

Mar 27 2024**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM Horry County Common Pleas Court
Honorable Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2023-001132
Trial Court Case No. 2018-CP-26-00307

Wedgewood Condominium Association, Respondent,

v.

Centex Homes, a Nevada General Partnership; Balfour Beatty Construction, LLC as Successor by Merger to Centex Construction Company, Inc., and Centex Construction, LLC; Crescent Engineering, Inc., Defendants,

Of which Centex Homes, a Nevada General Partnership; Balfour Beatty Construction, LLC as Successor by Merger to Centex Construction Company, Inc., and Centex Construction, LLC, are the Appellants.

and

Centex Homes, a Nevada General Partnership, Third Party Plaintiff,

v.

Right Way Construction, Inc. a/k/a RWG, Inc. a/k/a Right Way Group, Inc. a/k/a RWGR, Inc.; Frank Harris d/b/a Frank Harris Construction a/k/a F. Harris Construction a/k/a Harris Drywall; Builders First Source- South East Group, LLC; Stock Building Supply, LLC f/k/a Stock Building Supply, Inc. f/k/a Carolina Builders Corporation; Michael D. Brownlee d/b/a Carolina Drywall & Interiors; Carolina Drywall & Interior, Inc., a/k/a Carolina Drywall & Interiors, Inc. a/k/a Carolina Drywall Contractors, Inc.; Roof Doctor of the Carolinas, Inc.; John D. Frazier d/b/a and/or a/k/a Roof Doctor and/or Roof Doctor of the Carolinas and/or Roof Doctor of the Carolinas, Inc.; Steven Bosch d/b/a The Roofer Man; Tri- City Insulation and Building Products of Myrtle Beach, Inc.; Martin Mata d/b/a Martin Masonry, Inc.; Martin Masonry, Inc.; BR Brick & Masonry, Inc.; BR Brick & Masonry, LP f/k/a BR Brick & Masonry, Inc.; Unicon Concrete, LLC; Seno's Cleaning Services; Rice Planter Carpets, Inc. n/k/a Creative Touch Interiors, Inc., Floors, Inc. Successor By Merger to Rice Planter Carpets, Inc.; Carpets by Kendall, Inc.; Reliable Floor Systems, Inc.; TNT Painting; Paint with Pride a/k/a Painting with Pride; William Evans d/b/a Top Notch Painters; Morningstar Consultants, Inc.; MI Windows and Doors, LLC; Michael Dawson d/b/a Michael

Dawson Construction, and Inc.; Vereen Concrete Co. Inc.; AK Construction Inc. a/k/a AK Framing and Siding Co.; and AK United, Inc. f/k/a AK Construction Inc., Third-Party Defendants.

RECORD ON APPEAL – VOLUME IV

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1 windows?

2 **A** The OSB appears -- the damage on most of the
3 OSB that I've looked at, both in Mr. Clements'
4 photograph and ours, and the test cuts we both
5 made, the damage to the OSB appears to be at the
6 mull joints in the windows below the mull joints.

7 **Q** You also -- and I think you agreed to this,
8 and I want to be sure -- that you found areas where
9 there is no weep holes by the brick?

10 **A** I found areas where there is no weeps.

11 **Q** So for the jury's understanding, isn't it
12 true that a weep hole allows water to get behind
13 the brick so it doesn't stay behind the brick?

14 **A** The purpose of the weep hole is to create a
15 path for water to exit the building, yes.

16 **Q** And that is a code violation, correct? You
17 have to have weep holes?

18 **A** I wouldn't say you don't have to have weeps.

19 **Q** You don't?

20 **A** Depends where they are. At the lintel area
21 of a building, I see it quite often.

22 Matter of fact, this building we are sitting
23 in, there are no weeps at that location.

24 **Q** You would agree with me that weep holes in
25 brick are a good industry practice?

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1 **A** Certainly, and in most cases you find the
2 weeps.

3 **Q** You also indicated there were no lag screws
4 in Mr. Fuller's cuts, and no lag screws in my cuts,
5 correct?

6 **A** That's correct.

7 **Q** Then you said lag screws are needed for
8 earthquake protection?

9 **A** I don't know that I used earthquake
10 protection. If I did, I said it.

11 **Q** Do you want to see it or not?

12 **A** No, I don't need to see it.

13 **Q** So you do need lag screws --

14 **A** A lag screw is to secure a lintel to the
15 structure of the building. Obviously, if an
16 earthquake causes a building to collapse, it won't
17 protect the lintel, but there needs to be a lag
18 screw that ties the lintel to the structure of the
19 building.

20 **Q** So that is earthquake protection for that?

21 **A** That is one of the reasons, yes.

22 **Q** So if you ain't got no lag screws and we have
23 an earthquake, that is another problem?

24 **A** Could be.

25 **Q** And then you've indicated in your deposition:

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1 "Metal ties at the brick veneer, I saw them
2 embedded in the brick in violation of the code"?

3 **A** There are brick ties in this job that does
4 not specifically meet the requirements.

5 **Q** You also indicated in your deposition it is
6 not good practice to put the vapor barrier on the
7 inside of the exterior walls?

8 **A** In my opinion, that is a good -- at this
9 point in time, yes.

10 **Q** Now, you indicated that there was a failure
11 to use self-adhered flashing at the windows, and
12 that is a construction violation?

13 **A** Sorry?

14 **Q** You indicated there is a failure to use
15 self-adhered flashing at the windows, and that
16 violates a good construction standard and practice?

17 **A** It depends on where it is and what the
18 conditions are. There's areas where it can be
19 used, and it meets the code. There are areas where
20 you didn't have to use it, and it meets the code.

21 **Q** You indicated in your deposition that
22 self-adhering flashing at the windows, if it's not
23 there, it is construction industry practice
24 violation?

25 **A** In this particular case, it is -- it would be

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1 a violation of the plans and specs.

2 Q All right. And I think you said in your
3 deposition something to the effect you agree with
4 Mr. Fuller that a number of windows needed to be
5 replaced; is that right?

6 A I don't think I said windows needed to be
7 replaced.

8 Q You are correct. You indicated that you need
9 to have the flashing repaired around the windows,
10 right?

11 A Correct.

12 Q You indicated there was no weep holes in the
13 soldier course?

14 A If I said that, yes.

15 Q And that soldier course is that row of bricks
16 that sticks above someone's -- is it first or
17 second story window?

18 A It could be anywhere.

19 Q And you have pictures of that, I believe?

20 A Yes.

21 Q I think you said in your deposition --
22 correct me if I'm wrong -- that Centex is required
23 to transfer the common areas, the walls, bricks,
24 common areas, the roof in good condition, correct?

25 A That would be normal practice.

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1 Q And free of code violations, too, right?

2 A That would be the desire.

3 Q Let's go to the roofs. I believe in your --
4 you talked about the overdriven and underdriven
5 nails, correct?

6 A Correct.

7 Q And you described that, someone working and
8 using a nail gun; is that right?

9 A I don't know how they were put on, but I
10 haven't seen a roofer for the past 20 years that
11 used a hammer.

12 Q If you used a hammer, you wouldn't have
13 overdriven nails?

14 A Sure you would.

15 Q But those are also problems, right, under the
16 code? Overdriven and underdriven nails penetrate
17 through the shingles and can cause leaks?

18 A If you penetrate that shingle deep enough, it
19 could cause a leak.

20 Q Now, you didn't talk about it, but you did in
21 your deposition. The underlayment, there was a
22 problem with the underlayment and the drip edge; is
23 that right?

24 A The underlayment on the areas that
25 Mr. Clements looked at, in the photographs that I

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1 looked at of his, the underlayment is underneath
2 the metal drip edge on the eaves of the building.

3 Q All right. So I'm not a big construction
4 person, but you are talking about the edge of the
5 building?

6 A The edge of the roof where the roof meets and
7 turns back the soffit to the building.

8 Q And right there is where they did not have
9 enough underlayment?

10 A No. The underlayment was there; it was
11 underneath the metal drip edge.

12 Q Which it is not supposed to be?

13 A The underlayment should overlap on the eaves.
14 On the rakes, it should be under the metal drip
15 edge.

16 Q And you said that didn't meet the standards,
17 and you said you found that on all of the roofs; is
18 that right?

19 A I didn't examine all of the roofs.

20 Q Mr. Schaff (phonetic) works for you?

21 A Yes.

22 Q So you were asked in your deposition, Page
23 201 -- I'll read the question -- I'll tell you
24 what, I'll let you do it. Read the question and
25 you read the answer you gave.

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1 **A** Okay.

2 "Question: Okay. All right. So now that
3 we agree there is a code violation, let me ask you
4 whether or not you observed that condition on the
5 roof at the Wedgewood Condominium Association?

6 "I know Mr. Schaff did."

7 **Q** **(BY MR. CONNELL)** So Mr. Schaff, your
8 employee, observed that same condition on the
9 roofs?

10 **A** Yes. He photographed some of those, yes.

11 **Q** So when you said you didn't observe it, you
12 didn't mean to say that one of your employees
13 didn't observe it. You personally didn't observe
14 it?

15 **A** I did not personally look at that. He did,
16 and I saw his photographs. I agree with his
17 statement.

18 **Q** You said in your deposition: "I told my
19 employee you are going to, quote, find this
20 everywhere"; correct?

21 **A** Sorry?

22 **Q** You also said in your deposition: "I told my
23 employee you will find this everywhere"?

24 **A** I told him it's not uncommon to find that.

25 **Q** You also indicated that there was a mistake

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1 on a the number of nails per shingle in the report;
2 is that right?

3 **A** If that's what I wrote, that's what I said.

4 **Q** You made a mistake in your own report about
5 the number of shingle -- number of nails that would
6 be put in each shingle, correct?

7 **A** Perhaps.

8 **Q** Do you want to see it?

9 **A** No.

10 **Q** Then you made a statement that the roofs are
11 not per the manufacturers' specifications, correct?

12 **A** The manufacturer has an installation
13 instruction on how to apply their shingles, and
14 obviously by both Mr. Clements' photographs and
15 mine, that's true.

16 **Q** Wasn't done according to what the people who
17 make the roof product told them to do, correct?

18 **A** That's correct.

19 **Q** Also, you said there was improper starter
20 strips, and this condition occurred and violated
21 the manufacturers' specifications of the roof?

22 **A** If it is improper, it is in deference to
23 their requirement, yes.

24 **Q** And there were improper starter strips?

25 **A** I think that is a fair statement.

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1 **Q** You didn't talk about this on your direct,
2 but what is an improper starter strip, because I'm
3 not sure I understand that myself?

4 **A** A starter strip -- when you put a roof on,
5 the first thing you put at the eave of a roof is a
6 starter strip. It can be a manufactured starter
7 strip, or you can cut the tabs off of shingles and
8 turn them upside down and put those down as a
9 starter strip.

10 **Q** So I'm thinking of it as the roof is going
11 up, and there is like a little peak, put the
12 starter strip on that, right, and run it up?

13 **A** If I may. This is the slope of the roof.
14 The starter strip is applied at this first edge of
15 the roof, on the slope of the roof. Then the
16 shingles are placed up the roof. (indicates).

17 **Q** And there were improper starter strips on the
18 roof, right?

19 **A** I think we found that, yes.

20 **Q** I think you've said this, and you agreed, but
21 the sheet metal fastener is a problem?

22 **A** Probably said that the sheet metal fasteners
23 were not -- there were an insufficient number of
24 sheet metal fasteners, yes.

25 **Q** You indicated there is, quote, "an improper

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1 drip flashing around the columns." These are the
2 columns on the walkways?

3 **A** I think that is what you are referring to,
4 yes.

5 **Q** So we were talking earlier about the stairs
6 and the risers, how they go up the staircase, and
7 you indicated in your deposition there was a
8 38 percent failure rate in the difference between
9 the risers and the treads, correct?

10 **A** If that's the way I said it, yes.

11 **Q** So when you talk about the risers, that is as
12 you go up the stairs? Is that a riser?

13 **A** A riser is the change in the elevation from
14 one step to the next.

15 **Q** And the tread is the width of the tread that
16 you put your foot on?

17 **A** That is what you step on.

18 **Q** And you found a 38 percent failure, correct?

19 **A** I don't remember. I'll accept your number
20 for it.

21 **Q** Appreciate it.

22 Did you want to look at the number of treads
23 you said some 1,150 treads that you believe to have
24 problems?

25 **A** If that's what I said, that's what I said.

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1 **Q** So now we're outside of the buildings, and
2 you talked about the handicap ramp. You said there
3 is a violation there because the handicap ramp has
4 a certain rise in it?

5 **A** No. I think Mr. Clements measured those
6 slopes and determined that on certain slopes, if it
7 is greater than a specific slope, the ADA requires
8 a handrail.

9 **Q** And there were no handrails?

10 **A** There was no handrails on the exterior
11 walkways.

12 **Q** And wouldn't you agree that's really
13 important for elderly people that live at Wedgewood
14 to have handrails and be complaint with ADA?

15 **A** I'm an older person and use them, and I don't
16 have a problem.

17 **Q** You think it should be corrected, because
18 that is what the ADA says?

19 **A** Well, ADA is like any standard, it is a
20 recommendation. For a truly handicapped person,
21 there would be times where a handrail would be
22 necessary.

23 **Q** You said in your deposition that the concrete
24 ramps have a one-eighth inch deviation, which
25 violates the ADA, in Buildings 5 and 9, and you

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1 must replace the concrete stairs -- repairs --
2 including steps, which are too high, correct?

3 **A** Which are what?

4 **Q** The steps are too high?

5 **A** The risers on the steps exceed what is a good
6 practice, yes.

7 **Q** So you got defective risers inside the
8 building when you go to your unit, and you got them
9 on the outside of your unit in the parking lot,
10 too, correct, as you are coming out to the parking
11 lot?

12 **A** You are talking of two different things here.

13 **Q** Yes, sir.

14 **A** On the outside of the building, the concrete
15 walkways up to the building, in some cases that
16 walkway is lower than the level of the concrete
17 slab on the first floor, which necessitates the
18 installation of, I think, two risers, two steps up
19 to get to it. In most of the buildings, that
20 sidewalk abuts the slab, so there are no steps. In
21 the case where steps are, those steps are
22 incorrect, yes.

23 **Q** They need to be fixed?

24 **A** Yes.

25 **Q** And they violate the code?

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1 **A** Yes.

2 **Q** And you talked about the handrails, and that
3 is a code violation?

4 **A** Code recovers an inch-and-a-half spacing
5 between the rail and the building or whatever it is
6 attached to.

7 **Q** You indicated that you allowed -- you had a
8 repair allowance for the OSB around about
9 40 percent of the windows; is that right?

10 **A** I think that is correct.

11 **Q** And that wasn't an actual scientific way you
12 did it, you just came up with the number of
13 40 percent, right?

14 **A** I would say it is predicated on experience.

15 **Q** But you don't actually know. You just came
16 up with a guess, right, 40 percent?

17 **A** Sure.

18 **Q** Could be 60 percent?

19 **A** Could be 20 percent.

20 **Q** But the case in Beaufort where you got sued
21 and made an estimate like that, that is one of the
22 issues that you got sued for, right, H2L?

23 **A** I don't know. I already spoke to that
24 before.

25 **Q** And then you said the flashing at the head of

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1 the window contributes to water intrusion below the
2 windows, correct?

3 **A** If there is incorrect flashing at the head,
4 you can get water intrusion.

5 **Q** And then you said in your deposition by
6 saying, quote, "I saw similar issues in all nine
7 buildings, code violations, violations of the
8 industry standards, and violations of
9 manufacturers' specifications," correct?

10 **A** I think we've gone through that during this
11 trial a number of times.

12 **Q** All right. You've seen the photographs up on
13 the screen during the presentation?

14 **A** Yes.

15 **Q** So I want to talk to you in practical terms.
16 It seems it's hard to understand what that means,
17 so what I did was I took a piece of paper and I
18 taped it together, two windows double hung windows,
19 okay?

20 **A** Okay.

21 **Q** So assume these are the windows at Wedgewood?

22 **A** As a representation, yes.

23 **Q** I mean, it is hard to look and figure what
24 that means.

25 **A** I understand.

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1 Q So this is a good way to do it, right? All
2 right.

3 So the mullion -- correct me if I'm wrong --
4 is a strip that is applied down the center like
5 that, right?

6 A That is a reasonable depiction.

7 Q So the silicone is behind the mullion?

8 A No.

9 Q It's not back here in the middle?

10 A No.

11 Q Where is it at?

12 A Right here (indicates).

13 Q So your testimony is that it is on the sides?

14 A If you follow those instructions, that's what
15 it tells you to do.

16 Q And then the cap is like that, right?

17 A No.

18 Q Doesn't it go over it?

19 A No. It goes here -- hold your --

20 Q Hold my window up?

21 A The cap comes up here (indicates).

22 Q So you can't even see the cap, can you?

23 A Generally, it would be hard to see.

24 Q So you can't do any caulking to the cap,
25 because you can't see it?

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1 **A** Sure, you can.

2 **Q** How do you do that?

3 **A** Caulk it before you put on siding.

4 **Q** So that would have been something that Centex
5 would have had to do, right? They would have had
6 to put the caulk, and then put this on, and that
7 doesn't come off, right?

8 **A** When you mull that window together, that is
9 putting two different windows and putting them
10 together. The process that this particular
11 manufacturer uses is you apply the sealant on the
12 horizontal top, and you install a metal cap that
13 clips in folds over and covers that up. You put
14 the vertical mull strip into the windows, and then
15 you caulk the joints on the exterior. That is what
16 the instructions tell you to do.

17 **Q** The metal cap is intended to protect water
18 coming from the sky, right?

19 **A** The metal cap is the cap that covers the
20 joint where those two windows meet.

21 **Q** And, in this case, there is an issue whether
22 or not Centex or the window manufacturer mulled
23 them together properly, correct?

24 **A** I don't know if there is a question of
25 mulling correctly. I think the question, in my

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1 mind, and what I see out there, is the
2 deterioration of the caulking around those windows
3 or mulls.

4 **Q** Do you know something about the Morningstar
5 report?

6 **A** I have never read it.

7 **Q** Can you make any comment about whether or not
8 you agree that Mr. Clements saw construction
9 defects that were noticed by Morningstar in 2002,
10 that were still there when he saw them?

11 **MR. DesCHAMPS:** Objection.

12 **THE COURT:** Basis?

13 **MR. DesCHAMPS:** Speculation.

14 **MR. CONNELL:** He just said he didn't see
15 them.

16 **THE COURT:** Okay.

17 **Q (BY MR. CONNELL)** And so I think we agree on a
18 couple of things. Don't we agree on the fact that
19 Centex is the general contractor or developer, and
20 they have complete responsibility for what went on
21 at Wedgewood?

22 **A** We've said that before.

23 **Q** Whether or not some subcontractor was
24 unlicensed or whether or not some subcontractor did
25 something wrong, it is Centex's responsibility,

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1 right?

2 **A** Centex ultimately has the responsibility,
3 yes.

4 **Q** Do you know anything about Watkins Services
5 and what kind of work they did out there?

6 **A** I know what they did for us. I don't know
7 what they did for Mr. Clements.

8 **Q** You don't know what they did for the
9 homeowners?

10 **A** For the homeowners?

11 **Q** Yes. In doing destructive testing.

12 **A** I'm not aware of that.

13 **Q** Thank you.

14 THE COURT: Redirect?

15 MR. DesCHAMPS: Briefly.

16 **REDIRECT EXAMINATION**

17 **BY MR. DesCHAMPS:**

18 **Q** I'll go quick and get you out of here.

19 The vapor barrier he was asking about in the
20 e-mail that you and Mr. Connell looked at, that was
21 the product that you heard Mr. Martin testify that
22 the city code official required to be installed?

23 **A** That is the product that he testified that
24 the city inspector required him to put on.

25 **Q** That's the product under the Good Cents

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1 program that Santee Cooper had the state-wide to
2 install it the way it was at Wedgewood?

3 **A** To be sure we're technical. They are
4 requiring a certain term rating to ensure that you
5 have minimum -- maybe perhaps zero -- transfer at
6 that particular point.

7 **Q** The water intrusion damages to the OSB you
8 found out at Wedgewood you just talked about was
9 under the windows, right?

10 **A** I'm convinced, personally, as I testified
11 earlier, that the damage to the OSB isn't because
12 of the situation with the mulling of the windows,
13 not that the mulling itself is the problem, but in
14 general the mull area is where water is entering.

15 **Q** The caulk joint you talked about with
16 Mr. Connell?

17 **A** Yes.

18 **Q** You made test cuts all of over the building.
19 We talked about that at the beginning of your
20 presentation?

21 **A** Yes.

22 **Q** If that vapor barrier was going to cause that
23 -- a problem to deteriorate the sheathing within
24 all of those wall cuts, it would have happened by
25 20 years later when you were out there?

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1 **A** One would expect it, yes.

2 **Q** And you found no evidence of that occurring
3 over the 62 wall cuts you did all over the
4 building?

5 **A** No, I didn't, and we did not do one like
6 Mr. Clements did where we actually took the
7 insulation out.

8 **Q** You were looking at the sheathing?

9 **A** We were looking at the sheathing.

10 **Q** And you found the sheathing was intact and
11 wasn't damaged?

12 **A** Yes.

13 **Q** Are subcontractors required under a project
14 to have a license?

15 **A** I can't answer that.

16 **Q** Who is required to have a license during a
17 project?

18 **A** I would think the state would require them to
19 be licensed, but I do not know that.

20 **Q** General contractor?

21 **A** General contractor, yes.

22 **Q** Who pulls the permit on a project?

23 **A** It could be a number of people.

24 **Q** Like at Wedgewood?

25 **A** Probably -- again, I don't know the practice

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1 of Centex, but Centex could pull a permit for the
2 entire project.

3 Q And when the general contractor has a
4 license, are you familiar with the state
5 requirements if the general contractor that is
6 licensed can hire unlicensed subcontractors to work
7 on the project?

8 A Sorry?

9 Q Are you familiar with state laws about
10 general contractors who have a license, are they
11 allowed under the law to hire unlicensed
12 subcontractors?

13 A I don't know.

14 MR. DesCHAMPS: That is all we have.

15 **RECROSS EXAMINATION**

16 **BY MR. CONNELL:**

17 Q You wouldn't hire any unlicensed contractors
18 to work on your project, would you?

19 A No, I would not.

20 THE COURT: Anything further?

21 MR. DesCHAMPS: Nothing further.

22 THE COURT: You can step down.

23 Who are you putting up next?

24 MR. DesCHAMPS: Skip Lewis.

25 THE COURT: Put him up and get him qualified,

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1 and then lunch will be here and we can get going.
2 The lunch is not quite here yet, so we'll put the
3 next witness up and just start -- keep going until
4 they tell me lunch is here, and you can go back.

5 MR. DesCHAMPS: We call Skip Lewis.

6 (SKIP LEWIS, having been duly sworn,
7 testified as follows:)

8 THE WITNESS: L.G. Lewis. My good friends
9 call me Skip. I've been called other names, too.

10 **DIRECT EXAMINATION**

11 **BY MR. DesCHAMPS:**

12 **Q** Mr. Lewis, how are you?

13 **A** Well, thank you.

14 **Q** What do you do for a living?

15 **A** I practice engineering.

16 **Q** Are you a structural engineer?

17 **A** I am a structural engineer.

18 **Q** Can you tell the jury your qualifications and
19 background and experience in structural
20 engineering?

21 **A** Do I start in employment practice or grade
22 school?

23 **Q** Tell them where you went to college and work
24 history. We don't need to know every day, but
25 generally what you do for a living.

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1 **A** I went to Clemson. I finished undergraduate
2 school in 1966. I finished the master's degree in
3 civil engineering, structural major, in 1967.

4 I would say for the first six or seven years
5 I worked in Charleston for the U.S. Navy. The
6 structural engineering I did there was related to
7 ships and submarines.

8 In 1971, I moved to Greenville, South
9 Carolina, and began employment in what is referred
10 to as private practice as a professional engineer;
11 that means practicing in a manner that you are
12 working for clients as opposed to a manufacturer.

13 I began with Piedmont Engineers, Architects,
14 and Planners. I guess my -- the first project I
15 remember from a structural nature was the corporate
16 office building for Newport News Ship Building, a
17 company up in Virginia. That was, I believe, a 25
18 -- somewhere around a 25-story, high-rise building,
19 concrete frame supported by precast concrete piling
20 that was driven into the coast of Virginia at the
21 shipyard. It was an impressive building, and they
22 used it for, among other things, the top level for
23 launching parties for the submarines that were
24 constructed in Newport News.

25 **Q** Mr. Lewis, let me prompt you a little

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1 further. Where do you work now?

2 **A** Fast forward. I'm with H2L Consulting
3 Engineers and have been there for the life of the
4 company.

5 **Q** What do you do at H2L?

6 **A** Well, the jobs are numerous. I'm the
7 chairman of the company, so I have corporate
8 responsibilities, but I'm also an engineer and I
9 continue to have an active practice in engineering.
10 I continue to be associated with professional
11 societies outside of H2L.

12 In the practice of engineering with H2L, I
13 manage and design and analyze structures, and I
14 analyze building envelopes. The structural work is
15 done both in the design capacity and in the
16 forensic analysis capacity. The building envelope
17 work is predominantly forensic engineering.

18 **Q** How long have you been doing forensic
19 engineering work?

20 **A** How long? My first forensic assignment was
21 somewhere around 1976 involving a little school
22 building in Walhalla, South Carolina. That was a
23 brand new building with specialized brick panels
24 that were failing and some structural framing that
25 was failing. I was asked by the school district

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1 to, basically, do a forensic evaluation of that
2 building and assist them in getting repairs
3 completed for the building, which we did.

4 **Q** Could you tell the jury about some of your
5 experience and history and some of the community
6 and association involvement at the state and
7 national engineering groups?

8 **A** I'm a member of a number of engineering
9 organizations. In South Carolina, for example, I
10 served for ten years on the Board of Registration
11 for Professional Engineers actually licensing other
12 engineers.

13 I served as a representative for South
14 Carolina on the National Council of Engineers.
15 This is an organization comprised of all of the
16 state and territorial boards of the U.S. I was
17 president of NCWES, I believe, in 1995, 1996.

18 Subsequent to that, I was one of a number of
19 team members in negotiating the cross board
20 practice of engineering; that means engineers
21 practicing across international waters between U.S.
22 and Canada, U.S. and Mexico, part of the NAFTA
23 agreement; same thing with Australia and the U.K.
24 and other countries under the Asian Pacific
25 Economic Cooperative, APEC as you may have heard.

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1 I guess those are the -- the highlights that
2 I go back in the number of years that I've been
3 involved with engineering organizations.

4 I also have been involved with the American
5 Arbitration Association. I serve on the -- as a
6 neutral on the panel of arbitrators for complex
7 construction disputes. For about a three-year
8 period, I served on the executive board of the
9 board of directors for the American Arbitration
10 Association.

11 MR. DesCHAMPS: Centex would move to proffer
12 Mr. Lewis as an expert in structural engineering.

13 MR. CONNELL: No objection.

14 THE COURT: Without objection.

15 Ladies and gentlemen, in this case Mr. Lewis
16 is qualified as an expert in the area of structural
17 engineering. Like other experts, that allows him
18 to give his opinions and the reason for his
19 opinions, and that is for you to use as you see
20 appropriate and as compared to other evidence in
21 this case.

22 MR. DesCHAMPS: Would now be a good time to
23 break?

24 THE COURT: Should we break? We'll just keep
25 going until it comes.

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1 **Q** **(BY MR. DesCHAMPS)** Did you investigate Ross
2 Clements' allegations about the shear walls at
3 Wedgewood?

4 **A** I did.

5 **Q** Can you tell us what you did to investigate
6 that?

7 **A** Yes. It is a complex matter. Is it okay to
8 explain what shear walls are and how they work so
9 they will understand?

10 **Q** Sure.

11 **A** At Wedgewood, there are nine buildings. Of
12 the nine buildings, all of the buildings were
13 constructed from one of three sets of architectural
14 and structural plans. They are not all the same,
15 but there are similarities among all of the
16 buildings.

17 They are three-story buildings, but from a
18 structural significance standpoint, the concrete
19 slab on grade, which is the first floor of the
20 building, is also a foundation slab. It is called
21 a "slab on grade foundation building."

22 The two elevated floors are comprised of
23 prefabricated wood trusses that span from wall to
24 wall to wall. Basically, the truss span is -- the
25 floor joist span is a distance of about 28 feet,

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1 which is equal to the width of the unit.

2 The floor trusses bear on a term you heard
3 yesterday "demising walls." And the demising walls
4 are walls that separate one dwelling unit from
5 another dwelling unit at each floor level.

6 For the Wedgewood buildings, eight of the
7 nine buildings have three demising walls on each
8 floor of each building.

9 On one building, Building 3, there are four
10 demising walls, because you have one additional
11 dwelling unit in Building 3. Each floor has five
12 units instead of four.

13 The roof framing -- the roof framing is
14 comprised of prefabricated wood trusses. The roof
15 trusses span in the direction opposite the
16 direction of the wood floor trusses. In other
17 words, the wood floor trusses on the building
18 expand from left to right, and from unit to unit.

19 The roof trusses are supported by the rear
20 walls and the front walls that span front to back.
21 They are, generally speaking, a roof truss that is
22 pretty much in line with the demising walls down
23 below. The demising walls not only separate the
24 dwelling units, but they also provide an important
25 structural aspect of the buildings, and that is

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1 what counsel is referring to when he says "shear
2 walls."

3 A shear wall is a wall that resists -- for
4 what we're talking about today -- wind pressure, a
5 lateral pressure, a pressure and a force that is
6 going against the wall.

7 The demising walls, which serve as shear
8 walls, basically are there to restrain the front
9 and the rear walls from leaning in high wind
10 periods; for example, a hurricane.

11 But the walls, which are basically diaphragms
12 that go from the floor to the ceiling, and from the
13 beginning of the shear wall to the end of the shear
14 wall are elements that stiffen the wall and provide
15 resistance to that wind pressure that is trying to
16 make -- when wind is blowing against the front side
17 or against the back side of the building, it wants
18 to make the third level lean to the left, wants to
19 make the second level lean to the left, and the
20 very first floor to lean. The shear walls at each
21 of the levels provide stiffness that restrains that
22 wall movement.

23 The shear wall does not have to be the
24 complete length of the demising wall. For the
25 buildings at Wedgewood, the ground floor shear wall

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1 have a shear wall length that is greater than the
2 other floors of the building. There are two shear
3 wall segments in each demising wall on each floor
4 of the building.

5 On the first floor, the segment is 12 feet
6 long. So we have two, 12-foot sections of shear
7 walls in each demising wall on the first floor.

8 On the second and third floors, the shear
9 wall width or lengths are 8 feet. Other than that,
10 they are similar. But the reason the wall lengths
11 are different is because of the forces that they
12 are trying to displace or make the walls lean is
13 different from each floor.

14 The ground floor shears that have to be
15 resisted are the total of all of the wind forces
16 from the ground to the roof. On the second level,
17 they are resisting the upper two levels.

18 **Q** Let me ask you this question: Do you agree
19 with Mr. Clements' contentions as it relates to the
20 shear walls?

21 **A** I agree with Mr. Clements in this respect
22 only. The actual construction of the shear walls
23 does not match verbatim what is shown on the plans
24 that were developed in 1999. With respect to the
25 suitability of the shear walls to resist the wind

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1 forces, I find that those shear walls are very much
2 satisfactory.

