of --

9 A. Best Buy.

10 Q. Where was that fall? Where did it occur? Was
11 that in South Carolina?

12 A. South -- yes, in Bluffton.

13 Q. Okay.

14 A. It was Best Buy, not Home Depot.

15 Q. Okay. I'm sorry.

16 A. Oh. That's all right.

17 Q. For that fall that happened at the Best Buy
18 there in Bluffton, did you go to the same doctors that
19 had treated you before or did you go to any different
20 ones?

21 A. No. I really just went to the emergency room.
22 They had called an ambulance to see if I wanted to go to
23 the hospital. And I kind of told him no at that point.
24 And they said, Well, tomorrow you might get up and it's
25 going to be pretty painful, so, you know, just come

1 right in and we'll take it from there.

2 And that's what I did.

3 Q. Okay.

4 A. And I didn't go see anybody for that in
5 particular.

6 Q. All right. So it was --

7 A. I worked it into my regular visits.

8 Q. Okay.

9 So they did treat you for your right leg when
10 you went to see Dr. -- is it Tobin?

11 A. I don't think so.

12 Q. Okay.

13 A. I don't remember, to tell you the truth.

14 Q. Okay.

15 Is it possible that there's some information
16 in those medical records where they checked you out and
17 you just don't know if it's there or not?

18 A. Oh. Sure. I'm sure everything is possible.

19 Q. Okay.

20 Have you had a chance to review your medical
21 records at all?

22 A. No.

23 Q. Okay.

24 Do you have any reason to think that Dr. Tobin
25 missed anything or included something that you have

34

1 actually been treated for? Do you have any reason to
2 contest what's in your medical records?

3 A. No.

4 Q. Have you ever had any kind of treatment for
5 any kind of mental health issues like depression or
6 anything like that?

7 A. No. Oh. I do -- I take medication for
8 depression. I got very depressed after this happened,
9 and I was -- I'm on -- I can't remember the name of it.
10 They had given me an antidepressant.

11 Q. Okay.

12 Are you still taking that?

13 A. I take an antidepressant now. Yes.

14 Q. Which one is that?

15 A. Citalopram.

16 Q. Can you say that -- spell it for me?

17 A. I'm not sure how to spell it.

18 C-I-T-A-P-R-A-M, Citalopram.

19 Q. Okay.

20 I don't think that's quite the right spelling,
21 but I think I know which drug you're talking about.

22 A. Yeah. I'm sorry. I'm not a good speller.

23 Q. Some of those medical things are really --

24 A. Yeah. They're ridiculous anyway.

25 Q. Now, you weren't working at the time of the

1 accident, correct?

2 A. No.

3 Q. You don't have a claim for lost wages, do you?

4 A. No.

5 Q. Are you receiving any kind of disability
6 payments?

7 A. No. Just my retirement, you know, my Social
8 Security. I don't know...

9 Q. Right.

10 How long did -- I don't think I asked this
11 question specifically. How long did you serve in the
12 Air National Guard?

13 A. I believe it was almost six years. They gave
14 us time off because we were activated.

15 Q. And you didn't have any disabilities or
16 anything from release from that -- from your service
17 there, did you?

18 A. No.

19 Q. And I'm assuming you are on Medicare now.

20 A. Yes.

21 Q. Has Medicare paid for any part of your
22 treatment?

23 A. I'm not sure. They might have. You know,
24 what I'm getting -- you mean treatment that I'm getting
25 now or treatment that I got then?

36

1 Q. Any treatment that you got as a result of the
2 slip and fall.

3 A. I believe they might have.

4 Q. Okay.

5 You're not on any kind of social networking
6 site like Facebook or --

7 A. No.

8 Q. -- any of that, are you?

9 A. Absolutely not.

10 Q. Me either.

11 A. I'm sorry. I just find those things so
12 annoying.

13 Q. I'm right there with you.

14 A. My kids and my grandkids are on it all day
15 long, and I'd like some face-to-face time, never mind
16 Facebook.

17 Q. I totally agree with you on that.

18 THE WITNESS: Right?

19 BY MR. LEADBITTER:

20 Q. In terms of the area around the sidewalk, if
21 you would, just try to explain to me the area or the
22 spot where you said your toe got in there.

23 What is the condition of the sidewalk over
24 there? Is it well maintained?

25 A. Honestly, I didn't think so.

1 Q. Okay.

2 A. There were a lot of areas were was cracked
3 and, you know, it just didn't blend together.

4 Q. Okay.

5 Have you ever made any complaints to the
6 homeowners association or to the owners of the property
7 or anyone about the condition of the sidewalks there?

8 A. I believe I did. And I think a lot of people
9 at that point -- somebody said that they were all
10 complaining about, you know, the way it was being
11 maintained.

12 Q. Do you have any specifics, anybody -- any
13 individual that you're aware of that made any kind of
14 complaint, specific names?

15 A. No.

16 Q. Were you actively involved in your homeowners
17 association --

18 A. No.

19 Q. -- like going to meetings and stuff like that?

20 A. No. That was just for the owners. I was a
21 renter.

22 Q. Who were you renting from?

23 A. I'm trying to recall the fellow's name. I
24 can't. Frank Piza, Penza, something like that.

25 Q. Okay.

38

1 Would you have any, like, records of payments,
2 canceled checks or anything like that, that might jog
3 your memory on that?

4 A. No.

5 Q. Okay.

6 A. Sorry, but no.

7 Q. How did you make your payments to him?

8 A. Checks. It was a management company --

9 Q. A management company.

10 A. -- that took care of that. And I gave them a
11 check.

12 Q. Who was the management company?

13 A. I'm trying to recall their name. I really
14 can't.

15 Q. Okay. And I have the same question on that.

16 Do you think you might have some paperwork, an
17 old lease agreement or something, that would have that
18 information for me?

19 A. No. I don't have anything like that.

20 Q. Okay.

21 How about your bank accounts? Do you have any
22 bank statements that would show your rent payments that
23 would indicate who that went to?

24 A. No. I had closed that bank just before I came
25 up here a while ago, and I used a different bank, so

1 they wouldn't have any record of that, or I wouldn't
2 have any record.

3 Q. Okay.

4 Would your wife know who the -- either the
5 owner or the rental company was? Would she have that
6 information or would she be available to help us out
7 with that?

8 A. I don't think she'd be available but -- I
9 don't think she'd have any information, rather, because
10 I was the one that took care of the rent and all that.

11 Q. Okay.

12 And when did your lease or whatever that you
13 had with this Frank, whatever his last name is -- when
14 did that lease expire?

15 A. It was going to expire in June or May of --
16 here we go. I forget. In May.

17 Q. Of which year?

18 A. I'm trying to remember. I'd say about -- I
19 guess it's about three years ago --

20 Q. Okay.

21 A. -- or two years ago. So that would be,
22 probably, '17.

23 Q. Okay.

24 A. May of '17 or '18.

25 Q. Are there any other witnesses, to your

40

1 knowledge, other than the person that came to help you
2 get back up -- anybody else that you know of that saw
3 you fall or that you talked to about it?

4 A. No.

5 Q. Did you report the fall to the management
6 folks at either High Tide or the board at Estate at
7 Westbury?

8 A. Yes.

9 Q. Okay.

10 A. My wife did. She reported it and gave them
11 whatever information we had, at the office.

12 Q. Okay.

13 That's the High Tide office that was
14 maintained there on the site.

15 A. I don't know if that's High Tide. I'll be
16 honest with you. Every time you went, they gave you a
17 different name.

18 Q. Okay.

19 A. So it was the one -- I'm pretty sure it was
20 High Tide. They were inside the little cubbyhole that
21 they had.

22 Q. Did she fill out any kind of written report or
23 anything or did she --

24 A. Yes.

25 Q. -- just go talk to somebody?

1 Oh. She did a written report.

2 A. Yes. She gave them a full written report with
3 names of doctors and et cetera.

4 Q. Okay.

5 Did you keep a copy of any of that or did
6 you -- it was just something that you all gave the folks
7 there at High Tide?

8 A. No. We just gave it to them. And I lost all
9 my papers. That's what happened. You know, all my
10 records and stuff are gone.

11 Q. Okay.

12 Do you have any other damages of any kind that
13 you haven't -- in terms of what your claim is as a
14 result of the fall that you sustained, either in terms
15 of bodily injury or anything else of damages, or have
16 you told me everything that you have?

17 A. No. I believe that pretty much covers it.

18 Q. Now, as we sit here today, are you still
19 having any kind of issues with your left knee?

20 A. Yeah. I get a lot of pain in it. I was told
21 I'm probably getting arthritis. And I do have to put
22 something on it every now and then.

23 Q. And when you say you put something on it, are
24 you putting, like, ice or...

25 A. Yeah, ice or a sleeve.

42

1 Q. I was going to say, do you use compression and
2 you just kind of keep it warm?

3 A. Yes. Yeah.

4 Q. Okay.

5 Do you ever have to take any kind of meds
6 for -- like Advil or ibuprofen for swelling?

7 A. Yes. I did. I can't take any anymore.

8 Q. Why can't you take --

9 A. I had a problem. I wound up with a problem of
10 my kidney wasn't working. I was taking way too many
11 anti-inflammatories, so I try to stay away from them.

12 Q. When did you have that problem?

13 A. It was this year, this year. That's why I'm
14 still up here. The doctors up here are treating me.
15 It's been a hell of a month.

16 Q. I'm sorry to hear that.

17 A. No. I'm just mumbling to myself. I'm trying
18 to recall which came first.

19 Q. Right.

20 Other than the problem from taking that that
21 might impact your kidneys, have you had any other
22 kidney -- like kidney stones or anything like that --

23 A. No.

24 Q. -- that's caused problems with your kidneys in
25 the past?

1 A. No. It was a complete shock when I went in
2 and that's what they told me. And I actually had to get
3 dialysis for a couple of treatments.

4 Q. Are you on dialysis now?

5 A. No. I was on it. It was about a month ago.

6 Q. Okay.

7 And was that just because your kidneys weren't
8 clearing the level of drugs in your system?

9 A. I believe so. Yeah.

10 Q. Okay.

11 A. My diet was horrible. I was using a lot of
12 salt and fat and stuff so...

13 Q. I got you.

14 Have you made dietary changes and
15 everything --

16 A. Oh, yeah.

17 Q. -- to help deal with that? Okay.

18 A. Yeah. Well, I'm here with my daughter. She
19 won't let me eat anything. She threw everything out,
20 and that's it.

21 Q. Well, that's a good thing.

22 A. Oh, yeah. It's a good thing. I don't know
23 whether to smack her or kiss her for it.

24 Q. I think kiss would be the appropriate thing.

25 A. I think kiss would be better.

44

1 Q. I think so. All right.

2 Is there anything else that you recall that's
3 critical about the accident in terms of factually,
4 things that I haven't asked you about that you think I
5 should know about?

6 A. I can't think of any.

7 Q. Okay.

8 A. You know, just that I wish -- I wish it had
9 been level so I wouldn't have fell. That's about it.

10 Q. Okay. All right. I understand.

11 So, if you would, share with your lawyer the
12 information about the issue that you had with your
13 kidney that you're getting the treatment from up there
14 in New York, and, if you would, just provide them with
15 the information of that so that we can look into that.

16 I'm going to need to get that information
17 because I don't think I've gotten any information from
18 any out-of-state -- out-of-South Carolina doctors in the
19 case. I could be wrong and I can go back and
20 double-check. But in the event we don't have that, I'd
21 appreciate if you could help us out with that and give
22 that to your lawyer so we can look into that.

23 But other than that I don't have any other
24 questions for you. And I was just going to thank you
25 again for being patient this morning while we dealt with

1 those court hearings and making yourself available on
2 the Zoom meeting and everything. I think that that
3 was -- in this current situation, this is about as good
4 as we can do. And I really appreciate it.

5 A. It was my pleasure. It was nice to meet you,
6 another Air Force one.

7 MR. COGGIN: I have a couple of questions.

8 MR. LEADBITTER: All right.

9 EXAMINATION

10 BY MR. COGGIN:

11 Q. Nick, how are you walking today?

12 A. Today I use a cane for -- I use a cane when I
13 walk. I can walk a little bit without it, but I mostly
14 use a can.

15 Q. How far can you comfortably walk?

16 A. Maybe 50 feet, 60 feet. I know that because
17 they gave me a pass for the Suffolk bus, and you have to
18 walk that much to get it -- you know, to get on the bus.

19 Q. Give me a second. I just want to look over my
20 notes and see if there's anything more that I want to
21 do -- ask about, I should say.

22 You, at one point, had to -- during your
23 recuperation had to move from the Estate at Westbury,
24 didn't you?

25 A. Yes.

46

1 Q. Tell us about that.

2 A. Oh. All right. I almost forgot about that.

3 I guess I put it out of my head.

4 I got to the point where I couldn't take care
5 of myself and Kathy couldn't take care of me anymore.
6 She busted up her foot. My leg was busted. And it just
7 became impossible for us to get on. Her family was kind
8 of helping us financially, and they put us in an
9 independent living thing on Main Street in Hilton Head.

10 Q. How long were you there?

11 A. I was there about -- oh, God -- about five
12 months, four or five months. And that's where all my
13 papers and records are and everything like that.

14 Q. Okay. Let's see. Just one more thing. The
15 drinking. You said that you will have a drink at a
16 wedding.

17 How many weddings have you gone to in the last
18 ten years?

19 A. Oh. Maybe half a dozen.

20 Q. Yeah. Okay.

21 And you don't drink other than that. Is that
22 right?

23 A. Not really.

24 Q. Maybe have a glass of wine. That's it.

25 A. Yeah, a glass of wine if I took my wife to a

1 nice restaurant, which she complains I don't. And,
2 obviously, with the birth of my grandchildren, we
3 toasted.

4 Q. How many grandchildren do you have?

5 A. I have five.

6 Q. Okay. Same as me.

7 A. Yeah.

8 Q. That's great.

9 A. I'm telling you. We keep tabs pretty good on
10 each other.

11 MR. COGGIN: That's for sure. Okay. I have
12 no further questions. Thank you, Mr. Sanfilippo. I
13 very much appreciate it.

14 THE WITNESS: Oh. Thank you.

15 (The deposition was concluded at 12:39 p.m.)
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SIGNATURE OF DEPONENT

I, the undersigned, NICHOLAS SANFILIPPO,
do hereby certify that I have read the foregoing
deposition and find it to be a true and accurate
transcription of my testimony, with the following
corrections, if any:

PAGE	LINE	CHANGE	REASON
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NICHOLAS SANFILIPPO	DATE
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CERTIFICATE OF REPORTER

I, Carroll Anne Boutahar, Certified
Verbatim Reporter and Notary Public for the
State of South Carolina at Large, do hereby
certify:

That reading and signing of the
foregoing deposition by the witness was reserved.

That the foregoing deposition was
taken before me on the date and at the time and
location stated on page 1 of this transcript; that
the deponent was duly sworn to testify to the
truth, the whole truth and nothing but the truth;
that the testimony of the deponent and all
objections made at the time of the examination were
recorded by me and were thereafter transcribed;
that the foregoing deposition as typed is a true,
accurate and complete record of the testimony of
the deponent and of all objections made at the
time of the examination to the best of my ability.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 24th day of August,
2020, at Columbia, Richland County, South Carolina.



Carroll Anne Boutahar
Carroll Anne Boutahar
Certified Verbatim Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
December 13, 2021

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(None was proffered.)

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NICHOLAS SANFILIPPO vs WESTBURY HORIZONTAL PROPERTY
JULY 8, 2022 - B. DURIG, PHD, PE

1 IN THE COURT OF COMMON PLEAS
2 FOURTEENTH JUDICIAL CIRCUIT
3 STATE OF SOUTH CAROLINA
4 COUNTY OF BEAUFORT

5 NICHOLAS SANFILIPPO,
6 Plaintiff,
7

8 vs.

CIVIL ACTION NUMBER
2019-CP-07-00554

11 ESTATE AT WESTBURY HORIZONTAL PROPERTY REGIME
12 aka ESTATE AT WESTBURY OWNERS ASSOCIATION
13 (a multifamily real estate community)
14 And HIGH TIDE ASSOCIATES (a property
15 and HOA management company),

16 Defendants.
17 -----/
18

19 The videoconferenced deposition of BRYAN
20 R. DURIG, Ph.D, P.E., a witness in the
21 above-entitled cause, taken pursuant to Notice
22 and agreement, before Ceil Weser, Certified
23 Court Reporter and Notary Public, by
24 videoconference, on the 8th day of July, 2022,
25 commencing at or about the hour of 10:06 a.m.

*For at the Court
witness - the
deposition at his.*



NICHOLAS SANFILIPPO vs WESTBURY HORIZONTAL PROPERTY
JULY 8, 2022 - B. DURIG, PHD, PE

2-5

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	Page 2 APPEARANCES OF COUNSEL: FOR THE PLAINTIFF: VIA VIDEOCONFERENCE GARY COGGIN, ESQUIRE 4 Dunmore Court Suite 202 Post Office Box 7092 Hilton Head Island, South Carolina 29928 843-689-7777 gcitylaw@aol.com FOR THE DEFENDANTS: VIA VIDEOCONFERENCE NATHAN AKERS, ESQUIRE Howell, Gibson & Hughes 25 Rue Du Bois Lady's Island, South Carolina 29901 843-522-2401 nakers@hghpa.com - - -	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	Page 3 I N D E X PAGE EXHIBIT INDEX ----- 4 OPENING REMARKS AND STIPULATIONS ----- 5 DIRECT EXAMINATION: By Mr. Akers ----- 5 CROSS-EXAMINATION By Mr. Coggin ----- 87 REDIRECT EXAMINATION By Mr. Akers ----- 94 CERTIFICATE ----- 101
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	Page 4 DOCUMENTARY EVIDENCE NUMBER DESCRIPTION PAGE DX-1 Dr. Durig's File Materials 5	1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25	Page 5 BRYAN R. DURIG, Ph.d, P.E., having been produced and first duly sworn as a witness, testified as follows: (Whereupon, Defendant's Exhibit Number 1 was marked for identification.) DIRECT EXAMINATION BY MR. AKERS: Q Good morning, Dr. Durig. My name is Nathan Akers. I represent the Defendants in this matter Estate at Westbury and High Tide Associates. You recall that this matter involves an alleged trip and fall at the property on or about late October, I believe October 24th or 26, 2017 with the Plaintiff on one of the sidewalks. Just to get started, I imagine you have been deposed before, correct? A Yes, sir. Q So you know the drill then? A Yes, sir. Q Well, if you could go ahead and state your name for the record, please. A Brian Robert Durig D-u-r-i-g.



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1 **Q And what is your age and date of birth?**
2 A I prefer not to put that. I will give
3 you my age. I don't want to give you my date of
4 birth on the record. I am 58 years old. I was
5 born in 1964.
6 **Q Okay.**
7 **And what is your educational**
8 **background?**
9 A I grew up in Columbia. Went to
10 Richland Northeast High School. Graduated high
11 school in 1981.
12 Went to the University of South
13 Carolina I think a week later. Started in
14 summer school, graduated in December of 1984
15 with a Bachelor of Science in Mechanical
16 Engineering.
17 Stayed at South Carolina, got a
18 Master's of Science in Mechanical Engineering in
19 December 1985.
20 I continued in graduate school, got a
21 Ph.D. in Mechanical Engineering in May 1988.
22 Then while I was working I went back to
23 night school and I got an MBA in August of 1993
24 from South Carolina as well.
25 **Q Okay.**

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1 through one of the labs to get everything
2 checked to make sure there were no shorts in the
3 power cables and everything else. So they were
4 extremely safety conscious, as well as premises
5 and stairs, et cetera.
6 After 1991 when realized that the
7 reactors would not operate again due to safety
8 issues and basically Savannah River Site was
9 going to basically become a waste processing
10 facility, which I believe that is pretty much
11 all they do out there now.
12 Came back to Columbia, went to work for
13 Engineering Design and Testing Corp. in west
14 Columbia for a professor that I had named Tim
15 Jur. Worked there ten years and seven months
16 basically doing what I do now looking at
17 accidents. He had a metallurgical lab. I ran
18 that for him for a while.
19 And then in January 1, 1994 I came over
20 to Summit Engineering, which was started by two
21 co-employees I had at Engineering Design and
22 Testing Corp. And have been here for the last
23 28 years working as a consulting engineer.
24 **Q Okay.**
25 **So you are a consulting engineer for**

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1 **And what is your work experience?**
2 A After doing research in graduate
3 studies at the University, teaching some classes
4 and labs, et cetera I went to work at Savannah
5 River Site in just south of Aiken, South
6 Carolina. At that time in June, I started
7 June 1, 1988, there was one nuclear reactor
8 operating, that was about two or three years
9 after Chernobyl, and there was safety concerns
10 for those reactors; and basically I worked in
11 the nuclear engineering division of the Savannah
12 River Laboratory, which basically did research
13 on reactors to evaluate what safe power limits
14 they could operate at.
15 So for three years we sat around and
16 ran tests on every accident scenarios somebody
17 could come up with, as well as designing
18 equipment to actually stick in a reactor and run
19 tests in a reactor simulating losses. Two of
20 those three years or the last two of those three
21 years I was also our safety coordinator for our
22 division, which included monthly safety
23 inspections of our premises and equipment. So
24 we had a very strict policy that you could not
25 plug an electrical device in until it had gone

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1 **Summit Engineering?**
2 A Correct.
3 **Q And so could you just tell me what your**
4 **day-to-day work is with Summit Engineering?**
5 A Sure. We basically specialized in
6 investigating accidents or investigating
7 something that is not working properly, whether
8 it be a personal injury case such as this, or
9 whether it be a water line that broke on an ice
10 maker that flooded the buildings and causes a
11 million dollars worth of damage.
12 So we basically do what is sometimes
13 referred to as forensic engineering, where we
14 come in after there has been some kind of loss
15 or some kind of issue and try to figure out what
16 happened.
17 In this case it is basically an
18 alleged -- you say an alleged, a trip and fall
19 case over a change in elevation in a sidewalk.
20 To jump ahead to make it easier for you, I
21 probably do somewhere in the neighborhood of
22 150 cases a year which I would consider premises
23 such as this, a trip and fall, a slip and fall
24 fall, a fall down a stairwell, fall on an
25 improperly constructed handicapped ramp. Those



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1 are the four primary one's that I get involved
2 with premises cases for me.
3 **Q You sound pretty busy.**
4 **A Yes, I am.**
5 **Q And you are a forensic engineer, I just**
6 **want to make sure I heard you correctly?**
7 **A Yeah, I mean basically what we do is**
8 **forensic engineering work. You call yourself a**
9 **consultant because you don't work for some other**
10 **company that hires you, so you are a consultant**
11 **to them.**
12 **But basically the work we do is**
13 **forensic engineering, figure out what happened**
14 **and why.**
15 **Q And what is the address of Summit**
16 **Engineering?**
17 **A 146 Leisure Lane, suite C, Columbia**
18 **29210.**
19 **Q Thank you. And so your practical**
20 **experience in this field, you just mentioned**
21 **four major areas.**
22 **Could you repeat those? One was**
23 **premises. You said you do 150 premises cases a**
24 **year, is that correct?**
25 **A Yeah, it is in that neighborhood;**

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1 lot with fire investigations, whether it be
2 origin and cause or whether it be strictly
3 cause, or some life safety issue with it, which
4 is basically means of egress; and then straight
5 mechanical type cases, whether it be a machine
6 guarding case or a failure of a water hose or a
7 failure of a steering column. And so we will go
8 out and look at it and see if it is impact
9 related or fatigue related, and then look at it
10 from a materials perspective to see if it was
11 manufactured properly or not.
12 **Q Okay.**
13 **Thank you. So it would be fair to say**
14 **that what you do is you offer your professional**
15 **services in litigation, correct?**
16 **A They don't go all to litigation, maybe**
17 **20 percent go to litigation to the point where I**
18 **give a deposition; but yes, we treat pretty much**
19 **everything potentially as a litigation issue.**
20 **Q What is your hourly rate or what are**
21 **your fees?**
22 **A This case was last year, so it was 250**
23 **an hour for engineering work; and then 375 for**
24 **deposition and trial time.**
25 **Q 375 an hour?**

