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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable William A. McKinnon

Appellate Case No. 2022-000580
Circuit Court Case No. 2018-CP-46-03726

The Grapevine of Riverwalk, Inc. Respondent,

v.

Riverwalk River District Building 6, LLC, Mark Mather, GRH Development Resources,
LLC, The Greens of Rock Hill, LLC, and Assured Administration, LLC,
.....Appellants.

**RECORD ON APPEAL
VOLUME III**

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1 bank's mortgage. But I don't think the bank would allow
2 that and I don't think they would want that. That is, I
3 think that is a real problem with the remedy of specific
4 performance that they seek. This is not a stand alone
5 unit, you know, somebody owns and somebody wants to buy.
6 It would require condominiumization, it would require
7 releases on lenders. It would require a lot of things
8 that are not contemplated in the contract they say they
9 want to enforce. That is a real issue in this case.

10 THE COURT: We will think about that some more. It
11 just occurred to me while listening to the banker testify.
12 Counsel, I appreciate both sides. I will see everybody at
13 2:15.

14 (Whereupon, a lunch break was taken.)

15 THE COURT: Mr. Martens, I imagine you have some
16 motions.

17 MR. MARTENS: We do. We have got some motions for
18 directed verdict. Your Honor, it may be just a technical
19 issue that I am kind of familiar with. Counsel said they
20 had no more witnesses. But I don't know that I heard him
21 say on the record that they have closed their case.

22 THE COURT: Well, we are on the record. So, is that
23 the fact, the Plaintiff has closed their case?

24 MR. MECKLER: We rest, Your Honor. I didn't know if
25 you wanted to get back to the --

1 THE COURT: Well, that is a legal issue. I think Mr.
2 Martens wants to make sure, as far as evidence, that
3 everything is in.

4 MR. MARTENS: Your Honor, the fact that the Plaintiff
5 has closed its case, we have several motions at this time.
6 And we are going to move for a directed verdict on one, or
7 on each of the different causes of action that are
8 asserted in the Plaintiff's second amended complaint.

9 THE COURT: Okay.

10 MR. MARTENS: I want to remind the Court you had
11 granted, previously granted summary judgment to the
12 Defendants on the third cause of action, fraudulent
13 inducement; the fourth cause of action which was fraud;
14 and the sixth cause of action which was breach of the
15 covenant of good faith and fair dealing. So recognizing
16 that those claims have already been dismissed by summary
17 judgment, I will address each of these claims. Let me --

18 MR. MECKLER: I want to make a point of
19 clarification. My understanding from looking at the
20 transcript, you said that the breach of good faith and
21 fair dealing is not a stand alone claim but it is a
22 component of the breach of contract claim.

23 THE COURT: Correct, as a cause of action.

24 MR. MECKLER: Right. I just didn't want to be under
25 the impression --

1 MR. MARTENS: And I completely agree with that, it is
2 part and parcel of a breach of contract claim. Let me
3 start with the negligence misrepresentation claim which is
4 the tenth cause of action.

5 THE COURT: Let me ask the question to the
6 Plaintiffs, for these kind of causes of action. Tell me
7 precisely what you believe the negligent misrepresentation
8 is.

9 MR. MECKLER: I am happy to do that, Your Honor.
10 Number one, they were informed that they would be buying,
11 leasing a condominium unit that they would be able to buy.
12 The letter of intent called it a condominium unit.
13 Everything said condo, the purchase and sale agreement
14 even has condo written on it. They just hadn't built the
15 building yet. So they were representing when that was
16 built, it would be a condominium building. It was
17 represented to them that the lender required the two-year
18 lease which is why they couldn't purchase the unit
19 outright. The lender testified today that was not true.
20 It was represented to them that they would have use of the
21 outdoor space. Mr. Williams testified to that and said
22 that he thought if they could have it that would be
23 misleading. And his understanding is they would have and
24 he is the guy who put the lease together, negotiated with
25 them and executed it. They were negligently

1 misrepresented that they could buy the unit under the
2 option to purchase with 120 days notice.

3 THE COURT: Isn't that the same as the first one?

4 MR. MECKLER: The first one, it was actually a condo.
5 There was a condo for them to buy, I mean they were --

6 THE COURT: Condo existed.

7 MR. MECKLER: Yes. This one, you could buy that
8 condo on 120 days written notice. Then the lender
9 required the two-year lease and then the outdoor, the use
10 of the outdoor space. We are not saying, we are not
11 saying that the outer space was part of the lease premises
12 but that is part of the lease, they would be able to use
13 that outdoor space for chairs and tables like they had at
14 Baxter. Mr. Williams even testified that, yes, they
15 wanted to emulate that and that was his understanding.
16 And if it wasn't in there it would have been, it would
17 have been a mutual state -- it was inadvertent on both
18 parts. But they are taking the position that they can't
19 use it.

20 THE COURT: The four statements are, they were
21 informed that it was a condo they could buy, a condo
22 existed. The lender required a two-year lease. They were
23 informed they had a option to purchase and they were
24 informed that he can use the outdoor space.

25 MR. MECKLER: That's it.

1 THE COURT: All right, Mr. Martens.

2 MR. MARTENS: So, Your Honor, first I want to point
3 out that the evidence is that the only individual the
4 Sills spoke with was Dave Williams. And that has been the
5 testimony, he was the point of contact, he was the guy
6 they talked to. Dave Williams was an employee of GRH
7 Development Resources and obviously he was acting as an
8 agent for Building 6. There has been no evidence that
9 Mark Mather, Greens of Rock Hill or Assured Administration
10 made any representations at all to the Plaintiffs or were
11 even involved in any of the discussions that led to the
12 execution of the lease. So at least with regard to those
13 Defendants there is no evidence that would support a claim
14 for negligent misrepresentation against any of those
15 Defendants under Plaintiffs theory of the case.

16 THE COURT: Let me hear from the Plaintiff's on that
17 point only. And go ahead, I am really not familiar with
18 this amalgamation theory. I have seen it. You are
19 basically trying to assert all these claims and say the
20 Defendants are the, I mean, what is the --

21 MR. MECKLER: Amalgamation, in 2018 when they
22 switched over, used to be the -- Mr. Williams letter of
23 intent is Assured; GRH on behalf of the landlord; the
24 landlord has no employees, directors or officers. Mark
25 Mather runs it all. The 30(b)(6) says it is all rolled up

1 into that --

2 THE COURT: That is a very different than saying he
3 is liable for everything.

4 MR. MECKLER: He is the sole member, manager of
5 Assured. He is the manager of Greens of Rock Hill. If I
6 am remembering correctly and even I am confused.

7 THE COURT: Give me the law that supports the
8 amalgamation theory.

9 MR. MECKLER: Stoneledge at Lake Keowee Owners's
10 Association, Inc. 425 SC 276.

11 THE COURT: I don't like to play hide the ball. So I
12 will just tell you what I am thinking now. The breach of
13 contract claim is very, it is going to go to the jury.
14 The rest of it I am very skeptical. So tell me, 425 --

15 MR. MECKLER: SC 276.

16 THE COURT: Okay, I am there.

17 MR. MECKLER: And this is a developers actually.
18 Townhome Developer Enterprise in pursuit of a common
19 business purpose so to justify amalgamation of their
20 interest and action alleging negligence, breach of
21 warranty, et cetera. Developers were corporally
22 affiliated under one umbrella company. These all run down
23 through Assured which was created, the title for the
24 Townhome project, Riverwalk River District Building 6 only
25 owns the property. They allowed individual members to

1 operate as agents without distinction as to who they
2 represented. And they shared responsibility. So in this
3 case very similar. Dave Williams was doing everything
4 for, with respect with Assured, for GRH, for River
5 District Building 6 and for Mr. Mather who is the eventual
6 owner, signer, executor of all of these contracts. He is
7 literally on everything. And even, if you look at the
8 deed that we just had with the expert. He talks about
9 these being related companies, they have sole property to
10 each other for zero dollars. That million piece of
11 property, they transferred zero to get it from Greens of
12 Rock Hill to RD6, zero. And so it is very similar to this
13 case, Your Honor. And in this, the Plaintiffs are dealing
14 with these people. They keep seeing these different
15 names, different email addresses, Assured, nothing from
16 River District Building 6. And then when they get their
17 lease it is all of these different amalgamated names on
18 there.

19 THE COURT: The lease, that is on the signature. The
20 lease can be clear. Their landlord is Building 6.

21 MR. MECKLER: I get that. But when they are going
22 through the process, when we have got these negligent
23 misrepresentations. They are coming from people
24 representing the landlord. And they are representing the
25 landlord, not saying, hey look, I don't represent the

1 landlord, I am with Assured or I work for GRH. They are
2 just dealing with people to lease space in this building.
3 They don't tell them that they are different. He says he
4 works for GRH but he is sending letterhead out on
5 Assured's letterhead to her.

6 THE COURT: Let me, assuming you have got the
7 intertwined entities. You have to show bad faith, abuse,
8 fraud or injustice. And I don't see that. I see a breach
9 of contract. Where is the fraud, the injustice.

10 MR. MECKLER: The fraud is, they told them there was
11 a condo buy and there wasn't a condo to buy.

12 THE COURT: But they were negotiating an arms length
13 over a commercial contract.

14 MR. MECKLER: But then they leased it to them and it
15 still says there was a condo, there never was one. They
16 didn't say, hey look, we are going to put a condo together
17 at some point during the lease.

18 THE COURT: So there was testimony that after the
19 lease that the, your clients were told that there was a
20 condo regime existed?

21 MR. MECKLER: No, no, no, beforehand.

22 THE COURT: Right. But then there was a commercial
23 contract. Who told them a condo regime existed.

24 MR. MECKLER: Mr. Williams. He sends them the letter
25 of intent and it is for a condominium unit.

1 THE COURT: Right and that is not a representation
2 that it currently exist.

3 MR. MECKLER: Well, no, because the building hasn't
4 been built.

5 THE COURT: Right.

6 MR. MECKLER: The representation to them was that,
7 that is a condominium. Melanie Sills testified that her
8 understanding from him was, those were going to be
9 condominiums and they just had to send their notice.

10 THE COURT: I know she said that was what her
11 understanding was. The statement made by the Defendants,
12 that's the statement that, had mentioned the condo and the
13 purchase agreement.

14 MR. MECKLER: No, no, no. The letter of intent
15 before they ever intended to the lease agreement
16 referenced the condo unit. But, Your Honor, to get past a
17 directed verdict there just has to be evidence that yields
18 more than one reasonable inference or inference in doubt.
19 The jury could believe Melanie and say, yeah, we believe
20 that Dave Williams did, in fact, say it was going to be a
21 condo unit from the beginning.

22 THE COURT: That is not fraud. You have to have
23 evidence at the time he said that he knew it was false.

24 MR. MECKLER: He had to have known because they
25 hadn't taken any action to create a condo.

1 THE COURT: But they did in the future.

2 MR. MECKLER: That was after the lease, that was way
3 down the road. That is like saying, Your Honor, that's
4 like saying, hey, I am going to sell you a car. And you
5 go get the car and the tires -- get a car at some point.
6 They didn't lease her, lease the Grapevine. What they
7 said they were going to lease.

8 THE COURT: You believe that document is a statement
9 by the Defendants, that a condo regime currently existed?

10 MR. MECKLER: Yes. Here is a case, representation
11 intended to induce a party to enter into a contract may
12 form the basis of negligent representation claim.

13 THE COURT: Show me, I want to see the document that
14 you say is the statement.

15 MR. MECKLER: 281 SC 79.

16 THE COURT: I want to see the statement.

17 MR. MECKLER: On top of the document you have got the
18 testimony of Ms. Sills that said, all of these
19 representations that I talked about came from Dave
20 Williams is --

21 THE COURT: I am listening very carefully and she
22 never said, I was told a condo regime existed. If she
23 said that I missed it.

24 MR. MECKLER: She said, I always thought it was a
25 condo.

1 THE COURT: She said what?

2 MR. MECKLER: She said, I always thought it was a
3 condo.

4 THE COURT: That's not the same thing. That is what
5 she thought.

6 MR. MECKLER: And then she pointed to this document.
7 We are saying negligent misrepresentation, there doesn't
8 have to be fraud. That he should have known or he should
9 have informed her that, the fact there wasn't a condo and
10 they didn't, they weren't intending to do it.

11 THE COURT: Tell me the statement? I don't see it
12 right now, its not enough.

13 MR. MECKLER: It says condominium unit. But, Your
14 Honor, it is under the case law because she testified that
15 is what she relied upon.

16 THE COURT: It has to be --

17 MR. MECKLER: 30(b)(6) testified they would not do
18 the condo if they didn't have to.

19 THE COURT: The fact, the heading on the left says
20 condominium option, that's the statement.

21 MR. MECKLER: No, no, no.

22 THE COURT: Again, tell me the statement.

23 MR. MECKLER: Your Honor, the case is about testimony
24 and documents. So we have got Melanie Sills testifying on
25 behalf of Grapevine. She says, hey, we wanted to

1 purchase, Dave Williams acknowledges that all they wanted
2 to do is purchase. He talked about condominium unit. She
3 said, great. He put it on there. They are talking
4 condominium --

5 THE COURT: Again, you say he put it -- show me what
6 you are talking about. I don't see any statement
7 asserting a condominium regime exist.

8 MR. MECKLER: I don't think he has to say, a
9 condominium regime exist. He just has to say, condominium
10 with the options for it. They are selling something that
11 they don't have.

12 THE COURT: I don't think that is enough. You are
13 saying she had -- she reasonably relied on this one word
14 to say --

15 MR. MECKLER: No, I am not saying that.

16 THE COURT: Again, tell me what she -- tell me what
17 the statement was.

18 MR. MECKLER: It's the entirety of the process. It
19 is the negligent representation that there is going to be
20 a condo that you are going to lease. And then you can buy
21 it. The lease doesn't say --

22 THE COURT: Now we are talking about things that are
23 going to happen in the future. I thought you were telling
24 me that, they claimed at the time these documents, that a
25 condo regime existed.

1 MR. MECKLER: That is what, that is what I am saying
2 they are telling her, we are going to lease this condo and
3 then you can buy it. They didn't say, we are going to
4 lease this, this premises that is in a building that has
5 not been condominiuzed and then we will see if we can
6 figure out and then you will buy it. That is not what the
7 --

8 THE COURT: This isn't a commercial contract between
9 sophisticated parties. I just don't see a
10 misrepresentation. I mean, I certainly don't see
11 something that can be reasonably relied upon by a
12 commercial entity that is an assertion -- you tell me
13 there is an assertion here somewhere that a condo regime
14 presently exist.

15 MR. MECKLER: How can you lease somebody something
16 that doesn't exist --

17 THE COURT: Because it will be done in the future.

18 MR. MECKLER: But there nothing in any document or
19 any testimony that says, this will be done in the future.

20 THE COURT: Nor is there anything that says it is
21 done now.

22 MR. MECKLER: But that is what they leased. You can
23 purchase it upon 120 days of written notice. How can you
24 purchase something, there is nothing to purchase. That is
25 the negligent misrepresentation.

1 THE COURT: They have a right to purchase something
2 three years in the future.

3 MR. MECKLER: But it is the premises they are
4 leasing. It is not, it is not something else. They are
5 not saying, we are going to give you something different
6 in three years. They are saying, you are going to lease
7 this Suite 104, in three years you can buy it. But they
8 can't because it wasn't the condo they said it was.

9 THE COURT: I am going to, with regard to that
10 statement I don't see the evidence there. So I am going
11 to grant this. So let's move onto to the lender required
12 to this statement you think is a misrepresentation, does
13 the window require a two-year lease.

14 MR. MECKLER: Yes. So Grapevine came to Mr. Williams
15 and said they wanted to purchase. And he said, well, you
16 can't purchase because our lender requires a two-year
17 lease and so we will have to do this lease purchase
18 option. She relied upon that and that was a negligent
19 misrepresentation because the lender testified that was
20 not a requirement of the lender.

21 THE COURT: The lender did testify that two leases
22 were required.

23 MR. MECKLER: He said, two leases. I am talking
24 about a two-year lease, not two leases.

25 THE COURT: 1.

1 MR. MECKLER: They could have leased another --

2 THE COURT: Yes, but that was the first.

3 MR. MECKLER: That doesn't have anything to do with a
4 two-year lease requirement.

5 THE COURT: You, so you are saying the
6 misrepresentation, it is not that they are required a
7 lease but they required a lease within the period of two
8 years.

9 MR. MECKLER: Because the lender required it and that
10 is what they are using to induce them to buy, to get
11 involved in this. Hey, we are going to sell it to you, we
12 can't sell it to you outright because our lender won't let
13 us. But the lender testified that that wasn't true.

14 THE COURT: If I am buying a car and salesman tells
15 me my boss said I can't get over than \$30,000.00. And
16 really they would sell it to me for \$29,5. That is
17 actionable?

18 MR. MECKLER: I am sorry, say that again.

19 THE COURT: If I am buying a car and the salesman
20 says my boss says we can't go over \$30,000.00 on this
21 vehicle. And really the boss said we will go down to
22 \$29,5. That is actionable. I can sue based on that?

23 MR. MECKLER: That is the same company. This is
24 different. They are saying that somebody else --

25 THE COURT: You are telling me two commercial

1 entities negotiating a contract, you can bring a legal
2 claim based on a statement.

3 MR. MECKLER: It is just saying, a representation
4 intended to induce a party to enter into a contract may
5 form the basis of a negligent misrepresentation.

6 THE COURT: It says reasonable. It has to be, you
7 are telling me if the exact same contract, if they had
8 said Mr. Mather requires a two-year lease, they wouldn't
9 have signed it, they would have walked away. That is what
10 you have to show, right?

11 MR. STAPLES: That is what Mr. Sills testified to,
12 that he, they had the meeting and he offered a lease
13 without an option and they walked away from the deal.
14 They said, we are not here --

15 THE COURT: But that is not, your argument has to be
16 that if he had said somebody else, not the lender. If he
17 had said Mark Mather requires, somebody had to require,
18 right.

19 MR. MECKLER: If they are lying to them to induce
20 them to enter into an agreement, yeah. And that is why, I
21 know you have ruled on the other issue. But that is why
22 we are trying to -- it is the same thing. They are making
23 these misrepresentations because she is sitting at the
24 table, she is not ready to do it, she wants these certain
25 things. And they know they need to get that lease to get

1 financing.

2 THE COURT: Right. But I understand the lease has
3 the two-year provision. Who cares as far as your clients
4 are concerned, why it is in there. Whether the banker
5 required it or Mr. Mather required it or Mr. Mather's
6 girlfriend asked for it. They know what the lease says.
7 What does it matter why it is in there.

8 MR. MECKLER: Because if the landlord said, hey,
9 look, we are requiring it, she would have negotiated with
10 them because she would have had leverage. But they are
11 telling her she has no leverage because it is not them, it
12 is the bank. So she gets in there, they just don't sell
13 it to her otherwise she wouldn't have done it. It would
14 have been a different negotiation. You can't, you know,
15 somebody sells you a car you can't lie to them about it.

16 THE COURT: Sure you can. They say that all the
17 time. Oh, the boss says we can't go lower, and they make
18 comments like that all the time.

19 MR. MECKLER: You can't say the manufacturer requires
20 us to sell you this additional warranty or you can't buy
21 the car.

22 THE COURT: You can't, that is true.

23 MR. MECKLER: It is the same thing. The bank won't
24 less us lease it to you unless you do a two-year, won't
25 let us sell it to you unless you do a two-year lease.

1 That is just false, it is patently false and it is only
2 made to induce her to enter into that lease agreement of
3 Grapevine. There is no other reason to make that
4 statement.

5 THE COURT: All right. I will think about that.
6 Let's go on to the option to purchase.

7 MR. MECKLER: I think the jury could easily infer
8 that they never intended to sell that unit to them, that
9 when they told them they had an option to purchase they
10 misrepresented their true intentions. We have the
11 30(b)(6) say that, if they don't end up having to purchase
12 it they won't make the building into condominiums. They
13 had them keep it confidential, they didn't offer to
14 anybody else. And I think the jury can infer that the
15 only reason that they gave them that option to purchase is
16 so they would sign that lease so they can get their
17 financing because they were in a pinch to get those two
18 leases done. And that they never intended and it would
19 was a misrepresentation that they were going to sell it.
20 And the jury can infer that because they did not sell it.
21 We are four years out when they gave notice and they
22 didn't sell it and there has not been, at least through
23 discovery, a good reason as to why they just kept saying
24 they are working on it, working on it, working on it.
25 They never consummated it.

1 THE COURT: I am going to grant that motion, I don't
2 see anything there of a breach of contract claim. If that
3 is a breach of contract claim, any breach of contract
4 claim is going to support misrepresentation. It is
5 basically, you are saying, they knew they were going to
6 breach in advance.

7 MR. MECKLER: No, no, no. I am saying they
8 negligently misrepresented to her that she would be able,
9 Grapevine would be able to purchase the condo.

10 THE COURT: They did it in there, there is a purchase
11 option. So what you are saying is, they knew they were
12 going to breach the contract.

13 MR. MECKLER: Right, that they never intended to do
14 it, they only did it to induce her to enter it.

15 THE COURT: I have not heard any evidence of that so
16 I am going to grant the motion.

17 MR. MARTENS: Negligent misrepresentation to all
18 Defendants?

19 THE COURT: No, the only one I am holding off on is
20 about the existence of the condo regime. But as far as
21 the statement, the option to purchase and the condo regime
22 existing, I am granting it. The third, tell me the
23 outdoor space.

24 MR. MECKLER: Outdoor space. So Mr. Williams
25 testified that she would not enter into the lease

1 agreement without outdoor space, that it was important to
2 her that they talked about it, that and she testified that
3 is why they did it, because they wanted to emulate Baxter
4 Village. And according to their attorneys, the default
5 letter, they didn't have right to use the outdoor space.

6 THE COURT: Right. They negotiated a commercial
7 lease. I mean there is no, they didn't get what they
8 wanted. That doesn't mean it is a misrepresentation.

9 MR. MECKLER: I think it is because they can use a
10 commercial, I think the lease reads they can use it but
11 the landlord has taken the position they can't even though
12 they represented to her beforehand that they could even
13 after the lease because they let her use it for a couple
14 of years and then said, no, you don't have the right to
15 use it. So I think the representation that you are going
16 to have outdoor space was a misrepresentation made solely
17 for the purpose to induce them to enter into the lease
18 agreement.

19 THE COURT: Right. But it is not, there is no way
20 under the circumstance that reliance is reasonable. This
21 is a commercial lease with sophisticated parties.

22 MR. MECKLER: It is reasonable because they share the
23 common area provision which you would reasonably read to
24 say, okay, yes, there it is, I get to use it.

25 THE COURT: In common with every other business. How

1 can they possibly run a restaurant, sharing this outdoor
2 space with every other business in the building.

3 MR. MECKLER: Because they don't run the outdoor
4 space as a restaurant, it is just a patio, take their
5 stuff and go sit down.

6 THE COURT: Right. But they have tables that they
7 serve, how can they do that if the other businesses are
8 using it too.

9 MR. MECKLER: There, one of the patio's is right on
10 their front door, there is not another business there.

11 THE COURT: Right.

12 MR. MECKLER: The other patio is right behind them.
13 And she testified that people can use it and they did.

14 THE COURT: This is a negotiated commercial lease, it
15 is very clear what is in it and I am going to grant the
16 motion in regard to that about use of outdoor space. I
17 will withhold judgment, I have to think about the
18 statements about the two-year, regarding the two-year
19 lease. And I am going to grant the motion with regard to
20 the amalgamation theory. I just have not heard any
21 evidence of the kind of injustice or nefarious action that
22 would support that kind of claim. So we take each
23 individual individually. Okay. Let's move on to breach
24 of contract accompanied by fraudulent act.

25 MR. MARTENS: Your Honor, just so I am clear on the

1 negligent misrepresentation. Again, without amalgamated
2 interest or amalgamation theory, the only potential
3 Defendants to that would be Building 6, the landlord and
4 GRH.

5 THE COURT: That's correct.

6 MR. MARTENS: Okay.

7 MR. MECKLER: I don't understand that. What did you
8 say?

9 MR. MARTENS: GRH, the employer of David Williams or
10 Building 6, the landlord.

11 THE COURT: For the statement that I haven't ruled
12 on.

13 MR. MECKLER: It would be Assured too because David
14 Williams was working for Assured as well.

15 THE COURT: What is the evidence of that.

16 MR. MECKLER: The email address is Assured and that
17 letter of intent is on Assured's letterhead signed by Dave
18 Williams.

19 THE COURT: So Assured, GRH and the landlord. Let's
20 move on and we will come back to that. Breach of contract
21 accompanied by fraudulent act.

22 MR. MECKLER: Your Honor, there is simply no evidence
23 of a fraudulent act.

24 THE COURT: Let me do the same thing here. Let's
25 move along. We just ask the Plaintiff's Counsel, what is

1 the fraudulent act?

2 MR. MECKLER: Well, I think there is a couple of
3 things. Number one, I mean, it depends on how you look at
4 it, Your Honor. You go back to the beginning and you say,
5 hey, the breach of fraudulent act, there was never a
6 condo. The fraudulent act was Mr. Mather told them that
7 they better not get on the wrong side of this contract or
8 they will not have use of the patio.

9 THE COURT: How is that fraud.

10 MR. MECKLER: Because it was not correct, they had
11 use of the patio in the lease agreement itself. So he is
12 trying to make a representation to them that is false for
13 them to rely upon which they did by moving the things in.
14 It is just, Your Honor, this whole case is people not
15 being forthright with Grapevine as they are trying to do
16 what the lease requires of them which is to give notice to
17 buy this, they did literally nothing wrong. And you have
18 got these companies, you have got Assured, you got GRH,
19 you got Greens of Rock Hill; you have got the landlord,
20 all kind of manipulating around them. They can't tell who
21 is who because these people interacting in different
22 capacities, all employed by GRH. You know, they use
23 Assured and landlord, RD6 --

24 THE COURT: Mr. Meckler, you have a breach of
25 contract case, it is clearly going to the jury.

1 MR. MECKLER: I understand that.

2 THE COURT: But I just, I mean where is the fraud.
3 That is a tough thing to show. I am not allowed to send
4 claims to the jury, they are based on conjecture or
5 theory.

6 MR. MECKLER: It is, I guess it is, the law is not
7 quite, there is a lot of gray. And when I hear this
8 testimony that, yeah, you are going to have an outdoor
9 space, here is the things show the condo unit. Fraudulent
10 act is defined is any act characterized by dishonesty and
11 factor unfair dealing. The fact that they gave them
12 notice and we are four years later and they still haven't
13 closed is dishonest.

14 THE COURT: But assuming it is all the truth, that is
15 in breach of contract. How is his, what action by the
16 Defendants converts to a routine breach of contract to
17 fraud.

18 MR. MECKLER: It is converted to fraud when they keep
19 telling them, hey, yeah, we are going to do it, we are
20 going to do it, we have got these contracts, we are going
21 to do it and we will get back to you. And when Mr. Mather
22 says, let's close on April 17th and they don't have the
23 contracts ready to that and they would not have been able
24 to close on April 17th, that in and of itself is fraud.
25 We have got the 30(b)(6) testifying later on that they

1 didn't have any of that ready. But he texted them to say,
2 let's close on April 17th.

3 THE COURT: I am going to grant the breach of
4 contract by fraudulent act. I just do not see the kind of
5 unjust fraudulent act to support that cause of action.
6 All right.

7 MR. MARTENS: Your Honor, the next cause of action,
8 violation of the Unfair Trade Practices Act.

9 THE COURT: I will do the same thing, I will ask Mr.
10 Meckler and Mr. Staples, what is the Unfair Trade
11 Practices Act, and did they do that violates the act.

12 MR. MECKLER: Your Honor, you can have a breach of
13 contract but you have got this whole situation where these
14 people have done what they have done. They executed that
15 option to purchase, we are now four years later and there
16 is no justifiable reason that they haven't closed on this.
17 It is more than a breach of contract because they are
18 streaming along, streaming along. They don't even have
19 the unit, it is not a condo that they said they could
20 purchase in 120 days notice. It wasn't even a condo to
21 purchase at that point. These people are still out there
22 leasing. One of the reasons we have the Unfair trade
23 Practices Act is to deter people from doing the same
24 things to others that are being done unfairly to people
25 now. So you can see the situation where another Grapevine

1 comes in, they sign the same agreement. They get down to
2 their 120 days, there is no condo, it doesn't exist so
3 they have been sold something that doesn't exist. Which
4 in and of itself is unfair and deceptive. But then they
5 don't even close on it four years later.

6 THE COURT: I just don't agree, let me stop you on
7 that. I don't see any statement that says, there is a
8 presently existing condo regime. If it said that I would
9 be with you on these arguments. But you keep saying they
10 said there is a condo and I do not see a statement that
11 says that.

12 MR. MECKLER: Melanie Sills said they said they were
13 going to sell, lease her a condo that she could buy in the
14 third lease year.

15 THE COURT: That is not the same thing as saying the
16 regime currently exist.

17 MR. MECKLER: She is not a lawyer though. If you
18 tell someone you are going to sell them a condo, you
19 assume it is a condo, not your living room in your house.
20 If you say, I am going to lease you an apartment you
21 assume there is an apartment there. I think it is
22 reasonable to assume that.

23 THE COURT: It may be reasonable to assume that but
24 that doesn't mean that is fraud if it is not true or
25 unfair trade practice.

1 MR. MECKLER: How is it not. I mean, if that is not,
2 if leasing somebody something that you can't, with an
3 option to purchase, something you can't sell --

4 THE COURT: They could have done it a year later,
5 right.

6 MR. MECKLER: Then you don't take up any actions to
7 put yourself in a position to sell. And then you still
8 don't, four years later put yourself in a position to
9 sell. How is that not unfair, how is that not deceptive.
10 If that is not I don't know what ever could rise to the
11 level of an unfair and deceptive trade practice.

12 THE COURT: Mr. Martens, let me hear you on that.

13 MR. MARTENS: Your Honor, there was evidence that
14 they prepared reading documents and they did, testified to
15 that, acceptable documents. So this notion that they
16 never intended to perform goes out the window.

17 Unfair Trade Practices Act is intended to address
18 things that affect the public at large. It is not
19 intended to redress a private contract dispute. There is
20 a contract between business sophisticates, testimony was
21 that the option to purchase was a one time offer, that
22 they are the only ones that got that in their lease.
23 There is no evidence from which a reasonable juror could
24 find that this impacts the public at large. It is a
25 breach of contract at best.

1 THE COURT: I am going to grant the motion on that,
2 Unfair Trade Practices Act. What is our next one.

3 MR. MARTENS: Civil conspiracy, Your Honor. There
4 has been no evidence of a combination, let me find,
5 because I know the law just changed recently on this.

6 THE COURT: My recollection that there is no longer a
7 special damages requirement for civil conspiracy.

8 MR. MARTENS: Correct, yes. Combination or an
9 agreement between two or more persons to commit an
10 unlawful act or a lawful by unlawful means, together with
11 the commission of an overt act in furtherance of the
12 agreement in damages. They questioned whether LLC's are
13 persons under the Act, for purposes of a conspiracy claim.
14 There is something called the Intra Corporate Immunity
15 Doctrine that says you can't conspire, a corporation can't
16 conspire with itself. Mr. Mather can't conspire by
17 himself. There is just no evidence of a conspiracy
18 between these Defendants to commit an unlawful or commit a
19 lawful act by unlawful means.

20 THE COURT: The Supreme Court did not give us any
21 guidance at all on what this cause of action means now.
22 Mr. Meckler.

23 MR. STAPLES: I think I am going to take this one.

24 THE COURT: I try to be upfront about what I am
25 thinking.

1 MR. MECKLER: I appreciate it and good people and
2 good minds can differ on things. And you and I have
3 different opinions on some of these and that is okay. You
4 are the Judge and you get to make the ruling. I am not
5 the Judge and I don't get to. I am going to sit down.

6 THE COURT: Before we get to, talk to me about what
7 this cause of action means in light of current case law.
8 Can Mr. Mather's, I mean we are all in agreement that
9 these are all his corporate entities. I mean, everything
10 eventually flows back to Assured, you know, the Greens is
11 the sole member of Riverwalk and Assured is the sole
12 member of Greens and Mather is the sole member of Assured.
13 Right, and that is kind of the way it all works. So how
14 can he conspire with himself. I mean, it is all the same
15 guy. He owns a bunch of different corporate entities, who
16 is party B in the conspiracy here.

17 MR. STAPLES: Well, it would be GRH Development
18 Resources, Your Honor. That is the one Defendant that is
19 not in that direct line. At the signature page where he
20 signs, he signs Mark Mather as manager of Assured, manager
21 for Greens, for manager of RD6. But GRH Development
22 Resources is out here separate from that chain and that is
23 what houses all of the employees. Mr. Mather is an
24 employee of GRH Development. That is a stipulated fact.
25 Maybe we will pull up the stipulations, it might help to

1 see that. We also prepared a --

2 THE COURT: And GRH is not a --

3 MR. STAPLES: He is the managing member. He is an
4 employee but it is all by effects, you know, his company.
5 I think he may only have like a forty percent interest in
6 it or something. We prepared a chart of entities, it is
7 not in evidence but it may be helpful just to reference
8 because it does get confusing trying to keep this. You
9 can establish a civil conspiracy with circumstantial
10 evidence. And I think that, it goes back to what Mr.
11 Meckler said, this whole case, you know, this whole theory
12 of this is you have got all of these different legal
13 entities, there is a complete blurring of distinction.
14 You have got from the outset, Dave Williams presents
15 himself as a employee of GRH Development yet he is an
16 authorized signatory for Assured Administration. The RD6,
17 LLC shows up on the lease, that is the first time we even
18 see that entity. The conspiracy that there was going to
19 be, you know, a condominium, that there would be an option
20 to purchase, that there would be an outdoor patio space
21 when Grapevine exercises its notice and the Defendants
22 can't get their act together to create the regime. Mr.
23 Mather shows up and says, I am mad about the parking
24 situation, if you guys don't fix this, not only are you
25 going to be on the wrong side of the contract to sell, I

1 am going to revoke your patio. And that is exactly what
2 he did. It is maybe something that defies easy
3 articulation.

4 THE COURT: The conspiracy, in Plaintiff's view, the
5 revocation of the patio use?

6 MR. STAPLES: That would certainly be a part of it,
7 yes. They would also be from the beginning, going back to
8 the negligent misrepresentation claim. It is, you know,
9 that the lender requires a two-year lease to purchase that
10 was a representation made by Dave Williams on behalf of
11 two different legal --

12 THE COURT: My mind is working more slowly than you
13 are talking. Civil conspiracy requires either an unlawful
14 end or unlawful means towards a lawful end, correct?

15 MR. STAPLES: Yes.

16 THE COURT: So if Mr. Mather had, I mean his view,
17 the contract does not grant Grapevine the use of the
18 patio. He is not, not to put tables out there. What is,
19 is it the means unlawful or the end, how do we get to
20 conspiracy. I mean, I understand you say he is mad about
21 the lawsuit and he punishes them by revoking their use of
22 the patio. If he is legally entitled under the contract
23 to do that, what, how do we get to a conspiracy. What is
24 the unlawful means or unlawful end.

25 MR. STAPLES: The assumption that you made is he is

1 entitled to do that, he is not. They have the right to
2 use the common area. The lease doesn't say, you have the
3 right to use the common area but you can't put anything
4 out there. What instead of table and chairs, they put out
5 flower pots. I mean, you know, the testimony from Melanie
6 was that if someone showed up and sat at that table with a
7 Subway sandwich that didn't buy a glass of wine, she
8 wasn't going to kick them out, they had every right to be
9 there, to sit there. The fact that they provided the
10 tables and chairs doesn't mean they are claiming exclusive
11 use over that patio.

12 THE COURT: I agree with you. But how does Mr.
13 Mather having a different view of the contract permits
14 gets you to a conspiracy. I mean I understand what you
15 are saying and what you are saying is very plausible. If
16 the contract does, in fact, permit Grapevine to use the
17 patio. but Mr. Mather disagrees or his attorney disagreed
18 or whoever made the decision. How do you get from that to
19 a civil conspiracy.

20 MR. STAPLES: Because Mr. Mather doesn't act on his
21 own in this case.

22 THE COURT: What is the unlawful means or unlawful
23 end.

24 MR. STAPLES: Well, the unlawful end is to frustrate
25 Grapevine's business. To cause them to lose revenue. I

1 mean, here, a dramatic drop in the party's earnings and
2 revenue shows damages when it can be contributed to a
3 conspiracy.

4 THE COURT: The conspiracy is just Mr. Mather has a
5 different view of the contractual rights. Are you saying
6 any time a business mistakes their rights in a contract
7 and asserts rights that they don't really have, that they
8 are conspiring and they are subject to liability and tort.

9 MR. STAPLES: It was retribution, I mean --

10 THE COURT: But legal retribution is okay. If I say
11 you can sue him by a swimming pool and then you sue me for
12 my fence being a foot over your property, I can say, well,
13 you can't swim in my pool anymore. It is completely
14 within my legal rights. There is nothing wrong with that
15 legally, is there?

16 MR. STAPLES: You know, that is a different scenario,
17 Your Honor. I don't know, what I know is there has to be
18 some cause of action for what he did and what is done in
19 this case.

20 THE COURT: It is a breach of contract.

21 MR. STAPLES: But the breach is complete on February
22 2nd, 2018, this all occurred after.

23 THE COURT: Do you agree with me there has to be an
24 either unlawful end or unlawful means?

25 MR. STAPLES: I am reading the jury charge that we

1 prepared. I believe that is correct, Your Honor.

2 THE COURT: What is the unlawful --

3 MR. STAPLES: Unlawful act or lawful act by unlawful
4 means.

5 THE COURT: Correct.

6 MR. STAPLES: So you are asking me what is the
7 unlawful --

8 THE COURT: What is the unlawful part. I know your
9 argument is Mr. Mather --

10 MR. STAPLES: It was unlawful for him to revoke the
11 patio because the lease provides for access to the common
12 areas. Right. It was unlawful to represent that they
13 would have patio space when, in fact, they don't. It was
14 unlawful to represent that the lender required a two-year
15 lease to purchase when the lender did not have such
16 requirement. I am reading here, it says a civil
17 conspiracy claim exist even where Defendants committed no
18 unlawful acts but where the purpose of the Defendants
19 actions were to damage the other parties business. I
20 mean, clearly Mr. Mather's intent in revoking their patio
21 space was intended to damage their business, to create a
22 loss profit, to limit there ability to have as many
23 customers as they otherwise could.

24 THE COURT: It has to be more than that. If I set,
25 if I open a wine bar in the building next door to the

1 Grapevine I am trying to hurt this business, I want their
2 customers. And that is a tort, is it, it has got to be
3 more than he took an action that, to hurt their business.

4 MR. STAPLES: But he had no right to take that action
5 under the lease, is what we are saying.

6 THE COURT: So any action taking in violation of the
7 contract supports tort claim in your view.

8 MR. STAPLES: I mean I am not going that far with it,
9 I mean in the context of this case this sure seems like a
10 case that ought to be in a civil conspiracy case.

11 THE COURT: This is argued all the time in contracts.
12 They take actions that they think are justifiable and they
13 may or may not be justified later on. But those aren't
14 tort cases, they are just -- go ahead.

15 MR. MECKLER: I am going to beat a dead horse.
16 Somewhere to the negligent misrepresentation argument,
17 there is a distinction between the breach and the
18 negligent misrepresentation in this case, the unlawful
19 act. So when they leased the building and say there is
20 going to be, I will take your position and say, they said
21 there was going to be a condo regime. Never formalizing
22 the condo regime, that is a negligent misrepresentation,
23 that is unlawful act. The breach is not going through
24 with the sale. The breach is not following through on the
25 option to purchase. The negligent misrepresentation is

1 there is going to be a condo regime. There never was a
2 condo regime. If there was a condo regime and they said,
3 and they didn't sale you would still have the breach
4 there. But the fact they never created the condo regime,
5 good intentions don't mean anything. If your
6 representation was negligent, you knew or should have
7 known, you couldn't do it or you wouldn't do it, or you
8 needed lender approval which they all should have known at
9 the time, that is separate from the breach of not actually
10 consummating the sale. So for both of those, that is the
11 unlawful act for civil conspiracy and that is the hook for
12 negligent misrepresentation that is different and separate
13 of the breach for not consummating the sale itself.

14 THE COURT: I am going to send this one to the jury.
15 I have a great reservation about this cause of action.

16 MR. MARTENS: Your Honor, may I be heard?

17 THE COURT: Sure.

18 MR. MARTENS: I want to point out, there is a case
19 called Painter's Mill Grill, LLC; versus Brown. It is a
20 Fourth Circuit case from 2013. And it was a suit by a
21 limited liability company, owner and operator of a
22 restaurant. Brought an action against the landlord and
23 the landlord's agents alleging, in this case, it was a
24 civil conspiracy under 1985. And the Court held that
25 under the Intra Corporate Conspiracy Doctrine landlord's

1 agents cannot conspire with each other. That was a 1985
2 action, a civil rights conspiracy. I think it is the same
3 thing applicable here. Anything that Mr. Mather did, he
4 did in his capacity as the manager of the landlord.

5 THE COURT: Except for GRH, they say his whole is
6 only forty percent shareholder in GRH.

7 MR. MECKLER: That is a Maryland case, Your Honor.

8 MR. MARTENS: But GRH didn't take any of the acts
9 that they are now attributing as unlawful acts. The fact
10 that GRH may be out there, there has to be a combination
11 to carry out an act that is harmful to a third party. The
12 mere fact that GRH is a codefendant in this case doesn't
13 create a conspiracy cause of action.

14 THE COURT: What have you alleged GRH did.

15 MR. MECKLER: Every one of these people involved in
16 this conspiracy, the negligent misrepresentation,
17 employees of GRH including Mr. Mather.