3 Q Did you identify any repairs that you are
4 recommending with respect to the shear walls at
5 Wedgewood?

6 A I do not. Those shear walls do not need any
7 repairs.

8 Q Did you conduct an investigation to determine
9 if the shear walls are compliant with the building
10 code?

11 A If the shear walls are sufficient to resist
12 the code specified wind speeds, which they are, the
13 shear walls are in compliance with the building
14 code, and they are.

15 Q So the portion of Mr. Clements' report, 6.0,
16 you do not believe there needs to be any repairs to
17 the shear walls regarding the opinions that
18 Mr. Clements offered?

19 A My calculations tell me that there are no
20 repairs necessary at any of the shear walls, the
21 interior shear walls that we are describing at
22 Wedgewood.

23 Q Did you investigate the floor/ceiling
24 assemblies that Mr. Clements identified?

25 A I did.

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1 **Q** Do you agree there are needed repairs for
2 those?

3 **A** I do not. I don't agree with that.

4 **Q** Can you tell the jury what you did to come to
5 that conclusion?

6 **A** Mr. Clements -- and sometimes I have
7 difficulty understanding what he is trying to say.
8 I believe what he was trying to say in one breath
9 is that the space above the ceilings has to have a
10 draft stop within the partitioned area. His whole
11 focus tends to be, basically, above the ceiling and
12 above the demising walls between the units.

13 He also, I think, asserts that there are
14 things like blocking and pieces of drywall that
15 should be in the cavity space of the demising walls
16 that are not there.

17 These are not problematic. I've analyzed the
18 floor/ceiling space, both with respect to fire
19 protection requirements and with respect to
20 structural requirements, and I find the ceiling
21 conditions in all of the units that Mr. Ross
22 criticized to be in compliance with the code in
23 terms of what is required for a fire resisting
24 rating, for a shear wall standpoint, and being able
25 to transfer shear forces from one wall to the wall

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1 below. All of that checks out fine structurally.

2 Q You are calling for no repairs within the
3 floor/ceiling assembly?

4 A No repairs are necessary. It is code
5 compliant.

6 Q Did you investigate the attic framing issues
7 and the attics of the Wedgewood buildings?

8 A I did.

9 Q Did you go up into the attics in some of the
10 units?

11 A I did. It was hot, too.

12 Q And do you agree or disagree with
13 Mr. Clements with respect to what he identified
14 regarding the deficiencies he says exists in the
15 attics?

16 A Let me try to answer it this way. I disagree
17 with Mr. Clements' conclusion that the attic
18 trusses are not structurally satisfactory based on
19 what he defines as missing clips. What Mr.
20 Clements has done is to send someone into the attic
21 to identify what they saw as anchor clips, and then
22 he comes back and reports that some anchor clips
23 that should be there are not there, or a different
24 type of clip is there, not that insufficient number
25 of anchor clips have been installed.

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1 I think what they have not done is recognize
2 that the attics they went into are not exactly like
3 the attics that are drawn on the plans. I told you
4 a moment ago these plans were prepared in 1999.
5 When the buildings were constructed, the roof
6 framing was designed not by Mr. Curry, who you have
7 heard referred to as structural engineer of record.
8 The roof trusses were designed by an independent
9 organization, a roof truss fabricator. That
10 fabricator had a professional engineer that
11 provided services to them, and who stamped and
12 sealed the roof truss drawings.

13 The significance is -- as I did -- if you
14 compare the roof truss data sheet with the plans of
15 the buildings, you know that there are changes that
16 were made that are not reflected on the plans that
17 were relied upon by Mr. Clements.

18 The truss data sheets provide the magnitude
19 of the uplift force that are to be resisted by the
20 connection between the roof trusses and the
21 vertical walls of the building.

22 What -- what I did in analyzing those was to
23 look at the actual uplift loads as reported by the
24 truss manufacturer to determine what would be
25 necessary to resist those loads. In just about

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1 every situation -- and I caveat this -- the answer
2 is the uplift anchors that are provided are
3 satisfactory.

4 Now, there are some locations where you can't
5 determine the actual number of clips because of the
6 camera angle or location of the truss in the attic
7 that is inaccessible. What I have recommended and
8 what is reflected in the H2L repair plan is that a
9 part of the repair method be to engage another
10 independent engineer, that is competent to do so,
11 to just compare the truss data sheets with the
12 anchors that are seen in the attic and supplement
13 what is there with additional clips, if necessary.

14 I don't believe any additional clips are
15 necessary, but might be. The repair would not
16 require the removal of any trusses or any
17 materials. It would be a simple matter of adding
18 additional clips that are nailed to accessible
19 members of framing that are located in the attic.

20 THE COURT: Okay. Now might be a good time
21 to break.

22 Ladies and gentlemen, your lunch is back
23 there, and I remind you don't discuss this case.

24 Mr. Foreperson, when you are finished and
25 ready, please knock on the door. Thank you.

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1 (The jury exits at 12:53 pm., and the
2 following is heard out of the presence of the jury.)

3 THE COURT: You can step down, Mr. Lewis.
4 Don't discuss your testimony.

5 Take about 30 minutes.

6 After Mr. Lewis, who is next?

7 MR. HILDEBRAND: Jerry Watkins, and then
8 that's it.

9 THE COURT: I wouldn't ask you to -- are you
10 considering a rebuttal witness?

11 MR. CONNELL: I don't know.

12 THE COURT: Okay. I think we'll be finished
13 today with the testimony.

14 We'll be at ease for 30 minutes.

15 (A lunch recess was taken.)

16 THE COURT: You ready to go?

17 MR. CONNELL: Yes, ma'am.

18 THE COURT: Let's bring the jury in.

19 (The jury enters at 1:46 p.m., and the
20 following is heard in the presence of the jury.)

21 **DIRECT EXAMINATION (CONT.)**

22 **BY MR. DesCHAMPS:**

23 **Q** Mr. Lewis, I've handed you what is marked as
24 109 --

25 MR. DesCHAMPS: Without objection?

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1 MR. CONNELL: Yes.

2 THE COURT: All right. It's in evidence.

3 (Defendants' Exhibit 109 marked and
4 admitted.)

5 Q Are these your notes and calculations from
6 your investigative file?

7 A They are.

8 Q These are calculations and investigative
9 notes that you took in investigating the shear
10 walls and the floor/wall assembly in the attics at
11 Wedgewood?

12 A This is what they appear to be. They are all
13 or a portion of my calculations.

14 Q Okay. The matters you identified that you
15 are calling for repairs -- are recommending repairs
16 in the attics, you've included in your written
17 repair scope that H2L prepared to deliver for
18 pricing to our estimating expert?

19 A Yes. I have recommendations for added work
20 to be done. Inspections of connections and repair
21 of some -- completion of some lateral bracing where
22 there may be a snapped web member in the truss.

23 Q And that is part of 108, H2L's repair scope?

24 A Yes.

25 Q And within that repair scope you've called

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1 for no repairs to the shear walls and no repairs
2 within the floor/ceiling assemblies, correct?

3 **A** That is correct.

4 **Q** Mr. Lewis, were you in here earlier when your
5 partner, Bob Carter, was asked about an e-mail you
6 had written to him a couple years ago?

7 **A** Yes.

8 **Q** That had to do with some buildings that you
9 had investigated some time ago?

10 **A** Yes. That memo recounts -- or at least it
11 advises Mr. Carter, that I had been involved back
12 in the, I would say, mid-2000's, 2004, '05, '06, in
13 that time frame, of a number -- a number of
14 buildings in Horry County that had been built to
15 comply with what is referenced in the memo as the
16 "Good Cents program." That was a program
17 instituted for this area by -- I think it is the
18 Conway Electric, but certainly the Santee Cooper
19 Electric Cooperative. So the answer is, yes.

20 **Q** How old were the homes or the buildings that
21 you inspected when you were mentioning them in the
22 e-mails?

23 **A** I think the ones that I saw are probably no
24 more than five or six years old.

25 **Q** Okay. What you found in those cases when you

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1 investigated, did you find the same thing as far as
2 damage at Wedgewood?

3 **A** No, not at all. What I found in the earlier
4 cases -- first, after the memo was written, I did
5 further research into trying to find out -- figure
6 out what the problems were that I observed on the
7 Good Cents program homes were not occurring at the
8 Wedgewood buildings.

9 If you looked at the photographs of the
10 Wedgewood destruction cuts and all, the majority of
11 the OSB is undamaged. Practically all, if not all,
12 studs within the wall cavity are undamaged. There
13 is no mold growth inside the cavities of any of the
14 walls at Wedgewood. There are no complaints, to my
15 knowledge, by homeowners of musty odor or mold
16 growth inside the dwelling unit. All of those
17 conditions that I've just described were concurrent
18 with the conditions of the earlier investigations
19 when you get into it.

20 I remember in a casual conversation I had
21 with Mr. Carter, I said, I can remember going into
22 some of those dwellings back when the Good Cents
23 program kind of saw its, I guess, heyday, top of
24 the peak, and then it started trailing off. But
25 you could go into some of these wood framed

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1 buildings that had the Good Cents vapor barriers,
2 and you could literally put your fist around the
3 two-by-four cavity and squeeze water out of the
4 stud. That's the difference that I saw in the Good
5 Cents homes that were investigated circa to 2005.

6 Compared to the conditions that existed at
7 Wedgewood, which after 22 years, in terms of the
8 wood studs, looks almost pristine. That is a very
9 big difference.

10 As I carried that investigation further, I
11 started looking at the permeability of the wall,
12 the exterior coverings, the brick and the lap
13 siding, that exists at Wedgewood compared to the
14 cement stucco and eaves. I don't know if you know
15 what eaves is, but back in the early 2000's and
16 mid-2000's, there was a wall assembly that was
17 Styrofoam glued directly to OSB and plywood
18 sheathing. Back in those days, those were very
19 problematic homes. The Good Cents program
20 accelerated the problems associated with that kind
21 of construction.

22 Q There is no eaves at Wedgewood?

23 A There is no eaves at Wedgewood.

24 Q No stucco?

25 A No hard coat stucco at Wedgewood.

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1 The permeability ratings of the wall systems
2 at Wedgewood provide much greater vapor
3 permeability than the walls of the buildings that
4 were problematic buildings back in my earlier
5 investigations. That is why you don't see anything
6 in the H2L report that calls doing anything with
7 the polyethylene. It is simply because by the time
8 we prepared the report, the presence of the
9 polyethylene had become -- I guess the best word to
10 say is "a nothing burger."

11 The polyethylene vapor barrier has not been
12 or is likely to become problematic in the Wedgewood
13 buildings.

14 MR. DesCHAMPS: That is all. Answer any
15 questions from Mr. Connell.

16 THE COURT: Mr. Connell.

17 MR. CONNELL: Thank you, Your Honor.

18 **CROSS EXAMINATION**

19 **BY MR. CONNELL:**

20 **Q** My understanding is that in your deposition
21 you indicated that you would only talk about a
22 specific part of the report; is that right?

23 **A** I don't recall. Can you refresh my
24 testimony?

25 **Q** Yes, sir, I can.

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1 MR. CONNELL: Your Honor, can I ask the judge
2 to charge what a deposition is for this witness?

3 THE COURT: Pardon?

4 MR. CONNELL: Could I ask to get a charge on
5 a deposition?

6 THE COURT: Ladies and gentlemen, as you
7 heard before, what he's asking him about is a
8 deposition that he's given. Again, as I told you,
9 a deposition is taken at a lawyer's office or a
10 business office. It is on the record. The person
11 is sworn in, and the lawyers for both sides are
12 allowed to ask questions of the witness. You are
13 to judge the testimony just as if the testimony was
14 given right here.

15 MR. CONNELL: Thank you, Your Honor.

16 **Q** (BY MR. CONNELL) Mr. Lewis, you indicated in
17 your deposition that was taken that your
18 contribution to the report was in a very specific
19 area, not the entire report?

20 **A** That's correct.

21 **Q** So you can't testify about other areas of the
22 report. That was Mr. Carter, is that right?

23 **A** Well, I would say the balance of the report
24 was Mr. Carter, but that doesn't mean I can't
25 testify about issues that I'm knowledgeable of.

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1 **Q** But when your deposition was taken, you made
2 it clear that you are only talking about a specific
3 portion, and that is all you were going to offer?

4 **A** That, I think, is where I have tendered my
5 testimony. My intent was that the tender of my
6 testimony would be consistent with the statements
7 provided in the deposition.

8 **Q** I understand.

9 MR. CONNELL: Can I offer this?

10 MR. DesCHAMPS: Yes.

11 THE COURT: No objection?

12 MR. DesCHAMPS: No objection.

13 THE COURT: That will be offered in evidence
14 as 10?

15 MR. CONNELL: And 11.

16 THE COURT: 11 is without objection as well?

17 MR. DesCHAMPS: Yes, Your Honor.

18 (Plaintiff's Exhibits 10-11 was marked and
19 admitted.)

20 **Q** **(BY MR. CONNELL)** This is Plaintiff's 10,
21 which has been offered in this case, are your
22 notes, correct?

23 **A** That looks like -- yeah.

24 **Q** And your handwriting? Do you need a minute?

25 **A** No.

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1 **Q** All right. So you would agree, would you
2 not, that Plaintiff's Exhibit 10 are your notes in
3 regard to this -- part of your notes, correct?

4 **A** Yeah, these appear to be my notes.

5 **Q** On Page 2, did I hear your testimony that you
6 said that you thought the truss company did the
7 design of the trusses for the building structure?

8 **A** My testimony was that the truss company did
9 design the trusses, did accept design
10 responsibility for the trusses, and had their own
11 PE sign and seal the trusses.

12 **Q** Page 2, you have "truss for building
13 structure by building design," correct?

14 **A** Page 2?

15 **Q** Yes. All the way at the bottom.

16 **A** These, I believe, were taken from the truss
17 data sheets.

18 **Q** At the bottom, under "responsibilities," for
19 design truss connections, you have "truss building
20 structure by building designer," correct?

21 **A** Yes.

22 **Q** So can we agree that what you found, or what
23 you could find, that the attics and the trusses in
24 the attics was not built as per the plan? Yes or
25 no?

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1 **A** The answer is your statement, in my judgment,
2 is incorrect, and I say that for this reason: The
3 plans do not specify -- the notes on the plans
4 delegate the design of the roof framing to the
5 truss fabricator. The truss fabricator has the
6 prerogative of designing the roof trusses in the
7 manner that they feel is still economical, but
8 still structurally sound.

9 If you compare the roof structural drawings
10 prepared by Mr. Curry, which were part of some 1990
11 drawings, that were not even permitted at this
12 point in time, those drawings reflect to girder
13 trusses. I hope I'm not speaking over the heads of
14 somebody, but there are roof trusses and roof truss
15 girders. Roof truss girders support roof trusses.

16 If you look at the design drawings for the
17 one building that has been used by the plaintiff to
18 make an allegation or assertions with respect to
19 all buildings, indicates a presence of six girder
20 trusses in the attics of the building. There are
21 only two girder trusses that were necessary based
22 on the design prepared by the truss fabrication
23 company.

24 So that was a significant economical benefit
25 to redesigning or rearranging the trusses that were

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1 shown on what I refer to as the "Bobby Curry
2 drawings." The Bobby Curry drawings are a part of
3 the architectural and structural plans that were
4 prepared by the architects prior to the buildings
5 being permitted and construction, prior to the roof
6 trusses being designed.

7 Following the design of the roof trusses, the
8 roof truss layout plans and the roof truss data
9 sheets are documents that are required to be
10 submitted to the building official as a part of the
11 construction process. To the best of my knowledge,
12 that was done.

13 There is no evidence in the record that would
14 indicate a failure on anyone's part to follow the
15 protocol with respect to the filing of the plans
16 prepared by truss fabricators.

17 Q All right. You didn't find and you don't
18 have any copies of any truss layout drawings,
19 correct?

20 A That is correct.

21 Q And you have never seen any, correct?

22 A I have not.

23 Q And you've never been able to identify a
24 correlation of data sheets by building number,
25 correct?

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1 **A** That is not entirely correct, but that is
2 partially correct. I do have -- at least at this
3 point in time -- I have truss data sheets for the
4 three building designs that were constructed at
5 Wedgewood. The only drawing of those that we would
6 have to make any kind of comparison with are the
7 plans for what is referred to as Golf Villas 2.

8 **Q** I'll have you look at No. 11, your notes in
9 evidence. Look at Page one, sir. Look at the
10 middle of the page. In all black, you've written:
11 "Notes from assessment of truss data sheets,
12 parentheses, no layout designs available," correct?

13 **A** That is in reference to the truss layout
14 plans. There are no truss layout plans that are
15 available. Twenty years after the buildings were
16 constructed, the records are no longer available.
17 That's the problem. And you're right, there was no
18 truss layout plans available.

19 **Q** In fact, you have written on Plaintiff's
20 Exhibit No. 11: "No identification or correlation
21 of data sheets available by building number,"
22 correct?

23 **A** That's right. They're available only by
24 building type or design type.

25 **Q** You agree, would you not, that the

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1 information you are using is incomplete, correct?

2 **A** There is a lot of incomplete -- from a design
3 documentation standpoint, there is a lot of missing
4 information 20 years after construction.

5 **Q** And you are going on incomplete information,
6 correct?

7 **A** I'm going on the information that I can rely
8 upon. It is incomplete, that portion, that can be
9 relied upon.

10 **Q** Look at Page 4, Exhibit No. 11. You see
11 that, sir?

12 **A** I do.

13 **Q** Look at the bottom. Isn't it true that Page
14 4 of No. 11 says: "For approval only, not for
15 construction"; isn't that correct?

16 **A** That is correct. Let me explain what that
17 means. When you see the words "for approval only"
18 on a set of truss data sheets, that is in the
19 progression of final approvals. The truss
20 designers prepare truss data sheets. They then
21 submit it to the engineer of record, in this case
22 it is Bobby Curry. They are submitted to the
23 engineer of record. The engineer of record
24 approves or revises -- edits or questions data on
25 the trust data sheets, and it goes back to the

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1 fabricator. The fabricator incorporates whatever
2 final changes have to be made, and then there is a
3 set that is issued for permitting.

4 It is like reviewing the architectural plans
5 by an owner of a project reviewing and going back
6 and forth between the architect and the owner with
7 revisions to the plans before the plans ever go to
8 the building officials for approval.

9 The same general type of process is applied
10 in the drawings for prefabricated trusses, simple
11 as that.

12 Q You don't have, nor have you ever seen, a set
13 of the drawings that were used for permitting,
14 correct?

15 A I've never seen a set of the drawings that
16 were submitted for permitting or the record
17 drawings, the as-built drawings, for the buildings
18 themselves. Everyone associated with this case,
19 including the plaintiff, are working from the same
20 set of documents that are, basically, incomplete at
21 this point in time.

22 Q You did find -- based on what you just said,
23 you found some areas that you believe need to be
24 repaired that are construction defects, correct?

25 A No. That is not correct. Let me say again

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1 what I said earlier. I said the recommendations
2 that I have made is to have a competent engineer
3 take the truss data sheets, go into the attics, and
4 inspect the actual anchors there and confirm that
5 the anchors are satisfactory, or if not, how do we
6 need to supplement the anchors there with
7 additional uplift. That is the key.

8 I have never -- I have never had reason to
9 believe that there are any problems with the actual
10 connections of the roof trusses to the building
11 walls. In the high-wind events that have occurred
12 in the past 20 years, there has been no
13 displacement of any roof trusses, no movement at
14 all, no connection failure between an uplift anchor
15 and a truss.

16 In addition to that the -- what I refer to as
17 truss reactions, that is the information you get
18 off of the truss data sheets, are within reason of
19 the type of anchors and hold-down connections that
20 you do see in the attics. There is no reason to
21 believe that what is there is not satisfactory.

22 But out of an abundance of caution, there is
23 a recommendation that we have a third-party
24 inspector inspect the connections and sign off or
25 make recommendations of what reinforcements need to

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1 be added.

2 Q So you are deferring your opinion until a
3 third opinion comes along and makes a decision
4 whether the connections are structurally correct;
5 is that correct?

6 A No. That's not right. I think I've
7 expressed what my opinion is. My opinion is that
8 there is no problems. My calculations indicate
9 there is no problems. But, as I said, when you
10 look at the information that is available from the
11 attics, and most of this information I went into a
12 number of the attics and was able to inspect many,
13 but not all of the trusses. I was able to see some
14 sides of the trusses, but not the opposite that
15 would be hidden from view.

16 If, for example, if a truss is sitting in a
17 wall and has a hurricane clip on the left side of
18 the truss, and a hurricane clip on the right side
19 of the truss, the information available in
20 photographs may only show one clip, one on the
21 right side or the left side, with the other clip
22 being hidden or not accessible for viewing. That
23 is why I made the recommendation that I did. It
24 certainly was not out of any concern of any
25 connections there or the performance of the trusses

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1 as they have existed over the past 20 years.

2 Q So your opinion is that further investigation
3 by a third party is necessary?

4 A I don't consider it necessary. I consider it
5 advisable, just like I would advise a homeowners
6 association to apply sealant on a routine basis.

7 Q Now, you are a principal of H2L?

8 A I am.

9 Q I think we heard they have about 16
10 employees?

11 A Sorry?

12 Q H2L has about 16 employees?

13 A That's correct.

14 Q And were you involved in the case involving a
15 lawsuit of Beaufort County by a homeowners
16 association against --

17 A I've been involved in a lot of cases in
18 Beaufort County involving homeowners associations.

19 Q Apologize. Where H2L got sued, they were
20 sued in Beaufort County by a homeowners
21 association?

22 A Tell me a little bit about it.

23 Q Windsor Place Horizontal versus Wise
24 Construction and H2L Company and others.

25 A What is the date of that?

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1 **Q** Filed November 7, 2007.

2 **A** 2007. I have to reach back in time. Would
3 that have been on Daniel island?

4 **Q** I don't know. It says you acted as -- quote,
5 "H2L as a design professional for the remediation
6 and renovation and prepared a scope of work."

7 MR. DesCHAMPS: Hearsay.

8 THE COURT: Does he have any knowledge of it?

9 **Q** **(BY MR. CONNELL)** Do you have any knowledge of
10 it?

11 **A** Sorry?

12 **Q** Do you have any knowledge of this case where
13 H2L was sued?

14 **A** Such as my knowledge is in a case. It was
15 when? 2007?

16 **Q** Yes, sir.

17 **A** 13, 14, 15 years ago?

18 **Q** Yes, sir.

19 **A** It would be very, very clouded at this point
20 in time, but, yes, I remember the settlement that
21 was negotiated from that suit.

22 **Q** What I want to ask you is: You remember H2L
23 was sued, correct?

24 **A** I do remember that.

25 **Q** The case was settled; is that what you just

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1 said?

2 **A** That is what I just said.

3 **Q** Now, a significant amount of your work has
4 been with Centex; is that correct?

5 **A** No, not me personally.

6 **Q** H2L, not you personally?

7 **A** Yeah. I would consider Centex a very
8 valuable client of H2L.

9 **Q** Valuable client?

10 **A** Yes.

11 **Q** You've done other work for Centex in Horry
12 County?

13 **A** Personally, I'm not sure. I may have.

14 **Q** I don't mean to say you, personally, but H2L
15 has done work, correct?

16 **A** Yes, we have.

17 **Q** And H2L has done work in Barefoot Resort in
18 other homeowners associations for Centex?

19 MR. DesCHAMPS: Objection; accumulative.
20 He's already asked Mr. Carter about it.

21 THE COURT: No. You can ask him.

22 **Q (BY MR. CONNELL)** Did you hear the question?

23 **A** Repeat it.

24 **Q** Your company, not you personally, your
25 company has done work in Horry County in Barefoot

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1 Landing for Centex for nine different associations;
2 isn't that correct?

3 **A** I don't know how many associations, but I can
4 confirm that we've done other work at Barefoot
5 Landing.

6 **Q** Willow Bend, you did work there?

7 **A** Most of these are going to be Mr. Carter
8 questions. Most of the Centex cases was routed
9 through or handled by Mr. Carter. I can't be
10 specific.

11 THE COURT: Okay. Come on up.

12 (Whereupon, a bench conference was had out of
13 the hearing of the jury.)

14 MR. DesCHAMPS: Skip Lewis has not worked for
15 Centex. Bob has. He's already asked him. He is
16 trying to get Skip open the door to argue.

17 THE COURT: So just keep going to something
18 else.

19 MR. CONNELL: I'm sorry, you said go to
20 something else?

21 THE COURT: He doesn't know. He says he
22 didn't do their work.

23 (The following was had in open court.)

24 **Q (BY MR. CONNELL)** You indicated a few moments
25 ago about the vapor barriers was a nothing burger;

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1 is that what you said?

2 **A** That is what you heard me say.

3 **Q** You have seen pictures, have you not, of rot
4 at Wedgewood behind the walls, correct?

5 **A** I have seen photographs of the deterioration
6 of OSB at Wedgewood. I may have seen evidence of
7 deterioration on the outside face of studs, but not
8 in the cavity.

9 **Q** Take a look at this picture where the vapor
10 barrier is. You were talking about that earlier.
11 Come out here. Come over here and get a good look.

12 **A** Is there a way to turn the lights off? Yeah.
13 This is a good photograph.

14 **Q** Doesn't it show some rotted wood?

15 **A** On the exterior face, yes.

16 **Q** Yeah, that's what I'm asking about, rotted
17 wood.

18 **A** On the exterior face of the wall, I have
19 acknowledged there are areas of deteriorated OSB.
20 But once you get behind the OSB, look at the
21 horizontal two-by-four you see below the arrow
22 head, look to the stud to the right, the face of
23 the stud where the electrical wiring is going
24 through, that is not deteriorated wood.

25 **Q** But, sir, that is not a nothing burger,

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1 agree?

2 **A** I think my testimony was that the
3 polyethylene vapor barrier was a nothing burger.

4 **Q** How about the wood there, that's not a
5 nothing burger, is it?

6 **A** I did not address my comment to the wood.

7 **Q** You see this one right here? What about that
8 one, look at the wood. I'll talk about the wood.
9 Isn't that wood rotted?

10 **A** Well, let's be sure what we're talking about.
11 You are using "wood" for oriented strand board.
12 I'm using wood for studs and wood framing, of a
13 structural nature. I have acknowledged that the
14 oriented strand board has areas of deterioration.
15 See the two-by-four behind the OSB on the right
16 side of your screen, that piece of wood could have
17 been purchased from Lowe's last week.

18 **Q** How about this piece, do you think that could
19 have that have been purchased from Lowe's last
20 week?

21 **A** Again, that is oriented strand board. That
22 is not wood framing.

23 **Q** I get it. Okay. You can go back. I see.
24 Let me show you Exhibit No. 9, the e-mail.

25 **A** Exhibit 9?

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1 **Q** I have the same exhibit on this board, okay.
2 So I'll ask you questions about the exhibit.

3 **A** So what you have on that board is the same
4 thing I'm looking at here?

5 **Q** Let's look at it so we make sure we're on the
6 same page. Same document?

7 **A** Same thing. You did a good job.

8 **Q** Thank you. I appreciate that. Always good
9 to tell someone you did a good job.

10 October 10, 2019, you sent an e-mail to
11 Mr. Carter in this case, right?

12 **A** I did.

13 **Q** So we sent a subpoena to H2L, and lo and
14 behold, Exhibit 9 came back. That is how we got
15 it. Do you understand?

16 **A** Wouldn't you expect to receive it in a
17 subpoena?

18 **Q** I appreciate you sending it to me. Let's
19 look at it. You've got "BC" so that is Bob Carter?

20 **A** That is correct.

21 **Q** And so let's start again from the top. If
22 you would, read the first sentence of the first
23 paragraph.

24 **A** "Attached are two papers I came across this
25 evening. Might be worth your reading."

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1 These were articles about the Santee Cooper
2 Good Cents program. That is what originated this
3 e-mail.

4 **Q** All right. Now, second sentence: "It might
5 be important to confirm that all buildings were
6 constructed complaint with the Good Cents program,"
7 correct?

8 **A** That is correct.

9 **Q** You don't know the answer to that question
10 either, do you?

11 **A** I do now, yes.

12 **Q** Okay.

13 **A** We heard testimony yesterday from the Centex
14 property manager or superintendent that the
15 building officials required that to be the
16 polyethylene barrier to be installed in the
17 building.

18 The essence of the building code official's
19 requirement and my judgment stems from the Santee
20 Cooper Electrical Cooperative that put this program
21 into place in Horry County. Santee Cooper is a
22 state-owned entity. It is an agency by itself. It
23 has its own protocols, and the building officials
24 in Horry County, I believe, were implementing the
25 recommendations of the Good Cents program in their

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1 communications with the contractors.

2 Q All right. So look at Paragraph 4. You
3 write, quote, "the someone would need to be
4 determined by legal minds"?

5 A I do see that.

6 Q Did you have any contact with Centex lawyers
7 about this e-mail?

8 A I did not. Well, I don't think I did. I
9 can't say that. I would have to say I don't
10 recall.

11 Q You don't recall, and you don't have any
12 record of doing it; is that right?

13 A You are correct. Right.

14 Q Do you think you did it, or you don't know?

15 A No, I think I would think somewhere along the
16 line, in casual conversation, there was mention
17 made, but I don't have any record of such casual
18 conversation. It may have been referenced to the
19 Good Cents program, may have or may not have been
20 made.

21 Q So you go on to say: "For buildings that
22 were built this way, comma, the only fix of which
23 I'm aware involves removal of all interior GWB on
24 exterior wood stud walls, comma, removal of the
25 vapor barrier material, comma, and repair of

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1 damaged studs, sheathing, dot, dot, dot, a costly a
2 affair," right?

3 **A** That's correct. And that recognizes to get
4 access to remove the vapor, whether it is causing
5 problems or not, if you are going to remove that
6 vapor barrier, you either have to remove drywall on
7 the inside of the dwelling units, or you have to
8 remove the exterior wall coverings on the outside
9 of the dwelling units, one or the other. That is
10 the only choice you have.

11 The fortunate thing is many people in Horry
12 County were paid, received payment, to have vapor
13 barrier material removed.

14 **Q** So do you have any idea what "a costly
15 affair" would be to do that in this case?

16 **A** In terms of dollars?

17 **Q** That is what you meant when you wrote it,
18 right?

19 **A** Yeah, I meant in terms of dollars.

20 **Q** You meant money?

21 **A** Yeah.

22 **Q** How much?

23 **A** I don't know. I have no idea.

24 **Q** Five million dollars?

25 **A** I have not done any cost estimates to

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1 determine that. You have the essence of the cost
2 estimate, and within the materials that
3 ProCon provided. So your expert should be able to
4 tell you what that cost is.

5 Q So you would agree with ProCon's estimate to
6 do this, right?

7 A No, I didn't say that. I just said you have
8 those figures in ProCon's estimate. I made no
9 judgment at all on the estimate that was prepared
10 by ProCon. I have considered their repair scope to
11 be quite excessive, but made no judgment on the
12 unit pricing or total pricing that was placed on
13 the plaintiff's scope of work.

14 Q Go to the next paragraph, sir. Read the
15 final paragraph for the jury, where it says "this."

16 A Last paragraph?

17 Q Yes, sir.

18 A "This, in my judgment, is a very big deal and
19 needs to be discussed with counsel as soon as
20 possible."

21 Q Stop right there. You did not talk to
22 lawyers about this from Centex?

23 A I think I told you that in a formal way that
24 was never done.

25 Q I understand. You said it twice in the

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1 e-mail is why I'm asking.

2 **A** Let me put this in context. This memo was
3 written on October 10th. By the end of the year
4 of 2019, we had determined that the vapor barriers
5 were not problematic for these buildings. I
6 explained a few minutes ago about the difference of
7 permeability between the earlier buildings that
8 were problematic, and the buildings at Wedgewood,
9 big difference in the buildings.