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1 sometimes a little more, sometimes a little less
2 ; but that is probably a good average these
3 days. Now I was saying the four types of
4 premises cases I do are trip and falls, such as
5 this on a change in elevation. Something to do
6 with a stairwell or stairway where stairs were
7 not formed properly.
8 **There is what a lot of times are**
9 **referred to are slip and falls, and they are not**
10 **always slip and falls, but some are slips and**
11 **falls; so I will measure coefficient of**
12 **friction, look at the material that is used. If**
13 **they put paint without abrasive materials in it,**
14 **those types of cases.**
15 **And then what is the fourth one I said?**
16 **Ramps. We get a fair number of ramps that are**
17 **constructed. Most of the time they are thrown**
18 **in by some subcontractor that doesn't understand**
19 **what the codes require for ramps, and they put**
20 **them in way too steep and people will have**
21 **accidents on the ramps. So those are probably**
22 **four areas of premises I routinely work in.**
23 **Q Okay.**
24 **A Overall I work in three principal**
25 **areas: Premises liability, such as this; I do a**

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1 **A Yes, sir.**
2 **Q Okay, and trial. All right.**
3 **And have you ever been a defendant in**
4 **litigation, have you or Summit Engineering ever**
5 **been sued?**
6 **A We were sued, the company was. I was**
7 **not named. My partner was Neil Baer. We did a**
8 **case for Nationwide Insurance where he went out**
9 **to look at water intrusion issues, windows**
10 **leaking; and the homeowner sued us for not**
11 **fixing her windows. The judge threw it out.**
12 **She just never showed up, but we were named in**
13 **that case.**
14 **Q So the case was dismissed then?**
15 **A The case was dismissed. We weren't**
16 **hired to do the repairs, but she wanted us to**
17 **repair her house.**
18 **Q How much time so far in your estimation**
19 **have you spent on this case so far?**
20 **A Probably somewhere, 10, 12 hours.**
21 **Q And I forgot to ask, were there any**
22 **other besides the Nationwide Insurance window**
23 **issue, was there any other suits that you can**
24 **recall?**
25 **A No, sir.**



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1 Q Okay.
2 And so you worked about 10 to 12 hours
3 on this case.
4 Have you ever worked with Mr. Coggin or
5 his law firm before?
6 A Yes, sir.
7 Q When was that?
8 A One time probably ten years ago maybe.
9 Maybe more. There was a bicyclist in -- I can't
10 remember if it was Palmetto Dunes or Hilton Head
11 Plantation. I think it was Hilton Head
12 Plantation, and he was riding down the road and
13 a landscape trailer came by and struck him. Hit
14 him with the trailer; and the trailer I believe
15 was wider than the truck, so the guy didn't get
16 over far enough. And I think that is the only
17 case I worked with Mr. Coggin before.
18 Q Okay.
19 But does that -- that particular case
20 with the bicycle and the trailer had to do with
21 forensic engineering? From an aspect of I guess
22 forensic engineering?
23 A Basically accident reconstruction where
24 the trailer was, the width of the trailer, where
25 it struck the bicycle --

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1 else, it didn't get to the point of being giving
2 a deposition.
3 Q If something pops in your head and you
4 remember, just let me know.
5 A Yes, sir.
6 Q So how often do you testify for
7 Plaintiff's Counsel?
8 A Hopefully never. Hopefully I don't
9 have to. I am not sure what you mean by that
10 how often. I mean as far as case-wise probably
11 70, 75 percent of my cases are plaintiffs. 25
12 to 30 would be defense cases. More Plaintiff's
13 cases go deposition than defense cases, just
14 because that is the way the system works.
15 Q Okay.
16 A But it is probably 70/75 percent
17 plaintiffs and 25/30 percent defense.
18 Q All right. Thank you.
19 Before I forget to ask, do you have
20 family or friends in Beaufort County?
21 A Not on a permanent basis, no. I have
22 got two daughters that are working down in
23 Hilton Head this summer.
24 Q What are their names?
25 A Well, they are not -- they don't live

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1 Q So are you a certified accident
2 reconstructionist?
3 A No, I am not certified as far as going
4 through the ACTAR or anything for vehicles, but
5 I do reconstruct just in understanding what
6 happened and where it occurred.
7 But if you get into angles of vehicles
8 and crush data, I used to do that in the early
9 nineties before the certifications came out; but
10 I don't do much of that. I may do light or site
11 distances if you got a car going 50 miles an
12 hour, how long does it take them to get from
13 this point to this point.
14 Q Oh yeah.
15 A As far as a reconstruction where you
16 are getting all the angles of the cars as they
17 progress through the crash, I don't do that.
18 Q So that was the only other time you
19 have worked with Mr. Coggin and his law firm, is
20 that right?
21 A I believe so. If there was one other
22 one I don't remember it.
23 But I know I did give a deposition in
24 that case at his office; but I can say that is
25 the one I can remember. If there was something

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1 there. Their permanent address is Columbia, but
2 Delaney and Mallory.
3 Q Okay, that is fair enough. And their
4 last name is Durig?
5 A Yes, sir.
6 Q So when were you first contacted or
7 hired by Mr. Coggin as an expert in this matter?
8 A Based on the letter he sent me
9 June 10th, it looks like we must have talked by
10 phone on June 9, 2021.
11 Q And is that the --
12 MR. AKERS: Can we go off the
13 record just a moment?
14 (Whereupon, an off-the-record
15 discussion was held.)
16 BY MR. AKERS:
17 Q We are back on the record.
18 We were just discussing exhibits to
19 this deposition and, Dr. Durig, we will get into
20 those in a minute.
21 What did you do today to prepare for
22 the deposition?
23 A Went through making sure I had most of
24 what I sent you printed out. I am not sure I
25 printed every page, but I printed out most of



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1 it. And that is when I found the two file names
2 that were the same, and then when I clicked on
3 them I found out they weren't the same.
4 So basically just went through and made
5 sure I had everything and selected a few
6 photographs to print out, and just went through
7 and read my letter/Affidavits. Basically the
8 same typo on the cover page of my letter, it had
9 June 7th, instead of July 7th, to match the rest
10 of the letter; but basically just read that --
11 **Q Was that a typo, the June 7th, I**
12 **noticed that too?**
13 A Yes, if you look at next page in the
14 header it says July 7th on the header.
15 **Q You are referring to your expert report**
16 **or letter to Gary Coggin regarding your**
17 **findings, is that correct?**
18 A Correct. It is shown on the cover page
19 as June 7th, but on the header to the letter it
20 is on page 2 and 3, it is July 7th, which is the
21 actual correct date, July 7th.
22 **Q Thank you. And what were you asked to**
23 **do in this case?**
24 A Basically I remember talking with Gary
25 that he had a client that had fallen or tripped

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1 A Correct, it is my understanding those
2 were taken by a paralegal for Bauer & Metro.
3 **Q Do you know who that paralegal is?**
4 A I think it is the Affidavit. There is
5 three Affidavits that were provided to me. Let
6 me see which one it is.
7 **Q Okay.**
8 **Just to be clear, this gentleman who**
9 **took the pictures and stuck the quarter in this**
10 **what seems to be a seam between the concrete, he**
11 **is not a forensic engineer to the best of your**
12 **knowledge, is he?**
13 A No, she is not.
14 **Q Is there any concern you might have**
15 **from an engineering standpoint for using a**
16 **quarter as a measurement tool in this case?**
17 A Any concern, no, our federal government
18 is pretty good by making quarters the same size.
19 They might be off by a hundredth of an inch, but
20 no, this is what I recommend if you are going to
21 go out and take pictures for me to look at. I
22 ask them to put a quarter inside to get an idea
23 of what the scale in elevation is.
24 **Q I guess my concern would be the seam**
25 **underneath might not be totally uniformly flat,**

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1 over a change in elevation in the sidewalk and
2 wanted to know if I could take a look at it and
3 evaluate it from a hazard standpoint.
4 And at some point he sent me the
5 pictures. I did not see an Email with this
6 attachment, so I assume he mailed it to me; and
7 then I scanned it in, because I have a digital,
8 and that is why I think I renamed it or its name
9 what I did because I know he did name it that.
10 So I scanned it and put it into the folder.
11 So he basically sent me some background
12 information, some photographs that were
13 originally taken by Bauer and Metro. I do work
14 with those guys and it is probably some comment
15 I made to them over the years. If you are
16 looking at a change in elevation, put a quarter
17 in it so you can scale it. The quarter is like
18 .97 inches. So it is just under one inch.
19 So the fact that there is quarters in
20 those photographs is probably something I told
21 those guys years ago when they are out taking
22 photographs, it will help get you --
23 **Q Dr. Durig, are you referring to the**
24 **photographs in the additional 30 pages you sent**
25 **me this morning?**

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1 **so the possibility is to push the quarter**
2 **farther down would be present, is that correct?**
3 A That is correct.
4 **Q Okay. So it is possible and to your**
5 **understanding to a degree of -- a reasonable**
6 **degree of engineering certainty it is possible**
7 **that that quarter measurement might provide an**
8 **inaccurate reading, is that correct?**
9 A No, it wouldn't be inaccurate. It
10 would be the bottom surface would be the level
11 of the ground between the two sections of
12 concrete, some of them are filled in with dirt
13 so it is level; and some of them there is an
14 area where it might go a little bit below, which
15 is why I told Gary that I need to come down and
16 re-measure that over to the other section of
17 concrete to get that change in elevation, as
18 opposed to just solely relying on the quarter.
19 But yes, if you get it too far down in
20 there it can give you a little bit higher change
21 in elevation than what would be present between
22 the two sections of concrete.
23 MR. COGGIN: Objection as to form.
24 BY MR. AKERS:
25 **Q Dr. Durig, do you know when these**



Page 22 1 photographs with the quarter were taken? 2 A The girl's name is Terry Murphy, and 3 she said it was in November 2021. 4 Q Terry Murphy? 5 A Yes. 6 MR. COGGIN: Excuse me, I have 7 given you that name, Nathan. 8 THE WITNESS: That can't be 2021. 9 It has got to be 2017, because she has 10 the same date mixed up as the accident 11 as October 5, 2021. It is my 12 understanding it was within a month, so 13 it should be November 20, 2017. 14 BY MR. AKERS: 15 Q So do you know as you sit here today 16 are you certain when these pictures were taken? 17 A I am not certain. I just know they 18 were taken before it was repaired, which I think 19 the repair records show December 2017. So 20 sometime between October 2017 and December 2017 21 and November would be one of those months. 22 Q And these photographs that are attached 23 to your June 10, 2021 correspondence with Mr. 24 Coggin, how do you know that this is the 25 particular area where Mr. Sanfillipo fell?	Page 23 1 A I wasn't there, but this is what has 2 been identified in the other two Affidavits, 3 that this area is where he fell; and you can 4 line up this area where I took photographs based 5 on the columns behind in the background of the 6 photograph. 7 Q Okay. And who told you this is where 8 -- this is where he fell? 9 A Well, it is in the Affidavits of 10 Kathleen Sanfillipo and the Affidavit of Diane 11 Lewis; as well as Mr. Coggin when we were out at 12 the site, that this is the area that was 13 identified as the fall area. 14 Q And so you are relying on the 15 Affidavits of Kathleen Sanfillipo, and who else 16 did you say? 17 A We had Diane Lewis, I think she is the 18 lady who actually went and helped him up. 19 And Terry Murphy is the other one that 20 she is a paralegal that photographed this area 21 as being identified as the area that he fell. 22 And if you look at the photographs you can kind 23 of see the background and know that the -- I 24 will call it the expansion joint is where I 25 photographed and took measurements.
Page 24 1 Q So you are making the assumption based 2 on that information from those two ladies that 3 this is the exact seam in between the slabs of 4 concrete that he tripped over, is that correct? 5 A I mean it is an assumption based on 6 evidence, if you want to call that an 7 assumption; but it is what with the material 8 that I reviewed I have concluded that this was 9 the joint that they were discussing and 10 photographed previously. 11 Q Bear with me. 12 MR. COGGIN: I object to the form 13 as to that question, Miss Court 14 Reporter. 15 BY MR. AKERS: 16 Q Dr. Durig, do you see the photograph in 17 this series that we were just discussing? It 18 has the stairs in the background. It has a 19 couple of columns. 20 A Yes. 21 Q Where is this? Do you know where that 22 is? 23 A If you park in front of building 1000. 24 Q Okay. 25 A And if you are in the parking lot	Page 25 1 looking at building 1000, this is the left 2 sidewalk that runs to the apartments on the left 3 side, including the apartment that 4 Mr. Sanfillipo was in which is 1001 or 1011. 5 Q Go ahead. 6 A It is on the left side of building 7 1000. 8 Q The left side of building 1000, okay. 9 Now is this to the best of your 10 knowledge the building where the Plaintiff 11 lived? 12 A Yes. 13 Q So this seam is very close to his 14 building? Close to his door, correct? 15 A Yeah. I mean if you park in the 16 parking lot and walk over on the left sidewalk, 17 you would cross over this to his apartment. 18 Q Okay. All right. 19 So let me ask you this, what else did 20 you review in preparing for the deposition 21 today? 22 A Whatever material I sent you. I didn't 23 review all of it, because I know most of it, 24 because like I say I took pictures -- 25 Q Did you review any additional



Page 26 1 transcripts of the witnesses so far? Did you 2 read the deposition of the Plaintiff? 3 A No, I don't have any depositions to 4 review. 5 Q Okay. One of the questions I have for 6 you, Dr. Durig, is in these photographs that you 7 sent me this morning where they are using a 8 quarter, do you have those in front of you? 9 A Yes, sir. 10 Q It seems like they are staying way over 11 to the left closest to the grass, do you see 12 that? 13 A Yes. 14 Q Those photographs? 15 A Yes, sir. 16 Q Let me ask you this way, in your 17 measurements was that side, that corner of that 18 slab closest to the grass the highest part of 19 the alleged defect? 20 A Yes, it would be; and I think the 21 description is he tripped with his left foot. 22 So you would be typically center to the left; 23 but yes, this is the area that was greatest, was 24 closer to the grass the higher it got. 25 Q And why did you assume that he tripped	Page 27 1 over the most severe portion of that part of the 2 sidewalk? 3 A I didn't say he tripped over the most 4 severe portion. I am just saying he tripped. 5 It would be reasonable to trip on the left side 6 because he tripped with his left foot. 7 MR. COGGIN: Object to the form. 8 THE WITNESS: And that is kind of 9 where I was described by them that this 10 was over on the left side of the 11 sidewalk. 12 MR. COGGIN: Miss Court Reporter, 13 I am objecting as to form as the 14 characterization of the sidewalk as the 15 highest part. 16 BY MR. AKERS: 17 Q Okay. So as we sit here today you 18 can't say with certainty exactly what portion of 19 that seam he actually tripped over, is that 20 correct? 21 A Right, I was not there that day so I 22 can't tell you. We don't have a video of it. 23 You would have to just go on what his memory of 24 it was, where he was along that surface. 25 Q Okay. All right.
Page 28 1 And some of these photographs, and 2 there are many, I am not going to waste your 3 time counting through them; but if you look 4 there's one -- there are a couple closer to the 5 end or in the middle and there is a blue dot 6 with someone standing there in a pair of boots. 7 Do you see that? 8 A Yes, sir. 9 Q Do you see the blue dot? 10 A Yes, sir. 11 Q And the blue dot, you can see it 12 clearly, correct, from the picture? 13 A Correct. It is in the photograph, I 14 agree. 15 Q All right. 16 Let me direct you, Dr. Durig, to -- so 17 I am discussing the batch of 30 pages that you 18 sent me this morning, the first page being that 19 June 10, 2021 letter to Gary Coggin. The 20 seventh page, it is a Proposal from MAJ 21 Enterprises. 22 If you could turn to that and let me 23 know -- 24 A I am at it. 25 Q Do you recognize this document, have	Page 29 1 you seen it before? 2 A Yes, sir. 3 Q And can you tell me what it is? 4 A It appears to be a Proposal from MAJ 5 Enterprises to make repairs to different 6 concrete structures at the -- I guess at that 7 time at the Estate of Westbury Park where they 8 have identified some places where they have to 9 actually cut out the concrete and replace it, as 10 well as a number of places where they have to 11 basically grind it down, which was done here. 12 When you get a change in elevation you can grind 13 down to an appropriate slope to bring the two 14 surfaces in compliance with industry standards. 15 Q Now, okay, go two more pages over. It 16 is an invoice. Can you see that? 17 A Yes. 18 Q Who is this invoice from? 19 A It looks like it is the same, MAJ. 20 Q So they actually -- they are actually 21 the entity that conducted the repairs that were 22 marked, is that correct? 23 A I would assume so. As you see in this 24 invoice they had identified 16 additional places 25 than what was originally identified in April of



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1 2017 to make repairs.
2 **Q Okay. But they didn't specifically**
3 **identify the spot where you measured, is that**
4 **correct?**
5 **A Correct. So they may not have --**
6 **Q They just identified any spots that**
7 **needed attention?**
8 **A Yes.**
9 **Q So let us go back to these photographs**
10 **with the blue mark.**
11 **If MAJ Enterprises was selected and**
12 **actually conducted the repairs, do you believe**
13 **that they were probably -- most probably the**
14 **one's who would have marked the area to be**
15 **remedied?**
16 **A I mean they can be. They could go out**
17 **and do their survey and say this is all the**
18 **spots we needed; and obviously between April and**
19 **whenever this invoice was sent in December they**
20 **identified 16 more spots. I don't know if this**
21 **was one of the 16 they identified as additional**
22 **so --**
23 **Q Okay. So you see it says sidewalk on**
24 **the Proposal, do you see that right up there?**
25 **A Yes.**

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1 is still moving and you most likely will fall
2 forward. Typically you do not fall backwards if
3 you are walking forward and your foot catches
4 something and trips you.
5 **Q Okay. So you said that his -- so you**
6 **said that his foot caught the ledge. So in**
7 **other words, his toes would have hit the**
8 **raised -- the raised edge, and he would have**
9 **fallen forward?**
10 **MR. COGGIN: Object to the form.**
11 **THE WITNESS: Go ahead, Gary.**
12 **MR. COGGIN: Object to the form.**
13 **THE WITNESS: Yes, it would be his**
14 **left shoe. But people say toes, I say**
15 **foot if he was barefooted. But yeah,**
16 **his left shoe as it was moving forward**
17 **as he is walking as it struck the**
18 **change in elevation it would stop it or**
19 **interrupt its flow and you are going to**
20 **lose your balance and fall forward.**
21 **BY MR. AKERS:**
22 **Q And so he was going towards his**
23 **apartment?**
24 **A Yes.**
25 **Q When was the first time you went to the**

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1 **Q Do you see where it says: Sidewalk**
2 **repairs as marked on-site?**
3 **A Right.**
4 **Q Do you believe that these are probably**
5 **what they were talking about, these blue dots,**
6 **the marking's?**
7 **A Let me see. It could be. Like I say**
8 **there is 16 additional one's on the December, so**
9 **we don't know when those additional 16 shows up**
10 **and which 16 they are.**
11 **Q Okay.**
12 **So tell me, Dr. Durig, what is your**
13 **understanding of how this incident actually**
14 **occurred? Walk me through how you think this**
15 **happened.**
16 **A Mr. Sanfillipo was walking on the**
17 **sidewalk, and based on the Affidavits it was**
18 **told to, whichever one was in there, maybe Miss**
19 **Lewis, that his left foot struck the change in**
20 **elevation; and he tripped and fell forward**
21 **landing on his knees and hands and face, which**
22 **from an accident reconstruction standpoint is**
23 **what you would expect if you are walking and**
24 **your foot hits an impediment to keep your foot**
25 **from traveling forward, your center of gravity**

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1 **scene?**
2 **A June 23, 2021.**
3 **Q Okay. And that is when you conducted**
4 **your site inspection?**
5 **A Yes, sir, and took photographs.**
6 **Q And the fall happened in October of**
7 **2017, so that is almost four years after the**
8 **fall, correct?**
9 **A Yes.**
10 **Q And walk me through everything you did**
11 **while you were at your June 23rd site**
12 **inspection?**
13 **A Okay. I looked at the area, confirmed**
14 **that the -- I will just refer to it as an**
15 **expansion joint as the expansion joint that was**
16 **shown in the other photograph confirmed that is**
17 **the one I was looking at. It had been repaired**
18 **prior to my involvement in the case, and I**
19 **believe there is actually some landscape blocks**
20 **on the right-hand side of the sidewalk that were**
21 **not there in these photographs as well.**
22 **Confirmed it was the right expansion joint.**
23 **Took photographs of the sidewalk basically from**
24 **the parking lot up along that sidewalk.**
25 **Eventually went all the way down to his**



Page 34 1 apartment, which would be the second entrance. 2 His apartment I believe was the bottom left-hand 3 side. 4 Came back and took measurements by 5 using a straight edge, which is the blue 6 90-degree ruler and then measured vertically 7 from the higher portion of the sidewalk. I say 8 higher because the one bends down. So basically 9 the level spot of the one sidewalk compared to 10 where the level would have been at the higher 11 sidewalk, and I was in the basically 3/4 inch 12 range as I measured across there. 13 Q And what did you see when you got 14 there? Right when you got there what did you 15 see? What was your impression? 16 A I mean you got a handicapped parking 17 spot designated for I think it is 1001 18 apartment, which I believe was his; so that 19 would imply that that walkway is intended to be 20 used by handicapped people. It is a handicapped 21 parking spot with a car with a handicapped 22 sticker on it; and there is some broken concrete 23 out by the asphalt parking lot. And then as you 24 walked on you could see where several areas had 25 been repaired, one before, this a smaller area;	Page 35 1 and then on the left-hand side where the grass 2 was, and then this one which had a larger repair 3 surface all the way across the full 48-inch wide 4 sidewalk. And then basically like I said there 5 had been a few changes to the landscaped area 6 and just confirmed we were in the right spot. 7 Q When you say changes to the landscaped 8 area, do you have those photographs? I think 9 there is 75 of them they sent me that is part of 10 your file? 11 A There should have been 81; but yes, I 12 have them. 13 Q I am looking at number 1. In the 14 earlier photos it looked like there was some 15 wooded sort of barrier, but in this one it looks 16 like there is a raised stone or brick barrier. 17 Is that still the same entrance to the 18 same building? 19 A Yes, and that is why I say if you look 20 at those two columns that are in that photograph 21 that you just are referring to that I made, 22 there is concrete block down there; and then 23 when you look at the one's they took. I am 24 trying to find one that has it. 25 You can see the two columns are there,
Page 36 1 yes. They had two wooden one's back there by 2 the column; but now they have added these brick 3 one's out, all the way out to the sidewalk 4 probably to keep people from cutting across 5 there, having less grass to mow, which I don't 6 disagree with it. The less grass to mow is 7 better. 8 But yes they had wooden one's over by 9 the columns in 2017 when these photographs were 10 taken, and now the brick or the block pieces are 11 there to outline that landscaped area. 12 Q So it is the same area in photo 1 as 13 the other previous photographs we discussed, 14 correct? 15 A Yes. 16 Q And it looks like it was a clear, sunny 17 day, is that your recollection? 18 A Yes. 19 Q And was there anything blocking your 20 view of the seam at all, or could you see it 21 right away? 22 A I could see it because I am out there 23 looking for it, but you do have a shadow that 24 comes across there that you have light on one 25 part, dark on the other part; and it would	Page 37 1 depend on the time of the day and the month of 2 the year, of whether or not that shadow would be 3 all the way across or maybe half of it. But I 4 had not looked at that issue whether or not 5 there would be a shadow on the date of this 6 loss. 7 Q But when you saw it there is nothing 8 covering it or no physical obstruction to your 9 view of it, right? 10 A No, you could see where they ground the 11 concrete down and it kind of stood out that hey, 12 there has been some repairs made to it here. 13 Q And was this the only seam that you 14 measured in your site inspection? 15 A I would have to go back and look. 16 There was one that you cross over before you get 17 to this one from the parking lot. It is only 18 about a foot that had been ground down. I don't 19 know if I measured that one or not. I would 20 have to go back and step through the photographs 21 to see if I did. I just don't remember off the 22 top of my head. 23 But if I did there would be a 24 photograph basically of that joint, and then 25 right after that there would be the same method