18 THE COURT: I am going to send this to the jury. And
19 I will tell you, I have grave reservations on this cause
20 of action. I think the dissent was right in the Supreme
21 Court case, I think they opened up a can of worms on this.
22 But we have no guidance at all from the Supreme Court on
23 this cause of action. I may grant the JNOV on this one
24 but I am going to send it to the jury and see what the
25 jury does. But let's move on to the next one.

1 MR. MARTENS: So, Your Honor, we are now down to
2 breach of contract and specific performance.

3 THE COURT: Unless you have, I think breach of
4 contract is clearly going to the jury. You may have an
5 argument that I haven't thought of.

6 MR. MARTENS: I thought we ruled tortious
7 interference was out.

8 THE COURT: Not yet.

9 MR. MARTENS: Tortious interference requires a
10 showing of five elements. Existence of the contract,
11 knowledge of the contract, intentional procurement of its
12 breach, absence of justification and resulting damages.
13 Again, the four Defendants named; Mather, GRH, Greens and
14 Assured. There has been no evidence presented at all that
15 Greens or Assured took any action to create a breach of
16 the contract. Mr. Mather was acting in his capacity as
17 manager but to the extent he caused the breach, we have,
18 there is clear case law that says a manager of an LLC
19 acting within the scope of his authority as manager may
20 expose the LLC to liability but it doesn't expose him to
21 personal liability unless he has acted outside of the
22 scope of the agency for some selfish purpose, some
23 personal reason. There has been no evidence of that. If
24 Mr. Mather, let's assume for the sake of argument, that
25 Mr. Mather in his capacity as manager knew there was a

1 contract, just decided to breach it just to breach it,
2 anything he did in that regard was in his capacity as a
3 manager of the contracting party. It doesn't give rise to
4 a tortious interference claim.

5 MR. MECKLER: Yes sir, Your Honor. It is interesting
6 and reminds me of another case I had and it was a company
7 in South Carolina, also had a business in Las Vegas. And
8 they thought they were very smart. They set up two LLC's
9 and there was a horrific accident in Las Vegas that
10 involved a machine. A guy got caught into a machine. And
11 the Las Vegas company, it was worker covered by the
12 Worker's Comp Insurance. LLC over here wasn't because the
13 guy doing the maintenance wasn't part of that company.
14 The same thing here, where they are trying to be so
15 eloquent setting up all of these different LLC's, what
16 they did is they made everybody employees of GRH. So
17 anybody that was involved in the breach that didn't go
18 through, didn't go through with the condominium regime,
19 that didn't get the sale completed, that caused that in
20 any manner, they were members of GRH. They weren't
21 members of the landlord, they weren't the landlord because
22 the landlord, according to the landlord's own 30(b)(6) had
23 no employees, no officers, no directors, literally just a
24 holding company. So all of these other people --

25 THE COURT: What is the tortious interference.

1 MR. MECKLER: Caused the breach.

2 THE COURT: The breach meaning, failing to allow your
3 clients to exercise the option to purchase.

4 MR. MECKLER: They didn't do the condo regime, the
5 law implies upon a party that it takes those actions
6 reasonably necessary to put in a position to perform. The
7 first thing is you have got to be in a position to
8 preform, you had to have created the condo.

9 THE COURT: Who, okay and who tortiously interfered
10 with the ability or the decision to not, tell me who the
11 tortious interferer was.

12 MR. MECKLER: So it was, I am trying to remember.
13 Your Honor, I confuse myself on who these companies are
14 right now. Assured, let me see, they signed as Riverwalk
15 Building 6 was the landlord, right. And you have got
16 Greens of Rock Hill, that is who everybody is employed by.
17 So whoever makes the decisions about, are we going to
18 consummate the sale, are you going to get the property
19 regime done, they aren't an employee of GRH. And then you
20 have got Assured under that and the 30(b)(6) says they all
21 roll up to Assured, all of these companies roll up to
22 Assured. So GRH for sure, they would have to because they
23 are the only people that can make decisions are employees
24 of GRH.

25 THE COURT: The landlord is Building 6, right?

1 MR. MECKLER: Right.

2 THE COURT: And the sole member of that entity is
3 Greens of Rock Hill.

4 MR. MECKLER: Right.

5 THE COURT: And the sole member of that entity is
6 Assured, right.

7 MR. MECKLER: Correct.

8 THE COURT: So those are all entities that would,
9 that would have made the decision to either not move fast
10 on how you interpret the evidence, not move fast enough or
11 not to allow the option at all.

12 MR. MECKLER: Correct.

13 THE COURT: So what did GRH do to induce those
14 entities to break the contract. What was the interference
15 they did.

16 MR. MECKLER: They are the ones that did it. I mean,
17 they are the landlord because of the way they set this up.
18 The landlord literally can't do anything, it is just, it
19 paper, it is on paper. So the decisions are made at GRH
20 is level. So GRH is the one that is directing, are we
21 going to do --

22 THE COURT: If they are making the decisions it is
23 not tortious interference. Tortious interference requires
24 a third party.

25 MR. MECKLER: They are a third party because --

1 THE COURT: But you are saying they are making the
2 decisions.

3 MR. MECKLER: That is exactly what I am saying.
4 Because the lease is between Grapevine, Riverwalk River
5 District Building 6.

6 THE COURT: You just told me Grapevine Building 6
7 can't make any decisions, it has no employees.

8 MR. MECKLER: It is still the entity that is the
9 contract is with. It is a legal entity. What I am
10 saying, they were trying to be overly smart, instead of
11 having the employees in Riverwalk District Building 6,
12 kind of like my client that has a Nevada office, they
13 didn't do that because they are trying to effectively save
14 themselves from liability. So they moved all of these
15 employees to GRH.

16 THE COURT: But the tortious interference claim is a
17 third party interloper, is interfering with party A and
18 party B's contract.

19 MR. MECKLER: Right.

20 THE COURT: Tell me how that happened in this case.

21 MR. MECKLER: You have got party A is Grapevine.
22 Party B is Riverwalk Building District 6. Interloper
23 party C, GRH.

24 THE COURT: They are actually the decision maker,
25 they are not an interloper.

1 MR. MECKLER: But they are a third party.

2 THE COURT: They can't both be the decision maker and
3 the interloper. That is what you are arguing.

4 MR. MECKLER: I don't know why they let them make
5 that decision. That is the whole issue. They are
6 allowing this third party to interfere with their
7 contract.

8 THE COURT: Who is the third party.

9 MR. MECKLER: RGH.

10 THE COURT: You are also telling me --

11 MR. MECKLER: GRH.

12 THE COURT: The people that did the --

13 MR. MECKLER: Right.

14 THE COURT: And also the decision maker.

15 MR. MECKLER: Right. It is like, it is the same
16 scenario. They were being smart in Nevada and South
17 Carolina and you go, it is the same company. It is not
18 the same company. They set up two LLC's to provide them
19 liability protection, those two companies. They were two
20 smart for their own good because when they separated the
21 entities for that purpose the law treats them as two
22 separate entities. So when they had a worker's comp claim
23 this entity is not covered by it because they were so
24 smart, different legal entity. We have that here.
25 Grapevine illegal entity; Riverwalk Building District 6,

1 illegal entity. Riverwalk Building District 6 can't take
2 any actions on its own.

3 THE COURT: Who is the decision maker in your view,
4 actually for Riverwalk, that made the decision, we are not
5 going to go through with this contract.

6 MR. MECKLER: Well, it looks like it was several. It
7 was Mark Mather who had the ultimate decision making
8 authority. There was Craig Ostrander who is under him who
9 is suppose to be heading all of this up but he said they
10 were busy with other things.

11 THE COURT: Who is the third party that induced Mr.
12 Mather and Mr. Ostrander to breach the contract?

13 MR. MECKLER: They are the third party that induced.

14 THE COURT: There is a third party and the contract
15 breaker. They can't be the same.

16 MR. MECKLER: That's again, not the fault of
17 Grapevine, that's the fault of how they decided to
18 structure things. If they had of put all of their
19 employees, if says Mark Mather and Craig Ostrander were
20 employees of Riverwalk Building District 6 I would
21 one-hundred percent agree with you. But when they are
22 trying to get smart and have the employees be employees of
23 GRH Development, that is where they made their mistake.
24 And it turns them into interlopers because they are
25 getting involved between, a lease between Grapevine and

1 Riverwalk Building District 6. They can't --

2 THE COURT: That is an entity they control.

3 MR. MECKLER: Your Honor, I understand but they can't
4 have it both ways. So there is no amalgamation but then
5 on the other hand, no, wait, look, we are all on the same,
6 we are one in the same company. Because if you buy that
7 argument then we are right on the amalgamation because it
8 is two separate legal entities.

9 THE COURT: The same entity cannot be both the
10 interloper and the decision maker. And that is what you
11 are telling me.

12 MR. MECKLER: Riverwalk Building District 6 gets to
13 make the ultimate decision.

14 THE COURT: But you just told me it has no employees.

15 MR. MECKLER: It has a manager.

16 THE COURT: Okay. Who is Mr. Mather?

17 MR. MECKLER: Mr. Mather is ultimately --

18 THE COURT: Assured and the Greens.

19 MR. MECKLER: And there is the crazy schematic for
20 how all of this works. So Riverwalk Building District 6
21 has its manager but all of these people who are making the
22 decisions, they have, it is GRH Development. So GRH
23 Development is saying, hey, we are not ready to sell, we
24 can't sell, we don't have it, we are not going to make it
25 up, we have got other things to do. We have got, we are

1 not going to close. It is coming from down below to up
2 top. But they are two different legal entities. If they,
3 if all of those people would have been employees of
4 Riverwalk Building District 6 you would be right. But
5 there is either, either they are amalgamated and they are
6 one entity or they are separate entities and this becomes
7 the third party interloper.

8 THE COURT: You are trying to convert a routine
9 breach of contract case into a tort case because there is
10 multiple legal entities involved. And I am just
11 struggling to see that.

12 MR. MECKLER: I am not, I mean it is just the way, it
13 is the facts of the case. If they were, most cases like
14 this, Your Honor, you have got party A and party B. You
15 got the tenant and you have got the landlord. But then
16 you have got this group that is trying to protect
17 themselves liability wise. So they are setting up this
18 LLC, this LLC, this LLC, this LLC. Right. And so you
19 can't have it both ways, you can't separate yourself and
20 give yourself protection as Riverwalk Building District 6.
21 We are going to be protected, we are not going to put
22 anybody up there, we are going to move them down, we are
23 going to put them in GRH Development. We are going to
24 protect them, they are going to be a separate legal
25 entity, we are going to say Assured Administration is a

1 separate legal entity. That way you can't go after all of
2 them because we are separate companies.

3 THE COURT: Let me ask you this. What was the
4 interference.

5 MR. MECKLER: The interference is, they encouraged
6 Riverwalk Building District 6; one, not to complete the
7 condominium regime, to put itself in a position to close
8 pursuant to the option to purchase.

9 THE COURT: What is the, is it an email, is it a
10 phone call. Very specifically, what is the interference?

11 MR. MECKLER: Well, I think all the emails saying it
12 is, they are not ready and it is not going to GRH
13 employees.

14 THE COURT: That saying, internally we are not ready,
15 how can that be interference of someone else's contract?

16 MR. MECKLER: I am not sure --

17 THE COURT: They are talking about within their
18 corporate structure, we are not ready, we need more time.
19 How can that be interference with someone else's contract?

20 MR. MECKLER: Because they are directing what
21 Riverwalk Building District 6 does. Whether they should
22 or not is a different story. They shouldn't but they are.
23 And so when they don't close, when they make this
24 decision, we are not going to close, the 30(b)(6) of
25 Riverwalk Building District 6, they are not going to close

1 because the suit is going on. That is coming from GRH.
2 Those decisions are being made at GRH for Riverwalk
3 Building District 6 which is interfering with a contract
4 from Riverwalk Building District 6 and Grapevine.

5 THE COURT: Mr. Martens.

6 MR. MARTENS: Your Honor, if that were the case, the
7 lawsuit was filed because of an alleged breach. I assume
8 the decision was made at GRH, we can't close because of
9 the lawsuit. The alleged breach that gave rise to the
10 claim had already incurred. I mean, that can't be the
11 procuring act. That is more, I mean it is no different
12 than property manager sending a notice of default under
13 the lease. It is an agent of the contracting party. The
14 fact that Mr. Mather is, any of these folks are employed
15 by GRH does not amount to a procurement of a breach on
16 behalf of the single purpose entity, Building 6. It is
17 not third party interference, it is not tortious
18 interference with contract. At most it is a breach of
19 contract.

20 THE COURT: I agree. I am going to grant the motion
21 of tortious interference claim. So that brings us to
22 specific performance and breach of contract. And I am
23 still, let me look back at my notes. We are going to send
24 to the jury the breach of contract claim.

25 MR. MARTENS: So the specific performance cause of

1 action, Your Honor, first what I want to point out, that
2 specific performance is a unique --

3 THE COURT: Let's hold off on that because that is
4 for the Court. We can make that decision after that
5 verdict. If you don't mind, let's hold off on that.

6 MR. MARTENS: I think that leaves us with the breach
7 of contract cause of action.

8 MR. MECKLER: Correct.

9 MR. MARTENS: And so the elements of breach of
10 contract, a binding contract entered by the parties,
11 breach or unjustifiable failure to perform and damage that
12 was suffered by the Plaintiff as a direct and proximate
13 result of the breach. The evidence that has been
14 presented is that there is lease with an option to
15 purchase within the lease. The option to purchase by its
16 term is executable during the third lease year. The
17 evidence that has been presented is that, during the, that
18 the, Grapevine gave notice of its intent to exercise the
19 option; that the Grapevine had various attempts to get the
20 closing set throughout 2018, the third lease year; and
21 before the expiration of the third lease year, before the
22 time for performance had expired Grapevine declared
23 default and filed suit for breach. The time for
24 performance had not passed. We were still within the
25 third lease year, we still had an opportunity to perform.

1 There was not a breach, we were in the option period
2 entitled to perform.

3 THE COURT: That is one possible interpretation of
4 the contract. Isn't it just as plausible to say, that
5 your client had 120 days to close after they got notice,
6 so long as in that period.

7 MR. MARTENS: Well, that is potentially another,
8 another version of what the contract or another
9 interpretation of what the contract provided for. But
10 there was also evidence, testimony presented that there
11 was never a tender of an earnest money deposit; there was
12 never an offer of a contract, purchase contract by the
13 Plaintiff; there was simply a letter saying, hey, we want
14 to exercise our option. Everybody that has testified
15 said, the contract was going to look like Exhibit G but we
16 had essential terms that needed to be filled in and there
17 is no evidence that Exhibit G was ever signed by anyone,
18 purchaser, seller, anybody. There was not evidence that
19 there was consideration given for that, that was simply a
20 lease Exhibit that says when it comes time to execute this
21 option this is the kind of contract we are going to use.
22 So we don't believe that under that interpretation, we
23 don't believe under any reasonable interpretation of that
24 evidence that there is a valid breach of contract cause of
25 action.

1 THE COURT: I disagree, I am going to send that one
2 to the jury. The Plaintiff has every inference in their
3 favor and at this point I am going to send that to the
4 jury. I do want to hit back on something we talked about
5 a few days ago. One of your motion's, Mr. Martens, was
6 about that the issue of special damages, you know, in the
7 contract. Put aside what, the option to purchase. Let's
8 say that this case was solely involved on the patio. So
9 your interpretation of that contract would be, there are
10 no damages recoverable if the landlord wrongfully denies
11 the tenant the use of the outdoor space?

12 MR. MARTENS: That is correct because that was the
13 term of the contract that was negotiated by the parties.
14 And parties, commercial parties are free to contract
15 however they choose to and when those terms are clear,
16 unambiguous and agreed to, the Court's duty is to enforce
17 the contract as it was written, not to give one party or
18 the other a better deal than the one they negotiated for
19 themselves. This Plaintiff, in agreeing to this lease,
20 said, we agree that if we have dispute we will not seek or
21 recover these types of damages. And we believe they
22 should be bound by that, it is clear, it is unequivocal,
23 it is unambiguous and it was agreed to at the time they
24 entered into this contract.

25 THE COURT: Other than this rather unusual situation

1 where there is an option to purchase, isn't that basically
2 waiving any right to recover on the contract. What other
3 --

4 MR. MARTENS: No, no it is not, Your Honor. The
5 contract specifically provides that they can recover
6 actual damages, actual damages but not consequential
7 damages.

8 THE COURT: What are actual damages for a restaurant.

9 MR. MARTENS: Let me find the paragraph. So it is
10 paragraph 56, limitation of landlord's liability.
11 Anything in this lease to the contrary notwithstanding
12 the convenance, undertakings and agreements herein made
13 are made and intended not for the purpose of binding
14 landlord personally or the assets of the landlord, but are
15 made and intended to bind only the landlord's interest in
16 the demised premises and building of which it is a part
17 and in the rents and revenues derived therefrom. No
18 personal liability shall be asserted or enforceable
19 against landlord, stockholders, officers or partners or
20 the respective heirs. Legal representatives, successors
21 or assigns on account of the lease, on account of any
22 covenant undertaking or agreement of the landlord in this
23 lease. Further in no event shall any special
24 consequential, excuse me, or punitive damages be awardable
25 against or recoverable against landlord or the landlord

1 interest hereunder. And I think actual damages or breach
2 of a lease would be, let's see, arguably its, we paid rent
3 and you were in breach. Those are our damages and we
4 didn't get what, we didn't get what we paid you to
5 provide. That is the actual damages. Consequential
6 damages by definition are damages that the parties
7 contemplated as being within the realm of possibility if
8 there is a breach. I think it is the hold, I remember
9 from law school, it is the, you breached the contract for
10 the space and as a result my band didn't get to perform.
11 The actual damages are, what did you pay for the space and
12 you didn't get it. That is the actual damages.
13 Consequential is, well, we were going to make \$100,000.00
14 dollars by bringing in the Rolling Stones.

15 THE COURT: You have convinced me. So the damages,
16 if the jury sides with the Grapevine on the patio issue
17 the damages are the rent starting in April of 2019,
18 correct.

19 MR. MARTENS: I believe that to be the case, Your
20 Honor.

21 THE COURT: Okay. Y'all want to be heard on that
22 issue. What is the, as far as numbers, what was rent
23 versus loss profits. What is the difference?

24 MR. MECKLER: Well, the loss and, I am not sure I
25 understand your question. So the rent that she has, they

1 have had to pay since the breach was about \$100,000.00
2 dollars. Loss profits from not being able to sell
3 alcohol, I would have to look up --

4 THE COURT: It is actually, it is a really close
5 figure, isn't it.

6 MR. MECKLER: \$300,000.00 on lost profits.

7 THE COURT: I do it now, it is more, it is \$56, it
8 was \$110 roughly. So it is almost identical. I think Mr.
9 Martens is right on that issue, assuming that provision is
10 enforceable then the damages are not the profits but the
11 damages, they would be entitled to get their rent back
12 from the time they were wrongfully excluded from the
13 patio.

14 MR. MECKLER: I still argue the whole paragraph is
15 unenforceable.

16 THE COURT: Tell me why.

17 MR. MECKLER: In that last line. In the event of
18 transfer of landlord's interest in the demised premises or
19 the building other than a transfer for purposes of
20 securing a debt, transfer shall be automatically relieved
21 of any and all obligations and liabilities on the part of
22 the landlord from and after the date of such transfer.
23 Two reasons. I think it is unconscionable against public
24 policy. Number one, is goes against the fraudulent
25 transfer act. So if somebody gets a judgment, they can

1 avoid it by just, putting the property in some other
2 entities name.

3 THE COURT: Why not just strike that sentence. That
4 is not applied. You are wanting to strike the whole
5 paragraph.

6 MR. MECKLER: It is an integrative paragraph.

7 THE COURT: Okay, Mr. Martens is going to say the
8 contract is not valid. It has got an unconscionable
9 provision. You arguing that I should strike more than the
10 sentence but less than the contract.

11 MR. MECKLER: The case is talking about, limitation
12 of liability clauses against public policy. And I would
13 claim this one is because of that, not that the whole
14 contract is but that this one is, limitation. And the
15 cases that deal with limitation of liability clauses, they
16 don't strike a whole contract because of it. They just
17 say the limitation of liability clause is inoperable
18 because it is against public policy. Because it leaves
19 the Plaintiff with no avenue to recover damages.

20 THE COURT: Right. The clause that you are objecting
21 is totally separate from the consequential damages clause.
22 It is the next sentence, conceptually and completely
23 different.

24 MR. MECKLER: But one you have the trial and damages
25 are awarded you are out of court and it is too late. So

1 say we, hypothetically, say we win and we get the \$400 in
2 rent and whatever. Tomorrow they go and they just
3 transfer the title of the building to some other entity.
4 That judgment, according to this is worthless regardless
5 if they got money from the other entity or not. They did
6 another transfer like they did between --

7 THE COURT: I have got to read this provision again.
8 Is the fourth from the last word of that paragraph attorn,
9 a-t-t-o-r-n?

10 MR. MECKLER: Yes.

11 THE COURT: What does that mean.

12 MR. MECKLER: It is bizarre and that was going to be
13 my second argument. Attorn means you put yourself in that
14 position of tenant to the new entity. So say, just
15 hypothetically speaking, they transfer the property from
16 Riverwalk River District Building 6 to Assured. Grapevine
17 would just become a tenant of Assured then. Now, if they
18 had gone through with the, if they had of gone through
19 with the sale, Your Honor, the lease would have
20 terminated. We wouldn't be talking about this. So it is
21 a little, I just think this whole thing is unfair and
22 deceptive.

23 THE COURT: Let me stop you. This is a difficult to
24 understand clause. It says the transfer or, that would be
25 Building 6, right.

1 MR. MECKLER: Right.

2 THE COURT: Shall be automatically relieved any and
3 all obligations and liabilities on the landlord's part,
4 and this is the key, I think. Accruing after the date of
5 the transfer. Isn't that just a normal operation of a
6 law. If I have a house and I sell it to you I am not
7 liable for what happens to the house after I sell it.
8 That does not strike me as unconscionable.

9 MR. MECKLER: You are right.

10 THE COURT: So I think I am going to rule on Mr.
11 Martens favor on that point. I think it sounds like the
12 difference is only about \$10,000.00 dollars. And the
13 difference the loss profits up to today versus rent paid
14 up to today.

15 MR. MECKLER: I am trying to understand.

16 MR. MARTENS: I want to make sure I understand too.
17 My understanding is what they intended to put to the jury
18 is not only are we entitled to our rent but we are also
19 entitled to loss profits. So it is not either/or. I
20 think they were seeking to recover both and I think under
21 the terms of the lease they would, they would arguably be
22 entitled to recover rent they paid following the breach.
23 But they are not entitled to recover any of the documents,
24 the stuff that Mr. Ligon testified about today.

25 THE COURT: Well, let me ask. Mr. Meckler, was your

1 claim that your clients should get their rent back in
2 addition to the loss profits?

3 MR. MECKLER: Yes, because once the breach occurred
4 all that rent they paid should have been going to either
5 reimbursing for paying for the space or paid down their
6 mortgage that they would have taken out on the space. And
7 I think, I think that the loss of the use of the space and
8 the sales they couldn't make are actual damages. They are
9 damages that occurred related to a provision in the lease
10 which allowed them to use the patio. And if they had gone
11 through, again, with the sale, when they, this lease would
12 have terminated and there wouldn't have been any rental
13 payments. There is nothing to credit back to them for not
14 getting what they bargained for because they shouldn't
15 have been paying rent then anyways. Because no rent was
16 due following the consummation of the sale because the
17 lease became, would have become null and void if they had
18 gone through with it.

19 THE COURT: Mr. Martens.

20 MR. MARTENS: And consequently the alleged
21 contractual term that gave them access to the common areas
22 would have likewise terminated. So they can't say, our
23 lease would have terminated so we shouldn't be required to
24 continue making payments but we still want to enforce loss
25 profits by pursuant to a term of that lease, according to

1 our theory of the case, should have been terminated.

2 THE COURT: Mr. Meckler. If they had closed in
3 February 2018 that would have been the end of the patio,
4 right.

5 MR. MECKLER: I don't know if that is true or not
6 because we don't have the condo regime documents to look
7 at. Extensively they would have the same rights to use
8 the common area outside that they had under the lease.
9 That is why I think that the, that is why I have been so
10 passionate about the negligent misrepresentation, the
11 unfair trade practices because it is this kind of, it is
12 this gotcha, yo-yo where you move here and you can't move
13 here and it is not reasonable. It is not reasonable to
14 put anyone in that position, I don't care if they are
15 sophisticated, if they can't read, I don't care who they
16 are. What happened here was not right, it was unfair and
17 it was deceptive. And how we are here trying to figure
18 out, under simple breach, how can you make these people
19 whole.

20 THE COURT: Put the profits aside, Mr. Martens, what
21 about their argument, that the mortgage would have been
22 paid down. Had your client closed on February, they, the
23 rent, they would have, the money would have been paid
24 towards the mortgage.

25 MR. MARTENS: There is no mortgage, there is no

1 evidence of a mortgage.

2 THE COURT: My thinking is muddled and I think, yes,
3 okay.

4 MR. MECKLER: Your Honor, I said mortgage or
5 reimburse.

6 MR. MARTENS: I think Ms. Sills said she was going to
7 pay cash.

8 THE COURT: I think at one point there was going to
9 be swap of the properties.

10 MR. MECKLER: At one point there was and at one point
11 she paid to get loan commitment.

12 THE COURT: I am going to grant Mr. Martens motion
13 and I am going, I am going to exclude the loss profits
14 damages. I think that that contract, contractual
15 provisions are enforceable. I think it is clear law in
16 South Carolina that special consequential damages includes
17 lost profits in a contract case. I don't see any reason
18 not to enforce that provision.

19 MR. MARTENS: Will the Court instruct the jury that
20 they are not to consider this?

21 THE COURT: Okay. Based on my notes, what we are
22 sending to the jury is, breach of contract; send civil
23 conspiracy; and I am going to send to the jury the
24 negligence misrepresentation claim based on the assertion
25 that the bank, the bank required a two-year lease. I will

1 instruct the jury that they, I will instruct the jury, if
2 they can award as damages for breach, rent but not lost
3 profits. Is there anything else we need to talk about.

4 MR. MECKLER: If there is a breach of contract how do
5 we, is it ran through the remainder of the term of the
6 agreement, there is not specific performance because they
7 shouldn't have to pay any of it.

8 THE COURT: I am sorry, you have lost me.

9 MR. MECKLER: We are going to try a breach of
10 contract case. The jury comes back, yes, you have
11 breached the contract. Two ways, the outdoor space; and
12 two, you didn't sell them the space. So they get their
13 rent from the date that --

14 THE COURT: What I am envisioning, is I am going to
15 ask the jury those two questions. We are going to ask,
16 did they breach the contract by failing to allow the
17 purchase; and secondly, did they breach the contract by
18 revoking access to the patio. And I think the damages
19 stop as of the lawsuit. But if there is a finding that
20 they breached the contract by revoking use of patio then,
21 and the landlord continues to not allow it then you have
22 got a finding by the fact finder that is a breach of the
23 contract and you can recover then.

24 MR. MECKLER: They were suppose to buy this unit for
25 \$270,000.00. We reduce that because of the -- but they

1 still don't have the unit.

2 THE COURT: Oh, yeah. I mean, you still get to argue
3 for the damages \$130 plus the \$25, right.

4 MR. MECKLER: \$130 plus the \$25.

5 THE COURT: You get the difference, I am sorry, \$430
6 minus \$270.

7 MR. MECKLER: But they still, when we do about future
8 rent. I mean they are still paying rent they otherwise
9 would not have to pay to 2026 because they are stuck in
10 the lease even though there is a clear breach that they
11 should have sold it to them.

12 THE COURT: Mr. Martens.

13 MR. MARTENS: I believe breach of a lease would give
14 them an option, give them the right to terminate too. So
15 I don't think it is appropriate to be calculating future
16 damages under a lease that, if it is in breach --

17 THE COURT: It has been a long time since I have
18 looked at that issue. My recollection of contract, is
19 that that is correct. If there is a finding by the jury
20 that there is a breach then the lease is terminated. It
21 is an election but you know, your clients would be out of
22 the lease, they would have the money for the value between
23 for what they contracted to purchase, the present value of
24 the property minus what they would have had to pay and
25 then be free to find another space.

1 MR. MECKLER: It just gets more complicated because
2 they put \$2 to \$300 thousand dollars into an up-fit of
3 that space. So I think that would be actual damages as
4 well that they would be entitled to get back. Because
5 they would have to, you got to make them whole and to be
6 whole they have to go get a new place.

7 THE COURT: Mr. Martens, if they have got to get a
8 new place they have got to get the value of their up-fit,
9 don't they?

10 MR. MARTENS: So I am looking at paragraph 13.

11 THE COURT: Of the lease?

12 MR. MARTENS: Yes, sir.

13 THE COURT: What does it say.

14 MR. MARTENS: Do you have a copy of the lease, Your
15 Honor?

16 THE COURT: I do, I can't lay my hands on it at the
17 moment. I have just got so much paper up here.

18 MR. MARTENS: I will try to get you a copy.

19 THE COURT: Read me, actually I think I just found
20 it. Paragraph 13.

21 MR. MARTENS: Yes, sir.

22 THE COURT: I am there.

23 MR. MARTENS: Paragraph 13 is trade fixtures and it
24 authorizes the tenant at its own cost and expense and is
25 more particularly provided, the demised premises with

1 trade fixtures, all trade fixtures installed shall remain
2 the tenants property. So they are entitled to take them
3 with them. Provided however nothing shall be deemed to
4 effect landlord's remedy of distrain. And I believe, my
5 client is telling me that there was suppose to be a list
6 of trade fixtures submitted to the landlord but it was
7 never done. So I don't think they, if they elected to
8 terminate, the trade fixtures remain the tenants. They
9 bought them, they are theirs.

10 THE COURT: Well, some things. Furniture and things
11 like that. But there are also things like improvements,
12 painting and --

13 MR. MARTENS: Maybe try a simpler answer to that
14 question. There was no evidence presented as to that
15 element of damage. And they can't, they can't now argue,
16 oh, there is additional stuff, I forgot to tell the jury
17 about.

18 MR. MECKLER: Correct, Your Honor. We asked Ms.
19 Sills what she spent, what Grapevine spent on the up-fit.
20 She said \$2 to \$300 thousand dollars. And they didn't ask
21 her any questions about it. This is a full run business
22 that they invested time, money and into for a lease that
23 was suppose to run through 2026.

24 THE COURT: My inclination is to allow the Plaintiff
25 to present that to the jury. What they could take with

1 them, Mr. Martens. Outdoor furniture, some tables and
2 chairs, what?

3 MR. MARTENS: Sure and I think there are indoor
4 tables. I have never been there, Your Honor, I don't
5 know. I think there is kitchen equipment and those kinds
6 of things and tables and chairs, that kind of stuff that
7 is theirs. And it is theirs to take.

8 MR. MECKLER: I have been doing this for a long time,
9 representing landlords and tenants.

10 THE COURT: I am going to let the claim go to the
11 jury. And, Mr. Martens, you can argue they have a right
12 to take the stuff with them, they can take the oven, they
13 can take the frig. And point out to the jury they don't
14 have any evidence about what that would be worth. But I
15 think, that, she did testify they spent between \$2 and
16 \$300 thousand dollars up-fitting. And if they have to
17 terminate and go somewhere else I think they are entitled
18 to present that as damages. All right, anything else we
19 need to talk about.

20 MR. MECKLER: I don't know. Civil conspiracy, I have
21 got some ideas if you want them to mill over.

22 THE COURT: It is going to the jury, the breach of
23 contract, I am confident on. The negligent
24 misrepresentation as to the bank issue, I am going to let
25 that go to the jury. The civil conspiracy claim makes me

1 real uncomfortable. I just think, our Supreme Court has
2 given us no --

3 MR. MECKLER: I meant specific performance.

4 THE COURT: Okay. My feeling on that is, that is an
5 after verdict discussion. Because in order for that to
6 even come up the jury has to find there was a breach and I
7 think if the jury finds there is a breach then you can
8 choose, if you want to, to ask for specific performance at
9 that point. And Mr. Martens can argue I shouldn't do it.
10 I don't think that even comes up unless you get a finding
11 of breach by the jury.

12 MR. MECKLER: I am happy to hold off.

13 THE COURT: Civil conspiracy cause of action makes me
14 really uncomfortable. I may JNOV that if we get a jury
15 verdict on it. I have to think about that. That is a
16 pre-court opinion, appears to suggest almost anything in
17 South Carolina is legal actionable is now subject to a
18 conspiracy claim also. And it does not seem to be any
19 limit that I can discern from that opinion. But I will
20 think about that. I guess let me ask it this way. Are my
21 rulings clear. I know that you don't always agree with
22 them but are the parties clear on what I ruled. Is that
23 clear enough?

24 MR. MECKLER: I believe so.

25 MR. MARTENS: Yes, Your Honor.

1 THE COURT: We end for the day and we will have
2 Defense case tomorrow, we will have a charge conference at
3 the close of the Defense case and then we will charge and
4 do closing. Does that sound reasonable?

5 MR. MECKLER: Yes, Your Honor.

6 THE COURT: See everybody at 9:30 tomorrow.

7 August 26, 2021

8 THE COURT: Is the Plaintiff ready to proceed?

9 MR. MECKLER: Yes, Your Honor. I do have one
10 question, if I can get some clarification. Just when I
11 was looking at everything last night. I am trying to
12 figure out on the damages issue, present to the jury, you
13 have allowed the negligent misrepresentation. So my
14 understanding is that I can then put in the loss profits.

15 THE COURT: That's my ruling, yes.

16 MR. MECKLER: And then with respect to the prior rent
17 that they paid, prior to February. Technically they
18 didn't get what they bargained for. If the jury finds
19 there was a breach because it was really no option to
20 purchase. Can I put information in front of the jury
21 regarding the, prior to February 2018 when the notice was
22 given. Because the jury can then make a reduction.

23 THE COURT: What you want to be able to argue, is not
24 only should they get the rent from the patio, the patio
25 change forward but you want the back rent also because

1 they --

2 MR. MECKLER: They didn't really get the bargain.
3 They didn't get what they bargained for.

4 THE COURT: That would be double dipping on those
5 damages. You are already making the claim that they
6 breached but not executing the option contract. So I
7 don't think you can get that, plus get refund of rent all
8 the way back to 2016.

9 MR. MECKLER: I just wanted to check with you.

10 THE COURT: Yes on the profit damages, no on the
11 going back to 2016. Anything from the Defense before we
12 get started?

13 MR. MARTENS: Nothing, Your Honor.

14 THE COURT: Let's bring them in.

15 (Whereupon, the jury came into open court at
16 approximately 9:58 a.m.)

17 THE COURT: All right, ladies and gentlemen, I have a
18 note that says we are not, whoops, that is the wrong note.
19 I apologize. This note says, the correct note says, does
20 the Court know if the juror that left ill has been tested
21 for COVID and if so what were the results. Our Clerk's
22 office has reached out to that juror. And what she
23 responded was, she has been tested, she does not have the
24 results of the test yet. However, she is very sick and is
25 not able to get out of bed and has chest pains and she

1 believes she does have it. Does not have the official
2 results yet.

3 THE COURT: Mr. Martens.

4 And, ladies and gentlemen, if she does call in and
5 tells us it is a positive test we will let you know.

6 MR. MARTENS: The Defense calls Todd Brockmann. May
7 it please the Court.

8 THE COURT: Yes, sir.

9 Todd Brockmann, being
10 first duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 By Mr. Martens:

13 Q Tell the jury your name, sir.

14 A Todd Brockmann.

15 Q And what do you do for a living?

16 A I am a real estate and tax attorney. I am licensed
17 in South Carolina and North Carolina.

18 Q Have you done legal work related to Riverwalk River
19 District Building 6?

20 A Yes.

21 Q And tell the jury a little bit about the type of work
22 that you have done in regard to this specific entity?

23 A I do a lot of real estate work, if you are familiar
24 with Riverwalk, it is a big complex and this is one part
25 of it. And so I do, like on this particular building, we

1 formed an entity for the building to get put into. The
2 building gets transferred. We do the financing. I do a
3 loan closing with the lender who is going to lend so the
4 building can be built. Pretty much anything and then
5 investment, anything having to do with real estate
6 building I handle.

7 Q You mentioned financing and was something we heard
8 some testimony about, financing yesterday. Tell me what
9 role you played with regard to financing of this building?

10 A So when the time comes to do the financing I get
11 asked to get involved. The lender, in this case, Bank
12 OZK, it was the Bank of the Ozarks at the time, they call
13 themselves Bank OZK now. They have an attorney and so we
14 go through the process of, you know, we provide them with
15 due diligence and then the bank will produce loan
16 documents. I review them, negotiate them to get the terms
17 right and then we close the loan which is a matter of the
18 bank financing the money. And then we record a mortgage.
19 So the bank has a lien on the building. It is a process,
20 takes anywhere, you think you can do it quickly. But
21 usually ends up being a three or four month process to go
22 through and get all of this documentation in place.

23 Q I want to show you an Exhibit that was introduced
24 yesterday. I am going to hand you what has been marked as
25 Plaintiff's Exhibit number 43. Do you recognize that

1 document?

2 A It looks familiar, it looks like the loan agreement
3 that was done when we closed the financing.

4 Q And did you represent the borrower entity with
5 respect to that loan closing?

6 A Yes. The borrower who is the landlord.

7 Q Okay. When did that transaction close?

8 A Looks like 2014. That seems about right. I am
9 looking at the document, I think it says July 30th, 2014.

10 Q Is that generally consistent with what you recall?

11 A Yes, it was about that time.

12 Q Now in conjunction with that loan closing, what types
13 of information or documents were you required to provide
14 to the lender?

15 A In the, like in the due diligence process. That is
16 where we are getting the loan, all the information they
17 want to see in order to approve the loan. So, you know,
18 we do a title search so we can show them that the property
19 that we are taking the collateral in, that the borrower
20 owns it and do properly encumber it with a mortgage. Then
21 there is environmental testing that gets done. They want
22 an environmental report. They, a commercial building like
23 this they want to see, you know, for the residential
24 spaces they want to see the formal lease. On the
25 commercial side they want to see the actual signing

1 commercial leases, so we provide them. And then they are
2 also, not on the legal side, but they are doing a lot of
3 underwriting. So they are looking, you know, how much the
4 rent is going to be. How much is it going to cost to
5 operate this building. And then the bank ends up, by
6 processing all of that information, they can determine
7 that, yeah, we can make a loan this large because we know
8 that the rents are going to be able to pay our loan back.

9 MR. MECKLER: Your Honor, I am going to object to
10 this testimony. He is testifying as to what the bank
11 would say and do. We actually had the banker here
12 yesterday.

13 THE COURT: I am going to overrule the objection, is
14 a real estate attorney who does these kinds of closings.

15 Q Continue, sir.

16 A That was all that I was going to say.

17 Q You mentioned that one of the documents that you had
18 provided to the lender was leases for tenants in the
19 building?

20 A Yes, I don't know if I actually provided it or if the
21 landlord provided it. It would have been part of the due
22 diligence that the bank was looking at.

23 Q Let me hand you what has previously been marked as
24 Plaintiff's exhibit 1. This is the commercial lease
25 agreement for the Grapevine of Riverwalk. Would that have

1 been one of the lease agreements that was provided to the
2 lender during the loan process?

3 A Yes.

4 Q Did you have anything to do with the preparation of
5 that document?

6 A No.

7 Q And were you, at the time you were involved with the
8 loan closing, were you generally familiar with the terms
9 of that document?

10 A No, not really. What happens is, these get provided
11 to the lender for their review because they want to see
12 what are the terms of the lease. And they want to confirm
13 what the rent amount is, any other provisions of the lease
14 that will impact them.

15 Q Sounds like that wasn't something, specific terms of
16 that lease was not something that you were intimately
17 concerned about at that point in time?

18 A No. I probably received a copy of it somewhere in
19 the process but would have been nothing for me to really
20 do other than provide it to the lender if it hadn't been
21 provided.

22 Q During the loan application, underwriting process,
23 were you, did you become aware or were you made aware of
24 the fact that this particular lease agreement has an
25 option to purchase in it?

1 A I think I knew that at the time.

2 Q Did you make any effort to study the terms of that
3 option or what it provided or didn't provide at that time?

4 A Not at that time because it really wasn't germane to
5 what I was doing. It was just a matter of the lender
6 needed to see it and so, you know, there is, this building
7 only has a few commercial leases. But, you know, on a
8 large transaction there might be 20. The client doesn't
9 want me spending time looking at stuff that is germane to
10 what my job is at that point.

11 Q So you assisted of the formation of the LLC and you
12 assisted with the loan closing that was the construction
13 loan for the building, correct?

14 A Correct.

15 Q And then what is the next involvement you had with
16 regard to Riverwalk River District Building 6?

17 A I think that the next thing that would have come up,
18 well, probably to be accurate, when the lender closed the
19 loan and they are going through the construction process
20 the lender wants to see the title updated periodically,
21 every couple of months. They want to make sure that
22 everything, sometimes like if a contractor is not getting
23 paid they would file a mechanics lien. So I was probably
24 tasked to update the title every month or two while they
25 were making construction draws. So that was kind of part

1 of the construction process. But beyond that, the next
2 time was probably late in the year of 2017 when the topic
3 of purchasing the space came up.

4 Q And how did the topic of purchasing, and you say
5 topic of purchasing the space, what do you mean by that.

6 A I think that Brian Wilson sent a letter either to the
7 landlord or to me or both indicating that the Grapevine
8 wanted to purchase a space pursuant to the purchase
9 option.

10 Q Let me show you what has been marked as Exhibit 2.
11 Is that the letter to which you are referring?

12 A Yes, I have never seen this letter. I don't think it
13 came to me. My guess is what happened was the, Dave
14 Williams got this letter and then somehow it was passed on
15 to me at some point.

16 Q What is the date on that letter?

17 A July 26th, 2017.

18 Q And what is your recall about when you would have
19 started performing any kind of additional legal work in
20 response to that letter?