10 Twenty-two years, pristine framing lumber in
11 the cavities. The vapor barrier material in the
12 walls at Wedgewood are not a source of the damage
13 that you see on the exterior.

14 Let me explain why that is the case. If you
15 look at the OSB photographs, you'll notice that the
16 deterioration of the OSB is from the outside facing
17 in, working to the inside. The studs aren't even
18 damaged. If it was a vapor barrier problem, the
19 studs inside these walls would have had mold and
20 mildew growth on them. They would have been
21 deteriorated almost beyond recognition. I don't
22 find any evidence of damage at all to the studs
23 that support the exterior sheathing and the
24 interior drywall. No damage.

25 When you see the deterioration moving from

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1 the outside to the inside, it's telling you that
2 the moisture formation on that panel is being
3 generated on the outside face, more likely than
4 not, from condensation or water leakage that is
5 streaming down the outside face of the OSB.

6 The one area that would be different would be
7 where you would have water from mullion leaks that
8 would go pretty much uniformly from inside to
9 outside, but the rest of the stuff is all moisture
10 that has formed or gotten behind the WRB. You just
11 don't find that in these buildings. It is not
12 there.

13 Q Look at the last sentence: "For the earlier
14 ones on which I was involved, we did repair work
15 from the outside"; do you see that?

16 A I do, yes.

17 Q What earlier ones are you talking about that
18 you did repair work from the outside?

19 A That means removing exterior wall coverings.

20 Q Which locations are you talking about? Which
21 ones are you talking about?

22 A You are talking about here at Wedgewood, or
23 in the earlier investigation?

24 Q Look at your e-mail: "For the earlier ones
25 on which I was involved, we did repair work from

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1 the outside." Where did you do that?

2 **A** When?

3 **Q** Where? What location?

4 **A** I can't remember them all.

5 **Q** You can't remember them all?

6 **A** Was that 2007 -- '17 -- so that is 12, 14, 15
7 years ago.

8 Our firm will manage around a hundred to 150
9 envelope cases a year. There is no way to recall
10 10, 12 years ago. They were all Horry County
11 cases; that, I do know.

12 **Q** Condominiums?

13 **A** Not all. Not all. There was some single
14 family.

15 **Q** And what condominium groups in Horry County?

16 **A** I don't know.

17 **Q** So you have no recollection what that earlier
18 one -- where they were; is that right?

19 **A** Not as I sit in this seat I don't. I'm not
20 that good.

21 **Q** You did do repair work from the outside?

22 That is what you said in the e-mail.

23 **A** I think so, yes.

24 **Q** And then you also noted that the root cause
25 was recurring high humidities inside the cavities?

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1 **A** Yes.

2 MR. CONNELL: Thank you. I appreciate it.

3 MR. DesCHAMPS: Nothing further.

4 MR. HILDEBRAND: We call Steve Watkins.

5 (STEVE WATKINS, having been duly sworn,
6 testified as follows:)

7 THE WITNESS: Steve Wayne Watkins the
8 Second, but I'm referred to as JR.

9 **DIRECT EXAMINATION**

10 **BY MR. HILDEBRAND:**

11 **Q** We know each other. I'm Tom Hildebrand, and
12 I represent Centex Homes in this matter. I'll try
13 to move through this quickly.

14 Tell me, generally, where you are from.

15 **A** I was born in Durham, North Carolina, but we
16 moved here when I was five years old to Myrtle
17 Beach, and this is where I've lived for the last 47
18 years of my life.

19 **Q** Where did you go to school?

20 **A** Myrtle Beach High School.

21 **Q** And your occupation?

22 **A** General contractor.

23 **Q** How long have you been one?

24 **A** I've been a general contractor 23 years, but
25 I've been in the construction field as a third

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1 generation -- I'm going to raise it up -- I've been
2 in the construction field, third generation, since
3 the mid-80s.

4 Q And your company is named what?

5 A Watkins Services, Incorporated.

6 Q And it's licensed as a general contractor?

7 A Yes, sir.

8 Q What is your position in that company?

9 A President.

10 MR. HILDEBRAND: Your Honor, I would like to
11 move Mr. Watkins as an expert.

12 THE COURT: General contractor?

13 MR. HILDEBRAND: Yes, ma'am.

14 MR. CONNELL: No objection, Your Honor.

15 THE COURT: Ladies and gentlemen, he is
16 qualified in the expertise of general contracting;
17 that allows him to give his opinion and the reasons
18 for his opinion. That is for you to use as you see
19 appropriate and as compared to other evidence in
20 this case.

21 Q (BY MR. HILDEBRAND) How many employees does
22 your company have?

23 A Currently, nine.

24 Q And you subcontract your work out?

25 A Yes, sir, we do.

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1 **Q** What is the focus of Watkins Services? What
2 is primarily the work you do?

3 **A** For the past 25 years, we have specialized in
4 severe damage repair. We basically take buildings
5 apart and put them back together.

6 We also have a division where we do high-rise
7 waterproofing on oceanfront resorts, commercial
8 roofing, and residential roofing.

9 **Q** How did Watkins Services first get involved
10 with the Wedgewood project?

11 **A** For you all or for Centex?

12 **Q** I understand you did work before we contacted
13 you, right?

14 **A** Yes, sir, we did.

15 **Q** What was the work you did?

16 **A** We assisted Ross Clements with some
17 destructive testing cuts on the property, I think
18 around 2016.

19 **Q** So Mr. Clements directed your company to do
20 some destructive testing and open up some areas?

21 **A** Correct.

22 **Q** Did you all decide where to open it up, or do
23 you have any involvement in that?

24 **A** No, sir.

25 **Q** And do you charge for your those services?

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1 **A** Yes, we do.

2 **Q** All right. And then, at some point, you were
3 asked to do repair estimates on behalf of Centex in
4 this matter, correct?

5 **A** That's correct.

6 **Q** Going back to the work that your company did
7 for Ross Clements, did you have any personal
8 involvement with that? Did you go out to the
9 project and oversee the work or anything?

10 **A** I did not. We had a bigger job in Charleston
11 and one in the upstate in Seneca. So I sent
12 forces -- I was in Seneca, but I sent some crew we
13 had up from Charleston to assist in his test cuts.

14 **Q** Then you were requested by Centex to come and
15 price out a scope of repairs that had been
16 promulgated by Bob Carter; is that correct?

17 **A** That is correct.

18 **Q** Have you done that?

19 **A** I have.

20 **Q** This is Centex Exhibit 98 for identification.

21 **A** This is embarrassing, I'm sorry, I forgot my
22 readers.

23 Stacy, can I borrow yours? I apologize.

24 Thank you, sir.

25 **Q** All you did was pricing? Earlier you did

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1 repairs, correct?

2 A That's correct.

3 Q Here you did pricing?

4 A That's correct.

5 Q Do you do pricing for homeowners
6 associations?

7 A I wouldn't call them "repairs." We assisted
8 in the destructive testing cuts.

9 Q Does your pricing change whether you are
10 doing a repair estimate for a homeowners
11 association or a plaintiff or a defendant in a
12 lawsuit?

13 A No, sir. The numbers that I use -- I do a
14 lot of pricing whether it is actual bidding
15 projects or assisting with construction litigation
16 testimony. I just use the same numbers for both.
17 We do consider the cost estimates that I prepare
18 for these cases, we consider them bids.

19 Q That is one thing I wanted to clarify. We'll
20 go through your bids, but the work that Mr. Carter
21 testified to, and he testified about the reasons
22 for it and such, I understand you have no opinion
23 on that?

24 A I do not.

25 Q You simply said, Here is the scope of work,

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1 and you put the numbers on?

2 **A** That's correct.

3 **Q** You would hope that the association, at any
4 time, will contact you so you can implement that
5 work and get that job; is that correct?

6 **A** That is why I go through this painful
7 process, yes, sir.

8 **Q** So Exhibit 98 that I handed you. Go to Page
9 1 of 2, dated May 8, 2023. Without going through
10 each item, tell me -- explain to the jury under "GR
11 one through ten" what the general requirements are?

12 **A** These are the expenses I have in performing
13 my work. That is not task specific, so it includes
14 dumpster pricing, scaffolding, supervision, things
15 like that.

16 **Q** And then, briefly, what is: "1.00, brick"?

17 **A** And, again, this is based on the scope of
18 repair prescribed to us by H2L. In Section One,
19 there is 35 -- I'm sorry, I talk with my hands --
20 there is 35 windows in brick where there is three
21 windows that are a triple window and then a half
22 round over the middle window. We are pulling the
23 soldier course head brick off of the two flanking
24 windows of the triple window. We're pulling the
25 brick out, installing waterproofing, and

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1 reinstalling the brick.

2 Q Okay. How about the windows, can you tell
3 the jury what repairs are being done there?

4 A It is basically the same. There is 34
5 windows that we are going to -- they are not the
6 windows with the half round. These are other
7 windows in brick where we are doing the same
8 procedure of removing the head brick or soldier
9 course, installing flashing, and reinstalling the
10 brick.

11 Q Soldier course, that is where you have the
12 bricks lined up like this (indicates).

13 A Yes, sir. And I'm trying to be brief. I can
14 talk all day long about this stuff, but I'm trying
15 to give you the Cliff notes.

16 Q I think the jury would appreciate your
17 brevity.

18 Okay. Roofs, number three, install fascia
19 metal.

20 A In H2L's scope of repair, he has -- they have
21 two photographs of missing the fascia wrap metal,
22 and we're tasked with putting that back.

23 Q Okay. Forty walkways and balconies for \$560?

24 A This is -- if I remember this right, it was
25 the intent of H2L that once the balcony

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1 waterproofing work was done, as a course of
2 maintenance on the building, during that
3 procedure --

4 Q By the homeowners?

5 A Yes, sir. During that procedure, the trim
6 will be removed on the edges or balcony beams.
7 That will expose the existing Type X gypsum, the
8 fireproofing, and that any gaps that discovered
9 here, this money here can be used to fix those
10 gaps.

11 Q And then 5.0: Attics, \$8,978. Could you
12 describe what the work there is?

13 A Yeah. This is -- I believe Skip just
14 finished testifying about this. It is the attic
15 work where the lateral bracing or any type of
16 bracing that is specified that needs to be done is
17 within this allowance, and also repairing top or
18 bottom cord deficiencies that we might see in the
19 trusses.

20 Q All right. Section 6.00, entitled "exterior
21 walks and ramps," for \$1,716. Can you tell me what
22 that is?

23 A Yes, sir. There is two areas where the
24 walkways -- there are steps that go from one
25 walkway to another walkway, and the steps are out

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1 of code. The risers are too tall. So we're --
2 this price will cover demoing or removing steps and
3 repouring steps in that area so that it is code
4 compliant.

5 Q So these are concrete steps?

6 A That's correct.

7 Q And the last area here is 7.0, stair handrail
8 for \$810. What is that?

9 A We're prescribed by H2L -- there is nine
10 buildings. One location per building to remove the
11 existing ADA hand-grab railing, to install new
12 blocking to fur that railing out a little further
13 to make it code compliant, and reinstall the
14 existing railing.

15 Q The total of your scope of work to implement
16 the repairs you just described is, what?

17 A \$137,325.81.

18 Q And then the second part of your proposal,
19 which is now on the screen for the jury, number
20 one, I would assume, your description of the
21 general requirements would be identical as to what
22 the nature of the work would be?

23 A That's correct.

24 Q And then the brick is a little more expensive
25 here; it is \$20,070. Can you tell -- explain to

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1 the jury what these repairs entail?

2 **A** It is the same price. You scared me for a
3 second. But it is the same price from this
4 estimate to the prior estimate.

5 **Q** So this estimate builds onto the prior
6 estimate?

7 **A** That is correct. We use the first estimate
8 as a base, and then we've added -- at H2L's
9 direction, we added some more -- or a bigger scope
10 of repair.

11 **Q** So from Mr. Carter's testimony, the base was
12 things that might arguably be related to original
13 construction issues, and then the add-ons are
14 maintenance or betterments in his view?

15 **A** That's the way we understand it.

16 **Q** Okay. The 2.0, windows for \$104,157, what is
17 that?

18 **A** Yes, sir. That is -- that's in addition to
19 the work on the heads of the windows and brick.
20 We're also doing work to other windows at the sill
21 or underneath the windows. So there is 78
22 additional windows and brick where we are removing
23 brick and making repairs underneath the brick
24 windows, and there is 68 windows in siding where
25 we're doing the same thing where we are removing

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1 siding and trim under the window, making a repair,
2 and reinstalling the siding.

3 Q The roofs, I think that was on your prior
4 estimate, wasn't it?

5 A Yes, sir.

6 Q Walkways and balconies, can you tell the jury
7 what this is, please?

8 A Yes, sir. The procedure to add the fire --
9 the gaps in the beam fireproofing is still in this
10 section, but in addition to that, we have -- as
11 prescribed by H2L, we are installing rubber,
12 basically, covers or treads to the existing stairs,
13 and that is to -- the thicknesses of the
14 application of the treads will vary to bring the
15 stairs back into code.

16 Q Okay. So this will address that?

17 A From what I understand, the variance issue
18 from one tread to the next tread.

19 Q The attics, you talked about that one?

20 A Yes, sir.

21 Q Exterior walk ramps, have you talked about
22 that?

23 A Yes, sir.

24 Q Stair handrails, you talked about that?

25 A Yes, sir.

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1 **Q** So the total of your two estimates or
2 original construction issues, and then for the
3 maintenance and government issues, is \$384,963.94;
4 is that correct?

5 **A** That's correct.

6 **Q** And you would do the scope of work for both
7 of those for the price that you set forth?

8 **A** Yes, sir, I will.

9 MR. HILDEBRAND: Thank you very much. Answer
10 any questions counsel may have.

11 I would like to admit that, Your Honor.

12 THE COURT: 98?

13 MR. CONNELL: No objection.

14 THE COURT: 98 is in evidence.

15 (Defendants' Exhibit 98 admitted.)

16 **CROSS EXAMINATION**

17 **BY MR. CONNELL:**

18 **Q** So let me ask this question, because I think
19 this solves a lot of issues. Your only role, as
20 far as Centex was, they told you wanted they wanted
21 you to price, and you priced it?

22 **A** That's correct.

23 **Q** And you didn't go out there and look at all
24 of the code defects that were at Wedgewood and tell
25 them, These code defects need to be fixed, right?

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1 **A** I did not. Correct.

2 **Q** And you didn't go out there and tell them,
3 hey, I see this construction industry standard
4 violation, and we need to fix that?

5 **A** I did not do that.

6 **Q** You, basically, did what they wanted you to
7 do in regard to your estimate?

8 **A** That is correct.

9 **Q** And it's true, is it not, that your estimate
10 would be way different if I gave you a different
11 scope of work?

12 **A** Yes, sir. If the scope changes, my price
13 changes.

14 **Q** So if I told you there is all sort of code
15 defects and I say, JR, I need you to go out there
16 and price each one of those and tell me what it is
17 going to cost, you wouldn't come up with the number
18 you just came up with, would you?

19 **A** If the scope increases, then logically the
20 number increases.

21 **Q** Bigger the scope, bigger the cost?

22 **A** Yes.

23 **Q** And so the issue of them calling something
24 "original construction betterment," you don't pass
25 judgment on any of those things, do you?

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1 **A** I do not.

2 **Q** You just did what they told you and gave them
3 what they wanted to give you, based on what they
4 thought?

5 **A** That's correct. We consider it like a bid,
6 like bid documents, so I received bid documents and
7 priced it.

8 **Q** And so you were taking directions from
9 Mr. Carter and Mr. Lewis about what the price is;
10 is that right?

11 **A** From H2L, yes, sir. I think I mainly talked
12 to Bob.

13 **Q** So Mr. Carter gave you a list, but didn't
14 tell you about all of the code defects out there,
15 did he?

16 **A** I mean....

17 **Q** He didn't say, Here is a code defect, I need
18 you to fix that, and another one here, another one
19 there? He gave you a specific job?

20 **A** Yes. He gave me an assignment, a prescribed
21 scope of work, and I priced it, that's correct.

22 **Q** I believe I asked you this in your
23 deposition, you have done forensic construction
24 services in the past, correct?

25 **A** We've assisted in destructive testing, yes,

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1 sir.

2 Q I believe you said in your deposition that
3 you saw things that were wrong out there?

4 A I don't think I said that. I haven't been
5 there during any of the testing.

6 MR. DesCHAMPS: Can we confer?

7 (Whereupon, a bench conference was had.)

8 MR. DesCHAMPS: I don't think we took his
9 deposition.

10 MR. CONNELL: I mean, I've got it in my hand.

11 MR. DesCHAMPS: Are you sure it isn't a
12 different one you're talking about?

13 MR. CONNELL: Let me see.

14 MR. DesCHAMPS: Can I come look real quick?

15 MR. CONNELL: Sure, you can.

16 (Whereupon, attorneys confer.)

17 MR. CONNELL: Does that solve it? All right.

18 (The following was had in open court:)

19 Q (BY MR. CONNELL) So I took your deposition.
20 I know it was a long time ago and you forget. Read
21 here where it says on Page 18 your answer.

22 A Yes, sir. I don't recall saying that, but,
23 yes, sir.

24 Q So you did see construction defects out there
25 at the time you were out there. You just didn't

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1 list them, right?

2 **A** Yeah, but I wasn't there for Stacy's
3 destructive test assisting Ross, and I was not
4 there for the second destructive test when we were
5 assisting Bob Carter, so I can't recall what that
6 would have been.

7 **Q** I asked you the question: "When you say
8 "wrong," violations of industry standards, code
9 violations, or manufacturers' specifications?"

10 And you said: "Correct," right?

11 **A** Yeah. Did you follow up and ask me what I
12 meant by that, because that could shed some light
13 on it? Do you mind if I go back?

14 THE COURT: Yeah, you can look.

15 **Q** (BY MR. CONNELL) Yeah, whatever you want.

16 **A** I know further down you referenced Willow
17 Bend, and I want to be sure we were talking
18 about....

19 **Q** Okay. I'll show you something.

20 **A** By the way, how are you doing, Gene?

21 **Q** Pretty good. How about you?

22 **A** I've been better.

23 **Q** You don't like being on the stand?

24 **A** I do not.

25 **Q** It's a good experience.

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1 Just so you know, this is Wedgewood. We were
2 all by Zoom --

3 **A** I'm not saying you are trying to set me up.
4 I just do not recall seeing anything out there like
5 that, because I didn't spend hardly any time there,
6 so I want to be sure that I knew that that was
7 referring to Wedgewood and not one of the other
8 Barefoot properties.

9 **Q** No question it is referring to Wedgewood
10 based on what I just showed you?

11 **A** Gene, I didn't get a chance to read.

12 **Q** You want to read the whole deposition? It is
13 150 pages.

14 **A** How many questions do you have regarding
15 this?

16 THE COURT: Well, you actually should have
17 done that before you came up today, refresh your
18 recollection.

19 Do you want to take him to a specific part,
20 and you can look a little before and a little
21 after?

22 MR. CONNELL: Sure.

23 THE COURT: We're not going to take a break
24 for him to read the whole deposition.

25 MR. CONNELL: I'm ready to move on.

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1 THE COURT: Okay.

2 Q (BY MR. CONNELL) Now, you also did
3 destructive testing and expert services for the
4 homeowners, correct?

5 A For Stacy Stanley, yes, sir.

6 Q For Wedgewood?

7 A I did.

8 MR. CONNELL: We would offer that as 12.

9 MR. HILDEBRAND: That's okay.

10 (Plaintiff's Exhibit 12 marked and admitted.)

11 Q (BY MR. CONNELL) Doesn't it say "expert
12 witness projects" here on Exhibit 12?

13 A Yes, sir.

14 Q That is a list of the people who were out
15 there; is that right?

16 A Correct. Yes, sir.

17 Q They were out there for the destructive
18 testing; is that right?

19 A That is correct, yes, sir.

20 Q So you did destructive testing for the
21 homeowners, and you did destructive testing for
22 Centex?

23 A Yes, sir.

24 Q And Centex did not ask you to do bids for the
25 destructive testing you did for the homeowners,

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1 correct?

2 **A** Sorry?

3 **Q** Centex did not ask you to do estimates for
4 the destructive tests that you did for the
5 homeowners, right?

6 **A** They didn't ask me to price the scope of the
7 repair for that project.

8 **Q** And they didn't say, hey, you did destructive
9 testing for both the homeowners and Centex, so tell
10 us what these things are that the homeowners found
11 in their destructive testing, correct?

12 **A** I'm sorry, say that again. I want to make
13 sure I answer correctly.

14 **Q** No problem.

15 You did destructive testing for the
16 homeowners?

17 **A** That's correct.

18 **Q** And that was before you did the destructive
19 testing for Centex?

20 **A** Correct.

21 **Q** They came along later?

22 **A** Centex, yes.

23 **Q** And said, We want you to do destructive
24 testing?

25 **A** Correct.

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1 **Q** Right. So you did not do an estimate for the
2 destructive testing that was done by the
3 homeowners?

4 **A** I'm a little confused. We don't provide
5 estimates for destructive testing. We're asked to
6 show up with a crew, and we're directed where to
7 cut and how big of areas.

8 We provide estimates for scope of repairs,
9 but we were not given, to my recollection or
10 knowledge, a scope of repair by Stacy or the
11 homeowners for this case.

12 **Q** And when Centex looked at their scope of
13 repair, they didn't ask you to do a scope of repair
14 for the destructive testing that you had done for
15 the homeowners?

16 **A** Destructive testing?

17 **Q** For what was found from the destructive
18 testing.

19 **A** The scope of repair?

20 **Q** Right.

21 **A** Are you asking me they did not ask me to
22 price their scope of repairs?

23 **Q** The HOA's.

24 **A** The HOA's, that's correct, they did not ask
25 me to do that.

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1 **Q** They just wanted you -- they told you and
2 cherrypicked what they wanted you to do a scope of
3 repair for?

4 **A** They provided me with a scope of repair, and
5 I priced it.

6 **Q** For the destruction testing for the
7 homeowners, it was about \$32,000?

8 **A** Yes, sir.

9 MR. HILDEBRAND: Without objection.

10 THE COURT: Without objection.

11 (Plaintiff's Exhibit 13 marked and admitted.)

12 **Q** **(BY MR. CONNELL)** So you were just asked by
13 Centex to do what they wanted you to do, and you
14 didn't do any independent looking at what you
15 thought might need to be done; is that correct?

16 **A** That's correct.

17 **Q** And it is true that your scope of repair
18 would be wholly different if I asked you to look at
19 a whole bunch of different issues?

20 **A** If you gave me a different scope of repair,
21 my number will be different.

22 **Q** Right. And they are calling it "construction
23 betterment" and all sorts of things?

24 **A** They have about three different categories.

25 **Q** Correct. And you --

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1 **A** Those are their terms, that is correct.

2 **Q** And I think you made 57 cuts?

3 **A** I can't remember. I mean, that is possible.

4 **Q** And you indicated at one point that the price
5 was \$417,889?

6 **A** That sounds about right.

7 **Q** And you said that you gave them a price of
8 \$417,889.01?

9 MR. DesCHAMPS: May I approach?

10 THE COURT: You may.

11 (Whereupon, a bench conference was had out of
12 the hearing of the jury.)

13 MR. DesCHAMPS: That did include plumbing
14 that would be barred by the Statute of Limitations,
15 so it is reduced after you take the plumbing claims
16 out. So if he's asking about -- I don't want to
17 get into these other claims.

18 MR. CONNELL: Don't know.

19 MR. DesCHAMPS: Don't know what?

20 MR. CONNELL: Whether there is or not. I
21 didn't ask him about that.

22 THE COURT: Well, is it not broken down?

23 MR. CONNELL: Not that I could tell. He said
24 in his deposition he first came up with a price of
25 \$417,889. He talked to you all, and then he came

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1 up with a price of \$329,000 another time, and then
2 the next day a different price.

3 THE COURT: So you don't know if plumbing is
4 included, but if it is, that's not fair to ask him
5 that.

6 MR. CONNELL: The problem is there's no way
7 to know. It doesn't say anything in the
8 deposition.

9 (The following was had in open court.)

10 THE COURT: Ladies and gentlemen, I'll ask
11 you to go back to your jury room. Do not discuss
12 this case; it wouldn't be appropriate to do so.
13 We'll be back with you.

14 (The jury exits at 3:04 p.m., and the
15 following is heard out of the presence of the jury.)

16 THE COURT: Is there an exhibit attached to
17 it?

18 MR. CONNELL: No. Let me just look at
19 something real quick.

20 MR. HILDEBRAND: For housekeeping --

21 THE COURT: There was no exhibit attached to
22 it? I have a hard time believing in a Zoom
23 deposition that he was pulling these numbers out of
24 thin air without something to reference. He had to
25 have been referencing something, unless you are

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1 that good.

2 THE WITNESS: No, I'm not. I do work with
3 numbers a lot, but I don't have a photographic
4 memory.

5 THE COURT: Sorry, Mr. Hildebrand.

6 MR. HILDEBRAND: I didn't mean to interrupt
7 you. I was just going to ask what was the cutoff
8 date -- time?

9 THE COURT: There is no cutoff. As long as
10 they want to. I can tell you my intent is to get
11 all of the testimony done. If you have rebuttal,
12 we're going to get that done, too. We're getting
13 everything done today. So I need to tell this jury
14 the next time they come back in that we're going to
15 be going late and call home and tell people.

16 MR. HILDEBRAND: No, we're done after this.

17 MR. CONNELL: Let me talk to him.

18 MR. HILDEBRAND: So will we argue and charge
19 today?

20 THE COURT: No. No. No. We're going to
21 break when you finish all the testimony, including
22 if there is any rebuttal, that is all going up
23 today, but that is done. They go home, and we're
24 going to talk about the jury charge and verdict
25 form here and get it settled before we leave

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1 tonight, and then we're going to argue and charge
2 in the morning.

3 MR. HILDEBRAND: Yes, ma'am.

4 THE COURT: When he was testifying at that
5 deposition, did you have something in front of you,
6 an estimate or whatever you gave the HOA?

7 THE WITNESS: I did have the estimates that I
8 produced. I had -- this was a Zoom, right?

9 MR. CONNELL: It was.

10 THE WITNESS: So I had the estimates that I
11 produced. I had H2L's scope of repair, and I had
12 my estimate backup information, but I think that is
13 all I had.

14 THE COURT: What I'm trying to say is this:
15 Somehow, he needs to be oriented to what he had and
16 what he was referring to. I'll explain to you why.
17 Because we've backed out some things based on the
18 Statute of Limitations in this case, and that's why
19 we think your numbers are off, because we've backed
20 off some things.

21 MR. CONNELL: Maybe I can work something out
22 with him.

23 THE COURT: Perfect. Let's take a break.

24 (A recess was taken.)

25 THE COURT: Have you resolved your issue?

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1 MR. CONNELL: Yes, ma'am. I'm tired anyway.

2 THE COURT: Me too. As long as you haven't
3 caught my cold, you are doing well, because it is
4 the longest lasting cold of my life.

5 Now, that you said that, I'll take a Covid
6 test.

7 All right. Let's bring the jury in.

8 (The jury enters at 3:17 p.m., and the
9 following is heard in the presence of the jury.)

10 THE COURT: All right. Mr. Connell.

11 **CROSS EXAMINATION (CONT.)**

12 **BY MR. CONNELL:**

13 **Q** All right. Exhibit No. 12, you have an
14 alleged expert witness at the time; is that right?

15 **A** That's correct.

16 **Q** And on the bottom of Exhibit No. 12, you've
17 got "expert witness"?

18 **A** Yes, sir.

19 **Q** So when you were doing destructive testing
20 for homeowners, you were acting as an expert
21 witness?

22 **A** That is just mislabeled.

23 **Q** You made a mistake?

24 **A** We did, yes, sir.

25 **Q** When got hired by Centex at the time, did you

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1 tell them you did destructive testing for the
2 homeowners?

3 **A** I did.

4 **Q** And the final question: Everything would
5 change with your estimation if I gave you a
6 different scope, right?

7 **A** If the scope changes, my number will change,
8 yes, sir.

9 **Q** So you only did what you were asked to do by
10 Centex?

11 **A** That's correct.

12 MR. CONNELL: Thank you.

13 MR. HILDEBRAND: Nothing further, Your Honor.

14 THE COURT: We have a matter of law I need to
15 take up with the attorneys, ladies and gentlemen.
16 I need you to remind you to not discuss this case;
17 it would not be appropriate to do so. After that,
18 I'll bring you back in here.

19 MR. CONNELL: We can tell you now we're not
20 going to offer a reply.

21 THE COURT: So everyone is done and rested?

22 MR. CONNELL: Yes, ma'am.

23 THE COURT: All right. Ladies and gentlemen,
24 both sides have rested their case. What we have
25 left to hear is the closing arguments and my charge

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1 on the law. That takes a while. So we're going to
2 break for the evening now. I would like to start
3 tomorrow morning a little later. Is that
4 acceptable? I don't want to -- is 9:30 better?

5 Okay. We want to be sure that everything is
6 finalized. So 9:30 is good.

7 I have to tell you, even though you have
8 heard all of the evidence, you have not heard their
9 arguments or charge on the law, and it is still
10 inappropriate for you to talk about the case or
11 anyone else you come in contact with.

12 Go home, get a good night's sleep. There
13 will be breakfast for you in the morning, and I
14 anticipate we'll have lunch for you in the
15 afternoon. Look forward to seeing you tomorrow at
16 9:30. Thank you.

17 (The jury exits at 3:20 p.m., and the
18 following is heard out of the presence of the jury.)

19 THE COURT: Motions?

20 MR. HILDEBRAND: Yes. Ma'am. The defendant
21 would move for directed verdict as to all of the
22 causes of action on the basis of the Statute of
23 Repose. The Statute of Repose bars the claims
24 beyond 13 years, and it bars all claims. We talked
25 about it yesterday, the statute could not be -- I

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1 think the legislature worded it --

2 THE COURT: It says "torts and law and
3 other." It is all encompassing. I agree with
4 that.

5 MR. HILDEBRAND: Yes, ma'am. So I think that
6 under that, the only cause of action that they have
7 on a claim, potentially, would be gross negligence.
8 So -- and -- I think that bars punitive damages.
9 It says the only claim is for gross negligence.

10 THE COURT: Where do you get that?

11 MR. HILDEBRAND: Because I have a jury charge
12 on it. Mere gross negligence does not support an
13 award of punitive damages.

14 THE COURT: The question is -- and I'm
15 reading -- when you look at the punitive damages
16 charge and the gross negligence charge, it's gross
17 negligence when -- the least of the standard, in my
18 opinion, is recklessly, okay. We do have reckless
19 as a part of the gross negligence charge.

20 So as part of the charge, and this is under
21 the punitive damages charge: "Recklessness is
22 distinguished from negligence. Negligence is the
23 failure to use due care. Negligence is
24 carelessness. Negligence is failure by omission or
25 co-mission to exercise due care as a person of

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1 ordinary -- ordinary reason and prudence would
2 exercise in the same circumstances.

3 "Recklessness is a higher degree of
4 culpability and responsibility. Recklessness
5 signifies a conscious failure to exercise due care.
6 Recklessness is a conscious indifference to the
7 rights of a plaintiff, or a reckless disregard to
8 the rights of the plaintiff."

9 I think recklessness, under punitive damages,
10 as well as recklessness that can be found in gross
11 negligence, allows them to get punitive damages. I
12 mean, it is the one word. Unless you can show me
13 some case law that says anywhere that recklessness
14 doesn't allow a plaintiff to get punitive damages,
15 which I don't think there is, then I think it is
16 appropriate.