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1 of using an angle ruler with a tape measure.
2 **Q So how sure are you that he did trip in**
3 **this area, that it wasn't the other seam from**
4 **the one you actually measured?**
5 A Because the photograph that I was
6 provided of where the incident occurred is
7 consistent with this one, which is the 20
8 photographs that were in Mr. Coggin's letter.
9 **Q And remind me again who provided those**
10 **photographs?**
11 A Well, Mr. Coggin provided them to me.
12 They looked like they were taken by Bauer and
13 Metro paralegal that had gone out and met who
14 must have been their client at the time, who
15 went out to meet the Sanfillipo's and document
16 the sidewalk.
17 **Q So you relied on the photographs from**
18 **the former paralegal of another law firm who**
19 **relied on what was told to him by the other two**
20 **women, is that correct?**
21 A Yeah, I think it is a female. But yes,
22 they identified where the incident occurred.
23 MR. COGGIN: Object to the form.
24 BY MR. AKERS:
25 **Q And do you know whether they actually**

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1 **What is a trip?**
2 A When your foot is moving and it catches
3 an impediment, something impedes its travel. So
4 in this case as his left foot is going forward,
5 as he is walking it catches something and stops.
6 But your center of gravity of your body is still
7 going, and so you can't plant your foot out in
8 front of you to stabilize your body. So your
9 center of gravity is too far forward and you
10 fall forward onto your knees and hands.
11 **Q So with a trip something interacts and**
12 **stops your foot when it is moving forward, is**
13 **that correct?**
14 A Correct, it interrupts its travel.
15 **Q Got it, okay.**
16 **And are there any other assumptions you**
17 **made in developing your opinions?**
18 A As far as the accident scenario, no.
19 But then you tie that into is there a
20 hazard here, is there a trip hazard here; and
21 the answer is yes, there is based on that change
22 in elevation.
23 But as far as how the accident occurred
24 I am relying on the Affidavit to describe it.
25 **Q Can you remind me of the name of the**

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1 **saw him fall?**
2 A His wife did not, but Miss Lewis
3 basically went over there and picked him up off
4 the ground; and he identified to her that is
5 where he fell according to the Affidavit.
6 **Q Let me ask you what assumptions did you**
7 **make in developing your opinions with respect of**
8 **how this accident happened?**
9 MR. COGGIN: Object to the form.
10 THE WITNESS: If you review the
11 Affidavit of Miss Lewis, she basically
12 was there with him; and he told her
13 that his left toe caught on the raised
14 segment of the sidewalk and pointed to
15 it, which would be this one; and the
16 way he fell would be consistent with a
17 trip, as opposed to a slip.
18 So if his left foot caught in the
19 change of elevation and fell down on
20 his hands and knees, it is consistent
21 with how you would fall under that
22 accident scenario.
23 BY MR. AKERS:
24 **Q So a trip versus a slip, you said it is**
25 **consistent with a trip and not a slip.**

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1 **law firm that that paralegal worked for?**
2 A Bauer & Metro, they are here in Hilton
3 Head as well on Sea Pines Circle.
4 **Q You said you worked with them before?**
5 A Correct, I have one current slip and
6 fall with one of the attorneys there now.
7 **Q A current one?**
8 A Yes, I have a current case with that
9 law firm as well.
10 **Q All right. Thank you.**
11 **And what opinions -- we are moving on**
12 **from assumptions.**
13 **What specific opinions did you have or**
14 **did you make in your evaluation of this case?**
15 A Okay, in reviewing the photographs that
16 were provided to me that were taken we believe
17 in November of 2017 there is a change in
18 elevation somewhere between a 1/2 an inch and an
19 inch; and as you pointed out that depends on
20 where that quarter is and how deep it goes into
21 that joint.
22 I went out and confirmed by
23 reconstructing the height of that change in
24 elevation that this is somewhere in the
25 neighborhood of three-quarters of an inch, and



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1 anything over vertically over a 1/4 inch has to
2 be beveled. Anything over a 1/2 inch has to be
3 sloped, which is what they have on there now,
4 that they ground it down to an appropriate
5 slope, at least in most places they did.
6 And so we have a vertical change in
7 elevation that is a known trip hazard, and this
8 area should have been repaired at a minimum, and
9 until it could be repaired you should paint all
10 the way across the change in elevation to
11 identify, hey, there is something different here
12 and that was not done either. So we have a trip
13 hazard that may have been known since April of
14 2017 -- or April of 2017 when the proposal from
15 MAJ was provided to the HOA, that this is one of
16 the original spots that was identified. It had
17 been at least six months that it hadn't been
18 repaired or highlighted to identify it as a trip
19 hazard; and then unfortunately Mr. Sanfilippo
20 tripped before it was repaired in December of
21 2017.
22 Q Okay.
23 And let me ask you, Dr. Durig, to take
24 a look back at the photographs with the quarters
25 in it, if you could, please.

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1 discussion was held.)
2 BY MR. AKERS:
3 Q Dr. Durig, my question is in the
4 photographs where they have the quarter in the
5 seam, wouldn't it in your opinion as an
6 engineer, wouldn't it be more appropriate to put
7 the quarter on the surface of the other slab to
8 measure the difference and not in the seam where
9 it could go deeper?
10 MR. COGGIN: Object to the form.
11 THE WITNESS: Yeah, if I was doing
12 it, yeah, I would. But that is why I
13 went back out and measured it. Because
14 like I said it is a little bit below --
15 BY MR. AKERS:
16 Q I am sorry, go ahead.
17 A You are asking the questions.
18 Q You wouldn't have done it this way,
19 would you have?
20 A No, I would have turned the quarter
21 sideways so it would be more on the lower slab
22 than the upper slab.
23 Q Okay, thank you. Let me talk about
24 some of these photographs here that you have.
25 And by photographs I am talking about the batch

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1 A I have got them right here. I have got
2 them still out, so I am cheating.
3 Q Thank you. Does it look it looks like
4 the quarter is in the seam, right, it is in
5 between the slabs, right?
6 A Right.
7 Q Well, doesn't the seam go a little bit
8 deeper than the surfaces of the slab?
9 MR. COGGIN: Object to the form.
10 THE WITNESS: It is filled in with
11 dirt and some of these you can see
12 there is plants growing in them. There
13 is one of them that doesn't look like
14 it goes down very far compared to the
15 other sidewalk.
16 BY MR. AKERS:
17 Q Okay, but people don't walk in the
18 seam, right? They walk on the surface of the
19 slab, is that correct?
20 A Correct, and that is why I went back
21 and did it between the two slabs, not trying to
22 find the maximum vertical distance between them.
23 MR. COGGIN: I am going to
24 interrupt.
25 (Whereupon, an off-the-record

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1 of about the 75 that you sent me yesterday.
2 Tell me about the tape measure.
3 Why were you using the tape measure?
4 A To get the vertical displacement
5 between the two levels. So at the bottom of the
6 tape measure is on the lower concrete surface,
7 and the blue ruler is on the upper concrete
8 surface. So you want to know what that vertical
9 difference is. So you use a tape measure to
10 measure a distance.
11 Q And what about when you were laying the
12 tape measure horizontally across, what were you
13 using it to do?
14 A One would be to measure a width of the
15 sidewalk which is 48 inches, which is pretty
16 standard for a two-way traffic, where you got
17 two people and they can pass each other. A
18 36-inch wide sidewalk would not allow that. You
19 would have people stepping off the side of it.
20 So it is 48 inches wide.
21 And I think I measured between two
22 expansion joints, which is what, 113 inches I
23 think.
24 Q Okay.
25 Can you go to photo number 30. Let me



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1 know when you are there.
2 A Mine are numbered more than that, but I
3 think I know which one.
4 Q Okay.
5 I will describe it to you. It is your
6 blue L-shaped ruler.
7 A Yes.
8 Q And the vertical tape measure.
9 A I have got a bunch of them, and they
10 all look like that, and I am about 30 down so
11 they should be the same.
12 Q They are roughly the same, 30 to 33.
13 So let me ask you this, it looks like the ruler
14 is extending a couple of inches past where the
15 seam is, do you see that?
16 A Yes.
17 Q And from an engineer's perspective if I
18 were on a slightly sloped surface, maybe five
19 degrees or ten degrees and I extended out,
20 something like a ruler.
21 Is it true that the farther I extended
22 it out the higher that end point of the ruler
23 would be?
24 A Right. If you are at a ten degree
25 slope then we do have another problem we can get

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1 You might be able to change it by a
2 16th of an inch, but you are still well over a
3 1/4. This is basically 300 percent of more than
4 a 1/4, so you are not going to change it by more
5 than a 16th or even a maximum of an eighth of an
6 inch. It still would be a trip hazard based on
7 its height. But I am trying to get to where it
8 is kind of level, so your foot would be coming
9 off that part of the sidewalk and striking the
10 upper one. I can make it more. I can get it
11 more by coming closer to that joint, it will go
12 up because that surface of that sidewalk kind of
13 comes down some; and so my vertical change at
14 that location is going to be higher than this.
15 Q I understand what you are saying.
16 There are a couple of photographs in
17 here where it looks like you were going closer
18 towards the center away from the grass?
19 A Right.
20 Q Mine says 39 and 40.
21 Do you see it?
22 A Correct.
23 Q So I want to ask you about this. Let
24 me try to increase the size here. It looks like
25 there is sunlight underneath the ruler?

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1 into later in a ramp and not having handrails.
2 So I don't know if you want to call it a ten
3 degree slope.
4 Q That is just a hypothetical. We don't
5 know if it is a ten degree slope. I am trying
6 to figure out why the blue ruler is a couple of
7 inches past where the seam is. To me it would
8 seem like you would want to have it closer to
9 the seam to get a more accurate reading?
10 A Correct, and then we get to that issue
11 that you talked about it, it being a little bit
12 lower because we have a joint there. You can
13 see in my photographs most of that joint has
14 been filled in with either concrete or dirt. So
15 maybe those quarters are real accurate because
16 it doesn't drop down below them.
17 But here I am trying to get up to kind
18 of where the sidewalk would be level; and so
19 your foot if it clears across that level
20 sidewalk it is going to impede with that upper
21 area. It wouldn't make -- if you want to try to
22 reduce it by an inch over 5 percent slope, ten
23 degrees like I said would get you into a
24 different ball game of having ramps and not
25 having handrails and lot of other safety issues.

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1 A Yes, one of those there is a little bit
2 higher, yes.
3 Q So the ruler isn't resting on the
4 concrete?
5 A Well, the back of it is. The back of
6 it is because I am not holding it up in the air.
7 So the back of it might be on it, so you might
8 have a little bit of an uneven -- I can't tell
9 you in the picture -- you could have a little
10 bit of uneven, but we are up again in a little
11 over three-quarters of an inch, so that
12 difference is maybe a 16th of an inch.
13 Q Okay.
14 A So it is still well over a 1/4, which
15 is what I am looking for, what that big change
16 is.
17 Q Wouldn't you want to have it more level
18 closer to the seam than farther away?
19 A Again, as you start to down that slope
20 then you are going to get even a greater change
21 in elevation. If I go to the very end of that
22 concrete it is going to be even a bigger change
23 in elevation.
24 But as you said my foot is not going to
25 be in the bottom of that expansion joint, unless



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1 my toe gets right in there, which it can, and
2 then when you go to pick your foot up it is
3 going to impede on a higher change of elevation
4 than what I measured. So yes, it could be as
5 much an inch if you got right close to the edge,
6 but again I am going out to where it is kind of
7 level on the left section of concrete or the
8 left slab and comparing it to the right slab;
9 and I am in the 3/4-inch change in elevation,
10 which is a trip hazard.
11 **Q Okay. And can you go to the picture,**
12 **it is the very first one. It looks to be like a**
13 **cell phone or an iPod.**
14 **Is that you in the photograph?**
15 A Yes, that is my nice shoes.
16 **Q Can you tell me what this gadget is in**
17 **this app? Is that an app?**
18 A Yes, it is called an iPhone. It is a
19 cell phone. It is pretty cool. It is made by
20 Apple. But they have an app on it that does
21 levels, and I just basically threw it up there
22 to see what the level of that slope is. And
23 4.8 degrees is what is the maximum for a ramp
24 that is part of a means of egress, which this
25 would be, which is a 1 in 12 slope or

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1 **Q Okay. Are there any more opinions that**
2 **you developed in your evaluation of this case?**
3 A The one's that are in my report or
4 letter basically saying anything over a 1/4 of
5 an inch has to be beveled. Anything over a 1/2
6 inch has to be sloped like a ramp, which this
7 is, the 4.8. And that would be basically a trip
8 hazard. There is the International Property
9 Maintenance Code that talks about that in 302.3.
10 That has not been adopted as an official
11 ordinance in Beaufort County or the City of
12 Hilton Head; but it would be an industry
13 standard as discussed in how to maintain
14 sidewalks safe.
15 ASTM F 1637 has the same requirements
16 as far as slopes go in maintaining exterior
17 walkways, and it would be my opinion that this
18 does not comply with the ASTM F 1637 industry
19 standard because of the change in elevation, it
20 is too excessive.
21 And then you have the ADA and the ANSI
22 117 which do apply and these would violate those
23 standards because the vertical change in
24 elevation is excessive.
25 And then you have another article I

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1 8.3 percent or 4.8 degrees.
2 So this slope in this area is what is
3 max number allowed slope, which is 4.8 degrees.
4 So this is with the slopes, so sometimes it is
5 too steep if they don't grind back far enough.
6 **Q What is the app called?**
7 A iHandy Level.
8 **Q And is that an app that you use**
9 **routinely in your forensic engineering?**
10 A If I want to do a quick check, yes.
11 **Q I mean because usually I see like those**
12 **long handheld levels. I am just trying to**
13 **figure out why you didn't use one of those.**
14 A Because this wasn't a condition that
15 was at the time of the incident, so I am just
16 checking to see if they did it correctly, but it
17 didn't have anything to do with the accident.
18 **Q Why put the level on the part that has**
19 **been ground down?**
20 A To see if they made the slope proper,
21 4.8 degrees is a proper slope for a ramp; so I
22 wanted to check to make sure that they had the
23 slope proper.
24 **Q And was it proper?**
25 A Yes.

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1 referenced in mine as basically Cohen's article,
2 Cohen and Pauls, that talk about when people
3 walk you expect it to be level or something to
4 tell you otherwise.
5 **Q We will talk about those in a minute.**
6 **But what are some of the factual**
7 **support you have for the opinions on the raised**
8 **edges?**
9 A The measurements that were shown in
10 their photograph taken in we believe November of
11 2017, and then confirmed with my measurements in
12 June of 2021.
13 **Q Okay. And you mentioned some of the**
14 **IPMC, ASTM, ADA, and ANSI 117?**
15 A Yes.
16 **Q Are there any other documents other**
17 **than those other photographs that you relied on**
18 **in making your opinions?**
19 A I mean I have got some research
20 articles I provided, but primarily --
21 **Q I have got those.**
22 A Primarily it is the change in elevation
23 that is the subject of what is the basis of the
24 opinions.
25 **Q All right. We will talk about those in**

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1 a second.
2 Have you spoken with the Plaintiff or
3 any other experts in developing your opinions?
4 A No, sir.
5 Q All right. So when you mentioned the
6 International Property Maintenance Code, you
7 said it was not adopted in Beaufort County or
8 the City of Hilton Head, is that correct?
9 A That is my understanding, correct.
10 Q So who or what organization actually
11 does set the standard of care, because you
12 mentioned the ADA, the ANSI, IPMC and then the
13 ASTM F, those are four different entities.
14 I want to know who is the authoritative
15 voice on this and who actually sets the standard
16 of care?
17 A All four of those documents have the
18 same requirements on changes in elevation. ANSI
19 A 117 is a national standard that was adopted in
20 the State of South Carolina in 1976. So it has
21 been around in the State of South Carolina as a
22 requirement for at least 40 years prior to this
23 incident. So I guess that would be the state
24 legislature stated that that is the standard of
25 care.

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1 the State of South Carolina as required. The
2 IPMC is a permissive code and it is up to the
3 individual county or city to adopt it. So
4 Richland County has adopted it, Lexington County
5 has not. Mount Pleasant has adopted it, but
6 Charleston County has not; so it is adopted in
7 different areas depending on whichever county,
8 state, city government -- not state -- whatever
9 county or city government or entity is in charge
10 of that area, so they would set that as a
11 required ordinance, I guess an ordinance.
12 What is promulgated and required by the
13 state and the federal government as well as
14 industry standards.
15 Q Are you talking about the ASTM?
16 A I am talking about all four of them, I
17 mean all four --
18 Q Okay.
19 A I mean they all have different groups
20 that require you to follow them. One is the
21 federal government, one is the State of South
22 Carolina in the ANSI 117.1. And the other two
23 are industry standards promulgated by ASTM is
24 one, and the second one is the industry that
25 develops all the building codes, ICC.

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1 The ADA was based on the ANSI A 117.1
2 and first published in 1991 and re-published in
3 2010. They have the same requirements, so that
4 would be a federal mandate that they need to
5 maintain their walkways in a safe fashion for
6 handicapped accessibility. You have a
7 handicapped parking space at the end of the
8 sidewalk, so it would be pretty reasonable to
9 expect a handicapped individual may be using
10 this sidewalk, so that would be a standard of
11 care to comply with the federal requirement.
12 ASTM F 1637 is a national standard
13 promulgated by the American Society of Testing
14 and Materials who promulgates lots of standards
15 for construction, namely steel, concrete, many
16 other material specifications used in the
17 construction industry. So this is their
18 construction and maintenance standard on how to
19 maintain a walkway safe.
20 And then you have International
21 Property Maintenance Code, which is published by
22 the International Code Council, ICC, that
23 promulgates building codes, fire codes,
24 residential codes, mechanical codes, fuel gas
25 codes, all the codes that have been adopted by

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1 Q Okay, but IPMC has not been adopted in
2 Beaufort County or the City of Hilton Head to
3 the best of your knowledge?
4 A To the best my knowledge, yes, sir.
5 Q And how about ASTM, has that been
6 adopted in Beaufort County or the City of Hilton
7 Head?
8 A No, sir, that is why it is called an
9 industry standard, because this is what the
10 industry discusses of what is needed to maintain
11 your walkway safe.
12 Q Do you know what ASTM stands for?
13 A American Society of Testing and
14 Materials.
15 Q So are you familiar with this ASTM
16 International, do they have my role in requiring
17 or forcing compliance with its standards?
18 A No, it is a voluntary standard to
19 maintain it safe.
20 Q When would they become mandatory?
21 A If it is referenced in the IBC
22 International Building Code or IRC, ISC, those
23 have specifications that you have to use the
24 appropriate materials that meet different ASTM
25 standards. But it wouldn't be ASTM coming in



Page 58 1 and telling you you violated it, it would be 2 your county inspectors. 3 Q So if Beaufort County or the City of 4 Hilton Head didn't adopt them, then they 5 wouldn't be mandatory or required, would they? 6 A Correct, they would not be mandatory. 7 They would be an industry standard that should 8 be followed. 9 Q Okay. I am looking at, Dr. Durig, I am 10 looking at what you provided to me, the ASTM 11 "International Standard for Safe Walking 12 Surfaces" document? 13 A Yes. 14 Q Can you just read the first section 1.1 15 for the record. 16 A "This practice covers design and 17 construction guidelines and minimum maintenance 18 criteria for new and existing buildings and 19 structures. This practice is intended to 20 provide a reasonably safe walking surfaces for 21 pedestrians wearing ordinary footwear. These 22 guidelines may not be adequate for those with 23 certain mobility impairments." 24 Q Thank you, Dr. Durig. 25 And in that scope it says guidelines.	Page 59 1 What is the difference between a 2 guideline and a standard? 3 A Well, this is a standard and they are 4 providing you guidelines of what should be 5 followed to do that. So I mean the title of 6 this is "Standard Practice For Safe Walking 7 Surfaces", so this is a standard that has been 8 developed to help people understand how to 9 maintain your walkways safe. 10 Like I said, if you go back and look at 11 the building codes they tell you how to build 12 it, they don't tell you how to maintain it. 13 Q The ASTM, specifically these are 14 guidelines within the overall standard? 15 A Correct, for design and construction 16 and maintenance to make sure you have a safe 17 walking surface. 18 MR. COGGIN: Dr. Durig, what is 19 that document? I don't think I have 20 that. Can you give me the name of it, 21 please. 22 THE WITNESS: It is the ASTM F 23 1637, I believe this is the 2013 24 version. There is about five other 25 versions. It was first published in
Page 60 1 1995, so it has been around. 2 MR. COGGIN: Version 1627? 3 THE WITNESS: This is version 4 2013. 5 MR. COGGIN: 2013, okay. 6 Maybe you can get me a copy of 7 that. I will talk to you about it 8 later. 9 THE WITNESS: It should be, I 10 provided it in the file materials. 11 MR. COGGIN: Okay, thank you. 12 MR. AKERS: We can have a 13 discussion off the record if we need to 14 discuss things like that in the future, 15 but I will carry on. 16 BY MR. AKERS: 17 Q So this is version 2013 for the ASTM, 18 correct? 19 A Yes, sir. 20 Q So this fall happened in 2017. 21 Did you review the ASTM F 1637, version 22 2017? 23 A Probably not. I got 2019. 24 Is there a 2017? I don't remember 25 there being a 2017. Maybe there is.	Page 61 1 Q Maybe. It looked like they do one 2 every year. 3 A No, they don't do one every year, I 4 know that because I got '95, 2003, 2007, 2013 5 and 2019. 6 I will have to see if there is a 2017. 7 Q Fair enough. Well, the 5 second -- 8 5.2, the walkway changes in level, would that be 9 a guideline within their standards? 10 A I mean I guess that would be a 11 guideline, because this is an industry standard. 12 It would tell you what needs to be done. 13 Q So if it is 1/4 inch, it doesn't need 14 treatment, is that correct -- or up to, is that 15 correct? 16 A Up to 1/4 inch it doesn't need 17 treatment. That doesn't mean you can't trip and 18 fall over that because you can because of your 19 mobility and your gait. But as far as the 20 industry standards go and building codes and 21 standards go, up to a 1/4 inch can be vertical 22 without any edge treatment. 23 Q And if it is in between a 1/4 and a 1/2 24 inch, it has to be beveled -- 25 A Correct.



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1 **Q -- With the correct slope. Okay.**
2 **And greater than a 1/2 inch it has to**
3 **have a ramp or stairway, is that correct?**
4 **A Correct, and that is what I checked**
5 **with that slope of 4.8 degrees, that is the**
6 **appropriate slope for a ramp.**
7 **Q So is the ASTM the industry standard or**
8 **the standard of care?**
9 **A It is one industry standard, as well as**
10 **the International Property Maintenance Code and**
11 **then the ANSI and the ADA.**
12 **Q So there is not -- there is not one**
13 **authoritative industry standard?**
14 **A They are all three, but they all have**
15 **the exact same numbers. They all say the exact**
16 **same thing. They use the same 0 to 1 or 0 to a**
17 **1/4, 1/4 to a half, and above a 1/2.**
18 **Q And do you rely on one over the other**
19 **in particular?**
20 **A Not really. I mean they all say the**
21 **same thing. If you want to get into your legal**
22 **requirements by state law, yes, the ANSI A 117**
23 **is required by the State of South Carolina.**
24 **ADA is required by the federal**
25 **government.**

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1 know his medical history.
2 **Q I will represent to you he doesn't have**
3 **a disability. He is not -- or at the time he**
4 **isn't or was not wheelchair bound and neither**
5 **was he blind.**
6 **But my question is regarding the**
7 **standards from the ADA and the ANSI is looking**
8 **through this document on the first page, the**
9 **third page, the fourth page, it seems to me that**
10 **these standards are geared towards people who**
11 **are in a wheelchair to facilitate their**
12 **wheelchair going over surfaces.**
13 **So my question is why do these**
14 **standards apply to this particular case if he**
15 **isn't a wheelchair bound individual?**
16 **A You are talking two different things**
17 **there. So when we look at a sidewalk I look at**
18 **it to determine whether or not there is a hazard**
19 **there. There is a hazard because of the change**
20 **in elevation. Regardless of who is using it, it**
21 **is a trip hazard; and it needs to be repaired,**
22 **and it may have been identified five months, six**
23 **months before this incident as having needing to**
24 **be repaired. So someone identified it in April**
25 **or after this incident that hey, this area needs**

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1 So they are all required. So they all
2 have the same -- to me they all have the same
3 issues, if you violate them you violate all of
4 them.
5 **Q Well, let us talk about the ANSI and**
6 **the ADA.**
7 **Do you have those in front of you?**
8 **A Some of them, yes.**
9 **Q I am looking at the document you**
10 **provided. It says United States Access Board,**
11 **and it is referencing the ADA standards, are you**
12 **there?**
13 **A Yes, I have that.**
14 **Q First, do you have any knowledge that**
15 **the Plaintiff in this case is in any way**
16 **disabled?**
17 **A I don't know his medical history. I**
18 **know he is a 73-year old gentleman; and if he is**
19 **staying in apartment 101 I think that is the**
20 **designated handicapped spot. It has a number on**
21 **it, apartment 1001, so that would imply that at**
22 **least somebody in that apartment would be**
23 **considered handicapped, because they got a**
24 **handicapped sticker or at one point that area**
25 **was designated for handicap access. I don't**

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1 to be repaired.
2 So when we look at something and we see
3 a hazard, the first thing you want to do is
4 eliminate the hazard to make it safe; and so
5 this should have been ground down back in April
6 when they found it, and then not necessarily
7 wait five, six months without taking any
8 precaution to highlight it, warn or guard
9 against it.
10 So when you look at this, this change
11 in elevation would be a violation of the ADA.
12 How it applies to him, I don't know how, I don't
13 know what his gait was, I don't know his medical
14 history to say he is covered under the ADA; but
15 the ADA would tell you this has to be corrected.
16 **Q The same issue with the ANSI, you say**
17 **it is required by the state of South Carolina,**
18 **correct?**
19 **A Correct, that was adopted in 1976 by**
20 **the legislature.**
21 **Q That was my next question, you read my**
22 **mind, 1976.**
23 So this is again the same question with
24 the ADA, it looks like it is geared towards
25 blind and wheelchair bound individuals?