21 A Yes. At some point thereafter and obviously prior to
22 early 2018 I was asked to prepare the building to be, what
23 is called a horizontal regime, under State law. I think
24 people would generally say condo. It is not technically a
25 condo. In South Carolina it is called a horizontal

1 regime. And so it was my job to coordinate the
2 documentation because, additionally it is a stand alone
3 building. So the stand alone building is owned by the
4 landlord entity. And so when, in order to be able to sell
5 a portion of it you have to go through this process called
6 the horizontal regime in which you create units within the
7 building that could be individually sold. You can't just
8 willy nilly, oh, I am going to sell you this apartment or
9 this space unless you have gone through the formalities.
10 The two biggest formalities of that are a plat. So an
11 engineer or a surveyor prepares a plat to basically show
12 floor by floor how these units exist. So they go out and
13 they measure and measure all the walls. And so I think
14 you can determine what each of these units consist of
15 because instead of having this one big building that is
16 sitting on a piece of property with a building, now you
17 have got a series of little properties. Each unit is its
18 own property, it has its own tax, property, it is subject
19 to its own property taxes. And so any of us can then own
20 one of those units. Can sell one but doesn't have to sell
21 the whole building. So the, there are two key documents.
22 The plat, so the engineer plats all of that information.
23 But the key document that creates this horizontal regime
24 is called a master deed. And so that is a document that
25 sets forth all the terms and conditions about how the

1 condominium is to operate. How it is formed, how to
2 operate, what the rules are, you know, what unit owners
3 can do, not do, et cetera. So if anybody has ever lived
4 in a condo you were subject to all of these condo rules.
5 It is the same thing here. Even though there is a
6 commercial component and a residential component in this
7 building, it kind of works the same way.

8 Q Your testimony is that you were asked to perform this
9 work some time in the later part of 2017?

10 A Yes.

11 Q And with regard to the work that you were being asked
12 to do, what was your understanding that was being
13 undertaken, that somebody was asking you to do that?

14 A In order to create the unit that comprises the
15 Grapevine space, so that they can be sold.

16 Q I asked you a little while ago if you were familiar
17 that the Grapevine's lease contained an option to
18 purchase.

19 A Yes.

20 Q And as you began to work on the horizontal property
21 regime in anticipation of a transaction that would
22 ultimately result in a sale, was one the things that you
23 considered in terms of that option to purchase?

24 A Initially I didn't because it wasn't kind of the
25 scope of what I was asked to do. It was, they were going,

1 there was going to be a purchase and that the building
2 needed to be prepared in order to do that. So initially,
3 no.

4 Q Okay. At some point did you began to take a look at
5 the terms of the option to purchase and what it did and
6 did not provide?

7 A Yes. At some point later, I don't recall exactly
8 when that was.

9 Q If you will, sir, take a look at paragraph 33 of
10 Exhibit 1.

11 A Okay.

12 Q Would you read the first sentence of paragraph 33 to
13 the jury, please.

14 A Yes, sure. Tenant shall have the option to purchase
15 the premises during the third lease year with not less
16 than 120 days advanced notice to landlord or \$270,000.00
17 dollars, (the purchase price), in accordance with the
18 purchase and sale of your agreement provided in Exhibit G.

19 Q Now this provision refers to something called the
20 third lease year?

21 A Correct.

22 Q What was your understanding of what the third lease
23 year, what that meant.

24 MR. MECKLER: Your Honor, objection, Defendants have
25 already admitted what the third lease was and when it

1 began.

2 THE COURT: They have admitted but I think this
3 witness is entitled to say what he thought it was. You
4 are asking historically the time. I am going to allow it.

5 A And so, going back, what I read in 33. It says
6 during the third lease year. So in order to determine,
7 this lease in section four that talks about how you define
8 the lease year.

9 Q And what does paragraph four say about lease year?

10 A You want me to read it or paraphrase.

11 Q Paraphrase if you are comfortable, if not --

12 A I can just read it. That way it is clear.

13 Q Okay.

14 A It says the word, lease years, is used in the lease
15 shall mean the period commencing on the commencement date,
16 that is a capitalized term; or if the commencement is not
17 the first day of the month, then on the first day of the
18 following calendar month and then ending one year
19 thereafter together with each subsequent year or
20 subsequent years. So there is a document, I am sure it
21 has got to be an exhibit that is the tenant acceptance
22 letter from when the building was complete and the tenant
23 accepted the premises. So when this lease was signed the
24 building wasn't complete, may not have been there, I don't
25 recall the timing. So in that case the lease provided

1 that they would, when it was complete the landlord would
2 hand, then handed the premises to the tenant. And there
3 was a tenant acceptance letter dated February 2nd which
4 indicated the commencement date was February 2nd.

5 Q Of what year?

6 A 2016. So based upon it being that the date was
7 February 2nd, the language that I read about, if the
8 commencement date is not the first day of the month then
9 the first day of the following calendar month means to me
10 that the first lease year would have started, commencement
11 date was February 2nd, March 1st, 2016 would be the
12 beginning of the first lease year. So just kind of doing
13 a timeline. So year one was March 1; the February 28th,
14 2017; the second lease year was March 1st 2017 to February
15 28th, 2018. The third lease year would have been March
16 1st, 2018 til February 29th, 2019.

17 Q So the third lease year would have ended sometime in
18 early 2019, is that correct?

19 A Yes, February.

20 Q Did that have any significance to you as you were
21 beginning to prepare horizontal property regime documents
22 in anticipation of this purchase option?

23 A I didn't look at that when I started preparing the
24 documents. Later on it did come up for sure.

25 Q Why?

1 A Because, I am sure, the tenant was very eager to buy
2 the unit. They were pushing, pushing, pushing to sell or
3 to buy the property. So one of the things I wanted to
4 look at is to say, when did the landlord have to sell it
5 to them. And the answer is during the third lease year.

6 Q Does it state a particular date of the third lease
7 year that that transaction has to occur?

8 A No.

9 THE COURT: Can I see y'all at the bench.

10 (Whereupon, a bench conference was held in the
11 presence of the jury but out of the hearing of the
12 jury.)

13 THE COURT: Ladies and gentlemen, what we just talked
14 about is, Mr. Brockmann is an attorney but he is a fact
15 witness in this case, not an expert witness. So he is
16 permitted to give his, he is permitted to tell you what he
17 did in the past or advice he gave to his client. But he
18 is not permitted to give his opinion of what parts of the
19 contract mean or don't mean because he is not an expert
20 witness in the case.

21 Q So, Mr. Brockmann, keeping that in mind, did your
22 review, reading about the revision of the lease in any way
23 impact the manner in which you worked to move this
24 transaction forward?

25 A Yes. We felt that the landlord had no obligation to

1 close until the end of the third year lease. Because it
2 didn't say, to the first day of the lease year. It didn't
3 say the 3rd day of the lease year. It didn't give any
4 date. So it was clear to me that the last day for the
5 landlord to perform was February 28th, 2019.

6 Q And irrespective when the third lease year began or
7 ended, did you put together a horizontal property regime
8 master deed and bylaws?

9 A Yes.

10 Q Let me show you what as been parked as Plaintiff's
11 exhibit 18. And if you look at the bottom, most of it has
12 been redacted. At the very bottom there is an email from
13 Mark Mather to Brian Wilson. Do you see that. The
14 substance of the email is actually on the second page?

15 A It is an email, January 30th of 2018 from Mark Mather
16 to Brian Wilson.

17 Q Flip over to the second page of that email and read,
18 start reading at the top of that.

19 A I have attached two documents for your review.

20 Q Stop there. So does that email indicate that two
21 documents were sent to Brian Wilson on January 30th of
22 2018?

23 A Yes.

24 Q What were the two documents that were sent to Brian
25 Wilson on January 30th of 2018?

1 A I don't know what was sent to him. It just says, our
2 draft, master deed and bylaws and architectural plans for
3 construction.

4 Q Had you completed a draft of the master deed and the
5 bylaws on or before January 30th of 2018?

6 A Yes. I actually went back and looked because I
7 figured I would get asked about this. The master deed,
8 went through several versions but I actually found where I
9 had made final revisions to the master deed on January
10 30th and I believe, I had sent that to Mark and I assume
11 that is what he sent on to Brian Wilson. But I don't know
12 that.

13 Q Why weren't they recorded?

14 A Because we would never record those until we were
15 completely ready to close because things change. So once
16 you record a document its on the public record, you are
17 kind of stuck with it. You can go in later and record
18 something else to amend it, terminate it, what have you.
19 But just common practice in real estate law, we would
20 never record a document until we needed to record it. If
21 you record it early and it is wrong or something, you
22 know, things are always changing up until the last minute.
23 So we would always wait until the last minute. So the
24 assumption is, if this closing was going to occur we would
25 have recorded, first we would record the plat because that

1 kind of starts it because the plat is referenced in the
2 master deed. And then we fill in the recording
3 information from the plat and then we would record the
4 master deed. And then we would record any kind of
5 conveyance documents to a buyer. We might do it the day
6 before but we wouldn't do it ahead of time until we knew
7 we were sure we had everything nailed down with the
8 closing.

9 Q Let me show you what has been marked as Plaintiff's?
10 Exhibit number 39 or introduced as Plaintiff's Exhibit 39.
11 Do you recognize that document?

12 A I assume it, I know we were emailing at that time so
13 this looks accurate.

14 Q It is an email chain between you and Brian Wilson,
15 isn't it?

16 A Yes.

17 Q And what is the earliest date in that email chain?

18 A It looks like at the end, the bottom which would have
19 been the first email was Tuesday, October 10th, 2017 which
20 was an email from Brian Wilson to Travis Hege, who is an
21 employee of GRH, the landlord.

22 Q And if you will, turn to the page that is stamped,
23 page number 8 of the email.

24 A Okay.

25 Q Do you see there is an email from Brian Wilson to

1 Suzanne Wilson, I assume they are not related.

2 A I assume not. Suzanne Wilson is my paralegal.

3 Q Okay. And Suzanne works for your law firm?

4 A Correct. At some point she would have gotten looped
5 into helping me on the transaction.

6 Q All right. And what did Mr. Wilson ask for in that
7 document, on that email?

8 A The email from November 7th from him and Suzanne and
9 Suzanne forwarded it to me. It says, please advise the
10 status of the HPR documents for Riverwalk District
11 Building 6. I represent the Grapevine in its purchase of
12 a condominium unit which your firm is preparing. Do you
13 anticipate the seller will be able to close on the sale of
14 this unit by February 2nd, 2018. The buyer is involved in
15 a 1031 exchange so the timing is of the essence. Please
16 let me know if you anticipate any delay in this
17 transaction. Please send the proposed master deed for my
18 review as soon as possible for my review. I do not want
19 the timing to creep up on this. Thanks for your help.
20 Look forward to working with you. Brian.

21 Q So Mr. Wilson asked for a proposed master deed for
22 his review in November of 2017. And looking back at
23 Exhibit 18, when was that provided to him?

24 A January 30th of 2018.

25 Q When Mr. Wilson contacted your law firm in November,

1 on November 7th, 2017, how long did it take you to get
2 back to him in response to his email?

3 A Looked like he emailed on November 7th at 10:41;
4 Suzanne forwarded it to me at 10:44, three minutes later.
5 And then it looks like I replied at 10:50 a.m., six
6 minutes later.

7 Q So within nine minutes of him reaching out you were
8 responding?

9 A I tend to be kind of hypervigilant on emails.

10 Q Turn over to page six of Exhibit 39. Let me know
11 when you are there.

12 A I am there.

13 Q What appears on page six?

14 A Kind of going from the bottom, there is an email from
15 Brian on November 27th, 2017 at 12:57 p.m. where he, you
16 want me to read it?

17 Q Sure.

18 A Dear Todd. Please advise of the status of the HPR.

19 Q And HPR is what?

20 A I assume he means horizontal property regime, i.e.,
21 the condo. My client wishes to engage a tax deferred
22 exchange therefore timing is of the essence. Please
23 confirm this transaction, we will be able to, schedule on
24 February 2nd. Please let me know if there is anything I
25 may can do to assist with the process.

1 Q Let me stop you there. Were you aware of any closing
2 that had been scheduled February 2nd?

3 A No. Brian Wilson indicated that they wanted to close
4 by February 2nd and I assume that was because they were
5 doing the 1031 exchange. If somebody sells a property and
6 they want to avoid the tax on that they can sell the
7 property, put the money with a qualified intermediary,
8 basically an escrow agent. They hold the money and then
9 the seller can buy another property to replace it. And
10 when they reinvest those proceeds they don't have to pay
11 the tax on the gain. So it is a common real estate
12 strategy to avoid taxes for sure.

13 Q Okay.

14 A So the, my assumption was that February 2nd was
15 maybe, was either their 180th day or close to it.

16 Q But with respect with your involvement in this
17 transaction, were you going to be the attorney
18 representing the seller?

19 A Correct.

20 Q And in your experience as a transactional attorney,
21 do buyers attorney and seller's attorney typically
22 coordinate and agree upon a date for a closing?

23 A Eventually, yes. There is a lot of times where we
24 are working towards it. A lot of times in a purchase
25 agreement there is a hard deadline for closing. Anybody

1 who has bought a house, they know, you had to close by
2 August 26th or whatever it is. But in this case we didn't
3 really have that, we didn't have a hard deadline of any
4 sort. At some point we do say we are close on this day
5 and then try to do so.

6 Q Now, Mr. Wilson sent that email to you on what date
7 and what time?

8 A It was Monday, November 27th, 2017 at 12:57 p.m.

9 Q And how long did it take you to respond?

10 A I responded the next day, I assume that was
11 Thanksgiving week. I may not have been so much in the
12 office. But so, yes, the next morning, at 10:14 a.m. I
13 replied back. We are working with the bank and the
14 engineer on this process. We cannot commit to any
15 particular date at this point. So please wait for us to
16 advise on the timing. Thanks.

17 Q Okay. Turn to page five of Exhibit 39. Tell the
18 jury what that is.

19 A It is an email from Brian to me on January 3rd, 2018
20 at 3:38 p.m. You want me to read it?

21 Q Yes, sir.

22 A Dear Todd. Please advise of the status of the
23 formation of the HPR of this unit which is scheduled to
24 close in four weeks. If the unit is not anticipated to be
25 ready please advise and anticipate a date of readiness and

1 propose the accommodations from the seller for a delay in
2 the closing date, if any. My client gave notice of this
3 closing last July so there has been sufficient time to get
4 this task accomplished.

5 Q Do you have any idea what he was talking about when
6 he asked about proposed accommodations from the seller.

7 A No.

8 Q Were you aware of any agreement that would require
9 the seller to give accommodations?

10 A No. Going back to what we discussed earlier about
11 the third year, we determined that the closing did not
12 have to occur until February --

13 MR. MECKLER: Objection, Your Honor.

14 THE COURT: I am going to overrule the objection. It
15 is confined to what they thought at the time.

16 Q When did Mr. Wilson send that email to you?

17 A It was January 3rd, 2018 at 3:38 p.m.

18 Q When did you respond?

19 A It appears that I responded the next morning, January
20 4th, 2018 at 9:52 a.m. And I said, it is in process but
21 we cannot commit to any particular date at this point.

22 Q And was it in process as of January 4th of 2018?

23 A Yes. I was personally working on the master deed and
24 the, you know, work was being engaged to get the plat
25 done. So me finishing the master deed was a little bit

1 contingent on getting the plat done because there is
2 information from the plat that I had to insert into the
3 master deed. For example, when you determine all the
4 units and their square footage then you have to determine,
5 you know, under a condo everybody has to make that monthly
6 check to pay for the common expenses. They collect it all
7 and they divide it up into percentages based upon how big
8 a space you own. We hadn't had all of those calculations
9 to determine what the, how much was allocated to the
10 Grapevine, how much was allocated to every other space in
11 the building.

12 Q And so what you told him on January 4th at 9:52, is
13 that it is in process but they can't commit to a
14 particular date?

15 A Correct. Because we didn't, there was no obligation
16 to close on any particular date.

17 Q Turn over to page two of Exhibit 39. And this is Mr.
18 Wilson's response to your email, correct?

19 A It appears. At the bottom?

20 Q Yes sir, at the bottom.

21 A He sent me an email on Thursday, 2018 at 10:39 a.m.
22 He said --

23 Q That would have been within about 30 or 40 minutes of
24 you telling him we are working on it, right?

25 A Okay. Yeah, maybe 45 minutes later.

1 Q What did Mr. Wilson say?

2 A He said, Todd, it is my understanding you are stating
3 the seller will be unable to sell the condominium unit on
4 February 2nd, 2018. It is further my understanding you do
5 not know when it might occur. Please correct me if I am
6 misstating your communication.

7 Q Continue on.

8 A Are we talking about the delay of weeks, months or
9 years? My client exercised the purchase option on July
10 17th. Please let me know exactly what has been done and
11 what remains to be done. Are the HPR documents complete.
12 Has an architectural engineer signed off on them. The
13 last three questions were in bold. It is obviously in my
14 client's best interest to wait a period of time for the
15 sell if the seller is acting in good faith.

16 Q So Mr. Wilson told you, as of January the 4th, it was
17 in his client's best interest to allow the seller to
18 perform?

19 A That is what he said or that is what he wrote.

20 Q Turn over to page one of Exhibit 39. And tell the
21 jury what that is?

22 A He wrote to me on January 18th, 2018 at 10:58 a.m.
23 It says, Todd, I find no response to my correspondence of
24 January 4th. In the absence of a response or show, any
25 showing of good faith I referred my clients to Attorney

1 Josh Howard who has prior litigation experience involving
2 this building. It is not too late for your client to
3 provide evidence of good faith to close on the sale of the
4 condominium unit as promised.

5 Q Read the subject line of Mr. Wilson's email?

6 A Subject, Riverwalk River District Building
7 6/Grapevine-Any update of remedies for breach of contract.

8 Q Now, were you aware of any breach of contract that
9 had occurred as of January 18th of 2018?

10 A Not by the landlord.

11 Q Had the date that Mr. Wilson proposed in July even
12 occurred when he was accusing the landlord of being in
13 breach of a contract?

14 A He was proposing a closing date of February 2nd, 2018
15 which had no meaning to me other than they appeared they
16 wanted to use this property as a replacement property for
17 a 1031 exchange.

18 Q But January 18th was obviously before February 2nd,
19 right?

20 A Correct.

21 Q So what was the breach?

22 A There wasn't. I mean, it is the same thing, you
23 know, if closing didn't occur on February 2nd. We
24 believed that the landlord had no obligation to close on
25 that date.

1 Q And then the landlord provided the horizontal
2 property regime documents on January 30th?

3 A Correct.

4 Q Let me show you what has been introduced as
5 Plaintiff's Exhibit 5. Do you recognize that email?

6 A Yes.

7 Q Tell the jury what that is.

8 A It is an email from me to Jetter Pittman who is a
9 surveyor engineer and he was working on the plats.

10 Q So you were working on the regime documents and
11 Jetter Pittman was working on the plats?

12 A I was working on the master deed and he was working
13 on the plat.

14 Q Okay. What did your email to Jetter Pittman say.

15 A Where do we stand on getting the condominium plat for
16 the building completed. We have a contract that requires
17 selling the space in a couple of weeks so we need to get
18 this done ASAP. Thanks.

19 Q What prompted you to send that email?

20 A I am not picking on Jetter individually. Surveyors
21 tend to be extremely slow in getting stuff done. And so
22 on a daily basis, you know, I am assigned to get the
23 transaction done. And so one of the big parts of my job
24 is to be hurrying the cats, wrangling people, making sure
25 everybody else in the transaction is getting their job

1 done partly because that is my job and partly because if
2 it doesn't get done I am the one that gets yelled at. So
3 I am constantly pushing surveyors along. Now, the one I
4 tell you, I was asked about this in my deposition. The,
5 what I was doing was lighting a fire under Jetter Pittman
6 to get the job done. At that time I didn't take any
7 independent determination about the contract other than I
8 knew that it had to be done during the third lease year.

9 Q And how much time had passed since Mr. Wilson had
10 sent an email accusing the seller of being in breach and
11 saying he was referring his client to a litigation
12 attorney. How much time had passed between that email and
13 your email to Jetter Pittman?

14 A So the email that indicated the remedies for breach
15 of contract was January 18th, 2018 at 10:58 in the
16 morning. This was the following morning, January 19th at
17 9:34.

18 Q Had you reached a legal conclusion that the seller
19 was under a contract that required it to close in two
20 weeks.

21 MR. STAPLES: Same objection, Your Honor.

22 THE COURT: I am going to allow the question.

23 A I don't remember exactly when I made a legal
24 conclusion about the closing date on the contract. At
25 this point I was told they wanted to buy and I was told to

1 prepare the documents and so I was doing that job. I
2 don't recall when it was that I looked closely at the
3 lease to make the determination about the third lease
4 year. It probably was around that time, I just don't
5 remember when that was.

6 Q For the purpose of your email to Mr. Pittman was just
7 to get him moving?

8 A Correct.

9 Q What happened when February 2nd arrived?

10 A I don't recall. We didn't attempt to close or
11 anything. I think maybe at some point prior to then it
12 was clear that the closing wasn't going to happen then.
13 So my hunch is that nothing happened on that day because
14 we weren't planning on closing that day.

15 Q As we moved on into 2018, tell the jury what happened
16 in regard to this transaction?

17 A I will speak in kind of generalities because, you
18 know, there was lots of starts and stops during 2018. I
19 did look at some of the exhibits to kind of refresh my
20 memory on various things. I know that at some point Brian
21 Wilson was replaced as the attorney for the landlord.

22 Q For the tenant.

23 A For the tenant, excuse me. I think it was shortly
24 after the failed closing that Brian wanted to have, was
25 trying to push to get done. So somewhere long the line,

1 later in the Spring we were contacted by Shawn Fallin who
2 is an attorney, I know him as an attorney, and basically
3 attempting to move this process along again. I think I
4 read it was May.

5 Q And did you work with Mr. Fallin, I am not sure how
6 to pronounce it?

7 A We were kind of continuing the process to see if we
8 could come about with a closing. The problem was, during
9 this whole year, you know, I mean we are here today
10 because the landlord and tenant don't get along. So there
11 was, things happening along that time that would create
12 starts and stops. There would be a fight about parking,
13 you know, all kinds of things. So the, but I recall that
14 somewhere in April, May, there was some work to try to get
15 to a closing but nothing came to fruition that I recall.

16 Q How long was Mr. Fallin involved?

17 A I don't know exactly, maybe a few months. Later on,
18 I want to say, August, I was contacted by Jack Santaniello
19 who lives next door to me. He is a partner of Plaintiff's
20 Counsel and he reached out to me because, he said he was
21 doing work for Grapevine. Jack is a franchise attorney so
22 he does like business work. But he said he saw my name on
23 correspondence and he reached out directly to me to kind
24 of see what could be done along these lines. And I want
25 to say that was August, September of 2018.

1 Q Let me show you a document and see if you recognize
2 this.

3 A Yes, this is some of the email correspondence.

4 MR. MARTENS: Your Honor, we would move to introduce
5 this document as Defendant's Exhibit number.

6 MR. STAPLES: Your Honor, may we approach?

7 THE COURT: You may.

8 (Whereupon, a bench conference was held in the
9 presence of the jury but out of the hearing of the
10 jury.)

11 (Whereupon, Defendant's Exhibit 2 was admitted into
12 evidence.)

13 Q I will hand you up what is marked as Defendant's
14 Exhibit 2.

15 A I have seen this before because I am positive it was
16 one of the exhibits provided to me for my deposition. It
17 has got the same stamp at the bottom, looks like it would
18 have been 13.

19 Q And tell the jury in just sort of general terms what
20 that Exhibit 2 is?

21 A It was some back and forth between Jack and i about
22 this matter.

23 Q Which matter?

24 A The landlord/tenant dispute that we are here for.

25 Q Okay. And in, in, when did that exchange occur?

1 A The top of it has Friday, August 31st, 2018 at 8:59
2 a.m. And it goes, he forwarded an email from, like a week
3 before that somebody else did. I think that it occurred
4 over a day or two.

5 Q In late August of 2018 were attorneys who represented
6 the purchaser contacting you about what can we do to get
7 this on track?

8 A Jack did.

9 Q And did you talk to Jack?

10 A Yes, I am pretty sure we talked either on the phone
11 or out in the driveway at some point because, you know, I
12 think, well, I can't speak for him. My goal in engaging
13 the conversation was I thought we could maybe get the
14 dispute resolved somehow.

15 Q Now, Mr. Brockmann, by late August of 2018 had you
16 become aware that there was an issue related to the common
17 areas and how those common areas might be treated in a
18 condominium versus landlord/tenant relationship?

19 A Definitely, that was kind of a recurring theme or
20 problem. Like I said, during 2018 there were stops and
21 starts. That was one of the major issues.

22 Q What was the issue?

23 A The tenant wanted to use the sidewalks outside of
24 their place to put tables. And as part of the purchase
25 they were insisting to have that right at various times.

1 Q And that is, in fact, a big part of the dispute that
2 we are about here today, isn't it?

3 A Correct.

4 Q Is it safe to say that that dispute had not been
5 resolved as of August 31st of 2018 when you and Mr.
6 Santaniello are communicating?

7 A Yes, it has never been resolved.

8 Q You and Mr. Santaniello communicating in August 30th
9 and August 31st of 2018, were we still within the third
10 lease year?

11 A Correct.

12 Q I am going to hand you what has been marked as, what
13 has already been introduced as Plaintiff's Exhibit 5. Do
14 you recognize that letter?

15 A Yes, I am familiar with it.

16 Q What is it?

17 A It is a certified letter from the landlord law firm.
18 You want me to read it.

19 Q Tell the jury in general terms what it is. They will
20 be able to read it.

21 A Yes. The tenant or the tenants's attorney sent a
22 letter saying that the landlord was in fault for not
23 selling the unit to them.

24 Q What was the date of that letter?

25 A October 5th, 2018.

1 Q October 5th of 2018 still within the third lease
2 year?

3 A Yes. There was like four months left or more.

4 Q As of October 5th of 2018 had the parties been able
5 to resolve their disagreement over how the common areas
6 would be treated in the condominium regime?

7 A No.

8 Q Look at this document and I ask if you recognize
9 that?

10 A Yes.

11 Q What is it?

12 A Its an email from Jack to me on Monday, November
13 12th, 2018 at 12:07.

14 Q Okay.

15 MR. MARTENS: Your Honor, we would move to introduce
16 this as Defendant's Exhibit number 3.

17 THE COURT: Any objection?

18 MR. STAPLES: No objection.

19 THE COURT: Into evidence without objection.

20 (Whereupon, Defendant's Exhibit 3 was admitted into
21 evidence.)

22 Q I would now hand you what has been introduced as
23 Defendant's Exhibit number 3. Tell the jury what the
24 subject of that email exchange between you and Mr.
25 Santaniello was?

1 A It was, I recall that after they sent the demand
2 letter we had conversations --

3 Q Did you mean default letter?

4 A That, it says breach and demand in the subject line.
5 Buy, yeah, the October 5th letter from Mr. Meckler. And
6 so, subsequent to that there probably were some
7 discussions, negotiations about this issue that
8 transpired. And so it appears that Jack was responding to
9 a discussion that we may have had about options and kind
10 of indicated what his client wanted to do.

11 Q And what did Mr. Santaniello tell you was his
12 client's inclination?

13 A Well, I can just read it. Todd. I have discussed
14 the option you presented to me to present to my clients.
15 One, proceed with closing but with outright use of the
16 patio; or two, terminate the option, continue with the
17 lease and they can continue to use the patio. This time
18 their inclination is to proceed with the closing. We do
19 not appreciate how your client is attempting to utilize
20 the patio as leverage to get his way on terminating with
21 the option and not proceeding with the closing.

22 You want me to keep going?

23 Q That's okay.

24 A It is really the next paragraph that I thought was --
25 He said, we believe the best way to make sure all of the

1 proceedings are closing, is possible, is for us to file
2 the complaint for specific performance and damages related
3 to the delay in closing. Including the offset for
4 additional -- against the purchase price. It keeps things
5 moving along with respect to the closing and keeps your
6 clients focused on such. He is saying they are going to
7 file suit.

8 Q Was this still within the third lease year?

9 A Yes, it was November 12th, 2018 and the third lease
10 year didn't end until February of 2019.

11 Q You know what he was talking about, damages related
12 to delayed closing?

13 A No. I understand that he was making a demand of some
14 sort. But I am not aware of anything in the lease that
15 would have provided for that. I am also, the bigger issue
16 is that it was impossible for the landlord to be a breach
17 in this time for not closing because the time for
18 performance hadn't occurred.

19 Q Okay. And with regard to the statement that they
20 were going to pursue damages for the delay closing. Take
21 a look with me, if you will, paragraph 33 of the lease
22 again.

23 A Okay.

24 Q And it says the landlord shall apply \$25,000.00
25 dollars of rent and a security deposit against the

1 purchase price at the time of closing.

2 A Yes.

3 Q Are you aware of any other provision of the lease
4 that would entitle the tenant to additional credits based
5 on when the closing actually occurred?

6 A No.

7 Q And it is a matter of record in this case that suit
8 was filed in December of 2018 and that a lis pendens was
9 filed in December of 2018. Was this lawsuit filed during
10 the third lease year?

11 A Yes.

12 Q What was the impact of the lis pendens in regard to
13 any proposed or pending transaction?

14 A So the filing of a lis pendens, what is basically
15 means, it means pending litigation, I believe.

16 Q I will tell you Mr. Wilson discussed some of this in
17 his testimony yesterday. I don't know if it is necessary
18 for you to go into a detailed explanation. But for terms
19 of the effect that a lis pendens has on a property owner
20 who is trying to schedule a transfer, what does the lis
21 pendens do?

22 A Well, I mean, it is intended to be used to just put
23 the world on notice that there is something, there is
24 something pending regarding this property. So,
25 theoretically -- a purchase contract when the buyer

1 thinks, you know, the buyer has a contract for a certain
2 amount of money and then the seller finds another buyer
3 who wants to pay more money and sell it out from
4 underneath them when the buyer knows they will file a lis
5 pendens to put something in the real estate records so
6 that it would make it difficult to be able to do any type
7 of real estate transaction. Because the title attorney
8 who does the search would find it and would say, whoa,
9 whoa, what is going on here, we have got an encumbrance on
10 the title. So it encumbers the title of the property.
11 The other thing that is commonly utilized for is to, sort
12 of tweet the lender. A lender who makes a loan on a
13 commercial property, they like everything to be perfect.
14 They want to see the fully occupied, any controversy they
15 get a little weird. So with this lis pendens file, it is,
16 I don't know if they got sent to the lender or what have
17 you but they would become aware of it and then they would
18 kind of, you know, come to you and say, what is going on
19 here. And so it does hinder the owner's ability to
20 transact business on property because, you know, you
21 wouldn't be able to refinance with this sitting there
22 because the lis pendens is sitting there in front of the
23 new mortgage. So you get into title issues because it is
24 sitting there.

25 Q Would you be able to get a partial release of this

1 security with the lis pendens hanging out there?

2 A No. But in theory if the parties did come to an
3 agreement, that that really involves the lis pendens
4 getting dropped. So but, no, if it is still sitting out
5 there it would be, you could still record stuff, you could
6 still do stuff if people are willing. But it is a
7 practical matter, kind of just stops everything.

8 Q Okay. And the lis pendens, would that have been
9 filed during the third lease year?

10 A Correct. I believe it was like December 21st, if I
11 recall. I went and looked at it the other day. So that
12 would have been a couple months before the end of the
13 third lease year.

14 Q Let me show you what was introduced as Plaintiff's
15 Exhibit number 19. Tell the jury what that document is.

16 A It has Nate Pierce at the top but I don't, so that
17 might had been the person who printed it or something.

18 Q I think that is right, he is a member of one of the
19 attorney's previously involved in this.

20 A So I don't know who that is. But it says from
21 Melanie Sills to Mark Mather on April 3rd, 2018.

22 Q What does it say?

23 A It says. Hi Mark. The documents look fine. Please
24 let us know of a good closing date. April 23rd or 24th
25 would work great for us. I need to check with Brian

1 Wilson to get it on his schedule.

2 Q Just make sure that everyone is clear on this. You
3 had prepared a master deed and condominium bylaws by when.

4 MR. STAPLES: Objection to the leading question, Your
5 Honor.

6 THE COURT: I am going to allow the question.

7 Q When did you prepare those documents, sir?

8 A I mean, it was over a period of time but we had sent
9 what was a substantially final set to Brian Wilson on
10 January 30th as we discussed earlier.

11 Q And Ms. Sills indicated that the documents were final
12 on what date?

13 A This was April 3rd of 2018.

14 Q And why did the transaction break down?

15 A I really can't, you know, I don't know. Like I said,
16 during all of 2018 there were various starts and stops.
17 And the landlord and tenant generally don't get along.
18 And so as things popped up there would be delays for a
19 couple of months and then would pick back up. I don't
20 know why it didn't come to fruition at this time.

21 Q If the purchaser or someone representing the
22 purchaser had said to you during this period of time,
23 Todd, we have got the wrinkles ironed out, we are ready to
24 go forward. Did you have, from your prospective and from
25 your side of the transaction, did you already have

1 everything you needed ready to go at any point in time?

2 A I mean, the master deed and plat would have required
3 some finishing touches, putting in dates and signatures
4 and such. The documents that the landlord needed to
5 prepare were more or less done. It wouldn't have taken
6 just a few days to just dust them off at any time, make
7 sure the dates were right on them and then get them
8 signed, recorded, et cetera. From the standpoint to
9 create the horizontal regime, yes. From the standpoint of
10 actually closing the sale, I don't recall ever getting
11 like draft closing documents or anything like that that
12 where we were moving expressly towards the closing in any
13 way.

14 Q Did anybody presenting, the purchaser ever offer to
15 you or talk to you about making an earnest money deposit
16 or making arrangements of earnest money?

17 A No. I wasn't aware that that ever occurred. But the
18 closing attorney on the transaction would have been the
19 buyer's attorney. As the seller's attorney I would be
20 kind of dealing with the seller side. But traditionally
21 the buyer's attorney is the one who was closing attorney
22 on real estate transaction.

23 Q And what are the responsibilities of the closing
24 attorney?

25 A You know, the delegation of work between the seller's

1 attorney and the buyer's attorney varies. And so
2 sometimes the seller's attorney will prepare like a deed
3 and documents. Sometimes the buyer's attorney will
4 prepare them. And me, as the seller's attorney, I would
5 just review them and make sure that they were correct.

6 Q And you use the term, what is a closing attorney?

7 A It is, so in South Carolina, if you bought houses or
8 something you went to the attorney's office to sign
9 everything. So they handle pretty much all the aspects of
10 a closing, the preparation, the finalization of the
11 documents. They do the title search and then they take
12 the documents that have to be recorded, deed, mortgage, et
13 cetera. And so then they are also the ones that disperse
14 the money. So when the buyer comes and wants to give the
15 money, the buyer pays the money to the closing attorney
16 and then the closing attorney pays for the recording of
17 the deed, his or her fees. So there is a closing
18 statement and then whatever the seller is entitled to the
19 closing attorney will then send the net proceeds of the
20 sale.

21 MR. MARTENS: Your Honor, may I have just a moment?

22 THE COURT: Yes, sir.

23 MR. MARTENS: I have no further questions, Your
24 Honor.

25 THE COURT: Cross-examination.

1 MR. STAPLES: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 By Mr. Staples:

4 Q Mr. Brockmann, as the seller's attorney, you don't
5 get to make the decision on the closing date. Is that
6 right?

7 A The attorneys don't ever get to make the decision on
8 the closing date. The clients decide that, they tell us
9 what they want to do.

10 Q So is it a fair summary of your testimony that you
11 were essentially ready to go to the closing table, you had
12 prepared your master deed but you were waiting on the
13 landlord to authorize you to agree to a closing date. Is
14 that correct?

15 A All I ended up doing, we got the billing ready to be
16 condo'd. As far as ever setting a closing date or doing
17 the actual closing, I am not aware if that was ever done.

18 Q And you represent Mark Mather?

19 A I represent the landlord, yes, and Mark's companies.

20 Q Right. Mark's companies include Assured
21 Administration?

22 A Yes.

23 Q And they include the Greens of Rock Hill?

24 A Yes.

25 Q And they include GRH Development Resources?

1 A Yes.

2 Q And Mark Mather is the managing member of Assured
3 Administration?

4 A Correct.

5 Q And Assured Administration owns the Greens of Rock
6 Hill?

7 A Correct.

8 Q And the Greens of Rock Hill is the entity that
9 purchased the majority of tract of land down at the
10 Riverwalk development?

11 A Yes. The entire size is about a thousand acres and
12 the Greens of Rock Hill, LLC acquired it in like 2005,
13 2006, somewhere around there.

14 Q Okay. And now the landlord entity, Riverwalk River
15 District Building 6, LLC, that is a subsidiary of the
16 Greens of Rock Hill?

17 A The, yes. So Riverwalk Building 6, LLC is an LLC, at
18 least initially would have been wholly owned by the Greens
19 of Rock Hill, LLC. So, yes, we call it a special purpose
20 entity as opposed to a subsidiary. But it was owned,
21 initially was owned entirely by the Greens of Rock Hill.
22 That may have changed over time.

23 Q And we heard some testimony from Anthony Swainey at
24 Bank OZK yesterday about how, it was his understanding
25 that the landlord entity, the RD6, LLC was, in fact, a

1 single purpose entity?

2 A Correct.

3 Q And you would agree with that?

4 A Yes. It was formed specifically to own this
5 particular building.

6 Q And so it essentially mirrors the signature block on
7 the lease. You have RD6, LLC as the landlord entity which
8 is owned by the Greens of Rock Hill which is in turn owned
9 by Assured Administration?

10 A Correct.

11 Q Now, you did not have any involvement in the
12 negotiations of Grapevine's lease?

13 A Correct.

14 Q And you did not have any involvement in the drafting
15 of that lease?

16 A No.

17 Q And that would include any of the exhibits in that
18 lease, you did not prepare any of those?

19 A Correct.

20 Q And I take it you do not have any knowledge about any
21 lender requirement relating to Grapevine's option to
22 purchase in terms of a length of time that they were
23 required to lease before they could exercise that option?

24 A No. The only time I would have had interaction in
25 regard to the lease with the lender was providing that to

1 them as part of the due diligence of the closing of the
2 loan.

3 Q Right. And you testified that, in fact, Bank of the
4 Ozark's approved that lease?

5 A I assume so because they closed.

6 Q So your role in dispute or in this case is that you
7 were engaged by the landlord to prepare the condominium
8 regime for Building 6 where Grapevine is located?

9 A Yes, I physically prepared the master deed, the
10 engineer prepared the plat.

11 Q Right. And you were engaged for that purpose to
12 prepare a master deed, accommodate the sell to the
13 premises to Grapevine?

14 A Correct.

15 Q And so your goal was essentially to convert
16 Grapevine's space into a condominium unit that could then
17 be sold?

18 A Correct.

19 Q And you are not aware of any reason why that could
20 not be done?

21 A Other than putting the documents in place.

22 Q After Grapevine gave notice to the landlord of its
23 intent to exercise the option to purchase and to actually
24 buy the unit, you were initially unable to commit to any
25 particular closing date?

1 A Yes. It wasn't my role to commit to a date or not.

2 Q The horizontal property regime had to be in place
3 before the closing could occur?

4 A Correct.

5 Q Now, the horizontal property regime could have been
6 set up before Grapevine exercised its option to purchase?

7 A Correct. It could have been done at any time.

8 Q And you sent an email on January 19th, 2018 to Jetter
9 Pittman, I believe Mr. Martens talked to you about that,
10 would have been roughly a week or so before the closing
11 date proposed by Mr. Wilson in which you state, "We have a
12 contract that requires selling the space in a couple of
13 weeks. So we need to get this done ASAP."

14 A Correct.

15 Q Were you being truthful to Mr. Pittman when you sent
16 that email?

17 A Yes. At that point, all I knew is we were suppose to
18 have a closing with Brian Wilson on the sale of this. And
19 so, yes, I did not make any independent determination at
20 that time. I just assumed that Brian Wilson, you know,
21 had a reason. And at that point I did know that they
22 trying to do the 1031 exchange. So obviously if we can
23 help accommodate that, you know, that would be great.

24 Q I mean, let's be honest. The words in your email
25 says, we have a contract that requires selling the space

1 in a couple of weeks?

2 A Correct.

3 Q And you would agree with me that the words matter?

4 A Sure.

5 Q Now, to your knowledge the master deed that you
6 prepared, in draft form, was never finalized?

7 A It still hasn't been finalized.

8 Q And Grapevine or the Sills were not required to sign
9 off on that master deed, were they?

10 A No.

11 Q But they did communicate an approval of those
12 documents back to Mr. Mather?

13 A They or their attorneys approved them multiple times.

14 Q And you agree that creating that horizontal property
15 regime and getting those documents in final form and
16 recording them with the Registered of deeds, that was
17 solely within the landlord's control?

18 A Absolutely.

19 Q And as far as your involvement back in 2008, at any
20 time during the third lease year that regime was never
21 completed?

22 A Correct.

23 Q And the closing was not going to occur without the
24 landlord's permission and consent?

25 A Yes. I mean, obviously the landlord has to sign

1 documents for the closing just like the tenant would.

2 Q And, Mr. Brockmann, did the closing occur at any
3 point in time during the third lease year?

4 A No.

5 MR. STAPLES: Your Honor, if I could have a moment.

6 THE COURT: Yes, sir.

7 MR. STAPLES: Nothing further.

8 THE COURT: Any redirect?

9 MR. MARTENS: Very briefly, Your Honor.

10 REDIRECT EXAMINATION

11 By Mr. Martens:

12 Q Mr. Brockmann, did the horizontal, I am sorry, did
13 the master deed that you prepared contain any language
14 about the common areas?