17 MR. HILDEBRAND: My situation would be under
18 the statute that it is very limited and would only
19 allow for gross negligence for recklessness and the
20 damages flowing from that, but would not allow --
21 since it doesn't speak to punitive damages, then it
22 would not allow punitive damages. That is my
23 interpretation.

24 THE COURT: I understand. All right. I
25 disagree. Okay.

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1 Can we have him respond to just that alone?
2 I need to figure out what you all are doing with
3 the breach of warranty and habitability,
4 workmanlike, because those are all subject to the
5 Statute of Repose.

6 MR. CONNELL: I think I made my position
7 clear, but I can do it again.

8 I think -- first of all, I would say that you
9 are right about you violate a statute, and a
10 building code can be a statute, just like violating
11 a highway statute when you are driving down the
12 road, so evidence of a violation of a statute is
13 punitive damages. That is not the issue at this
14 point, but I think it's an issue, maybe, if we get
15 a verdict.

16 I would say, Your Honor, I would move for my
17 own directed verdict. Here is what I would say:
18 All of the evidence from the plaintiff's experts
19 and the defendants' experts are that there was
20 construction defects. There were code violations
21 of industry standards, and there were violations of
22 manufacturing specifications. So we all agree to
23 that. They put in their own estimate.

24 So I think there is only two issues now. The
25 issue being, ladies and gentlemen of the jury --

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1 THE COURT: So they've admitted negligence?

2 MR. CONNELL: Exactly. So then the question
3 is negligence is admitted by their testimony.

4 THE COURT: The question is whether or not
5 they believe it proximately caused damages, and
6 that is where I hear the experts are differing.

7 MR. CONNELL: They are differing on the
8 numbers. So the charge would be, ladies and
9 gentlemen, the Court has determined that the
10 defendants are negligent. The next question for
11 you to answer is: Was the negligence gross
12 negligence, reckless? If so, how much? That is
13 what I would think the verdict form would be on
14 that issue.

15 The second issue would be the unfair trade
16 practices. Everything else is out:
17 Inhabitability, expressed, implied, they are all
18 gone. Just two.

19 THE COURT: So you just want gross negligence
20 and UTPA?

21 MR. CONNELL: And I want you to tell the jury
22 that from all of the evidence, there is only one
23 inference, that the defendants were negligent,
24 because they were based on the testimony of all of
25 the experts.

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1 The only question for you, ladies and
2 gentlemen, I've already found as a matter of law
3 negligent, were they grossly negligent? If they
4 were, how much?

5 So that is how it has been tried. They tried
6 the case --

7 THE COURT: So you still want the Unfair
8 Trade Practices Act in or not?

9 MR. CONNELL: Yes, ma'am.

10 THE COURT: So what happens when they come
11 back with only Unfair Trade Practices Act and then
12 an actual dollar amount?

13 MR. CONNELL: I think what happens is that is
14 the verdict.

15 THE COURT: No. The problem is this: At
16 that point, they've never been charged the Statute
17 of Repose, or to consider any Statute of Repose,
18 and not that I'm suggesting we do that, but I still
19 think there is a Statute of Limitations issue.

20 MR. CONNELL: On the unfair trade practices?

21 THE COURT: Yeah, on any cause of action.

22 MR. CONNELL: But the section of the Unfair
23 Trade Practices Act says from point of discovery.

24 THE COURT: It's a discovery rule, but then I
25 would have to charge the Statute of Limitations.

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1 As of now, I have the Statute of Limitations in our
2 charge because I still think it's applicable. You
3 moved for summary judgment on it.

4 MR. CONNELL: He should get that I think.

5 THE COURT: I think Statute of Repose is
6 something significant and different, and I know
7 your argument would be, okay, at the very end. The
8 question of whether or not -- if you prevail in the
9 Unfair Trade Practices Act, whether or not damages
10 are trebled and attorney's fees are awarded is
11 based on whether or not it was willful conduct, and
12 while you and I disagree on the definition of
13 willful, because it is set out clearly in the case
14 law, I understand that to be a determination for
15 me, and that is just as to treble damages, whether
16 or not I believe and have a finding of willful.

17 MR. CONNELL: I agree.

18 THE COURT: So I'm asking you is what happens
19 when they come back under a positive for the Unfair
20 Trade Practices Act, give you an actual damages
21 dollar amount, but myself or someone else has to
22 consider the Statute of Repose because that cause
23 of action is subject to the Statute of Repose. Do
24 you understand what I'm saying?

25 The reason -- you get past it on the gross

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1 negligence for punitives. I mean, we're talking
2 about two different things. When you get past it
3 for the punitives on gross negligence, because you
4 have your building code violations, but it is the
5 building code violations that cause it.

6 The Unfair Trade Practices Act you have to
7 accurately define what that practice is, and the
8 only testimony I heard in this case as to that is
9 the speaking about Centex makes a good product. We
10 give you good homes, X, Y, and Z. That is what is
11 capable of repetition, and that's the deceptive
12 act.

13 You haven't argued that the way they build is
14 deceptive. We've gone around and around about
15 this. Deceptive would be them telling you that --
16 we laughed about it, we said get a simple --
17 deceptive would be telling people that we put
18 marble in these kitchens, and it turns out to be
19 laminate, right?

20 Deceptive would be we're telling you this
21 entire place has been built with water-treated
22 lumber, and you strip it all down, and it wasn't
23 there. That, I think, is deceptive and unfair in
24 their building practices.

25 So my question is -- I'm not sure, and I

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1 think you might run a risk, and you might want to
2 think about this, but you might run a risk if the
3 jury thinks that you are giving them something if
4 they don't find gross negligence, but they find
5 Unfair Trade Practices Act, they have a dollar
6 amount, and then are we agreeing, or do we believe,
7 that it's me that determines whether it is willful?

8 MR. CONNELL: The jury has to decide that.

9 THE COURT: We could do just a question. Can
10 we just do that? I can tell you that all the case
11 law says is that it's the Court that finds the use
12 of the unfair or deceptive method, act, or practice
13 was wilful. I mean, it's a court's determination,
14 and that is what you argued to me before as well.

15 That is what Stephanie McDonald did in that
16 one case you gave me. It was her determination
17 whether or not it was willful. I don't know if she
18 just directed a verdict as to that or what. I'm
19 not sure how she did it, but I guess what I could
20 do, and this is the one thing you have to agree,
21 but we could -- we can describe the word of
22 willful, and you could have a line under the unfair
23 trade practices, have a question after that that if
24 they find for the Unfair Trade Practices Act, do
25 you believe that Centex's unfair trade practice or

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1 act was willful, and then I would have to give them
2 the definition of "willful" in the charge.

3 See what I'm saying? Because we're on a
4 line. If I charge the Statute of Repose, but we're
5 not doing that -- do you see?

6 MR. HILDEBRAND: Your Honor....

7 THE COURT: You're not getting it?

8 MR. CONNELL: Say it again.

9 THE COURT: This is my concern. We haven't
10 put in front of them the Statute of Repose, so that
11 is the 13-year limitation, okay. My
12 understanding -- you are going to say the first act
13 was the brochure that Mr. Spencer received,
14 correct? The first act of deception, which is here
15 is our brochure. We want you to buy this condo.
16 It's going to be perfect, blah, blah, whatever it
17 says. So that is the first act.

18 So, at that point, when does the Statute of
19 Repose run? At the time they discovered it, and
20 then we kick into the time that they discovered
21 what the problem is?

22 MR. CONNELL: I think, yes, ma'am, it goes
23 back to what the Unfair Trade Practices Act says,
24 and there is a specific statute in there about
25 discovery.

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1 THE COURT: I understand that. It is the
2 discovery rule, which we know. Portland Cement, we
3 all know that. The problem is this: I'm not sure
4 that you collect any money if the jury finds that
5 they violated the Unfair Trade Practices Act, and
6 if they give you actual damages, I don't know that
7 you collect any money, because the Statute of
8 Repose hasn't been applied to it yet.

9 MR. CONNELL: I do understand that.

10 THE COURT: So we have to somehow back up and
11 the Statute of Repose -- you don't want to have
12 just negligence -- you don't want them to think,
13 well, because you found negligence, we're going to
14 get the money. So I'm trying to figure out in
15 fairness to everybody.

16 He has been adamant about not charging the
17 Statute of Repose. I mean, he had a motion of
18 limine, and the reason he doesn't want it is, of
19 course, he doesn't want the jury to think that they
20 feel sorry for you and give you money, so they must
21 find them grossly negligent, if there was kind of
22 sympathy, right, Tom?

23 MR. HILDEBRAND: Yes, ma'am.

24 MR. CONNELL: I think you have to charge that
25 under the gross negligence section anyway, the

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1 Statute of Repose. On that cause of action, I
2 think you have to charge that. I mean, as we've
3 talked about, that is the only way that the gross
4 negligence and recklessness can be applied is
5 through the Statute of Repose.

6 THE COURT: But they are already admitting
7 simple negligence to start with.

8 MR. CONNELL: I haven't heard them say that.

9 THE COURT: I think their experts did.

10 MR. CONNELL: Well, that's what I was saying
11 before. In that case, Your Honor has to give me a
12 directed verdict on negligence, and you need to
13 tell these people that we already found negligence,
14 and the question for you is: Is there gross
15 negligence? If so, how much?

16 THE COURT: I think we have to do that, and I
17 agree with you, because your own experts said,
18 listen, for what we know to be building code
19 violations, and we can all admit there isn't
20 damage, right?

21 MR. CONNELL: They all agreed to it.

22 THE COURT: That is why their scope is so
23 limited. This is what it would be to fix what they
24 believe needs to be fixed. So you have to admitted
25 negligence, no question.

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1 MR. HILDEBRAND: But, Your Honor, I think
2 what we have to assess is there is some issues
3 related to that. So my experts said, yes, there
4 are some deficiencies that we now conclude are code
5 deficiencies, but then you still -- but then like
6 the steps, okay. The steps don't apply to
7 everything, and I think you have -- they've alleged
8 a lot of separate deficiencies, and to say that we
9 admitted negligence, that would apply --

10 THE COURT: No. No. No. It doesn't matter.
11 Think of it like a typical automobile wreck case.
12 You can say I was at fault for the wreck. I did
13 something wrong, but all of those damages he's
14 claiming, that he has a broken neck, X, Y, and Z,
15 that was a prior problem. They are not entitled to
16 that because it wasn't proximately caused by the
17 accident. This is the same thing.

18 MR. HILDEBRAND: I beg to differ, Your Honor.
19 Because what we have is not one automobile wreck,
20 but 20 automobile wrecks, because they've alleged
21 that there is a deficiency with these concrete
22 steps. Okay. There is an issue there. The
23 repairs are 7,000 bucks.

24 THE COURT: I need to know this: Do you
25 admit that Centex proximately caused any damages

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1 from their negligence?

2 MR. HILDEBRAND: No. And I'll tell you why.
3 One, the Statute of Limitations. The plaintiffs
4 knew back in 2000 -- and this is the one we
5 struggled with so much -- they were told in 2006 by
6 the homeowners association, look, there are issues
7 with this building, and you need to hire an
8 engineer to inspect them and determine if these are
9 Centex's problems.

10 THE COURT: So you are saying Statute of
11 Limitations is a pure affirmative defense to
12 negligence?

13 MR. HILDEBRAND: Yes, ma'am. Absolutely.

14 And then by their own property manager's
15 admission, in 2016 they said, We told you back in
16 2006, and now we've got a bigger problem. You all
17 need to come out and do exactly what we told you to
18 do back in 2006.

19 So, basically, if they would have done it in
20 2006, what they finally decided to do in 2016, all
21 of these problems would have been discovered. I
22 think that that is -- if we're going to get there,
23 that is something for the jury to consider.

24 THE COURT: I hear you. You want me to
25 charge comparative negligence? You have opened

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1 such a Pandora's box. We are charging mitigation
2 of damages --

3 MR. HILDEBRAND: I don't know about
4 comparative damages. We're getting a little far
5 afield, but if it goes to -- if it is only going to
6 be gross negligence, I think a charge on
7 comparative gross negligence is appropriate. I
8 think you can have comparative gross negligence
9 just like you can have comparative regular
10 negligence.

11 THE COURT: I've never seen that. I have to
12 think about that.

13 So my question is, first, Mr. -- again, how
14 are we applying the Statute of Repose? Before we
15 argue this, how are we applying the Statute of
16 Repose and the Statute of Limitations to the Unfair
17 Fair Trade Practices Act?

18 MR. HILDEBRAND: Your Honor, I think it is
19 really pretty simple. There are two different ways
20 to look at the case, and two different ways that it
21 could be charged. What I argued in the past, and I
22 think is the appropriate way to argue --

23 THE COURT: Which is what?

24 MR. HILDEBRAND: Is to say just like they
25 have on their verdict form: Do you find for

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1 negligence? Do you find no gross negligence? Do
2 you find for whatever -- implied warranty of
3 workmanlike service, breached of expressed
4 warranty, whatever, and then you have gross
5 negligence. If they don't check -- they check off
6 whatever causes of action they find, and then they
7 put in the figure of what they find the damages to
8 be. But if they don't check gross negligence, then
9 there is nothing. That is what happened in
10 Greenbriar.

11 THE COURT: My question is: How are they to
12 apply the Statute of Repose to it?

13 MR. HILDEBRAND: It is a simple matter of
14 law. You would say, okay, they didn't find gross
15 negligence. We have shown that the units are under
16 the Statute of Repose. They get nothing. The
17 simple finding of gross negligence defeats the
18 claim.

19 MR. CONNELL: I think gross negligence and
20 reckless is for the jury to decide.

21 MR. HILDEBRAND: Right. But they would have
22 said no gross negligence, and the rest of it
23 becomes a nullity. If they find gross
24 negligence --

25 THE COURT: That is why it behooves

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1 potentially you to withdraw all the other claims.
2 I mean, that is the problem. That is a risk you
3 run. What I'm saying is you can withdraw anything
4 you want or agree to anything you want.

5 MR. HILDEBRAND: But he can't have his cake
6 and eat it, too. If he doesn't want to do what I
7 just proposed, then he has got to admit that all of
8 his causes of action have to go out. They can't be
9 on the verdict form. No question that the UTPA is
10 covered by the Statute of Repose. If that is what
11 he wants to do, he has to say, okay, I have no
12 claims except gross negligence. Jury, you come
13 back and tell me whether there is gross negligence
14 or not. Yes or no, and what are the damages, and
15 that's it.

16 If he wants to try to prove a claim for
17 punitive damages, he can do that, or we go to that
18 second tier. But I think that is where we are.
19 Those are the two options. If he says I want to go
20 just on the gross negligence, okay. He'll argue
21 that, and we'll argue against it, and the jury goes
22 back. Is that what you would like?

23 MR. CONNELL: I would like two causes of
24 action. I'm clear about that.

25 THE COURT: My question is: If you want your

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1 two causes of action, we have to apply the Statute
2 of Repose. I have to charge Statute of Repose.

3 MR. CONNELL: I think you should. I always
4 thought you were going to. What is going to
5 happen, as Your Honor knows, and what they made
6 clear is, these are old, too old. So what I have
7 to say is, there is an exception in the law, and
8 the exception is the Statute of Repose. If we show
9 gross negligence, then you can find for the
10 plaintiff.

11 MR. HILDEBRAND: But the only way -- that is
12 only to try to tell the jury that you have to find
13 gross negligence or we don't recover anything. The
14 only reason you would try to do that is to get
15 sympathy.

16 MR. CONNELL: No. That is the law. We have
17 to prove gross negligence.

18 MR. HILDEBRAND: Okay. But that's the law,
19 and that is for the Court. When the --

20 THE COURT: Listen, if we're charging -- if
21 we're charging the Statute of Repose -- there is no
22 question, if we're charging the Statute of Repose,
23 we have to ask the question of: Were they
24 negligent, and were they grossly negligent? I know
25 that is the only fair way to do it.

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1 MR. HILDEBRAND: I think it should be simply
2 gross negligence, or putting all of the other
3 causes of action and then putting the damages.

4 THE COURT: He can withdraw any claim he
5 wants to. So if he wants to withdraw all the other
6 ones, he can. You bring the case, and you choose
7 how to run it.

8 MR. CONNELL: Just the two.

9 THE COURT: You just want the two?

10 MR. CONNELL: Right.

11 THE COURT: Then I have to charge the Statute
12 of Repose and Statute of Limitations.

13 MR. CONNELL: I figured you would. That is
14 their defense.

15 THE COURT: Exactly. And mitigation of
16 damages and....

17 MR. HILDEBRAND: I don't think that one leads
18 to the other, Your Honor. If he wants to -- if he
19 wants to prove only two causes of action, gross
20 negligence and UTPA, then have the jury check one,
21 and then check the other, and then state their
22 damages. He can argue gross negligence and UTPA.
23 Leave it to the jury to decide one or the other,
24 very simple.

25 THE COURT: My concern is I haven't seen

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1 where the Statute of Repose ever gets charged. I
2 mean, obviously, the Statute of Limitation does,
3 and you moved on it, but....

4 MR. CONNELL: The only reason I say you have
5 to charge it is he's going to say these things are
6 20 years old, and you don't have to recover. The
7 fact of the matter is there is a mechanism in the
8 law that there is this exception, so I think you
9 have to charge it.

10 THE COURT: But the whole argument is that it
11 is reckless, that they can consider violations of
12 the building code as evidence of recklessness, and
13 part of gross negligence is recklessness, and so
14 that will be defined.

15 It says -- I mean, you are going to argue,
16 listen, these violations show they are reckless.
17 He's going to argue -- again, you heard that
18 violation of a code is negligence per se, but it's
19 not evidence of gross negligence per se. It could
20 just be used as evidence if they see it
21 appropriate. That is what the charge is.

22 MR. HILDEBRAND: So have we decided that he's
23 going to argue -- do you find gross negligence, yes
24 or no? Unfair Trade Practices Act --

25 THE COURT: Right, and then actual damages.

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1 MR. HILDEBRAND: Not charge gross negligence.

2 THE COURT: You mean on all the warranties
3 and the other stuff?

4 MR. HILDEBRAND: Right. Nor on the Statute
5 of Repose?

6 THE COURT: No, he wants the Statute of
7 Repose charged. That is what he just said.

8 MR. CONNELL: Because it goes to the first
9 cause of action: Gross negligence.

10 MR. HILDEBRAND: No, it doesn't. Gross
11 negligence -- you can have a finding of gross
12 negligence without the Statute of Repose. People
13 do it all the time. Were they grossly negligent or
14 not? Statute of Repose -- gross negligence is not
15 dependent on Statute of Repose. You have gross
16 negligence in just about every case.

17 The issue is, as you said, whether it gets
18 charged and whether the charging of it invites the
19 sympathy that we're trying to avoid. So simply
20 don't charge the Statute of Repose, but have him
21 recover on the two causes of action that he wants.
22 Do you find gross negligence, yes or no. Unfair
23 trade practices, yes or no. If you find one or the
24 other, set forth the damages that you find.

25 THE COURT: You all want to talk? Let me

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1 give you five minutes.

2 MR. CONNELL: We're going to go with gross
3 negligence, and dismiss the UTPA too. Just that
4 one cause of action.

5 THE COURT: Okay.

6 MR. HILDEBRAND: Okay.

7 THE COURT: All right. So am I charging the
8 Statute of Repose? My problem is I can't find
9 anywhere where judges have actually charged the
10 Statute of Repose. I'm comparing this a little to
11 the Castle Doctrine, and after the fact the Court
12 came back and said, No. No. No, you are not
13 supposed to charge it, because this was zero
14 guidance before, and I think we have zero guidance
15 right now, so...

16 My question is we know that the one part of
17 the Statute of Repose, as far as the damages
18 portion is concerned, whether or not it is to be
19 decided by the judge to treble damages if it is
20 willful. I'm wondering why wouldn't the case
21 law -- if they said the whole thing was for the
22 judge, why wouldn't they have said that as well?
23 It's the same reason why the Castle Doctrine no one
24 said anything until the supreme court looked at it
25 afterwards.

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1 So we're all clear, you want the Statute of
2 Repose charged; is that correct?

3 MR. CONNELL: Yes, ma'am.

4 THE COURT: The plaintiffs, yes, and the
5 defense doesn't?

6 MR. HILDEBRAND: Yes, ma'am.

7 THE COURT: Is that really our only issue?
8 I'm shocked.

9 MR. CONNELL: I think so.

10 THE COURT: Then we need to talk about --
11 we'll decide that, but after that -- so we're
12 taking out all of the warranty issues and none of
13 that --

14 MR. CONNELL: Right.

15 THE COURT: Straight on negligence -- or
16 gross negligence.

17 MR. CONNELL: Right.

18 THE COURT: So we have the one question, and
19 then actual damages?

20 MR. CONNELL: That's right.

21 THE COURT: When the jury comes back -- let's
22 think through this -- you are going to put on
23 evidence of net worth or stipulate to it, or what
24 are you going to do?

25 MR. CONNELL: If we win.

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1 THE COURT: Of course. But we have to be
2 ready. So you'll put on evidence of net worth?

3 MR. CONNELL: We'll do something, but I don't
4 know what it will be.

5 THE COURT: Okay. You'll do something, and
6 then when I charge them at that point, I'll charge
7 them on punitive damages, correct?

8 MR. CONNELL: Right. You can't do that, like
9 you said, the bifurcation issue.

10 THE COURT: Exactly.

11 And then anything else other than punitive
12 damages?

13 MR. CONNELL: No.

14 MR. HILDEBRAND: Yeah, I think so. If they
15 find yes for gross negligence, they can decide
16 whether they want to do punitive damages. I submit
17 there would only be net worth to admit that.

18 THE COURT: We'll take it up now.

19 MR. CONNELL: I've tried a bunch of cases,
20 and you put on whatever evidence you want to, and
21 you have a second jury argument, and then they go
22 back again, and you charge them on punitive
23 damages.

24 THE COURT: They get so mad. They don't know
25 what's coming. They think they got their verdict

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1 and think they are good, and then I have one more
2 thing, and then they get mad.

3 MR. CONNELL: I don't like the bifurcation,
4 but I didn't have any choice.

5 THE COURT: Right. But I think your
6 argument, second closing, we're doing second
7 arguments again?

8 MR. CONNELL: You have to.

9 THE COURT: But only limited to punitive
10 damages?

11 MR. CONNELL: That's right. And you can
12 charge clear and convincing on that.

13 THE COURT: Right.

14 So my question is -- you talked about
15 comparative gross negligence.

16 MR. HILDEBRAND: I'll withdraw that, if that
17 helps. Particularly, if you are not charging the
18 Statute of Repose, I would say it makes it simpler.

19 THE COURT: I'm not sure what I'm doing yet.
20 I think I might have to. I just don't see who will
21 make that determination, because I don't see where
22 it clearly goes to me to make the determination as
23 to whether or not the Statute of Repose applies.
24 The only thing I see in the case law is I determine
25 whether or not it would apply to an Unfair Trade

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1 Practices Act case. So we're not talking about
2 treble damages, but I do think we have to charge
3 the Statute of Repose.

4 MR. HILDEBRAND: Your Honor, it is simply --
5 again, gross negligence. They can pursue a claim,
6 that is a stand-alone cause of action, and that's
7 something the jury comes back with. If they find
8 that, then the Statute of Repose is not barred.

9 There is nothing for them to determine for
10 the Statute of Repose. It ran 13 years after this
11 project was done, period. End of story. No
12 question.

13 The only issue is can they prove gross
14 negligence. If they do, then Statute of Repose
15 doesn't matter.

16 THE COURT: Doesn't matter.

17 MR. HILDEBRAND: Exactly.

18 THE COURT: Yeah.

19 MR. HILDEBRAND: But the existence of the
20 statute is irrelevant to the jury, because it
21 applies 13 years. Black and white. It is
22 mathematical. So to charge it, there is no reason
23 to. They find gross negligence, one way, up or
24 down.

25 THE COURT: Yeah. Right.

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1 I just need someone to give me an authority
2 where I charge Statute of Repose, because I just
3 can't find it. I don't see it. I don't think I
4 should. Again, all this jury has to find, for you
5 to recover, is recklessness.

6 MR. CONNELL: I assume, Your Honor, you are
7 going to have to tell them Section B for purposes
8 of Subsection A -- violation of building code does
9 not constitute, per se, fraud.

10 THE COURT: Oh, I'm charging that. I can
11 tell you that. Read exactly what I'm charging.

12 LAW CLERK: "Building code violations: I
13 charge you that a violation of a building code
14 violates a legal duty in its negligence per se and
15 is evidence of recklessness and willfulness.

16 Violation of a building code does not
17 constitute recklessness, willfulness, and
18 wantonness per se, but violation of a building code
19 is some evidence you may consider that a contractor
20 acted recklessly, willfully, and wantonly."

21 MR. HILDEBRAND: Is that Judge Anderson?

22 THE COURT: Yeah. Yeah.

23 MR. HILDEBRAND: I'll go with the standard
24 charge of Judge Anderson.

25 THE COURT: Okay. Give me just a second.

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1 (A brief pause in the proceedings.)

2 THE COURT: What else -- Mr. Hildebrand, I
3 don't think we got a request to charge from you
4 specifically.

5 MR. HILDEBRAND: Yes, ma'am. I have it.

6 THE COURT: Thank you.

7 I need the exhibit with the stipulations.
8 What exhibit is that?

9 MR. DesCHAMPS: No. 7.

10 THE COURT: You submitted a request of
11 charge, and I think you should make the entire
12 thing a Court's exhibit, and I'll have him do the
13 same thing for the defense, in case I don't charge
14 something you asked, and that way you are covered
15 for the record.

16 MR. CONNELL: Okay.

17 Do you want me to charge contractor?

18 MR. CONNELL: You are going to have to charge
19 them about a developer is required to turn over the
20 project.

21 THE COURT: Yeah. Yeah. Yeah.

22 We're not going to charge fiduciary duty.

23 (A discussion was had off the record while
24 the judge and law clerk confer.)

25 THE COURT: Okay. We can talk through this.

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1 I -- it's going to be on the record, I just wanted
2 everyone to have it so we can talk through it.

3 Okay. So we'll start with Plaintiff's No. 1.
4 Do you want me to put in what a contractor is?

5 MR. CONNELL: Yes, ma'am.

6 THE COURT: No. 2 as well?

7 MR. CONNELL: We don't need No. 2.

8 THE COURT: All right. So we'll find
9 somewhere to put in No. 1.

10 In the way we've charged this, we have Centex
11 Homes, a Nevada general partnership; Balfour Beatty
12 Construction, a successor by merger to Centex
13 Construction and Centex Construction, LLC -- can we
14 just say the Centex entities, or you want them all
15 separated? Can we call them the "Centex entities"?

16 MR. HILDEBRAND: That's fine.

17 MR. CONNELL: That's fine, Your Honor.

18 THE COURT: Okay. Your definition doesn't
19 meet what we're trying to do here because they are
20 both the contractor and developer, so how are we
21 going to use the definition, because that
22 definition doesn't work.

23 MR. CONNELL: What do you want to put in?

24 THE COURT: You tell me. I mean, we've
25 already called Centex the developer, slash,

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1 contractor. I didn't know -- I think you are
2 begging the question to try to define it. And this
3 one doesn't apply because you say: "I charge you
4 that a contractor means a person who contracts with
5 an owner." They didn't contract with an owner;
6 they contracted themselves.

7 MR. CONNELL: Okay. Take it out.

8 THE COURT: So 1 is out. And 2 you want to
9 take out because it is the definition of
10 subcontractor.

11 Plaintiff's Request No. 3, where it says: "I
12 charge you that you may consider whether a
13 subcontractor is unlicensed in reaching a
14 decision."

15 No, that's not appropriate. It is a comment
16 on the facts, and I'm not charging it.

17 Next one is: "I charge you that general
18 contractor means an entity which performs or
19 supervises or offers to perform or supervise
20 general construction."

21 Again, they are the developer and contractor,
22 so that does not make sense. We're calling them
23 the general contractor and the developer.

24 MR. CONNELL: That's fine.

25 THE COURT: Plaintiff's Request No. 5 has to

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1 do about bidding a contract.

2 MR. CONNELL: Take that out.

3 THE COURT: Five is out.

4 So I'm putting in the violation of a building
5 code -- I read you what I'm putting in there,
6 because I think it is better than this and so it
7 explains it better.

8 MR. CONNELL: Okay. You're the judge.

9 THE COURT: No. 7, this whole -- I think it
10 is a pretty close comment on the facts. I just
11 don't think that is appropriate.

12 No. 8 is not appropriate in this case,
13 either.

14 No. 9 -- and when I say "not appropriate,"
15 for the record, I mean it doesn't apply to the
16 facts of this case. It is good law, okay.

17 "I charge you that selling for a sound price
18 raises an implied warranty of things sold as free
19 from defects known and unknown to the seller."

20 MR. CONNELL: That it out.

21 THE COURT: No. 9 is not in.

22 We're not doing Unfair Trade Practices Act
23 anymore, so we don't need 10.

24 Don't need 11 because it is already in with
25 Unfair Trade Practices Act.

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1 No. 12 is Unfair Trade Practices Act, so it
2 doesn't matter.

3 13 is out.

4 So we did keep this in here. We did keep
5 this portion where they say: "A developer owes a
6 fiduciary duty to an HOA to ensure the common
7 elements are in good repair at the time they are
8 conveyed or to provide the association of funds
9 sufficient to effectuate any need of repairs."

10 So that is staying in there. I think it is
11 appropriate.

12 You need to raise objections if you don't
13 like what I'm putting in or taking out.

14 MR. HILDEBRAND: Your Honor, on that one, I
15 believe -- I don't think that would come in because
16 that was a separate cause of action they had. I
17 think they simply have to prove gross negligence,
18 and this is under --

19 THE COURT: I can says "owes a duty." It
20 doesn't have to be called a "fiduciary duty," but
21 it is a fiduciary duty, and it is the law
22 regardless. It doesn't have to be a separate cause
23 of action in and of itself. I think it is good law
24 and should come in, so I'm keeping it in there.

25 No. 15 was obvious, but do you want that

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1 charged? If they didn't have a right, we wouldn't
2 be here.

3 MR. CONNELL: Take it out, Your Honor. I'm
4 two for 15 now.

5 THE COURT: "I charge you the developers are
6 responsible for the condition of the common
7 elements at the time they deed over to the POA."
8 Do you want this one or the other one, because I'm
9 not charging both.

10 MR. CONNELL: The other one was the
11 developer?

12 THE COURT: This is a developer one, too.
13 Kylynn says she thinks is better, and I think it's
14 good to listen to someone who hasn't been doing
15 this as long. Sometimes it reads more like a
16 layperson, so put 16 in, and take the other one
17 out.

18 No. 17, we're not charging.

19 No. 18 -- yeah.

20 No. 19 doesn't apply.

21 No. 21, I talk about that.

22 I believe that if you cut back the legal, I
23 think juries more often get it right.

24 Let's go through the defendants'. Did you
25 get a copy of his?

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1 MR. STANLEY: Yes, ma'am, we did.

2 THE COURT: I have Anderson's mitigation
3 charge. That is No. 1, so that is already in
4 there.

5 We already have the gross negligence charge
6 in there.

7 We talked about recklessness and what that
8 means.

9 I'll charge a good charge on recklessness and
10 exactly what it means. It may not be the full
11 portion of the Anderson's because he says
12 everything four different ways, but I'll craft
13 something.