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1 A Yes. 2 MR. COGGIN: Objection as to form. 3 You keep characterizing it as blind and 4 wheelchair bound and so forth like 5 that. That is limiting it. You don't 6 know what his medical history is, so 7 please don't do that. 8 MR. AKERS: Well, I have his 9 medical records; and I am not referring 10 to the Plaintiff. I am referring to 11 the document scope. But thank you. 12 Thank you, Dr. Durig. 13 BY MR. AKERS: 14 Q So let me move on. 15 A Just real quick, if you want to go back 16 to that original ANSI 117, age is considered a 17 handicap. So when they first started developing 18 this, age was considered a handicap. 19 Q Is it still considered a handicap? 20 A It is going to affect who you are and 21 how you see and how well you go; so there is 22 some aspect to that, yes. 23 Q And do you know what age that begins? 24 A What age what begins? 25 Q What age they determine is the starting	1 point to be considered handicapped in the ANSI? 2 A They don't. They just say that age is 3 considered a handicap; and like I say when you 4 go back and look at the history of the ANSI 117 5 it is not only for people in a wheelchair is 6 what I am trying to get at, and those numbers 7 are based really on nonhandicapped people. So 8 whenever you are looking where the numbers came 9 from were based on studies of people walking. 10 Not necessarily only handicapped people so. 11 Q If you could provide that to 12 Mr. Coggin, so I can get that. I don't know if 13 this is the Building Blocks, chapter 3 that you 14 sent me. 15 A The original ANSI, no. I have got the 16 1961 version. I will scan it and send it to 17 you. 18 Q That would be great. Thank you. 19 I want to talk about the Cohen and 20 Pauls' article you sent me. 21 A Yes. 22 Q So the abstract talks about kind of why 23 people fall. 24 And are you looking at the abstract A 25 and I guess A through D?
Page 68	Page 69
1 A Yes. 2 Q Could you just read A through D, 3 please, for the record. 4 A A states: Unexpected impediments in a 5 level walking surface. 6 B: Unexpected change in level. 7 C: Unexpected change in traction. 8 D: Unexpected change in stair 9 geometry. 10 Q And this is all dealing with trying to 11 prevent falls, correct? 12 A Yes, I mean like I say you are 13 identifying what hazard are so people can go out 14 and fix them to prevent people from falling 15 down, correct. 16 Q So in this document it seems to me that 17 one of the largest issues would you agree in 18 your work experience and to a reasonable degree 19 of engineering certainty most probably that one 20 of the biggest issues with these falls is the 21 unexpected nature of whatever defect may or may 22 not be there? 23 A That is correct, that and their ability 24 to regain balance. I was having dinner the 25 other night and there was a change in elevation	1 at a door, and I am like that looks like a trip 2 hazard to me and sure enough there is a young 3 girl probably 18, 20 tripped on it, but she 4 didn't fall because she was able to regain her 5 balance. But you get a 73-year old person that 6 goes through this doorway with an inch and a 1/2 7 change in elevation, you very easily can fall. 8 So it does because people don't expect 9 it to be there, but it also has to do with their 10 ability to regain their balance. 11 Q And if they don't know it is there, 12 that is the issue of being unexpected, is that 13 correct? 14 A Well, that and being distracted, 15 looking where you are going. Not looking at 16 your feet to know that you are crossing over 17 that, but yes. 18 Q Okay. All right. 19 I am looking at now, Dr. Durig, this is 20 similar to what we just discussed, the article 21 is called Watch Out or Do We. 22 Do you have that in front of you? 23 A Yes. 24 Q So I am on page at the top it says 1255 25 of that article.



Page 70 1 Now this is in this heading the 2 subheading of "Expectation" on the left. Do you 3 see that? 4 A Yes. 5 Q Could you please read the third 6 paragraph down for the record, please? 7 A The first category, it starts off with 8 the first category? 9 Q Yes, sir. 10 A "The first category of expectation is a 11 priori. A priori expectations similar to top 12 down processing are ultimately driven by habits 13 and prior experiences. These are expectations 14 that are brought into the tasks by the user. 15 For example, if a user is familiar with a 16 certain walkway, they may have a priori 17 expectation that the walkway surface contains 18 hazard such as vertical perturbations, uneven or 19 cracked surfaces or so forth. 20 Q Thank you, Dr. Durig. So if somebody 21 has a priority knowledge of a certain area, you 22 really couldn't say in that prior familiarity 23 with the area and any sort of hazard that might 24 be there, you really couldn't say that it would 25 be unexpected if they encountered it, correct?	Page 71 1 MR. COGGIN: Object to the form. 2 THE WITNESS: It would be based on 3 the person's knowledge and 4 understanding of whether that was a 5 hazard or not. If they don't know it 6 is a hazard, they might not be on alert 7 to it as much as somebody else who 8 would be -- so that would be somebody 9 like me or somebody doing an 10 inspection, looking for safety hazard, 11 they would have a different perspective 12 on a like condition. 13 BY MR. AKERS: 14 Q I understand. But suppose somebody had 15 complained about the hazard before, would you 16 say they understand it was a hazard? 17 A Yes, if they complained of the hazard 18 before they would understand it is a hazard, it 19 is hard to disagree with that. It is pretty 20 straightforward if I say it is a hazard, I will 21 understand it to be a hazard. 22 Q So I think that is all of that. 23 In your developing your opinions, I am 24 going back to the ADA the ANSI and the ASTM -- 25 and is it the IPMC?
Page 72 1 A Yes, sir. 2 Q Did you use a combination of those to 3 make your evaluations and your opinions? 4 A I think I addressed each one 5 separately, but my opinions are more based on 6 the area being described where the fall 7 occurred, which is the sidewalk and a change in 8 elevation. 9 Photographs taken shortly afterwards 10 say November when the fall was in October. 11 The type of fall where he fell forward 12 on his knees and hands, and my measurements in 13 2021 all identify a trip hazard between those 14 two sections of concrete. 15 And then applying that information to 16 industry standards and codes, mainly IPMC, ASTM 17 1637, ADA, ANSI 117.1. So those would be the 18 basis of saying that the roughly 3/4-inch change 19 in elevation is a trip hazard. 20 Q Okay. 21 A And then you can look at the other 22 documents to say why people don't look at their 23 feet when you walk. You don't necessarily see 24 the change in elevation unless there is some 25 kind of big warning on it. So if they would	Page 73 1 have taken yellow safety paint and sprayed all 2 the way across this like some places do until it 3 can be fixed, so that would at least give 4 somebody a warning that hey, there is something 5 here you need to be looking for. 6 Q And I think I have asked you this 7 before, but the way you determined where this 8 happened was from other people who said they 9 knew where it was, right? 10 A Correct, I was not there that day so I 11 am relying on the Affidavits and the photographs 12 that were taken afterwards or identified later. 13 Q And this is Kathleen Sanfillippo and 14 Diane Lewis? 15 A Correct, and then the paralegal that 16 was out there as well. 17 Q Bear with me just a moment. 18 MR. AKERS: Are you all okay with 19 taking a five-minute break? 20 THE WITNESS: Yes. 21 (Whereupon, a short break was 22 taken.) 23 MR. COGGIN: I will take a printed 24 version of the transcript and I will 25 need an index with it and include all



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1 the exhibits also.
2 BY MR. AKERS:
3 Q Dr. Durig, let us go back on the
4 record, Madam Court Reporter, please.
5 We are back on the record, we were just
6 discussing, Dr. Durig, some of the materials you
7 relied on in developing your opinions.
8 Let me ask you this, do people -- where
9 do people if they are alone typically walk on a
10 sidewalk? Do they walk in the center, do they
11 walk on either side, or extreme side?
12 A Typically more down the middle.
13 Q Typically more down the middle?
14 MR. COGGIN: Object to the form.
15 It calls for speculation.
16 BY MR. AKERS:
17 Q And do you know where the Plaintiff was
18 walking at the time of this incident?
19 A No, I was not there. But like I say
20 when you look, if you walk down the middle and
21 your left foot is going to be closer to the
22 grass than it would be to the right side; and if
23 you tripped on your left foot that would put you
24 more over on that side of it.
25 Q Okay. And so I am looking at some of

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1 here because I haven't been there yet.
2 If he is leaving his apartment towards
3 the area where you took pictures of the alleged
4 defect, would he be walking towards those
5 stairs?
6 A Not to get to that location you would
7 not. That would lead you to, and I will say the
8 right side of the building if I am in the
9 parking lot looking at it. So part of it would
10 depend on where you parked, if you parked on the
11 right side of that building, because there is
12 parking spaces down on that end you would
13 probably walk down that side of the sidewalk to
14 get to your apartment.
15 So it really kind of depends on where
16 you are in the parking lot, but that leads to
17 the opposite side of the building from where the
18 subject sidewalk change in elevation was
19 located.
20 Q So it is a breezeway? You can get to
21 the subject area from his doorway depending on
22 where you go?
23 A That is my memory of it, yes; because
24 you could go all the way through, yes.
25 Q When you were there, did you measure

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1 your photographs again, I know you said you had
2 81?
3 A I show 81 photographs.
4 Q Okay, I am showing 85. If you could
5 send me the version that has --
6 A That is the Email I sent that has 81
7 attached to it.
8 Q They must have done something to it. I
9 will go back and check. I am looking at what I
10 have, it is page 66 and it is a photograph of a
11 doorway and it says 1001.
12 Do you see that one?
13 A I will find it.
14 Q And you took that picture on June 23,
15 2021 when you did your site inspection, correct?
16 A Correct.
17 Q And what is this a picture of?
18 A That is the picture of his door as far
19 as I understood, which unit he lived in which is
20 1001.
21 Q Now, looking down the hallway, do you
22 see those stairs?
23 A Yes.
24 Q Let's say he is leaving his apartment.
25 I am just trying to get some spatial awareness

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1 how far it was from his door to the subject
2 area?
3 A No, I did not. You could probably
4 count the concrete sections; but no, I didn't
5 measure it.
6 Q Do you have an estimation of what that
7 distance is?
8 A Not really. I think someone said it
9 was about a hundred feet in one of those
10 Affidavits. It is probably a little more than
11 that. Probably a hundred to 150 feet maybe.
12 Q A hundred to 150 feet from the doorway?
13 A Yes, that would be my estimate.
14 Q Let me ask you this and bear with me,
15 so do you need any additional information to
16 further develop your opinions, or do you believe
17 you have everything you need?
18 A I mean I have what I need to identify
19 this as a trip hazard. Now is it CAJ -- or MAJ,
20 if they are deposed and they can say we put this
21 blue mark on there right before we went out and
22 did the repairs, that would be one that was not
23 identified in April. If they said they put this
24 blue dot here in April, then that would confirm
25 that this area had been identified for five



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1 months prior to this loss. Changes in elevation
2 don't occur overnight. They are normally pushed
3 up by roots of plants, et cetera. So I mean
4 this condition could have been there for two or
5 three years or longer.
6 **Q Okay.**
7 **A** But it would confirm if they did it in
8 April they knew about this area for safety
9 purposes for at least five months and didn't
10 paint it safety yellow or put up any kind of
11 warning sign or correct it and grind it down.
12 **Q So you kind of got into what I was**
13 **going to ask before, and would you expect at the**
14 **time that they laid the sidewalks that they**
15 **would be even?**
16 **A** Yes.
17 **Q So you mentioned sometimes they can be**
18 **pushed up or that elevations can change.**
19 **How would that happen?**
20 **A** Basically roots grow underneath and
21 have a tendency to push up a section or a joint
22 in the concrete. Not all the joints are pushed
23 up, but they are all pushed up on the side where
24 the grass is growing.
25 I don't remember how far the closest

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1 **MR. COGGIN:** Object to the form.
2 **BY MR. AKERS:**
3 **Q Earlier, Dr. Durig, you testified about**
4 **how the mechanism of how this fall occurred?**
5 **A** Yes.
6 **Q You described this as a trip.**
7 **A** Correct.
8 **Q And I am going to do my best to**
9 **paraphrase, but you mentioned a trip was when**
10 **you are going in a forward direction and when**
11 **you are moving your foot it is stopped or**
12 **impeded by an object or something else when you**
13 **move your foot forward which causes you to fall**
14 **forward and trip, is that correct?**
15 **A** Yeah basically, that is just what we
16 read about in the Cohen and Pauls' articles A
17 and B when you get an unexpected impediment in
18 your level walking surface. So if it is level
19 and then all of a sudden you have a small change
20 and it catches your foot, it is not able to
21 continue traveling in a forward motion to plant
22 and be able to have your body stabilized. Your
23 center of gravity is too far forward, and you
24 have a tendency to fall.
25 **Q Let me ask you this, if I were -- let**

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1 tree was. You could get some --
2 **Q Can sidewalk slabs also settle into the**
3 **ground, and I guess for lack of a better word**
4 **sink down?**
5 **A** They can. One side can sink and the
6 other side stays level.
7 **Q And this doesn't happen -- you**
8 **testified that this sort of thing doesn't happen**
9 **overnight, correct?**
10 **A** Typically not, no. This is a long
11 term, I would say a long term process, months,
12 years.
13 **Q And so if I were living at this place**
14 **and walked to this sidewalk frequently, and I**
15 **had been living there for let's say five or six**
16 **years, then I would also be aware of this**
17 **condition, is that correct?**
18 **MR. COGGIN:** Object to the form.
19 **THE WITNESS:** Yes, if you walked
20 over the sidewalk after five or six
21 years you would probably recognize that
22 there is a change, but it is going to
23 change over those five or six years. I
24 don't think it would be static and be
25 the same as it was five years ago.

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1 **me use a photograph so I can kind of -- we can**
2 **just kind of visualize this. Let me look at --**
3 **I have to go back.**
4 **I am on your very first photograph of**
5 **that batch of 81 that you sent me, okay?**
6 **A** Okay.
7 **Q And you see the stairs and where the**
8 **breezeway leading up to his apartment begins,**
9 **correct?**
10 **A** Well, this is the front entrance. His
11 apartment is on the back of that photograph. So
12 you have the breezeway here in the front and
13 then you have a second breezeway in the back.
14 He is at the back breezeway.
15 **Q Okay. So that second column in the**
16 **back that is more shady back there, that is**
17 **where he lives?**
18 **A** Correct.
19 **Q Okay. Now let me ask you this, if I am**
20 **leaving -- so he doesn't live in the breezeway**
21 **where it is this sunny part in number 1, right?**
22 **A** Correct.
23 **Q Let me ask you this, if I am walking in**
24 **this area and I am coming from where you said**
25 **his breezeway is and I am coming towards the**



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1 camera person --
2 A Yes.
3 Q -- Could I have tripped on that alleged
4 defect as you measured it?
5 A You wouldn't, I wouldn't consider that
6 a trip.
7 You would have an unlevel walking
8 surface that can cause you to fall because you
9 lose your balance, because your foot is not
10 level and planar. You can have a fall if you
11 are walking in that direction, but I wouldn't
12 describe it as a trip where your foot catches
13 something to stop it. If you planted your foot
14 on that change in elevation, you can basically
15 roll your ankle and have a fall.
16 It is a fall hazard, but I wouldn't
17 classify it as a trip.
18 Q But you did testify earlier that your
19 understanding of how this happened was that he
20 tripped?
21 A Correct.
22 Q So all of these opinions that you
23 shared with me today, are they to a reasonable
24 degree of engineering certainty most probably?
25 A I would say engineering certainty, yes.

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1 documentation.
2 Q And if you over the course of this
3 matter working with Mr. Coggin develop any
4 additional opinions would you please advise
5 Mr. Coggin so the deposition can be reconvened
6 to explore those opinions?
7 A I will do my best.
8 Q Okay.
9 I just have a couple more. Do you have
10 any training or education in the field of human
11 factors?
12 A Not education-wise. I have done a lot
13 of research in it, which is what all these
14 articles are to understand how people fall.
15 Personal experiences, watching videos of people
16 fall, that aspect of it, yes.
17 But I don't have a degree in human
18 factors, no.
19 Q What about, do you have any training or
20 education in the field of cognitive psychology?
21 A No, sir.
22 Q Do you have any training or education
23 in the field of visual perception?
24 A As far as personal experience in doing
25 research -- I would say more application than

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1 I don't know what the most probably means. It
2 is the most probable cause of the incident I
3 guess you could say that, yes. The change in
4 elevation is the most probable cause of this
5 incident.
6 Q Understood. And could you, again I
7 can't remember if we went over this
8 specifically, but could you tell me exactly what
9 you are an expert in?
10 A In this area it would be mechanical
11 engineering and safety. Having done this for
12 32 years I am a certified safety or walkway
13 safety auditor through the University of North
14 Texas. A certified fire protection specialist
15 deals with means of egress and fire safety.
16 And you got NFPA 101, which is very
17 similar to chapter 10 of the means of egress in
18 the building codes when it gets into walkways,
19 stairs, ramps, et cetera, how to maintain a
20 building safe; so based on that, yes.
21 Q And are all opinions you shared with me
22 today, is that the entirety of your opinions or
23 do you have more?
24 A No, that is based on what we have is
25 what I wrote in the report and provided to you

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1 research. Understanding, watching people,
2 looking how I do things, reviewing the research,
3 yes. I understand people don't look at your
4 feet. You look at 6 to 10 feet in front of you.
5 That is why you don't see things that you trip
6 on. That is basically a lot of research that
7 has been published over the last 30 years which
8 I have reviewed. So I understand all that and I
9 apply that to a situation of safety issues, such
10 as this, a change in elevation, which is
11 supported, which that research supports the
12 building codes and the ANSI's and the ADA are
13 why we have 0 to a 1/4 inch vertical changes
14 allowed.
15 It all plays together of where those
16 standards come from and what material they use
17 to develop those numbers. So I understand it
18 all. I am sure I know more than the jury member
19 would know on that, so from that perspective
20 yes, I would be an expert on that.
21 Q Do you have any training in the field
22 of or education in the field of biomechanics?
23 A Not necessarily biomechanics. I mean I
24 did bioengineering work for my Ph.D., was
25 looking at human retina and implant materials.



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1 But not related to a person walking. But again
2 that has just been developed over the last
3 32 years of looking at this and understanding
4 the safety and how people walk. From that
5 perspective, yes; but not a formal class on it,
6 no.

7 **Q And you mentioned, I am just backing up**
8 **a little bit, you mentioned you were an expert,**
9 **you said you were an expert in the field of**
10 **visual perception?**

11 A No. I said I understand how people
12 look and I apply that to a situation of safety.
13 I can't tell you what somebody saw or
14 didn't see, no.

15 **Q So you don't hold yourself out as an**
16 **expert in the field of visual perception?**

17 A No, I don't. I am just saying I apply
18 it, and I understand what the research has
19 shown. But to be able to come in here and tell
20 you this person saw that, no, I can't do that.

21 **Q Okay, all right.**
22 **In terms of your expertise and**
23 **education and experience in mechanical**
24 **engineering and safety, who would be responsible**
25 **for maintaining the sidewalks?**

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1 areas of studies. I mean something that is
2 visible, yes, and you can see it. But does
3 someone actually observe it when they are
4 walking without any kind of warnings and stuff,
5 no, that is why we have warnings.

6 **Q What I am asking is if there is**
7 **actually under what education level can you get**
8 **a degree in the field of visual perception, or**
9 **what is that under?**

10 A It would be typically under psychology
11 or if the area has a human ergonomics, those
12 type of studies.

13 **Q You indicated you were a certified**
14 **walkway safety auditor.**
15 **What exactly is that?**

16 A Basically understanding what hazard are
17 with walkways. It was an 8-hour training
18 seminar or class with a test after it; and you
19 pass all the tests and they give you a
20 certificate. The same with a certified fire
21 protection specialist. It was a 2-1/2-day class
22 with an exam afterwards to show that you
23 understand the codes and safety issues and means
24 of egress.

25 **Q Who sponsors that?**

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1 A It would be the owner or in this case
2 it is probably the HOA. I haven't seen any kind
3 of formal documents, or if they have a property
4 management company and they designated them to
5 do monthly inspections or to maintain the
6 property safe, it would also include them. But
7 I am not an attorney, but I didn't think an
8 owner can wash his hands of all responsibility,
9 at least I have been told that by a number of
10 attorneys; so I don't know the legal aspect of
11 it.

12 **Q Right. Bear with me, I am just running**
13 **through.**
14 **Dr. Durig, I appreciate your time.**
15 **Thank you very much for now.**
16 **Gary might have a couple of questions**
17 **for you.**

18 MR. COGGIN: Thank you very much,
19 Nathan, I appreciate that. A very
20 thorough job.

21 **CROSS-EXAMINATION**
22 **BY MR. COGGIN:**
23 **Q Is there actually a field of visual**
24 **perception, Doctor?**
25 A In human factors you have different

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1 A That one was the National Fire
2 Protection Association NFPA. A lot of it is on
3 NFPA 101 and the fire protection handbook
4 dealing with fire protection, the means of
5 egress, life safety.

6 **Q And there are actually specialists in**
7 **walkways, is that right? And you could be**
8 **called in as a walkway auditor?**

9 A Yes, I could yes. I mean I have got a
10 certification that says that, yes.

11 **Q We talked about the different groups,**
12 **the ADA and the ANSI and so forth.**
13 **From my understanding from your**
14 **testimony is the ANSI is what has been adopted**
15 **in South Carolina, is that correct?**

16 A Correct, it was adopted in 1976.

17 **Q And what is the difference between say**
18 **the ADA and the ANSI and the ASTM and IPMC, is**
19 **there much of a difference between them?**

20 A As far as the requirements for a safe
21 walkway, no, they all have -- I will say three
22 out of four. The IPMC does not designate
23 specific dimensions. Where the ASTM F 1637, the
24 ADA and the ANSI A 117 actually specifically
25 give you values.