15 A Yes.

16 Q Do you recall what you drafted?

17 A No, it is an exhibit.

18 Q It is not an exhibit but I can show it to you to
19 refresh --

20 A I figured I would be asked about it so I did look at
21 it and I did look at it recently.

22 MR. MECKLER: Your Honor, I would object, to the
23 extent this is not directed to the cross.

24 THE COURT: Counsel, approach, please.
25

1 (Whereupon, a bench conference was held in the
2 presence of the jury but out of the hearing of the
3 jury.)

4 A Yes, it looks like what I prepared.

5 Q Does that document indicate that it was prepared by
6 you?

7 A Yes, it says drawn by and after recorded return to
8 me.

9 Q And if you need to, flip to the appropriate portion
10 of that document just to refresh your memory of what you
11 drafted?

12 A Yes. There were various versions as we went along.
13 I don't think they changed substantially, substantially
14 after January, the one that was sent to Brian Wilson on
15 January 30th of 2018. I know some subsequent versions
16 were done along the way. I don't believe there were
17 substantive changes to it. Updating some factual
18 information but I am pretty sure this was -- because along
19 the way we had, numerous times they were, you know, they
20 were approved. Emails that Melanie Sills sent said they
21 were approved. Brian Wilson had said they were approved.

22 Q And specifically with regard to use of common areas,
23 what did you draft for the master deed. You don't need to
24 read it but just tell the jury what you put in there.

25 A I mean, in any property regime you have to have rules

1 and regulations regarding the common areas. First and
2 foremost, everybody, there is an association that gets
3 created to manage the condominium. The association can
4 assess all the owners for their percentage share of the
5 overall cost. So the association calls for insurance, for
6 maintenance, for mowing the grass, planting bushes,
7 whatever. All of that gets added up and then everybody
8 has to pay their two percent share or whatever it is that
9 they are doing. So it goes, there is lots of various
10 things in here but I think, as it relates to this matter,
11 the most provision is section 7.3 of the master deed that
12 was approved.

13 Q Why is that relevant to this dispute?

14 A You know, at the heart of the dispute is the use of
15 the outside sidewalk areas.

16 Q Sidewalk areas --

17 THE COURT: I am going to reverse that earlier
18 ruling, I think it is outside the scope of cross.

19 MR. MARTENS: No further questions.

20 THE COURT: Any recross?

21 MR. STAPLES: No, Your Honor.

22 THE COURT: You can step down. Call your next
23 witness.

24 MR. MARTENS: We call Mark Mather.

25 Mark Mather, being

1 first duly sworn, testified as follows:

2 DIRECT EXAMINATION

3 By Mr. Martens:

4 Q Tell us your name, please, sir?

5 A Mark Mather.

6 Q Tell the jury just a little bit about yourself, Mr.
7 Mather.

8 A I was born in Cincinnati, Ohio; grew up in
9 Cincinnati; went to Miami University in Oxford, Ohio.
10 Went to Graduate School at North Carolina State
11 University. I was the Graduate Assistant Football Coach
12 at NC State; played football in college. And worked in
13 Raleigh after Graduate School. When I left, I worked for
14 a consulting firm and I went back to Cincinnati in late
15 80's. I had to eat some words that I told my father that,
16 when I went off to college, because he did not go to
17 college. By the way, son, what are you going to study.
18 And I said, whatever, but I am not going to wind up being
19 a dumb, dumb contractor like you. And when I showed up
20 ten years later he said, so where are you now. My family
21 is contractors. I just looked up recently, my grandfather
22 was born in 1884 and he was a dumb, dumb contractor like
23 my father and here I am in contracts.

24 Q Mr. Mather, we have heard your name mentioned a lot
25 during the course of this trial. Tell the jury what you

1 currently do?

2 A I work, I work as an employee for a company called
3 Jerry's Development Resources. What I would like to say
4 is that is the, I am also a manager of the company called
5 Assured Administration; Assured Administration owns
6 things. And Jerry's Development Resources is an
7 organization. I like to say that we get work, we do work
8 and we keep score. So the functions of the other
9 businesses, if they do not have employees are performed by
10 either Jerry's Development Resources, if we are going to
11 do things as a captive manager company developer or, or
12 write the contracts that I sign when we have a third
13 party. So if we have a third party property manager, we
14 currently manage some of the properties we have at
15 Riverwalk, we do our accounting but we have third party
16 accountants. We have had in the past third party lessor's
17 or I am sorry, leasing agents and sometimes we do it
18 ourselves. Get work, do work, keep score.

19 Q And what is the biggest or primary project that your
20 company has been working on over the last several years.

21 A Since I moved here in 2013 full-time, so working on
22 Riverwalk which is a, it is just a name. Riverwalk is
23 actually the development's name that, Greens of Rock Hill
24 started and, these were entitled, use the word,
25 entitlement in the development business. They are

1 entitled, that is how we got our zoning. It is called, it
2 is entitlement. I use that as a way towards my children.
3 We are, Greens of Rock Hill purchased the property in 2005
4 and from there on they have been the original owner of any
5 property that gets transferred into a single asset company
6 when we develop things.

7 Q And is Riverwalk River District Building 6, LLC a
8 single purpose entity?

9 A We call it a single purpose entity, the bank calls it
10 single asset entity. Yes, it is.

11 Q And what asset does Riverwalk River District Building
12 6 own?

13 A Riverwalk River District Building 6 owns what I like
14 to call the Grace Building, I have got a daughter, Grace.
15 And that is the asset that it has and when we first formed
16 it it was formed to have a single mortgage.

17 Q And is Riverwalk River District Building 6 the
18 landlord of Grapevine of Riverwalk?

19 A It is.

20 Q And do you serve in the capacity as a manager of
21 Riverwalk River District Building 6?

22 A I do not personally have the full authority. The
23 Riverwalk River District Building 6 has two other
24 partners, has two partners. Riverwalk River District
25 Building 6 is then managed by the managing member which is

1 Greens of Rock Hill. Greens of Rock Hill is managed by
2 Assured Administration.

3 Q Did you have authority to sign documents on behalf of
4 Riverwalk River District Building 6?

5 A That is correct.

6 Q Were you involved in any of the negotiations of the
7 marketing that led to the execution of the lease that
8 brings us here.

9 A Directly, no. Succinctly, of course, ultimately in
10 charge of.

11 Q And, in fact, your signature appears on the lease
12 agreement, does it not?

13 A Yes, as the manager of Assured, the owner and manager
14 of Jerry's Development Resources and Jerry's, -- and then
15 Riverwalk River Building 6. That's correct.

16 Q Now, at the time you signed this lease agreement on
17 behalf of the landlord entity Building 6, were you aware
18 that it contained the option to purchase provision?

19 A I was.

20 Q Did that cause you any pause or concern?

21 A No. Just as long as we followed her documents, it
22 did not give me any pause or concern.

23 Q Was it unusual or unique that Building 6 would enter
24 into a lease with an option to purchase?

25 A The only wrinkle that came into that option to

1 purchase was, I wanted to make sure we gave it to your
2 bank and I wanted to make sure we had a purchase and sale
3 agreement that allowed us to send the purchase and sale to
4 our bank for them to review so that we could then parcel
5 out that piece, that demised premises and transact based
6 on the mortgage.

7 Q And so the option to purchase was a provision that
8 you would have pointed out to the lender during the
9 process?

10 A I really wasn't involved in the direct conversation.
11 I sound like that person but I had people working for me,
12 so to speak. And lawyers working for me, Todd working for
13 me. And I know those documents and the due diligence we
14 passed on and we represented that they were true and just
15 proceeded along those lines.

16 Q Let me ask you a few questions about the terms of the
17 lease agreement. And one of the provisions of the lease
18 agreement is a description of what is called the demised
19 premises.

20 A In deed.

21 Q What is the purpose of that provision?

22 A I almost want to caution myself of being an expert.
23 The demised premises is we are identifying the property
24 within, we are talking about a specific part, specific pro
25 and we are preferring something that has, as I like to

1 say, it has got its X's and it has got its Y's and it has
2 got its Z's, X, Y and Z. It is a specific location.

3 Q It identifies this particular space that you are
4 leading to the tenant?

5 A Yes, a specific location, uh-huh.

6 Q And we talked, you heard testimony about the purpose
7 provisions of the lease? What are purpose provisions and
8 I believe that is paragraph three or four.

9 A The purpose, the purpose is we are putting together
10 mix used development. We have multiple buildings going
11 into the same location. We are building what is known as
12 common area, common area includes parking. We have to,
13 within the confines of our zoning provide the proper
14 number of parking spaces for the, for all of our tenants
15 and the uses in this location here called the River
16 District. And actually line up water and sewer coverage
17 and line up traffic patterns, traffic control site;
18 sanitation and among other things. The uses have demands
19 on the infrastructure, if you will.

20 Q And Grapevine's lease describes the use of purpose as
21 a mercantile wine and craft beer shop/bar. Is that
22 correct?

23 A That's correct.

24 Q Does it allow Grapevine to engage in business
25 activities outside of, acting as a wine and craft beer

1 store and bar?

2 A Well, yesterday I saw the testimony back and forth,
3 apparently between Dave and Melanie. And its pretty
4 specific that says it is a, excuse me, for purpose of
5 operating a wine and craft beer shop and bar. They doing
6 business as Grapevine wine shop, wine bar for such
7 incidental uses thereto that may be approved by the
8 landlord in advance and in writing. So we just want to
9 make sure that we control, have the opportunity when we
10 are the landlord to control the tenant's uses and frankly
11 the demand for things that were not necessarily known to
12 everyone such as parking. Parking is a big deal down here
13 at River District, big deal.

14 Q Why?

15 A Because our design space is confined, trying to have
16 a, it is suppose to be a special spot, the River District
17 is suppose to be a special spot, special spot has, from an
18 architecture you saw that we talked to Alan, a very
19 capable man in terms of the ideas. So we want to have, it
20 is called human scale. So you want to have your buildings
21 connect to each other and when you walk past there is,
22 there is a parameter that we all know and recognize or
23 they say in the books how much parking should be within a
24 given space, at least this is what I believe to be true.
25 So we are not engulfed in a sea of parking so we did not

1 want the River District to be another mall or strip mall.
2 We wanted it to be a special spot.

3 Q And in Grapevine's lease you read, it says, on uses
4 that may be approved with landlord in advance and in
5 writing are also allowed. Are you aware of any incidental
6 uses that have been approved by the landlord in advance
7 and in writing?

8 A None that I am aware of, no.

9 Q Did the landlord, to your knowledge, ever approve in
10 advance and in writing sales of pastries and coffee?

11 A Well, it is a revision of this lease, I prepared
12 myself, looking at some of the documents. And the lease
13 says that any approval is by counter signatures by the
14 tenant and the landlord. So there are none of those
15 amendments within our, within our file.

16 Q You have heard testimony, during the course of this
17 trial, that Grapevine was permitted or permitted to use
18 common areas, to set up tables and chairs to serve
19 customers. Do you recall that testimony?

20 A I remember the testimony indeed. So the, I have
21 stacks and stacks of papers for a lease. I like to review
22 documents if necessary and that is how we can keep track
23 of things. The Grapevine's use of those spaces outside of
24 the rights so to speak, so the, giving them permission
25 would be true approval, correcting them from using the

1 stuff was my prerogative. Because somebody does something
2 wrong doesn't mean I need to correct them especially if it
3 doesn't harm anybody. And that is the way we went through
4 those pieces. So for instance, at the beginning of this
5 project, when we had one building down there, double
6 parking a vehicle did not matter. The Pump House was not
7 up and running and there was not a bunch of traffic
8 running past there. It is not important from the
9 standpoint if someone would double park even though it was
10 outside of the lines. Now when we had an incident where I
11 was very upset with double parking. That double parking
12 happened on a Saturday when there were 300 or 400 people
13 traveling down the river. And I, in the parking space,
14 not explicitly, but I allowed people to park in our
15 undeveloped area for use of the river. And it was the end
16 of the day and they were about to travel out. Now that is
17 when double parking matters. So as we have been through
18 this whole piece because someone is, it isn't a default
19 situation, doesn't mean I have to tell them they are in
20 default and pursue that default. It merely means that
21 they are in default.

22 Q Is it accurate that the landlord allowed Grapevine to
23 use the common areas for its business for a period of
24 time?

25 A Without me going through that whole thing, of course

1 we allowed them to.

2 Q Why would you do that. Why would you want them to
3 use space that they didn't rent?

4 A Well, just as I said, we get to where we keep score.
5 What I like to say for Riverwalk is we want it to be a
6 place where everyone flourishes. And to the extent that
7 they could expand their business and be a necessary part
8 or a significant part of our development they would
9 flourish and therefore the development would flourish. So
10 that is why we allowed them to work outside of the
11 confines of their lease.

12 Q And did the issue related to Grapevine's use of
13 common areas serve customers instead of tables. Did that
14 become an issue as the parties began to discussing,
15 transitioning landlord, tenant relationship into a
16 purchase sell of a condominium unit?

17 A Yes, it did. And it appeared to be significant
18 portion of the Grapevine's business. So when I go
19 through, I don't want to bore everybody again over these
20 documents. But when we look at the testimony and the
21 things that I have done, when I sent my email to Brian
22 Wilson. I said please look at the definition of premises
23 and demised space. I did the same when I sent it to
24 Melanie and Dave. Please look at the definition within
25 these documents.

1 Q Why?

2 A Well, from a flourish standpoint. I know that they
3 would not have the rights to any outdoor space. It is
4 within the X, Y and Z, within the spaces that are in this
5 lease that we have, those are going to be transcribed into
6 the document which is the horizontal property regime. And
7 I knew, because I reviewed those documents, that section
8 7.3 which we just heard a few minutes ago, said that they
9 do not have a right to them. As a matter of fact, no
10 right to put any personal property which are tables and
11 chairs or conduct any business in the common area. And I
12 knew that was not in their best interest. We heard
13 Melanie talk about being partners. That would not be
14 appropriate for me to not point out, look at the document.
15 Watch out for yourself, look at the document.

16 Q So there were, the landlord, tenant relationship, the
17 landlord had the discretion to allow them to operate in
18 the common area?

19 A Correct. That is my absolute reading of the
20 document, yes.

21 Q And would that change under the horizontal property
22 regime that was going to be put in place that would still
23 take this transaction?

24 A Yes, it would. Because then it would be, in the
25 condominium association and the other owners had much more

1 specific rights to that space.

2 Q How did Dave and Melanie Sills respond when you
3 broached this subject with them?

4 A Well, it was mostly with Dave and I just, I don't
5 know how many times I said, please read the documents.
6 Just please read the documents. And it was important to
7 me. It was important to me to make sure we did not harm
8 somebody by a set of documents that were not in their best
9 interest.

10 Q Did you ever point this out to Brian Wilson, the
11 attorney?

12 A I said to Brian, I don't want to be caught, not
13 having a document in front of me, but I believe the
14 document says, pay attention to the or please, well,
15 actually may I please read it?

16 Q Yes, sir. This is introduced as Plaintiff's Exhibit
17 number 18.

18 A And I didn't want to refer to the documents that bore
19 you. I have attached, I have attached two documents for
20 review. You heard about that one. Please refer to
21 Exhibit B which is in draft form. We will substitute the
22 details below in final version. Here is the important
23 one. Please note that the demised premises in the lease
24 and the, "property" are the same definition. Which means
25 the 1,490 square feet space, in this case we found out it

1 was actually measured a little bit less than that, it is
2 only that space. That is your space. Please note that
3 the demised premises in the lease and the property have
4 the same definition.

5 Q Did either of the Sills ever respond to you on that
6 issue?

7 A Respond to me on the definition, I believe, I can't
8 remember any specific conversation. But when we went to,
9 I can't remember a conversation.

10 Q As 2018 progressed and the parties were moving toward
11 a closing purchase transaction did the issue of common
12 space and how that would impact Grapevine's operations in
13 a condominium versus in, did that become an issue between
14 the parties?

15 A Absolutely. Absolutely. We were all ready and told
16 in November or December that we are going to get sued. I
17 mean, we saw that. So and we have all heard testimony
18 from bankers and the banking and have unfortunately
19 learned that the hard way a few times. In my capacity,
20 taking care and it is my children's company and myself's
21 company, as we said before. I like the capacity to take
22 care of that. There is a reason we have Exhibit G so that
23 we can follow how to go through a sales contract. After I
24 took care of my opinion, please look at your document, to
25 look at that space, what I was reserving for myself is I

1 need to see that purchase and sale contract come across in
2 the appropriate form for me to sign so that I could go to
3 our bank and say this is how we are going to go through
4 this process of selling this property.

5 Q Was Exhibit G to the lease, and we have looked at
6 that, was found acceptable at that point in time or any
7 point in time?

8 A Well, there are words in the piece that had, I saw
9 how long it took to mark up that document, it took less
10 than ten minutes to mark it up. Fill in the closing date,
11 fill in the escrow agent, fill in the names of the
12 attorneys, fill, from there on it was basically fill in
13 your name.

14 Q Did Grapevine ever provide you with purchase and sale
15 agreement with those blanks filled in?

16 A No, we never got there.

17 Q Did Grapevine ever provide or tender or offer to
18 provide an earnest money deposit?

19 A No.

20 Q Why did you need a purchase contract, what difference
21 does that make?

22 A Well, it just makes, the more precise and detail the
23 purchase document is the easier it is for that to go
24 through a sale. We sell homes over at Riverwalk, I was
25 not here for a few hours yesterday, I was working on a

1 sale. We sold a home yesterday. It just makes the
2 process go through. Now it was important to us, we had
3 certain, we have protections for ourselves in that
4 purchase contract that allowed me to go to the bank and
5 say, can we go do this. And the protections were also for
6 the purchaser, buyer, I can't remember what the work is in
7 it. So that they can look at the title, we want you to
8 clean up the title or not. We just heard about lis
9 pendens. So is there something in that title that would
10 clog it up which is why, of course, we have single asset
11 companies so that things don't contaminate the title and I
12 am not an expert on titles.

13 Q But you heard Ms. Sills testify that she heard
14 conversation between you and her husband where you said,
15 don't be on the wrong side of this contract. Do you
16 recall that testimony?

17 A Yes, I remember the testimony.

18 Q What did you mean by that?

19 A Well, I don't know what the quote was because it
20 doesn't sound like something that I would say. But I,
21 that occasion was a double park incident when this was on
22 that Saturday with cars coming by. And as a matter of
23 fact, it was somebody unloading something going into the
24 Grapevine with no one watching the car and then I said,
25 hey, move that car out of the way. Who are you. So I did

1 not want to be disruptive. Dave and I talked over to the
2 side in the common area. And I said, this isn't
3 acceptable, probably way more animated but not a shouter,
4 I am 60 years old, 58 then. Although I am direct and I
5 just couldn't take it, just read your documents, don't get
6 on the wrong side of this. In my mind I am thinking,
7 otherwise I am going to sell you this space and you are
8 not going to be outside of it.

9 Q The closing on the sale, never did occur, is that
10 correct?

11 A It did not.

12 Q Why not?

13 A For the first portion of the, of the notice letters
14 we did not have the horizontal regime which is the purpose
15 of 120 days. That should be enough time to go put
16 together the regime, at least that is how I read the
17 document. As we are working through January of 2018 we
18 are still 14 months away. But we are trying to
19 accommodate but I still did not have my purchase and sale
20 agreement that is clear in the space. I talked to Brian
21 Wilson, the purchase and sale agreement because I was not
22 -- I can call him on the phone. And each and every time I
23 asked my attorneys to go get a purchase and sale agreement
24 it comes up with a blank. And the reason I didn't close
25 is I did not have a purchase and sale agreement come

1 through. I always, I knew that I could, was in a matter
2 of days or weeks or a month that I had many conversations
3 with Todd. If I need to, if I want to protect myself am I
4 able to file these documents, go through the cost
5 associated with this which is more than free, thus the
6 \$26,000.00 dollar deposit, go through the expense putting
7 in tax ID's, file the paperwork with the State, go through
8 the expense of talking to our bank to make sure that we
9 can file these documents. Do I have enough time to do
10 that and say the space can be sold. But that didn't
11 matter anymore when we pursued in December.

12 Q Why didn't it matter anymore?

13 A According to everybody else and my recollection of
14 laws and safety it is, when the lis pendens is in there it
15 pretty much shuts down everything. Plus we were sued for
16 many different things, as we say, the kitchen sink.

17 Q From your observations, being down there as an
18 employee of GRH and effectively the manager of Building 6,
19 did you observe times where Grapevine was operating
20 outside of its lease?

21 A I lived in an apartment across the street from, I
22 live in the Pierre Building, my father's name is Pierre
23 and my son's middle name is Pierre.

24 Q In what ways did you observe Grapevine operating its
25 business outside of the terms of its lease?

1 A I have gone through a list myself. We start off
2 with, we start off with the, we start off with the
3 purpose. We go through, calling out the definition of the
4 lease here which is a big field evidently. We go through
5 the, the payment of the deposit didn't come until we saw
6 it on the projector yesterday. They are suppose to tender
7 a payment for their deposit when they signed the lease.
8 We got it in October of '15. Fifteen or sixteen months
9 later, it was only \$6,700.00 dollars, but it was. I am
10 looking at it now, it is pretty much trade fixtures. They
11 didn't fill out the trade fixtures so we would know,
12 should they leave what was theirs and what was suppose to
13 stay behind. The common area has been beat to death.
14 These, let's see, misleading covenance of the terms.
15 Apply with applicable laws. So probably a big one,
16 actually an absolutely big one. After we went through all
17 of that, didn't close and litigations and suits, I am
18 sorry, I will take that back. We knew it to be true in
19 October of '15 there was a dog bite incident. We, of
20 course, looked at our insurances and it turns out that the
21 outdoor space is only insured by the buildings property
22 insurance. Now we are passing that on to the other
23 tenants within the building, the other commercial tenants
24 as well as the owner of the apartments. But clearly it is
25 outside of the LLR's. We had testimony about, we have a

1 restaurant called Libby's. The name on the restaurants
2 license for alcohol and beer and that space is not within
3 their, the exterior of that building; does not provide for
4 in their liquor license. As a matter of fact, we asked
5 for them, if it is then because they represent it was.
6 Please provide a document that says that is true. I am
7 sorry, I just beat that one, they are outside the space.
8 And the new get into the things of, which I am sure this
9 is a legal term, it was important to us is the last
10 provision on this piece is, have everybody read it later
11 on. Along the lines, you only hold the landlord
12 responsible, you don't hold the agents, the other owners,
13 the other members of that entity responsible. It is
14 clearly only the landlord. It also says, sorry about
15 this, jury. This shall not be a jury trial. That is what
16 the document says. Just many of the issues.

17 Q Did you ever direct anyone not to move forward with
18 closing on the proposed sale of this space?

19 A Tells me not to move forward, no, as a matter of
20 fact, let's make sure we, there is no penalty for having
21 your homework completed ahead of time. So as long as we
22 have got our documents together we can move, let's make
23 sure that we have them. But, no, I really wanted to have
24 my Exhibit G sent over to me so what we could sign a
25 purchase and sale contract. That is what I wanted and

1 that is what I asked for. So we knew that we could go
2 forward with our obligations on the contract. I wanted
3 that so that I was protected and I could go to the bank,
4 look here, this is how much money we are going to receive,
5 this is how much money we are going, you please tell us,
6 bank, how much money we need to pay off the bank for
7 releasing this much collateral. That is how it goes.

8 Q Mr. Wilson sent his letter in July of 2017, it is
9 now, what, August of 2021.

10 A Right.

11 Q Has the landlord, I am sorry, has Building 6 received
12 a purchase contract any time between Mr. Wilson's letter
13 and today?

14 A Well, in one of our demand letter's I say there is
15 the attached purchase contract and then, of course, there
16 is not anything filled out on it. So, no, we have not.

17 Q And between the time Mr. Wilson sent his letter in
18 July of 2017 and today, has anybody ever offered to tender
19 a \$25,000.00 earnest money deposit?

20 A No.

21 MR. MARTENS: May I have just a moment, Your Honor?

22 THE COURT: Yes, sir.

23 MR. MARTENS: No further questions, Your Honor.

24 THE COURT: Cross-examination?

25 MR. STAPLES: Yes, sir.

CROSS-EXAMINATION

By Mr. Meckler:

Q Mr. Mather.

A Yes, sir.

Q Can you point out to me in the lease agreement where the term, wine and craft beer shop and bar is defined?

A It is not defined in the lease.

Q The lease is Riverwalk River District Building 6 is formed according to your corporate rep that was deposed, correct?

A I didn't hear the question, please.

Q The lease is a form of Riverwalk River District Building 6, correct?

A That is not correct.

Q That is what your corporate represented and testified to in the deposition. Was he not being truthful in that deposition?

A I can't speak for being truthful or not truthful, sir. I can speak to, we know that document was modified and we saw it being modified during the testimony here. So if it were our document, if it were our document then it would not be modified.

Q That was my question. Is the basis of that document your form?

A It is not our original form. I don't remember seeing

1 that document but we use it three times in the past.

2 COURT REPORTER: I can't hear, Judge.

3 THE COURT: Can we bring one of the portable
4 microphones over to Mr. Meckler for the Court Reporter.
5 Thank you.

6 Q You indicated that it took you about ten minutes to
7 fill out the purchase and sale agreement, correct?

8 A That is correct.

9 Q Did you send it to Grapevine?

10 A I sent it to my attorney and had them send it to
11 y'all.

12 Q Do you have Exhibit G in front of you?

13 A I do now.

14 Q Okay. The landlord could have filled in what the
15 unit number is, correct?

16 A And I stand corrected. When I filled it out and sent
17 it to y'all, I referenced not the specific recorded
18 document, in the document the markup was, the condo master
19 deed filed and recorded. I marked it up and said, the
20 draft documents drafted in January or whatever, and sent
21 to you. That is what I marked up.

22 Q So you did mark up Exhibit G?

23 A I am sorry?

24 Q You now testified that you did not mark up Exhibit G?

25 A I am sorry, I did mark it up.

1 Q And you didn't send to Grapevine? You didn't
2 complete it and send it to Grapevine, did you?

3 A I sent it to our attorney.

4 Q You sent it to your attorney?

5 A Yes.

6 Q Okay. But you didn't send it to Grapevine?

7 A I saw your markup come back to me.

8 Q Not on Exhibit G you didn't.

9 A Oh, Exhibit G. I am sorry. I saw a purchase and
10 sale agreement marked up as Exhibit G come back to me.

11 Q That didn't come back to you from Grapevine.

12 A Okay.

13 Q And, in fact, if you look at C2 on this, the only
14 person that could fill out who the, with the beneficial
15 interest numbers is, is the landlord, correct?

16 A On Exhibit G?

17 Q Exhibit G.

18 A There are empty blanks. I don't know who can fill
19 that in, I am sorry.

20 Q Anyone would know that information, wouldn't they?

21 A I believe it would be in the recordation, I believe.

22 Q The horizontal property regime was never recorded,
23 was it?

24 A That's correct.

25 Q You never agreed to a closing date, correct?

1 A Never agreed to a closing date. That is correct.

2 Q If you look at paragraphs G and H, the condominium
3 River District Building 6 and documents, they have never
4 been finalized, correct?

5 A My understanding is they have been approved by
6 everyone.

7 Q And they have been recorded?

8 A They have not been recorded.

9 Q The number of units in the condominium documents,
10 that is under the control of the landlord, correct?

11 A Yes.

12 Q And that would have been filed. In the purchase and
13 sale agreement itself, actually on page four it says it is
14 an agreement between seller and buyer. So it list the
15 seller first, correct?

16 A In the document says, if seller first --

17 Q You are the sole manager of Assured Administration,
18 correct?

19 A I am the sole manager, yes.

20 Q And the Greens of Rock Hill remain in control of the
21 Riverwalk property that has not been designated to River
22 District Building 6 or other single purpose entity,
23 correct?

24 A I don't believe that to be true.

25 Q Who were the members of GRH Development?

1 A I am a sixty-five percent member of GRH Development
2 Resources. And the other one is Proximo, Proximo,
3 (inaudible), thirty-five percent.

4 Q What is your formal title at GRH Development?

5 A Co-managing member.

6 Q Do you remember being deposed by Mr. Staples back in
7 December of 2019?

8 A I do.

9 Q And he asked you that simple question. He said, do
10 you have a formal title or role at GRH Development. Do
11 you remember that?

12 A I remember vaguely the deposition.

13 Q Do you remember your answer?

14 A I believe it would, I would need to look at my
15 documents.

16 Q You couldn't tell him at that deposition, while you
17 are in the middle of litigation over this important
18 matter, what your title at one of the Defendant's company,
19 your own title, correct?

20 MR. MARTENS: Your Honor, may we approach?

21 THE COURT: You may.

22 (Whereupon, a bench conference was held in the
23 presence of the jury but out of the hearing of the
24 jury.)

25 Q And I understand this Riverwalk River District 6,

1 Building 6 has never had any employees?

2 A If that is your understanding.

3 Q Is that understanding correct?

4 A Yes, that is correct.

5 Q And my understanding that Craig Ostrander is an
6 employee of GRH Development, is that correct?

7 A Your understanding is incorrect.

8 Q Is Craig Ostrander an employee of GRH Development
9 Resources?

10 A No.

11 Q Was he?

12 A Yes.

13 Q Was Dave Williams an employee of GRH Development
14 Resources?

15 A He was.

16 Q Was Matt Blackum an employee or independent
17 contractor for GRH?

18 A He was.

19 Q Which was he?

20 A He was an independent contractor.

21 Q And there are no other tenants at Riverwalk River
22 District Building 6 that has an option to purchase in
23 their lease agreement. Isn't that correct?

24 A I believe that to be true.

25 Q And when you were deposed back in December, Mr.

1 Staples asked you about the letter that Mr. Wilson wrote
2 in July of 2017. Do you know what letter I am referring
3 to?

4 A I do not.

5 Q I am going to hand you what has been previously
6 marked as Exhibit 2. Do you recognize that letter?

7 A You put it up as Exhibit 2 on Monday.

8 Q My question is, do you recognize the letter?

9 A Yes, I recognize this letter. You put it up as
10 Exhibit 2 on Monday.

11 Q And you were asked about that letter in your
12 deposition, correct?

13 A No, I don't really remember being asked about this in
14 my deposition.

15 Q Well, I will tell you, your statement was that you
16 did not dispute that that letter was intended by Mr.
17 Wilson to constitute, exercise the option to purchase. Do
18 you still feel that way?

19 A You broke up, I didn't hear you exactly.

20 Q Is that an exercise, a notice of exercise the option
21 to purchase on behalf of Grapevine?

22 A What did I say in my deposition. I don't believe
23 this is, this is not a notice to exercise an option
24 because their option would be consistent with the purchase
25 and sale agreement.

1 MR. MECKLER: Your Honor, we have the original
2 deposition.

3 THE COURT: You can open it.

4 (Whereupon, Mr. Meckler opens a deposition.)

5 Q I will hand you to review.

6 A May I review all three of these at the same time?

7 Q Review whatever you need.

8 A Okay.

9 Q I am going to put that in there so you don't lose
10 your page.

11 A All right. Thank you, sir.

12 Q If you look at page 117. Are you there?

13 A Yes, sir. I am sorry, I am looking at it.

14 Q On page 116 Mr. Staples presented you with a Exhibit
15 14 which is an affidavit of Brian Wilson which had
16 attached to it that letter that we were just discussing,
17 correct?

18 A That's what appears is here. I didn't read the
19 affidavit and now I am going to go through this whole --
20 if that is what you are telling me I believe you.

21 Q Okay. You can read it. Take whatever time you need.
22 Are you ready?

23 A I am ready.

24 Q If you look at line 18 on page 117. Do you see that?

25 A Yes, I do.

1 Q Christian's question to you was, All right. Do you
2 have any reason to dispute that this letter was intended
3 by Mr. Wilson to constitute notice of exercise of the
4 option that we just looked at. What was your answer?

5 A No. This is a notice letter.

6 Q All right. Let me see that again. Do you agree with
7 me that it was the landlord's responsibility to prepare
8 the condominium document?

9 A Yes, that is true.

10 Q And that was not by February 2nd, 2018, correct?

11 A My, it is my interpretation of the facts that the
12 condominium documents were forwarded on the 30th or 31st
13 of January to Brian Wilson. So and you are asking
14 questions that lead me to give yes's and no's. So is that
15 correct, I don't believe you are correct, I think.

16 Q And your deposition again. Let me direct you to page
17 122 this time. If you will take that. Actually look at
18 page 129, if you could. Please tell me when you get
19 there.

20 A I am on page 129.

21 Q Okay. You testified and you can look at on page 129,
22 lines 13 to 14. We were to prepare the condominium
23 documents, typically a deed. Did I read that correctly?

24 A We were to prepare the condominium document,
25 typically the deed. Yes, I did say that.

1 Q And the next question by Mr. Staples was, okay. Were
2 those things done by February 2nd, 2018. What was your
3 response?

4 A I believe they were not.

5 Q And the next question was. So is there any reason
6 they were not. What was your answer?

7 A My answer was they were not completed.

8 Q And Mr. Staples asked you, Right. Any reason why,
9 why were they not completed. What was your answer?

10 A They were not completed.

11 Q And if you look at page 130, line 1. Mr. Staples
12 asked you, I mean the landlord was the one that was
13 responsible for creating those documents, right. What was
14 your answer?

15 A The landlord, our tenants did not complete these
16 documents.

17 Q Did Riverwalk River District Building 6 intend to
18 honor its contract with Grapevine?

19 A Absolutely.

20 Q If you will turn to your deposition, page 134,
21 please. Please tell me when you are there.

22 A I am on page 134, sir.

23 Q Please look to line 17. Question from Mr. Staples.
24 Did Riverwalk River District Building 6 intend to honor
25 its contract. What was your answer?

1 A I cannot answer that at that time. I know that --

2 Q Go ahead.

3 A It was at that time, was finished then. I know we,
4 Riverwalk River District Building 6 had prepared deeds to
5 that extent.

6 Q Mr. Staples, well, why can't you answer that question
7 at that time. I mean, is there some doubt that it didn't
8 honor its contract. And your response was, no. Correct,
9 did I read that right?

10 A You did but there is two questions there. So which
11 one was the no for?

12 Q You answered it. If you look at 135 in your
13 deposition. You testified that there was some issues. It
14 says, banking on the piece at the time that it needed to
15 be investigated. Do you recall that?

16 A I am sorry. You are asking me to read something and
17 then tell you, I am sorry, what is the question.

18 Q Asking you if you remember that there was some
19 banking issues, if I can have that back from you. There
20 is some banking issues with respect to the closing of the
21 option to sale the premises to Grapevine. Were there any
22 banking issues?

23 A Yes. I now know that we need to take and have a
24 partial release of the mortgage. And if you will, please,
25 at the time that I was deposed, I was deposed as Mark

1 Mather. I was not deposed as a representative of all of
2 these documents. So if I was squirrly means I didn't have
3 the documents in front of me.

4 Q I don't remember calling you squirrly. But you
5 signed the lease agreement?

6 A I did sign the lease.

7 Q And you testified that at the time you signed the
8 lease you didn't investigate whether or not you would have
9 to provide notice to the bank to effectuate the sale?

10 A I thought I just testified exact opposite.

11 Q Let's do it again. Take a look at 135, please.
12 Please tell me when you are there.

13 A I am on page, did you say look at 135 or page 135?

14 Q Page 135, please.

15 A Okay. I am looking at 135.

16 Q Okay, line two. Your answer was, there was some
17 issues associated with banking on that piece at the time
18 that needed to be investigated.

19 A You read that correctly.

20 Q Okay. Question. What do you recall about that.
21 What was your answer?

22 A Permission to sell the premises.

23 Q Next question. So let me get this straight. You
24 signed a commercial lease agreement committing yourself to
25 an option to purchase but then you had to investigate with

1 the bank whether you could actually fulfill that contract.

2 What was your response?

3 A That is my testimony, uh-huh.

4 Q You were asked whether you had an understanding as to

5 why Mr. Brockmann could not commit to the February 2nd,

6 2018 date. Do you recall that?

7 A I am sorry, I was reading this document. Would you

8 please repeat that.

9 Q Sure. You were asked a question as to why, if you

10 had an understanding as to why Mr. Brockmann could not

11 commit to the February 2nd, 2018 closing date. Do you

12 recall that.

13 MR. MARTENS: Your Honor, I am going to object, calls

14 for speculation.

15 THE COURT: I am going to allow it.

16 A Do I recall --

17 Q Let's do it this way. Why don't you turn to page

18 140. Do you think this is funny?

19 A No, I was just thinking --

20 Q This is a serious matter.

21 A A very serious matter but why don't you turn to is a

22 very, I taught my children not to speak to people like

23 that because it puts them down. And that was kind of

24 funny in front of the people here.

25 Q Turn to page 140.

1 A Yes, sir.

2 Q If you look at line 19. The question is well, we are
3 looking at the document right now where Mr. Brockmann
4 informs Mr. Wilson on November 28th of 2017, it says, we
5 are working with the bank and the engineer on this
6 process. We cannot commit to any particular date at this
7 point so please wait for us. Do you see that?

8 A I see that, yes.

9 Q On line four it says, do you have any understanding
10 as to why Mr. Brockmann could not commit to a date. What
11 was your answer?

12 A I don't see the, are you asking to switch to page 141
13 now?

14 Q Yes, 141, line four. Your answer is line six. What
15 was your answer.

16 A On page 141, not 140. Do you have any understanding
17 as to why Mr. Brockmann could not commit to a date is the
18 question. And I said, I do not.

19 Q Todd Brockmann is your Counsel, correct?

20 A Yes.

21 Q And Mr. Staples ask you, later on in your deposition,
22 did you have any explanation for why there was no closing
23 on February 2nd, 2018. And your response was, I do not.
24 Is that correct?

25 A If you are asking me to read the deposition would you

1 please point to me to where the questions and pages are?

2 Q Sure, page 171, lines 23 through 25.

3 A I am sorry, you want me to read 1 through 25?

4 Q No. Lines 23 through 25. I will read 23 and 24. Do
5 you have any explanation to why there was no closing on
6 February 2nd, 2018. What was your response?

7 A I do not.

8 Q Turn to page 182, if you could.

9 A I am there.

10 Q If you will look at lines 2 through 6. I will read
11 the question. Do you have any recollection of ever
12 setting any date for the closing. What was your response?

13 A I do not have recollection of any setting, any
14 closing date for the closing. My role is to sign a
15 document when they were completed. I am sorry. My role
16 is to sign the documents when they are completed.

17 Q Do you recall the landlord taking any action to
18 prepare for a closing before a letter asking for a
19 closing?

20 A Is this from the deposition that we are asking about,
21 or are we asking about --

22 Q I am asking you, we can go and see if you testified
23 the same in your deposition. But I am asking you, isn't
24 it true that you do not recall the landlord taking any
25 action to prepare for a closing before a letter asking for

1 a closing?

2 A You tell me I didn't know anything to set to closing,
3 yes, indeed. We put together, I contacted Todd to get the
4 documents together that I thought would be in the, to make
5 a transaction go through. And I talked to Brian Wilson on
6 the phone. I said something to Melanie, I talked to Dave,
7 Dave Sills. I said, read your documents. And I believe
8 that we did plenty of things to prepare for a closing.

9 Q Can you turn to page 205 in your deposition. A
10 statement that you made at lines 3 and 5. If you could
11 read that for the jury.

12 A I do not recall the landlord taking any action to
13 prepare for a closing before a letter asking for a
14 closing.

15 Q Mr. Mather, you have never converted a building to a
16 condominium, have you?

17 A I have not.

18 Q You assigned Craig Ostrander as a responsibility to
19 handle converting Grapevine or converting Riverwalk River
20 District Building 6 along with Mr. Brockmann to handle
21 that conversion to a condo, correct?

22 A No.

23 Q That is not correct?

24 A That is not correct.

25 Q Okay. Was Mr. Ostrander in charge of the closing?

1 A No, Todd Brockmann was in charge of the closing.

2 Q Okay. Who controls Riverwalk River District Building
3 6?

4 A The Greens of Rock Hill.

5 Q If you will turn to your deposition, page 210.

6 A I am on page 210, yes sir.

7 Q If you could, please read the statement you made at
8 lines 12 and 13?

9 A I control Riverwalk River District Building 6, I am
10 sorry. Let me read it again. I control Riverwalk River
11 District Building 6. Yes, I control Riverwalk River
12 District Building 6 within the confines of manager and
13 member documentation. If you are asking me the question
14 on the intent to sell --

15 Q I am asking you --

16 A Then that would be a matter of what is, then that
17 would be a matter of what is the contracts out there.

18 Q You are aware that Grapevine had used the outdoor
19 patio with patio furniture for roughly three years,
20 correct?

21 A I am aware of that now, yes sir.

22 Q Well, you say you live across the street. I assume
23 you saw it every day, right?

24 A Well, not from the beginning. I moved in and
25 sometime after Grapevine was up.

1 Q How long after?

2 A I can't really remember.

3 Q Roughly when did you move in, a year ago, two years
4 ago, three years ago?

5 A I believe '18 but I could be wrong by a year.

6 Q Okay, so it could have been 2017?

7 A I don't believe so. It was after Riverwalk River
8 District Building 7 was, so that would be, I really don't
9 remember.

10 MR. MECKLER: Your Honor, I am unsealing his
11 deposition transcript.

12 THE COURT: All right.

13 MR. MECKLER: Mr. Mather, let me grab that other
14 transcript back from you. Your Honor, now that this has
15 been unsealed would you like me to take it to the Court
16 Reporter?

17 THE COURT: Leave it there, the exhibits.

18 Q Mr. Mather, you were deposed again on February 18th,
19 2020, correct?

20 A If that is the date, I don't really recall when I was
21 deposed.

22 Q I represent to you it is.

23 A Okay.

24 Q You were asked, were you aware of any instances when
25 Grapevine was formally notified that its use of the patio

1 was considered by landlord or by anyone acting on the
2 landlord's behalf such as a property manager to be in
3 default of the lease prior to March 29, 2019. Do you
4 recall how you responded?

5 A I do not.

6 Q Okay. Let me ask you this, do you recall any
7 instances of that being defaulted for anything prior to
8 March 27th, March 29th, 2019?