14 MR. HILDEBRAND: So we'll come back to that?

15 THE COURT: No. I'll have to come back and
16 read where it is.

17 No. 3?

18 MR. CONNELL: Mine is not numbered. What is
19 No. 3?

20 THE COURT: Centex's No. 3.

21 MR. CONNELL: I just have no numbers.

22 THE COURT: Recklessness.

23 MR. CONNELL: Oh, okay.

24 THE COURT: I'm going to charge the whole
25 thing, which is Centex's No. 3 on recklessness.

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1 No. 4, I already told you what I'm charging
2 for this same thing. I say: "It is not evidence
3 of gross negligence or recklessness. It can be
4 considered by you as evidence," which is the proper
5 law. So four is already in there.

6 So I typically -- I don't know -- do you have
7 them at the end where I say: "You owe no support
8 or sympathy to anyone?" No. 5, I thought I had a
9 version of it, and I usually do, but I'm going to
10 put it in there at the end, so sympathy is in.

11 No. 6 is already in my charge, which is
12 speculative damages.

13 Centex No. 7, there is no contract in here.
14 So where it says "recoverable damages" that you got
15 from the South Carolina Jurisdictional Construction
16 Law -- is there case law that says that?

17 When we get this all cleaned up, I'll send it
18 to you. I truly believe to send to you all the
19 night before so you know what it is going to be
20 charged and then you can put objections on the
21 record. I mean, I send it to the jury. I don't
22 know why, but I'll be nice. I think judges should.
23 If we're going to tell them what the law is, why
24 shouldn't they have it in their hands when they are
25 back there? I know it's old school, and people

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1 don't want to do it, and everyone doesn't do it
2 because they haven't in the past, but the law is
3 what it is. It needs to be charged correctly, and
4 they should understand it and know it. Read that
5 part.

6 LAW CLERK: "If you find the Centex entities
7 were grossly negligent in the construction of
8 Wedgewood condominiums, your next step is to decide
9 how much money the Centex entities should be
10 required to pay Wedgewood Condominium Association.
11 We call such an award 'damages'. Actual damages
12 are properly called 'compensatory damages,' meaning
13 to compensate, to make the damaged party whole, to
14 put the party in the same position it was prior to
15 the damage received insofar as this is monetarily
16 possible. In other words, actual or compensatory
17 damages include compensation for all damages, which
18 are naturally the proximate result of the alleged
19 wrongful conduct of the defendants."

20 THE COURT: Say the "alleged grossly
21 negligent conduct."

22 MR. CONNELL: Or recklessness.

23 THE COURT: Well, you have to stick with
24 gross negligence, because that is defined as
25 recklessness, willfulness, wantonness.

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1 MR. CONNELL: Okay.

2 LAW CLERK: "Actual damages are awarded to a
3 litigant in compensation for the party's actual
4 loss.

5 "Actual damages are such as will compensate
6 the party for losses sustained. They are such
7 damages as will simply make good or replace the
8 lost caused by the wrong.

9 "Actual damages are damages in satisfaction
10 of or in recompense for a loss or damage sustained.
11 The goal is to restore the damaged parties nearly
12 as possible through the payment of money to the
13 same position it was in had the damage not
14 occurred."

15 THE COURT: That is from Magnolia? So what
16 does Anderson say? Okay. I want to ask you all a
17 question. In Anderson, when it talks about a
18 contractor/developer negligence, it says: "The
19 general measure of damages in this case is the
20 difference in the value of the building or home --
21 I would say -- had been properly constructed and
22 the value of the house."

23 We're talking about the common space, so
24 instead of "home," can I say "common space"?

25 Then it says: "Items or elements of damage

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1 that may be shown by the plaintiffs are such things
2 as, one, cost of repairs; two, depreciation" -- did
3 we have any testimony about depreciation?

4 MR. HILDEBRAND: No, ma'am.

5 THE COURT: Do you want that taken out?

6 MR. HILDEBRAND: Yeah.

7 THE COURT: The one thing I would say,
8 though, is -- you know, he said that -- I guess you
9 could argue -- the owner testified that he bought
10 it for 125, worth about 250 now. So talking about
11 a 22-year investment. That is probably not a great
12 return giving the housing market, I don't know,
13 but....

14 MR. CONNELL: Plus, you have the Property
15 Disclosure Act that requires you to.

16 MR. HILDEBRAND: That didn't come into
17 evidence. My house hasn't done any better than
18 that.

19 THE COURT: Where do you live?

20 MR. HILDEBRAND: Dunes West.

21 THE COURT: That's okay. Mine hasn't either.
22 There is no loss of use, is there?

23 MR. HILDEBRAND: There is no standing for
24 that.

25 THE COURT: And it says "incidental damages

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1 and consequential damages." So do you -- this
2 sounds a little more tailored towards this kind of
3 case, this portion of it. So I think you -- let's
4 say it goes towards the value of not just the
5 common areas, but because the common areas are held
6 in one-eleventh of owners, it's of the whole thing.
7 So I think it's the common areas of the owners, so
8 I think we need to put something like that.

9 My question is this statement, which is
10 Centex's No. 7, we don't want to talk about
11 economic waste. We don't want to get into this.
12 That's your argument, is the unreasonableness of
13 their estimate, so that is more of an argument more
14 than anything.

15 Then we'll charge Statute of Limitations
16 because we've all agreed, no question.

17 What about Centex's No. 9? I think it is a
18 good argument of the law. I don't know if it is
19 verbatim. This is Centex's remaining useful life.

20 MR. CONNELL: Typically, Your Honor, I don't
21 like federal court stuff. If it is not a state
22 case, don't charge it.

23 THE COURT: So you are objecting to it? I
24 mean, I think it is a fair -- there is nothing
25 incorrect about it.

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1 MR. CONNELL: I'm sure he's going to argue
2 it.

3 THE COURT: You argued it as well. I think
4 you are the one that put in -- you put in the
5 reserves, the estimates.

6 MR. CONNELL: They did.

7 THE COURT: I'm going to put in as of right
8 now, because I think it is an appropriate charge on
9 the law.

10 I think this is commenting way too close on
11 the facts of the case when we talk about the use of
12 unlicensed subcontractors. You have a lot of dots
13 in the middle of this. I think it is too close.
14 You guys can argue it. I think your experts are
15 the ones that said it is more of a standard of care
16 issue.

17 I'm looking now at his Statute of Repose
18 charge.

19 He didn't want it. You wanted it.

20 MR. CONNELL: This is Centex's charge.

21 MR. HILDEBRAND: Only if you are going to
22 charge --

23 THE COURT: Only if I am, yeah.

24 I think all of this needs to be charged in
25 additional to the actual statute to the portion

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1 that applies, which was Subsection 9.

2 MR. CONNELL: A and B.

3 THE COURT: Sorry, A and B.

4 If I'm charging the Statute of Repose, I'm
5 charging all the preamble too behind it. I think
6 that is fair. You two can agree to not charge it
7 or charge it.

8 Is that something that you two want to think
9 about it?

10 MR. HILDEBRAND: Yeah, give me a second. I
11 want to decide now.

12 THE COURT: Okay. I want you to think about
13 the Statute of Repose issue. Let me read through
14 it once, and once I have a decision about the
15 Statute of Repose, I'll put that in, and then we'll
16 send this to everyone who wants it, for you to go
17 through it.

18 MR. HILDEBRAND: Sorry?

19 THE COURT: Once we get what we just talked
20 about inserted, and once you make a decision on the
21 Statute of Repose, we'll e-mail you a copy of the
22 charge.

23 MR. HILDEBRAND: I'll tell you what, I'll
24 agree with him. I'll do the Statute of Repose and
25 the preamble.

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1 THE COURT: Okay. So as long as you agree, I
2 can't be reversed on it, so. They may say --

3 MR. CONNELL: No offense, but there is a lot
4 in this case to be reversed on, on both sides.
5 This is new ground.

6 THE COURT: This has been pretty clean, but
7 anyway. Okay.

8 So let's take 10, 15 minutes and let her put
9 it together, but I want you to have it before we
10 leave.

11 Who is arguing for you all, Gene?

12 MR. CONNELL: I'm trying to talk Mr. Stacy
13 into doing it.

14 MR. STANLEY: We're flipping a coin tonight.

15 THE COURT: Ms. Hildebrand, you are arguing?

16 MR. HILDEBRAND: Yes, ma'am.

17 THE COURT: What are we thinking? I never
18 limit anyone, but I will if they are falling
19 asleep.

20 MR. HILDEBRAND: Half an hour, at the most.

21 MR. CONNELL: Agree. They've been here five
22 days.

23 THE COURT: On the record, you guys are rock
24 stars. I think people lose them.

25 MR. CONNELL: Last February I was involved in

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1 a case, 15 million dollars, tried for five days and
2 they were out for nine minutes.

3 THE COURT: Can you send your No. 3 and 11 by
4 e-mail?

5 You raised the Statute of Repose as a defense
6 in your answer. I think because you raised it as a
7 defense, I have to charge it. That's why. Okay.
8 That is what I've decided and come down to.

9 I'm struggling. I don't think it is error to
10 do it. I don't know if that's what they intended
11 originally, but....

12 MR. CONNELL: You can waive it, if you want
13 to.

14 THE COURT: Again, I just told them -- this
15 is for the record. We're sending you a copy of the
16 rough jury charge, is what we'll call it, and the
17 verdict form so you can see it. There are
18 scrivener's errors and some subject/verb agreement
19 things that may be in there, but the law is there.

20 There is someone that does "the law"
21 (indicates) in front of the jury. Who is it? It
22 is someone in Myrtle Beach.

23 MR. CONNELL: Stuart Axelrod.

24 THE COURT: It might be.

25 MR. HILDEBRAND: I think I was on the record

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1 when I said I was okay with charging the Statute of
2 Repose?

3 THE COURT: And then you said, no, you
4 weren't.

5 MR. HILDEBRAND: That might have been off the
6 record, so for the record, my official position was
7 that I would object to the Statute of Repose being
8 in the final charge.

9 THE COURT: Official and final decision?

10 MR. HILDEBRAND: That's my final answer.

11 THE COURT: I can take it out tomorrow
12 morning if you want me to.

13 Again, that was my ruling it, and it was
14 based on you raising it as a defense in your
15 answer, so I believe I should charge it, okay.

16 Hopefully, we won't be making any new law.

17 We told the jury to come at 9:30, so maybe
18 9:15. If you have serious problems with the
19 charges, you better come earlier than that.

20 MS. HILLER: I'll be here at 9:00 then.

21 THE COURT: Are you driving back and forth?

22 MR. HILDEBRAND: We might be.

23 THE COURT: I was there the first night, and
24 then I moved. That's okay. If I keep getting
25 Myrtle Beach cases, we have to get a house here.

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1 I'll tell you this: Joycelin Newman has just been
2 put on business court. So that should be great.

3 Okay. You have them all, and just e-mail us
4 if you see something, and we'll come back at 9:00.
5 Have a good night you all.

6 **(WHEREUPON THE PROCEEDINGS FOR MAY 25, 2023**
7 **CONCLUDED.**

8 **(THE FOLLOWING WAS HAD ON MAY 26, 2023 OUT OF**
9 **THE PRESENCE OF THE JURY.)**

10 LAW CLERK: I have a question for the actual
11 damages revision submitted by Centex. It is on
12 Page 8, if you have it printed. With your
13 revision, the first sentence would read under
14 actual damages: "If you find the Centex entities
15 were grossly negligent in the construction of
16 Wedgewood condominiums and that the claims of the
17 Wedgewood Condominium Association are not barred by
18 the Statute of Limitations, comma, your next step
19 is to decide how much money the Centex entities
20 should be required to pay Wedgewood Condominium
21 Association."

22 Our question is whether you want that to
23 read: "And that the claims of the Wedgewood
24 Condominium Association are not barred by the
25 Statute of Limitations and/or the Statute of

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1 Repose," or you only want the Statute of
2 Limitations in there because we're charging both?

3 MR. DesCHAMPS: And/or the Statute of Repose.

4 MR. CONNELL: I mean, those are the defenses.
5 What do you want me to tell you, I mean?

6 THE LAW CLERK: We're charging both of them,
7 so we feel it is appropriate that both are in
8 there.

9 MR. DesCHAMPS: Thank you. We agree. That
10 would be an appropriate decision.

11 THE LAW CLERK: Okay. And we're still
12 looking about placing that sentence you decided or
13 you had made the comment about removing -- about
14 developers are responsible for the condition of the
15 common elements. She wants that in the charge,
16 she's looking for where if we're not putting it
17 right there.

18 MR. DesCHAMPS: Okay. Can I approach and
19 hand you one thing? Under the Statute of
20 Limitations, here is a collection of cases that
21 they knew or should have known. It's just a focus
22 of "might exist." It is to focus on adding that a
23 claim might exist, is the nature of that provision.

24 THE LAW CLERK: So what we did with that is
25 the suggested change on top of Page 8. We, of

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1 course, changed "wrongful conduct" to "grossly
2 negligent conduct." And then "through the exercise
3 of reasonable due diligence that some claim against
4 another party might exist," but that comment with
5 that quote from Stokes Craven is also -- falls in
6 that paragraph as well.

7 MR. DesCHAMPS: So in the "knew or should
8 have known" portion, "it's knew or should have
9 known that a claim might exist" is what is going to
10 be charged?

11 THE LAW CLERK: "Knew or should have known an
12 action arises from grossly negligent conduct
13 through the exercise of reasonable due diligence
14 that some claim against another party might exist."

15 MR. DesCHAMPS: Okay.

16 THE LAW CLERK: All right. Thank you.

17 MR. CONNELL: You are going to take out the
18 section about the personal injury section?

19 THE COURT: Yes. Since you agreed on that,
20 we'll take that first long sentence out, and then
21 leaving the other two, which are about exceptions,
22 I believe.

23 MR. DesCHAMPS: That's right.

24 (A recess was taken.)

25 THE COURT: Good morning. Let's go through

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1 the changes to the jury charge. Okay.

2 Tell them what was done.

3 THE LAW CLERK: So we took the developer is
4 responsible for the condition of the common
5 elements at the time these areas are deeded over to
6 the homeowners association, added that at the
7 beginning of Page 6 before the Statute of Repose,
8 after the gross negligence part.

9 We added in the changes for "wrongdoer" by
10 subbing in "grossly negligent or wrongful."

11 THE COURT: Grossly negligent for that.

12 THE LAW CLERK: Where that would be found.

13 We kept in for the Statute of Limitations a
14 "claim ought to have been discovered," that
15 paragraph, but added in "that some claim against
16 another party might exist" at the end.

17 The comment you made from the case law is
18 found in the next paragraph, so we kept that the
19 same.

20 Actual damages on Page 8, we added in not
21 only the Statute of Limitations, if they find that
22 applies, and/or the Statute of Repose.

23 We also added in the building code violation
24 charge at the end of the gross negligence charge.

25 THE COURT: You told them that you fixed in

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1 the actual damages just the cost of the repair?

2 THE LAW CLERK: Yes. Where they can consider
3 just the cost of repair.

4 That's it.

5 MR. DesCHAMPS: I'm sorry, just the part with
6 the Statute of Limitations, knew or should have
7 known, did you say that that part says something
8 about grossly negligent in it? I wasn't sure --

9 THE LAW CLERK: We had "wrongful conduct" in
10 there originally, and there was a change about
11 changing that to "grossly neglect conduct," so we
12 made that change.

13 MR. DesCHAMPS: So on the part about the
14 Statute of Limitations, if it does say this, I'm
15 not sure how it reads, but I don't want the -- we
16 ask that the Statute of Limitations charge not say
17 that they knew or should have known that some
18 grossly negligent conduct might give rise to a
19 claim. Because, really, what the argument is is
20 that we think they knew or should have known before
21 the Statute of Repose even ran. So I think that
22 will be adding more to what we need to show for the
23 Statute of Limitations than what the case law is.

24 THE COURT: I can put in there "from the
25 wrongful conduct." Instead of grossly negligent, I

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1 can say "the wrongful conduct." I mean, that's
2 what the case law says.

3 MR. DesCHAMPS: Okay. I think that probably
4 would be okay.

5 THE COURT: That's what we had originally.

6 MR. DesCHAMPS: Yeah. The only change I
7 wanted was instead of saying the claim does exist,
8 saying it might exist, was the nature of the change
9 we were requesting for that part. So, originally,
10 it was an action arises --

11 THE COURT: That is what we said, "might
12 exist." Yeah, it says "might exist."

13 MR. DesCHAMPS: Right. Okay. Thank you,
14 Your Honor.

15 THE COURT: Anything else?

16 MR. DesCHAMPS: I have one quick matter, and
17 I think it is with consent of counsel. Defendants'
18 Exhibit 1 was the PowerPoint, and we agreed that we
19 would put the PowerPoints in. I showed it to Your
20 Honor and him, but we didn't formally moved to
21 admit. I conferred with counsel, and he agrees.

22 MR. CONNELL: I did, Your Honor.

23 THE COURT: That goes in without objection.
24 Defendants' 1 is admitted without objection.

25 (Defendants' Exhibit 1 admitted.)

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1 THE LAW CLERK: One other change was what you
2 all told me this morning you consented to do was
3 removing that sentence in the Statute of Repose
4 about the personal jury. We did take out that one
5 sentence?

6 THE COURT: And we took out the "whereas,"
7 too, by the way. It says whereas, whereas,
8 whereas, okay.

9 MR. DesCHAMPS: Do you plan to e-mail the
10 final version?

11 THE COURT: I did, yes.

12 You are not allowed to disseminate the
13 earlier version, but if you want to give it to
14 other people, I don't care, okay.

15 So go print it one more time, and I'm going
16 to read through it while they do their closing
17 arguments. You do that, and we'll go from there,
18 and someone not say anything objectionable in your
19 closing statements, okay.

20 (A recess was taken.)

21 THE COURT: Are we ready to go? She has it
22 e-mailed to you.

23 Are you ready?

24 MR. HILDEBRAND: Yes, ma'am.

25 MR. CONNELL: Yes.

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1 THE COURT: Let's bring them in.

2 (The jury enters at 9:15 a.m., and the
3 following is heard in the presence of the jury.)

4 THE COURT: Good morning. It is a pleasure
5 to see you all again.

6 As you know, what we have left is to hear the
7 closing arguments from the attorneys, and I'll
8 charge you on the law that is applicable to this
9 case. All right. So give them your attention,
10 please.

11 MR. CONNELL: Thank you.

12 THE COURT: Yes, sir.

13 MR. CONNELL: Ladies and gentlemen, it is
14 funny how things happen in life. You know, there
15 are 400,000 people in Horry County, and of those
16 400,000 people, the driver's license records were
17 used to pick you people. And 399 people were
18 picked out of 400,000 people to come here this
19 week. And out of the 399 people, you all came to
20 the courthouse. It was wall-to-wall downstairs.
21 If you remember the jury room downstairs, you
22 remember the line everybody wanting to get off.
23 You remember that line? And you all stayed. You
24 know, that is just not random. It is not a random
25 thing.

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1 You have paid attention, and you've taken
2 notes, and nobody has gone to sleep. You've had
3 concern for your fellow people, for the people of
4 the homeowners association, and so I want to thank
5 you for that, because it is rare that strangers
6 will come into the courthouse in a case like this
7 and then think about their fellow man. So we
8 appreciate that.

9 I do understand that this has been long for
10 you all, and I apologize for anything that we might
11 have done to make it last longer. I can tell you
12 that we tried to whittle it down so that you would
13 not have to stay here any longer. So I'm not going
14 to stand up here for hours. I'll talk to you for
15 about 15, 20, maybe 30 minutes about the case, and
16 I'm assuming they'll talk to you about 15, 20, 30
17 minutes. After that, the judge -- after that I'll
18 have what is called "a reply," but it won't be
19 long.

20 You've seen all of the evidence. You'll get
21 all of these records back here. We'll give them to
22 you, and then you can go in and start talking.

23 As I told you at the outset, this is a civil
24 case, and a civil case has the burden of proof by a
25 preponderance of the evidence. You remember in the

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1 beginning of this case the blind lady with the
2 scales? The preponderance of the evidence, if the
3 evidence tips in the plaintiff's favor, you must
4 find for the plaintiff.

5 In this case, it's not just preponderance.
6 The evidence is overwhelming. It is overwhelming
7 that the defendant built a building in violation of
8 the building codes. You might think, well, what
9 does that mean? Well, the building codes go back
10 to the Bible. If you look in one of the old
11 testaments, there is a section in the Bible that
12 says -- and I was surprised when I started looking
13 up building codes, but there is a section in the
14 Bible that says: "Don't build your house without a
15 rail so your neighbor doesn't fall." So the
16 building codes are safety codes. They protect you
17 all. They protect me. They protect the public.

18 When a jury comes to this courthouse, a jury
19 is charged with enforcing the law; that is what you
20 all do. So you are going to get in your materials
21 a copy of the building code, of the ordinance, that
22 says the building code was enacted by the City of
23 North Myrtle Beach, and it was enacted to protect
24 the public. It was enacted for safety reasons,
25 enacted for uniform construction practices.

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1 So be thinking about that when you go back
2 there, and think about the history of where
3 building codes come from, because they were
4 designed to protect people, designed to protect us
5 all.

6 You know, in most cases it comes down to two,
7 three things, and this is one of them. One of the
8 issues in most cases are credibility or
9 believability. When I say "credibility" or
10 "believability," I mean who do you believe? Who do
11 you think was right about what they said? Do you
12 believe the Centex experts who were sued for the
13 same problem we have in this case, that is a
14 remediation of a project? Or do you believe Ross
15 Clements who spent 31 days -- 31 days looking at
16 this project? Do you believe him, or do you
17 believe the others? Who was the best witness?

18 So one thing you don't count up the witnesses
19 and say they had three witnesses and you had two,
20 you lose. That is not what you do. You can take a
21 part of anyone's testimony, and take a part of
22 someone's else's testimony and come to a decision.

23 In doing that, you have to consider
24 credibility. Then you also have to consider
25 something called bias. You know, people are

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1 biased. We know about bias in our own lives. Who
2 had the most bias? In this case, when you look at
3 the Centex experts, they had been working for them
4 since 2016. They have an employment relationship
5 ongoing with them, a relationship that makes them
6 biased. That is also something you consider.

7 So one of the other things you might consider
8 in this case is this: Plaintiff's Exhibit 1,
9 Centex promises to their customers. Their promises
10 are that they are going to build exceptional homes
11 for people, and you are going to get the Centex
12 Certainty that everything is right, everything is
13 correct. It's been built according to the building
14 code, industry standards for construction, and the
15 manufacturing specifications, meaning that when
16 they put that siding on the walls, they put it on
17 with the right nails. When they put that roof on,
18 they didn't have -- they didn't short sheet the
19 roof. All of those things. When they put the
20 house wrap on, it protected everything. But you
21 are going to find that they didn't live up to their
22 promises.

23 So I want to talk to you for a few minutes
24 about the Centex experts, because I made notes
25 about them.

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1 Mr. Carter is a nice guy, he really is. I'm
2 sure he thinks he's helpful, but, you know, when I
3 started cross-examining him and then he said -- you
4 know, he said, I didn't say that, and then I had to
5 pull out this notebook and say, How about this
6 page? And then he said, Yeah, I guess I did say
7 that. And the next time I asked him a question and
8 I said, You didn't say that in your deposition, and
9 he said, Well, let me look at it, pull it back out,
10 and then he said, okay. So then after that, every
11 time I asked him about his deposition, he said,
12 Yeah, he said it. I said it.

13 So what did he tell you? He's an expert. He
14 told you that there was code violations throughout
15 these buildings. He told you that there was
16 industry standard violations throughout these
17 buildings. He told you there was manufacturing
18 specification violations throughout these
19 buildings, and he said he wouldn't hire uninsured
20 contractors or unlicensed contractors -- not
21 uninsured -- to do business for him.

22 The telling point for him, I think, was when
23 I asked him what, I thought, was a simple question:
24 You have two houses. This house has code defects.
25 It has manufacturing specification violations,

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1 industry standards. And then you have this house
2 over here that has none of those. Which house do
3 you want? What was his answer? Well, I can't
4 answer that. I can't say anything about that.
5 That's ridiculous.

6 You know, I have two cars. One has been
7 wrecked, been fixed, and another had no damage,
8 which car do you want? No homeowner who pays
9 hundreds of thousands of dollars gets mortgages on
10 their properties, spends their life savings, wants
11 to have any type of home that has defects. You
12 don't expect it, and you certainly don't expect it
13 from a national builder who builds in 23 states, is
14 what we heard.

15 So I submit to you that Mr. Carter's
16 deposition, his testimony, all of what he told you
17 can be discounted because of what he said.

18 Also, if you note, he agrees with
19 Mr. Clements. Mr. Clements said there were code
20 defects. Mr. Carter said there was code defects.
21 Mr. Clements said there was manufacturing
22 specification violations. They applied the wrong
23 things for their products. Mr. Carter said that.
24 Mr. Clements said construction industry standard
25 violations. Mr. Carter said that. So they agree.

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1 They agree.

2 What about the next guy, Mr. Lewis? He was
3 quite a character. I showed him pictures of rot,
4 and he wanted to argue with me about that. But he
5 also came around and said, Yeah, there are
6 construction defects, code violations,
7 manufacturing specifications, all of those things.
8 So now you have two Centex experts, and those two
9 Centex experts agree with Mr. Clements. They agree
10 with him about all of those things.

11 So the next guy came up, Mr. Watkins. He's
12 an interesting guy, isn't he? He worked for the
13 homeowners association, and they paid him \$3,200.
14 Then, he gets a job with Centex, and he comes over
15 there and gets paid by them. I said, Did you know
16 anything about any construction defects? Oh, no.
17 No. I didn't see them when I was out there.

18 I had to show him his deposition. What did
19 he say, how long is this going to take? When can I
20 get out of here? What was he like? Think about
21 him, too.

22 I call him -- and I'm probably a lot older
23 than most of you, but you remember the show Hogan's
24 Heroes on TV? You probably haven't seen it if you
25 are not my age. But it was show in which these

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1 Americans were in a prisoner of war camp, and there
2 was a sergeant, Sergeant Schultz. He was a German
3 guy. When something happened that he didn't want
4 to talk about, he would say, I know nothing. I
5 know nothing. Nothing. Nothing. That is exactly
6 what Mr. Watkins is. He knows nothing about
7 anything. He was paid. I liken him to a double
8 agent. He was paid by Centex, admits there was
9 construction defects. In his scope of repair, it's
10 only what they asked him to do. He wasn't asked to
11 do it by them. He didn't put anything on it.

12 So when you think about the experts in this
13 case, who was the most credible? Who was the most
14 believable? Who hadn't been sued? Who spent 31
15 days here? Who endured seven days of depositions
16 and cross examinations? What person did that?
17 Only Mr. Clements did that, and Mr. Clements should
18 be commended for what he did for the homeowners in
19 this case.

20 So let me talk to you about a couple other
21 things that we need to discuss. Do you remember --
22 might have heard this five, ten times in this
23 trial. I'm sure you all remember that the
24 homeowners didn't do any caulking. Oh, they should
25 have caulked that and this.

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1 So when you get -- you're going to get your
2 collage of so-called expert testimony. Remember,
3 you saw it on the screen, just like you saw ours?
4 When you get that, think about this. Look through
5 the entire book, about 200 pages. You will not see
6 one picture of any caulk or lack thereof. The
7 reason you won't see it is because they don't have
8 it, and they can't produce it.

9 As our homeowners association witness said in
10 the beginning, we caulk as needed. So they can
11 argue all they want to about caulk, but they can't
12 show you one picture -- not one picture in their
13 stuff about caulk. So think about that when you
14 think about credibility and believability. Who is
15 telling the truth in all of those kind of things?

16 Now, the other witnesses was a Centex
17 employee, and what did he say? He said what
18 everybody said in this trial. Yeah, we had code
19 violations. Yeah, we violated construction
20 standards. Yeah, we violated manufacturing
21 specifications, but we didn't do anything about it.
22 So what does that tell you? Everybody agrees.

23 The only real issue in this case is what
24 damages were done to the homeowners. If you are a
25 homeowner in this case and you want to sell your

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1 unit, you have a problem, because you have to
2 disclose that. So when you think about those
3 things, I think it will help you understand where
4 we are with the case.

5 The other thing I would ask you to think
6 about is think about this is in the context of a
7 community safety program. When I say "community
8 safety," I talk about the building codes and why
9 they should be a part of what you should be
10 concerned about in this case. I just wrote quick
11 notes about the building codes and the community
12 safety issues. It seemed like Centex experts even
13 agreed with the plaintiff's expert in this.

14 No lag screws in the lintels. You remember
15 those pieces of metals up there? No lag screws.
16 You need those for hurricanes. No hurricane clips
17 in the attic. Unsafe stairs. These people are
18 retirees. Stairs that are not properly -- proper
19 risers all the way down. Failure to wrap house
20 wrap behind areas you can't see. Failure to apply
21 the siding properly. Failure to install -- using a
22 vapor barrier improperly. Not having weep holes in
23 the brick so the water can't get through. All of
24 those things -- and there are over 50 we could
25 point to you to talk about, but all of those things

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1 you should be thinking about because those are
2 requirements of the law. The building codes, those
3 are the requirements of community standards, and
4 you all are here to uphold community standards.
5 That is what you are supposed to do. That is the
6 oath you took. You took an oath about community
7 standards.

8 So then we get down to -- you'll hear this
9 argument, I'm sure. Tom is a great lawyer, and
10 he'll hammer me about these. These things are too
11 old. They took long, you know. Well, the law
12 allows for what we're doing here. The law allows
13 when you violate building codes, there is no
14 limitation on that. If you violate a building
15 code, and you do it like what you've done in this
16 case, you are going to hear the judge say you can
17 and should consider that, because building codes
18 are safety codes. So be thinking about that during
19 the course of when you are back there.

20 When you violate a building code, the fact
21 that these things -- they weren't learned about by
22 the homeowners association until 2016 or until when
23 all of these boards were taken off and we saw this
24 rotten wood, that is allowed by the law. The law
25 says you can do that.

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1 I'm going to show you -- and, again, I won't
2 show you everything in the notebook. Our notebook
3 is hundreds of pages, also. But I'll ask
4 Mr. Stanley to turn the PowerPoint on. I'll go
5 through some of the photographs with you, and
6 you'll have this back in your jury room. Again,
7 these are just a few of the points of our case.

8 So, obviously, when you look at rotten wood
9 behind brick veneer, you can't see that until you
10 have destructive testing. Like I said,
11 Mr. Clements spent 31 days out there, and when he
12 opened up the wall, that is what he saw: Rotten
13 wood unprotected wood. When he opened up the
14 corner, that is what he saw rotten wood.

15 He saw the fireproofing was damaged because
16 it was improperly applied; water damage after water
17 damage after water damage. Of course, the
18 homeowners couldn't know that until the testing was
19 done. That is called a latent or hidden defect, by
20 the way.

21 The best way to talk about a latent defect is
22 to think of a wrecked car, okay. I own a car. I
23 had a big wreck on the highway. I repaint it and
24 make it look all fancy. I sell it to you, but I
25 don't tell you about the latent defect. That's the

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1 kind of fraud and recklessness you have in this
2 case.

3 Take me to the -- those are excellent
4 pictures of rotten wood that was not disclosed
5 until the testing was done.

6 If you would, take me to the walkways.

7 Look what you have there. Again, rotten wood
8 peeled back. All of this stuff is so unnecessary.

9 Look at the screws in this thing. They are
10 not even tied in. The rotten wood below.

11 How about the vapor barrier?

12 Take me to that.

13 Oh, back up. Right there.

14 You are like 85 years old. You bought a
15 condo to come down here and retire. You are at
16 Wedgewood. Look at the difference as you go down
17 the steps. Old people have a hard time walking
18 anyway, you certainly don't want to walk on any of
19 these steps. If someone falls, Wedgewood
20 Homeowners Association is liable because it is on
21 record that we have a bad staircase.