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1 The IPMC just says maintain your
2 walkways, et cetera, in a hazard-free condition.
3 **Q The ASTM, I always thought that was the**
4 **American Standards of Measures?**
5 A My memory is American Society of
6 Testing and Materials.
7 **Q No, I think you are probably right. I**
8 **don't know where I got that at.**
9 **And you say that is applicable to the**
10 **matter at hand, is that correct?**
11 A Yes, I mean it is an industry standard
12 that would guide someone on how to maintain
13 their walkways safe.
14 **Q I am making a note here.**
15 **Doctor, we talked briefly about the**
16 **period of time between the discovery of**
17 **dangerous conditions, and for your information**
18 **the Discovery was predicated on an elderly woman**
19 **running her wheelchair into an uneven condition**
20 **and upsetting. I have often wondered how would**
21 **that take place.**
22 **Would she hit the raise in altitude or**
23 **how would that happen?**
24 A Typically you would be going and
25 striking it, because you don't -- the wheels on

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1 MR. AKERS: Object to the form.
2 THE WITNESS: Depending on the
3 entity, whether or not they would
4 require a permit to fix an outdoor
5 sidewalk, that is not really covered
6 under the building code. Probably not,
7 no.
8 I am just trying to think. You
9 know, if you are doing something with
10 the structure, yes, you may have to get
11 a building permit.
12 But to replace a sidewalk or to
13 repave a parking lot, no, I am not
14 familiar with required permits.
15 But, and if they had to have a
16 permit, I haven't seen any produced in
17 this one to say when they got the
18 permit or when it was applied for. So
19 it doesn't seem like there would be a
20 permit required.
21 BY MR. COGGIN:
22 **Q Now, the process of grinding is**
23 **essentially just taking sharp blades and**
24 **grinding it back and forth and leveling out the**
25 **segments of sidewalk, is that correct?**

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1 a front side of a wheelchair are small diameter.
2 So the higher the change in elevation, the
3 higher it is to the center of the wheel.
4 **Q Okay.**
5 A And the higher up it is, the more it is
6 going to impede that wheel as you are traveling.
7 It is worse if you are turning and your wheels
8 turn at an angle and you hit it. You can
9 typically have someone fall out of it if it tips
10 all the way over, if it is an electric one and
11 yeah, you are moving and it hits the wheel and
12 it continues forward. It would have to be
13 pretty hard to tip it over in a forward fashion,
14 but if it is turning, yeah, I can see that much
15 more likely than just straight on.
16 **Q And we talked about the Homeowners**
17 **Association, and the management association were**
18 **made aware of this in April 6th, I believe of**
19 **2017, and yet did not act on it until months and**
20 **months.**
21 **Is there anything in your knowledge**
22 **that would prevent that type of delay in working**
23 **on something, is there a series of measures you**
24 **have to do or is there permits or anything else**
25 **like that that has to be taken care of?**

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1 A Correct, it is just a grinding wheel.
2 I think it is larger blade, almost like a
3 concrete cutter; but you are just basically
4 grinding it down.
5 See, there is a company in Greenville
6 that used to be one of the only one's in the
7 state that did it. I am sure there is other
8 people in the state that do it now, because you
9 can see them a lot more places.
10 Different cities are designating a
11 certain amount of money every year to go they go
12 out and grind sidewalks to make them safer.
13 Charleston is one, I think Manning is one. I
14 have seen them in Beaufort County before. In
15 Beaufort County office buildings where they come
16 in and grind them down just to try to eliminate
17 that change in elevation, rather than cutting
18 all the concrete out and re-pouring it.
19 **Q I have seen it done a few times.**
20 **Actually my complaint is you can not find them,**
21 **and I guess I knew about that.**
22 **But in any case it only takes about 25**
23 **or 30 minutes to do it if I can remember**
24 **correctly, is that your experience?**
25 A Yes, it doesn't take long. Especially



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1 if you have multiples of them to do, it is just
2 taking a machine and shaving it down.
3 MR. COGGIN: I have no further
4 questions. Thank you for being here.
5 Nathan, it is good working with
6 you.
7 REDIRECT EXAMINATION
8 BY MR. AKERS:
9 Q Just a couple more, Dr. Durig, I will
10 be brief.
11 In your Affidavit, I am looking at
12 paragraph 8 where you begin discussing the ASTM.
13 Do you see that?
14 A Yes, I am getting there. Just one
15 second.
16 Yes.
17 Q So it is actually on the next page
18 discussing Section 5.7.1: Exterior walkways
19 shall be maintained so as to provide safe
20 walking conditions.
21 A Yes.
22 Q Do you see that? Okay.
23 So they don't provide -- this section
24 doesn't provide the elevation requirement,
25 correct?

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1 What we have is either depressed or
2 raised, depending on which side of the concrete
3 slab you want to be on.
4 Q And earlier we discussed the IPMC and
5 the ASTM, and to your knowledge neither have
6 been adopted by Beaufort County, the State of
7 South Carolina, or the City of Hilton Head, is
8 that correct?
9 A That is semi-incorrect. The State of
10 South Carolina recognizes the IPMC as an
11 applicable standard or building code; but they
12 consider it a permissive code, which means it is
13 up to the local entity to adopt it.
14 But the State of South Carolina does
15 recognize it. They just don't force you to
16 follow it like they do the International
17 Building Code or International Residential Code.
18 Q Is that the same story -- with what you
19 just mentioned that is with respect to the IPMC,
20 right?
21 A Correct.
22 Q And is that the same story with ANSI?
23 A No, I mean that would be different. I
24 mean the state -- I don't think they have it in
25 under the LLR requirements from building codes

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1 A 5.72 does, but 5.71 does not. It tells
2 you to just provide a safe walking surface.
3 Q It says here: Exterior walkway
4 conditions that may be considered substandard,
5 in need of repair include conditions in which
6 the pavement is broken, depressed, raised,
7 undermined, slippery, uneven or cracked to the
8 extent that pieces may be readily removed.
9 Did you ever remove any pieces from any
10 walkway while you conducted your evaluation?
11 A No, in this area there wasn't any
12 cracks.
13 I did photograph some cracked concrete
14 up by the parking lot, but I didn't try to
15 remove any of it.
16 Q So then would it be fair to say that
17 under 5.7 it is not unsafe?
18 A No, I would not. I mean this is
19 depressed.
20 Q But that is a different section,
21 correct, where you saw cracks?
22 A Yeah, a different section of the
23 walkway or sidewalk, yes. So that where it says
24 cracked to the extent the pieces may be readily
25 removed, no, that was not in this area.

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1 that you have to follow the ASTM standard, no.
2 They do with the ANSI 117 but --
3 Q And you said ANSI 117 was adopted by
4 the SC legislature in 1976, is that correct?
5 A Yes, I am saying the South Carolina
6 legislature adopted it in 1976. And if you look
7 at LLR's page on building codes and applicable
8 codes, it will list the ANSI 117.1.
9 Q So in the same manner that SC
10 recognizes the IPMC as permissive and it being
11 up to the county to adopt, is the same story
12 that the SC legislature while it adopted the
13 ANSI in 1976, it is also recognized as
14 permissive?
15 A No, not in the way I have read it. No.
16 Q Well, what is your perception of it?
17 A That it is required because it says I
18 think all buildings are required to comply with
19 ANSI A 117.1. Where the other one says the
20 Building Code Council says we recognize IPMC,
21 but it is up to the local entity to adopt it.
22 So that is completely different than
23 the state legislature adopting the ANSI A 117.1.
24 Q So then is the ANSI the standard of
25 care?



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1 A It is one. I mean it is required as an
2 ordinance. It is a law. I guess you would call
3 it a law. Is that a standard of care, I am sure
4 it is. But so is an industry standard from my
5 understanding, that the standard of care would
6 be --
7 **Q What is the industry standard?**
8 A I don't think there is the industry
9 standard. There is multiple. There is three
10 that we talked about, as well as other research
11 that all tells you what is safe or not safe. So
12 you would want to comply with those guidelines
13 as well.
14 I mean the industry standard is to
15 maintain it safe, to provide a safe walking
16 surface.
17 **Q Is complying with the combination of**
18 **all those guidelines you mentioned earlier, is**
19 **that your own standard or do you recognize**
20 **standard of care to evaluate in that manner?**
21 A I think you are asking a legal
22 question. It would be my interpretation that I
23 would comply with all of them, because if you
24 comply with the most strict and there is one
25 that is a little less strict, you comply with

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1 consistent; so I would say all three
2 apply.
3 BY MR. AKERS:
4 **Q Okay.**
5 **Well, that is all the questions I have.**
6 **Thank you.**
7 MR. COGGIN: Dr. Durig, thank you
8 very much.
9 THE WITNESS: I will waive.
10 MADAM COURT REPORTER: What is
11 your usual order?
12 MR. AKERS: Just an Etran, a
13 searchable Etran copy would be great,
14 and I would really appreciate it that
15 we need to expedite this.
16 MR. COGGIN: I will take it
17 expedited too.
18 (WAIVED SIGNATURE.)
19 (Whereupon, the deposition of
20 Bryan Durig, Phd., P.E. was
21 concluded at 12:09 p.m.)
22
23
24
25

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1 all of them if you comply with the most strict
2 cases.
3 We had that in a recent case where a
4 manufacturer said to do it more restrictive than
5 OSHA says to do it, because OSHA was published
6 50 years ago. And so you would comply with the
7 most restrictive and that way you automatically
8 comply with everything else.
9 But these all say the same thing, so
10 that is why I am saying -- I don't know where
11 you are trying to get to. But all the standards
12 have the same requirements on the 1/4 inch and
13 being a trip hazard, as does the research in the
14 material I provided.
15 **Q Is it your testimony today to a**
16 **reasonable degree of engineering certainty**
17 **that -- strike that.**
18 **Is it your testimony today that you**
19 **can't point to a single definitive or**
20 **authoritative source that sets the industry**
21 **standard or the standard of care for walkways in**
22 **maintenance and construction?**
23 MR. COGGIN: Object to the form.
24 THE WITNESS: I would say all
25 three of these do. I mean they are all

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C E R T I F I C A T E

1
2
3 STATE OF SOUTH CAROLINA:
4 BEAUFORT COUNTY:
5
6 I, Ceil Weser, CSR and Notary
7 Public in and for the above county and state, do
8 hereby certify that the foregoing testimony was
9 taken before me at the time and place
10 herein before set forth; that the witness was by
11 me first duly sworn to testify to the truth, the
12 whole truth, and nothing but the truth, that
13 thereupon the foregoing testimony was later
14 reduced by computer transcription; and I certify
15 that this is a true and correct transcript of my
16 stenographic notes so taken.
17 I further certify that I am not of
18 counsel to either party, nor interested in the
19 event of this cause.
20
21 *Ceil Weser*
22
23 Ceil Weser, CCR
24 Notary Public
25 Beaufort, South Carolina



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IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

CASE NO. 2019-CP-07-00554

Nicholas Sanfilippo,

Plaintiff,

vs.

Hide Tide Associates,

Defendant.

-----/

Deponent: Robert Nathaniel Dunlap
"Rocky"

Date: July 1, 2020



ORIGINAL

Time: 10:01 a.m.

Place: The Law Offices of Gary Coggin
4 Dunmore Court, Suite B-201
Hilton Head, South Carolina

Reporter: Theresa D. Saxon
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1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 Robert Nathaniel Dunlap,
3 having been produced and first duly sworn as a
4 witness, testified as follows:

5 DIRECT EXAMINATION

6 BY MR. COGGIN:

7 Q Mr. Dunlap, my name is Gary Coggin.
8 I'm an attorney from right here in Hilton Head
9 Island, and I'm with you today because I
10 represent Mr. Nicholas Sanfilippo who, on or
11 about October the 26th, 2017, tripped and fell
12 while he was walking on the sidewalk in the area
13 of Building 1000 at the Estate at Westbury. And
14 I asked you to come to my office today to
15 discuss various matters that attach in some way
16 to his trip and fall.

17 Have you ever had your deposition taken
18 before?

19 A Yes.

20 Q Yeah, okay, so you're familiar with
21 the -- the process and so forth. Okay.

22 There's just a couple things I just
23 want to go over, and the first thing is, just
24 listen carefully to my questions. If you don't
25 understand something I say or you don't

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 understand the gist of what I'm saying or
3 something, just ask me to repeat myself or even
4 ask me to rephrase it or something like that.
5 I'm happy to do so.

6 And from time to time, you'll hear the
7 gentleman that's attending by telephone, and
8 that's Doug Leadbitter, from time to time you
9 may hear the gentleman Doug Leadbitter who's
10 representing the Estate at Westbury object to
11 the form of the question. That is a -- you
12 know, that's an objection you hear quite a lot.
13 You still have to answer the question. And
14 sometimes I'll rephrase my question and so forth
15 like that.

16 And the only other thing I can think of
17 to tell you is to answer my questions audibly,
18 no "uh-huhs" or shaking your head or something
19 like that. If you can do it "yes" or "no,"
20 that's fine.

21 Do you have any questions?

22 A No.

23 Q Okay. I want to thank you for being
24 here.

25 Give me your full name, if you would.

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A Robert Nathaniel Dunlap.

3 Q l-a-p?

4 A l-a-p.

5 Q Okay.

6 A Junior.

7 Q Okay. And where do you live?

8 A 8 Winding Trail Lane, Hilton Head
9 Island 29926.

10 Q How long have you lived there?

11 A I think 14 years.

12 Q And I think you told me you're from
13 Charleston originally.

14 A Correct.

15 Q Were you born in Charleston?

16 A I am from Charleston.

17 Q You grew up there?

18 A I did.

19 Q Where did you go to school?

20 A Rivers High School.

21 Q Any -- any college or anything like
22 that?

23 A University of South Carolina.

24 Q USC, okay. What year did you graduate?

25 A I -- I didn't finish.

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 Q Okay. Were you in the military?

3 A Yeah. United States Marine Corps
4 Reserve.

5 Q Okay. Six years?

6 A Six long ones.

7 Q What kind of work did you do?

8 A I was with Bell South my entire career.
9 I started as a cable splicer helper and worked
10 up to general manager of the cellular
11 department, covering all of South Carolina.

12 Q Oh, is that right? Where were you
13 located?

14 A Columbia.

15 Q Okay. So I was going to ask you where
16 you lived before you came to Hilton Head, it was
17 Columbia then?

18 A Yeah.

19 Q So you retired to Hilton Head?

20 A I did.

21 Q What I wanted to talk to you about
22 today is that at some period of time during when
23 Mr. Sanfilippo fell and was injured, I believe
24 at that time you were the vice president of the
25 board of directors; is that right?

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A I think so.

3 Q This would have been --

4 A You said he fell in '17?

5 Q October I believe of 2017, yeah. I
6 have it here. I'll give you the sheet in just a
7 second, but --

8 A Yeah, I think I was at that time.

9 Q Okay. All right. How long were you on
10 the board in terms of years at the Estate at
11 Westbury?

12 A Two and-a-half.

13 Q Okay. And what years were they?

14 A June of -- June of '19 -- June of '18,
15 two years back. I came off in June of 2018.

16 Q 2019, June 2019?

17 A '18.

18 Q Oh. You came off?

19 A Off.

20 Q So it was two and-a-half years or back
21 from then?

22 A Yeah.

23 Q What positions did you hold on the
24 board?

25 A I was vice president I think the entire

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 time.

3 Q To serve on the board, what kind of
4 qualifications do you have to have? Did you
5 have to be a property owner? What were the
6 qualifications?

7 A You had to be a property owner, but you
8 didn't have to live on property.

9 Q Okay. Did they elect anybody into --
10 as a board of directors that was not a property
11 owner or was -- lived on the site? No?

12 A I'm sorry, repeat that.

13 Q Did you have anybody that lived on the
14 site that served on the board?

15 A At the time I was on the board, no.

16 Q What length is the term?

17 A Well, it -- it varies.

18 Q Okay.

19 A I think two to three years, so that you
20 don't have the whole board leaving at the same
21 time.

22 Q Staggered.

23 A So you have like two leave one year and
24 three the next year or whatever.

25 Q And were you elected or appointed?

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A Elected.

3 Q Tell me how that -- that worked. It
4 was just like a regular class election or
5 something, where you had people who decided they
6 were going to run, or how did that work?

7 A You submitted an application.

8 Q Okay.

9 A And then the homeowners, I think there
10 are four hundred and some odd, vote.

11 Q Now, when you were on the board of
12 directors, you had -- each board member had one
13 vote; is that correct?

14 A Correct.

15 Q And how many people were on the board
16 at one time?

17 A Five, if I remember correctly. Yeah, I
18 think it was five.

19 Q Now, at the time of -- that we're
20 talking about where the predicate for this whole
21 case took place, and that was October the 26th,
22 2017, that's the trip and fall of
23 Mr. Sanfilippo, you were the vice president at
24 that time, at least that's what it says in the
25 notes. You're no longer on the board. Did you

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 just get tired? Did you quit? What happened?

3 A No, it was time to rotate off.

4 Q Okay. You only -- you had --

5 A Well, with one caveat. Let me -- let
6 me say this about that. We had had the Bannon
7 Law Firm --

8 Q Yeah, yeah, I know them.

9 A What's her -- Meredith? I think
10 Meredith Bannon.

11 Q Meredith's the wife, yeah.

12 A Yeah. She used to attend our meetings
13 to make sure we were doing everything, you know,
14 according to law and aboveboard.

15 And it appeared that in the past, the
16 boards prior to us had held an election, and if
17 you didn't get 51 percent of the votes, in other
18 words, if you -- if you didn't have a quorum,
19 then you would just fall back on however many
20 votes, you know, came in.

21 And if I got the most votes, I got on
22 the board. Whoever got the second most votes
23 went on the board.

24 Well, when Mrs. Bannon -- when it was
25 coming -- I think coming up for an election or

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 whatever, she dug into that.

3 And she said, "No, that's not the way
4 you can do it. You have to -- if you don't get
5 a quorum, then the second fallback has to be
6 another X percent."

7 So based on that criteria, it appeared
8 that those of us currently serving on that board
9 had not met that threshold. So we said, "Well,
10 what should we do?"

11 Her legal opinion was to hold an
12 election and elect board members according to
13 her definition of what the bylaws said, which is
14 what we did. And that was I think June of that
15 year. And when we did, they elected new board
16 members.

17 Q I got you. Kind of a tortured
18 interpretation of the Horizontal Property Act is
19 what that was, to be honest with you.

20 A And frankly, I had already served
21 enough time. I wanted to come home anyway.

22 Q No, I understand.

23 I noticed that you -- from what I saw
24 you were very active on the board.

25 A Yes, yes.

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 Q You know, you -- you seconded votes and
3 you did things and so forth.

4 Who is Warren Johnson?

5 A He was the president.

6 Q Okay. Is that the Warren Johnson
7 that's out in Hardeeville, he's an attorney?

8 A No. He's in North Carolina.

9 Q And that's why he was always attending
10 by telephone?

11 A Correct.

12 Q Yeah, okay. Can you -- this is kind of
13 a wide ranging question. What was the function
14 of the board of directors?

15 A Well, I guess it was -- first and
16 foremost, was to make sure that the moneys
17 collected were protected and spent, you know,
18 with a lot of oversight; secondly, to improve
19 the property; and, thirdly, was to manage the
20 property management company that was there every
21 day running the -- the facility.

22 Q Okay. That -- that kind of leads right
23 into the next question. When you were there,
24 who was the property management company? Was it
25 High Tide, or was it somebody --

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A It was High Tide.

3 Q Was there anybody else there while you
4 were there?

5 A No.

6 Q Okay. The meetings were one time a
7 month?

8 A Yes.

9 Q Okay. And it appears to me from what I
10 can see, you went to every meeting; is that
11 correct?

12 A I don't think I missed -- I don't -- I
13 missed one, but I had to -- I attended that by
14 phone, because I was coming back from a medical
15 procedure in Savannah.

16 Q Okay. While you were on the board, was
17 there ever an extended period of time the board
18 didn't meet?

19 A No.

20 Q And that's through 2017 and 2018?

21 A Yes.

22 Q Okay. Would they ever miss a month,
23 say "We've got the Fourth of July coming up,
24 we'll pick it up in August," or was it pretty
25 assiduous, that you'd --

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A No, we were pretty good about not
3 missing a meeting. Now, we might change the
4 date, but I think for the most part, we met once
5 a month.

6 Q And who was responsible for the keeping
7 of the minutes of the meetings? Now, I see
8 different names, but really, what I'm asking is,
9 was that a -- a member of the board, or was that
10 somebody appointed by High Tide, or how did that
11 work?

12 A I -- I think the primary responsibility
13 fell on the secretary of the board.

14 Q Okay.

15 A And I can't remember her name. I'm
16 sure you have it in some of the minutes.

17 Q Yeah, I do.

18 A Very nice lady. She usually --

19 Q Debbie Schumann?

20 A Yeah. Debbie usually attended by phone
21 as well.

22 But I think there was a collaborative
23 effort once Debbie put the minutes together,
24 that the onsite property manager would maybe
25 look them over and add to or, you know,

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 whatever, before we sent them out.

3 Q Okay. You would have them printed and
4 so forth like that?

5 A When you said "printed," we didn't mail
6 a copy, but --

7 Q Well, you said you sent them out. Oh,
8 you meant you emailed them to the members?

9 A Yeah, I think we emailed them, or we
10 sent them to the website so they could access
11 them.

12 Q Okay. Now, where were the minutes
13 kept? And what I'm saying is that Debbie would
14 take the meeting, but you would have, say,
15 minutes for 2017. Where were they?

16 A I'm going to say I assume they were in
17 the office.

18 Q Okay. But you don't -- you don't
19 really know?

20 A Each of the board members got a copy,
21 but I don't know where it would -- quote,
22 unquote, the official copy, you know, was kept.

23 Q And that's what I'm asking. Were they
24 kept year to year, or it was something where
25 they would get tossed every couple of years or

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 what?

3 A I don't know of any time that we talked
4 about tossing them --

5 Q Yeah, okay.

6 A -- because there were occasions where
7 the on-site manager would go back and refer to,
8 you know, prior minutes a year or longer back.

9 Q Okay. So upon information and maybe
10 knowledge, do you think they might have been
11 kept at the -- on site?

12 A That's the only place I know they could
13 have been. I don't think they were at High
14 Tide's office, you know, off-site office.

15 Q Now, when you say "on site," you're
16 talking the office right there?

17 A At the Estate at Westbury.

18 Q Yeah, okay.

19 Do you still own property there?

20 A Yes.

21 Q And how many units do you have?

22 A I've got one.

23 Q Yeah. It's a nice -- I have to say,
24 it's a nice place, I think.

25 A It could be nicer, but yeah, that was a

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 good investment for us.

3 Q Yeah, yeah. Okay.

4 When they were keeping the minutes, did
5 the secretary, did she use shorthand? Did she
6 type like Ms. Saxon is doing here, you know,
7 with stenotype?

8 A I have no idea. She was by phone.

9 Q Oh, she was by phone, that's right. I
10 apologize. I forgot that. Okay.

11 Is it possible there were -- besides
12 hard copies or electronic copies, there were
13 audiotapes or anything like that?

14 A There were audiotapes. Well, I say
15 "tapes." It was recorded, because Debbie would
16 refer back to the recordings to get details that
17 she may have missed.

18 Q Do you have any idea where those --
19 copies of those tapes are or anything?

20 A I don't.

21 Q Okay. And who -- who would know, do
22 you have any idea who might know?

23 A High Tide.

24 Q Yeah. And how about Debbie, I guess
25 she would know too, right?

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A She -- she would probably know.

3 Q Is she still around? She -- you said
4 she was off site. Where is --

5 A Off site.

6 Q Yeah. Where is she at?

7 A I think she's in North Carolina too --

8 Q Okay.

9 A -- or maybe upstate South Carolina.

10 Q Okay.

11 A I mean, she's not like in Pennsylvania
12 or anything.

13 MR. COGGIN: Off the record.

14 (Off the record.)

15 BY MR. COGGIN:

16 Q Now, when you had board meetings, were
17 they open to everybody?

18 A Yeah.

19 Q I mean, the residents could come?

20 A Encouraged them.

21 Q Okay. Were there any residents that
22 actually would come from time to time?

23 A We averaged five or six.

24 Q Was it the same people all the time?

25 A Usually.

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 Q Do you remember any names?

3 A No. Well, I do remember one, Janet
4 Spinelli.

5 Q I've seen that name here, yeah. And
6 she was a resident?

7 A She was a resident, her and her
8 husband.

9 Q Are they still around?

10 A Yes. She's on the board now. Well, I
11 think she just got elected off.

12 Q Oh, okay. She was -- she was a
13 resident that actually owned property there?

14 A Yes.

15 (Whereupon, Plaintiff's Exhibit
16 Number 1 was marked for
17 identification.)

18 BY MR. COGGIN:

19 Q Mr. Dunlap, I'm showing you what's been
20 marked as Plaintiff's Exhibit Number 1 for
21 identification. And that is the Board of
22 Directors -- the Minutes for the Board of
23 Directors Meeting on August the 22nd, 2017.

24 MR. COGGIN: And, Doug, I haven't
25 forgot about you. What I'll do is post

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 these things to you as soon as the -- as
3 soon as this is over. I'll gather them
4 together and put them in the mail. Is that
5 okay?

6 MR. LEADBITTER: That will be fine.

7 BY MR. COGGIN:

8 Q Okay. As I said, this is from the
9 board of directors meeting of August the 22nd,
10 2017. And what I'm interested in is, you do
11 recognize that; is that right?

12 A Well, I didn't commit all the minutes
13 to memory --

14 Q Yeah, but it --

15 A -- but it -- it looks to be --

16 Q It does look like it was from that?

17 A It looks familiar.

18 Q Okay. And let me direct you to Number
19 II under Old Business.

20 A Yes.

21 Q And that talks about installing 20 new
22 cameras around the property to handle areas of
23 need. And there was a motion to purchase and
24 install, and it was seconded by you.