9 A Do I recall them being defaulted, I don't recall any
10 of that, no.

11 Q Mr. Mather, going back to your February 18th
12 deposition. Let's read this. Mr. Staples was just asking
13 you a simple question.

14 He said, if you need me to repeat it or rephrase it
15 please let me know. I am not here to trick you or confuse
16 you. I want to make sure you understand my questions and
17 I get a truthful answer. Is that fair.

18 And then your answer was, no.

19 Christian's question was, its not fair?

20 Your answer, its not fair.

21 Christian question. Why is that not fair?

22 I want you to turn to page 235 in your deposition,
23 please. Look at page 235, line 1.

24 A I don't believe you actually read what Christian
25 Staples said to me at that time. Can I read his part also

1 now because I think you were wrong.

2 Q Sure, I am looking at it right here.

3 A Let's see if this was exactly what you said.

4 Q Okay.

5 A The first part was correct. I am not here to trick
6 or confuse you. Is that fair?

7 No.

8 It is not fair?

9 It is not fair.

10 Why is it not fair.

11 Q And what was your response on line 1?

12 A Because I don't know what fair is and then I was
13 interrupted.

14 Q What is your answer on line 1?

15 A Well, I got interrupted at the time. My recollection
16 is I was interrupted.

17 Q I am not asking you if you were interrupted. What
18 was your answer.

19 MR. MARTENS: Objection --

20 THE COURT: The witness should answer the question,
21 please.

22 A Line 1 says, because I don't understand what fair is.

23 Q Correct.

24 MR. MECKLER: Your Honor, I have no further questions
25 for this witness.

1 THE COURT: Any redirect.

2 MR. MARTENS: Very briefly.

3 REDIRECT EXAMINATION

4 By Mr. Martens:

5 Q Mr. Mather, you were asked some questions about a
6 couple of depositions that you gave?

7 A That is correct.

8 Q Were you a party to this case when you were deposed,
9 any of those times?

10 A I was not a party to the case nor did I prepare for
11 the deposition.

12 Q And since that time have you reviewed a lot of
13 documents and reviewed a lot of information in preparation
14 for this trial?

15 A There is a lot of information that I reviewed, yes.
16 But at that time, no.

17 Q Thank you. No further questions.

18 THE COURT: Any recross?

19 MR. MECKLER: No, sir.

20 THE COURT: Thank you, sir, you can step down.
21 Anything else from the Defense?

22 MR. MECKLER: The Defense rest, Your Honor.

23 THE COURT: Approach the bench and we will talk about
24 scheduling.

25

1 (Whereupon, a bench conference was held in the
2 presence of the jury but out of the hearing of the
3 jury.)

4 THE COURT: Ladies and gentlemen, that concludes the
5 evidence in the case and the Defense has rested. So what
6 that means is we have remaining, we have explanation of
7 the law to you, what we call the jury charge and then the
8 closing arguments of the attorneys. So what I am going to
9 do is let y'all go for lunch. And I appreciate your
10 attention, that was a long morning and I appreciate y'all
11 sticking with it and paying attention, I can tell you
12 were. Be back at 3:00. We are going to take an hour
13 break and we will do legal matters. Be back at 3:00 for
14 the jury charge and closing arguments. Thank you.

15 (Whereupon, the jury was excused from open court for
16 a lunch break.)

17 THE COURT: Counsel, I am going to just forward you,
18 my Law Clerk and I have been going back and forth, drafts
19 for the jury charge and verdict form, I am sorry, proposed
20 jury charge and then also the verdict forms. I am going
21 to send y'all a draft, what email should I use.

22 (Whereupon, the attorneys give the Court their email
23 addresses.)

24 THE COURT: And these are first draft, these are not
25 set in stone. This is our first draft, y'all take a look

1 at them over lunch. Anything we can take up, we will have
2 everybody back at 2:00. Anything from the Plaintiff?

3 MR. MECKLER: Your Honor, we are going to have a
4 motion for a directed verdict on specific performance. I
5 don't know if you want to hear that now.

6 THE COURT: I will hear it but it seems to me that
7 the most efficient course if I have to defer ruling on it
8 because it depends on the jury's factual determination of
9 whether there is a breach or not.

10 MR. MECKLER: I understand. We have to make it.

11 THE COURT: Go ahead and make it and I'll defer
12 ruling.

13 MR. STAPLES: Your Honor, we do have a written motion
14 that we can file or hand up if that will be easier.

15 THE COURT: Hand it up and if you have a copy for the
16 Clerk --

17 MR. STAPLES: And this has not been filed or signed
18 and this is just for reference.

19 THE COURT: Just hand it to me. All right. I am
20 going to defer my ruling as well as argument. Anything
21 else from the Plaintiff?

22 MR. MECKLER: No, Your Honor, thank you.

23 THE COURT: Anything from the Defendant?

24 MR. MARTENS: No, Your Honor.

25 THE COURT: See everybody back at 2:00 o'clock.

1 (Whereupon, a lunch break was taken.)

2 THE COURT: Have y'all had a chance to review the
3 proposed jury instructions and verdict form?

4 MR. MECKLER: We have.

5 THE COURT: Mr. Martens, were y'all?

6 MR. MARTENS: Yes, sir.

7 THE COURT: Let me hear from the Plaintiff first with
8 regard to the jury instructions.

9 MR. MECKLER: Your Honor, we have a few requests to
10 changes.

11 THE COURT: Okay.

12 MR. MECKLER: The first one is on breach of contract.

13 THE COURT: Okay.

14 MR. MECKLER: And we would just ask that the
15 following be added. It would be virtually impossible for
16 a contract to encompass all of the many possibilities
17 which may be encountered by the parties, neither law or
18 equity requires every term or condition to be set for the
19 in the contract. And that is from McCorrow v. Andirect
20 Development Corp. (phonetic); 28 SC 96. And then we also
21 ask to be added, in the absence of an expressed division
22 in the contract, the law will imply an agreement to do
23 those things that according to reason and justice should
24 be done to carry out the purpose for which the contract
25 was made. And that is from Commercial Credit Corp v.

1 Nelson Motors, Incorporated. 247 SC 360.

2 THE COURT: I am not inclined to use the first one
3 because that, I think, overlaps with the intention of the
4 parties charge, deliberately construed and that kind of
5 thing. Because the second one, what is the second one
6 that you just gave me.

7 MR. MECKLER: It is Commercial Credit Corp v.
8 Nelson. It is 247 SC 360. And Columbia East Associates
9 --

10 THE COURT: One second. That sounds like a
11 reasonable charge. Mr. Martens, what do you think about
12 that one?

13 MR. MARTENS: I don't have any objection on it.

14 THE COURT: Okay. Let me just double check the
15 language here. Do you have, can you email that language.

16 MR. MECKLER: Can I hand it up, Your Honor.

17 THE COURT: Yes. And I also think, I am going to
18 put, for this case I am going to put in the breach of
19 contract, the parties have stipulated a valid contract
20 exist. Any objection to that language?

21 MR. MECKLER: No objection.

22 MR. MARTENS: No objection.

23 THE COURT: Okay. All right.

24 MR. MECKLER: The next one, Your Honor, we would
25 object to the instruction regarding the duty to mitigate

1 damages because that was, I don't believe that is a
2 defense in this case.

3 THE COURT: Mr. Martens.

4 MR. STAPLES: Your Honor, I can represent to the
5 Court, I have it pulled up, I did review it, I did not see
6 it.

7 MR. MARTENS: I don't believe mitigation, a failure
8 to mitigate is an affirmative defense.

9 THE COURT: I was going to say, I have not looked at
10 this in many years. But I don't recall that being an
11 affirmative defense that has to be plead. Is that the
12 case. Do we have a flaw on that?

13 MR. STAPLES: That I have not looked at, Your Honor.

14 MR. MARTENS: This is part and parcel of every
15 alleged breach.

16 THE COURT: Let's see what West Law says. I am not
17 finding anything so far.

18 MR. MARTENS: Your Honor, there is a rule, I am
19 trying to find it.

20 THE COURT: I am looking at the rules too. It is
21 Rule 8(c). Okay. It does not appear to be on the list.
22 Mr. Staples, I will give y'all a chance to pull that up.

23 MR. MECKLER: Your Honor, it says any other matter
24 constituted an avoidance --

25 MR. STAPLES: I can cite, there is a holding in the

1 Missouri Court of Appeals that, the borrower failed to
2 raise the affirmative defense, failure to mitigate damages
3 and therefore the Court could not raise the defense on its
4 own.

5 THE COURT: To mitigate is a damages limitation. So
6 that does not seem to me to be the affirmative defense or
7 avoidance. Okay. It does appear that there is a case.
8 After reading the case, at least, Creative Communication
9 v. Travelers. Okay. It is unpublished. Okay. It
10 appears, Plaintiff's are right on this one. It is
11 unpublished but this is, Creative Communications v.
12 Travelers. The cite is a West Law cite, WL 117 3896. And
13 it says although Rule 8(c) does not specifically list
14 mitigation as an affirmative defense, it requires the
15 Defendant to affirmatively set forth any other matter
16 constituting an avoidance or affirmative defense. Under a
17 former code pleading in South Carolina Supreme Court
18 recognized mitigation must be plead and proved, with a
19 cite. More recently our Court's have recognized the
20 burden of proof lies on the party asserting mitigation,
21 with a cite. And then some quotes and, the Defendant has
22 the burden of establishing the Plaintiff's lack of due
23 diligence in mitigating damages. Another cite, party that
24 claims damages should have minimized, has the burden of
25 proving, they could recently have avoided or reduced.

1 Stating Defendant asserted an affirmative defense bears
2 the burden of proof. The Court of Appeals writing again.
3 Generally the failure to plead their affirmative defense
4 constitutes a waiver. A party cannot benefit from the
5 affirmative defense that was never plead. Okay. In that
6 case I am going to take out, based on the, I know it is
7 not published, it is not binding, that is the Court of
8 Appeals guidance. I am going to strike that charge.

9 MR. MECKLER: The next suggestion is for the
10 negligent misrepresentation section.

11 THE COURT: Okay.

12 MR. MECKLER: We would just ask that the following be
13 added. A representation intended to induce a party to
14 enter into a contract form the basis of a negligent
15 misrepresentation claim. And that cite is Pittman v.
16 Gallaway, 281 SC 70.

17 THE COURT: Mr. Martens?

18 MR. MARTENS: Your Honor, I am not sure I necessarily
19 have an objection to that. And I have got some requests
20 about that same cause of action.

21 THE COURT: Well, if its okay let's finish up with
22 the Plaintiff's request. Did you have that language?

23 MR. MECKLER: I do, Your Honor.

24 THE COURT: Thank you.

25 MR. MECKLER: The next one is, we would ask that the

1 Court to incorporate our charge number 25, merger clause
2 not a valid defense to fraud or misrepresentation as it
3 was written in our charge. And I can read it or just
4 bring it up to you.

5 THE COURT: Basically what that charge is saying is
6 that the parol evidence rule doesn't apply to tort claims.
7 Right, is that another way of what you are saying.

8 MR. MECKLER: It is saying that a, here it is, South
9 Carolina Courts have held that, South Carolina Courts have
10 held that a party should not be allowed to hide behind a
11 merger integration clause in order to avoid the
12 consequences for the misrepresentation or fraud claim.
13 The concern, they get up and say something about some
14 limitation provision. The jury gets confused. Number
15 one, it applies to everything. But number two, it also
16 bars damages under negligent misrepresentation.

17 MR. MARTENS: Your Honor, I am familiar with that
18 line of cases and those cases are dealing with intentional
19 fraud. And essentially it is a Slack V. James line of
20 cases. And it says, you can't lie to something and then
21 use it, an integration clause to say you can't sue me for
22 fraud. The Courts granted summary judgment on fraud,
23 fraudulent inducement. I don't think it would be a proper
24 charge.

25 THE COURT: The language, the Plaintiff says

1 misrepresentation or fraud. Let me pull up the cases.
2 What is the best case for you on that.

3 MR. MECKLER: Gilliland v. Elmwood, 301 SC 295.

4 THE COURT: That language suggest to me is more than
5 fraud. The Court in Gilliland says we follow the
6 reseasoning of the Formento Court to hold that neither the
7 parol evidence rule nor a merger integration clause in the
8 contract prevents Elmwood from proceeding on a negligent
9 misrepresentation theory. So I think it is -- I am going
10 to reword this slightly. What I am going to say is, a
11 merger or interrogation clause in a contract, mean the
12 complete and final agreements. Such a clause is not an
13 offense to a misrepresentation claim. Is that fair
14 enough. All right. I have that.

15 MR. MECKLER: Your Honor, I am not sure, we also have
16 a claim for punitive damages. And I don't see anything in
17 there about that.

18 THE COURT: My inclination is to not charge punitive.
19 I will be happy to hear argument on this issue now, as
20 good a time as any. But I have not heard any evidence,
21 recklessness, willfulness or wantonness, enough, it has
22 got to be proven to a clear and convincing standard. I
23 have not heard anything that rises to that standard.

24 MR. MECKLER: Your Honor, I would argue that the fact
25 that Dave Williams said it was a lender requirement and

1 the lender said it wasn't a requirement is, I would say
2 intentional, beyond willful.

3 THE COURT: But the claim is negligence, right.
4 Claim is negligent misrepresentation.

5 MR. MECKLER: Misrepresentation.

6 THE COURT: I mean talking about single statement
7 made by --

8 MR. STAPLES: It was reckless at the very least. You
9 also heard testimony from Mr. Mather stating that he did
10 not conduct any investigation in whether that option to
11 purchase could be fulfilled. So that could arguably be
12 reckless as well.

13 THE COURT: But that is on the contract claim which
14 doesn't allow punitive. Mr. Martens?

15 MR. MARTENS: Your Honor, I think about the totality
16 of that witness' testimony. It was somebody else handling
17 the relationship at this point in time. I have no idea
18 what that person told Mr. Williams. You know, we know Mr.
19 Williams was told black and told them white. I do not
20 believe there is any evidence in this case that would rise
21 to punitive damages and we would object.

22 THE COURT: The contract did, the loan contract did
23 require two leases. So saying our lender requires two
24 leases is a correct statement. Going from that to, you
25 know, a two-year lease is required, that is easily a mix.

1 I mean --

2 MR. MECKLER: I hear you but it didn't require
3 Grapevine to be one of those two leases, there are other
4 --

5 THE COURT: But no other parties had signed the lease
6 when the Grapevine signed.

7 MR. MECKLER: I understand that.

8 MR. STAPLES: And actually that is not what that
9 agreement said. There were three tenants identified and I
10 think if you look at the dates the Grapevine was actually
11 the third that signed the lease.

12 THE COURT: The testimony was they were the first.

13 MR. STAPLES: The testimony was they were the first
14 but the document says otherwise.

15 THE COURT: Okay. I am not going to send punitive
16 damages claim to the jury on that single statement, in the
17 context of a commercial lease negotiation. Mr. Martens?

18 MR. MARTENS: Thank you, Your Honor. We have a few
19 requests as well. Under breach of contract we would
20 request the Court charge one who signs a written
21 instrument has the duty to exercise reasonable care to
22 protect themselves. And that cite is Marlboro,
23 McCallister and others. There are three cases that are
24 cited. I think it is Anderson's request to charge.

25 THE COURT: Mr. Meckler.

1 MR. MECKLER: Your Honor, I just think that is
2 duplicative. You already have a duty to read a paragraph
3 --

4 THE COURT: Give me one more time the language you
5 like, Mr. Martens.

6 MR. MARTENS: One who signs a written instruction has
7 the duty to exercise reasonable care to protect themselves.
8 It is not simply a matter of reading, it is a matter of
9 reading reasonable steps to protect your interest.

10 MR. MECKLER: It sound like the same as the first
11 line, you have to read and learn the context before
12 signing it.

13 THE COURT: Well, Mr. Martens is saying, it is saying
14 reasonable care beyond just reading the document. I will
15 charge it. Let me add that at the end. All right.

16 MR. MARTENS: The next one, Your Honor, every
17 contracting party has a duty to the other party.

18 THE COURT: Where are you, Mr. Martens.

19 MR. MARTENS: The cite is Burwell versus South
20 Carolina National Bank.

21 THE COURT: Where do you want it added?

22 MR. MARTENS: I am sorry. In written contract.

23 THE COURT: And tell me the language again.

24 MR. MARTENS: Every contracting party owes a duty to
25 the other party to, I am sorry, every contracting party

1 owes a duty to the other party to the contract and to the
2 public to learn the contents of a document before he signs
3 it.

4 THE COURT: That I think is duplicative. We have
5 already, we have got the duty to read the contract. So I
6 think we have got that covered.

7 MR. MARTENS: And then, Your Honor, there were a
8 couple of provisions that were in your proposed charge
9 that we believe should not be.

10 THE COURT: Okay.

11 MR. MARTENS: You have got a provision, construction
12 against party preparing the contract. The evidence that
13 has been presented is that this was a negotiated back and
14 forth contract between, primarily between Dave Williams
15 and Melanie Sills and we have Exhibit 15 from Ms. Sills
16 made specific comments and requests to provisions and
17 those were incorporated into the document. This is not,
18 here is our contract, sign it if you want to agree.

19 THE COURT: But this Rule is not an adhesion contract
20 rule, it is a rule against the party that prepared the
21 original draft is my understanding, isn't it? That is the
22 law, whoever provides the initial draft the contract is
23 construed against them.

24 MR. MARTENS: I think when you have mutual drafting
25 of the contract the scrivener is of no significance.

1 THE COURT: But it is not mutual. The fact that one
2 party sends some edits or change requests, my recollection
3 of the rule is different from yours. Let me pull it up
4 real quick.

5 MR. MARTENS: Okay.

6 THE COURT: Okay. The best I found is a case called
7 Coastal State's Bank versus Hanover Holmes. This is the
8 Court of Appeals, it is from 2014 and this is applying
9 that rule in a contract between a bank, a guarantor and a
10 property developer which is in commercial parties. I
11 think the rule still applies.

12 MR. MARTENS: Your Honor, the next one is conflicting
13 clauses. I don't believe there has been any testimony
14 about conflicting clauses and I think it is just
15 unnecessarily confusing to the jury. There really hasn't
16 been an issue in this case.

17 MR. MECKLER: Your Honor, I think there are because
18 they allege that they, they don't have exclusive use to
19 the patio but there is one provision about cleaning the
20 patio which would conflict with what they say the common
21 area paragraph talks about. I do think that is a
22 conflicting provision.

23 THE COURT: Okay. You want them to accept the
24 second, right?

25 MR. MECKLER: I think that the conflicting provision

1 suggest that the first provision does allow for uses of
2 the patio. I mean, the provisions conflict but --

3 THE COURT: You want to rely on the second one,
4 right. You want to rely on the fact that they have to pay
5 money to maintain the patio.

6 MR. MECKLER: Yes.

7 THE COURT: I am going to take that one out.
8 Anything else, Mr. Martens?

9 MR. MARTENS: Yes, Your Honor. On the negligent
10 misrepresentation charge.

11 THE COURT: Okay.

12 MR. MARTENS: This is in light of a directed verdict
13 motion and rulings on those.

14 THE COURT: Yes, sir.

15 MR. MARTENS: As I understand the rulings, the only
16 alleged negligent misrepresentation that has survived
17 directed verdict has to do with this two-year lease
18 requirement.

19 THE COURT: That's correct.

20 MR. MARTENS: And as drafted, this charge does not
21 make that clear and the jury, of course, would not know
22 that.

23 THE COURT: I thought about that issue but given in
24 South Carolina we are not to charge on the facts of the
25 case. I think I am limited to what I can do here.

1 However, I think that is an issue for closing argument.
2 You can say that the only issue before the jury is that
3 statement.

4 MR. MARTENS: So in light of that fact I would
5 request that the Court add to this charge, the evidence of
6 a mere broken promise is not sufficient to prove negligent
7 misrepresentation any more than it is sufficient to prove
8 fraud. And the cite for that is Winburn versus Insurance
9 --

10 THE COURT: Evidence of a mere broken promise is not
11 sufficient. All right. Mr. Meckler, Mr. Staples.

12 MR. MARTENS: And let me just say, Your Honor, I
13 think I would be fine with it stopping at negligent
14 misrepresentation just to avoid too many words going back
15 to the jury.

16 MR. MECKLER: I am not sure I understand.

17 THE COURT: This is a request to charge, submitted a,
18 the Winburn case, they want me to charge. Evidence of a
19 mere broken promise is not sufficient to prove negligent
20 misrepresentation.

21 MR. MECKLER: I don't think that is applicable in
22 this case because nobody has suggested that there was a
23 promise of negligent misrepresentation that the bank
24 required a two-year lease agreement. I don't know that
25 that is a promise, that is just a negligent

1 misrepresentation.

2 THE COURT: I agree. I am going to decline the
3 charge.

4 MR. MARTENS: Your Honor, my concern about it is, the
5 only reason it is no longer part of their case is because
6 Your Honor made a ruling yesterday that said you can no
7 longer pursue that. The jury doesn't know that and I
8 understand you are saying that we can tell the jury that.
9 But they are going to be taking the statement of the law
10 from you and if they have heard testimony about, we were
11 told we could use the patio, we were allowed and then we
12 were no longer allowed to use it, or we were told we could
13 buy a condo and then we didn't and that was negligent
14 misrepresentation which is all the testimony that was put
15 out, put forth in the Plaintiff's case. The jury may or
16 may not understand that the claim is now limited solely to
17 this bank issue.

18 THE COURT: I will instruct the jury, I agree with
19 you but I think adding that charge makes it more
20 confusing. It intermingles the contract claim and the
21 negligent misrepresentation and that is what we are trying
22 to avoid. So I will charge, I will tell the jury that on
23 the cause of action for negligent misrepresentation, the
24 sole statement and issue is the alleged statement that the
25 bank required a two-year lease.

1 MR. MARTENS: Thank you.

2 MR. MECKLER: I just note that, I hate to go back to
3 the charge you gave yesterday. The fact that they could
4 even infer that would suggest that the negligent
5 misrepresentation claim should survive related to the
6 issues he just brought up.

7 THE COURT: That is a good argument. Let me make a
8 note to do that. Anything else?

9 MR. MARTENS: Nothing from the Defense, Your Honor.

10 THE COURT: Let's turn at the verdict form. I know
11 there is not a signature to a date line at the end. We
12 will add that on for the Foreperson. From the Plaintiff?

13 MR. MECKLER: Your Honor, just a couple of things,
14 simple. On number three there appears there is, should
15 say yes/no like the other ones.

16 THE COURT: Yes it should. Well, okay, basically
17 asking the jury to find did any, are any of the
18 Defendants, okay.

19 MR. MECKLER: You look at it, it says if you answered
20 yes.

21 THE COURT: Let me think of a better way to word
22 this.

23 MR. MARTENS: Perhaps yes/no as to each Defendant,
24 Your Honor.

25 THE COURT: So we are going to say, I am going to

1 change the to any. So did any Defendant, and then instead
2 of a box and instead of instruction about check, and as to
3 each Defendant do a yes/no. And then if you answer yes as
4 to any Defendant, what amount of damages resulted.

5 MR. MECKLER: Okay. The last one is number four. We
6 have in our notes from yesterday and that all of the
7 Defendants should be included.

8 THE COURT: I think that is correct. Counsel, this
9 is the one that I am the least confident on. I really
10 struggled how to word, what I ended up coming up with, did
11 they conspire to harm the Plaintiff. There is no case
12 law, there are no charge books. But that is based on the
13 guidance we have from the higher courts, that is the best
14 I could do.

15 MR. MARTENS: And, Your Honor, I had understood that,
16 when we argued this issue yesterday that it had come down
17 to, only two potential Defendants could be conspirators,
18 that being Building 6 and GRH.

19 THE COURT: Because your argument was Mr. Mather
20 directly controlled the other entities.

21 MR. MARTENS: Well, I think Mr. Meckler's argument
22 was that GHR employee's these people and they act, those
23 are the coconspirators. And so I don't think it is
24 appropriate to expose the other Defendants on that claim
25 since that is the, that was the argument the Plaintiff

1 made to survive directed verdict on that claim, at least
2 in regard to these two Defendants.

3 MR. MECKLER: I understand. He is the manager of
4 Assured and then Assured is the manager of --

5 THE COURT: Right, but the decision making party is
6 the same. I mean, it is still Mr. Mather for all of those
7 entities who is making the decisions.

8 MR. MECKLER: I understand that. But there is still
9 separate legal entities that are taking action. So Mr.
10 Mather is not sued five times, they are separate legal
11 entities.

12 THE COURT: This is kind of what we talked about
13 yesterday. So in your opinion could Assured conspire with
14 Greens of Rock Hill to do something?

15 MR. MECKLER: Yes.

16 THE COURT: I disagree.

17 MR. MECKLER: I understand.

18 THE COURT: They are separate legal entities if the
19 same, I mean they don't have any employees, it is just Mr.
20 Mather. There is no one else to take the action.

21 MR. MECKLER: I understand that. But the outside
22 world can't determine what, who a company uses to do
23 different things. The law sets up these companies as
24 different entities so that they are considered different
25 entities. Defense Counsel at one point said, said they

1 were people.

2 THE COURT: They are, they are legal entities.

3 MR. MECKLER: I understand that. They are legal
4 entities so I can't go to, I can't go to one and pretend
5 it is the same as the other unless I can get amalgamation.
6 If I can't get amalgamation they are separate. If I get
7 amalgamation they are the same.

8 THE COURT: They are separate but they can only act
9 to Mr. Mather who is the manager or he manages the entity
10 that is the manager.

11 MR. MECKLER: Right.

12 THE COURT: And in the end the only person, they
13 don't have any employees, unlike GRH. GRH has other
14 people that works for them.

15 MR. MECKLER: I understand that. But say Assured
16 enters into a contract to buy that whiteboard right there.
17 And Assured doesn't pay for that whiteboard. They don't
18 sue Mr. Mather, they are going to sue Assured and Mr.
19 Mather will say, no, Assured is its own legal entity, I am
20 just the manager.

21 THE COURT: But the conspiracy, you have to have two
22 distinct conspirators. My understanding of the law is, if
23 you have two entities that are managed by the same person,
24 I just don't see how you can maintain the conspiracy. If
25 I own two businesses, sole proprietorships, you say they

1 can conspire. I am the sole shareholder of Company A and
2 Company B, you say they can conspire with each other.

3 MR. MECKLER: I think they can because they are
4 separate legal entities. But even if they can't, say you
5 have got, in this case we have got Silvia Balan who is one
6 of the 30(b)(6) who testified. She sent a letter to
7 Grapevine saying, hey, you can't use the patio, it is not
8 permitted by your lease. Well, here is that third party
9 that conspired now. So it is not just Mr. Mather --

10 THE COURT: She is not a Defendant.

11 MR. MECKLER: For a conspiracy, you don't have to
12 name every single person who is involved in the
13 conspiracy, you just have to have two of them.

14 MR. MARTENS: There is absolutely no evidence
15 presented that she sent a letter pursuant to some
16 conspiracy.

17 MR. MECKLER: That is for the jury to find out. We
18 don't get to decide the facts, the jury does.

19 MR. MARTENS: But you didn't present a case -- they
20 didn't present those facts or present that theory of
21 liability.

22 THE COURT: I am going to keep that charge as it is.
23 I understand your argument, you are protected for appeal.
24 I may be wrong on that but I don't think, even though they
25 are separate legal entities, you are correct on that. I

1 don't think, if they are solely managed by Mr. Mather or
2 another entity that he manages, I don't think they can
3 conspire with each other. That would be him conspiring
4 with himself. Anything else from the Defense?

5 MR. MARTENS: Nothing, Your Honor.

6 THE COURT: All right. Well, Counsel, I am going to
7 give these changes to my trusty law clerk and we are going
8 to add a signature page and date line. My practice is, I
9 will charge first, we will have copies of the charge, it
10 will go back with the evidence, they will have a written
11 copy of the charge.

12 MR. MECKLER: Your Honor, do you send them out again
13 for us to make, I think we have to put, even though we
14 talked about it, I think the rule requires we make any
15 objections following the charge.

16 THE COURT: Yes, that is correct. I will send them
17 out, what I tell them is, that we will need to review the
18 exhibits before exhibits taken out. And during that time
19 you can put on the record any objection.

20 MR. MECKLER: Thank you, Your Honor.

21 MR. MARTENS: And, Your Honor, at the close of all
22 the evidence we would renew out motion for a directed
23 verdict as to the conspiracy cause of action.

24 THE COURT: Again, this one makes me very
25 uncomfortable but based on, we have so little guidance

1 from the higher court, I feel like I have to send it to
2 the jury. That doesn't mean, if there is a verdict it
3 does not mean I will not revisit it in a JNOV motion. I
4 figure, if it goes up on appeal it is better, we already
5 have a jury decision that can be evaluated by the Court
6 than have to redo the whole trial.

7 MR. MARTENS: And we would also renew our motion for
8 directed verdict as to the negligence misrepresentation
9 claim. Obviously the alleged negligent misrepresentation
10 was the bank is going to require this. There has to be a
11 showing of detrimental reliance. At the time the alleged
12 misrepresentation was made, the Plaintiff was still in the
13 position to either enter the lease or leave. And if they
14 didn't like the two-year lease term they were free to say,
15 you know what, we are not going to, we are not going to do
16 this. The reason it was required of them, the two-year
17 lease term, is really of no consequence. They had an
18 option and they chose to enter the lease with the option
19 to purchase as opposed to declining the lease offer. And
20 there is no showing of detrimental reliance based on all
21 the evidence that has been presented at the trial.

22 THE COURT: I am going to deny the motion. It is a
23 close call but I think the testimony was that the
24 Plaintiff's wanted a purchase. And they originally, they
25 have offered a lease and they declined and then the

1 Defendant re-approached them and said, how about this
2 option to purchase and as part of that inducement they
3 were told the lender, basically this is the best we can do
4 because our lender requires it. I think that is enough to
5 send to the jury. All right. Well, Counsel, take ten
6 minutes and we will come back with the final printed
7 versions and we will call the jury back in.

8 (Whereupon, a short break was taken.)

9 THE COURT: Anything we need to take up before we
10 bring the jury back in?

11 MR. MECKLER: Not from the Plaintiff, Your Honor.

12 THE COURT: The Defense?

13 MR. MARTENS: No, Your Honor.

14 THE COURT: Let's bring them in.

15 (Whereupon, the jury came into open court at
16 approximately 3:19 p.m.)

17 THE COURT: Ladies and gentlemen, welcome back.
18 Y'all have been able to follow the rules I have been
19 giving you about not discussing the case? Okay,
20 excellent.

21 All right. Ladies and gentlemen, I am about to give
22 you what is called the charge on the law which is my
23 explanation of the law of South Carolina that is relevant
24 to this case and you will have a copy of this with you. I
25 do always apologize in advance, though, because I think

1 you have ever taken a public speaking class, the teacher,
2 I am sure, told you, look your audience in the eye, don't
3 read off notes. I have to break that rule now because it
4 is important that I read this to you correctly and not to
5 paraphrase it. So I will be reading and I apologize for
6 that.

7 With that said, Mr. Foreman and Members of the jury,
8 you have heard the evidence and the arguments of both
9 parties. I will now explain to you the rule of law you
10 must follow and apply in deciding this case. When I have
11 finished you will hear the closing arguments of the
12 parties before you go to the jury room and begin your
13 discussion, sometimes called deliberations. Your decision
14 must be based only on the evidence presented here. You
15 must not be influenced in any way by either sympathy for
16 or prejudice against anyone. I will give you a copy of
17 these instructions in written form to have with you in the
18 jury room. During deliberations you may refer to these
19 instructions as a guide to your decision making. You must
20 follow the law as I explain it to you, even if you do not
21 agree with it. You must consider these instructions as a
22 whole and not follow some and ignore the others.

23 I remind you that during this trial you and I have
24 certain duties to perform. As a trial Judge it was and is
25 my responsibility to preside into the trial of this case.

1 And I also have the duty to rule on the admissibility of
2 evidence offered during a trial. You are to consider only
3 the evidence before you. If there was any testimony I
4 ordered stricken from the record in this case during this
5 trial you must disregard that testimony. You are to only
6 consider the testimony which has been presented from the
7 witness stand, any exhibits which have been made part of
8 the record and any stipulations, that means agreements of
9 counsel.

10 I have the additional duty to charge you on the law
11 applicable to this case which is what I am doing now. As
12 the presiding Judge I am the sole Judge of the law in this
13 case and it is your duty as jurors to accept and apply the
14 law as I explain it to you now. If you already have any
15 idea as to what the law is or what the law ought to be and
16 does not agree with what I am now telling you, you must
17 abandon your idea because you are sworn to accept and
18 apply the law exactly as I state it to you.

19 In every case tried in this court before a jury, you
20 the jury are the sole and exclusive judge of the facts in
21 a case. A trial Judge cannot intimate, state, comment on
22 or make any statement to a trial jury about the facts in a
23 case. Since you, the jury, are the sole judge of the
24 facts you should not infer from anything I have said
25 during the trial in ruling on various issues or anything

1 else, or anything that I am now saying during my
2 instructions that I have an opinion about the facts in
3 this case. The law does not allow me to have any opinion
4 about the facts in this case. This is a matter solely for
5 you, as the jury, to determine. As jurors, it is your
6 duty to determine the effect, the value, the weight and
7 the truth of the evidence presented during this trial. In
8 this case the Plaintiff, the person who brought the
9 lawsuit, has the responsibility to prove every essential
10 part of their claims by a preponderance of the evidence.
11 This is sometimes called the burden of proof or burden of
12 persuasion. A preponderance of the evidence simply means
13 an amount of evidence which is enough to persuade you that
14 the claim or contention is more likely true than not true;
15 or such as by the greater weight of the evidence. In
16 deciding whether a fact has been proved by a preponderance
17 of the evidence, you may consider the witness' testimony,
18 regardless of who called the witness; and all the exhibits
19 received in evidence regardless of who produced them. If
20 the proof fails to establish any essential part of a claim
21 or contingent by the preponderance of the evidence you
22 should find against the party making that claim or
23 contention.

24 As I said before, you must consider only the evidence
25 I have admitted in this case. Evidence includes the

1 testimony of the witnesses and the exhibits that have been
2 admitted. Anything the lawyers say is not evidence and is
3 not binding on you. You should not assume from anything
4 that I have said that I have any opinion about the facts.
5 In fact, except for my instructions to you on the law
6 right now, you should disregard anything I have said
7 during the trial in arriving at your own decision about
8 the facts in this case. Your own recollection and
9 interpretation of the evidence is what matters. In
10 considering the evidence you must use your reasoning and
11 commonsense to make deductions and reach conclusions.

12 There are two types of evidence which are generally
13 presented during a trial, direct evidence and
14 circumstantial evidence. Direct evidence is the testimony
15 of a person that claims to have actual knowledge of a fact
16 such as an eye witness. And it is evidence which
17 immediately establishes the fact that is trying to be
18 proved. Circumstantial evidence is proof of a chain of
19 facts or circumstances indicating the existence of a
20 different fact. And it is evidence which immediately
21 establishes collateral facts from which the main fact
22 could be inferred. Circumstantial evidence is based on
23 inference and not on personal knowledge or observation.
24 The law makes absolutely no distinction between the weight
25 or value to be given to either direct or circumstantial

1 evidence; nor is a greater degree of certainty required of
2 circumstantial evidence than of direct evidence. You
3 should weigh all the evidence in the case.

4 During the presentation of this case you may have
5 noticed that certain parts of documents that were
6 presented were redacted or covered up. This is due to the
7 rules of court and what the decision made by me as the
8 Judge. Please do not speculate as to what may or may not
9 be contained in these redacted portions and do not hold
10 these portions against either party in the case.

11 Expert witnesses. The rules of evidence ordinarily
12 do not permit witnesses to testify about their opinions or
13 their conclusions. Normally they can only testify about
14 what they themselves have seen or heard. An exception to
15 this rule exist for expert witnesses. This is a witness
16 who, by their education and experience, has become an
17 expert in an art or science or profession or calling and
18 they may state their opinion on relevant and material
19 matters in which the witness claims to be an expert and
20 may also give the reasons for their opinion. You should
21 consider any expert opinion received in evidence in this
22 case and like any other evidence give it the weight you
23 think it deserves. If you decide the opinion of an expert
24 witness is not based on sufficient education or experience
25 or if you conclude the reasons given in support of their

1 opinion are not sound or that their opinion is outweighed
2 by other evidence in the case you may disregard the expert
3 entirely. An expert witness' testimony is not to be given
4 any greater weight than that of other witnesses just
5 because they are an expert. Further, you are not required
6 to accept an expert's opinion even if it is not
7 contradicted. There can be a conflict in the testimony of
8 expert witnesses. To that end you must weigh one expert's
9 opinion against that of the other and you must consider
10 the reasons given by one as compared to that of the other.
11 You should consider relative credibility and knowledge of
12 the experts who have testified. You should find in favor
13 of the testimony which, in your opinion, is entitled to
14 the greater weight.

15 Now, when I say you must consider all the evidence in
16 this case, I don't mean you must accept it all as true or
17 accurate. You should decide whether or not you believe
18 what each witness had to say and how important their
19 testimony was. In making your decision you may believe or
20 disbelieve any witness in part or in whole, the number of
21 witnesses testifying about a particular point that does
22 not necessarily matter. In deciding whether you believe a
23 witness I suggest you ask a few questions. Did the
24 witness impress you as one that was telling the truth.
25 Did the witness have a particular reason in not to tell

1 the truth. Did the witness have a personal interest in
2 the outcome of the case. Did they seem to have a good
3 memory; did they have the opportunity and ability to
4 accurately observe the things they are testifying about.
5 Did the witness appear to understand the questions clearly
6 and answer them directly. And did the witness' testimony
7 differ from the other evidence in the case. But please
8 keep in mind, a simple mistake by a witness doesn't mean
9 they weren't telling the truth as they remember it.
10 People naturally tend to forget some things or remember
11 them inaccurately. So if a witness misstates something
12 you must decide whether it was because of an innocent
13 lapse in memory or an intentional deception. The
14 significance of your decision may depend on whether the
15 misstatement is about an unimportant fact, an unimportant
16 detail or an important fact.

17 Breach of contract. In this case the Plaintiff
18 claims that the Defendant breached a contract that existed
19 between the parties. The parties have agreed that a valid
20 contract exist in this case. In order to recover for a
21 breach of contract the Plaintiff must prove by a
22 preponderance or greater weight of the evidence that the
23 word, breach, means the failure without legal excuse to
24 perform a promise that was part of the contract. A party
25 breaches a contract when they do not perform as they

1 agreed under the contract by failing to carry out a term
2 or a promise or a condition of the contract. In the
3 absence of an expressed provision of the contract the law
4 will imply to do those things that according to reason and
5 justice should be done to carry out the purpose for which
6 the contract was made. A person who signs a written
7 contract has the duty to exercise reasonable care to
8 protect himself or herself.

9 Intention. In interpreting contracts you must
10 determine the intention of the parties and put those
11 intentions into effect. In doing this you must consider
12 only the outward expressions of the parties. You cannot
13 consider any undisclosed or secret intentions. Contract
14 should be liberally construed to carry out the intentions
15 of the parties. It is the substance of the agreement, not
16 the form which must control the instruction or
17 interpretation. When interpreting a contract you are not
18 limited to the literal meaning of the term if you decide
19 that the literal meaning would defeat the parties true
20 intentions. A contract is to be considered by looking at
21 its subject matter, nature and purpose. When you hear the
22 term in the general purpose you should look at the
23 language in light of that purpose. When the contract is
24 in writing you must determine the intention of the parties
25 primarily from the document itself. Intention of the

1 parties must be determined from the entire agreement and
2 not from one particular clause or provision. When the
3 written contract is clear its meaning must be determined
4 by the contents of the document alone. We are about half
5 way there. Thank you for your attention. When the
6 contract is clear the meaning must be determined by the
7 contents of the document alone. If the circumstances
8 warrant terms which do not contradict, the written
9 language of the contract may be implied to carry out the
10 intentions of the parties. You have to determine a
11 contract could be given two different meanings. And one
12 of these meanings would make the contract unusual or
13 extraordinary. And the other meaning would make the
14 contract reasonable and fair. You must construe the terms
15 to make the contract reasonable and fair.

16 Duty to read. A party to a contract has a duty to
17 read it and learn its contents before signing it. A party
18 cannot complain about misrepresentation in the contents of
19 a contract if the truth could have been discovered by
20 reading the contract unless the party is ignorant and
21 unwary. Education, business and experience and
22 intelligence are all considered in determining whether a
23 party may be considered ignorant and unwary so to exclude
24 the failure to read the contract.

25 When the terms of a contract cannot be given more

1 than one meaning you should use the meaning that is a less
2 favorable to the party who prepared or wrote the contract.
3 When the language of the contract has more than one
4 possible meaning you must consider the circumstances
5 surrounding the making of the contract to help you
6 determine the real intention of the parties. However, you
7 may not use the circumstances and give the contract a
8 meaning which is not apparent on its face. Every contract
9 is subject to all the State law which can be applied to
10 the contract. In other words, the law of South Carolina
11 becomes a part of the contract, whether the contract that
12 says that or not. This is because everyone is presumed to
13 know the law. When a contract does not have a fixed time
14 for performance it is understood the contract will be
15 performed in a reasonable time. If there is a time
16 specified for performance it must be, the contract must be
17 performed within that time. However, the fact that a
18 contract contains a provision for performance by a certain
19 time does not mean it must be performed within that time
20 unless the parties intended for time of the essence. The
21 intention to make time of the essence it must be clear.
22 In deciding whether times of the essence in a contract,
23 you should consider the contract itself along with the
24 actions of the parties and the circumstances, conditions
25 and purposes of the parties with regard to the contract.

1 Where time is not originally of the essence it may be made
2 so by one party giving notice to the party that the party
3 will insist on performance by a certain date. However,
4 the time allowed by the notice must be reasonable.