22 You can't put your hand on the railing. She
23 can't get her hand around there. All of those are
24 code violations. Everyone agrees, by the way, that
25 they are code violations.

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1 The hurricane clips. As you all know, you
2 live here. We have hurricanes coming up this
3 weekend. We'll have, like, 3, 4, 5 inches of rain
4 and 40-mile an hour winds. Certainly, hurricane
5 clips and blocking is necessary.

6 Take me to the -- go back. There.

7 So one of the reasons -- there is something
8 called the American Disability Act. One of the
9 reasons for that is to make sure that people can
10 use property. When you have property that is not
11 built accessible, like this ramp going up, you will
12 have problems with people who have disabilities.
13 Obviously, those are not to code. You see there?
14 It exceeds the code by 8.33 percent.

15 So there -- you remember yesterday you saw
16 something about concrete stairs and how you get
17 down into the parking lot? Those are violations,
18 too. There are no handrails for handicap. All of
19 this was done, folks, by a national builder in 23
20 states who claims to know how to do this and built
21 plenty of these.

22 The vapor barrier, that is one of the most
23 interesting parts of the whole case. These Centex
24 experts don't want to talk about this. This is
25 what we call the smoking gun, folks. This, in my

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1 judgment, is a very big deal: "It needs to be
2 discussed with counsel ASAP before we issue any
3 reports. It is quite possible that recurring high
4 humidity levels inside the stud cavity is a root
5 cause of all or most of the weather-related issues
6 being found at the exterior wall coverings.
7 Repairs to correct would be expensive and
8 disruptive. Work should be done from the inside or
9 outside."

10 So you remember what they said when I asked
11 them about this? Oh, he said that -- Mr. Lewis --
12 I don't much remember that. When I got him up
13 there and started looking at that, he said, I don't
14 see anything wrong with that. Well, I see plenty
15 of wrong with that, and I know you all do. So it's
16 this kind of conduct that is reckless, grossly
17 negligent, and wrongful.

18 Show me the improper mulling, if you would,
19 sir.

20 All right. Let's look at that. So you
21 remember the window? They argued the windows
22 weren't caulked, but they don't have any windows
23 showing no caulk on them, by the way. What you do
24 is you have rot underneath each one of the windows
25 behind the siding that you can't see. So you

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1 pretty much have a, Well, you know, I think we
2 should probably owe for that, but maybe not all of
3 them, just a certain percentage.

4 So looking at those photographs and using
5 your common sense, you can realize that those are
6 defects that were created at the time of
7 construction.

8 When you think about what Centex was going to
9 do, they said they were going to sell homes for
10 high priority of satisfaction, peace of mind,
11 exceptional homes, the Centex Certainty, new
12 standards, and residential community with
13 uncompromising quality.

14 Do you see any of that in this? I'm sure you
15 don't.

16 Now we're down to, What do we do? How much
17 money should we pay? I wrote on this board that to
18 fix all of the code defects, to repair all of the
19 problems caused by Centex, \$9,376,719.85. What you
20 are going to hear from the defendants is
21 \$384,963.94.

22 What you also have to remember is
23 Mr. Watkins' testimony, and what was it? I didn't
24 look at all of the code defects. I didn't consider
25 all of the code defects. I only did what they

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1 asked me to do. So then we go back to the person
2 who looked at everything, Mr. Clements. He spent
3 31 days down here. Every time they came -- when I
4 say "they," I'm talking about Centex engineers. He
5 watched what they did. So every time there was an
6 issue, he was here.

7 His report, Plaintiff's Exhibit No. 3, over
8 350 pages, that details chapter and verse about
9 what it would take to get these people back to what
10 they expected when they bought.

11 So when you are thinking about what you are
12 doing, think about this report and the 31 days
13 Mr. Clements spent down here.

14 There is a verdict form. That's a fancy
15 lawyer word, but it is just this piece of paper.
16 You will have it back there, and the judge will
17 talk to you about it. But there is only two
18 sections on it. Section No. 1: "As to the claim
19 of gross negligence, we claim that Centex was
20 grossly negligent in violating the codes and not
21 having proper industry standards and manufacturer's
22 specifications. We, the jury, find in the favor of
23 Wedgewood Condominium Association." Put an X
24 there.

25 Go to Question 2. Question 2: "We, the

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1 jury, find for Wedgewood Condominium Association in
2 the amount of blank number of dollars damages."

3 All 12 of you must agree. It must be
4 unanimous as to what you do.

5 So the real issue in this case is what is the
6 damage? What damages -- what dollar amounts do you
7 put in here? Should you go to where the
8 plaintiff's who bought these things expected,
9 should you go back to them and what they bought and
10 expected to get a code-free home, a safe home, a
11 home that they could resale without problems? Or
12 should you go to this estimate of \$384,963? That
13 doesn't fix all of the things they caused.

14 One other thing I want to talk about is what
15 I call "blame the others defense," and you heard
16 that during the trial. The blame-the-others
17 defense is, well, you know, it was -- Gee, it was
18 Santee Cooper. It was the unlicensed contractor.
19 It was this person. It was that person. That's
20 not really my fault.

21 You remember when I asked Mr. Carter, I said,
22 Have you ever been to the military? He said, Yeah.
23 I said, Do you know what a general is? He said,
24 Yeah. Centex is the general contractor? He said
25 Yeah.

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1 The general contractor, the developer, the
2 person who makes all of the money, millions of
3 dollars from the sales of these things, that
4 person, Centex, is responsible for everything on
5 the job.

6 You know, the fact that he said that the
7 Centex employees said we were real busy running
8 here and there. It doesn't matter. You are the
9 general contractor. You are making all of the
10 money. You are selling these units. You are
11 putting out these brochures. It makes no
12 difference. Blame the others, that is one of the
13 oldest things in time. Blame someone else for
14 yourself problems. There is no one else here to
15 blame but Centex. Centex was the developer. They
16 were the builder. They were the marketer. They
17 promised the Centex Certainty a home that could be
18 built free of code defects, an exceptional and
19 uncompromising quality. I would say to you that
20 based upon what you have seen, and what these
21 experts have shown you, that they did none of those
22 things, and that you should find a verdict in our
23 favor.

24 Thank you again for all of your help.

25 THE COURT: Do you want to take down the

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1 board?

2 MR. CONNELL: Yes, ma'am. I was going to.

3 THE COURT: Oh, okay. Thank you.

4 MR. HILDEBRAND: Thank you, Your Honor, may
5 it please the Court?

6 THE COURT: Yes, sir.

7 MR. HILDEBRAND: Ladies and gentlemen, thank
8 you so much for your attention here. I can tell
9 you I have tried countless construction cases, and
10 I can honestly say that I've never -- never had a
11 jury that paid as much attention as you have. A
12 lot of this material is dry, and you all sat here
13 and paid close attention. We appreciate that, and
14 I know the plaintiffs appreciate that. I know you
15 heard the evidence.

16 What I told you at the beginning of the case
17 is -- a lot of you don't know about construction
18 law. You are not expected to. But what we do ask
19 is that you apply some common sense aspects of this
20 case and come to a decision that you feel is
21 reasonable. I think when you do that, when you
22 consider the common sense aspects that I'll go
23 through now, you'll come to the right decision.

24 Let's talk about what happened in 2001. We
25 had a completed build. It was finished. It was

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1 new. People bought it. There were no complaints.
2 That is one thing you have not heard about in this
3 case. You have not heard one complaint made to
4 Centex that they did not respond to. The
5 purchasers, fortunately, were happy with what they
6 bought.

7 You heard testimony from the board president,
8 and he was Mr. Spencer, a nice fellow. I liked
9 him. I don't play golf, but if I did, I would
10 enjoy playing golf with him. He testified that he
11 was the president of the board for 21 years, from
12 right when it was built in 2001 until '22. I know
13 you were paying close attention to his testimony.
14 What did he say? He said -- well, one thing that
15 he said before he got into anything else, he
16 admitted that his -- he bought his unit for
17 \$120,000, and it is now worth between \$240-,
18 \$250,000. So I'm happy for him and the other
19 owners out there that their unit has appreciated.
20 That is good news.

21 He also testified that there is a lot of
22 absentee owners who only come in on occasion. I
23 think he said he comes down four times a year and
24 plays golf. But the most important aspect of his
25 testimony was that he acknowledged that the board

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1 of directors of this association has a fiduciary
2 duty to maintain their property and to keep it up.
3 That is what he said, We have a fiduciary duty.

4 He also said is, Listen, we don't know
5 anything about construction. We don't do that
6 ourselves. What we did was we hired professionals
7 to come in. A professional management company,
8 Waccamaw Management, to come in and tell us what we
9 needed to do with our building. Not only -- and
10 then Waccamaw, in turn, came in and hired
11 professional inspectors who said these are how long
12 your building components are going to work. Here
13 are the reserves you need to set aside, because
14 things wear out as they get older. Things wear
15 out. You have to save money now, so when the roofs
16 wear out and other aspects, you'll have the money
17 to replace them. So he said, We hired
18 professionals because we didn't know -- we knew we
19 didn't have the expertise to fix our buildings.

20 What did the professionals tell them?
21 Mr. DesChamps read those aspects into evidence, and
22 the professionals told them several things: One,
23 your caulk -- the life expectancy of the caulk is
24 between three and five years. This is not Centex's
25 expert. This is not what we're telling them. That

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1 is what their hired -- their hired professionals
2 are telling them. Every three to five years this
3 caulk has to be replaced. That is what the life
4 expectancy of it.

5 When you see -- Mr. Carter said you need to
6 inspect it every year, and that is common sense.
7 If you have a crack, fix it. And then that goes
8 back to what I told you all -- or part of my cross
9 examination of Mr. Clements was a stitch in time
10 saves a dime. That is an old saying. If you have
11 a loose thread on your piece of clothes, you put
12 one stitch in it, and you are done. If you wait,
13 it is liable to bust, and then you have to have
14 nine stitches.

15 So they hired professionals. They said caulk
16 every three to five years. They said your roofs
17 will only last about 15 years. Again, that is not
18 us. That is their professionals. They said your
19 wood stairs, you can expect about 20 years out of
20 them. By now, they are two years overdue for
21 replacement.

22 And, very importantly in this case, they said
23 that when you replace the carpet on your walkways,
24 all of these walkways, and a lot of those
25 photographs we saw were of the walkways. There is

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1 no questions about that. There is two major issues
2 in this case: The walkways, and under the windows.

3 Those walkways, the carpet was replaced in
4 2010. They were specifically told, Look, when you
5 replace the carpet, you need to replace the
6 membrane. The membrane lasts about eight years.
7 Check it and make sure it is functioning properly.
8 Well, what they did is they removed the carpets,
9 and we saw the repair estimates that were
10 introduced that when they removed the carpet, they
11 cut it. They damaged it. They did some repairs,
12 at least we know. But when you are ripping out
13 carpet and have the strong adhesive, it will damage
14 that membrane. In some places, you can imagine,
15 it's not coming up, so they get a knife and cut it
16 up, and that is exactly what we saw here. The
17 damages from the walkways were right in line with
18 what the association was doing.

19 So the association was told to replace that
20 membrane, but they didn't do it. They were told to
21 caulk, but did not do it. In fact, the president
22 of the association, when Mr. DesChamps showed him
23 specific instances where the expenditures for caulk
24 had been deleted from the budget on numerous
25 occasions, he said, Why was it? The president of

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1 the association said -- I hope some of you took
2 notes on this -- he said, I have no idea. Later,
3 he said, Well, we followed some of the advice, and
4 some we didn't. And I wrote this one down, We
5 would save money where we could save money. That
6 just doesn't make any sense.

7 So they decided on some of the aspects
8 related to why we are here today, they decided to
9 not spend the money for the maintenance that their
10 experts was telling them that they needed to
11 follow. So that is the history we had coming up to
12 the point that Centex gets involved, with one other
13 exception.

14 Remember, in 2006, the professional people
15 who are managing this association had a board
16 meeting with the board of directors for this
17 association. The board management company said in
18 the meeting minutes, You all have water leaks
19 through the mullions of your windows. That is a
20 source of water intrusion. You need to hire an
21 engineering expert to take a look at it, and then
22 inform Centex this might be a construction
23 deficiency. The testimony was that that was never
24 done. Centex was never advised that the experts
25 had said, look, you have some leaking windows you

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1 might need to take a look at it. That was never
2 done. They never hired the engineer that their own
3 property manager told them to do to look at these
4 windows.

5 What Mr. Carter said was had they done that,
6 then the damage that we now see picture after
7 picture of would have been prevented, could have
8 been prevented, and something that could have
9 easily been fixed had they simply followed the
10 advice of their own people.

11 What is interesting, to me, is that in 2016,
12 according to the president of the association, the
13 association was told by the same management
14 company, Okay, now it's gotten really bad, and you
15 might need to contact a lawyer because the problems
16 we're seeing now has escalated.

17 My guess is that what they were probably told
18 by the association is, Look, what we told you in
19 2006 has developed further. You all need to look
20 into this further.

21 Mr. Connell talked to you about credibility
22 of experts and credibility of witnesses. You all
23 deal with people every day. Some people you find
24 are believable, and you believe what they say.
25 Some people you can look at their mannerisms,

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1 history, and determine what they say is not
2 credible. I would like you to take a look at some
3 of the witnesses, and like Mr. Connell did, I would
4 like you to follow along with me. I'm not going to
5 make a decision. You all make the decision. You
6 are the ones that have to find the facts here, but
7 listen to some of the aspects of the testimony, and
8 you all make this decision.

9 Mr. Clements, I'm sure he is a nice fellow,
10 was hired by a lawyer to come in, and when he was
11 hired, he was on a witch hunt. He knew which witch
12 to hunt, and that was Centex. Right from the start
13 he was looking to impose liability on Centex, which
14 is very clear once you start looking at what his
15 findings are and what his testimony is here today.

16 Mr. Clements doesn't design new structures.
17 He comes in afterwards and tries to find problems.
18 On this project, he was rooting around and snooping
19 around for 31 days trying to find something to
20 blame Centex with, and that is what he said. You
21 are right, he came up with a long notebook of
22 alleged problems, but how many of those are real
23 problems?

24 A couple of things that Mr. Clements didn't
25 look at was maintenance. I asked him, Were you

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1 ever asked by the association or by Mr. Stanley to
2 look into the maintenance as to how the association
3 could have caused some of these problems? He said,
4 No. Did you bother looking at any of the records
5 to see if any actions of the association might have
6 damaged some -- what repairs might have been made
7 or anything that would have damaged these common
8 elements? And he said, No.

9 Mr. Clements also had -- his philosophy is
10 not in line of what a real world philosophy is for
11 an engineer that we would want to look at our
12 houses. I asked him, Well, when you are looking at
13 repairs and damages and how things should be done,
14 does the amount, the cost, come into account at
15 all? No. Cost is irrelevant. According to
16 Mr. Clements, when he's looking for a project for
17 his attorney, cost is out the window.

18 He also said -- contrary to Bob Carter, he
19 said that the code has absolutely no room for
20 margin for error. It has to be exactly to the
21 eighth-of-an-inch right or it's non-code compliant.
22 He also said it has to be removed regardless of the
23 cost. I even used the crazy example of what if a
24 roof was only a tiny little bit short of what it
25 should be and the only way to fix that is tear down

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1 the whole house? Does that make sense? Would you
2 say that needs to be done? Yes. I don't think
3 that makes sense, and that is not what the code
4 says.

5 As Mr. Carter said, he looked at the
6 preamble, and the code is designed to provide that
7 a structure provides reasonable water tightness,
8 reasonable moisture resistance, and has reasonable
9 life safety aspects, and that is what Mr. Carter
10 looks at when he's looking at a house or a
11 structure. He tries to look in the common-sense
12 manner.

13 Let's look at the most important allegations
14 that Mr. Clements had. One is that he wouldn't --
15 he had a bone and he would not let go of it -- on
16 this vapor barrier issue. He said, By gosh, Centex
17 was wrong about the vapor barrier, and they've got
18 to replace it. That is what Mr. Connell said. But
19 what he -- what he won't acknowledge is that the
20 building inspector required Centex to put it in,
21 and they said you all have to do that. Jeremy
22 Martin testified, under oath, that is what they
23 said on this structure and other structures they
24 worked on. That is how they interpreted the code.

25 Mr. Clements interprets the code in some

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1 weird ways. His testimony on what are code
2 violations, he said because the code requires a
3 vapor barrier in one area, and says it is not
4 required in others areas, that means you can't use
5 it. Does that make sense to you? You all make
6 that decision.

7 But the vapor barrier issue is a non-issue,
8 because one thing I did ask Mr. Clements was -- I
9 said, Now, the local building officials are the
10 final say, correct? Yes, they are the ones that
11 make the final decision. If the code official
12 tells the contractor you have to install something
13 some way, then that's on the code official, not on
14 Centex, correct? He said, Yes. He agreed. So the
15 vapor barrier issue is out for those reasons, but
16 even beyond that, the fact is that there has been
17 no problem because of this vapor barrier issue.
18 These units have been up there 22 years.

19 If you look at the report generated by
20 Mr. Clements, and you'll have this back with you,
21 on this vapor barrier issue, there is one
22 photograph. The only area that was not underneath
23 a window or walkway that was supposedly identified
24 as a vapor barrier issue is this tiny little bit of
25 staining on this one board, and who knows how that

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1 would happen. You don't dry in a building
2 immediately. That board may have gotten water on
3 it during original construction, but there is no
4 evidence of any damage because of this vapor
5 barrier.

6 So what was required and installed hasn't
7 resulted in any damage. There is no damage then,
8 and there is no reason to take it out. Does that
9 make sense to you all for the plaintiff to say
10 Centex should bear the responsibility of that
11 issue?

12 Another issue I think is big, and you can use
13 to assess the credibility of Mr. Clements, is this
14 nailing pattern. That is another one he wouldn't
15 let go of. So the cement board is attached to the
16 building on the exterior walls with nails, and Mr.
17 Clements looked at them and said, I don't know that
18 that nailing spacing is exactly right, therefore,
19 it all has to be torn off. Is there any damage
20 caused by that? No. Any of them fallen off or
21 anything else? No. Despite the fact we had some
22 hurricanes? No. I don't think it is exactly
23 according to what the manufacturer said.

24 Again, here we go, Mr. Carter does what is
25 called a pull test. I think it is ingenious. He

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1 glued the board to the siding and then hooked up a
2 contraption where he slowly puts more pressure on
3 it and, holy mackerel, those boards stick on there
4 like they have been superglued. It is truly
5 unbelievable. You'll have Mr. Carter's findings
6 when you get back into the jury room.

7 In fact, can you pull that up for me, please?

8 You see the red, that is the test of pounds
9 per square foot. Under this first one, 265 pounds.
10 Under the current code, the requirement, at worst,
11 is 29 pounds. So you mathematicians out there do
12 the math on that. That is eight times the
13 requirement of the building code to pull that off
14 on that one. Eight times the resistance, and that
15 is a hundred miles an hour. A hundred miles an
16 hour equates to 29.6. The test Mr. Carter said
17 that on this board it is -- I don't know what winds
18 that would compute to, but eight times. The worst
19 that he found was 96. I'm not a mathematician, but
20 that is at least three times the wind resistance of
21 -- three times the hundred miles an hour.

22 So, again, we're talking about actual damages
23 in the real world and common sense. I submit when
24 you look at that evidence, this is really not a
25 real issue and not a valid opinion by an expert to

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1 say you need to spend millions of dollars to remove
2 and replace something that is functional and in
3 line with the -- does comply with the building
4 codes.

5 The roofs are another one. According to
6 Mr. Clements, you have to replace all of the roofs
7 because there is some nails overdriven. There is
8 no evidence of leakage, and they are eight years
9 past the time that the professionals told the
10 regime you need to replace the roofs because they
11 will wear out. That doesn't make any sense. There
12 is no evidence of leaking. That is not something
13 that is on Centex.

14 He also testified about structural issues,
15 but then I said, Are you a structural engineer?
16 No. Have you done any computations to determine
17 these structural issues? No. Can you do that?
18 No. But that didn't stop him from making an
19 opinion and saying all of this has to be torn out
20 when, in fact, all they had to do was hire a
21 structural engineer and take a look at it, and he
22 would have said, Yeah, it's code compliant, which
23 is what Skip Lewis did. He is a structural
24 engineer. He can do those calculations, and that
25 is what he determined. The as-built construction

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1 is code compliant, and it will resist hurricanes
2 and the uplift requirements.

3 Below the windows, he testified that is one
4 of the primary areas of water intrusion, but he
5 didn't address the caulking and the history on
6 that. So what you have is a repair estimate from
7 ProCon and Bob Gallagher that addresses a lot of
8 the issues that I believe the evidence shows are
9 non-issues. They have not resulted in any damage.
10 They are not the fault of Centex, and they don't
11 need to be repaired. The building is 22 years old,
12 and it is functional.

13 He came up with a nine plus million dollar
14 repair estimate. I don't mean to be derogatory,
15 but when I was growing up, I heard the term
16 "garbage in, garbage out." If the material that
17 goes into that estimate and the foundation for it
18 are improper, removing and replacing all of the
19 HardiePlank, the vapor barrier, and all the other
20 things, if those are improper, then the repair
21 estimate of the plaintiff is invalid, and I submit
22 to you it is invalid.

23 What Mr. Carter has done, and what we've
24 done, he said, you know, there might be some issues
25 that were related to original construction. Those

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1 can be repaired for \$137,000, are the items he says
2 might be related to original construction. If you
3 want to do some betterments and maintenance to
4 bring these things up to full functional
5 capability, then you can install a few things in
6 the attic.

7 You can -- that total estimate is \$384,000.
8 If you were to implement that, that calls for
9 repairs under every window where damage was found.
10 It calls for repairs in the brick lintels. It
11 calls for full repairs of anything that -- and puts
12 the buildings in excellent condition. It addresses
13 the stairs, handicapped ramps, and such.

14 So worst case, I would submit to you, a
15 verdict against -- in favor of the plaintiffs that
16 -- where Centex might have the some exposure would
17 be 137,000; a full fix of above and beyond with
18 betterments and such would be \$384,000. But that's
19 not the analysis. You don't get there yet. The
20 judge will explain to you how you arrive at the
21 verdict.

22 What is the law? You took an oath to listen
23 to the judge and follow the law. I'm sure a lot of
24 you all are saying how on earth can you have some
25 buildings that are 22 years old and you filed a

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1 lawsuit for repairs to them. Everyone knows you
2 have a one-year building warranty. If you have
3 issues, you come back and talk to the builder.
4 Beyond that, typically you don't have a warranty
5 after that. That is one thing I didn't mention
6 earlier: Centex does pride itself on its warranty.
7 If there had been a callback within several years,
8 or whatever, I'm sure that Centex would have
9 stepped in and addressed a lot of these issues.
10 But here we are 22 years later.

11 Our legislature passed a law called "Statute
12 of Repose." It applies to all structures that are
13 built, and it says that 13 years after a building
14 is completed, there are no claims that can be filed
15 against the builder. The judge will read you the
16 reasons for that law, because buildings can be
17 affected by many people, forces, and things after
18 completion. Acceptance of the building by the
19 owner puts on that person future responsibility for
20 the condition of the premises. After the person
21 takes possession of a building, there exists the
22 possibility of neglect, abuse, poor maintenance,
23 mishandling.

24 What the legislature says is it is not fair
25 to builders, whether it is a national builder like

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1 Centex or just a fellow who builds maybe one house
2 at a time, or builds a garage addition or other
3 repairs, it is not fair to give them unlimited
4 liability. So the liability cuts off at 13 years.

5 What the legislature said, though, is in
6 cases of exceptional circumstances -- exceptional
7 circumstances we will allow a jury to determine
8 whether there should be liability. They say -- the
9 legislature said the way the homeowners can meet
10 their burden of proof is to find that there was
11 fraud, gross negligence, or recklessness. So the
12 plaintiff's claims are barred unless they can prove
13 to you that there was fraud, gross negligence, or
14 recklessness.

15 The judge will read to you what does that
16 mean. What is gross negligence? It is probably a
17 term many of you have not heard, but the judge will
18 define that. What she'll tell you is -- listen to
19 this carefully. You'll hear these instructions
20 when you get back in the jury room: Gross
21 negligence is the intentional conscious failure to
22 do something that you are required to do, or the
23 conscious intentional doing of something that you
24 know is not right. They have to prove this very
25 high burden that in Centex -- that Jeremy Martin

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1 and Centex consciously and intentionally installed
2 bad work.

3 To find recklessness, there has to be a
4 conscious failure to use due care. Recklessness is
5 an awareness of wrongful conduct and continuing to
6 act regardless of consequences. What they have to
7 show is that Centex consciously and intentionally
8 installed bad work.

9 I'm about to wrap up. I appreciate your
10 attention.

11 But what has Centex do or what did they do on
12 this project to try to avoid problems? Again,
13 sometimes we miss the mark. We don't claim to be
14 perfect. That is why we have a repair program, a
15 warranty program, so we can address things if they
16 are not right.

17 Let's look at what Centex did try to do.
18 Remember that Centex's goal -- we're not a
19 fly-by-night contractor that comes in, builds a
20 house, and moves to Australia sitting on the beach
21 enjoying the fruits of our labor. We hope --
22 Centex Homes -- that we have happy customers who
23 will buy another house and recommend our homes to
24 friends and family. That is good business. It
25 makes no sense for a builder to intentionally build

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1 a house that is bad. Why on earth would a
2 homebuilder do that, and particularly one like
3 Centex that has been in business for 78 years?

4 We try to avoid it, and you heard Jeremy
5 Martin talk about it. We had monthly technical
6 training of all of our employees in every group at
7 least once a month that lasted three hours. We had
8 people come in and talk about new building
9 practices, best building practices. We tried to do
10 the right thing. We had EEE, every room, every
11 house, every day. We tried to review things and do
12 the right thing. We had Toolbox Talks with our
13 people beyond all of that, on particular houses, to
14 talk about issues that might come up, talk about
15 new products and developments and make sure that
16 things didn't go wrong.

17 We had Tailgate Talks on specific projects to
18 talk about what is going on with the project. We
19 had inline inspections. That was on that new
20 contractor form where after every aspect of the
21 building is completed, we looked at the work that
22 was done and tried to meet with them to make sure
23 it was done appropriately.

24 We had COR inspections where they were
25 surprised inspections. Once a year, someone from

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1 corporate headquarters would come in unannounced
2 and do a thorough inspection and tell us where we
3 would need to make improvements, and those were
4 done.

5 On this project, we went a step further and
6 hired an independent firm, Morningstar Consultants,
7 to come in and do inspections to tell us what
8 needed to be fixed. So all of that went on.

9 And then, on top of that, you heard about the
10 building inspectors. You heard from Mr. Martin,
11 they are not idiots. They are not clowns or
12 buffoons. They know what they are doing and are
13 properly trained. They come in, and you all will
14 have this as well, it's the inspection report. It
15 is very thorough. It is long. It is two pages and
16 tiny typed, but it talks about every aspects of the
17 building that is inspected and improved. You can
18 look at these if you want to when you are back
19 there. It talks about the foundation, structure,
20 wall and roof exterior sheathing, including the
21 types of fasteners, frequency of fasteners to
22 determine whether they are per the designers and
23 code requirements for high-wind resistance. Those
24 were specifically inspected by the code inspector,
25 and we passed and got a Certificate of Occupancy.

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1 On the second page, there is a building and
2 frame inspection where the inspector inspects the
3 hold-downs at shear walls, exterior walls and roof
4 sheathing, nailing, types of fasteners.

5 There is also a specific inspection on
6 high-wind resistance inspection to make sure the
7 buildings are inspected and approved.

8 So when Mr. Clements comes in and testifies
9 that, in his opinion, some of these are code
10 violations, I don't think Mr. Carter agreed. He
11 might have agreed on a couple, like the ramps were
12 not code compliant, a couple of stairs. But most
13 of them were not code issues, and I don't think his
14 testimony is correct because the building inspector
15 says on the exterior sheathing that the types of
16 fasteners and exterior sheathing and siding is all
17 correct. So those things were done.

18 One other thing you can take into account is
19 the fact that six employees of Centex actually
20 bought units in Wedgewood. So if we're building
21 condominiums that we think are bad and
22 intentionally building them poorly and not
23 according to code, does it make sense that we would
24 buy units? It doesn't make sense, I don't believe.

25 I would submit there was no evidence that

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1 Centex intentionally and consciously violated any
2 building codes. The codes that were mentioned to
3 be problematic were the stairs. There were a
4 couple other minor ones. The repairs are very
5 small, but there was no testimony that Centex
6 actually intentionally violated any codes.

7 Also, in addition to your finding, there must
8 be a finding of intentional conduct. There is
9 another defense you can consider that would do away
10 with this claim, and it is called the Statute of
11 Limitations. Some of you have probably heard that.
12 If you have a claim, you have to file it within a
13 certain number of years, and that means that if you
14 are in a car wreck, you know you have a claim for
15 car wreck and you have to file within three years.

16 Here, the Statute of Repose runs after 13
17 years, and there is no claim regardless. Within
18 that Statute of Repose, within that 13 years, if
19 you know you have a claim, say, in year two, you
20 only have three years to file your claim. If you
21 have a -- know you have a claim in year six, you
22 have three years. But no claims can go beyond the
23 13.

24 Here, the association learned in 2006 through
25 their own professionals that these very issues that

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1 are now being discussed were located and it was
2 recommended that a professional engineer come in
3 and examine them and determine whether there was an
4 issue. At that time, in 2006, had the regime
5 simply followed the advice of its own people, its
6 own professional property people, they would have
7 looked at these problems in 2006, instead of 2016,
8 and would have discovered all of these alleged
9 problems. So I think that also bars the
10 plaintiff's claims, the simple Statute of
11 Limitations.

12 I apologize for being long-winded, but there
13 was a lot of issues to cover. Thank you very much,
14 and sincerely for your very close attention.

15 I would ask you when you fill out this
16 verdict form, given the testimony that has been
17 introduced and the high standard that the
18 plaintiffs have to prove, that you find on this
19 first one where it says: "As to the claim of gross
20 negligence, we, the jury, find in favor of the
21 Centex entities." I submit that that is the fair
22 and appropriate verdict in this matter.

23 If you, for some reason, get beyond that and
24 find that Centex was at fault, at worst, it would
25 be the 137,000 or the \$350,000, but I don't believe

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1 you get there. Under the law that you have sworn
2 to follow, there can be no liability unless it is
3 established that Centex intentionally did
4 something, and we did not.

5 Thank you for your time.

6 THE COURT: Mr. Connell.

7 MR. CONNELL: I'll be brief, folks.

8 Common sense. Common sense. You don't
9 violate the building code. You protect public
10 safety, and you enforce the law. That is what
11 jurors do.

12 No. 2, the argument about this unit is worth
13 \$250,000. South Carolina has the Residential
14 Property Disclosure Act, and that law requires you
15 disclose defects --

16 THE COURT: I overruled.

17 MR. CONNELL: So if I own a unit at this
18 particular condo project and I want to sell it, I
19 have to give you, the new buyer, what I know about
20 the unit, and we know a heck of a lot about this
21 particular condo project. That is what you called
22 "a red herring" in the law.