25 A Yes.

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 Q Okay. How many cameras were already in
3 place?

4 A I have no idea.

5 Q Okay. Do you know where the cameras
6 were in place, by any chance, where they were
7 located?

8 A No idea.

9 Q Okay. Who would know?

10 A High Tide.

11 Q Anybody else besides High Tide?

12 A Yeah. This lady right here, Theresa
13 Childers, because she was the on-site manager.

14 Q That was -- she was with High Tide,
15 right?

16 A Yep.

17 Q Okay, thank you. Now, the decision to
18 put the new cameras in place was done on August
19 the 22nd, 2017. Do you remember when the work
20 started, when it finished or anything like that?

21 A I don't think it ever finished.

22 Q Oh, is that right?

23 A Yeah.

24 Q Well, tell me happened.

25 A Well, I take that back. That was '17.

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 Q Yeah.

3 A I'm drawing a bit of a blank as to
4 whether we actually put all 20 in.

5 If my memory serves me correct, we put
6 some more in, but I think there may have been
7 some more to go in. Because I -- I remember
8 that, because some of the people, when I say
9 "some of the people," the people who attended as
10 owners, you know, to the board meetings, they
11 would -- some of those wound up being on the
12 board when I left.

13 In one of the few minutes that they put
14 out, I was struck by the fact that they
15 cancelled the order to add more cameras, which
16 when we were on the board and they were sitting
17 there as homeowners, they were, you know,
18 adamant about adding more cameras for security.

19 So we were, in my mind, responding to
20 their request to add more cameras, but then when
21 they got on the board, they cancelled the order.

22 Q That's interesting.

23 A Yeah. It kind of baffled me too,
24 but --

25 Q Now, let me ask you about the cameras,

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 because -- and it's not my type to beat anybody
3 up in a war of words. Who would know where they
4 were, would it be High Tide, where they were all
5 placed, do you think? I think you said that,
6 yeah.

7 A Well, like I said, Theresa Childers.

8 Q Okay.

9 A I remember them furnishing us on the
10 board, I think, a diagram of the property,
11 showing where they were and where the new ones
12 were to go.

13 Q And that's the -- High Tide did that?

14 A Yeah.

15 Q Okay.

16 A And/or the company, you know, that made
17 the proposal.

18 Q That's the next thing I was going to
19 ask you. Do you remember the name of the
20 company that was involved in that?

21 A I think it was out of Charleston.

22 Q Okay. And who would know, and I think
23 I know the answer, High Tide?

24 A High Tide.

25 Q Okay. And again, you think that would

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 probably be Ms. Childers?

3 A Yes.

4 Q Okay. Is she still around?

5 A No. Well, I mean --

6 Q Well, High Tide's not around, yeah,
7 so --

8 A High Tide's here, and she left High
9 Tide, and she was replaced by Betsy somebody.

10 Q Okay. She was replaced by -- by Betsy.
11 Did Theresa go somewhere, or is she still in the
12 area, do you have any idea?

13 A She didn't live nearby. She lived I
14 think almost like an hour away.

15 Q Okay. Still in the state?

16 A She lived in Georgia.

17 Q Oh, okay. All right.

18 A I think.

19 Q No, that's fine. I appreciate the
20 information.

21 And here's something that I -- a number
22 of things that I was interested in, and you may
23 or may not know this. Who monitored the
24 cameras? How did that work? You know, did you
25 have a room like at High Tide where somebody sat

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 there in security and looked at them, or what
3 happened?

4 A No. It would -- the videos were just
5 recorded to like a hard drive or something
6 somewhere, so that if something happened, they
7 could go back and I guess pull up that day and
8 that time and look at them on demand.

9 Because we had a lot of people -- I
10 take that back, not a lot, but we had some
11 people who tried to enter the front gate and
12 damaged the gate. And the video, you know,
13 showed.

14 Now, the cameras at the front gate
15 weren't ours, but that was one example of some
16 of our owners or tenants being involved in the
17 video surveillance.

18 Now, we've had -- on property, we had
19 people complaining about, you know, people that
20 shouldn't have been there roaming around and
21 doing things that violated the rules, and they
22 were able to pull up the video and, you know,
23 prove who did it.

24 Q Okay. That's kind of one of those
25 questions, and I'm really naive about these

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 things, where does one go or who does one
3 contact when something like this happens?
4 That's the way I figured it worked, that when
5 something like this happens, they pull this
6 video up. Do you have any idea who that was?

7 A Yeah. That was the on-site manager.
8 She had access to it.

9 Q And who was that? And I apologize
10 for --

11 A Well, it was Theresa at one time.
12 Before Theresa, it was -- I can't remember her
13 name, but she left us and went down to Shelter
14 Cove. I think she may still be at Shelter Cove.

15 Q Okay.

16 A But the on-site manager had access to
17 those videos.

18 Q Where were they physically at -- or am
19 I just showing my naivete on these things -- you
20 know, the -- was there a --

21 A I don't think they were in the cloud.

22 Q That's what I'm wondering, yeah, you
23 know. You knew what I was thinking there.

24 A I don't really know if we had an
25 on-site server, you know, like Hillary had.

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 MR. COGGIN: Well, we saw what happened
3 there.

4 Okay. It's a whole line of questioning
5 that I really had no idea about, and I just
6 wanted to know. And essentially, that's
7 what I thought, is that if there was this
8 footage, you'd have the time or something
9 like that, you could pull those up.

10 And we can go off for a second.

11 (Off the record.)

12 BY MR. COGGIN:

13 Q Now, let me ask you this then. Mr.
14 Sanfilippo's fall took place in October of 2017.
15 Was there any video of that fall? Anybody have
16 any idea about that?

17 A I've got to tell you, the fact that
18 somebody fell and hurt themselves I think is
19 news to me. I could be wrong, we may have
20 discussed it, but I don't recall anybody saying,
21 "Well, yeah, we pulled up the video and we don't
22 have it on video" or "We do have it on video."
23 I just don't remember.

24 The only thing I remember about
25 somebody falling was a lady in a wheelchair,

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 believe it or not, around by --

3 Q Well, maybe you ought to give me that
4 name so I can --

5 A Well, she didn't get hurt, thank
6 goodness.

7 Q I'm kidding you.

8 A But I don't remember this individual's
9 name, or anything, I don't think, about it.
10 I --

11 Q No, if you don't remember, you don't
12 remember that, so --

13 A Yeah.

14 Q Is there anybody else there that you
15 can think of that would have knowledge of
16 something like that? Were there any guards that
17 were on site or security?

18 A The only security we have was at night.

19 Q And this happened at ten in the
20 morning.

21 A And that was -- and that was sort of
22 random at best.

23 Q Okay. Anything else at all, anything
24 you can think of?

25 A No.

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 Q I can actually -- believe it or not, I
3 can see that happening, I mean, just not
4 knowing, you know, particularly if he didn't
5 make a big fuss about it or anything like that.
6 Okay. But you can't think of anything else. I
7 looked through the records, and I didn't see
8 anything, any remarks about it or anything like
9 that.

10 Can you think of anybody at all that
11 would know more about that than anybody else
12 would?

13 A Well, in your search of the records --
14 well, never mind, because this is the minutes --
15 this is the minutes --

16 Q Yeah.

17 A -- from August of '17, and it happened
18 before or after this?

19 Q After.

20 A After this, okay.

21 Q Yeah. But see, there were no -- your
22 cameras on site and so forth like that, you
23 know.

24 What I'm trying to figure out, to be
25 honest with you, where the cameras were, what

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 happened, you know, and if something like that
3 just disappeared into the nether or we have no
4 idea, you know.

5 A Well, the fact that Theresa was onboard
6 in August of '17, then I would say she would be
7 the main one that would know that.

8 And I just -- I've just got to tell you
9 that I remember there's diagrams of where the
10 cameras were installed and where they were
11 proposed to be installed. I remember that for
12 sure.

13 Q Okay, okay.

14 A So I would hope that it would still be
15 in the record somewhere.

16 Q That's -- that's really all I need. If
17 you don't remember anything, you don't remember
18 anything. And me and you are probably close to
19 the same age, I know what that's like, so I know
20 exactly what you're saying.

21 How about anybody from High Tide that
22 might know anything about it? Or is Theresa
23 High Tide? And I apologize.

24 A Theresa's High Tide.

25 Q Yeah, okay.

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A Doug Skelly, who is the owner of High
3 Tide, he -- he's got a really good memory, and
4 he'd take -- he used to take a lot of notes.

5 Q Okay.

6 A So I would say he would be a secondary
7 person that might remember.

8 Q Well, I'll probably be talking to Doug
9 pretty soon about it. Okay.

10 And I have down here this video was
11 inhouse. What I'm actually more interested in
12 than anything is what company actually had that
13 and, you know, controlled that and so forth like
14 that and who you would talk to and so forth like
15 that, so -- but I'll talk to -- Theresa, I'm
16 sure would have it.

17 Was that on a 24-hour feed, or do you
18 have any idea, or did it shut down at night, do
19 you have any idea about that?

20 A No, no, I think it was 24-hour, because
21 we had stuff happening all the time.

22 Q Okay. But you don't remember who the
23 vendor was or anything like that?

24 A No.

25 Q Okay. Oh, the other thing is, when you

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 would pay for that, any of these installations
3 or anything like that, who in accounting would
4 handle that, pay vouchers, billing and so forth
5 like that? Was there somebody on the staff or
6 somebody with High Tide or somebody like that
7 that actually would pay bills, and you'd submit
8 invoices to them, and they'd pay out of the
9 funds and so forth? Who would handle that?

10 A Well, we on the board would authorize
11 payment, and I am assuming that the process
12 would be that Theresa would send it to High
13 Tide's office for payment.

14 Q Okay.

15 A I'm pretty sure she didn't make
16 payments out of that local office, you know, of
17 any magnitude. And she may have had some petty
18 cash stuff, but the big dollar amounts went --

19 Now, Mark Megliore, you see his name.

20 Q Yeah, I know Mark, yeah.

21 A Well, Mark's the finance guy, and he
22 kept his thumbs on -- on the finances, and he
23 produced all the financial reports.

24 Q Okay. Okay. The other thing --

25 That kind of does it for -- and I

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 appreciate you working with me on the videos,
3 and it's given me something I can look at
4 anyway. There may be something out there, and
5 there may not be. You know, it's been a while.

6 And the other thing is, in looking
7 through the board of directors meeting there, I
8 saw that in addition to installing security
9 cameras, there was one you -- you approved an
10 insurance payment request, which doesn't --
11 insurance settlement, which has nothing to do
12 with this here, pine straw application, request
13 for a new blower, I think you did that, voted
14 for -- voted on blinds and so forth.

15 So it looks to me like the board was
16 pretty much involved in almost every aspect of
17 things at the Estate at Westbury, would you kind
18 of agree with that, or was there things you guys
19 were just told to stay out of?

20 A Well, we were involved in everything
21 that was brought to our attention. And because
22 we didn't live there, you know, if something
23 happened let's say last week and nobody told us
24 about it, we wouldn't be involved.

25 Q And that raises a question that was

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 down the road for this, and I'll ask you right
3 now. What was the process of something being
4 brought to your attention?

5 A. It would be in the board meetings. And
6 typically, it came from the on-site manager, in
7 this case, Theresa.

8 (Whereupon, Plaintiff's Exhibit
9 Number 2 was marked for
10 identification.)

11 BY MR. COGGIN:

12 Q Mr. Dunlap, I'm showing you what's been
13 marked as Plaintiff's Exhibit Number 2 for
14 identification. And for the record, that's the
15 Estate at Westbury Homeowners Association Board
16 of Directors Meeting Minutes for September the
17 26th, 2017. So we've moved already a month in
18 our discussion here.

19 Now, I'm going to direct your
20 attention -- oh, yeah, I was going to ask you
21 this: As a board member and an owner, did you
22 ever take it upon yourself at any time to
23 periodically walk the property and assess what
24 was going on or anything like that and make
25 notes for maintenance and stuff like that?

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A Yes. Yes.

3 Q Did you do that on a regular basis?

4 A It was random.

5 Q Okay.

6 A But I would typically arrive 20 minutes
7 or more prior to the board meeting and mostly
8 ride around, but on some occasions, if I had
9 more time, I would walk.

10 Q And you would assess the property,
11 upkeep and so forth like that?

12 A Yes, and any violations.

13 Q How about dangerous areas or dangerous
14 conditions?

15 A Yes, I mean, obviously if I saw
16 something.

17 Q Yeah, areas that you thought needed
18 repair?

19 A Yeah.

20 Q Okay. That, from what I can gather,
21 was really something you took on yourself, it
22 wasn't part of your job or anything like that,
23 or did the other members do the same thing?

24 A Some did. But again, because Warren
25 was out of town and Debra was out of town, that

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 typically -- the only people usually on site was
3 Carolyn, Ralph, and myself. And Ralph probably
4 did as good or maybe a better job than I did
5 about that.

6 Q And Ralph is Ralph Paine?

7 A Yes.

8 Q Where is Ralph?

9 A He's still on the board. He's the --
10 he's the treasurer, I think.

11 Q Okay. Is he still -- does he live
12 around here?

13 A He does. He lives in Bluffton.

14 Q Okay. Do you know anything more
15 specific than that? Does he have an address or
16 anything like that?

17 A I'm sure he does, but I don't know what
18 it is.

19 Q Now, what I'm going to do is direct you
20 down, Mr. Dunlap, to what's been marked as,
21 let's see, "Old Business." Look under Old
22 Business. And under the Old Business, Number 6,
23 you can see it's marked major, M-a-j Concrete.

24 A Uh-huh.

25 Q And I don't -- do you remember that?

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 And I can -- I'm going to read it into the
3 record: "A discussion ensued regarding the
4 concrete work needed around the property for
5 safety reasons. Work will begin after board
6 approval. Rocky Dunlap motioned for approval,
7 Ralph Paine seconded. Unanimous."

8 I see your names connected quite a lot
9 in this stuff, and it seems to me you guys were
10 the two most active on the board. Do you
11 remember that discussion or what was going on
12 with that?

13 A Yeah. And I'm -- I'm surprised it
14 wasn't in this minute meeting, minutes --
15 meeting minutes.

16 Q Yes, because it was Old Business.

17 A Well, I think, though, that it was
18 because of the lady in the wheelchair, and --

19 Q See, I looked back too myself, and I
20 said, where is it at in the Old Business, and I
21 didn't see it either.

22 A You didn't?

23 Q No. So you're -- we're thinking along
24 the same lines. Thank you.

25 A Yeah. If my memory serves me correct,

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 that the -- the uneven walkway, concrete
3 pathways, that came to light because of the lady
4 in the wheelchair.

5 Q Okay. And she had -- she was in the
6 wheelchair and just hit one of these things, and
7 it knocked her right over?

8 A Yeah.

9 Q She was pretty tough and just bounced
10 up and she was on her way?

11 A Well, luckily, I think there was
12 somebody nearby who went over and rendered
13 assistance. But with that happening is -- is
14 when I said, "You've got to get this fixed."

15 Q Who was the -- who was the old lady, do
16 you remember?

17 A I have no idea.

18 Q Was it a resident?

19 A As far as I know.

20 Q Yeah. Okay. And -- and when did you
21 first bring that up about getting it fixed?

22 A The second I heard about it.

23 Q Yeah. But that was before -- what I'm
24 saying is, it was before this period of time
25 here?

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A I would imagine.

3 Q September the 26th. Okay. Yeah.

4 A Yeah, because here they actually
5 mention a concrete company. So before we would
6 even get to the point of bringing in a concrete
7 company, it would have had to have happened, and
8 we would have had to say, "Go get estimates to
9 get it fixed."

10 Q Yeah. Where do you see about a
11 concrete company? What I see is --

12 A Number 6.

13 Q "A discussion ensued regarding the
14 concrete work needed around the property for
15 safety."

16 A Yeah. M-a-j, that's -- Maj, that's the
17 name of a concrete company.

18 Q Oh, okay. I thought it meant major
19 concrete.

20 A No, no, no. It's actually a concrete
21 company.

22 Q Where are they at? That's interesting.
23 I didn't know that.

24 A Yeah, you'll see their trucks all over
25 the island. I see them all the time.

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 Q Okay. Just walk me through what
3 happened after that, because I'm very curious
4 about that. I saw that, and then I didn't see
5 anything else, you know, in the later meetings
6 or anything else like that. Do you remember
7 what happened or anything like that?

8 A I'm going to have to say I assumed they
9 did the work and we paid them.

10 Q Okay. Now --

11 A There would be no reason not for them
12 to have done the work.

13 Q Okay. Do you know when they did the
14 work?

15 A No idea.

16 Q Okay. And what do you -- what do you
17 think that work would have consisted of? And I
18 -- I kind of know the answer, and I'll tell you.
19 I'm not trying -- it's not a trick question or
20 anything like that.

21 A Yeah, yeah. I've seen this happen a
22 lot of places, all over the island, actually.
23 And I work at Sea Pines Golf Course. We do it
24 at Sea Pines Golf Course.

25 When concrete becomes uneven, it looks

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 like -- I'm assuming some sort of grinder that
3 they bring in --

4 Q I always call it a shaver.

5 A Shaver, grinder.

6 Q Yeah, yeah.

7 A And they shave off that rough edge and
8 to make it as smooth as you can.

9 Q Rocky, that happened out here, when I
10 came into this place about six years ago or
11 something like that.

12 And the first thing I told them, I
13 said, you know, "I don't want to be a bad
14 client, but you're going to have to fix this,
15 because people are going to come into the
16 office, and some of guys don't walk that well.
17 And then I've got to make them come up the
18 stairs." I said, "I don't want them suing me."

19 A Yeah.

20 Q You know, so they got it out right
21 away.

22 That was the only thing I could think
23 of too.

24 You don't remember when it was done or
25 anything else like that?

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A No.

3 Q Okay. That -- that is what I thought
4 it was you were talking about.

5 Were you down at the -- and I have to
6 digress again. Were you down in Sea Pines for
7 the tournament?

8 A No.

9 Q Oh, you don't work for that?

10 A Well, I -- I manage 44 starters and
11 rangers at --

12 Q Oh, okay, so you're still pretty busy
13 then.

14 A Yes.

15 Q I took you away from your work today.
16 I'm sorry.

17 A Well, I -- I work part-time. I'm not a
18 full time employee. But no, I wasn't down there
19 for the tournament.

20 MR. COGGIN: We can go off the record.

21 (Off the record.)

22 BY MR. COGGIN:

23 Q You brought that up at a meeting before
24 is what you're saying; is that right?

25 A I don't know that I brought it up, but

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 it came up.

3 Q At the meeting?

4 A When we were advised that that lady
5 fell in the wheelchair.

6 Q And what you're saying, though, is it
7 must have been before September the 26th, is
8 what you're saying?

9 A It would have to have been.

10 Q Yeah, okay. I'll have to look back
11 through the records and see if I see anything
12 like that. Okay.

13 (Whereupon, Plaintiff's Exhibit
14 Number 3, 4, 5, and 6 were marked
15 for identification.)

16 BY MR. COGGIN:

17 Q For the record, I'm showing you what's
18 been marked as Plaintiff's Exhibit Number 3,
19 Number 4, Number 5, and Number 6 for
20 identification.

21 This has been identified to me by
22 Mr. Sanfilippo as where he fell. And do you
23 remember, and this was -- he fell in October of
24 2017. Do you --

25 It's unfair of me to ask you if you

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 recognize any of that, because obviously you
3 don't, but I'm asking you anyway, do you
4 recognize any of that at all?

5 A I do not.

6 Q Okay.

7 A And I'm trying to remember where
8 building -- you said --

9 Q 1000.

10 A -- 1000, I'm trying to remember where
11 that building actually is.

12 Q It's kind of to the back. I've been
13 out there. It's kind of to the back.

14 A Yeah, my -- my building's in the very
15 back too.

16 But as you're riding down the road
17 heading to the end, is it on the left?

18 Q No. It's kind of riding down the road
19 and it's off to your right, I think.

20 A Oh, okay.

21 Q It seems to me you go around it.

22 And I've only been there a couple of
23 times, so I really can't -- I can't tell
24 for sure.

25 But I assume you would agree, though,

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 that that's the type of thing that they were
3 trying to shave?

4 A It's hard for me to tell. That could
5 be just dirt, you know. I don't know whether
6 it's raised or it's just dirt.

7 Q Yeah. But if it was --

8 MR. LEADBITTER: Excuse me. I'm at a
9 little bit of a disadvantage, I'm not --
10 because I can't -- are we looking at
11 photographs?

12 MR. COGGIN: Yeah, we are. And I
13 apologize, Doug. We're looking at
14 photographs of where Mr. Sanfilippo
15 indicated that he fell.

16 And I asked Mr. Dunlap, and he said he
17 couldn't tell if it was raised or it was
18 dirt or whatever it was.

19 MR. LEADBITTER: Right, I -- I got
20 that. I just wasn't sure of what, because
21 you never said photographs. So that's fine,
22 I got it.

23 MR. COGGIN: I apologize.

24 BY MR. COGGIN:

25 Q And I was asking you if you knew where

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 those were taken. These are outside the 1000
3 building, but there's really no point -- a
4 reference point or anything like that. Okay.

5 Well, let me ask it this way. If
6 that's not dirt, would you consider that to be
7 raised?

8 A I have no reference.

9 Q How about -- how about right there?

10 A I mean, if somebody put a yardstick or
11 something there --

12 Q Or a quarter in there. Yeah, we have
13 other photographs with quarters in there and so
14 forth but not there.

15 The same thing there, just take a look
16 at it. If you can't, you can't, that's all.
17 It's not a big deal.

18 A No, I can't tell.

19 Q Okay. And I've asked you about who did
20 it and what the cost was and so forth like that.
21 Do you think those bills would reside with
22 Mr. Megliore?

23 A They should.

24 Q How many properties do you own at EAW,
25 if I could ask you?

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A One.

3 Q I -- I think we've covered this, but
4 you don't know if that was done or not, is that
5 right, the shaving and so forth? If we can go
6 off the record for a second, I've got some other
7 photographs I'll show you.

8 (Off the record.)

9 (Whereupon, Plaintiff's Exhibit
10 Numbers 7 and 8 were marked for
11 identification.)

12 BY MR. COGGIN:

13 Q For the record, I'm showing Mr. Dunlap
14 what's been marked as Plaintiff's Exhibit Number
15 7 and Plaintiff's Exhibit Number 8 for
16 identification.

17 Now, Mr. Dunlap, when we're talking
18 about clipping or shaving or whatever, that's
19 what we're talking about, right?

20 A I don't know.

21 Q What don't you understand?

22 A I mean, what -- what -- what's the
23 question?

24 Q What I'm asking, is that indicative of
25 what shaving is?

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A I have no idea.

3 Q Okay.

4 A I mean, that looks like somebody could
5 have just cleaned it with bleach or a power
6 washer. I don't know.

7 (Whereupon, Plaintiff's Exhibit
8 Number 9, 10, and 11 were marked
9 for identification.)

10 BY MR. COGGIN:

11 Q For the record, I'm showing Mr. Dunlap
12 what has been marked as Plaintiff's Exhibit 9,
13 10, and 11.

14 Now, these are the same photographs
15 that I showed you initially. I think they were
16 like Number 3, 4, 5, and 6.

17 That's a close-up. And you were
18 talking about --

19 You can see where somebody is putting a
20 quarter in there to show the difference. I
21 think it's a quarter or a half dollar. I can't
22 tell which.

23 A Me either.

24 Q But can you -- can you tell that there
25 is a differential between the --

1 COGGIN - DUNLAP (DIRECT EXAMINATION)

2 A No.

3 Q No, okay.

4 A Well, what I've got to tell you is,
5 whoever took this photograph did a horrible job.

6 Q Well, they're -- they're amateur
7 photographs, yeah. Let me show you --

8 A Well, I'm an amateur photographer, and
9 I -- that -- I mean, a Polaroid in 'the seventies
10 would have done a better job than that.

11 Q Yeah. But don't you -- like on this
12 one, don't you see the difference, and I'm
13 referring to Number 10, don't you see the
14 difference between where the quarter back's
15 almost -- the quarter's flush on the other piece
16 of concrete?