5 Whether the time for performance is reasonable is a
6 question for you to decide based on circumstances of this
7 case. The Plaintiff cannot recover for a breach of
8 contract for the Defendant's failure to perform the
9 contract in a timely fashion if the reason for the delay
10 was a failure of the Plaintiff to perform his duties under
11 the contract.

12 Good faith and fair dealing. There exist in every
13 contract an unspoken, legally enforceable promise of good
14 faith and fair dealing.

15 Damages. Finally the Plaintiff must prove by
16 preponderance or greater weight of the evidence that the
17 Plaintiff suffered damages which were proximately caused
18 by the Defendant's breach of the contract. The Plaintiff
19 must prove damages by a preponderance or greater weight of
20 the evidence. This does not mean that the Plaintiff must
21 prove their damages to a mathematical certainty or produce
22 evidence of the exact amount of damages suffered.

23 However, the amount of damages cannot be left to guess
24 work or speculation. The evidence presented by the
25 Plaintiff must be enough to allow you to determine the

1 amount of damages with reasonable certainty and accuracy.
2 Damages for a breach of contract are those which may be
3 fairly and reasonably considered to arise naturally from
4 the breach of the contract or those that may be reasonably
5 be supposed to have been in the minds of the parties at
6 the time they made the contract. The Plaintiff may not
7 recover for damages for the breach of contract unless they
8 show that he or she has performed their part of the
9 contract or at least was able, willing and ready to
10 perform at the proper time.

11 Actual damages. Actual damages are damages that
12 compensate the Plaintiff and puts him as closely as
13 possible in the same position he was in before the
14 contract was breached. In other words, actual damages are
15 the actual losses and expenses which the Plaintiff has
16 suffered because of the breach. Generally, actual damages
17 are out-of-pocket costs, actually paid by the Plaintiff as
18 a result of the breach of contract and the gain above the
19 cost that would have been realized if the contract would
20 have been performed.

21 The Plaintiff also has a claim for negligent
22 misrepresentation. In other words, a claim,
23 misrepresentation made by the Defendant caused the
24 Plaintiff to suffer a monetary loss. In order to recover
25 from this negligent misrepresentation the Plaintiff must

1 first prove by preponderance of the evidence or greater
2 weight of the evidence that the Defendant made a false
3 representation to the Plaintiffs and representation
4 intended to induce a party to enter into a contract may
5 form the basis of a negligent misrepresentation claim. A
6 merger or integration clause in a contract is a provision
7 that says the contract is the complete and final
8 agreement. Such a clause in a contract is not a defense
9 to a misrepresentation claim.

10 Next, the Plaintiff must prove the Defendant had a
11 monetary interest in making the false statement. Proof
12 that a statement was made in the course of the Defendant's
13 business, profession or employment is enough to show a
14 monetary interest in making the statement even if no one
15 receives anything, exchange in the statement. The
16 Plaintiff must prove the Defendant owed the Plaintiff a
17 duty to make sure the truthful information was given to
18 the Plaintiff and the Defendant breached that duty by
19 failing to use due care. If the Defendant had a monetary
20 interest in making the statement and possessed expertise
21 or special knowledge that would ordinarily make it
22 reasonable for another person to rely on a Defendant's
23 judgment for the ability to make careful inquiry then the
24 Defendant has a duty of care with respect to the
25 representations. The Plaintiff must also prove that he or

1 she justifiably relied on the misrepresentation. The
2 Plaintiff's reliance on Defendant's statement is justified
3 only if the Defendant is in a superior position to the
4 Plaintiff as to the knowledge or truth of the statement.
5 The Plaintiff's reliance must also have been reasonable
6 that the Plaintiff knew the truth, reliance on the
7 Defendant's misrepresentation is not reasonable. The
8 Defendant will not be responsible for information which is
9 given with a clear understanding that the Defendant is not
10 liable for his accuracy. The Defendant is not responsible
11 for casual statements of representations as to the law or
12 matters which the Plaintiff can determine the truth of by
13 doing their own due diligence. Finally, the Plaintiff
14 must prove that the Plaintiff suffered a monetary loss as
15 a direct and proximate result of their reliance on the
16 misrepresentation.

17 The Plaintiff also has a claim for civil conspiracy
18 made by the Defendants, GRH and Riverwalk Building 6,
19 alleging that that caused the Plaintiff to suffer monetary
20 loss. In order to recover for conspiracy the Plaintiff
21 must prove one, a combination or agreement of two or more
22 people or legal entities. Number two, that combination or
23 agreement was to commit an unlawful act or a lawful act by
24 unlawful means. And three, together with an overt action
25 of further the agreement causing damages to the Plaintiff.

1 Mr. Foreman and ladies and gentlemen of the jury, I
2 wish to express the hope that each of you will be mindful
3 of the importance of your responsibility. You are not
4 called upon to serve as jurors very often and the proper
5 performance of the duty requires each of you to reach the
6 height of freeing your mind of all improper influences.
7 As the presiding officer of this court I am concerned that
8 the verdict you find will be the result of your going in
9 the jury room and confining your consideration to the
10 evidence and the law that you have heard in this courtroom
11 weighing fairly and impartially, as I have every
12 confidence that you will do. Your verdict cannot be based
13 on sympathy or compassion or prejudice or emotion or
14 anything not found in the evidence. Remember, your
15 verdict must be unanimous. I will now explain the verdict
16 form. Ladies and gentlemen, this is the verdict form.
17 There are four questions that the Foreperson will write
18 answers to that you all need to answer and of course the
19 answer needs to be unanimous. There is no significance at
20 all in the order in which possible verdicts are listed on
21 this form, it is simply one has to be listed first. All
22 twelve of you must agree. And as I said, the verdict
23 should not be based on sympathy, passion, prejudiced,
24 emotion or any other consideration not in evidence. Once
25 the jury agrees on the verdict the Foreman will sign his

1 name on the line underneath the verdict, knock on the jury
2 room door and inform the Bailiff that a verdict has been
3 reached. And then we will receive you back in the
4 courtroom. Now, ladies and gentlemen, the next and last
5 step here will be closing arguments by the attorneys. The
6 Plaintiff has the burden of proof so they go first. And
7 then the Defense has an argument and then the Plaintiff
8 has a reply argument. After that I am going to send you
9 back to the jury room and then we will take a few minutes
10 to make sure all the evidence is in order. Your signal to
11 begin deliberation is when the Bailiff brings you all the
12 evidence as well as the verdict form and the jury
13 instructions. All right. And then, ladies and gentlemen,
14 one last thing before the closing argument. You may
15 recall in my instruction I talked about a negligent
16 misrepresentation claim. The statement that the Plaintiff
17 alleges was a misrepresentation is an alleged statement
18 that the bank or the lender in this case required a
19 two-year lease as a condition of loaning money to the
20 Riverwalk Development, to the Defendant. All right. Yes,
21 sir.

22 MR. MECKLER: Good afternoon. It is getting late, I
23 know, it has been a long week. This is the first time I
24 get to talk to you directly, thank you for listening to
25 us. When I was a kid my Dad used to always say, Steve,

1 get to the point, what are you trying to talk about. And
2 so I was thinking, trying to figure out how are we going
3 to do this closing on a breach of contract case. What are
4 we really talking about. What we are talking about is
5 Grapevine did everything they were suppose to do. They
6 signed the lease, they paid the rent dutifully; they
7 operated; they allowed the landlord to use their space for
8 marketing purposes. They did everything, they sent the
9 notice that was required to exercise the option to
10 purchase. They acted in good faith throughout the whole
11 thing. All they wanted to do was buy the unit that they
12 had bargained for. That is all they wanted, they wanted
13 to have their own space, operate their business. They put
14 their life into this. They invested money into this.
15 Melanie said they put \$2 to \$300,000.00 dollars just to do
16 the up-fit to be able to start working there. The
17 landlord didn't do what it was suppose to do. It didn't
18 do anything it was suppose to do. It didn't sell the
19 premises when it got the proper notice; it didn't allow
20 them to use the patio that they were allowed to use under
21 the common area provision even though they had used it for
22 three years. The notice as sent on July 26th of 2017, in
23 big bold letters. You can see it, it was a letter from
24 Brian Wilson, you will have it with you in the jury room.
25 It said in big bold letters, it says this letter

1 constitutes notice and set a closing date of February 2nd,
2 2018. Let's look at the option to purchase language. I
3 will just read it for you. Paragraph 33. Tenant shall
4 have the option to purchase the premises during the third
5 lease year with not less than 120 days advance written
6 notice to landlord, for \$270,000.00 dollars the purchase
7 price in according with the purchase and sale agreement as
8 provided in Exhibit G. Landlord shall apply \$25,000.00
9 dollars of rent collected and the security deposit against
10 the purchase price at time of closing. Upon the purchase
11 of lease premises by tenant this lease shall be
12 terminated.

13 Remember when Mr. Martens stood up and he did his
14 opening. He said words matter. Words do matter. It says
15 they will have the option to purchase the premises during
16 the third lease year, not less than 120 days advanced
17 written notice. All that was required was that written
18 notice and the written notice was 120 days when that
19 notice, when that 120 days hits we close. If they wanted
20 it to be at some other point in the third lease year
21 landlord would have written in there. We don't have the
22 obligation to close until December 31st of the year that
23 you exercise the option or December 31st of the third
24 lease year, regardless of when you provide notice. It was
25 their form, they did not do that. As a matter of fact,

1 their attorney even sends an email acknowledging in
2 January of 2018, the guy doing the plat, hey, we got a
3 closing in a couple of weeks, we have got to get this
4 stuff done. The landlord knew that they had to close.
5 They couldn't pull it together but that is not Grapevine's
6 fault, that is the landlord's fault. The landlord leased
7 this property to them, never informing them that it was
8 not a condominium. I mean, they entered into a lease, to
9 lease a condominium that they can buy. Melanie Sills
10 testified that she wasn't informed that there were no
11 condominium to buy until Brian Wilson, her attorney,
12 starting researching the property records. And the
13 landlord, you heard their defense throughout this, well,
14 we couldn't do it, we had employee problems, we are
15 getting to it, we were working on it, check is in the
16 mail, pay you Tuesday for a hamburger today. That is not
17 sufficient. They had the duty to be in a position to
18 close that deal. The Judge just instructed you on the
19 law. The law will imply a duty on those people to do the
20 reasonable things necessary to comply with their
21 obligations under a contract. They didn't do that, that
22 is their fault. They should have been ready, prior to
23 that third lease year to have a condominium ready, able
24 and willing to sell to Grapevine. Grapevine has always
25 been ready, willing and able to purchase that unit. I

1 don't know if you caught it, Mr. Brockmann, when he was up
2 here testifying, the landlord's attorney, he said,
3 probably accidentally, it was failed closing of February
4 2nd, of 2018. That was a slip because he knows that that
5 was the date that that property should have been sold.
6 But Grapevine continues to pay rent, every month,
7 dutifully. Four years later and they talk about, well,
8 you had to close in the third lease year. Well, let's
9 look at that, they sent the notice in July of 2017.
10 February 2018 comes along, no closing; March, April, May,
11 June, July, August, September, October. They asked me to
12 send the letter, they put that into evidence, a default
13 letter I sent. Hey look, you are in default, you need to
14 close on this lease, we have been trying to work with you
15 but you haven't done it. Nothing, November. They are
16 mad, they get frustrated, they are paying rent every
17 month. Think about that, they were suppose to own that
18 property that they still had to pay rent to the landlord
19 for, every single month. Money that if they took out of
20 mortgage it would go pay off their mortgage. Money if
21 they had paid cash it would go to pay them back. They
22 dutifully performed every month. 2019 came, they didn't
23 close; 2020 came, they didn't close. We are now almost in
24 September of 2021, they still don't own that premises that
25 is clearly set forth in the lease agreement. Think about

1 that, four and a half years they haven't been able to
2 close it. Mr. Mather said they had to close their loan, a
3 \$2.5 or two-million dollar loan, I think Mr. Swainey
4 testified. Todd Brockmann said it took three or four
5 months to do that. This is a sale of a condo unit for
6 \$270,000.00 dollars. Think about it, four and a half
7 years. A child that was born the day that notice was
8 given, it is not four and a half years old, that child has
9 learned to crawl, learned to walk, learned to eat, learned
10 to talk, learned to smile. That is how long it has been.
11 There is no reasonable excuse that this sale has not
12 occurred as of this date. And they said, well, we stopped
13 because we got sued. Did they tell them they didn't have
14 to pay rent when the suit was filed. They are still
15 obligation under the contract to do those things that they
16 are required to do and they are doing them. They were
17 obligated as well. They said, words matter. Words
18 matter, but that is not what their defense has been.
19 Their defense has been words matter when they benefit us.
20 Words matter when they take the definition we want them to
21 take. Think about some of things. The lease, right to
22 exercise the option to purchase property on 120 days
23 notice. That is clear in the lease. They don't want you
24 to look at those words. They said, no, we just, any time
25 in the third lease year. Okay. But you didn't close in

1 the third lease year so that doesn't help you. Can't sell
2 cigars and coffee because the lease doesn't provide for
3 that. Well, the lease doesn't say anything about that.
4 The lease doesn't define what a craft beer and wine shop
5 is. Melanie Sills does because she owns two, now three of
6 them. And she told Dave Williams that she wanted to
7 emulate what they were doing at their other ones, sell
8 cigars, coffee. And the ghoul of the Defendant to use
9 their space, their name in their marketing materials that
10 acknowledges, Grapevine Wine Shop and Bar. Successful
11 launch at Baxter Village, Grapevine owners, Dave and
12 Melanie Sills have brought their wine shop, bar concept to
13 the River. Grapevine's Riverwalk location is a
14 multi-purpose space, retail shop and on-site bar area
15 offering the unique and distinctive mix of wines,
16 specialty beers and locally roasted coffee. It goes on.
17 And with freshly brewed coffee and pastries after a brisk
18 morning walk or enjoy wine, beer, artisan cheese and
19 deserts in the company of friends and neighbors under the
20 evening. They also offer a wonderful selection of wines,
21 beer, accessories and cigars to purchase on the go. Can
22 you imagine that. They used that in their marketing
23 material and then they want to say that is in default of
24 their lease. How can that be. They drafted the lease,
25 they are doing the marketing materials. No right to use

1 the patio. Well the common area clearly gives them the
2 right to use the patio. These are more marketing
3 materials of the landlord. Not only does the common areas
4 allow for tenant, its customers, employees and invitees to
5 have the non-exclusive right to use and enjoy the common
6 area with other tenants and their customers. The
7 landlord, because of that, required tenant to agree that
8 it will at times during the term hereof keep the demised
9 premises and all common areas immediately adjoining the
10 demised premises clear and free of construction rubbish
11 and dirt. The demised premises and those things near, the
12 things near it are the patios. And we know they allowed
13 them to do it because they used it as their marketing
14 materials. We know they intended them to do it because
15 Dave Williams testified that, yes, that was a condition to
16 the lease. And I said, Dave, well if it wasn't in the
17 lease how could that be. He said, it must have been an
18 inadvertency on behalf of the landlord and tenant. They
19 both intended for them to have use of the patio, it
20 doesn't make any sense for them to enter into that lease
21 agreement without use of the patio. That is not their
22 business model. The landlord knew it, Dave Williams knew
23 it and he said, if, if they didn't have it it would have
24 been misleading what he represented to them on behalf of
25 the landlord. If you look at the lease itself, we know

1 that the Exhibit A that they rely upon that does not show
2 the outdoor space is incorrect. The lease and demised
3 premises says wine shop, "as on Exhibit A attached
4 hereto". On Exhibit A the only thing that is depicted
5 with a name is a salon. And you will have that in the
6 jury room for you to look at. They talk about they didn't
7 submit the purchase and sale agreement that is attached as
8 Exhibit G. Brian Wilson testified, you do that at the
9 closing. And we know that is the landlord's
10 responsibility because if you look at every blank with the
11 exception, with the exception of Grapevine's attorney, it
12 is all information that has to be provided by landlord.
13 And that is what I was going on with Mr. Mather. You got
14 the blank for the percentage of ownership, you have got
15 the blank for the condominium units and what they are
16 comprised of. You have got the escrow agent's blank, that
17 would be a landlord individual. They couldn't fill that
18 out and send it in and the lease doesn't require them to.
19 The lease requires them to provide written notice that
20 they are going to exercise the option and then they do all
21 of that stuff at the end. But, again, all is irrelevant
22 because there was nothing to buy. They never created the
23 condominium that they had leased, it was like leasing a
24 room in your house, it didn't have any legal definition.
25 Any ambiguities in that lease are to be resolved against

1 the landlord. Your Honor gave you the law on that.
2 Ostrander, who was the corporate representative of
3 landlord testified and that is when I was sitting up there
4 reading the deposition transcript. He testified that the
5 lease was prepared by, prepared for landlord, on behalf of
6 landlord by Matt Blackum and was Riverwalk's form lease.
7 That is the lease they used for all of their tenants.
8 They may have taken some edits from them but it was their
9 lease. Words aren't the only thing that matters.
10 Representations matter, behavior, good faith matters.
11 Grapevine has done everything asked of it, even if they
12 didn't have to. They have a right to have the patio
13 furniture out there but when they defaulted them after the
14 dispute started and right before we filed suit, they said
15 you have got to take it in or you are in default. They
16 did it, they didn't have to take that patio furniture in
17 and it cost them money. You heard Mr. Ligon, it cost them
18 about \$311,000.00 dollars to do that because of all the
19 sales they have lost. They didn't have to do that but
20 they were worried about what they were up to because they
21 hadn't been defaulted in three years. Nobody said
22 anything about cigars or coffee or tea or anything like
23 that. It wasn't until this dispute heated up, Mark Mather
24 even threatened them, don't end up on the wrong side of this
25 contract, you will never use the patio again. Is that

1 good faith. You know what good faith is. It is the
2 person who looks you in the eye and says, hey, we had an
3 agreement, I am going to honor that agreement. I am going
4 to do what I obligated myself to do because that is what
5 we agreed to. That is good faith, that is honor. That is
6 what a contract means. Why didn't they sell it to them,
7 there has got to be a reason why. Well, I am guessing
8 because they don't want to convert the building. Think
9 about this. No other tenant has an option to purchase in
10 that building. When they signed, Dave Williams asked them
11 to keep it confidential. Craig Ostrander, the
12 representative of the landlord who testified said if they
13 don't have to do it for Grapevine they won't do it at all.
14 Brockmann confirmed that they wouldn't do it unless the
15 closing was set. Well, they never set the closing. The
16 only date that landlord offered a closing was April 17th,
17 2018. They didn't have the documents to do it, the
18 condominium wasn't even there either. He offered that on
19 the 12th, with the 17th, a few days later, over a weekend.
20 Ostrander admitted in his deposition that even as of March
21 of 2019 they didn't have the documents they needed to
22 close. He said that they needed bank approval, there is
23 not evidence of anybody ever sought that. They still
24 needed, this is in March of 2019, mind you. Two years
25 after the notice, they needed architectural documents;

1 they needed engineering documents; they need the master
2 deed. Brockmann said it was in draft form but Ostrander,
3 the corporate rep, Ostrander said it was never completed
4 and that was in March, 2019. His responses to why they
5 were having such a hard time is a lot of employee
6 turnover. And they had other things going on and he said,
7 I can't remember the quote, you remember what you
8 remember. But referred to the Sills' as myopic in their
9 little world, in their little world it is a big deal but
10 in our world, we had a lot of else going on. They are the
11 small potatoes, we have got bigger potatoes to fry, we
12 will get to them when we get to them. They never got to
13 them. So I think, you get to decide where the breach of
14 contract is. We have got the lease, they exercised that
15 they didn't perform. I don't know how to make it any more
16 simple and I can't overcomplicate it any more than that.
17 It just seems like a simple provision. There was no
18 condominium to begin with, they leased them something they
19 didn't have. Landlord had a duty to create the horizontal
20 property regime. And be in a position to close, that is
21 another breach, they never did that. The patio clearly
22 doesn't prohibit placing chairs and tables, no default
23 until suit was imminent. Another breach. They told them
24 they couldn't use it even though they had a right under
25 the lease to use it. I mean, think about how ironic that

1 is, that over this past four years they continued to pay
2 rent every month. Every month is a loss to them because
3 they are paying rent on a unit they should have owned,
4 every single month they have to write that check. Who
5 gets that money, landlord. Is it beneficial for him not
6 to close on the deal, sure. He keeps getting, he doesn't
7 have to give up the space. If the price was \$270, it was
8 suppose to close in February, they have now paid an
9 additional of \$100,000.00 dollars to him. So what, what
10 they were suppose to get, in February of 2018 for \$270,
11 even if they got it today would now cost them \$370 because
12 they had to pay an extra \$100,000.00 dollars. That is not
13 fair, that is not good faith. What was the intent of the
14 parties when they entered into the lease agreement. The
15 intent was to sell the space. I don't know if you
16 remember but Dave Williams and Melanie both testified that
17 she was offered a lease agreement, a straight lease and
18 they turned away, that is not what we want, we want to
19 purchase. Mr. Williams said the purchase was a
20 requirement of the lease. But that it wasn't for sale
21 right now and he said it wasn't for sale because their
22 lender required that they have a two-year lease before
23 they would be able to buy it. He said that so she would
24 rely on that. The lender needed to get that lease done
25 because as the banker said, Mr. Swainey, no lease, no

1 loan. If they didn't get their two leases they don't get
2 their construction loan. So they would do, they would say
3 what they need to say to get her to sign that lease.
4 Because otherwise she goes, well, if you are going to sell
5 it just sell it. But they needed to induce her to do the
6 lease anyways. And we know that what Mr. Williams said
7 was incorrect. It was a negligent misrepresentation. You
8 guys get to make that determination but Mr. Swainey, the
9 bank officer, was asked point blank by Mr. Staples, was it
10 a lender requirement that they sign a two-year lease
11 before they can purchase. And he looked Mr. Staples in
12 the eye and said, no. There was no sale, now they have no
13 patio. How do you right a wrong like this. How do you
14 put them back in the place they should have been without a
15 breach. The only way we can do that is damages. That is
16 the only way, you can't go back in time. They can't get
17 their money back voluntarily, they had to file a suit.
18 And what are their damages. You have got their rental
19 payments from February 18th just up through this month.
20 That is \$102,669.30. \$100,000.00 dollars in rent they
21 have had to pay. Fair market value. I don't know if you
22 remember the expert, Mr. Scott is the appraiser. This is
23 his business. He said, he reviewed their space there, he
24 looked at the comparables. And I asked him, is this what
25 it would cost for them to buy a comparable space so they

1 can have the ownership of the wine shop that they
2 bargained for. He said that fair market value is
3 \$430,000.00 dollars. If you look at paragraph three of
4 the lease agreement when they were suppose to have closed
5 on the deal. They were also supposed to get \$25,000.00
6 dollars back towards the purchase price as rent
7 reimbursement. They were also suppose to get their
8 security deposit back. That is \$6,705.00. Melanie
9 testified the up-fit was \$2 to \$300,000.00 dollars. That
10 is the money they spent making Grapevine what it is,
11 tables, chairs. They don't have to pay the \$270 they
12 would have paid. But for Mr. Williams representations
13 they wouldn't be in this mess because they would have
14 never bought it. They would have never leased it because
15 she was concerned they didn't want to sell it. He said,
16 it is not that we don't want to, lender requirement. She
17 relied on that and continued to negotiate with them. She
18 had already walked away from a proposed lease. The
19 landlord has got the duty to communicate truthful
20 information to them. You can't tell them it is a lender
21 requirement to induce them to enter into this agreement
22 when it really wasn't. Mr. Ligon did an analysis of
23 alcohol loss profits on the patio alone at Grapevine.
24 Loss of patio sales, \$311,045.00. They relied on Mr.
25 Williams to enter, Mr. Williams communications to enter

1 into this lease, but for that representation they would
2 have walked away. That is what Melanie testified to and
3 they have been damaged. It is a lot of money. It is a
4 big number, \$1,175,370.00 and you subtract the \$270. The
5 \$270 is what they would have purchased, they would have
6 had to pay to purchase the unit from the landlord. But
7 they have lost the value of that appreciation. If they
8 would have bought it in February of 2018 for \$270 they
9 would now own a property worth \$430,000.00 dollars.
10 \$905,000.00 is where we end up. Those aren't outrageous
11 numbers, they are not numbers to build up a damage awarded
12 for them. Those are really concrete numbers. Money they
13 shouldn't have had to spend, money they now are going to
14 have to spend to be put in the place they should have been
15 in February of 2018. That is what they were suppose to
16 get back on the purchase price, that is the cost of the
17 up-fit and I took out the \$270. It is hard asking for
18 that kind of money from people, I know, it is a big
19 number. When I look at it it is a big number, but it is
20 the right number. All they had to do to avoid all of this
21 was acting in good faith. If landlord would have acted in
22 good faith, shook their hands and said, we agree to that,
23 we agreed to sell you this premises, they wouldn't need
24 any of this. They would just be operating. It is not
25 their fault. GRH and Riverwalk Building District 6, Mr.

1 Ostrander testified that Riverwalk Building District 6 has
2 no officers, no employees, no directors. Riverwalk
3 Building District 6 is the landlord. Everybody and I
4 asked Mr. Mather where people were employed, they are all
5 employed by GRH. Mr. Williams, well, he is employed by
6 GRH, he also has an Assured email address and letterhead.
7 You will see that. But it was GRH in conjunction with
8 Riverwalk River District Building 6 that combined together
9 in interest, et cetera to breach the agreement.
10 Defendants have shown no concern of consideration for
11 Grapevine. Not throughout the process, really not
12 throughout the trial. They did not apologize, they have
13 not shown empathy, they have not seem to give a care about
14 what they have done to that business and those people
15 sitting over there. Is that good faith? Is that what we
16 consider good faith and contracts in the State of Soth
17 Carolina. Is that how these parties should have dealt. I
18 submit to you it is not. You took an oath at the start of
19 this trial that you would take an honest look at the
20 evidence, you would listen to the Judge and apply the
21 facts to the law. And it is a tremendous responsibility
22 and I know we are asking for you to come back with a big
23 number. But we trust you. The one thing you don't have
24 to do when you come in the Court House is check your
25 commonsense at the door. It doesn't stop in the parking

1 lot, you bring it in with you. As the Judge said, you get
2 to make the decisions. Did you believe Melanie. Do you
3 believe the evidence. You weigh that, did you believe the
4 other witnesses, did you believe the documents that you
5 have seen. That is your purview. We put our faith and our
6 fate in your hands right now. And I think once you guys
7 have the opportunity to go back, go through all the
8 evidence again, think about what you heard, what you
9 didn't hear you will comfortably be able to come back with
10 a verdict for Defendants on all causes of action. I want
11 to thank you for your time and attention and I know it has
12 been a long week and good luck in your deliberations.

13 Thank you.

14 MR. MARTENS: May it please the Court.

15 THE COURT: Yes, sir.

16 MR. MARTENS: This has been a long week and it is not
17 lost on any of the attorneys or the parties, the sacrifice
18 that you all have given to be here to preside in this case
19 and serve as our jury. It is a scary time in our world,
20 it is a scary time to be stuck in a place with a bunch of
21 people that you don't know for a week. The risk of a
22 pandemic hanging over our heads, had a scare on Tuesday
23 morning. Thank you all for being here. This is an
24 important week because this week, through your service,
25 you are going to help these parties resolve a dispute that

1 has clouded their bossiness relationship for years. Since
2 2018 Grapevine and my client have been locked in a dispute
3 and unable to resolve it. That dispute ends today, right
4 here in this courtroom. You know, Court Houses are
5 special places. In the earliest days of our Country and
6 even before Court Houses are a place where people come to
7 solve the unsolvable, to resolve the unresolvable. Court
8 Houses are where people come to defend their rights and to
9 seek justice. Now, where does justice come from, it comes
10 from you, the jury. The twelve of you, fellow citizens,
11 you have honored your civic duty, you set aside the
12 important matters in your lives and you have taken your
13 time to listen to this dispute and that is an awesome
14 responsibility. And today the twelve of you, speaking as
15 one, dispense justice. And you will resolve the dispute
16 that has been unresolvable. Probably find yourself
17 thinking, well, how do we do that, how do we resolve a
18 dispute that these parties have been unable to resolve for
19 themselves. You apply logic, commonsense, personal
20 experience. And you say, where do we start. I would
21 suggest to you, ladies and gentlemen, you start with the
22 written lease agreement. I said at the outset of this
23 trial that words have meaning, words matter. I had no
24 idea it was going to become the tag line of this week,
25 but, boy, has it. Words do matter, words in a contract

1 matter. They have meaning, they have purpose. If the
2 terms of a contract didn't matter they wouldn't be in the
3 contract. The lease controls the relationship of the
4 parties and the parties knew that that was the purpose of
5 the lease when they entered it. The lease agreement is
6 nothing more than the written body of a parties agreement.
7 And so following the terms of the lease you are honoring
8 the parties agreement. As the Court told you, when
9 parties entered a lease agreement they have a duty to read
10 and understand the terms of that document. Why does that
11 duty exist, because as Ms. Sills put it, a lease forms a
12 partnership. And when someone initials every page on a
13 commercial lease and then signs, that is their
14 representation that they have read the agreement, that
15 they and the agreement and they agreed to the terms of the
16 agreement. So let's talk about what these parties
17 actually agreed to as evidenced by their written lease.
18 They agreed that Grapevine would lease and pay rent on
19 1,490 square foot of space in Building 6 in the River
20 District of Riverwalk. And they agreed that the document
21 attached as Exhibit A to their lease accurately depicted
22 the premises. They agreed that Grapevine would have a
23 non-exclusive right to use and enjoy the building's common
24 areas in common with other tenants and occupants of the
25 building. They also agreed that those common areas were

1 primarily for use of customers and clientele of the
2 tenants. They agreed that Grapevine would operate its
3 business as a craft beer and wine shop, in fact, as the
4 exclusive craft, beer and wine shop of the River District.
5 And in exchange for that right of exclusivity Grapevine
6 wouldn't step on anybody else's toes, they wouldn't branch
7 out into things that were outside the scope of their
8 lease. At least without the, of the landlord's prior
9 written consent to do so. And, yes, they agreed Grapevine
10 would have the option to purchase its demised premises
11 during the third lease year. And by signing that lease
12 and by initially the page of the lease the parties
13 represented to one another that we understand this is our
14 agreement and we intend to be bound by it. Now, a party
15 is not allowed to enter into a written contract and then
16 say, well, that is not really our agreement. But that is
17 exactly what Grapevine is trying to sell to you in this
18 courtroom. Grapevine signed a written contract and said,
19 we are going to occupy 1,490 square feet of space and we
20 will pay rent for the privilege of doing that. But they
21 want you to believe that the real agreement was, we will
22 rent 1,490 square feet but we will use all of the common
23 areas for the conduct of our business. Grapevine signed a
24 written lease agreement that says we are craft wine and
25 beer shop. But they want you to believe that the real

1 agreement was, we can sell whatever we want as long as we
2 are selling it at our Baxter location because we told you
3 we wanted to kind of do what we were doing in Baxter. So
4 our real agreement is not what is in the lease but it is
5 what we talked about before we signed the lease. Let the
6 lease be your guide, don't accept this fiction of what the
7 lease says is not what the lease means. If these parties
8 have agreed to everything that Melanie Sills told you they
9 had agreed to, guess what, it would be in the lease. If
10 the lease allowed Grapevine to run its business out of the
11 common areas that would have been easy to draft a
12 provision and drop that into the lease, the document the
13 parties agreed on that term. If the parties had agreed
14 that Grapevine would be allowed to operate as a restaurant
15 for a dessert and coffee shop or a tobacco dispensary it
16 would have been easy to add those terms to the lease.
17 Don't believe for a second that a commercially
18 sophisticated party entered a lease agreement that said
19 one thing but meant another. And make no mistake, these
20 are commercially sophisticated parties. You remember when
21 Ms. Sills was on the stand I started asking her about
22 other business holdings of her and her husband. And do
23 you remember what she told me. We own and operate three
24 different Grapevine locations, they have real estate
25 holdings in Ashville, Folly Beach, Tybee Island, Fort

1 Mill. They have set up a nationwide franchise to use the
2 rights to the Grapevine name, marketing strategies,
3 concept and they had to get Federal Trade Commission
4 approval to do that. And before they became wine and
5 craft beer entrepreneurs Ms. Sills owned and operated two
6 UPS stores. Melanie Sills sat there on the stand and
7 said, well, I am a bottle washer and a bathroom cleaner.
8 She is a savey and successful bossiness woman. Melanie
9 Sills knows the importance of a contract and she knows how
10 to negotiate for what she wants. But don't just take my
11 words for it, look at the exhibits. You will have the
12 exhibits in the jury room with you, Exhibit 15 is the one
13 we spent some time going over and it is the email exchange
14 between Melanie Sills and Dave Williams about what should
15 and should not be in the lease. If you are so inclined
16 take that document and compare that to the actual lease
17 agreement and look at how many things that Melanie Sills
18 asked to be included in the lease, got included in the
19 lease. Melanie Sills knew how to ask for what she wanted.
20 The written lease agreement is the best evidence of the
21 parties actual agreement. So let the lease be your guide.
22 Now, there is no doubt that Grapevine took full advantage
23 of the buildings common areas for the benefit of its
24 business. And there is nothing, remember, Melanie Sills
25 said, oh, anybody who wanted to could come and sit there

1 but, of course, we offer them a drink, ha ha. She said,
2 by putting those chairs and tables out there in the common
3 area that really wasn't ours, we really weren't paying
4 for, we really weren't leasing, we could put more chairs
5 and tables, we could serve more beer, we can serve more
6 wine, serve more small plates and desserts and coffees and
7 make more money. And that is okay, it is okay. The
8 landlord allowed it to happen. You heard Mark Mather
9 testify to that. Yes, you know, they were outside the
10 lease but we were trying to get foot traffic down there,
11 they were there, it really wasn't hurting anybody. You
12 didn't hear Mr. Mather say, well, I should have gotten a
13 share of all the money they made selling beer and wine and
14 coffee and pastries and ice-cream and cigars on the common
15 area that they didn't pay to use for what, three years,
16 four years. Nobody is here to say that Grapevine did
17 anything wrong for taking advantage of that opportunity.
18 Mr. Mather said, we wanted them to do well. We wanted
19 them to succeed just as we wanted our project to succeed.
20 Does that sound like bad faith, does that sound like a
21 landlord that has got a got-ya wish for its tenant, to let
22 them take advantage of an opportunity to make more money,
23 to promote their brand, to build their clientele. Is that
24 bad faith? I would submit to you it is not, I would
25 submit to you it is good faith. But there is a difference

1 between taking advantage of an opportunity and taking
2 advantage of a business partner. It was interesting and,
3 you know, again, you have heard that they got to use the
4 space and it was so great and we had people sitting out
5 and everybody was having a good time. It wasn't
6 gratuitous. I mean, Grapevine wasn't hosting parties
7 where they were letting everybody come over and have a
8 good time, they were selling products. They were
9 conducting their bossiness, they were making money. And
10 Counsel talked about Jason Ligon and his testimony and his
11 reports and you will have his spreadsheets. Take a look
12 at just how much money that Grapevine made selling product
13 to people in the common areas. It is a lot of money. I
14 bet you it is close to the number that Mr. Meckler put on
15 his board and ask you to award his damages. Let him pay a
16 dime a rent for that privilege and they didn't have to
17 share any of that with anybody. It is good for them, it
18 was good for the landlord. As I was listening to Ms.
19 Sills testify about how, we understood it was common area,
20 anybody who wanted to use it could use it. She said, we
21 take our chairs and tables out in the morning, we would
22 bring them back at night. I started thinking about when
23 my family goes to the beach and every morning my wife will
24 elbow me in the ribs and get me to go put our beach chair
25 out. Because, you know, when you go to the beach you

1 claim your spot. You put your chair out, you put your
2 umbrella out, that is your spot. The beach belongs to
3 everybody but once you claim your spot it is your spot.
4 Grapevine is no stranger to that concept. Mr. Sills was a
5 spot claimer for Grapevine. He would go out and put the
6 tables out and put the chairs out. Ms. Sills testified
7 when they would close he would bring them in. They did
8 that every day and gradually over time, what was intended
9 as common area for use for all the tenants and all the
10 visitors, became Grapevine's spot. It wasn't a common
11 area anymore, it had become Grapevine's area and part of
12 its lease premises. That is a pretty cost effective way
13 to run a business, folks. You rent 1,500 square feet and
14 you operate out of 4,000. Its pretty savey, isn't it.
15 Grapevine would have you believe that Dave and Melanie
16 Sills wasn't savey at all, they weren't savey enough to
17 recognize that they never actually had any vested rights
18 to operate in those common areas. They would have you
19 believe that a marketing brochure for a concept design
20 should trump the terms of a written agreement with their
21 landlord. And don't believe that some how Dave and
22 Melanie Sills were mislead into entering a lease agreement
23 by Dave Williams statement that or lender will require a
24 two-year lease. What difference would it possibly make to
25 Grapevine, why they would be required to lease their space

1 for two years before executing an option. What difference
2 would it possibly make if it was a lender requirement or
3 an owner requirement or it just sounded like it would
4 improve Dave Williams standing with his company if he
5 could get someone to commit to a two-year lease. This was
6 all a negotiation. And the Sills' had an opportunity to
7 either accept those terms or say, no, thank you. We will
8 locate somewhere else because we don't want a lease, we
9 want to own. And we are not offered that, if we can't do
10 that here we will keep looking, we will keep looking, we
11 will find somewhere else that suits our needs better.
12 These savvy business people waived their options, they
13 waived the opportunities that the River District Building
14 6 presented for their business and they entered into a
15 lease. Because they wanted their business to be there
16 because they knew it was going to be a great place to be.
17 They knew it was going to be profitable and they knew they
18 were going to do really well there. And they have, they
19 have done really well there. Now, you heard Dave Williams
20 say, I told them that a two-year lease was a lender
21 requirement because that is what I was told. And so they
22 brought Anthony Swainey from Bank of OZK and they put him
23 on the stand and he said, no, we didn't require a lease
24 term of any specific duration. But I hope you paid close
25 attention to Mr. Swainey's testimony, in particular his

1 cross-examination because remember what he said when I
2 asked him, were you the relationship manager when all of
3 this was being negotiated between my client and the bank.
4 And he said, no, I wasn't. Mr. Swainey doesn't know what
5 the relationship manager told Dave Williams and they can't
6 rely on what Mr. Swainey says, as evidence that Dave
7 Williams misrepresented a thing. I want to talk for a
8 minute about Grapevine's alleged damages. Mr. Meckler
9 said that Grapevine ought to get all of its rent back.
10 Keep in mind and he is talking from February 2nd of 2018
11 until the time this lawsuit was filed. And we all heard
12 testimony and we all know that from February 2nd of 2018
13 until, what, March 19th of 2019, I think was when there
14 was a request to vacate the common area. So for over a
15 year of that time it was absolutely business as usual.
16 And everything that Grapevine, wine shop could do and
17 every place they could locate and every thing they could
18 set up and sell beer and wine and coffee and pastries and
19 whatever else they were selling, was rolling right along.
20 Yet they are now asking you to give them all of their rent
21 back. You think they got value out of being there that
22 year and being able to run their business and sell their
23 product and make money. And they said, we wouldn't have
24 leased if we had known, certainly got an advantage out of
25 leasing. Look at the revenue figures that are attached to

1 Mr. Ligon's report. Take a look at just how much money
2 the Grapevine was making by operating at Building 6. And
3 ask yourself, do you think that is fair, that is right,
4 that is good faith to say, well, we want all of our rent
5 back. We want to keep our money we made using your space
6 but we want all of our rent back. Does that seem right,
7 does that seem reasonable, does that seem fair, does that
8 seem just. We heard from Mr. Ligon. Said, oh, I
9 calculated, I work for a company called LitCon, stands for
10 litigation consultants. My whole focus in life, my whole
11 purpose, my world, my career is helping people prove
12 damages in court cases. That is what our whole companies
13 purpose is. You think LitCon gets paid to be modest and
14 give an estimate for damages. LitCon gets paid to put up
15 numbers on the board to try to put big numbers in front of
16 a jury to get big verdicts. And they get paid really
17 well. Mr. Ligon said, I didn't consider, I ran my
18 calculation by preparing what was going on at Riverwalk to
19 what was going on in Baxter. But I didn't consider how
20 many houses were in one location verses the other, what
21 laws applied in one place verses the other. I didn't
22 consider the operating environment or local ordinances or
23 restrictions. I didn't consider any of that stuff. What
24 I considered was, I was told, I was told that the only
25 difference between these two locations, one had a patio

1 and the other did not. And so I have assumed that if both
2 have had a patio they both would have done the same. And
3 because one had a patio and the other did not everything
4 that one made and the other did not must be a damage. It
5 must be a damage so let's put that out there. Does that
6 seem fair, does that seem right? Does that seem reasoned
7 and appropriate in a fair measure of damages. Mr. Ligon
8 was not even aware until I asked him at a deposition that
9 Grapevine of Riverwalk and Melanie Sills had embarked on a
10 social media campaign named at highlighting this dispute.
11 Now, do you think that folks who want to go hang out at a
12 wine beer and have a glass of wine or a glass of beer want
13 to get brought into a dispute. Do you think you would be
14 real excited or a customer would be real excited about
15 walking into a place that has got a placard on the door
16 that says, hey, look at this, look at this big dispute we
17 are in with our landlord. Come on in, join the bank, take
18 part in our crusade. And I think it is important to point
19 out that this document, it is a placard, says we apologize
20 for the inconvenience but we may serve you inside. And
21 then they quote some language of their lease and say, you
22 may use the common areas, we can't, we can't. We can't
23 put our tables and chairs out here. They didn't say, we
24 are trying to play nice, trying to get our dispute --
25 their interpretation of their lease was, hey, we can't do

1 it. Now, obviously this dispute has to do with the common
2 areas and the section of the common areas, it has to do
3 with the option, the exercises of the option. Grapevine
4 would have you believe that it is only obligation, it is
5 the only thing you need to do to exercise your purchase
6 option was to say, let's close. Here again, let the lease
7 be your guide. Look at what the lease says, look at what
8 the lease requires. The lease doesn't say, send a letter,
9 pick a day and show up. The lease says, Grapevine shall
10 have an option to purchase and that option will be
11 executable during the third lease year. The third lease
12 year didn't run out until at least, well, February of
13 2019. Grapevine had that period to exercise its option.
14 And as Mr. Mather testified this morning that Grapevine
15 had rendered a purchase contract and a deposit, the
16 landlord to convert the condominium and close the
17 transaction but that never happened. Counsel made a
18 comment or statement about Mr. Wilson's letter and Mr.
19 Wilson, remember, he was the original closing, original
20 attorney for Grapevine. He was the one that sent a letter
21 in July of 2017. Pay attention to what Mr. Wilson's
22 letter actually says. It says, this is notice of
23 Grapevine's intent to exercise its option. Grapevine
24 intends to exercise its option. It doesn't say Grapevine
25 is exercising its option, it says it intends to exercise.