23 You hear that phrase all the time. Back in
24 England, when they were trying to get the dogs off
25 the trail of somebody, they would get the worst

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1 smelling fish, and they would put it in the road,
2 so when the fox is being chased, the dogs would run
3 off on another track. That is what he is trying to
4 do. He said they made money because the market
5 went up, but the fact of the matter is that if I'm
6 selling that unit to anyone in South Carolina, I
7 have to give the disclosure act, which requires, by
8 law, that I tell them what I know about this
9 property, and as I said, we know a whole heck of a
10 lot.

11 So the next issue is the reserve study. That
12 does not discuss, nor does it mention, what to do
13 about code defects, because the reserve people
14 didn't know about the code defects we had in this
15 case. So the code defects are not a part of the
16 reserve study, and you'll see that in the records.

17 Next issue is caulk. Show me one picture --
18 Mr. Centex, multi-million dollar builder, show me
19 one picture of bad caulk. Randall Stevens said we
20 fixed and caulked as needed and painted as needed.
21 So you will find that I think.

22 The repair program. We filed this lawsuit
23 five years ago. Centex could have come to us and
24 said, We'll fix all of these code defects. They
25 haven't done it and never offered it, so their

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1 warranty stinks.

2 Real world. The real world is we don't put a
3 price on safety. Code violations are safety
4 violations. We don't want to be like Surfside,
5 Florida where buildings fall down. We have codes
6 for a reason, and your responsibility is to enforce
7 those codes.

8 The pull test, you heard a lot about that.
9 So you can make up any kind of test you want if you
10 get paid enough money to do so. Mr. Carter came up
11 with the pull test. It is not certified. It is
12 not approved. It is not a pull test that any
13 safety organization, the Consumer Products Safety,
14 or something that ASTM does. There is no
15 indication that the pull test has been anything
16 other than what he thinks should be done.

17 What he doesn't want to tell you is all of
18 those nail patterns, there is a reason for that.
19 Nails need to be put on 16 on center for safety
20 reasons, but he doesn't want to talk about that.

21 The Statute of Repose. He almost got it
22 right, but he didn't tell you the whole thing.
23 Fancy word: Repose. It means that you can bring a
24 lawsuit after a certain period of time, and you can
25 bring a lawsuit after a certain period of time

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1 after 13 years if -- if you can prove violations of
2 building codes, and that is what we've done here.

3 MR. HILDEBRAND: Your Honor --

4 THE COURT: Objection?

5 MR. HILDEBRAND: Yes, ma'am.

6 THE COURT: What?

7 MR. HILDEBRAND: The code section said
8 they --

9 THE COURT: You can't testify. You can only
10 do one word objections. Overruled.

11 You can continue.

12 MR. CONNELL: When you get this jury charge
13 in the back, you are going to see the violation of
14 a building code is admissible as evidence of fraud,
15 negligence, gross negligence, or recklessness.
16 There are so many building code violations here I
17 can't repeat them all, but that is what the rule
18 is.

19 Then he gets to: We had Tool Talks back in
20 2002, whenever it was that they finished. We had
21 great quality control. They didn't really have it
22 because you had unlicensed contractors on the job.
23 You violated building codes. That is clear. They
24 violated manufacturers' specifications. They
25 overdrove nails, didn't put them in the right

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1 patterns, not the right staircases, didn't have
2 hurricane clips, didn't have all of these things to
3 make a safe building, so you didn't have any
4 quality control.

5 What I find really interesting in this case,
6 and I would love to know what you all think some
7 other day, if they thought this thing was so great,
8 why didn't they get the building code inspector to
9 come down here? You know why? Because he would
10 have told them, You can't do all of these things,
11 and these things are code violations.

12 MR. HILDEBRAND: Objection.

13 THE COURT: Basis? Do you have an objection?

14 MR. HILDEBRAND: No, ma'am.

15 THE COURT: Okay.

16 MR. CONNELL: So then you have one other
17 thing. They present one piece of paper, right?
18 Everything else has been lost. They say, We have
19 this one piece of paper for 12 units that we say
20 we'll do everything. Did they bring anything?
21 Show anything? No, they showed none of those to
22 you. All they have is one piece of paper. We have
23 110 units out there, and they have one document,
24 but they don't have anything else. What can you
25 infer from that? Those things weren't helpful to

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1 them, or they would have presented them to you.

2 All we're asking you to do, folks, is be the
3 enforcer of the law. The law says that building
4 codes have to be enforced. There are really good
5 reasons, and the reasons are we don't want things
6 defective. We don't want things that are bad, and
7 we want to make sure that people live in safe
8 places. We want to be sure that people are
9 protected. We want to be sure that when you buy a
10 house from a big company like Centex, you can
11 guarantee that they will be held liable if they
12 don't do what they are supposed to. So we ask for
13 a verdict for the plaintiff.

14 THE COURT: Does anyone need a break?

15 Let's stand up and take a stretch.

16 Mr. Foreperson, members of the jury, you
17 heard the evidence and arguments of both parties.
18 I will now explain to you the law that applies to
19 this case.

20 Wedgewood Condominium Association, a
21 homeowners association, alleges that in this case
22 the Centex entities, a contractor/developer, were
23 grossly negligent in the construction of the
24 Wedgewood condominiums.

25 Now, under our Constitution and code of laws,

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1 only you, the jury, can make the findings of fact
2 in this case. I'm not permitted to tell you how I
3 feel about the evidence which has been presented
4 throughout this trial. I have intended to be fair
5 and impartial to each of the parties involved.

6 Ladies and gentlemen, it is your duty to
7 determine the facts in this case. You will have to
8 evaluate the credibility or believability of
9 witnesses. I've already discussed with you some of
10 the things you may consider as you decide whether
11 or not to believe a witness' testimony about a
12 particular matter. You can believe as much or as
13 little of each witness' testimony as you think is
14 proper. You may believe the testimony of a single
15 witness against that of many witnesses, or just the
16 opposite. You may believe a part of a witness'
17 testimony and disbelieve the rest. You should not
18 determine the truth merely by counting the number
19 of witnesses presented by each side. Throughout
20 this trial you have but one objective: To seek the
21 truth regardless of its source.

22 The same constitution of laws which designate
23 and make you the finders of fact, make me the
24 instructor of the law. You must accept the law as
25 I give it to you. If I'm wrong, there is another

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1 place and time for that error to be considered and,
2 if necessary, corrected. But for now, you must
3 accept the law as I give it to you. This means
4 that you should not be concerned with what you
5 think the law may be, but only with what I charge
6 you the law is.

7 The burden of proof of Wedgewood Condominium
8 Association's claims against the Centex entities in
9 this case is by a preponderance of the evidence. A
10 preponderance of the evidence simply means the
11 greater weight of evidence, which, as a whole,
12 shows that the facts sought to be proved is more
13 likely true than not true.

14 This can be illustrated by imagining a set of
15 scales. When the case begins the scales are even.
16 After all of the evidence has been presented, if
17 the scales should remain even or tip even slightly
18 in favor of the opposing party as to those claims,
19 then the plaintiff will have failed to meet their
20 burden of proof. If, on the other hand, the scales
21 should tip even slightly in favor of the claimant,
22 then they would have met their burden of proof.

23 Now, in a trial, evidence may be direct or
24 circumstantial. Direct evidence is testimony by a
25 witness about what the witness personally saw,

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1 heard, or did. Circumstantial evidence is indirect
2 evidence. That is, it is proof of one or more fact
3 from which one can find another fact. You are to
4 consider both direct and circumstantial evidence.
5 The law permits you to give equal weight to both.
6 It is for you to decide how much weight to give any
7 evidence.

8 Necessarily, you must determine the
9 credibility of witnesses who have testified in this
10 case. Credibility simply means believability. It
11 is your duty as jurors to analyze and to evaluate
12 the evidence and to determine which evidence
13 convinces you of its truth.

14 In determining the believability of witnesses
15 who have testified in this case, you may believe
16 one witness over several witnesses, or several
17 witnesses over one witness. You may believe a part
18 of the testimony of the witness and reject the
19 remaining part of the testimony of that same
20 witness. You may believe the testimony of a
21 witness in its entirety or reject the testimony of
22 a witness in its entirety. You may consider
23 whether any witness has exhibited to you any
24 interest, bias, prejudice, or other motive in this
25 case. You may also consider the appearance and

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1 manner of a witness while on the witness stand.

2 Now, ladies and gentlemen, the Rules of
3 Evidence ordinarily do not permit witnesses to
4 testify to opinions or conclusions. An exception
5 to this rule exists for witnesses we call "expert
6 witnesses." A witness who by education and
7 experience has become an expert in some art,
8 science, or profession may give an opinion as to
9 the subject the witness claims to be an expert in,
10 and may also give the reasons for the opinion.

11 You should consider an expert opinion given
12 by a witness, and like any other evidence, give it
13 the weight you think it deserves. If you decide
14 that an expert witness' testimony is not based on
15 sufficient education and experience, or if you
16 decide that the reasons given in support of the
17 opinion are not sound, or that the opinion is
18 outweighed by other evidence, you may disregard the
19 opinion entirely.

20 An expert witness' testimony is to be given
21 no greater weight than that of other witnesses
22 simply because the witness is an expert, and you do
23 not have to accept an expert's opinion even though
24 it is uncontradicted.

25 Expert witnesses must be paid per South

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1 Carolina law. However, the fact that they are paid
2 should not be weighed against their credibility,
3 unless you find that the amount which they were
4 paid has caused them to be biased, in favor of the
5 party by which they were paid.

6 Now, testimony was presented to you by
7 written deposition. A deposition is a record
8 containing sworn testimony given by a witness
9 outside of court in the presence of lawyers for
10 each party who may ask questions of the witness.
11 This testimony is entitled to the same
12 consideration and is to be judged as to the
13 credibility and weighed by you in the same way as
14 if that witness were present and gave that
15 testimony from the witness stand. It is then for
16 you, the jury, to determine the effect, the value,
17 the weight, and the truth of the testimony given in
18 the deposition.

19 Now, there have been some stipulations
20 entered into this case between the parties. A
21 stipulation is an agreement as to the fact. Once a
22 fact is stipulated to, that fact becomes
23 established for purposes of the case and cannot be
24 questioned or contradicted. In this case, the
25 parties stipulated to the evidence found in

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1 Plaintiff's Exhibit No. 7.

2 Now, Wedgewood Condominium Association claims
3 that the Centex entities were grossly negligent in
4 the construction of the Wedgewood condominiums.
5 Gross negligence is the intentional, conscious
6 failure to do something, which is incumbent upon
7 one to do, or the doing of a thing intentionally
8 that one not ought to do.

9 While negligence is the failure to exercise
10 due care, gross negligence is the failure to
11 exercise even the slightest care. Gross negligence
12 is a relative term and means the absence of care
13 that is necessary under the circumstances. Gross
14 negligence denotes the failure to exercise a slight
15 degree of care. Gross negligence involves an
16 intentional, conscious failure to do something
17 which one ought to do, or the doing of something
18 that one ought not to do.

19 A defendant is guilty of gross negligence if
20 they are so indifferent to the consequences of
21 their conduct as to not give slight care to what
22 they are doing.

23 Recklessness implies the doing of a negligent
24 act knowingly. When a person acts negligently, and
25 he realizes that he is acting negligently, the law

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1 says he is reckless, willful, and/or wanton.
2 Whichever term you prefer, they mean the same
3 thing; that is, the conscious failure to exercise
4 due care. The words "recklessness,"
5 "willfullness," and "wantonness" are synonymous.
6 The terms are used to describe a conscious failure
7 to exercise and observe reasonable or due care.

8 Recklessness is distinguished from
9 negligence. As I told you, negligence is the
10 failure to use due care. Negligence is
11 carelessness. Negligence is failure by omission or
12 co-mission to exercise due care as a person of
13 ordinary reason and prudence would exercise in the
14 same circumstances.

15 Recklessness is a higher degree of
16 culpability and responsibility. Recklessness
17 signifies a conscious failure to exercise due care.
18 Recklessness is a conscious indifference to the
19 rights of the plaintiff or a reckless disregard of
20 the rights of the plaintiff. Recklessness is an
21 awareness of wrongful conduct in a continuation to
22 act regardless of consequences.

23 Ladies and gentlemen, just so it is clear,
24 while a negligent entity is one who acts
25 carelessly, an entity whose behavior is reckless,

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1 willful, and/or wanton is not only careless in
2 their actions, but also aware that they are
3 careless.

4 The test for determining whether a tort may
5 be deemed reckless, willful, or wanton is whether
6 it was committed in such a manner and under such
7 circumstances that a person of ordinary reason or
8 prudence would have been conscious of it as an
9 invasion of the rights of the injured party.

10 Now, I charge you that a violation of a
11 building code violates a legal duty and is
12 negligence per se and is evidence of recklessness
13 and willfulness. Violation of a building code does
14 not constitute recklessness, willfulness, and
15 wantonness per se, but violation of a building code
16 is some evidence that you may consider that a
17 contractor acted recklessly, willfully, and
18 wantonly.

19 Now, the Centex entities raised the Statute
20 of Repose, a defense which is part of the laws of
21 our state. The Statute of Repose is a law that
22 extinguishes the right to bring an action after a
23 specified period of time has elapsed regardless of
24 whether the cause of action has accrued.

25 The Statute of Repose applicable in this case

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1 is 13 years. That Statute of Repose that is in the
2 laws of our state provides, in part: The General
3 Assembly finds that persons involved in
4 improvements to real property are subject to the
5 economic and emotional burdens of litigation and
6 liability for an indefinite period of time upon
7 allegations of defective or unsafe conditions.

8 And the General Assembly finds that it is in
9 the public interest to provide a measure of
10 protection against claims of litigation arising
11 years after the substantial completion of an
12 improvement to real property. And the General
13 Assembly finds that substantial differences exist
14 between improvements to real property and other
15 activities for which liability may be alleged,
16 including the fact that improvements to real
17 property have lengthy, useful lives and are
18 utilized, changed, and affected by many people,
19 forces, and things after completion. And the
20 General Assembly finds it is reasonable and
21 necessary to distinguish between a person in actual
22 possession or control of an improvement to real
23 property, and those otherwise involved in an
24 improvement to real property, for the following
25 reasons: Because acceptance of some future

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1 responsibility for the condition of the premises is
2 implied in the acceptance of an improvement to real
3 property. Because possession or control of the
4 premises is a reasonable and fair basis for
5 imposing some additional liability. Because after
6 the date of acceptance of the work by the owner
7 there exists the possibility of neglect, abuse,
8 poor maintenance, mishandling, improper
9 modification, or unskilled repairs of an
10 improvement. Because owners and persons in control
11 have the opportunity to avoid liability by taking
12 care of the improvement and by regulating its use.

13 Now, ladies and gentlemen, developers are
14 responsible for the condition of the common areas
15 at the time these areas are deeded over to a
16 homeowners association. Ladies and gentlemen,
17 however, this 13-year limitation provided by the
18 Statute of Repose is not available as a defense to
19 a person or entity guilty of fraud, gross
20 negligence, or recklessness in providing
21 components, in furnishing materials, in developing
22 real property, in performing or furnishing the
23 design, plans, specifications, surveying, planning,
24 supervision, testing, or observation of
25 construction, construction of or land surveying in

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1 connection with such an improvement, or to a person
2 who conceals any such cause of action.

3 For the purposes of this 13-year limitation
4 provided by the Statute of Repose, the violation of
5 a building code of a jurisdiction or political
6 subdivision again does not constitute, per se,
7 fraud, gross negligence, or recklessness, but the
8 violation is the type that may be admissible as
9 evidence of fraud, gross negligence, or
10 recklessness, and that is for you to determine.

11 Now, the Centex entities also raised the
12 Statute of Limitations as a defense, which is a
13 part of the law of our state. As adopted by South
14 Carolina, the discovery rule states that a Statute
15 of Limitations begins to run when a claim
16 reasonably ought to have been discovered. The
17 Statute of Limitations at the Wedgewood Condominium
18 Association's claim is three years.

19 A claim ought to have been discovered if an
20 injured party, the homeowners association, either
21 knows or should have known an action arises from
22 wrongful conduct through the exercise of reasonable
23 due diligence that some claim against another party
24 might exist.

25 The law requires to exercise reasonable due

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1 diligence that an injured party act with some
2 promptness, where the facts or circumstances would
3 put a person of common knowledge on notice that
4 some right of his has been violated, or that a
5 claim against another party may exist. At that
6 point, the clock starts. The clock is not delayed
7 until advice of counsel is sought or a full-blown
8 theory of recovery is developed. The jury must
9 apply the discovery rule to determine whether
10 Wedgewood Condominium Association filed this
11 lawsuit on time.

12 Now, ladies and gentlemen, if you find that
13 Centex entities were grossly negligent in the
14 construction of Wedgewood condominiums, and the
15 claims of the Wedgewood Condominium Association are
16 not barred by the Statute of Limitations and/or the
17 Statute of Repose, your next step is to decide how
18 much money the Centex entities should be required
19 to pay to Wedgewood Condominium Association. We
20 call this "award of actual damages."

21 Actual damages are properly called
22 compensatory damages meaning to compensate, to make
23 the damaged party whole, to put the party in the
24 same position it was in prior to the damage
25 received insofar as this is monetarily possible.

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1 In other words, actual or compensatory
2 damages include compensation for all damages which
3 are naturally the proximate result of the alleged
4 grossly negligent conduct of the defendants.

5 Actual damages are awarded to a litigant in
6 compensation for the party's actual loss. The goal
7 is to restore the damaged party, as nearly as
8 possible, through the payment of money to the same
9 position it was in had the damage not occurred.

10 Actual damages include compensation for all
11 damages, which are naturally the proximate result
12 of the alleged grossly negligent conduct of the
13 Centex entities.

14 Wedgewood Condominium Association, the
15 plaintiff, bears the burden of proving, by the
16 preponderance of the evidence, the nature and
17 extent of actual damages. The existence,
18 causation, or amount of damages cannot be left to
19 conjecture, guesswork, speculation, or the
20 possibility of a windfall.

21 Proof of amount of loss with absolute or
22 mathematical certainty is not required. Damages
23 must be proven to a reasonable degree of certainty.
24 The evidence presented by Wedgewood in this case
25 must enable you, the jury, to determine what amount

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1 is fair, just, and reasonable. The general measure
2 of damages in this case is the cost of repairs to
3 the common areas of Wedgewood condominiums.

4 Now, ladies and gentlemen, a party suffering
5 damages has a duty to exercise reasonable care and
6 diligence to minimize its damages. No recovery may
7 be had for losses which the damaged party might
8 have prevented by reasonable efforts and
9 expenditures. The damaged party is required to do
10 only that which is reasonable. In other words, a
11 damaged party is required to do that with which an
12 ordinary prudent person or party would do under
13 similar circumstances to mitigate its damages.

14 However, the damaged party is not required to
15 unreasonably exert itself and incur substantial
16 expense in an effort to mitigate damages. Where no
17 evidence is given, the damages could have
18 reasonably been reduced, the damaged party is not
19 required to have done more. Yet, a party will not
20 be allowed to sit back and wait and then seek to
21 recover damages when reasonable attempts would have
22 mitigated damages.

23 If you find that a building component
24 performed satisfactorily for any portion of its
25 estimate life, you may consider the benefit that

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1 the homeowners association received from the
2 building component, and the building component's
3 remaining useful life in determining damages.

4 Ladies and gentlemen, in this case I
5 permitted you to take notes. Your notes should be
6 used only as aides to your memory and should not be
7 allowed to take precedence over your independent
8 memory of facts. Notes are only for the juror's
9 personal use in refreshing recollection of the
10 evidence.

11 When in deliberations at the end of this
12 case, do not rely on the recollection of a juror
13 who took notes about the testimony of a witness
14 solely because the juror took notes. You should
15 not be unduly influenced by the notes of other
16 jurors. As we all know, notes can be wrong. Notes
17 are not entitled to any greater weight than each
18 juror's memory of the evidence. Those jurors who
19 do not take notes should rely on their independent
20 recollection of the evidence and not be influenced
21 by the fact that another juror took notes.

22 Mr. Foreperson, members of the jury, as you
23 retire to begin your deliberations in this case, I
24 wish to express the hope that each of you are
25 mindful of the importance of your responsibility

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1 here today. You are not called upon very often to
2 serve as jurors, and the proper performance of that
3 duty requires each of you to reach the height of
4 freeing your mind of all improper influences. So
5 please don't get the idea that I'm trying to
6 intimate to you how you should decide this case,
7 because I already told you, under the laws of the
8 state of South Carolina, you, the jury, are the
9 sole judges of all questions of fact, and it would
10 be highly improper for me to influence you in your
11 performance of that duty.

12 However, ladies and gentlemen, as the
13 presiding officer of this court, I am vitally
14 concerned that whatever verdict you reach will be
15 the result of you going back to your jury room and
16 confining your consideration to the evidence and
17 the law you heard here in this courtroom, weighing
18 it fairly and impartially, as I have every
19 confidence you will.

20 Ladies and gentlemen, everyone in this case
21 is entitled to justice, both the plaintiffs and the
22 defendants. You owe no support or sympathy to
23 anyone. A verdict in this case cannot be based
24 upon sympathy, passion, emotion, or some other
25 consideration not found in evidence. The Court is

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1 of the confirmed opinion that whatever verdict you
2 reach will represent truth and justice for all
3 parties involved.

4 Mr. Foreperson, I remind you, your verdict
5 must be unanimous. It must be the verdict of all
6 12 jurors. To that end, my law clerk has prepared
7 a verdict form. Ladies and gentlemen, it has the
8 case caption on the top. It says: "Wedgewood
9 Condominium Association, plaintiff, versus Centex
10 Homes," and it names all of the various entities.
11 It has the case caption on it, and it simply says
12 "verdict."

13 Ladies and gentlemen, there are two questions
14 on this verdict form. The first says: "As to the
15 claim of gross negligence, we, the jury, find in
16 favor of" -- and then there is two places. You
17 either check one or the other. The first possible
18 check is Wedgewood Condominium Association. If you
19 check that box, you go to Answer No. 2. If you
20 check the second box, it says: "The Centex
21 entities," and it also says after that: "If you've
22 checked this box, stop deliberating. You have
23 reached a verdict for the defendants."

24 So if you find for Wedgewood, you are then to
25 go ahead and answer the second question, which

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1 says: "We, the jury, find for Wedgewood
2 Condominium Association in the amount of" -- and
3 there is a line, and it says, blank, "actual
4 damages." You would write the dollar amount that
5 you award, if you find that appropriate and find
6 for Wedgewood Condominium Association.

7 Mr. Foreperson, there is a line underneath
8 that for you to sign and date this verdict form.

9 Ladies and gentlemen, when you have reached a
10 unanimous verdict, I ask that you knock on the jury
11 room door, and we'll bring you back into the
12 courtroom to receive your verdict.

13 Ladies and gentlemen, just a couple other
14 housekeeping matters. You are going to have my
15 entire jury charge that I just read verbatim with
16 you, as well as the verdict form. You will have
17 all of the evidence that was entered into this
18 case. Ladies and gentlemen, if you don't have it
19 back there with you, you are not entitled to it.
20 It means it wasn't entered into evidence.

21 Sometimes I have juries say they want to know about
22 this or that. Ladies and gentlemen, if it is not
23 in evidence, you are not entitled to it.

24 Additionally, I know you see that the court
25 reporter has been taking down what anyone says in

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1 this case, but I want you to understand there is no
2 printed transcript of what has been said during the
3 trial of this case. If there is certain testimony
4 you want played back, what I can do is bring you
5 back into the courtroom, and I can play the audio
6 tape of that testimony. I just need to make sure
7 that if you tell me you want to hear a certain
8 witness' testimony, I am required to play the
9 witness' entire testimony, which means the direct,
10 cross examination, any redirect, any recross, all
11 right.

12 Ladies and gentlemen, for the very last time,
13 I'm going to send you back to your jury room and
14 tell you don't begin your deliberations. If there
15 is something further on the law that the lawyers
16 want me to instruct, I will bring you back in here
17 and instruct further. If not, Mr. Foreperson,
18 again, you will receive the verdict form, my
19 charge, and all of the evidence that was entered
20 into this case, and that is your signal to begin
21 your deliberations, all right?

22 FOREPERSON: Yes, Your Honor.

23 THE COURT: Thank you for your attention.
24 You are excused to go back to your jury room.

25 (The jury exits at 11:38 a.m., and the

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1 following is heard out of the presence of the jury.)

2 THE COURT: Any questions or additions to the
3 charge from the plaintiff?

4 MR. CONNELL: I think a spoliation of
5 evidence charge is acceptable based on the
6 defendants' argument about the one building code
7 document that they had. Everything else is loss,
8 but they have the one. And the other thing is you
9 just sent back 15.

10 THE COURT: Oh, I know that. They go back
11 there until I bring the three out, and then we send
12 them for deliberations. When someone goes in with
13 all the evidence, the three come out.

14 MR. CONNELL: Are you going to hold them in
15 another room or ask them --

16 THE COURT: I'm going to release them. I'm
17 going to release them. I think this jury will come
18 to a verdict.

19 MR. CONNELL: Okay. Thank you, ma'am.

20 MR. HILDEBRAND: Nothing from the defendant.

21 THE COURT: Do you object to a spoliation
22 charge?

23 MR. HILDEBRAND: Yes, ma'am.

24 THE COURT: I don't think it is appropriate
25 in this case. I don't think there is any way to

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1 show that someone deliberately got rid of evidence.
2 There was no notice sent to them in the lawsuit
3 saying don't throw anything away. I think the
4 problem is this is an old project, which is why
5 we're all here. That is why the Statute of Repose
6 applies, as well as the Statute of Limitations, so
7 I don't think a spoliation charge is appropriate in
8 this case.

9 Anything else?

10 You saw the verdict form. Any opposition to
11 the verdict form?

12 MR. CONNELL: No, Your Honor.

13 MR. HILDEBRAND: No, ma'am.

14 THE COURT: All right. Thank you. Let's
15 make sure we have all the evidence.

16 (Attorneys and court reporter agree that all
17 evidence is present, and the jury deliberations
18 being at 11:45 a.m.)

19 (The following is had out of the presence of
20 the jury.)

21 THE COURT: So you understand, you are going
22 to put it on the record -- are you going to put
23 amounts or anything?

24 MR. DesCHAMPS: No. No.

25 THE COURT: I'm not blessing anything. This

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1 is just you putting it on the record?

2 MR. DesCHAMPS: Yes. I'm going to sit down
3 to read.

4 THE COURT: Please, because I'm not here.

5 MR. DesCHAMPS: This is counsel for Centex
6 Homes, third-party plaintiffs in this case, and
7 with the request to consent of the third-party
8 defendants, I want to put on the record and
9 establish before the return of the jury verdict
10 that Centex Homes has reached separate settlements,
11 confidential settlements, with each of the
12 third-party defendants that I'm about to name.

13 These are confidential settlement agreements,
14 and I am not going to state the confidential
15 settlement amount, but I am going to state on the
16 record that Centex Homes has settled with each of
17 these third-party defendants. In doing that, it is
18 understood that Centex Homes is not waiving the
19 confidentiality of those confidential settlements.

20 The following is the list of the third-party
21 defendants with which Centex Homes has reached
22 these confidential settlements. I'm going to read
23 them off the caption, and some of them have long
24 and tedious names:

25 Right Way Construction, Inc., also known as

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1 RWG, Inc., also known as Right Way Group, Inc.,
2 also soon as RWGR, Inc.

3 Second one is Frank Harris doing business as
4 Frank Harris Construction, also known as F. Harris
5 Construction, also known as Harris Drywall.

6 Next is Builders FirstSource, dash, Southeast
7 Group, LLC.

8 Next one is Stock Building Supply, LLC.
9 Stock Building Supply, LLC, formerly known as Stock
10 Building Supply, Inc., formerly known as Carolina
11 Builders Corporation.

12 Next is Michael D. Brownlee doing business as
13 Carolina Drywall and Interiors, Carolina Drywall
14 and Interiors, Inc., Carolina Drywall and
15 Interiors, Inc., also known as Carolina Drywall
16 Contractors, Inc.

17 Next is Roof Doctor of Carolina, Inc., John
18 D. Frazier doing business as, and/or known as, Roof
19 Doctor, and/or Roof Doctor of the Carolinas,
20 and/or, Roof Doctor of the Carolinas, Inc.

21 The next third-party defendant is Steven
22 Bosch doing business as The Roofer Man.

23 Tri-City Insulation and Building Products of
24 Myrtle Beach, Inc.

25 Next is Martin Mata doing business as Martin

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1 Masonry and Martin Masonry, Inc.

2 Next is BR Brick and Masonry, Inc., BR Brick
3 and Masonry LP, formerly known as BR Brick and
4 Masonry, Inc.

5 Next is Seno's Cleaning Service.

6 Next one is Rice Planter Carpets, Inc., now
7 known as Creative Touch Interiors, Inc., Floors,
8 Inc., successor by merger to Rice Planter Carpets,
9 Inc.

10 Next is Carpets by Kendall, Inc.

11 Next is Reliable Floor Systems, Inc.

12 TNT Painting.

13 Next one is Paint With Pride, also known as
14 Painting With Pride.

15 Next one is Michael Dawson doing business as
16 Michael Dawson Construction, Inc.

17 Next one is Vereen Concrete Co., Inc.

18 The final one is AK Construction, Inc., as
19 known as AK Framing and Siding Co., AK United,
20 Inc., formerly known as AK Construction, Inc.

21 That is the list of the third-party
22 defendants with which Centex reached these
23 confidential settlements, and the amount is stated
24 in a private e-mail correspondence between counsel
25 for Centex Homes and third-party plaintiff, and

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1 each of the third-party defendants with whom Centex
2 reached these confidential settlements.

3 Thank you.

4 THE COURT: Okay.

5 (A break in the proceedings as deliberations
6 continue.)

7 (Whereupon, the alternate jurors enter the
8 courtroom.)

9 THE COURT: Hello. You all, we want to thank
10 you for your service. I did not lose anyone this
11 week. I think it is the first time it has happened
12 since Covid, and I'm grateful that I didn't get any
13 of you sick because I've been ill the last two
14 weeks.

15 I want to thank you for your service. It is
16 not easy to sit for five days, and I understand
17 that. I appreciate your willingness to be here,
18 but this is the only way to resolve cases where
19 parties can't resolve them themselves, and so we
20 have to have jurors. A group of minds are much
21 better than one, certainly better than just a
22 single judge.

23 So at this time I'm going to excuse you. You
24 are permitted to talk about this case when you go
25 home, if you would like. Sometimes the attorneys

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1 or the parties want to know what you think about
2 certain things, so you can talk about it and are
3 allowed to talk about it. But if you have no
4 interest, you can say, No, thank you, and go on
5 your way.

6 The only thing I'll ask is that if you made
7 friends with some of the other jurors, I don't want
8 you to talk to them until they reach a verdict.
9 While I have no idea how long they will take, but
10 if it was overnight or something along those lines,
11 just don't speak with them.

12 I'll tell you, too, if you are interested in
13 what the verdict is, you are more than welcome to
14 call down to the clerk of court's office.

15 If anyone needs a work excuse, I think the
16 clerk's office has them for you. Again, ladies,
17 thank you. I know the lawyers appreciate it.

18 MR. CONNELL: Thank you so much.

19 MR. HILDEBRAND: Yes, thank you.

20 THE COURT: You are excused.

21 (Whereupon the alternate jurors exit the
22 courtroom at 11:49 a.m.)

23 THE COURT: Okay. We have a verdict. Do I
24 need to send them out if you prevail, or you want
25 to just present evidence or --

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1 MR. CONNELL: Just send them out so I can
2 think of what to do.

3 THE COURT: Okay. But you'll need to do it
4 real quick, because if we send them out too long
5 they'll really not be happy.