17 A No, I don't.

18 MR. COGGIN: Okay. Good enough. I'm
19 certainly not going to push you on these
20 things. I think that's actually all we
21 have. Mr. Leadbitter may have some
22 questions for you, okay, and after that --

23 MR. LEADBITTER: I do not.

24 MR. COGGIN: Oh, you have no questions
25 at all?

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MR. LEADBITTER: None.

MR. COGGIN: Okay. We're done.

Okay. Rocky, thank you.

(Whereupon, the deposition
was concluded at
10:52 a.m.)

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Plaintiff,

TRANSCRIPT OF HEARING

Defendant.

Beaufort, South Carolina

The Honorable Carmen T. Mullen, Judge Presiding

1

A P P E A R A N C E S

Appearing for the Plaintiff
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**

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Gary Coggins, Esquire

State of South Carolina

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PROCEEDINGS

THE COURT: All right, here's that. All right, the next one on my list that I have would be Mr. Coggins. You all ready to go on that?

MR. COGGINS: Yeah.

THE COURT: The San Filippo versus the Estate at Westbury, personal property *.

MR. FERGUSON: At the risk of sounding like a whiner, my - I have been told the Plaintiff is not here.

THE COURT: Oh, yes, sir, I apologize, I should have got you up here. Tell me which one it is again.

MR. FERGUSON: Leroy Jenkins.

THE COURT: I'm sorry, and, Mr. Jenkins, did you hear from Mr. Jenkins? Do you want to just forward me, Mr. Ferguson, a proposed Order granting your Motion, and can we give Mr. Jenkins - I'm not gonna dismiss - well, I'm sorry, you want the case dismissed, don't you?

MR. FERGUSON: We want it dismissed, Your Honor, but, you know, we want to give Mr. Jenkins 30, 60 days to respond.

THE COURT: Let's do this, I'm gonna give

1 him - I'm gonna go ahead and give him 30 days to
2 respond to discovery, but I want you to write in
3 this order his failure to do so will result in
4 the dismissal. And do you represent - is it -
5 is there more than one Walmart there? Do you
6 represent all the Walmart Defendants?

7 MR. FERGUSON: All the Walmart Defendants.

8 THE COURT: Okay, so you can go ahead and
9 dismiss all the Walmart Defendants, if he does
10 not answer discovery within the 30 days, or ask
11 the leave of the Court to do it, okay?

12 MR. FERGSUON: I will

13 THE COURT: All right.

14 MR. FERGSON: Thank you, Your Honor.

15 THE COURT: All right, absolutely, sir.

16 All right.

17 MR. *: A squeaky wheel, right?

18 THE COURT: Pardon?

19 MR. *: A squeaky wheel, right?

20 THE COURT: You got it. All right, here we
21 are, okay. All right, so these are - correct me
22 if I'm wrong, these are cross-motions - oh, no,
23 I'm sorry, no, these are both the Defendants'
24 motions for summary judgment against the
25 Plaintiff, correct?

1 MR. LEDBETTER: Yes, Your Honor.

2 THE COURT: And you represent the Horizon
3 Property Regime and the -

4 MR. LEDBETTER: High Tide Associates.

5 THE COURT: High Tide.

6 MR. LEDBETTER: Yes.

7 THE COURT: All right, sir.

8 MR. LEDBETTER: They're the property
9 manager.

10 THE COURT: I appreciate it, okay.

11 MR. LEDBETTER: Thank you, Your Honor, I'm
12 Doug Ledbetter, I'm here on behalf of the Estate
13 of Westbury, Homeowners' Association, again,
14 High Tide Associates, may it please the Court.
15 We filed these Motions for Summary Judgment,
16 based on the fact that Westbury is the - as the
17 Horizontal Property Association has turned over
18 at the time this slip and fall accident. They
19 had turned over the maintenance and
20 responsibility for that, for the neighborhood,
21 the common areas, and everything, and that had
22 already been turned over, at the time when this
23 accident occurred. To give you a little bit of
24 background, just so that you'll -

25 THE COURT: Just so I understand, Westbury

1 still owns the common elements, correct?

2 MR. LEDBETTER: Yes, Your Honor.

3 THE COURT: Okay, so the real question
4 becomes - I understand when you say they turned
5 over the maintenance. They hired a maintenance
6 company to do maintenance, correct?

7 MR. LEDBETTER: Yes, Your Honor.

8 THE COURT: All right. And then on top of
9 that, in any way, did Westbury Horizontal
10 Property Regime undertake to maintain it in any
11 way, any of the common areas, in addition to
12 having hired High Point, or High Tide, sorry.

13 MR. LEDBETTER: Your Honor, they would make
14 recommendations from time to time to High Tide,
15 which was then under the contractual obligation
16 to comply with any issues that they had.

17 THE COURT: Okay.

18 MR. LEDBETTER: They - they did have some
19 Board meetings, where different aspects were
20 presented to them; nevertheless, the - the -
21 High Tide Associates is - is the property
22 manager, is the - we've asserted would be the -
23 the proper entity, if someone was going to be
24 charged with negligence for *.

25 THE COURT: Okay. I apologize, so High

1 Tide Associates is the property manager company?
2 MR. LEDBETTER: Yes.
3 THE COURT: Okay.
4 MR. LEDBETTER: Yes, Your Honor.
5 THE COURT: So it's not like - I thought
6 they were landscaper, but, obviously, I was
7 wrong, or a, you know, cleaning company.
8 MR. LEDBETTER: Right, they're - they're -
9 THE COURT: Okay.
10 MR. LEDBETTER: -- *.
11 THE COURT: I understand now.
12 MR. LEDBETTER: Okay.
13 THE COURT: Okay.
14 MR. LEDBETTER: Thank you.
15 THE COURT: Okay.
16 MR. LEDBETTER: This was a slip and fall
17 that occurred on October the 26th of 2017. The
18 Plaintiff was actually renting his condominium
19 in this Homeowners' Association, in this
20 neighborhood, he was an individual - from an
21 individual, either Frank Peza or Penza, and so
22 we're not sure exactly who that - that person
23 was at the time.
24 THE COURT: Uh-huh.
25 MR. LEDBETTER: But the Plaintiff for sure

1 was simply leasing this condominium. He was not
2 a - a member of the Homeowners' Association. He
3 had no ties whatsoever to the Homeowners'
4 Association. Based on that, Your Honor, we
5 assert, as to the relationship between the - the
6 Plaintiff and the - the Defendants here, that
7 there is - he was - for premises liability
8 purposes and responsibility, that he be
9 qualified as a licensee only, instead of an
10 invitee, which is the issue that is kind of -
11 kind of driving the whole thing; because it
12 meant that now we're talking about what the duty
13 is for the -

14 THE COURT: Right.

15 MR. LEDBETTER: - the Defendants. And our
16 position, as a - as a licensee, that we would
17 be, or High Tide Associates actually would be
18 responsible for - to warn him of any dangerous
19 conditions on the property. It's our position
20 that the Plaintiff has not presented any
21 information, through any evidence whatsoever.
22 It's admissible, that there is a dangerous
23 condition on this property. He was asked in his
24 deposition, you know, about the sidewalk. He
25 doesn't know exactly where he fell, he just

1 said, "On the sidewalk." We've had pictures
2 that were taken by opposing counsel at the
3 location. We can't tell exactly what - where
4 these pictures are. He wasn't there when the -
5 when the fall happened, they weren't. They were
6 taken by the Plaintiff's attorney, and I don't
7 think he was even in South Carolina, at the
8 time, I'm not sure.

9 THE COURT: Was the Plaintiff able to
10 identify that, yes, in fact, that was where he
11 fell -

12 MR. LEDBETTER: No, Your Honor.

13 THE COURT: - in his deposition?

14 MR. LEDBETTER: No, Your Honor, these -
15 these are pictures on the sidewalk, and
16 they're -

17 THE COURT: I'm seeing them, I'm guessing,
18 on *Mr. Coggins' desk right there -

19 MR. LEDBETTER: Yes, Your Honor.

20 THE COURT: - is that correct? Are those
21 the same things that we saw?

22 MR. LEDBETTER: Yes.

23 THE COURT: All right, let me see them. Is
24 there any issue? Are we - are we convinced, or
25 do we know -

1 MR. *: Thank you *.

2 THE COURT: - that that is how the sidewalk
3 he fell on is a whole other issue, but that's
4 how it presented at the time he fell? Has there
5 been any work done out there? Any - I don't
6 know, new concrete, or I'm assuming -

7 MR. LEDBETTER: I mean these pictures, from
8 my understanding, were taken in either 2000 -
9 late 2019, or 2020, so the accident occurred on
10 October 26th of 2017, so - so, obviously, things
11 could have - anything could have happened to the
12 - to the sidewalk; but, again, these pictures
13 are - are not - I mean they're pictures, but
14 they're - they're not proof that there's
15 anything - that there's any dangerous detail,
16 defect. This would be - would qualify as an
17 open obvious condition, as a matter of law. I
18 mean there - we don't - we don't even have to
19 have any testimony or evidence that this was a
20 violation of any -

21 THE COURT: Codes?

22 MR. LEDBETTER: Code.

23 THE COURT: Anything.

24 MR. LEDBETTER: You know, exactly, we're
25 just -

1 THE COURT: Got it.

2 MR. LEDBETTER: They're just the pictures.
3 And based on that, after this long a time, all
4 the chance to do discovery and everything else,
5 that - that there - it's just a failure to - to
6 establish a dangerous condition on this
7 property; and, therefore, we would ask that the
8 entire case be dismissed, or granted on summary
9 judgment.

10 THE COURT: Mr. Coggins?

11 MR. LEDBETTER: Thank you.

12 MR. COGGINS: Thank you, Mr. Ledbetter.
13 Your Honor, for the record, my name is Gary
14 Coggins, I'm an attorney from right here in
15 Hilton - or, excuse me, Beaufort County, and I
16 am here on behalf of Mr. *Nicholas San Filippo,
17 who is the Plaintiff in the case of San Filippo
18 versus High Tide Associates and San Filippo
19 versus the Estate at Westbury. And we are here
20 today to answer the Defendant's Motion for
21 Summary Judgment. The facts of the case, Your
22 Honor, are rather simple, and Mr. Ledbetter's
23 right about that. On October the 26th, 2017,
24 Mr. San Filippo, who was a long-time lessee
25 resident of the Estate at Westbury, went out for

1 a walk. He would walk on the sidewalk, or the
2 walkways, approximately, every - two to three
3 times a week. He did this not so much for
4 exercise, he just liked to be outside. And on
5 the day - on October the 26th of 2017, he was
6 walking, the day was clear, it was a very
7 pleasant day. He was walking at a - just a fair
8 pace. Suddenly, his left foot hit an elevated
9 portion of the segment of the concrete block on
10 the concrete that he was walking on, and he
11 pitched heavily over onto the concrete, landing
12 on his hands, his arms, his face and his left
13 knee. Now, Mr. - Mr. San Filippo said later in
14 deposition, he knew immediately that he was
15 badly hurt, because of the excruciating pain he
16 felt in his left knee. Now, the short of all
17 this is, that Mr. San Filippo was taken to
18 Hilton Head Memorial Hospital, rushed into
19 emergency, and then taken to Radiology. The
20 Radiology physician took four shots of his left
21 knee, and that was enough for him to say that
22 the x-rays and scans said that he had suffered a
23 comminuted fracture, a Y-shape comminuted
24 fracture on his left *. Comminuted, as you
25 probably know means the bone was broken

1 completely through, so there were three segments
2 in - in his knee. I'm going to hand up - first,
3 let me put them in here, in the exhibit basket.
4 So, Karen, do you want it?

5 THE COURT: Just give it to Karen, yeah,
6 that's fine.

7 MR. COGGINS: Okay, thank you, Karen. That
8 is the report from the hospital, and you can see
9 the date on it is October the 26th, 2017, and
10 you can see the doctor was *, *Nicholas *, the
11 technique was x-rays, four - four views, and it
12 says that he had a nondisplaced Y-shaped midline
13 fracture of the patella, with a small hematosis.
14 Now, what followed continues to this day with
15 Mr. San Fillipo. First, he went into intensive
16 rehabilitation, and this -

17 THE COURT: Mr. Coggins, I'm not concerned
18 *raking out about his damages. I take it on
19 your word that he was damaged, as a result of
20 this.

21 MR. COGGINS: Okay, that's fine.

22 THE COURT: What I want to know is this.
23 Number one, was his status as a licensee or
24 invitee, in your opinion?

25 MR. COGGINS: I was right - just getting to

1 that.

2 THE COURT: Let's get to it then. .

3 MR. COGGINS: I'll just jump right to that.

4 THE COURT: Everyone behind you will
5 appreciate it.

6 MR. COGGINS: Okay. There's two areas of
7 controversy, thank you, in this case. The first
8 is a legal question. Was he a licensee, as said
9 by Mr. Ledbetter, or was he an invitee? And, in
10 fact, it doesn't matter. The second thing is,
11 is that - a fact question. The fact question -

12 THE COURT: Well, what's your position? Is
13 he an invitee or a licensee?

14 MR. COGGINS: Well, I could - I think under
15 common law, he is a licensee; however, there has
16 been a lot of changes said to this, as you're
17 probably well aware, and you've probably heard
18 it in your Court. Premises liability simply
19 means negligent - negligently taking care of
20 property. And what happened here is, in 1986
21 there was the South Carolina Residential
22 Landlord and Tenant Act, 2740440A1 says that the
23 plantation - the condominium complex, the
24 Association, the manager of the property must
25 keep the property safe and clean. Now, what's

1 happened in a number of cases in South Carolina,
2 is that these cases -

3 THE COURT: Well, did you - did you sue the
4 landlord? 'Cause I understand that he was
5 leasing this property, correct? Did you sue -

6 MR. COGGINS: He's -

7 THE COURT: Did you sue the landlord?

8 MR. COGGINS: No, he did not sue his
9 landlord, no.

10 THE COURT: Okay.

11 MR. COGGINS: He sued the E - the Estate of
12 Westbury -

13 THE COURT: Uh-huh.

14 MR. COGGINS: - and High Tide Associates.
15 We feel that if we sue the landlord under the
16 theory of negligence, that was it, there's no
17 liability without negligence. But in any case,
18 there have been a number of cases in South
19 Carolina now, that say that there is an
20 exception to the common law, and that exception
21 is called the common - the common yard, or
22 common place exception. And that means if - if
23 the Estate of Westbury owns and controls - the
24 Estate of Westbury, the Association owns the
25 common area, the material - or excuse me, the

1 property manager manages this property, and they
2 have control over it; but right now, because of
3 the - the HTA, excuse me, right now, because of
4 the South Carolina Residential Landlord and
5 Tenant Act, says that if you own this property,
6 then you have that obligation to keep it in a
7 safe condition. Everybody that's on that
8 property, that lives at this place, be they
9 owners, long-time renters, or whatever, assume
10 the status of a invitee. In any case, even if
11 he was a licensee, the licensee - the rule with
12 licensees is, that he has to be permitted onto
13 the property, and, number two, the - the
14 Association or the property manager must take -
15 seek him out and show him any conditions on the
16 property that are dangerous.

17 THE COURT: Any hidden conditions that are
18 dangerous.

19 MR. COGGINS: Pardon me?

20 THE COURT: Any hidden conditions that are
21 dangerous.

22 MR. COGGINS: That's concealed. That's
23 concealed. That's exactly right, concealed,
24 hidden conditions on the property that are -

25 THE COURT: This is a crack on a sidewalk.

1 MR. COGGINS: Huh?

2 THE COURT: I mean this is a - let - let me
3 ask you this, have you hired anyone to show that
4 there is any kind of code violation -

5 MR. COGGINS: Yeah.

6 THE COURT: - as a result of this?

7 MR. COGGINS: Just getting to that, thank
8 you. You're -

9 THE COURT: So - and if you have, where's
10 the affidavit, or the deposition where they said
11 this is a significant -

12 MR. COGGINS: You've actually read my
13 brief.

14 THE COURT: - violation?

15 MR. COGGINS: I can tell, yeah. What -
16 what it is, Your Honor, is - what happened is
17 that on September the 26th, 2017, in a meeting,
18 and I think this is number two in my - it's
19 number two in my hand-ups, there was a meeting
20 between the Board of Directors and the minutes
21 from that is what I got. I had to get the
22 minutes from the Defendants. They gave me 17
23 months of minutes. On this minutes, the 17th,
24 or, excuse me, the 26th of September, 2017, they
25 had a meeting. Number six on that list of

1 things to talk about was to hire MAG, M-A-G,
2 which is an acronym for Martin-Adam-*Gerkowski,
3 MAG Concrete in Blufton, to come out and give a
4 - a - come out and give a - a bid on fixing the
5 property. Now, I talked to Mr. *Dunlop, who's
6 the Vice-President of the Board in deposition,
7 and I asked him, "What prompted you to have
8 somebody come out and look at the - and look at
9 the property?" And he said, "Prior to -
10 sometime prior to Mr. San Filippo being injured,
11 in almost the same spot an elderly lady in a
12 wheelchair hit an uneven level between the
13 concrete, the segments, and the wheelchair
14 flipped over." And he said as soon as he heard
15 that, the next meeting he went into, he said,
16 "We have to get this thing fixed." Now, I
17 talked to him at length, and I asked him, "When
18 was this?" He couldn't remember. I said, "What
19 was the lady's name?" He couldn't remember
20 that. I asked if she lived on the property, or
21 if she was a tenant? He couldn't remember that.
22 But what I did then was, I subpoenaed all the
23 records from MAG Concrete, and if you look at
24 number three from MAG Concrete, is a proposal
25 sent to the Estates at Westbury, excuse me, High

1 Tide Associates on April the 5th, 2017.
2 THE COURT: Uh-huh.
3 MR. COGGINS: In which they talk about
4 repairing almost the entire walkway within the
5 common area. They say, for example, they're
6 gonna replace - and I sent these, by the way, I
7 sent these things to - to opposing counsel,
8 they're going to replace and refinish concrete,
9 match existing as close as possible, and they
10 were gonna put rebars under adjacent concrete to
11 prevent settling. They were going to clean up
12 the site. They were gonna install - work has
13 been estimated at 37 locations. And then what
14 they said that really interested me, at the
15 bottom it says, "Grind for smooth transition
16 between sections of walk, and cut roots outside
17 the walkway, where present. Work has been
18 estimated at 44 locations." This was April -
19 Your Honor, this was April the 5th, 2017. This
20 was almost eight months before he fell. If you
21 look further on this, you'll see there's notes
22 on this. These were probably done by Teresa
23 Childress, who is the onsite manager for High
24 Tide Associates, the property manager, and she
25 wrote down, requoted 8/17/17. And the reason

1 she did that was there's a note by Mr.
2 *Gerkowski saying, "That, if, in fact, the
3 proposal is not answered in 60 days, it'll be
4 withdrawn." And then there's also a note of
5 9/14/17. Now, Mr. Dunlop, the Vice-President
6 brought up on the 26th of September the fact
7 that they had to take care of these problems for
8 safety reasons. One month later nothing had
9 been done. This is eight months after the
10 original bid was given to - given to High Tide
11 Associates, and by association, the Estates at
12 Westbury, and nothing had been done. There
13 wasn't a thing done. The other part of this is,
14 that whether he is a licensee or an invitee,
15 there is negligence, if, in fact, the manager,
16 the property owner knows of this condition, but
17 does not tell the - the Plaintiff, the licensee,
18 or - the licensee, or the invitee. I frankly
19 think, Your Honor, that he was an invitee on
20 this, under the rule of - geez, there are a
21 bunch of cases that talk about that, and I can
22 give them to you. *Kramer v. Bell *Core
23 Management, *Coke v. Allstate. These are South
24 Carolina cases. One - well, excuse me, both of
25 those are *, so they're DSC cases. There's also

1 another case in here that indicates the same
2 thing, but the rule is the same. They knew
3 about this dangerous condition, indeed, a woman
4 in a wheelchair had flipped over some months
5 before, causing them to get serious about this.

6 THE COURT: Do you have deposition
7 testimony from her? Do you have deposition
8 testimony from her, or an affidavit saying that
9 she fell, and where she fell?

10 MR. COGGINS: I have -

11 THE COURT: Because pretty much everything
12 you've just said is hearsay, including the -

13 MR. COGGINS: Oh, no, you're - you're
14 not -

15 THE COURT: - notes written on what's right
16 there. So - and, again -

17 MR. COGGINS: You're absolutely right.

18 THE COURT: - I'm trying to figure out what
19 it is you're going to use as evidence to get
20 past summary judgment; and I can tell you, you
21 keep calling it a dangerous condition, but just
22 because you call it a dangerous condition,
23 doesn't make it a dangerous condition. I need
24 someone to tell me, some expert that can tell me
25 that it is a dangerous condition, or it's a code

1 violation, or something is wrong. So I can't
2 just take your word for it. Just because a
3 person fell at one crack, doesn't mean that
4 there's anything wrong with it, necessarily.

5 MR. COGGINS: Okay, well -

6 THE COURT: So, again, so my question to
7 you is, who do you have that says, this specific
8 spot has a problem, and what it is?

9 MR. COGGINS: Mr. Dunlop told me in
10 deposition, that's the Vice-President, there was
11 an old lady - and elderly lady, who fell out of
12 a wheel - hit the wheelchair, and the wheelchair
13 and her flipped over onto the concrete. I asked
14 him several questions about this, and he became
15 very forgetful. He didn't know her name.

16 THE COURT: He probably didn't know where
17 it happened either, right?

18 MR. COGGINS: No, it was outside the 1000
19 building, which is, essentially, in the same
20 area that Mr. San Filippo had his problem.

21 THE COURT: So you're saying essentially,
22 the problem is, *. So I think you need more
23 specifics. Let me tell you what I'm going to
24 do.

25 MR. COGGINS: Okay.

1 THE COURT: I'm *, but I'm going to do
2 this. I'm going to give you 30 days to go find
3 an expert witness, who's going to testify that
4 there is something wrong with this portion of
5 it. Now, I don't even know if you know where it
6 occurred, so I'm not sure what your expert - if
7 you're going to be able to find one; but if you
8 do not have an affidavit to me within 30 days
9 from an expert saying that there is either a
10 code violation, or there is something
11 specifically wrong, you're not going to survive
12 summary judgment.

13 MR. COGGINS: Okay.

14 THE COURT: Okay?

15 MR. COGGINS: That's fair, yeah.

16 THE COURT: It's that - that simple, and
17 when you send it, you need to send it over to
18 him, okay, as well.

19 MR. COGGINS: That's right.

20 THE COURT: And what I would suggest,
21 gentlemen, other than that, let's not do
22 anything. Don't spend anymore money on this
23 case. You just go find your expert, and I need
24 an affidavit, or I need deposition testimony
25 stating that, and then I'll consider it. We're

1 not going to come back and reargue. I've heard
2 everything I need to know on this issue. Your
3 problem is, is that you need someone to say that
4 it occurred here, and that there is a problem
5 with the concrete, and what it is.

6 MR. COGGINS: Well, there were 44 different
7 problems, 'cause they were going to shave 44
8 different sections.

9 THE COURT: I mean - let me ask you, did
10 your client fall in 44 different places on the
11 property?

12 MR. COGGINS: No. I think two people fell
13 on the same place.

14 THE COURT: Okay. Well, you think, but we
15 need to know.

16 MR. COGGINS: No, you're right.

17 THE COURT: So we need to figure it out,
18 okay?

19 MR. COGGINS: Thank you, Your Honor.

20 THE COURT: All right, absolutely.

21 MR. COGGINS: Appreciate it.

22 THE COURT: I'm gonna give you your
23 pictures back. I'm gonna go ahead and diary
24 this for 30 days. If for some reason you don't
25 hear from me, Mr. Ledbetter, if there is nothing

1 that comes across to you -

2 MR. COGGINS: Thank you, Karen.

3 THE COURT: - I need you to reach out to my
4 office, okay?

5 MR. LEDBETTER: Yes, ma'am.

6 THE COURT: I'll also tell you, I - for
7 those of you that are left, I'm in between Law
8 Clerks right now, so my new one does not come on
9 until August, so Jamie is doing everything, so
10 if you are sending anything, don't send it to *,
11 send it to *, which is my administrative
12 assistant, if you want me to see anything, all
13 right? So that's just letting you all know.