1 Hey, heads up, landlord. When the time comes, when the
2 third lease year arrives Grapevine intends to exercises
3 its option. But that never happened, it never actually
4 exercised the option at all. You heard Mr. Mather testify
5 this morning that on multiple occasions he told
6 Grapevine's principals, attorney, pay attention to what
7 the lease says, pay attention to the description of the
8 leased premises because Mr. Mather recognized that when
9 Grapevine exercised its option to only be acquiring the
10 1,490 square feet that it had actually leased. And the
11 relationship of landlord and tenant would go away, and the
12 common areas would be controlled by a different set of
13 documents. And that different set of documents would say,
14 you can't have tables and chairs out here, you can't set
15 up and operate your business out here. Under the
16 condominium regime the common areas will be governed by
17 the -- and Mr. Mather was trying to warn his tenant, hey,
18 watch out for your business, don't make a mistake, make
19 sure you understand what you are doing. Does that sound
20 like bad faith, does that sound like healing. I can't tell
21 you how to read your lease, take a look at it, make sure
22 you are not doing something you are going to regret. The
23 Sills' described that conversation, you don't want to be
24 on the wrong side of this contract. Mr. Mather wasn't
25 making a threat, he was warning them. You don't want to

1 be on the wrong side of this contract. You have got a
2 pretty sweet deal right now, you might mess it up if you
3 insist on executing the option that is in the lease. Todd
4 Brockmann said, I told their lawyer, if they want to
5 execute it they can execute it. But they need to
6 understand it is not going to come with the common area.
7 And the Sills didn't like that, that is why the closing
8 when was originally requested for February of 2018 got
9 pushed back and back and back and back, because there was
10 disagreement and misunderstanding and the negotiation
11 about what should we do about this. If you still want to
12 execute but you don't have that right under your lease how
13 are we going to deal with that. And the Sills of
14 Grapevine became impatient. Four months before the option
15 year even expired they declared a default and then they
16 filed a lawsuit and they filed a lis pendens to cloud
17 title. And speaking of closing title, Mr. Brockmann said,
18 one of the reason's people cloud title is to get the
19 lender's attention. They took a step further, they took
20 the lender's deposition and they brought him to court and
21 they asked him on the stand, is this technically a default
22 of the loan agreement. And remember I asked Mr. Swainey
23 on cross-examination, do you have a lot of landlord
24 clients. Yes. The landlord sometimes have disputes with
25 their tenants. Yes. Do you ever declare a default for

1 something like that. No. They were trying to rattle Mark
2 Mather's cage. They weren't playing nice. And while we
3 are at it, take a look at the email exchange between Todd
4 Brockmann and Mark Wilson, from January of 2018, we talked
5 about it when Mr. Brockmann was on the stand this morning.
6 And remember January 14th, 18th of 2018 which was a couple
7 of weeks before the date they had set for the proposed
8 closing. Mr. Brian Wilson is sending letters or emails
9 saying, you are in breach of contract, you are in breach
10 of contract. Why. Why would the, how could the landlord
11 have possibly been in breach on the day that they set for
12 their proposed transaction hasn't even arrived. This was
13 a setup, this is a setup, we know that, we know that
14 because they were declaring breaches and hiring litigation
15 attorneys before the option here even started. There was
16 no breach, there never was. The Sills jumped the gun,
17 Grapevine jumped the gun. They declared default
18 prematurely, they filed this lawsuit prematurely. They
19 shot themselves in the foot. The reason this transaction
20 hasn't closed is because while the landlord is trying to
21 resolve the legitimate dispute over what is going to
22 happen to this common area you have been using and
23 enjoying and profiting off of the whole time you have been
24 here, that is going to, that is going to go away if you
25 execute this option so we need to talk about what we are

1 going to do about that. They filed suit and here we find
2 ourselves years later in court. The words of a contract
3 matter, they really do. They are the best evidence of
4 what the parties actually agreed to. Words have purpose,
5 they have meaning, they have importance. Let the lease
6 guide your deliberations, let the lease tell you what
7 these parties really agreed to and we are confident if you
8 do that you will return a verdict for the Defendants.
9 Ladies and gentlemen, thank you again and truly in this
10 day and age we are all very, very, very appreciative of
11 your service on this jury. Thank you.

12 THE COURT: All right. Reply by the Plaintiff?

13 MR. MECKLER: Unnecessary, Your Honor, thank you.

14 THE COURT: All right. Ladies and gentlemen, that
15 brings us to close the arguments. I am going to ask you
16 to retire back to the jury room and just wait briefly and
17 I will have the evidence sent back to you. Once you
18 received all the evidence from the Bailiff that is your
19 signal to begin deliberations. I am not going to ask you
20 to deliberate very long tonight. I know you have family,
21 you have obligations, we have all day tomorrow. So you
22 don't need to feel pressured, I will get you back there
23 and let you talk for a little bit, look at some evidence
24 if you like to but I am not going to ask you to deliberate
25 very long. So just head on back to the jury room, use the

1 restroom and then your signal to begin deliberation will
2 be when you get the verdict form and all the evidence in
3 front of you when the Bailiff brings it back. Thank you
4 very much, ladies and gentlemen. Our Alternate, Mr.
5 Dumas, if you could stay, please.

6 (Whereupon, the jury was excused from open court for
7 a break.)

8 (Whereupon, the alternate was excused from the trial
9 of the case.)

10 THE COURT: Counsel, I know there are some things you
11 want to put on the record. Take a look at the exhibits
12 and we will get those back to the jury.

13 MR. MECKLER: Your Honor, I just wanted to renew our
14 objections to the jury charge that was raised during the
15 conference.

16 THE COURT: All right. Mr. Martens.

17 MR. MARTENS: I think I have the same objection, just
18 to make sure we are on the record.

19 THE COURT: Yes, sir. Y'all approach and look at the
20 exhibits and make sure everything looks to be in order.

21 (Whereupon, the Court Reporter and Attorneys go over
22 the Exhibits.)

23 MR. MARTENS: Your Honor, will we be in recess?

24 THE COURT: We will be in recess once we send -- my
25 inclination is give them about a half an hour, it is

1 already 5:00 o'clock and they have been very patient
2 today. So that is, I do want them the time to talk a
3 little bit.

4 (Whereupon, the jury started deliberations at
5 approximately 5:00 p.m.)

6 THE COURT: Counsel, my intention is to call them
7 back in and send them home. It is already 5:25. It has
8 been a long day. If anybody wants to be heard on that I
9 will give you a chance.

10 MR. MECKLER: I think that is fine, Your Honor,
11 unless they tell you that they --

12 THE COURT: If they tell me they want to stay then I
13 will let them stay.

14 MR. MARTENS: I agree, if they want to soldier on
15 then let's get it done.

16 THE COURT: Let's bring them in.

17 (Whereupon, the jury came into open court at
18 approximately 5:26 p.m.)

19 THE COURT: Ladies and gentlemen, it is about 5:30,
20 it has been a long day, I know y'all paid very close
21 attention, I know you have family and other commitments.
22 If you tell me right now we really want to stay until we
23 get a verdict tonight I will be happy to stay. But,
24 otherwise, my inclination is to let y'all come back
25 tomorrow morning.

1 FORMAN: Tomorrow morning.

2 THE COURT: I figured y'all --

3 FORMAN: We just got started and there is a lot of
4 information.

5 THE COURT: I understand. So I am going to release
6 y'all for tonight, don't discuss the case with anyone else
7 tonight and then tomorrow morning you have already began
8 deliberations so you don't have to wait for a signal for
9 me. When you get here at 9:30 just go to the jury room,
10 once all 12 of you are present you can begin to deliberate
11 again. You don't have to wait for me.

12 JUROR: Can we start earlier?

13 THE COURT: Yes, sir. Tell me what time you would
14 like to be here. Would 9:00, before 9:00 it makes it
15 hard.

16 FORMAN: 9:00 is okay.

17 THE COURT: We will see y'all at 9:00 and you will
18 get lunch for tomorrow.

19 (Whereupon, the jury was excused from open court for
20 the day.)

21 THE COURT: Counsel, anything we need to put on the
22 record?

23 MR. MECKLER: No, sir.

24 MR. MARTENS: No, your Honor.

25 THE COURT: Gentlemen, well case tried on both sides

1 and see y'all at 9:00 tomorrow morning.

2 (Whereupon, the case will resume the next morning at
3 9:00 a.m.)

4 AUGUST 27, 2021.

5 THE COURT: Good morning. Let's go back on the
6 record. For the record I have a note from the jury with
7 two questions. First said, regarding jury instructions,
8 page nine, civil conspiracy. Are the three listed items
9 all suppose to be met to meet the definition or just any
10 one of the three. And the second question, is finding the
11 Defendant breached the contract caused the contract to be
12 canceled. On the first one, that is a question about the
13 charge. I would be inclined to answer that and just tell
14 them, yes, all three elements must be met for the cause of
15 action. Any objection to that?

16 MR. MARTENS: Your Honor, only, my only comment on
17 that, is that there are actually four elements in causing
18 damage to the Plaintiff.

19 THE COURT: Okay. So I will respond that all four
20 must be met. Any objection from the Plaintiff?

21 MR. MECKLER: Well, yes, Your Honor. I think that is
22 confusing because it doesn't, there is no number four.
23 Just put it is the three and damages.

24 THE COURT: Got you. I will do that. The second
25 question, I am going to take suggestions on that. I mean,

1 they want to know does a finding of a breach of contract
2 cause, I am guessing that is a damages question. They are
3 trying to figure out how to compute future damages if they
4 find a breach.

5 MR. MECKLER: I think the answer, I thought we talked
6 about this. That is decided as an election after --

7 THE COURT: Yes. But as far as what do we tell the
8 jury. We have got to tell them something.

9 MR. MECKLER: I would say it may.

10 MR. MARTENS: I think it depends on what the breach
11 is.

12 MR. MECKLER: Because either way, they have got to
13 put them in the position they were at. If they are
14 thinking, if doesn't cause it to be canceled then they are
15 not entitled to the fair market value of a new place
16 because they are stuck there, that would be the wrong
17 impression to provide to them because -- I think it is
18 unrelated to their, what they are trying to decide.

19 THE COURT: Mr. Martens.

20 MR. MARTENS: I am thinking about what Mr. Meckler
21 said. So the two allegations, as I understand it,
22 essentially two allegations of breach. One is, has to do
23 with the option to purchase and the other has to do with
24 use of the patio.

25 THE COURT: Right.

1 MR. MARTENS: I am not sure, I don't know that either
2 one of those would result in termination of the contract.
3 I think we still have a lease. In fact, they put up
4 evidence of damages based on a projection through the end
5 of the lease term. I don't think you get -- that is what
6 I am struggling with. This would have been an easy
7 situation to solve and an easy problem to solve if it had
8 been here in breach of the lease we are leaving. Okay,
9 that's pretty easy to deal with. What is the measure of
10 damages and we have got a finite issue to deal with. But
11 that is not the case that was presented.

12 THE COURT: I am just thinking --

13 MR. MECKLER: I was not permitted to put evidence in
14 about future because you said it would be seeking double
15 recovery.

16 THE COURT: Right.

17 MR. MECKLER: So to tell them now, one way or the
18 other I think the answer to the jury is that, depended on
19 the verdict.

20 THE COURT: My guess is they are thinking about this
21 with regard to loss profits for the beer and wine.
22 Because the data that the expert gave was there were
23 future damages for loss profits.

24 MR. MECKLER: But that would be, regardless of the
25 term --

1 THE COURT: Right. Okay. The more I talk it through
2 with y'all I think the best instruction is to say that
3 this is not something that the, the answer to that
4 question depends and it is not something for them to
5 consider when they are reaching their verdict. That is a
6 matter for the Court later.

7 MR. MECKLER: I think that is correct.

8 MR. MARTENS: I think that is true.

9 THE COURT: Let's bring them in.

10 (Whereupon, the jury came into open court at
11 approximately 10:16 a.m.)

12 THE COURT: Ladies and gentlemen, good morning. I
13 have a question, I have two questions actually. The
14 questions are, first, in regarding jury instructions, page
15 nine, civil conspiracy. Are the three listed items all
16 suppose to be met in the definition or just any one of the
17 three. And the second question is, is a finding the
18 Defendant breached the contract cause the contract to be
19 canceled. As to the first question regarding civil
20 conspiracy, there are, I forgot to put number four but
21 there is a fourth element which is that they suffered
22 damages. And the answer to the question is all four
23 elements must be met, it is not either/or. Four, all four
24 elements must be satisfied for you to find a civil
25 conspiracy on behalf of the Defendant. And then the

1 second question, about whether the contract is canceled or
2 terminated. That is actually a fairly complicated
3 question and one that the Court will take up with the
4 attorneys after the verdict later on. For your verdict,
5 that is not something that you should consider, whether or
6 not the contract is terminated will be something we will
7 take up later. Thank you, ladies and gentlemen.

8 (Whereupon, the jury continued deliberations at
9 approximately 10:19 a.m.)

10 THE COURT: Any objections to the statements I gave
11 the jury?

12 MR. MECKLER: No, Your Honor.

13 MR. MARTENS: No, Your Honor.

14 THE COURT: Thank you, Counsel. We will mark that as
15 a Court's exhibit, Court's number 2.

16 (Whereupon, Court's Exhibit 2 was marked for
17 identification only.)

18 THE COURT: Let's go back on the record. The jury
19 has requested a calculator. So we have one from my
20 chambers, take a look at it, it is just a super basic, it
21 doesn't have internet access or anything crazy, it is a
22 very basic old fashion calculator. Any objection sending
23 this one back?

24 MR. MECKLER: No, Your Honor.

25 MR. MARTENS: No objection.

1 THE COURT: All right.

2 (Whereupon, a calculator was sent to the jury.)

3 THE COURT: I understand the jury has reached a
4 verdict. Let's bring them in.

5 (Whereupon, the jury came into open court with the
6 verdict at approximately 12:20 p.m.)

7 THE COURT: All right, Mr. Foreman, I understand the
8 jury has reached a verdict?

9 MR. FOREMAN: They have.

10 THE COURT: If you can pass the verdict to the
11 Bailiff.

12 Okay. Madam Clerk, publish the verdict, please.

13 CLERK OF COURT: State of South Carolina, County of
14 York, the Court of Common Pleas. Case number
15 2018-CP-46-03726. Grapevine of Riverwalk, Incorporated,
16 Plaintiffs versus Riverwalk River District Building 6,
17 LLC, et all, Defendants.

18 We, the jury, unanimously find, number one, did
19 Riverwalk River District Building 6, LLC breach its lease
20 agreement with the Grapevine of Riverwalk, Inc. in regards
21 to the lease's option to purchase. Yes. In the amount of
22 \$221,700.00 dollars.

23 Number two. Did Riverwalk River District Building 6,
24 LLC breach its lease agreement with the Grapevine of
25 Riverwalk, Inc, in regards to the lease's use of the

1 patio/common space. Yes. In the amount of \$1 -- no,
2 \$146,124.00.

3 Number three, did any Defendants make a negligent
4 misrepresentation to the Plaintiff. As to Riverwalk River
5 District Building 6, LLC; Yes. As to GRH Development
6 Resources, LLC; Yes. As to the Greens of Rock Hill, LLC;
7 Yes. As to Assured Administration, LLC; Yes. As to Mark
8 S. Mather; Yes. In the amount of \$96,800.00.

9 Number four. Did the Defendants, Riverwalk River
10 District Building 6, LLC and GRH Development Resources,
11 LLC conspire to harm the Plaintiff. No. In the amount of
12 zero dollars.

13 Signed by Foreperson, Steve Boyce on August 27th,
14 2021. Ladies and gentlemen, if this is your verdict
15 please indicate by raising your right hand.

16 (Whereupon, all jurors raised their hand.)

17 Let the record reflect all jurors affirmed the
18 verdict.

19 THE COURT: Would the Plaintiff like the jury
20 individually polled?

21 MR. MARTENS: No, sir.

22 THE COURT: I am sorry, that was a no?

23 MR. MARTENS: No, your Honor.

24 THE COURT: The Defense?

25 MR. MECKLER: No, Your Honor.

1 THE COURT: Ladies and gentlemen, it has been a long
2 week and y'all have worked very hard on this case and I
3 want to express the thanks from these attorneys and the
4 parties and the State of South Carolina and York County
5 for your service. We really appreciate your hard work
6 this week. Your jury service is complete. You are now
7 free from any restrictions involving what we talked about,
8 you are free to discuss this case with anyone you want,
9 family, friends. No one can make you talk about it but if
10 you like to you can. These attorneys are professionals
11 and just like every one else, they like to get better at
12 their jobs. So you may get contacted by one of these
13 lawyers asking, can you give them a little feedback, what
14 they could have done better, what they did right. You
15 don't have to talk to them if you don't want to but if you
16 like to you are absolutely free to do that. So with that
17 said, your service is complete and the pizza did just get
18 here at the time you handed in your verdict. There is
19 plenty of pizza. You are welcome to stay and eat as much
20 pizza as you like or you can take pizza to go or if you
21 are ready to get out of here you are welcome to do.
22 Ladies and gentlemen, thank you for your service.

23 (Whereupon, the jury was excused from open court at
24 approximately 12:24 p.m.)

25 THE COURT: Counsel, if y'all would like to inspect

1 the verdict form you are welcome to come up. Some
2 attorneys like to take pictures of the verdict form.

3 MR. MECKLER: That is a good idea.

4 THE COURT: Let's get back on the record. Counsel,
5 my inclination is to give y'all ten days for post-trial
6 motions and that would include, if the Plaintiffs want to
7 make the motion for specific performance. Is that
8 satisfactory to the Plaintiffs.

9 MR. MECKLER: Let me look at the calendar.

10 THE COURT: Let's just give y'all two full weeks. We
11 will say, post-trial motions by, that would be Friday, the
12 10th. That is acceptable to the Plaintiff?

13 MR. MARTENS: Yes, Your Honor.

14 THE COURT: To the Defense?

15 MR. MARTENS: Yes, Your Honor.

16 THE COURT: So post-trial motions will be due by
17 September the 10th. Anything else we need to take up for
18 today?

19 MR. MECKLER: Not that I can think of, Your Honor.

20 THE COURT: From the Defense?

21 MR. MARTENS: Nothing, Your Honor.

22 THE COURT: Okay. Very well tried case on both
23 sides. Thank you.

24 MR. MECKLER: Thank you, Your Honor.

25 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of Newberry)

I, Joy E. Holston, Official Court Reporter for the
Eighth Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete transcript of record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the County of York, South Carolina
on the days, sir of August 23rd through August 27th, 2021.

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

August 23, 2022

Joy E. Holston

Joy E. Holston, Court Reporter

My Commission expires: May 2, 2026

STATE OF SOUTH CAROLINA
COUNTY OF YORK

IN THE COURT OF COMMON PLEAS
CASE NO. 2018-CP-46-03726

THE GRAPEVINE OF RIVERWALK,
INCORPORATED,

Plaintiff,

-vs-

RIVERWALK RIVER DISTRICT
BUILDING 6, LLC, MARK S.
MILLER, GRH DEVELOPMENT
RESOURCES, LLC, THE GREENS OF
ROCK HILL, LLC and ASSURED
ADMINISTRATION, LLC,

Defendants.

TRANSCRIPT OF RECORD

October 13, 2021
York, South Carolina

B E F O R E:

Honorable William A. McKinnon, Judge.

A P P E A R A N C E S:

Mr. Christian H. Staples
Attorney at Law
Mr. Steven A. Meckler
Attorney at Law
Attorneys for the Plaintiff
Charlotte, North Carolina

Mr. Walter K. Martens
Attorney at Law
Attorney for the Defendant
Rock Hill, South Carolina

Shannon E. McGilberry, CVR-M
Court Reporter

1 THE COURT: First up we have *Grapevine versus Riverwalk*
2 *Building 6*, post-trial motions.

3 Let's take -- Mr. Martens, let's take your JNOV motion
4 first and then we'll take the plaintiff's motions.

5 MR. MARTENS: May it please the Court. Keith Martens
6 on behalf of the defendants. Your Honor, we filed several
7 post-trial motions and I'll just go through them in order.

8 The first, Your Honor, is a motion for JNOV as to
9 plaintiff's claim of breach of contract and this Court will
10 remember, this was jury question number 1, based up an
11 alleged breach of the option to purchase that was contained
12 within Grapevine's lease and our motion on that -- and I do
13 want to -- I want to point out also and I don't know if this
14 is the appropriate time to do this. Plaintiff has filed a
15 supplemental affidavit of Anthony Swainey. They filed that
16 late last week. I don't believe that's proper. Mr. Swainey
17 was a witness at trial. His testimony was given. He was
18 examined, he was cross-examined. He was deposed in this
19 case and I don't think it's -- I don't think it's
20 appropriate for them to be attempting to supplement his
21 testimony through a post-trial affidavit. So as an initial
22 matter, I just want to raise that issue to the Court's
23 attention.

24 THE COURT: I mean, I've not read the affidavit. What
25 does the affidavit say?

1 MR. MECKLER: So, Your Honor, the affidavit was --

2 THE COURT: I will read it; don't worry about that.

3 MR. MECKLER: I understand. -- not to supplement his
4 trial testimony, but you had raised an issue about specific
5 performance and the issue of the bank having a mortgage on
6 -- having a lien on the property. Mr. Swainey's affidavit,
7 basically, just says that the loan matures in November.
8 They're not going to extend the loan. There's no other
9 liens on the property and they really don't have a dog in
10 the fight, so to speak. So it was really just to address
11 Your Honor's concern that you raised.

12 THE COURT: We'll take that up on the motion for
13 specific performance.

14 MR. MARTENS: So, specifically, Your Honor, with regard
15 to the -- our motion for JNOV as to the allegation of breach
16 of contract on the purchase option, the issue, primarily,
17 has to do with the terms of the option to purchase and
18 whether, as a matter of law, the plaintiff properly
19 exercised or effectively exercised its option to purchase.

20 There is a case that we've cited in our brief, *Ingram*
21 *versus Kasey's Associates*, we believe is directly on point,
22 controls this issue. The reason --

23 THE COURT: Basically, your argument is that they
24 didn't do tender of cash. Correct?

25 MR. MARTENS: That's correct, Your Honor. And, in

1 fact, I would even go further to say that *Ingram* came closer
2 to properly executing his option than Grapevine did theirs.

3 In *Ingram*, the tenant sent a letter that said, I am
4 hereby executing my option, and then the question was
5 whether he was required to do something in addition to that.

6 In this case exhibit -- trial exhibit 2, which was the
7 letter of Brian --

8 UNIDENTIFIED SPEAKER: Wilson.

9 MR. MARTENS: -- Wilson -- sorry -- letter of Brian
10 Wilson was sent several months before the option period even
11 commenced and said this is notice that they intend to
12 exercise their purchase option and then the evidence is that
13 there was -- other than just requesting closing dates, et
14 cetera, that there was never an actual exercise during the
15 -- during the applicable option period. There was no tender
16 of a purchase price. There was no tender of the parties'
17 agreed earnest money deposit and under the holding of
18 *Ingram*, the Court clearly said that sending a notice is not
19 sufficient.

20 The *Ingram* case talks about the fact that a -- an
21 option to purchase that is imbedded within a lease is very
22 different than a stand-alone option to purchase and that
23 where the option by its express terms requires payment of
24 the purchase money or a part thereof, the making or the
25 tender or the -- this is quoting from another case -- where

1 the option -- *Connor versus James L. Phant* (ph.) -- where an
2 option by its express term requires the payment of the
3 purchase money or a part thereof accompanies the option the
4 exercise -- I'm sorry -- the election to exercise the
5 option, the making of the tender of the payment specified
6 unless waived is a condition precedent.

7 THE COURT: Mr. Martens, the issue I have with that
8 argument, though, is the property didn't exist yet and it
9 was the landlord -- it was the landlord's duty, as the jury
10 found, to create the horizontal property regime and create
11 the property that then could be transferred. Correct?

12 MR. MARTENS: Well, correct.

13 THE COURT: So it seems to me, I mean, basically, the
14 jury found that your client breached the contract by, in
15 part, not creating the horizontal property regime.

16 How can the -- how can you say the plaintiff has to
17 tender the purchase money when the property they're trying
18 to buy doesn't exist yet and what --

19 MR. MARTENS: Well, Your Honor, I believe that the
20 contract -- the lease specifically provides that the
21 purchase price is \$270,000 less a credit of \$25,000 and the
22 earnest money deposit that was paid under the lease and that
23 there's also -- and then there's also a reference to exhibit
24 G, which is referenced in Mr. Wilson's letter and that
25 specifically provides that upon entering into the contract,

1 that tender must be -- that must be made and we just believe
2 that *Ingram* is square on on all fours, that says that simply
3 giving notice is not sufficient and they were required to do
4 more than just simply say when the option period comes, we
5 want to exercise our option.

6 THE COURT: Tell me exactly what you think they needed
7 to do under *Ingram*. I mean, like, is it hand your client a
8 check or what -- tell me what they needed to have done.

9 MR. MARTENS: I believe they did. I believe they
10 needed to tender -- at least provide in escrow to their
11 closing -- to their designated attorney the check and Mr.
12 Wilson testified that never occurred. Mr. Wilson said he
13 never had the money in his account, he never asked for it,
14 he never provided it to anybody.

15 THE COURT: The plaintiff's testimony that they were
16 ready, willing and able to close and had the funds. That
17 was uncontroverted, as I recall.

18 MR. MARTENS: I believe that's correct, Your Honor, but
19 I believe -- *Ingram* says that they've got to do more than
20 simply give the notice and they just -- and our view is, of
21 the evidence is, they just simply didn't do that and there's
22 just no evidence to support the allegation. Of course, they
23 testified they were ready, willing and able, but there was
24 -- Mr. Wilson said I never had the money. I was -- you
25 know, I was supposed to close it and I was -- I never had

1 the money. There's evidence in -- there's evidence in the
2 record, I believe, Mr. Sampson Yellow's (ph.) email
3 correspondence with Mr. Brockmann, said that they jumped the
4 gun, the plaintiffs may have jumped the gun on this. It's
5 our contention, Your Honor, and our position that they just
6 never triggered a duty to act to -- to move forward with the
7 purchase option.

8 THE COURT: Even though they're continually asking your
9 client to create the horizontal property regime and it never
10 gets done?

11 MR. MARTENS: I believe that's correct. I don't think
12 you can just keep saying, we want to close, we want to
13 close, we want to close and I think *Ingram* clearly says
14 that, that these are -- that when the option talks about a
15 specific purchase price and then you -- and in this case
16 you've even got the exhibit G, which talks about upon entry
17 into the contract for purchase there will be a \$25,000
18 earnest money deposit and that just never happened. *Ingram*
19 -- and the Court said in *Ingram*, you know, there's no way
20 that we can equate giving notice that I want to exercise my
21 option as the requirement to tender the purchase price.

22 THE COURT: But in this case and the condition
23 precedent to executing the option is your client had to
24 create the horizontal property regime. That had to happen
25 first. Right?

1 MR. MARTENS: I think that had to happen before the
2 conveyance. I'm not -- I don't -- I don't agree, Your
3 Honor, that -- that we had to create the horizontal property
4 regime based upon an expression that we want to exercise.

5 The evidence at trial was that we were ready, that we
6 had the documents ready to file, that they were prepared,
7 that they had been reviewed by the plaintiff's attorney,
8 they had been found acceptable and they were ready for
9 filing and then the plaintiff never triggered the
10 obligation, because they never moved forward as was
11 contemplated in the contract.

12 THE COURT: Anything else on this, Mr. Martens?

13 MR. MARTENS: No, Your Honor.

14 MR. STAPLES: Thank you, Your Honor. For the record,
15 Christian Staples for the plaintiff.

16 Here's the problem with the *Ingram* case, Your Honor, in
17 *Ingram* the Court favorably cites to the *Connor versus*
18 *Alvarez* case and notes that in *Connor* the Court correctly
19 applied the general rule by holding that neither payment nor
20 tender was required in order to properly exercise the
21 option.

22 Now, the cases, *Ingram* and *Connor*, talk about this
23 general rule. It's also called the Williston Rule. It
24 calls for the creation of a bilateral contract.

25 In *Connor*, the Court held that the option was properly

1 exercised when the purchaser's attorney sent a letter
2 providing, quote, "Notice of intention to exercise the
3 option to purchase." *Connor* held that neither payment of
4 the purchase price nor tender was required.

5 Now, the facts of *Ingram* are so unique that they were
6 taken away from the general rule and applied the unilateral
7 contract theory, that you had to actually tender or pay and
8 the reason that's the case is because in *Ingram* they could
9 exercise that option at any time during the term of the
10 lease and what the purchaser did was he gave his notice of
11 intent to exercise the option, but then didn't close and the
12 lease expired and that's very important, because the
13 landlord was going to lose grandfather status under a zoning
14 ordinance if it was not in continual operation as a
15 restaurant and so, you know, that -- we think that the
16 *Connor versus Alvarez* case properly stands for the general
17 rule in South Carolina, that that's exactly what happened
18 here, the language of the exercise is exactly on point.

19 Now, the evidence at trial also confirmed by the
20 defendant's own witnesses that there was no issue with the
21 notice that was given. I mean, we heard from Todd
22 Brockmann, we heard from Mark Mather, we heard from the
23 30(b)(6) representative, Craig Ostrander, that when they
24 received Brian Wilson's letter exercising the option, they
25 began to take steps towards the closing. It just never came

1 to fruition, because they were waiting on the architect or
2 waiting on somebody else to do something that needed to be
3 done in order to create the horizontal property regime.

4 The other problem they have is they want plaintiff to
5 tender the funds, but yet, there's no escrow agent
6 identified in the purchase and sale agreement, it's blank
7 space, and we talked about at trial how that purchase and
8 sale agreement, that the blanks could not be completed until
9 the defendants established the horizontal property regime.
10 They would then have the information to complete that.

11 So for those reasons, Your Honor, I think the JNOV
12 should be denied. The jury heard all the evidence. There
13 was certainly a reasonable inference and if you look at the
14 literal language of this option from paragraph 33 in the
15 lease, it doesn't require payment or tender. It just
16 requires the giving of notice of a hundred and twenty days,
17 which clearly isn't this case.

18 THE COURT: This is an issue that I have given
19 considerable thought to, both at the actual trial, I've read
20 Mr. Martin's briefing, and I -- so I'm going to deny this
21 motion, given I've had enough time to think about that.

22 Mr. Martens, anything else from the defense?

23 MR. MARTENS: Yes, Your Honor. Our next motion, Your
24 Honor, is for JNOV as to the negligent misrepresentation
25 cause of action and there are a few issues with this -- with

1 this claim and this verdict, Your Honor.

2 The first is this: there's simply no evidence that Mr.
3 Mather, Assured Administration or Greens -- excuse me -- the
4 Greens of Rock Hill, Assured Administration, or Mr. Mather
5 had any communication with the plaintiff or the plaintiff's
6 representative prior to entering in this contract and so
7 without communication there can be no misrepresentation, at
8 least with regard to the verdict against those three
9 defendants we believe --

10 THE COURT: Give it to me one more time. Greens of
11 Rock Hill, --

12 MR. MARTENS: Assured Administration and Mark S.
13 Mather.

14 THE COURT: Mark S. Mather personally?

15 MR. MARTENS: Yes, sir.

16 THE COURT: Okay.

17 MR. MARTENS: The testimony at trial was that -- that
18 Mr. -- I'm sorry. I've forgotten people's names in the time
19 we've been away. -- that the representative they met with
20 was an employee of GRH Development and he met with them in
21 his capacity on behalf of the landlord.

22 So at least with regard to those three defendants, we
23 believe that, as a matter of law, there could be no claim
24 for negligent misrepresentation.

25 The other --

1 THE COURT: If you don't mind, Mr. Martens, let me hear
2 from the defendants on that. Mr. Staples?

3 MR. STAPLES: Yes, Your Honor. We think there was more
4 than ample evidence of the interrelation and connection
5 between these various defendants. The individual that sent
6 -- that made the misrepresentation was David Williams and
7 there was evidence that he had various email extension
8 handles at GRH Development or at Assured Administration. I
9 think he sent letters of intent from -- on Assured
10 Administration letterhead.

11 THE COURT: Well, talk -- talk about Mr. Mather. I
12 don't recall any testimony about -- in your representation
13 by Mr. Mather.

14 MR. STAPLES: Sure. Not directly by him, but he did
15 testify and the evidence confirmed that he ultimately owned
16 and controlled all of these entities. We talked about how
17 they all roll up to him. You have the landlord entity,
18 Riverwalk District Building 6, which is wholly owned by the
19 Greens of Rock Hill, wholly owned by Assured Administration
20 and controlled and, I think, majority owned by Mark Mather
21 individually.

22 Dave Williams, at the time he made his
23 misrepresentation, the landlord entity actually hadn't even
24 been registered in the state yet. I mean, I think it was
25 created, you know, right before the lease was executed, so

1 he could only have been acting on behalf of the other
2 entity.

3 THE COURT: Tell me when was the entity created?

4 MR. STAPLES: I'd have to look it up, Your Honor. I
5 could do that.

6 THE COURT: Well, if you can, that will be helpful.

7 MR. MECKLER*: Your Honor, while he's doing that, I'll
8 just -- I don't know if you recall that I had Mr. Mather, I
9 was cross-examining him and I asked him, I said, "Wasn't it
10 true that you were involved or in charge of Riverwalk River
11 District Building 6?" And he said, "No; no; no." Then we
12 went to his deposition where he said, "I'm in charge of
13 Riverwalk River District Building 6," and he finally
14 admitted that. So --

15 THE COURT: I agree that if someone owns a corporation
16 and that corporation has employees, the fact that they own
17 the company doesn't make them personally liable for the acts
18 of the company's employees. Correct?

19 MR. MECKLER*: No, except, if you recall, he also --
20 the testimony was also Riverwalk River District Building 6
21 didn't have employees. It was just a single enterprise that
22 owned --

23 THE COURT: You're right.

24 MR. STAPLES: Okay. So here's -- here's the dates,
25 Your Honor. Riverwalk River District Building 6, LLC, the

1 landlord entity, was formed June 9th, 2014. David Williams'
2 misrepresentation in the email was from February 24th, 2014,
3 so four months beforehand. So, you know, I just think that
4 sort of just gets -- you know, he had to be acting for
5 someone. We know he wasn't acting individually. He
6 testified he was employed by GRH Development. He was acting
7 also on behalf of Assured Administration. That's what the
8 documents that were introduced into evidence show. Mark
9 Mather was the sole owner operat- -- you know, controller of
10 those entities and so I think on that issue the jury verdict
11 needs to stand.

12 THE COURT: I'm inclined to grant it with regard to Mr.
13 Mather personally. I'm just -- I'm not -- I mean, I don't
14 recall any testimony that any of the -- that Mr. Williams
15 was working directly for Mr. Mather personally. Am I
16 missing --

17 MR. STAPLES: Yeah. I believe that there was testimony
18 that Mr. Mather was the ultimate boss, that he ultimately
19 controlled everything and so at the time, because Riverwalk
20 River District Building 6 had not been formally
21 incorporated, he was working on behalf of them, but that was
22 Mark Mather at the time.

23 THE COURT: Right, but that was his other entity,
24 right, GRH -- I mean, he was not an employee of Mr. Mather
25 personally.

1 MR. STAPLES: Right, but Mr. Mather said he controlled
2 -- he was in charge of this building, so he was the guy who
3 was running the show. I mean, it was -- Dave Williams
4 couldn't do anything without Mark Mather and that was, I
5 believe, it was Mr. Williams that testified that Mark Mather
6 was the ultimate boss, may have been the 30(b)(6), actually,
7 I think it was the 30(b)(6) of Riverwalk River District
8 Building 6, that Mark Mather was the ultimate boss for
9 everything.

10 THE COURT: But the allegation is not that -- or, I
11 mean, the allegation and the evidence wasn't that Mr. Mather
12 directed him to make a misrepresentation, it's respondeat
13 superior liability. Right?

14 MR. STAPLES: Yeah, I mean. Yeah. So that -- Dave
15 Williams, the issue and what the jury heard and what they
16 obviously found to be true is that Dave Williams was working
17 on behalf of all of these people, including Mr. Mather and
18 so the jury took that evidence, they reviewed it, they
19 looked at all the documents, all the interplay between the
20 different entities and they found that, in fact, they all
21 made that misrepresentation, because it's all -- they're all
22 interconnected.

23 I don't know if you remember, we had that one motion
24 here and he was -- even defendant's counsel was concerned
25 that there would be confusion among the parties because of

1 how interrelated they were and so I think that's what the
2 jury also found, that there really isn't a distinguishment
3 between -- I can't even remember all the names of them, but
4 that they're all really -- they were all working together at
5 that point, which is why Mather was involved, Dave was
6 involved. We had these different entities that Dave was
7 sending emails out on in correspondence to the plaintiff.

8 THE COURT: I'm going to take that under advisement.
9 I'll say I'm inclined to grant that motion with regard to
10 Mr. Mather. I'll think about that and get back to you after
11 I look at the documents. All right.

12 Anything else, Mr. Martens?

13 MR. MARTENS: Yes, Your Honor.

14 MR. STAPLES: Your Honor, just for clarification, with
15 the exception of Mr. Mather, you're denying --

16 THE COURT: Would be denying -- well, again, I don't
17 want to get back into it, but my inclination right now is I
18 will -- I'm going to deny the motion, except with regard to
19 Mr. Mather, and grant it with regard to him.

20 MR. MARTENS: Your Honor, the -- we believe that the
21 claim also fails even as to GRH Development and Building 6,
22 and it was a little bit unclear to me until I received
23 plaintiff's responsive brief, the alleged misrepresentation
24 that they apparently are hanging their hat on is this email
25 that says the bank will require a two-year lease. I think

1 they were -- kind of hit all around anything they thought
2 might constitute a misrepresentation at the trial, but they
3 seemed to be honed in on that and how the case would have
4 gone to the jury. That was nothing more than a statement of
5 future intent. As Mr. Staples just said, at the time that
6 representation was made, the landlord didn't even exist.
7 Mr. Williams was predicting what was going to be required in
8 the future when the landlord went out to get a loan to build
9 this building that the tenant would then occupy once the
10 building was constructed. All of this was his prediction of
11 what's going to be necessary in the future and as the cases
12 -- our courts have held time and again, a statement of
13 future intent cannot be the basis of a negligent
14 misrepresentation claim and so we believe that the claim
15 fails as to all defendants and that we're entitled to JNOV
16 as to that cause of action.

17 There's also evidence that the -- there's really no
18 evidence of detrimental reliance. The evidence was that
19 they were -- they were given this opportunity and said,
20 look, if you want to occupy space in this building that
21 we're going to build, you're going to have to enter a two-
22 year lease. They had the full opportunity to walk away, to
23 say no, thank you, that's not what we want and they made a
24 business decision to move forward with
25 the transaction under those terms. There's just simply no

1 evidence that Mr. Williams' statement led or mislead them to
2 do anything they didn't want to do and so our motion is,
3 Your Honor, JNOV as to all defendants for the reasons we've
4 argued.

5 THE COURT: All right. Mr. Staples?

6 MR. STAPLES: Well, I think that just complete ignores
7 the evidence that was presented, Your Honor. I mean,
8 Melanie Seals could not have been more clear that they
9 walked away from the initial proposal that Mr. Williams made
10 for a pure lease, without any option or right to purchase.
11 It was only when he then makes this misrepresentation that
12 the lender will require a two-year lease, but if you agree
13 to do that, we'll give you the right to purchase that they
14 came back to the table and said, okay, you know, we'll
15 accept that, we'll take it on good faith that you're being
16 truthful about that. Mr. Williams' email did not disclose
17 the identity of the lender. Melania Seals testified that
18 she didn't know who the lender was, so the reasonable
19 reliance is they're relying on him as the landlord's
20 representative and, you know, oh, by the way, the landlord
21 entity didn't even exist and that's probably another
22 misrepresentation that he made, but regardless, Dave
23 Williams' email, when you read it in the full context,
24 couldn't be more clear that it was a misrepresentation of
25 present existing fact, because he says, we discussed the

1 purchase option with our lender and they will require a two-
2 year lease to purchase. Now, they want to --

3 THE COURT: Mr. Staples, I don't need anymore argument
4 on that issue.

5 MR. STAPLES: Okay.

6 THE COURT: All right. Anything else from the defense?

7 MR. MARTENS: Your Honor, we have several other post-
8 trial motions. I don't know if you want to proceed with
9 those.

10 THE COURT: Please.

11 MR. MARTENS: The next motion we've filed, Your Honor,
12 is a motion for declaratory judgment as to the
13 enforceability of the lease and this issue really has to do
14 with this: clearly, there's a lease agreement in place
15 between these parties. There was a verdict that my client
16 breached that lease in two particulars. Our concern is that
17 given that finding, that the plaintiff may take the position
18 that we no longer have enforcement rights under the lease
19 because we were in breach and we are simply seeking a
20 declaratory judgment that the lease remains in effect, that
21 its terms apply, that -- you know, that the tenant's not
22 entitled to just ignore the terms of the lease and do
23 whatever they want from this point forward and that if the
24 tenant were to do that, that my client would have
25 enforcement rights under the lease.

1 There was evidence at trial that they -- that the
2 defendant was acting outside of the use requirements of the
3 lease without landlord's prior written consent. There's --
4 there was evidence presented at trial that they are -- that
5 they were using the outdoor areas to the exclusion of --
6 well, I don't know if it was to the exclusion of other
7 tenants, but our concern is they may take the position that,
8 hey, we won our case, therefore, we can do whatever we want.
9 We can occupy this patio space as part of our leased space.
10 We can exclude other folks from using it, et cetera, and we
11 simply believe that given the verdict and given the
12 continuing relationship between these parties, that there
13 needs to be a declaration of the parties' rights and
14 obligations to one another moving forward.

15 THE COURT: Mr. Martens, didn't the jury necess- -- I
16 mean, the jury made a factual finding that your client's
17 denying the plaintiff use of the patio was a breach of the
18 lease. So that, I think, is a -- I mean, that has
19 preclusive effect, does it not?

20 MR. MARTENS: I think there's a difference between
21 being able to use it and being able to use it to the
22 exclusion of others and the evidence -- and they were very
23 careful about how they presented that evidence at trial, the
24 evidence at trial was, oh, we'll let anybody use it. You
25 know, we'll set up our tables and we'll host people out

1 there and we'll serve people out there, but anybody else
2 wants to use it, that's fine, and our concern is -- and, in
3 fact, we -- you know, it has come to fruition that the day
4 following -- the day of the jury's verdict, hey, patio's
5 reopened, come visit us on our patio. That's the concern,
6 Your Honor, is this -- I mean, that's what this whole --
7 that's what -- you know, that's why this whole dispute arose
8 in the first place and ended up -- and if the lease remains
9 in effect, which it does, it has to mean something and there
10 has to be some enforcement mechanism.

11 THE COURT: Mr. Staples?

12 MR. MECKLER: Your Honor, I'm going to handle this
13 point. I got that motion, I got to be honest, I was a
14 little confused by it, because he's -- what the plaintiff
15 seems to be objecting to is that or what the defendant seems
16 to be objecting to is the plaintiffs are doing what they
17 were supposed to be able to do before the case that his
18 client breached by not allowing them to do that. There's
19 been no allegation that they prohibited anybody else from
20 using that patio when they reopened it, but what he's really
21 asking for is an advisory opinion from the Court. I mean,
22 there's been no suggestion, there's been no formal notice of
23 default or breach or another case filed. He can't try the
24 case after the jury's tried the case by bringing new issues
25 into it when we had a jury trial. That is clearly not

1 permissible under the law.

2 The issues he rose -- he just addressed about the use
3 of, I guess, I assume he was referring to the pastries or
4 whatever they sell and the coffee, they raised that during
5 the trial, 'cause they raised that to suggest that our
6 clients were in breach. The jury obviously did not buy that
7 based upon the evidence that his client actually advertised
8 their use to do those things, but you can't come back after
9 trial and then try to retry the case on new issues that
10 haven't actually arisen yet.

11 THE COURT: Mr. Martens, I'll say this is a new request
12 to me. I mean, I've done declaratory judgment actions, but
13 I've never heard anyone ask for declaratory judgment as a
14 post-trial motion. Can I even do that?

15 MR. MARTENS: That's a good question, Your Honor. I
16 believe you can. I did my best to research that. I
17 absolutely agree that, typically, a declaratory judgment is
18 sought through a pleading, through a filing, but if you look
19 at the Declaratory Judgment Act and the cases that have
20 been decided under that, there's no prohibition on raising
21 this issue by a motion. You know, our concern -- you know,
22 again, Your Honor, our concern is when there is a breach of
23 a lease, what we're going to hear is, you can't do that. We
24 sewed you and we won. You were in breach. You no longer
25 have an enforcement right under the lease, 'cause you

1 breached the lease and you're precluded -- you're now -- and
2 now we're got res judicata to this new breach because of --
3 because of you didn't sell us the space or denied us use of
4 the patio for two years while we were litigating and that's
5 the concern, Your Honor, is if we don't raise this issue and
6 get a declaration that the lease remain -- you know,
7 obviously, it's subject to the Court's determination of
8 whether or not the option to purchase is going to be
9 specifically enforced or not, but if Your Honor denies that
10 and what we're left with is a landlord/tenant relationship
11 that extends through 2026, what we can't be left with is a
12 ruling that gives us, as the landlord, no rights to enforce
13 the terms of the lease.

14 THE COURT: Now, I see the plaintiff's not contending
15 they don't owe rent or anything? I mean, your concern is
16 with the patio?

17 MR. MARTENS: Our concern is that the lease is intended
18 to govern the relationship of these parties. Now,
19 obviously, things that, from my client's perspective, are
20 not contemplated by the lease, were found to be allowed by
21 this jury and our concern is that -- our concern is that the
22 plaintiff may push those boundaries further and that when my
23 client goes to enforce the lease as the landlord, as it is
24 entitled to do as the owner of that property, that the
25 response we will get is just what -- just what we heard.

1 Oh, we tried that case and the jury said you were breach, so
2 you can't -- you know, that case -- you should have brought
3 that, you know, that's res judicata, it's estopped from
4 raising that. That's the concern, Your Honor.

5 THE COURT: Let me think about that. Counsel, I should
6 tell you, I think, last week I did actually walk into the
7 Grapevine very briefly. My wife's bicycle was damaged and
8 there's a bicycle shop next to the Grapevine and I saw a
9 friend of mine from church and just sort of walked in and
10 had a couple words with him. I didn't buy anything. I
11 didn't walk around, the Seals weren't present, but I --
12 probably was not a good idea, but it's just one of those
13 things, I saw a friend in there, it was, you know, so --
14 that was subsequent to the trial. I think it was last week,
15 but anybody want to raise an objection to that? I didn't --
16 I talked to my friend, his name is Randy Sturgis and we he
17 was sitting at the bar and I just -- I wasn't really
18 thinking, just walked in.

19 MR. MARTENS: No issue.

20 THE COURT: Okay. All right. Well, for time purposes,
21 Mr. Martens, anything else from the defense? I mean, I --

22 MR. MARTENS: Your Honor, we have -- there's an issue
23 of election of remedy, which is really going to be dependent
24 on Your Honor's ruling on this specific performance issue.

25 The motions for new trial -- we filed two motions for

1 new trial and, specifically, this one I'd like to point out
2 for the Court's attention, actually, one motion -- well,
3 two; I'm sorry.

4 So with regard to the jury question number 2
5 regarding the use of the patio, we moved for new trial, nisi
6 remittitur. The argument here, Your Honor, is that the
7 lease, by its expressed terms, prohibits the award of
8 consequential damages or recovery of consequential damages.
9 The evidence that the plaintiff presented in support of this
10 particular claim at trial was lost profits, which are
11 definitionally consequential damages and we believe that the
12 lease precludes the award of those and so we would ask for a
13 remittitur to reduce the verdict by that amount that was
14 awarded for that cause of action or, alternatively, a new
15 trial as to that claim.

16 THE COURT: Briefly, Mr. Staples.

17 MR. STAPLES: Your Honor, I believe you ruled on this
18 issue at trial and said that those could only come in as it
19 relates to the negligent misrepresentation of the
20 profitability.

21 There's no indication from the jury what
22 their award was for. It could have been for the loss of the
23 value of the rent they paid during the time that they
24 couldn't use the patio. It didn't match up with the lost
25 profit, so I don't believe that was it and I was very clear

1 in my closing, if Your Honor will remember, when I was
2 discussing lost profits I said it's only related to the
3 negligent misrepresentation.

4 THE COURT: All right. Let's turn to the motion for
5 specific performance.

6 MR. STAPLES: So, Your Honor, we initially raised this
7 as a directed verdict motion and you deferred the ruling, so
8 we're sort of hearing it now. I know I agree with Mr.
9 Martens, it's also sort of in the nature of an election of
10 remedy, but plaintiffs brought this action initially seeking
11 specific performance. They want to purchase this space. We
12 believe that they're entitled to do that, because we proved
13 all the elements that the existence of a valid lease and
14 option, plaintiff's performance, they paid the rent, they
15 exercised the option, they were ready, willing, able to
16 close and it's equitable between the parties, because we're
17 dealing with land. There's no substitute space. I mean, we
18 heard testimony from an appraiser that talked about, you
19 know, the various comps that were in his report. There's
20 nothing really even close to Riverwalk that would be
21 comparable in that. He'd have to go up to, like, Davidson,
22 North Carolina to even find a similar space, but it's
23 important to note that when land is the subject matter of an
24 agreement, specific performance -- that the jurisdiction of
25 equity to enforce specific performance is undisputed and

1 does not depend on the inadequacy of the remedy. Also, case
2 law is that the change in value of land will not justify a
3 refusal to grant specific performance. So, clearly, the
4 remedy of law is going to be inadequate, because we have,
5 you know, as evidenced by his declaratory judgment action or
6 motion and also some of the letter that he sent post-trial,
7 the parties are still sort of embroiled in this dispute over
8 their rights and obligations under the lease and so we think
9 that awarding specific performance is really the only way to
10 put plaintiff in the position that they would have occupied
11 had there not been a breach.

12 Now, we've touched on this already, the issue of the
13 Bank of Ozarks lien, the outstanding loan. We did submit an
14 affidavit of Anthony Sweeney who testified at trial just for
15 the purposes of confirming that loan matures next month and
16 I think he also says in his affidavit that there's -- you
17 know, that the borrower is current, there's not any issues,
18 that the bank's not going to extend that loan and so I think
19 it would be very easy to take the bank out of the picture if
20 you just order specific performance and set a closing date,
21 maybe sometime in December.

22 Also, case law, you know, this -- even the *Ingram* case,
23 I think is from the Court of Appeals' decision, talks about
24 it's not relevant whether the vendor's title was free and
25 clear at the time the option was exercised, but whether it

1 was marketable at the time of closing. So it's really sort
2 of irrelevant what liens may be on the property now as long
3 as they can get it clear at the time of closing and the
4 order can compel them to do that.

5 The law holds that a party to a contract contractually
6 charges himself with an obligation possible to be preformed.
7 He must make it good unless its performance is impossible.
8 There's nothing impossible about defendant's paying off this
9 loan and getting rid of the lien.

10 Also, the lease was fully executed before the bank
11 ever loaned any money. The lease was signed in June of
12 2014. I believe the construction loan was the month after,
13 in July. The bank approved the lease, which means that they
14 obviously intended that that could be performed at some
15 point in the future.

16 Now, another thing to note, Your Honor, rule 70 of the
17 South Carolina Rules of Civil Procedure gives the Court
18 broad power and authority to ensure that Your Honor's order
19 of specific performance is carried out. You could direct
20 the act to be done by some other person. You could issue a
21 writ of attachment or sequestration. You could adjudge the
22 party in contempt if they don't comply. You could enter a
23 judgment divesting of title. Those are all spelled out in
24 rule 70.

25 We think that if defendants are unable to create a

1 horizontal property regime, the Court could appoint Brian
2 Wilson or some other qualified individual to do that, to get
3 those documents recorded and to draft the deed, but so in
4 that specific performance order, Your Honor, there's a
5 couple other things that we want to make sure are included
6 and the first would be that plaintiff's future use of the
7 premises be in conformity with the jury verdict, meaning
8 that they have the right to use the outdoor common area and
9 that their use of that premises is unrestricted. They're
10 not going to be limited to, you know, they can't sell coffee
11 or tobacco or whatever.

12 Also, the case law is clear, *Connor versus Alvarez*, and
13 *Perry versus Green* that specific performance does not
14 foreclose a recovery of monetary damages as well and when
15 there are delayed damages of the nature we have here,
16 because this closing should have occurred back in February
17 of 2018, the plaintiff can receive specific performance and
18 an equitable credit against the purchase price. That's what
19 happened in *Connor, Perry versus Green* was delayed damages
20 for a failure to force seller to provide the registration
21 papers.

22 THE COURT: You're asking for the rent from the -- from
23 then to now, right, as a credit?

24 MR. STAPLES: Correct, and so applied to this case it
25 would be all the rent that's paid since February 2018 until

1 whatever closing date we have, 'til the deed actually gets
2 transferred.

3 THE COURT: But do you lose the damages, though, based
4 on the value of the property?

5 MR. STAPLES: Jury question one, damages would go away.
6 I think we would still get the patio damages because those
7 were based on a separate breach.

8 So, you know, again, Your Honor, I just think that
9 specific performance is really the only remedy here that's
10 going to bring finality to the parties' dispute. Plaintiffs
11 are adamant that they want to buy this space. That's what
12 they contractually bargained for. They should be entitled
13 to that. I think the Court can oversee, you know, by Mr.
14 Martens, he already said today that, you know, the
15 horizontal property regime is basically prepared, it just
16 needs to be recorded and finalized. The Court can oversee
17 that easily, can appoint an attorney to oversee that.

18 THE COURT: Mr. Staples, yeah, I'm not -- I'm not too
19 concerned about that, but I -- I mean, you're requesting
20 kind of the foot-set (ph.) of what Mr. Martens is requesting
21 is kind of my advisory opinion about whether in the future
22 your clients have the right to sell, you know, cigars or use
23 the patio. I'm not sure I can do that. I mean, isn't that
24 -- I mean, if the parties don't agree, that's got to be
25 hashed out at some future day in a future proceeding,

1 doesn't it?

2 MR. STAPLES: I don't -- I mean, they'd be the fee
3 simple owner of the space, Your Honor.

4 THE COURT: Well, then that may mean -- that may mean
5 your clients are right. I'm just saying I don't think if I
6 were to grant specific performance, I can also offer my
7 opinion as to what the effects of your client owning the
8 property outright would be.

9 MR. STAPLES: Well, then, as long as there's not
10 restrictions in the order. It says, you know, they have to
11 operate it as a wine bar. You know, I guess that --

12 MR. MECKLER: Your Honor, if I may, I think that we
13 were talking about before the issue is so they've leased
14 this property with the option to purchase. The -- what
15 they're purchasing is the unit they're leasing, that is the
16 same ability, so they can use the patio and have that
17 outdoor space. That's what they lease, that's what they
18 would be purchasing. They're purchasing the unit, so what
19 they -- what, I think, Mr. Staples is getting at is you
20 can't have them set up a condo regime that says, yeah, you
21 can have the spot, but you can't do anything with it, you
22 know, you can't -- you didn't really purchase it, we're
23 still going to control it, because that's really -- that's
24 more of a zoning issue than a condo homeowner's association
25 as you said. They shouldn't be restricted any more than the

1 lease would provide. It's just now they would own it. I
2 think once they own it, all these issues that Mr. Martens is
3 worried about with these continuing lease disputes and
4 things in the future that he is asking for an advisory
5 opinion on go away because there isn't a lease. They just
6 own it. They can operate their business. They've got to be
7 part of the condo regime, the other part of the building has
8 to, they have to operate under them.

9 THE COURT: Well, again, I'm not sure this is binding
10 on anybody, but my view is that, obviously, the lease
11 restrictions on what your client can do with the building,
12 that's all gone.

13 MR. MECKLER: Right.

14 THE COURT: They would own -- they would own it
15 outright.

16 MR. MECKLER: Right.

17 THE COURT: But I'm not sure -- it's obvious that they
18 get the use of the patio. I mean, they would have a fee
19 simple interest in the property, but I -- what -- I'm not
20 sure that that is referring to the patio.

21 MR. MECKLER: I hear what you're saying and the way I
22 see it and read the law, it looks -- I would think that
23 because they've got option to purchase this unit that comes
24 with the ability to use the patio, it's the same party doing
25 the condo or should have been setting up the condo unit,

1 that that is part of what they purchase.

2 THE COURT: Well, that's going to need some thought.
3 Counsel, I know that this is a complicated case. I'm not
4 making any rulings today, but there's a lot of attorneys
5 waiting, as you see. From Mr. Meckler's statements,
6 anything else you need to tell me today? I know I've got
7 memoranda.

8 MR. MECKLER: I don't think on that issue.

9 THE STAPLES: I mean, as long as -- yeah, I mean, our
10 motions have been filed -- we filed, so --

11 THE COURT: I know you've got your request for
12 attorney's fees.

13 MR. STAPLES: Pre-judgment interest and attorney's
14 fees, I believe, are our two motions in the specific
15 performance motion election that we just argued.

16 THE COURT: Mr. Martens, anything you feel like you
17 need to say about those issues? I've got your memoranda as
18 well.

19 MR. MARTENS: Your Honor, and certainly I want to have
20 an opportunity to address, one of the thoughts I had as I
21 was looking at this is I believe the motion for pre-
22 judgment interest and the motion for attorney's fees and
23 costs are premature, but the rules clearly say motion for
24 cost may be filed within ten days of receipt of entry of a
25 final judgment. There's been no judgment in this case. So,

1 you know, it may be appropriate for us to come back at some
2 later time to argue those issues if the Court finds --
3 determines that they are entitled to some fees or some
4 costs. That's just a thought.

5 I did want to address this issue about delayed damages
6 in the *Connor* case and I think it's important. The *Connor*
7 case, the option to purchase in the *Connor* case arose from a
8 contact that said you can lease this space and every rent
9 payment you make will be applied toward your purchase price.

10 The issue in *Connor* was not whether there was a valid
11 execution. The issue in *Connor* was whether option to
12 purchase renewed when the lease renewed and that's -- that
13 was the issue in *Connor* and so -- and, of course, because
14 the way those parties wrote their contract in a way that
15 says every lease payment you make will be applied toward
16 your purchase price, the Court had to decide that issue.
17 That's not the agreement these parties negotiated. These
18 parties negotiated a \$25,000 rent credit and, in fact, I
19 asked Ms. Seals about that during her examination, I said,
20 You wanted to have every rent payment applied and they
21 wouldn't agree to that. Right? So they're asking for more
22 than they bargained for and that's one of -- that's the
23 point I want to make here, Your Honor, is that equity
24 regards as done that which ought to be done.

25 THE COURT: Mr. Martens, but that -- you're saying your

1 client is equitably entitled to retain the lease payments
2 that your -- that the jury found your client wrongfully
3 attained, aren't you? I mean, the jury said you should have
4 sold them the property and you breached your lease by not
5 doing it. You're saying you want to retain the lease
6 payments during that period. That does not --

7 MR. MARTENS: Absolutely. And the reason I say that is
8 this, Your Honor, that -- if you think about the way that
9 option was negotiated, it says during the third lease year,
10 so if the option is executed on the first day of the lease
11 -- third lease year, it's a \$25,000 rent credit. If it's
12 executed on the last day of the third lease year, it's a \$25
13 -- \$25,000 lease credit. There is -- that's absolutely what
14 the parties negotiated, that regardless of when we execute
15 this option, you get a \$25,000 lease credit for rent paid.

16 They -- the evidence was they made a lot of money
17 operating this space while this litigation was ongoing.
18 They very much got a benefit out of being tenants in that
19 space and it's not -- they weren't paying -- it wasn't a
20 penalty, they had the right to use and operate their
21 business and, of course, they had to pay rent for that and
22 the alternative was to be able to get free space for however
23 -- whatever period of time. So --

24 THE COURT: I understand and I'll think about that. I
25 mean, I understand the argument. Anything else, Mr.

1 Martens?

2 MR. MARTENS: Not at this time, Your Honor.

3 THE COURT: Counsel, again, I'm sorry I've got to cut
4 you short. I will read everything you've submitted. I just
5 -- there's a lot of folks waiting. I just -- I've got to
6 move on. Thank you, Counsel.

7 MR. MARTENS: Your Honor, may I just put one thing very
8 briefly and I expect I know what the Court's ruling is going
9 to be. We also asked for a new trial on the issue of the
10 jury/non-jury issue and I just want to make sure that
11 whatever the Court's final ruling in this is that that's
12 also addressed for purposes of the record.

13 THE COURT: Thank you, sir.

14 MR. MECKLER: Your Honor, just for the record, I know
15 you -- there's -- we came across some case law and I know
16 that we had this discussion before we broke, but there is
17 case law out there that suggests that JNOVs that were filed
18 after ten days at post-trial or beyond the statute --
19 they consider the statute of limitations to file those.
20 So I just bring that issue up. I know we all talked about
21 it. I wasn't aware of that. I just wanted to --

22 THE COURT: They were filed within the Court's
23 deadline.

24 MR. MECKLER: They were filed and I will -- I concede
25 that and I just -- but I did want -- he put stuff on the

1 record, I had to put it on the record as well.

2 THE COURT: I understand.

3 MR. MARTENS: And I certainly wouldn't have gone beyond
4 ten days.

5 MR. MECKLER: I know you wouldn't. I just said we came
6 across it, I wasn't aware of it at the time.

7 THE COURT: I'm not -- I'm not going to find they're --

8 MR. MECKLER: I know.

9 THE COURT: Thank you, Counsel.

10 MR. MARTENS: Thank you, Your Honor.

11 (END OF REQUESTED TRANSCRIPT)

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In witness whereof, I have hereunto subscribed my name,
this 12th day of December, 2022.

April 26, 2027

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF YORK	)	2018-CP-46-03726
	)	
	)	
	)	
	)	
THE GRAPEVINE OF RIVERWALK,	)	
INC.,	)	
PLAINTIFF,	)	
	)	
vs.	)	TRANSCRIPT OF RECORD
	)	
RIVERWALK RIVER DISTRICT	)	
BUILDING 6, LLC, MARK MATHER,	)	
GRH DEVELOPMENT RESOURCES, LLC)	)	
THE GREENS OF ROCK HILL, LLC,	)	
AND ASSURED ADMINISTRATION,	)	
LLC,	)	
DEFENDANTS.	)	
	)	

February 28, 2022
Rock Hill, South Carolina

B E F O R E:

THE HONORABLE WILLIAM A. MCKINNON, JUDGE.

A P P E A R A N C E S:

CHRISTIAN STAPLES, ESQ.
STEVEN MECKLER, ESQ.
Attorney for the Plaintiff

KEITH MARTENS, ESQ.
Attorney for the Defendants

Proceedings Recorded by DCRP
Transcribed by Penny M. Johnson

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits submitted.)

P R O C E E D I N G S

1
2 THE COURT: Mr. Martens, it's your Motion, so be happy
3 to hear from you first.

4 MR. MARTENS: Thank you, Your Honor. May it please the
5 Court. And I don't think we're going to be here too
6 terribly long, I've got just a couple of followup issues.

7 Your Honor, this is a motion for reconsideration of
8 some portions of the Court's order that was filed on
9 December 13th, 2021. Of course, I'm mindful of the fact
10 that we can't just file successive motions for
11 reconsideration. I know the Court's has already considered
12 a lot of issues in this case. This motion is limited to a
13 couple of portions of the order that were announced for the
14 first time in this order on December 13th.

15 The first thing that we would ask the Court to give
16 some reconsideration to is in the first -- paragraph number
17 one of its order talking about the Court's order for
18 specific performance. There's a provision in that portion
19 of the order where Your Honor said that upon closing of the
20 sale, the lease will terminate, but the Plaintiff will
21 retain the right to jointly use the common areas as defined
22 in the lease with the remaining tenants in the condominium
23 document shall expressly so provide.

24 Your Honor, our concern about this portion of the order
25 is this. And I'm not a condominium order, but as I

1 understand it, when a horizontal property regime is created,
2 the ownership of the building, each tenant respectively
3 would own its individual unit, and then the owners in
4 proportion to their percentage ownership of the total of the
5 space would have common ownership of all the common areas.
6 So each of the respective occupants of the building would
7 have ownership interest and then there's a council of
8 co-owners that governs use and appropriation of the common
9 areas.

10 And our concern, Your Honor, is that by perspective
11 including in this order that you're going to allow this, we
12 believe that this portion of the order imposes obligations
13 on council of co-owners who aren't parties to the case.

14 THE COURT: Well, I tell you, Mr. Martens, my intent
15 with that was I thought it was an unnecessary part of the
16 jury's verdict, that they believed that the contract
17 permitted use of the common space. I know your client
18 disagreed with that, but I thought that was -- the jury
19 awarded damages on that issue, so that they have to have
20 concluded that the Grapevine was included to use the common
21 area. So I was trying to prevent relitigation of an issue
22 that in my opinion the jury decided.

23 So how should I fix it or reword it?

24 MR. MARTENS: Well, I mean, I think under the statute,
25 at least, my understanding of the statute, as a co-owner of

1 a portion of that building, they're going to have a
2 statutory right to use the common areas. 27-31-80 says that
3 all the co-owners share equally -- or not share equally, but
4 share in proportion to their ownership and all have a right
5 to use that.

6 And so I think to the extent the Court's concerned
7 about some sort of protection for the Plaintiff, the statute
8 would give them that once the building is converted to
9 condominium ownership.

10 THE COURT: Why not belt and suspenders? I mean, I
11 understand that you think the statute covers it, but how
12 would my order be in conflict with the law?

13 MR. MARTENS: Well, again, I think our concern, Your
14 Honor, is that it is -- we are perspectively directing the
15 manner in which condominium documents, which would include
16 not only the Covenants and the Master Deed that are drafted
17 by my client, but the By-Laws and the Covenants of the
18 association of co-owners.

19 I think it's the flip side of the argument that we've
20 had before, which is -- when we talked about whether or not
21 the lease would allow sale of alcohol in the patio and you
22 said I'm not going to anticipate and perspectively order an
23 advisory opinion.

24 So that's our concern, that this is, essentially, in
25 the nature of an advisory opinion. So when you do this, it

1 shall look this way. And that's why we would ask that maybe
2 the Court give some reconsideration to that.

3 THE COURT: But I thought you just argued to me that
4 the statute provides for that protection anyway, so why is
5 your client -- why is there a motion asking me to reconsider
6 something that the statutory law provides already?

7 MR. MARTENS: We just don't believe that it's
8 appropriate to perspective enter that as an order of the
9 Court.

10 THE COURT: All right.

11 MR. MARTENS: The other thing that we would ask the
12 Court to give some reconsideration to is the portion of the
13 order dealing with fees and costs. As the Court noted in
14 its order, an award of attorney's fees is allowed either by
15 contract or by statute. You correctly seized upon the fact
16 that the only potential basis of an award of attorney's fees
17 in this case is in the contractual agreement that is
18 between the Plaintiff and its landlord. And you reduced the
19 award of attorney's fees based upon the fact that there were
20 non-contractual claims encompassed in this. And,
21 certainly, we appreciate the Court's consideration of that
22 issue and believe that's appropriate to make that reduction.

23 What we think the Court may have overlooked is that
24 there were also multiple defendants. There were -- in this
25 case, there were five defendants. There were ten causes of

1 action. Four causes of action actually were presented to
2 the jury. The jury returned a verdict on three of those
3 four and a verdict for the defendant on the fourth -- or the
4 defendants.

5 The cases that are cited in Your Honor's order and the
6 cases that both sides have previously cited to the Court
7 talk about the fact that, particularly, when attorney's fees
8 are required by contract, the Court can't do anything except
9 to enforce the terms of the contract. I don't think this
10 contract ever contemplated that if Riverwalk River District
11 Building 6 found itself as one of multiple defendants that
12 at the end of the trial, it could be ordered to pay a
13 disproportionate share of the attorney's fees related to the
14 prosecution of those claims.

15 Again, we had -- 20 percent of the total defendants had
16 an attorney's fee provision. 20 percent of the total claims
17 were successful and a jury found in favor of the plaintiff.
18 And yet, Your Honor, awarded 70 percent of their requested
19 attorney's fees. And we would just ask the Court maybe to
20 give some reconsideration to that in light of the fact there
21 were multiple defendants. There were multiple claims.

22 You know, it's been a while since we tried this case,
23 but this case took a week. There was lots of testimony and
24 attempts to tie these other defendants into liability and
25 conglomeration theory. None of those were successful. And

1 we just don't think it's appropriate that at the end of all
2 of that that Plaintiff's get to hand their attorney's fee
3 bill to one of the five defendants and ask them to pay 70
4 percent of what they incurred.

5 The other portion of that that we would ask Your Honor
6 to, perhaps, take another look at has to do with costs. The
7 petition for fees and costs included over \$40,000 of costs.
8 35,000 of that alone was an expert witness's fee and his fee
9 had to do with calculating the loss of revenues for not
10 being able to use the patio.

11 The cases that are cited in Your Honor's order and the
12 cases that the parties have already cited to the Court and
13 the statute, for that matter, talk about what costs are
14 recoverable. Generally, expert witness fees are not
15 recoverable as costs. Deposition costs are not typically
16 recoverable. Mediator's fees, meals -- and I'm not sure,
17 there's certainly no evidence in Your Honor's order that you
18 specifically looked at which costs are recoverable and which
19 are not, it appears that you just included them as a lump
20 sum 30 percent reduction across the board. And we'd ask the
21 Court --

22 THE COURT: That is what I did, Mr. Martens. My
23 thinking on that was -- I mean, this is not a situation
24 where you're just getting taxable costs according to the
25 rules. I mean, the contract is providing for fees and

1 costs. So don't think that everything in that case -- I
2 know that you're right on the law when you talk about
3 taxable costs in a case where parties don't get attorney's
4 fees. You get deposition costs and filing fees and some
5 others, not expert fees. But it seems to me this is a
6 different situation than those cases.

7 MR. MARTENS: Your Honor, I'm not sure that the -- I'm
8 trying to find that provision of the lease. A tenant may
9 commence an action against the landlord for its actual
10 damages together with attorney's fees and costs as its sole
11 and exclusive remedy.

12 Costs isn't a defined term under the lease. And I
13 think when we're talking about an undefined term, we take
14 the common usage of that term. I think when a contract
15 talks about fees and costs, you're talking about litigation
16 costs and I think those are recoverable costs as defined by
17 statutes of this state. That's why we don't believe -- I
18 think you have to refer to the statute and you have to look
19 at what's taxable and what's recoverable when you're talking
20 about a contract that says if we get in litigation, you're
21 going to get your fees and your costs.

22 And I think if the parties had contemplated, you know,
23 or defined costs, I think we -- to include everything you
24 possibly incurred in the pursuit of this claim, then I think
25 it's appropriate to hand the bill over and here are all our

1 costs and that's that. But when it's used in this context
2 in the terms of talking about litigation, I think we have to
3 assume that the parties understood what costs were under the
4 law of this state and that costs means costs, taxable
5 awardable costs, and not just everything you possibly
6 incurred in pursuit of this claim.

7 So those are our motions, Your Honor. And I know
8 you've already -- I appreciate you hearing me on this. Of
9 course, you've already heard a lot of argument on this case.
10 I'm trying not to be repetitive of what you've already
11 considered.

12 THE COURT: No, I appreciate that. On the issue of the
13 causes of action and the defendants, I have actually had
14 this come up once before. It was a case, a Freedom of
15 Information Act case where a woman -- it was a Lexington
16 County School Board outside of Columbia. And a citizen was
17 very unhappy with the way the school board was conducting
18 the business and sued them for six different FOIA
19 violations. It was a bench trial and I found in her favor
20 on one of the six.

21 And I had the same issue, where the school board said
22 well, she gets one-sixth of her attorney's fees. I did a
23 lot of research on that. I did a lot of thinking. I just
24 couldn't find law that supported that. And my thinking was,
25 if you -- I mean, the plaintiff is the one that's forced to

1 resort to litigation. I couldn't find law that supported
2 saying their win percentage was 40 percent, so they get
3 four-tenths of their attorney's fees. If there is law out
4 there, could you point me to it?

5 MR. MARTENS: And that's not so much what I'm asking
6 the Court to reconsider. What I'm asking the Court to
7 consider -- in the example Your Honor just cited, it's the
8 same issue in the Maybank case. One defendant, multiple
9 causes of action. Here you have multiple defendants, one of
10 which has an attorney's fee provision, and --

11 You know, just as if you had co-defendants in a case
12 and one is found liable and one is found not liable and
13 there's an attorney's fees provision for one, but not the
14 other, it's inequitable and unfair to tell one defendant
15 that they're required to pay all of the attorney's fees that
16 were incurred just because they were included in the same
17 trial.

18 And that's the issue that I really think that Your
19 Honor's order -- and, again, I think given what we -- given
20 the issues in the case, given the trial, given all those
21 facts, I think it was appropriate for Your Honor to reduce
22 the fee. And if we had one defendant, that would be 30
23 percent, as good as an approximation as anything based on
24 Maybank, but neither Maybank nor the case that Your Honor
25 just cited contemplates where you have multiple claims

1 against multiple defendants. And that's what I think is
2 just -- your order is placing a disproportionate burden upon
3 the one defendant that happened to have an attorney's fee
4 provision in the contract.

5 Again, you're right, the plaintiff resorted to
6 litigation, but the plaintiff chose to expand the scope of
7 this to alleged conspiracy and amalgamation of interest and
8 all these tort claims. Plaintiff could have had a very
9 simple breach of contract claim. And I remember, at least,
10 at one of the hearings, and I don't remember if it was at
11 trial, where Your Honor said, Isn't this really just a
12 breach of contract action?

13 I mean, it's their prerogative, they have the right to
14 pursue whatever claims they want to pursue against whomever
15 they want to pursue them, but there's not an attorney's fee
16 provision in any of the claims other than in the breach of
17 contract claim and that's only against one of the multiple
18 defendants.

19 THE COURT: Happy to hear from counsel for the
20 Grapevine.

21 MR. STAPLES: Thank you, Your Honor. And just for the
22 court reporter's benefit, Christian Staples, and my partner,
23 Steve Meckler.

24 Your Honor, I guess I'll start where we left off with
25 attorney's fees and costs. I just want to note just for

1 Your Honor, I think you're probably aware of this, but on
2 Page 4 of your order, you do state that the Court finds the
3 contractual agreement in the lease entitles the plaintiff
4 to recover costs and attorney's fees, but only in regards to
5 the Defendant RD6 for the breach of lease claims. So to the
6 extent there's argument it doesn't address that, that is in
7 there.

8 Also, you know, I just think we need to remember, RD6
9 was really the central defendant. I mean, they are the
10 landlord. They are the owner of the building. But for
11 their refusal to honor this option to purchase, we would not
12 even be here, most likely. So it's not as if their some
13 fringed defendant that we lumped in and we got the verdict
14 against them and they happen to have the fee shifting
15 agreement and we're shifting the mountain of litigation onto
16 a small defendant. I mean, they were the central player.

17 So we think Your Honor's order was -- you know, the 30
18 percent reduction was fair and reasonable. We don't see any
19 reason to move away from that.

20 I think we take the opposite view of the costs
21 specifically. I mean, why would you mention costs if your
22 intent was to just simply have the statutory regime apply.
23 I mean, I think we have to assume that the parties meant for
24 something different to happen and that all costs mean all
25 costs.

1 Also, you know, at trial, there was testimony that the
2 landlord primarily drafted this lease. So any ambiguity
3 needs to be construed against them.

4 THE COURT: Does that rule hold true when it's a
5 commercial lease? I mean, I understand that would be the
6 case if it was a residential tenant, but does that rule hold
7 true when it's two commercial parties negotiating?

8 MR. STAPLES: I believe it does, Your Honor. You know,
9 there was some testimony at trial that there were certain
10 aspects of the lease that were negotiated by Ms. Seals, but
11 I don't believe this attorney's fee provision was one of
12 those provisions.

13 Let me just -- I'll address the regime argument very
14 briefly. I think it really boils down to there's really
15 only two parties at issue here. It's the builder owner,
16 RD6, and the Grapevine.

17 It's our understanding that Your Honor had stated that
18 the Grapevine, if they were entitled to specific
19 performance, they would be purchasing what they leased.
20 And, you know, they have a nonexclusive right to use the
21 common areas just like every other occupant of that
22 building.

23 So I think this concern about other unit owners is, you
24 know, a bit of a stretch. I mean, we heard from Todd
25 Brockman, the defendant's own lawyer, who, by his own

1 admission, had prepared a master deed and was ready to
2 record the documents. He explained out the building would
3 be subdivided. It's a four-story building. He said most
4 likely, we would do the top three residential floors would
5 just be one whole floor. We're not going to divide up every
6 apartment. With respect to the commercial suites, I think
7 there's four or five suites on the main floor, they were
8 just going to have one orphan parcel for Grapevine.

9 THE COURT: My recollection was they were not going to
10 sell off the other parcels. They would convert it to a
11 regime, but then Mr. Martens' client would remain the owner
12 and would lease the other premises.

13 MR. STAPLES: Right. And so, within the regime, you're
14 probably only going to have those two parties, Grapevine, so
15 that's where our concern comes in given the history of the
16 revocation of use from the patio, the jury's conclusion that
17 that was wrongful. You know, it is a boots and suspenders.
18 I do think it's in the statute, but I don't see any harm in
19 just reciting that in the order. I don't think it violates
20 or is contrary to the law.

21 THE COURT: Mr. Martens' reply?

22 MR. MARTENS: Your Honor, just very briefly, I think
23 the testimony at trial regarding negotiation of this lease
24 was that it was fully negotiated. Again, it's been a while
25 since we looked at this evidence, but we introduced evidence

1 where Melanie Seals went through every single provision and
2 commented on every single provision of that lease. This was
3 a fully negotiated lease and we think costs -- when you're
4 talking about a lawsuit, attorney's fees and costs, it would
5 be in the common normal usage, which is offset or
6 recoverable by a successful plaintiff at trial.

7 THE COURT: What about Mr. Staples' point, why would
8 the parties agree to a provision that simply gives them what
9 the statute already provides as far as costs? What's the
10 point of including that?

11 MR. MARTENS: I mean, I think that it's like any other
12 provision of the lease, they included it as fees and costs
13 because that's what -- obviously, I didn't negotiate the
14 lease, I didn't draft the lease, I don't know the answer to
15 that. But I think that -- I think that costs in the common
16 -- you know, when you're talking about litigation and you're
17 talking about a successful party recovering costs, you're
18 talking about the commonly-accepted costs that are awarded
19 to a successful plaintiff. And I think if they had
20 contemplated that costs would include fees paid to expert
21 witnesses, they could have drafted the contract to say just
22 that and they didn't.

23 And that's -- you know, that's the biggest chunk of
24 this is they had a very expensive expert witness who billed
25 a lot of time and money to present that evidence at trial.

1 And if they had intended expert witness fees to a
2 recoverable portion of costs, they easily could have said
3 you're going to be allowed to cover expert witness fees.
4 There are contracts that say just those things, and this one
5 does not.

6 Nothing further, Your Honor.

7 THE COURT: Any final parting words?

8 MR. MECKLER: I don't think so, Your Honor, other than
9 my recollection is the testimony from the stand was that the
10 lease was their form, so that language was their language,
11 not a negotiated term.

12 THE COURT: I'll be honest, on that point, I don't
13 remember either way.

14 Mr. Martens, what's your --

15 MR. MARTENS: I mean, I believe -- I think Mr. Meckler
16 is correct. My client's presented the form of a contract to
17 Ms. Seals, but then it went back and forth multiple
18 iterations in there. I think the testimony was that there
19 were versions bounced back over a period of weeks, if not
20 months before they got to the final version.

21 So I don't think it's appropriate -- when you're
22 talking about commercial entities and a commercial
23 transaction, you know, this isn't a take it or leave it, you
24 know, either you accept our terms or there's no agreement,
25 this was a fully negotiated contract and what was executed

1 is the final embodiment of the parties' agreement.

2 MR. MECKLER: I think Mr. Martens is conflating to a
3 different theory. In a commercial agreement, ambiguities
4 are drafted -- are construed against the drafter. I think
5 what he's conflating that with is an arm's length
6 transaction, the Court will allow you to make a bad deal,
7 which are two different legal principles.

8 THE COURT: Well, counsel, I appreciate y'all making
9 the trip down. It was nice to see you and I'll have a
10 ruling as quickly as I can.

11 MR. STAPLES: Your Honor, if I may indulge you one more
12 minute, just so we know kind of where we go from here,
13 you're going to enter an order on today and then I guess
14 we'll need a final judgment --

15 THE COURT: Correct. And now that -- once I issue the
16 order, the clerk will enter the final judgment.

17 And just to clear up that confusion before, that was --
18 I was unclear in my instructions to the clerk's office. My
19 intent was only the verdict form should have been entered
20 earlier.

21 Mr. Martens, that was the point you raised. That was
22 my intent. I was unclear in my instructions to the clerk's
23 office, so that's on me. I apologize for that.

24 MR. STAPLES: You don't want us to submit a proposed
25 final judgment?

1 THE COURT: Sure, you're welcome to do that. Just copy
2 Mr. Martens.

3 MR. MARTENS: Your Honor, I guess while we're making
4 sure we're all on the same page, the other issue, obviously,
5 has to do with timeliness of an appeal. As you're aware, we
6 -- belt and suspenders, we move for reconsideration, also,
7 the Court of Appeals said we should wait for Your Honor to
8 consider these post-trial Motions and enter a final
9 judgment.

10 My concern -- and Mr. Staples and I talked about this
11 on Friday, the case that was cited by the Court of Appeals
12 as the grounds for dismissal without prejudice, there's
13 language in that case that says upon the trial court
14 entering a final order in the case, either party will have
15 ten days as opposed to 30 days to appeal that decision.

16 So I guess just so I'm clear in my mind and I can talk
17 to other attorneys who are clear in their mind, the court's
18 final order, which deals with this, as I understand it, you
19 will issue a final order based on these Motions that we
20 argued today and then a judgment will be entered and that
21 will begin the --

22 THE COURT: Yes, sir.

23 Anything else from either side?

24 MR. MECKLER: I don't think so, Your Honor. In the
25 final judgment, we would intend to include whatever Your

1 Honor decides on these two issues and then I think you had a
2 deadline to close on the property, we would include that as
3 well just so it's in the record.

4 THE COURT: Just CC Mr. Martens.

5 And Mr. Martens, if you have any comments on their
6 proposed final judgment, just send them my way.

7 Thank you, Counsel.
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF AIKEN)

I, PENNY M. JOHNSON, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

July 28, 2022



Penny M. Johnson
Official Court Reporter