14 MR. COGGINS: 30 days starts tomorrow or
15 today?

16 THE COURT: 30 days start tomorrow, Mr.
17 Coggins.

18 MR. COGGINS: Okay.

19 THE COURT: That's fine.

20 MR. COGGINS: Thank you very much, Your
21 Honor.

22 THE COURT: Okay, all right, y'all.

23

24 At 11:21 a.m. the hearing was concluded.

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CERTIFICATE OF REPORTER

I, Kymberlee M. Williams, Certified Shorthand
Reporter/Registered Professional Reporter for the
14th Circuit of the State of South Carolina do hereby
certify that the foregoing is a true, accurate and

1 complete transcript of the proceedings held in this
2 case, relative to appeal, in the Court of Common
3 Pleas for Beaufort County, South Carolina on the 7th
4 Day of June, 2021.

5
6 I do further certify that I am neither of kin,
7 counsel, or interest to any party hereto.

8
9 This, the **th day of June, 2022.

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Kymberlee M. Williams, CSR/RPR

State of South Carolina) Court of Common Pleas
County of Beaufort) Fourteenth Judicial Circuit
Nicholas Sanfilippo,) Case No. 2019-CP-07-00554
Plaintiff,)
-vs-) Transcript of Record
Estate at Westbury Homeowners)
Association and High Tide)
Associates,)
Defendants.)

July 21, 2022
Beaufort, South Carolina

B E F O R E:

The Honorable R. Ferrell Cothran, Jr., Judge

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

Gary Coggin, Esquire
Attorney for the Plaintiff

Nathaniel Akers, Esquire
Attorney for the Defendant

Proceedings taken down electronically

Transcribed by:
Krystal J. Smith
Official Circuit Court Reporter

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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(No Exhibits Entered)

COURT REPORTER LEGEND

dashes	--	intentional or purposeful interruption
		or change in thought
ellipses	. . .	trailing off
[ph]		phonetically written
[sic]		written as said
[inaudible]		unable to hear or understand due to
		recording volume or quality

1 JULY 21, 2022

2 (WHEREUPON, the proceedings began at 10:53 a.m. as
3 follows.)

4 MR. COGGIN: -- latent and so forth. Those are the old
5 affirmative defenses that I don't think attach here. And
6 latent, the way Mr. Akers is describing it is, could apply to
7 my client very well because he didn't see it. It's as easy as
8 that.

9 You can say it was a clear day. So if you've got a 75-
10 year-old man walking and he's taking a walk, he's made that
11 walk -- in six years, he's probably made it 10,000 times, but
12 this time he's walking in a fashion that that one inch that's
13 sticking up trips him up and he goes down. That, my son, my
14 friend, is a latent --

15 THE COURT: Well, if he is a licensee or not.

16 MR. COGGIN: That's a latent --

17 MR. AKERS: Not being able to see something and something
18 being concealed are two wholly different things.

19 THE COURT: I mean I -- you know, a lot depends on
20 whether he's a licensee or he's an invitee and the standards
21 that --

22 MR. AKERS: He's a -- I have a case, Your Honor, that I
23 cited in my brief.

24 THE COURT: Are you in?

25 THE COURT MONITOR: Yes.

1 THE COURT: All right. We're finally back on the record,
2 if you want to --

3 MR. COGGIN: Oh, you are? All right.

4 THE COURT: Okay.

5 MR. AKERS: I guess I'll just pick up where -- where I
6 left off.

7 MR. COGGIN: I have no problem at all. Let him -- let
8 him argue.

9 THE COURT: Okay.

10 MR. AKERS: The *Vogt* case, I don't know how to --

11 MR. COGGIN: He wouldn't leave without my total.

12 THE COURT: No, sir.

13 MR. COGGIN: I'm a little overweight.

14 MR. AKERS: You know, *Vogt v. Murraywood*. That case --
15 and I have a copy if the Court would like. That case
16 described a guest of an actual owner of a unit in this
17 property, and part of the reasoning for finding the plaintiff
18 as a licensee was because precisely because they weren't
19 associated in any way with the property. They weren't a
20 member. No HOA dues were paid.

21 So you can understand my reasoning for putting that case
22 in here. In other words, a licensee is somebody who enters a
23 property for his own interest. He has nothing to do with the
24 defendants here. He's there just to benefit himself and find
25 a place to live. Okay? His relationship is strictly between

1 himself and Mr. Pinto, who, again, is his landlord. That's
2 what makes him a licensee. Okay?

3 And because he is a licensee, this standard applies to --
4 applies to him with the latent -- and it has to be both -- and
5 dangerous condition, which, by the way, the plaintiff's expert
6 failed to identify the alleged condition as such. And for
7 those reasons, Your Honor, we -- we feel -- defendant feels
8 that they're entitled to summary judgment.

9 THE COURT: Okay.

10 MR. COGGIN: Your Honor, first, the -- my expert is not
11 an attorney. We're talking latent defects and so forth.
12 Those are legal terms. He'd be presumptive if he would try to
13 identify it as such.

14 The -- the case that he just referred to was the subject
15 of a very insightful note by a law professor, and I think his
16 name is Underwood. And he said under these conditions -- and
17 I know he's read further in this. Under these conditions, a
18 licensee, somebody who is on the property, not an invitee, not
19 somebody that comes onto the property. That's where Mr. Akers
20 is making a mistake.

21 All of this licensee, invitee, trespass, those are people
22 that come onto the property. This is a person who has a whole
23 different status. He is a tenant. He's been paying rent for
24 six years, and he is not a licensee. He's a tenant. That's
25 where the mistake is being made.

1 And as a tenant, he has every right to be warned of
2 dangerous conditions. In one of the things I will show you, I
3 have pictures of the dangerous conditions. And in eight
4 months, the folks at High Tide Associates and the Estate at
5 Westbury, even though they knew of these conditions, never
6 bothered to tell anyone and never bothered to fix anything.
7 Eight months and they waited until something happened to get
8 it fixed, but I'll get into that.

9 THE COURT: Okay. Well, do you have any -- essentially
10 you said it's a different standard from a tenant? Do you have
11 any case law?

12 MR. AKERS: Yes, sir, I do, actually. Well, that --

13 THE COURT: I mean he's brought up something I never
14 heard before. That's why I'm thinking.

15 MR. COGGIN: I can't -- it's a question. You know, you
16 always have a list of ten things you know the judge is going
17 to ask you. That's one of them on there, and I cannot tell
18 you what it is. Probably I can find it as soon as I get back
19 to my office.

20 THE COURT: Okay.

21 MR. COGGIN: But I don't have it right now, and I
22 apologize.

23 THE COURT: Okay.

24 MR. AKERS: I had the benefit, Your Honor, of having --
25 having a couple of attorneys handle this before I did. So I

1 had an opportunity to look at their arguments previously.

2 There's a -- there's a federal case in the District of
3 South Carolina, 1994, called *Cramer v. Balcor Property*
4 *Management*. And in that case, the District Court was not
5 convinced that the assumption was sound that the relationships
6 of a store owner-invitee or an innkeeper-guest are analogous
7 to the relationship of the landlord and tenant. So again,
8 it's -- it doesn't -- it's not the same thing. It doesn't
9 apply. So --

10 MR. COGGIN: That's a store owner, though, Your Honor.

11 MR. AKERS: He's a tenant.

12 MR. COGGIN: That's a whole different animal.

13 THE COURT: Hold on. My court reporter can't get but one
14 of you at a time.

15 MR. AKERS: He's a tenant, but for the reasons he is
16 there, his disconnected or lack thereof relationship with my
17 clients make him a licensee. That's -- that's why this
18 standard does apply here with latent and dangerous. Thank
19 you, Your Honor.

20 MR. COGGIN: If Mr. Akers has any case law that says
21 that, I'd love to see it. That's not -- that doesn't say it.

22 MR. AKERS: You cited it in your first memo in
23 opposition.

24 MR. COGGIN: What is it?

25 MR. AKERS: *Cramer*.

1 MR. COGGIN: Yeah, but that does not say it.
2 MR. AKERS: It's on page 1226.
3 THE COURT: I'll read them and see what I think they say.
4 Anything else you want to deal with as far as your motion,
5 sir?
6 MR. COGGIN: No. In my defense, I've written so many
7 memos on this.
8 THE COURT: Okay.
9 MR. COGGIN: I've read so many cases. I might have
10 missed one, but I would have overlooked that because that's a
11 federal case.
12 THE COURT: Okay.
13 MR. COGGIN: Not a state case.
14 THE COURT: Either -- neither one have anything else to
15 tell me on this case? I'll read it.
16 MR. AKERS: I believe we've thoroughly covered it, Your
17 Honor.
18 THE COURT: Okay.
19 MR. AKERS: Thank you for being patient.
20 THE COURT: All right. Thank you all. And I will read
21 all these cases and see if it changes my mind on what I
22 thought Landlord-Tenant Act and slip and fall were all about.
23 Okay?
24 MR. COGGIN: Thank you.
25 MR. AKERS: Thank you, Your Honor.

1 THE COURT: Thank you.

2 MR. COGGIN: Well, I'm -- I'm next up, and Mr. Akers is
3 to follow.

4 THE COURT: That's -- that's why I wanted you to do it
5 right now then. I thought y'all had -- I don't know about
6 both of you.

7 MR. COGGIN: Mr. Akers, I provided these, but do you need
8 a copy?

9 MR. AKERS: No, no, no. I've -- I'm ready for this.

10 MR. COGGIN: Okay. You don't need them?

11 MR. AKERS: Nope.

12 MR. COGGIN: All right. Your Honor, thank you for your
13 patience. I very much appreciate that.

14 This obviously is the -- the case of Mr. Sanfilippo
15 versus High Tide Associates and the Estate at Westbury, and
16 for the record it's 2019-CP-07-00554. This is a premises
17 liability case.

18 And we are -- with this motion for summary judgment,
19 we're before the Court also, because the pleadings, the
20 evidence, the affidavits, the depositions, and all the papers
21 of the case, when viewed in a light most favorable to the
22 nonmoving party, show there are no genuine issues of material
23 fact, and the plaintiff should be awarded or should be
24 entitled to prevail as a matter of law.

25 What happened here is that the plaintiff is Mr.

1 Sanfilippo. At the time of this, he was in his seventies. He
2 was a 55-year barber from New York City who vacationed with
3 his four daughters every year in Hilton Head and loved this
4 area, came down when he determined that he would retire. He
5 was also a veteran.

6 When he retired, he would live here, and he got an
7 apartment at -- he's a very stable person, got an apartment in
8 Bluffton at the Estate at Westbury from a man named Mr. Pinto
9 from Bayonne, New Jersey, who he rented from for six years.
10 And during that period of time, his retirement was --
11 consisted of doing what he wanted to do. And in the fall in
12 particular, he would walk about two or three times a week on
13 the curtilage of the walkway in the Estate at Westbury, and he
14 would do this two or three times a week.

15 On October the 26th while he was walking and he was
16 within maybe 100 feet of where he lived -- and that was the
17 building -- Building 100 or Building 1000. He lived in
18 Apartment 1001. His left foot hit a raised edge of concrete
19 and he fell, landing on his head, his hands and arms, and his
20 knees.

21 And Mr. Sanfilippo told me that he immediately knew that
22 he had injured something very badly because of the
23 excruciating pain he felt in his knee. What he did was he
24 crawled off the sidewalk. And fortunately, he had a cell
25 phone, and he called his sister-in-law, who lived in the

1 adjacent plantations, the Estates at Westbury Park. And he
2 didn't call his wife because his wife was working. She had
3 one of those jobs where she would get in a lot of trouble if
4 she took or made telephone calls. The sister came out
5 immediately.

6 And I want to direct you to Exhibit No. 1, which is the
7 affidavit of Diane Lewis. And if you look at the affidavit,
8 in pertinent part you'll see it says in 6 as soon as I exited
9 my vehicle, I could see Nicolas sitting on the sidewalk.
10 Where he was injured was close to where he lived. He appeared
11 to be in great pain. I walked to where he was sitting. He
12 pointed to where he tripped and told me that while he was
13 walking, his left toe caught on a segment -- raised segment of
14 concrete, and he fell forward on his hands and face and his
15 knees and hit so hard that his shoes came off.

16 What happened then was the daughter decided -- or the
17 sister-in-law decided he had to go to the hospital, and she
18 took him to the Hilton Head Regional Medical Center, where he
19 was seen by an interventional radiology. I don't know what an
20 interventional radiologist is, but they took five or six
21 pictures and they determined from looking at the x-rays and so
22 forth that he had a split -- what they called a split
23 fracture, and that fracture was a -- this is -- I think it's
24 Exhibit No. 4.

25 It said it was a split fracture, split comminuted

1 fracture, a Y-shaped fracture. Comminuted means the bone is
2 broken all the way through. Y is that's the -- describes that
3 letter. And after that, he saw the emergency room doctor and
4 then he saw an orthopedic surgeon, and he was discharged to
5 home.

6 When he got home, when his wife saw him -- if you look at
7 Exhibit No. 2, this is Kathleen Sanfilippo. She said that
8 when I got home from work, Nicholas was resting in bed. This
9 is Number 7. I could tell when he talked he was in terrific
10 pain. A day or so after he got from the hospital, he was able
11 to go out with me in his wheelchair and show me what happened
12 and where he had fallen, and where he had fallen was about 100
13 feet or so from where we lived, and he even showed me where he
14 had tripped on the uneven edge of concrete.

15 And it's around this -- I want to direct you to Exhibit
16 No. 3, and that's the affidavit of Kerry Murphy. Before I
17 came on to this case in 2020, they had an attorney -- local
18 attorneys and one of the women that worked for them as a
19 paralegal had been sent out to the accident site, and she
20 talked to Ms. Sanfilippo to get -- to be showed where it was,
21 and she took a number of photographs.

22 Ms. Sanfilippo, Number 7, told me shortly after her
23 husband had fallen on this walkway, he pointed out to her the
24 exact location where he had tripped and fallen. Sanfilippo
25 stayed with me while I took a number of photographs of the

1 scene on my cell phone. Most of the photographs were from the
2 walkway from different angles. In several of the photographs
3 I used a quarter to establish a segment of -- a sense of
4 proportion, and I may have taken as many as 20 photographs. I
5 have these photographs.

6 THE COURT: I've got them. I've seen them.

7 MR. COGGIN: You've got them? Okay.

8 THE COURT: I don't think -- at least at this point in
9 the hearing, it's not disputed that the concrete was what it
10 was, and your guy fell on it. I'm not really concerned about
11 damages. Give me some legal argument as to why you should get
12 a summary judgment.

13 MR. COGGIN: Okay. We -- we're getting -- we're getting
14 to that. The -- he was released from the hospital. I don't
15 think I have to go through what his recovery was. There was a
16 walker, there was a wheelchair, and so forth like that. He's
17 had difficulties --

18 THE COURT: I saw that. You don't need to.

19 MR. COGGIN: -- for years with falling down. In fact,
20 about a year ago, he broke his knee on the way to the bathroom
21 and fractured his ankle. I don't think I have to go through
22 any of that. What I --

23 THE COURT: Well, I've had knee replacements.

24 MR. COGGIN: What I did was I drafted a complaint. I
25 drafted three complaints because I wasn't happy with the first

1 two. And finally in the complaints, I -- after I filed the
2 complaints, I started taking depositions and I took a
3 deposition from Rocky Dunlap. Let me get into the law here.

4 Rocky was a member of the board of directors, and I asked
5 Rocky -- I saw in the -- I had subpoenaed -- discovered all of
6 their minutes from their meeting every month, and I have 17
7 separate minutes. And I asked him, I saw in one of the
8 minutes they talked about MAJ Concrete, and I thought that
9 meant major concrete and I asked him about it.

10 And if you look on page 38 on 17, you'll see. Well, I
11 think, though, that it was because of the lady in the
12 wheelchair, and I looked back -- and then on 25 he says --
13 line 25 he says, if my memory serves me correct, and the next
14 page 39, that the uneven walkway, concrete pathways came to
15 light because of the lady in a wheelchair.

16 What had happened was a woman in late February was out in
17 a wheelchair, hit one of these uneven sections, tipped the
18 wheelchair over, threw her out onto the concrete. It was a
19 big deal, and down at the bottom of the page it says -- or
20 number 13 on 39 says when this happened was when I said we've
21 got to get this fixed. And then line 20 it says -- and when
22 did you first bring that up about getting it fixed? He said
23 the second I heard about it. If you look on page 40 on line
24 9, I said go get estimates to get it fixed.

25 THE COURT: Right. And I read that.

1 MR. COGGIN: Huh?

2 THE COURT: It was \$9,600 to get them fixed.

3 MR. COGGIN: Yeah. You saw all that?

4 THE COURT: But they never got it fixed.

5 MR. COGGIN: And what had happened then was at that point

6 -- and actually, the point -- and if you look at Number 7? I

7 think it's Number 7 we'll look at next.

8 That is an affidavit of Mr. M.A. Jukofsky. He is a --

9 quite a nice gentleman, a Vietnam War veteran, and he's been

10 in the concrete business for 20 years, currently suffering of

11 cancer. He thinks it was Agent Orange.

12 He -- his affidavit says my name is Michael Jukofsky.

13 I've examined the attached proposal. This is a true and

14 accurate proposal by MAJ Enterprises for sidewalk repairs and

15 replacement, blah, blah, blah. This was provided to High Tide

16 Associates via Theresa Childers, and then he goes on, and you

17 go to the next page. The third page is the proposal.

18 And the proposal, as you can see, is to High Tide

19 Associates, which was the manager of the common area. The job

20 is the Estate at Westbury. And if you look in the proposal

21 under April 5th was the proposal was made. It was actually

22 delivered on April 7th.

23 It says sidewalk repairs as marked on site. That's

24 important. And then he talks about two things that they're

25 going to do. One, they're going to dig up concrete that's

1 broken. If there's any cracks or anything like that, they're
2 going to get rid of it. They're going to put new rebar in and
3 so forth.

4 It says work has been estimated at 37 locations, and then
5 down at the bottom it says grind for smooth transition between
6 sections of walk and cut routes outside walkway where present.
7 Work has been estimated at 44 locations. And then last, under
8 the business records rule, I put this in, and that's
9 essentially an affidavit or -- excuse me -- an email from
10 Theresa Childers that says please find this requested
11 proposal.

12 Now, Childers' job was to disseminate this to her bosses
13 at the Estate at Westbury. There's two men, Gigliardi [ph]
14 and Skelly, and she was also supposed to get it to all the
15 people on the board of directors. So the point I'm making
16 with all of this is that on April the 7th, the board of
17 directors of the Estate at Westbury and the -- the managers
18 and the owners of High Tide Associates were on notice at that
19 time on April 6th that there was defective conditions
20 throughout the entire thing.

21 Now, my suspicion is, Your Honor, that they at that point
22 found the uneven piece of concrete where Mr. Sanfilippo later
23 fell. And the reason I have this, I want to -- I think it's
24 Number 3, but look at those pictures there.

25 THE COURT: I saw those.

1 MR. COGGIN: Did you see that?

2 THE COURT: For argument's sake --

3 MR. COGGIN: I don't have to argue this, you know.

4 THE COURT: Those were uneven.

5 MR. COGGIN: Yeah.

6 THE COURT: But he said that doesn't matter.

7 MR. COGGIN: Well --

8 THE COURT: The fact of it --

9 MR. COGGIN: What I'm saying is -- here's what I'm saying
10 is they were on notice at that time.

11 THE COURT: And I'll -- for argument's sake for this
12 hearing, I will agree with you they were on notice.

13 MR. COGGIN: Okay.

14 THE COURT: And he's claiming it was no -- that your
15 client was on notice. They were on notice. Everybody was on
16 notice. It was open, and that his argument is he should have
17 seen it. He'd been down there a number of times and that, you
18 know --

19 MR. COGGIN: There's been an obvious -- you can, you
20 know, make your -- what's it called when you make your choice
21 when you know a dangerous condition? There was a bunch of
22 them there. I have arguments for each one of those. I don't
23 think I have to make you suffer by going through them.

24 THE COURT: I understand that.

25 MR. COGGIN: What happened then, Your Honor, is that we

1 -- and I'll just skip to the end because I -- I think there's
2 somebody who might come down and give me a strike in my head
3 for talking too much.

4 But the -- we got the affidavit from the -- the expert,
5 and the only thing I want to read to you is -- look on the
6 last page of the affidavit.

7 THE COURT: Okay.

8 MR. COGGIN: It says 10. In summary, the vertical change
9 in elevation between the sidewalk sections adjacent to
10 Building 1000 in the Estate at Westbury created a fall hazard
11 and is considered default the cause of Mr. Sanfilippo's
12 incident. The exchange in elevation between the contract --
13 the concrete walking surfaces varied between one half inch and
14 one inch, depending on the location along the sidewalk, and is
15 -- and was not being maintained in accordance with several
16 alphabet standards.

17 The one that's law in South Carolina is ANSI, A-N-S-I,
18 A117.1, and then he says there were feasible and economic
19 alternatives, parentheses, simply grinding out the charge --
20 the change in elevation to eliminate the fall hazard. It
21 should have been performed on this area of the sidewalk to
22 eliminate the fall hazard associated with the change in
23 elevation adjacent to Building 1000, which would have
24 prevented Mr. Sanfilippo's fall accident.

25 Then the last thing I included was the -- the 27 4400.

1 THE COURT: Okay.

2 MR. COGGIN: And again, I have to say here that the
3 landlord shall keep the common areas of the premises in
4 reasonably safe condition, and that covers --

5 THE COURT: That comes under the Landlord-Tenant Act. It
6 may not apply.

7 MR. COGGIN: And then I have the Form 4. I don't know if
8 I included that or not. That was --

9 THE COURT: Okay.

10 MR. COGGIN: Okay. That's all I have to say. Thank you
11 very much.

12 Mr. Akers, thank you.

13 THE COURT: Thank you. Anything?

14 MR. AKERS: Very brief. Aside from the obvious, you
15 know, problems arising with respect to potential hearsay bar
16 from the -- from the affidavits, no one -- of course, no one's
17 disputing that he fell. He -- he fell, and he sought medical
18 care.

19 With respect to the MAJ Concrete invoices, those are --
20 that's -- that's evidence of the subsequent remedial measure,
21 and it's not -- it's not admissible under Rule of Evidence
22 407. Even if it were, I mean, it says as marked by the
23 company, showing where it is. So another -- another
24 indication to -- to watch out.

25 So that's my only response, Your Honor. Thank you for

1 your time and thank you for being patient.

2 THE COURT: Thank you. Thank y'all.

3 MR. COGGIN: your Honor, just for one response to the
4 remedial measure, I understand what Mr. Akers is saying. This
5 was done as a preemptive going around and getting all of this,
6 and they were going to do it before, not after. Okay? They
7 got into action about six weeks after Mr. Sanfilippo fell, but
8 there was a period, and you can count them, April, May, June,
9 July, August, September, October, when nothing was done.

10 That's what I'm talking about. They failed, and they
11 breached their duty of care. Thank you, Your Honor.

12 THE COURT: Thank you, sir. Okay, I'll let you all know.

13 MR. COGGIN: Thank you, Your Honor.

14 MR. AKERS: Your Honor, may I approach? I just have
15 something I forgot to --

16 THE COURT: Sure.

17 MR. AKERS: -- bring up today.

18 MR. COGGIN: Could I see that, please?

19 MR. AKERS: It's a portion of the form of the previous
20 hearing.

21 MR. COGGIN: Could I see that?

22 MR. AKERS: Oh, sure.

23 MR. COGGIN: There is a second page to this, and I was
24 going to bring this up, but then he put this up and said, of
25 course, in the situation here, he would be an invitee, whereas

1 the second page it says -- so I said two things, and that's
2 what I'm talking about.

3 THE COURT: And that's the expert's testimony pages?

4 MR. AKERS: No, no, Your Honor. That's the former --
5 that's the form -- a transcript of the former hearing with --

6 THE COURT: Oh.

7 MR. AKERS: -- [inaudible].

8 THE COURT: Oh, okay. Okay. Thanks.

9 (WHEREUPON, the proceedings ended at 11:17 a.m.)

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11 --- END REQUESTED TRANSCRIPT ---

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State of South Carolina

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Certificate

County of Florence

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I, the undersigned, Krystal J. Smith, Notary Public and Official Circuit Court Reporter for the Twelfth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing pages, numbered 1 through 22, constitute a true, accurate, and complete Transcript of Record of all the proceedings had and evidence introduced in the hearing of the above captioned case, relative to appeal, in the Court of Common Pleas for Beaufort County, South Carolina, on the 21st day of July, 2022, to the best of my ability based upon the audio and notes provided.

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

Krystal J. Smith

Court Reporter

Florence, South Carolina

January 17, 2023