6 MR. CONNELL: Yes. Yes.

7 THE COURT: All right. Let's bring them in.

8 MR. HILDEBRAND: Do you give attorneys ten
9 days usually on post-trial motions?

10 THE COURT: Yes. I don't want to do any of
11 that unless any of you do.

12 (The jury enters at 2:18 p.m., and the
13 following is heard in the presence of the jury.)

14 THE COURT: Mr. Foreperson, I understand the
15 jury has reached a verdict?

16 FOREPERSON: Yes, Your Honor.

17 THE COURT: Will you please hand it to the
18 bailiff, please?

19 In the case of Wedgewood Condominium
20 Association versus the Centex entities, as to the
21 claim of gross negligence, we, the jury, find in
22 favor of Wedgewood Condominium Association.

23 Question No. 2: We, the jury, find for
24 Wedgewood Condominium Association in the amount of
25 \$6,750,000 actual damages.

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1 Signed by our foreperson and dated.

2 Ladies and gentlemen, if this is your
3 verdict, will you indicate by raising your right
4 hand?

5 I note for the record that all jurors raised
6 their right hands.

7 Anything more as to this specific verdict?

8 MR. HILDEBRAND: Nothing, Your Honor.

9 THE COURT: Ladies and gentlemen, I am now
10 going to tell you we have one more question we need
11 you to answer. So what I'm going to do is send you
12 back to your jury room for a brief five minutes or
13 so, and then bring you back here. I believe there
14 is a little more evidence that is presented, and
15 then we'll send a second question back to you. All
16 right.

17 So thank you. We appreciate your patience.
18 We will be back with you shortly. So you can go
19 ahead and go back to your jury room at this time.

20 (The jury exits at 2:20 p.m., and the
21 following is heard out of the presence of the jury.)

22 THE COURT: You want five minutes?

23 MR. CONNELL: Yes.

24 THE COURT: Got it. All right.

25 (A recess was taken.)

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1 THE COURT: Are you just about ready?

2 MR. CONNELL: We need a couple of things to
3 get one thing.

4 MR. HILDEBRAND: Before we break, are they
5 going to introduce anything --

6 MR. CONNELL: We're going to introduce Ross
7 Clements' testimony about the other projects and
8 the slides that the Court did not allow us to
9 introduce in the actual damages phase, and then
10 present the request for admissions with the 10-Q
11 for Centex that were admitted to back in 2020.

12 THE COURT: Okay.

13 MR. HILDEBRAND: On the first issue of other
14 projects, we've addressed this in our brief, which
15 is Tab 3 in our motion in limine to exclude
16 allegations of defects at other projects. The
17 footnote on Page 5 talks about the cases that allow
18 that go to punitive damages and they all talk about
19 prior acts. That is the *Johnson v. Samidge*
20 (phonetic) case, *Magnolia North Properties* case,
21 and *Burbage v. Insurance Management Company*
22 *International*.

23 Your Honor, willful to prove punitive
24 damages, which is by a clear and convincing
25 evidence, it has to be -- have conduct. It can't

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1 be -- which was finished in 2001 -- future conduct.
2 I don't know of any case, frankly, that -- I'm not
3 aware of any -- that allows evidence of future
4 conduct to go to punitive damages. I'm aware of
5 the Gamble factors and I just --

6 THE COURT: No. 7 is the existence of a
7 similar past conduct is the Gamble factor. That is
8 past conduct.

9 MR. HILDEBRAND: Right. Yes, ma'am. So I
10 don't think this is relevant. I think if they want
11 to put in the net worth of that figure then we can
12 agree to that, but I think it would be highly
13 prejudicial to admit evidence of conduct that
14 occurred after this.

15 THE COURT: Do you want to respond?

16 MR. CONNELL: Your Honor, my position is
17 that, you know, Centex was operating an ongoing --
18 what we call an ongoing development at Barefoot
19 Resort that included a whole bunch of projects that
20 was done at the same time, and the defects that we
21 have in this case are pervasive in these other
22 cases, too. So we think that would be evidence
23 that a jury can find reckless conduct, clear and
24 convincing, that this was something that was
25 ongoing.

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1 THE COURT: You understand that if the
2 supreme court doesn't agree with you, you could
3 likely lose this entire verdict, not just the
4 punitives?

5 MR. CONNELL: I think I could lose the
6 punitives, but I don't think they would do anything
7 to the actual damages verdict.

8 THE COURT: I'm not going to talk you into
9 anything, but you have a serious difficult case on
10 Statute of Repose.

11 MR. CONNELL: Understand.

12 THE COURT: I mean, I think, if anything is
13 reversible in this case, it is on the Statute of
14 Repose and Statute of Limitations.

15 MR. HILDEBRAND: On those other issues, Your
16 Honor, even if it is punitive damages, all of those
17 -- all of your concerns that the projects are
18 different, different subcontractors, different
19 building codes, different designs, different
20 deficiencies, they all go to that. It is highly
21 prejudicial.

22 THE COURT: I think he is only going to say
23 the ones that are the same, correct?

24 MR. CONNELL: Right.

25 MR. HILDEBRAND: But they're not, Your Honor.

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1 I don't know if there is different building codes,
2 but I think they are. But I know they are
3 different subcontractors, different designs. It is
4 highly prejudicial, and I don't know how we can
5 respond to it.

6 And, again, without having a mini trial on
7 those other issues and having our witnesses testify
8 that they were different and different
9 subcontractors and such, it is highly prejudicial
10 and not relevant to the Gamble factors. Those are
11 past -- those go to past conduct.

12 MR. CONNELL: We'll just put in a request for
13 admissions.

14 THE COURT: Are you sure?

15 MR. CONNELL: I think you're convincing you.

16 THE COURT: I don't want to talk you into
17 anything, but I want to tell you, honestly, what I
18 see. I try to be truthful to everybody, you know.
19 None of us have a magic ball to see what the
20 appellant courts are going to do, but I think we
21 all read what's up there. I'm not going to stop
22 you. If you want to put it in and run that risk,
23 you can do it.

24 One of the Gamble factors is the likelihood
25 the award will deter the Centex entities or others

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1 from like conduct. That is one of the Gamble
2 factors. You know that if you get an award, you
3 are going to be arguing that three years from now.

4 MR. CONNELL: Oh, I do.

5 MR. HILDEBRAND: But, Your Honor, may I
6 address that point? To deter future conduct, this
7 happened back in 2001. These other projects that
8 he talks about were several years later, and now it
9 is 2022. Centex was sold to Pulte. It is now a
10 different company. You heard the testimony of
11 that.

12 THE COURT: I'm assuming Pulte still builds?

13 MR. HILDEBRAND: We do, and we learn new
14 stuff, but how is this going -- punitive damages
15 for something we did in 2001 where entirely
16 different people and everything else has changed
17 deter future conduct, which is really just the jury
18 found that we built this thing wrong. But so much
19 has changed after 22 years.

20 This is entirely different than the normal
21 case where you have a car wreck or something where
22 you have an incident that happens now, and you can
23 change something. This happened 21 years ago, Your
24 Honor -- 23 years ago now, Your Honor. I just
25 don't -- I would respectfully submit that it was

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1 highly prejudicial and a prejudicial error to allow
2 this testimony to come in. It's just not proper,
3 Your Honor.

4 MR. CONNELL: Can we talk a minute?

5 THE COURT: Yeah.

6 (A recess was taken.)

7 MR. HILDEBRAND: I think we've come to an
8 agreement. He'll publish just the net worth.

9 Do you know what the charge is on punitive
10 damages?

11 THE COURT: Yeah, it's the straight-up
12 punitive damages charge. I can read it to you now.

13 "Now that you have found Wedgewood
14 Condominium Association is entitled to recover
15 actual damages, you must consider whether Wedgewood
16 Condominium Association is entitled to recover
17 punitive damages. Wedgewood Condominium
18 Association seeks punitive damages in addition to
19 actual damages. Punitive damages, also known as
20 exemplary damages, are imposed as punishment. They
21 are not intended to compensate.

22 "Punitive damages are allowed in the interest
23 of society and the nature of punishment and as a
24 warning and an example to deter the grossly
25 negligent party and others from committing like

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1 offenses in the future.

2 "Moreover, they serve to vindicate a private
3 right by requiring the grossly negligent party to
4 pay money to the injured party.

5 "Punitive damages serve at least three
6 important purposes: Punishment of the Centex
7 entities' reckless, willful, wanton, or malicious
8 conduct; deterrence of similar future conduct by
9 the Centex entities or others; and compensation for
10 the reckless or willful invasion of Wedgewood
11 Condominium Association's private rights.

12 "The paramount purpose for awarding punitive
13 damages is not to compensate Wedgewood, but to
14 punish and set an example for others.

15 "What would justify an award of punitive
16 damages? As you consider the issue of punitive
17 damages, the highest burden of proof known to the
18 civil law applicable, South Carolina law provides
19 that in any civil action where punitive damages are
20 claimed, the plaintiff has the burden of proving
21 such damages by clear and convincing evidence.

22 "Punitive damages can only be awarded where
23 Wedgewood proves by clear and convincing evidence
24 that the Centex entities' actions were willful,
25 wanton, malicious, or in reckless disregard of

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1 Wedgewood Condominium Association's right.

2 "A conscious failure to exercise due care
3 constitutes willfulness. It is the present
4 consciousness of wrongdoing that justifies the
5 assessment of punitive damages against the
6 wrongdoer.

7 "Punitive damages will be allowed even when
8 the Centex entities do not realize they are evading
9 Wedgewood Condominium Association's right so long
10 as the act is committed in such a manner that a
11 person of ordinary prudence would conclude it was
12 done in reckless disregard of the rights of
13 another.

14 "Wedgewood Condominium Association cannot
15 recover punitive damages based on negligent
16 conduct. Negligence is the doing of some act which
17 a person of ordinary prudence would not have done
18 under similar circumstances or failure to do what a
19 person of ordinary prudence would have done under
20 similar circumstances.

21 "Mere negligence will not support a punitive
22 damages award. To recover punitive damages,
23 Wedgewood must prove by clear and convincing
24 evidence that the Centex entities' actions were
25 willful, wanton, or reckless.

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1 "The words 'reckless', 'willfulness', and
2 'wantonness' are synonymous. The terms are used to
3 describe a conscious failure to exercise and
4 observe reasonable or due care.

5 "Recklessness is distinguished from
6 negligence. Negligence is the failure to use due
7 care. Again, negligence is carelessness.
8 Negligence is failure by omission or co-mission to
9 exercise due care as a person of ordinary reason
10 and prudence would exercise in the same
11 circumstances.

12 "Recklessness is a higher degree of
13 culpability and responsibility. Recklessness
14 signifies a conscious failure to exercise due care.
15 Recklessness is a conscious indifference to the
16 rights of others -- I'm sorry, of Wedgewood or a
17 reckless disregard of the rights of Wedgewood.

18 "Recklessness and awareness of wrongful
19 conduct and a continuation to act regardless of
20 consequence.

21 "The test for determining whether a tort may
22 be deemed reckless, willful, or wanton is whether
23 it has been committed in such a manner and under
24 such circumstances that a person of ordinary reason
25 or prudence would have been conscious of it as an

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1 invasion of the rights of the injured party.

2 "There is no formula or standard that can be
3 used as a measure for assessing punitive damages;
4 however, factors relative to your consideration of
5 punitive damages are" -- and then I cite the Gamble
6 factors, which you all know the ten factors.

7 Then it says: "The financial condition of
8 the Centex entities is a factor you should consider
9 in awarding punitive damages. However, there is no
10 requirement that the Centex entities be a person of
11 means before you are justified in awarding punitive
12 damages.

13 "While the wealth of the Centex is a relevant
14 factor in assessing punitive damages, it is not
15 necessarily controlling. In other words, the
16 financial worth of the Centex entities is a fact
17 properly to be considered by you in determining an
18 amount to be awarded as punitive damages, but
19 evidence of net worth is not a prerequisite to
20 punitive damage awards.

21 "When, under proper allegations, Wedgewood
22 Condominium Association proves by clear and
23 convincing evidence a willful, wanton, reckless, or
24 malicious violation of their rights is not only the
25 right, but the duty of the jury to award punitive

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1 damages.

2 "Accordingly, if you find that Wedgewood
3 Condominium Association is entitled to require
4 punitive damages in addition to actual damages, it
5 is your duty to the include such damages in your
6 verdict form and award an amount as you may deem
7 reasonable and proper in the light of the facts and
8 circumstances."

9 Any objections, additions?

10 MR. HILDEBRAND: I think that is the standard
11 charge.

12 THE COURT: Yeah. It is the bench book
13 charge. I wanted to be sure you heard it
14 beforehand. Okay.

15 MR. CONNELL: Are you going to give them a
16 preliminary charge as to why we are in Phase 2?

17 THE COURT: I'll state that the trial was
18 bifurcated, yeah.

19 MR. CONNELL: And that the only issue now is
20 for punitive damages?

21 THE COURT: Yes.

22 MR. CONNELL: Okay. That's fine.

23 THE COURT: I thought I did that at the
24 beginning, but.

25 MR. CONNELL: I didn't know if you were going

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1 to -- some judges read the charge first and let you
2 argue, and some will give you a preliminary charge
3 and then --

4 THE COURT: Do you want me to read it first?

5 MR. CONNELL: Either way. I like it read
6 first because they don't know what is going on. I
7 would like the charge read first, Your Honor. That
8 is my preference.

9 THE COURT: I think I'll put as a last
10 comment on there that says, "You are not required
11 to award punitive damages. It is just for you to
12 consider."

13 MR. CONNELL: You are going to say it is up
14 to you, and not that you are not required? It is
15 up to you to decide whether or not punitive damages
16 are applicable?

17 MR. HILDEBRAND: But you are not required, I
18 think is appropriate.

19 THE COURT: All right. Are you ready?

20 MR. CONNELL: Yes, ma'am.

21 THE COURT: Let's bring the jury in.

22 Do you want me to read the charge or not?

23 MR. CONNELL: I think so.

24 MR. HILDEBRAND: No, I don't think so.

25 THE COURT: Then I won't. I'll explain what

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1 a bifurcated trial is and what we're doing.

2 MR. CONNELL: Thank you, Your Honor.

3 MR. HILDEBRAND: Your Honor, I understand
4 there is a request for admissions. I'm looking it
5 up now. It has been awhile since we did that, but
6 I don't know that -- what do you plan to introduce?

7 THE COURT: You are just going to read them?

8 MR. CONNELL: Exactly. I've got the request
9 for admissions for the 2016, '17, and '18 10-Q.
10 I'll put them in evidence and tell them what is in
11 it.

12 MR. HILDEBRAND: Well, what is the relevant
13 factor?

14 THE COURT: It is really -- what only matters
15 is net worth, and he's admitted to net worth,
16 correct?

17 MR. CONNELL: Just admitted these --

18 MR. HILDEBRAND: We admitted this awhile back
19 that these were our -- the only relevant
20 information of it is the net worth. I don't know
21 if it is in there, and if it is, that would be the
22 factor.

23 MR. DesCHAMPS: To be clear, it was to admit
24 that the annual report of Pulte was a true and
25 correct copy for four different years, is what it

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1 was.

2 Your Honor, the jurors --

3 THE COURT: Stop for a second you all. I
4 apologize. Please hold on.

5 One thing I wanted to add, that I don't think
6 I did, is I want to explain a bit more what the
7 clear and convincing evidence standard is. I just
8 feel like it needs it in the charge. I know the
9 bench book doesn't include it, but I think it is
10 important. They need to understand the difference.

11 What I want to add is -- after we say, "The
12 plaintiff has the burden of proving such damages by
13 clear and convincing evidence. The clear and
14 convincing evidence standard of proof is higher
15 than the preponderance of the evidence utilized in
16 most civil cases earlier, like in our case earlier,
17 but lower than the beyond-a-reasonable-doubt
18 standard that is used in criminal cases.

19 "Under the clear and convincing evidence
20 standard, the party presenting the evidence must
21 demonstrate that it is highly probable or
22 reasonably certain that their version of the facts
23 is true.

24 "This standard is considered to be more
25 stringent than the preponderance of the evidence

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1 standard, but less stringent than the beyond a
2 reasonable doubt standard."

3 Then I just go through the phrases, "Clear
4 and compelling evidence is a legal standard of
5 proof that is used -- clear and compelling evidence
6 is a term" -- okay. Hold on. I like this part.
7 It says, "Clear and compelling evidence is evidence
8 that is extremely persuasive and convincing."

9 What do you think? Yes or no?

10 MR. HILDEBRAND: Yes. That's good.

11 THE COURT: All right. Are we ready to go?

12 MR. CONNELL: Not yet.

13 THE COURT: Okay.

14 (A brief pause in the proceedings.)

15 THE COURT: Are we ready to go?

16 MR. CONNELL: We're having a disagreement.
17 Defendants don't agree that my request for
18 admission includes Centex Homes. Our position is
19 that in the request for admission, PulteGroup
20 bought Centex, and PulteGroup -- we do have a 10-Q
21 for them, which shows a \$10 billion net worth, that
22 asset. So that is what we propose to put in. Not
23 all of them, just for 2017 and '18, which includes
24 the statement that they own Centex, Pulte Homes,
25 Del Webb, Divosta, and John Weiland Homes and

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1 Neighborhoods. That is a part of the 10-Q that was
2 admitted to.

3 MR. HILDEBRAND: If you look at their request
4 for admissions --

5 Do you have that?

6 MR. CONNELL: Yeah, I do.

7 MR. HILDEBRAND: If you look at their request
8 for admissions, they are very clear. The
9 attachments are true and accurate copies of certain
10 documents of PulteGroup.

11 THE COURT: The next question is: Centex is
12 a subsidiary of PulteGroup, that Centex Homes is
13 indirectly, but ultimately, a subsidiary of
14 PulteGroup. PulteGroup is the parent company of
15 Centex.

16 Then it says: "Centex admits that Centex
17 Homes is indirectly built and is a subsidiary of
18 PulteGroup" -- why wouldn't you just admit -- have
19 admitted that what you have is PulteGroup's --
20 whatever year report -- and that Centex also
21 admitted that -- indirectly, but ultimately, that
22 Centex is a subsidiary of PulteGroup, Inc., and
23 that Centex admits that Centex Homes is indirectly,
24 but ultimately, a subsidiary of PulteGroup, Inc.?

25 Why don't you just do it that way? That is

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1 not an issue, because that is what you admitted to.

2 MR. HILDEBRAND: That is what we admitted to,
3 but that doesn't make it relevant.

4 I think the appropriate request for
5 admissions would have been to admit or just ask us
6 what is the net worth of Centex Homes. If he would
7 have done that, then he would have gotten a
8 response. What he did was ask for the -- us to
9 admit to the financial documents of a company of
10 the parent company. Below that parent company are
11 a whole bunch of subsidiaries. He sued Centex
12 Homes. It is a separate subsidiary of PulteGroup.

13 For him to now say that that one subsidiary,
14 that the financial means of the ultimate parent
15 company, that they are one in the same, they are
16 not one in the same.

17 He just didn't do it the right way. If he
18 would have asked, again, the information for Centex
19 Homes specifically, then he would have that and
20 publish it. He didn't. He did it for the parent
21 company. And what we admitted was correct. There
22 is a parent company, and we're a subsidiary of it,
23 but that does not make the financial information of
24 the parent company relevant. He didn't get a
25 judgment again PulteGroup, only Centex.

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1 THE COURT: So you are saying he had to prove
2 either some type of amalgamation theory or
3 something else?

4 MR. HILDEBRAND: Yes, ma'am, or simply just
5 saying, What was the net worth of Centex Homes, and
6 get the documentation before -- related to that. I
7 don't know what that is, but it's -- you can't just
8 say, Here is a whole bunch of documents and that
9 there might be someone up the chain.

10 He read a whole bunch of individual
11 subsidiaries, and each one of those, I would think,
12 are separate centers and have their own separate
13 issues.

14 MR. CONNELL: So, Your Honor, we could offer
15 a portion of Mr. Lundblad deposition that was taken
16 where he can say -- where the deposition is that he
17 has the most tenure with Centex, but we, Centex,
18 merged with Pulte in 2009. That is his testimony
19 in his 30(b)(6) deposition, so we could read that
20 report and put in.

21 THE COURT: I think you can, too.

22 MR. HILDEBRAND: But all that does -- that
23 does not establish the legal relationships. Yes,
24 there was -- Pulte bought -- that is what --

25 THE COURT: You have to argue that, because

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1 you admitted to what is in here, and as long as he
2 doesn't go beyond what he admitted to and what
3 Lundblad said, it is not wrong. You can argue to
4 the jury that Pulte is not Centex.

5 MR. HILDEBRAND: Pulte is the parent company.

6 THE COURT: I understand that. I think he
7 can enter what he has, and you can argue that all
8 he did was admit what the parent company had, not
9 what Centex's net worth is.

10 MR. HILDEBRAND: I would like to go on the
11 record and just say I object to it. I think it is
12 inappropriate.

13 THE COURT: Okay. You admitted to it. It is
14 on the request to admit.

15 MR. HILDEBRAND: It is a correct document,
16 but the ultimate --

17 THE COURT: I know. Okay. Okay.

18 You ready?

19 MR. CONNELL: Yes, ma'am.

20 THE COURT: Bring the jury in.

21 (The jury enters at 3:03 p.m., and the
22 following is heard in the presence of the jury.)

23 THE COURT: Welcome back, ladies and
24 gentlemen. I know you are wondering what is going
25 on. I need to explain to you that sometimes trials

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1 are bifurcated. Different issues are split. We
2 first had to reach a threshold issue before we can
3 even address the next issue.

4 In this case, the punitive award was
5 bifurcated from the rest of this trial; therefore,
6 you have one more question after some very, very
7 limited offerings about punitive damages.

8 I'm then going to charge you on punitive
9 damages, and it is up to you, to the jury, to
10 determine whether or not they are appropriate in
11 this case. You are not required to give punitive
12 damages to a plaintiff, but you are to consider
13 whether or not you believe it is appropriate in
14 this case. All right.

15 So we're going to have the lawyers -- they
16 are going to make a brief offering and short
17 argument, and then I'll charge you.

18 MR. CONNELL: Your Honor, we want to offer in
19 evidence Centex Homes' Responses to Request for
20 Admissions.

21 THE COURT: Ladies and gentlemen, request to
22 admit are a discovery tool that the parties give to
23 each other to determine whether or not certain
24 information or evidence is admitted by the opposing
25 party. All right. So that is what it is in this

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1 case.

2 MR. CONNELL: One says: "The attached hereto
3 are the true and accurate copies of the
4 2015/2016/2017 and 2018 annual reports of
5 PulteGroup, Inc."

6 The answer is: "Centex admits that the
7 documents, which are produced herewith are true and
8 accurate copies of the 2015/16/17 and '18 annual
9 reports of PulteGroup."

10 Request to Admit No. 2: "Centex is a
11 subsidiary of PulteGroup, Inc."

12 The response is: "Centex admits that Centex
13 Homes is indirectly, but ultimately, a subsidiary
14 of PulteGroup, Inc."

15 And No. 3: "PulteGroup is the parent company
16 of Centex."

17 And the response is: "Centex admits that
18 Centex Homes is indirectly, but ultimately, a
19 subsidiary of PulteGroup."

20 Attached to that are the 2015, '16, '17, and
21 '18 PulteGroup --

22 MR. HILDEBRAND: Your Honor, I would like to
23 get on the record my objection to this. We
24 admitted that those are documents of PulteGroup is
25 the parent company. They are not the specific

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1 documents of Centex Homes. We admitted the
2 authenticity, and that is correct, but they do not
3 relate specifically to Centex Homes that is the
4 defendant in this case. So I think it is
5 irrelevant and highly prejudicial.

6 THE COURT: Thank you. It is noted for the
7 record.

8 MR. CONNELL: We offer it as Plaintiff's No.
9 1 for the punitive damages stage.

10 (Plaintiff's Exhibit 1 marked and admitted
11 for Punitive Damages Phase.)

12 MR. CONNELL: We want to read a few short
13 portions of the deposition of Eric Lundblad, the
14 30(b)(6) witness for Centex Homes.

15 Page 27, Line 25: "Do you know why you have
16 been chosen as a 30(b)(6) designees today?

17 "Answer: I believe that I've been chosen
18 because I have the most tenure from the old days at
19 Centex so -- but we, Centex, merged with Pulte in
20 2009.

21 "Question: So from 2009 you have been an
22 employee of Pulte?

23 "Answer: Of one of their subsidiaries.

24 "Question: One of their subsidiaries?

25 "Answer: I believe I'm still a Del Webb

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1 Communities employee.

2 "Question: Tell me what that means.

3 "Answer: So Pulte themselves purchased Del
4 Webb Communities in 2004, merged with Del Webb
5 Communities. So in 2009, they purchased or merged
6 with Centex.

7 "Question: Okay."

8 So PulteGroup is the holding company that
9 holds all of these small -- large subsidiaries.

10 "Question: So under Pulte's umbrella, if
11 you will --

12 "Yes.

13 "-- would be Centex.

14 "Answer: Yes.

15 "So who did you work for from 2001 until
16 2009?

17 "Answer: Centex Homes."

18 We'll put that in evidence.

19 THE COURT: Just that portion?

20 MR. CONNELL: Just the few pages.

21 THE COURT: What is the date of the
22 deposition?

23 MR. CONNELL: That deposition is dated
24 November 20, 2019.

25 THE COURT: Okay.

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1 MR. CONNELL: That is Pages 27, 28, and 29.

2 THE COURT: Okay.

3 MR. CONNELL: For purposes of the record,
4 I'll just put a paperclip on the three pages until
5 we can get copies of those.

6 THE COURT: Okay.

7 (Plaintiff's Exhibit 2 marked and admitted
8 for Punitive Damages Phase.)

9 THE COURT: Anything further from the
10 plaintiff?

11 MR. CONNELL: No, Your Honor.

12 THE COURT: Anything from the defendant?

13 MR. HILDEBRAND: I would like to --

14 THE COURT: You both will be able to make a
15 brief argument, but you can put on evidence, if you
16 would like.

17 MR. HILDEBRAND: Oh, I understand. Oh, okay.

18 MR. CONNELL: I just put in some evidence.

19 THE COURT: Right. And if you would like to,
20 you can as well.

21 MR. HILDEBRAND: Oh, no. No. No.

22 THE COURT: Okay. Well, go ahead and make a
23 very brief closing statement.

24 MR. CONNELL: Ladies and gentlemen, thank you
25 for being here today, and we appreciate your

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1 assistance. I know it is Friday afternoon, and you
2 want to go home, so I'll only talk to you few
3 minutes.

4 The only question now is whether Centex
5 Homes, a/k/a Pulte, should be punished, punitive
6 damages. Punitive damages are damages to set an
7 example to make sure that this doesn't happen
8 again, to make sure that they abide by the building
9 codes, to make sure that they build their homes in
10 conformity with the industry standards.

11 So what you have just heard is the deposition
12 of one of their employees that indicates that Pulte
13 Homes bought Centex back in 2009. What you have --
14 what you will have in your jury room are three
15 statements of the net worth of Centex,
16 \$10 billion --

17 MR. HILDEBRAND: Your Honor, that's -- that's
18 an inaccurate statement, Your Honor. Those are the
19 financial records of PulteGroup, but not of Centex
20 Homes.

21 THE COURT: Okay. Go ahead.

22 MR. CONNELL: So you have this back there,
23 and you have to decide the question of should
24 Centex be punished for their conduct in this case
25 for not complying with the building code and for

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1 not complying with industry standards. We would
2 suggest you consider that, because punitive damages
3 are to deter future conduct, conduct which we don't
4 want to happen. We don't want other builders to
5 build like this.

6 So we ask that you consider that. Again, we
7 appreciate you being here. I'm sorry you had to be
8 here again at 3:15.

9 THE COURT: Thank you.

10 Mr. Hildebrand.

11 MR. HILDEBRAND: Thank you for your
12 attention. I understand your verdict, and it was a
13 verdict for what you found for the deficiencies,
14 and I hear you. Representatives of Centex Homes
15 hear you. We would ask you to consider there was a
16 full verdict. I don't think that this was
17 intentional conduct or evidenced by clear, cogent,
18 and convincing evidence that we intentionally hurt
19 somebody. I hear you that you found gross
20 negligence and found that some things were not
21 right, and you returned a verdict for the
22 plaintiffs for that amount, and it is a full amount
23 for them to make repairs to their structures. But
24 I would submit to you that the lesson is learned
25 and that punitive damages are not appropriate.

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1 There has been a full verdict thus far, and
2 we ask you to return no award for punitive damages.
3 Thank you.

4 MR. CONNELL: So the purpose of punitive
5 damages is to deter future conduct. That is what
6 you have to decide, whether or not the conduct that
7 Centex engaged in in this case of violating a
8 building code, violating industry standards, and
9 violating manufacturers' specifications, does that
10 conduct -- do you want to send a message to other
11 homebuilders that this is not appropriate conduct?

12 We would suggest that you do provide an award
13 of punitive damages to send a message to the
14 community, and to these builders who are building
15 all over the place in Horry County, that they need
16 to comply with the rules.

17 Thank you so much.

18 THE COURT: Ladies and gentlemen of the jury,
19 now that you have found Wedgewood Condominium
20 Association is entitled to recover actual damages,
21 you must consider whether Wedgewood Condominium
22 Association is entitled to recover punitive
23 damages.

24 It is up to the jury to determine if punitive
25 damages are appropriate, but please understand you

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1 are not required to award punitive damages.
2 Whether to award punitive damages is up to the jury
3 to determine.

4 Punitive damages, also known as "exemplary
5 damages," are imposed as punishment. They are not
6 intended to compensate. Punitive damages are
7 allowed in the interest of society in the nature of
8 punishment and as a warning and example to deter
9 the grossly negligent party and others from
10 committing like offenses in the future.

11 Moreover, they serve to vindicate a private
12 right by requiring the grossly negligent party to
13 pay money to the injured party. Punitive damages
14 serve at least three important purposes:
15 Punishment of the Centex entities reckless,
16 willful, wanton, or malicious conduct; deterrence
17 of similar future conduct by the Centex entities or
18 others; and compensation for the reckless or
19 willful invasion of Wedgewood Condominium
20 Association's private rights.

21 The paramount purpose for awarding punitive
22 damages is not to compensate Wedgewood Condominium
23 Association, but to punish and set an example for
24 others.

25 What would justify an award of punitive

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1 damages? As you consider the issue of punitive
2 damages, the highest burden of proof known to the
3 civil law is applicable. South Carolina law
4 requires that in any civil action where punitive
5 damages are claimed, the plaintiff has the burden
6 of proving such damages by clear and convincing
7 evidence.

8 Clear and convincing evidence is a higher
9 standard of proof than the preponderance of the
10 evidence standard that you used earlier in
11 determining the gross negligence and actual damages
12 of this case. But -- ladies and gentlemen, clear
13 and convincing is a higher standard than the
14 preponderance of the evidence, which you earlier
15 did. But I want you to understand it is not as
16 high as the burden of proof in criminal cases that
17 we call "beyond a reasonable doubt." It is a
18 middle standard, but it is still the highest
19 standard in a civil case.

20 Clear and convincing evidence is evidence so
21 strong and convincing that it leaves little or no
22 doubt about the truth of the matter. It is
23 evidence that is extremely persuasive and
24 convincing to the finder of fact. Punitive damages
25 can only be awarded where Wedgewood Condominium

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1 Association proves by clear and convincing evidence
2 the Centex entities' actions were willful, wanton,
3 malicious, or in reckless disregard of Wedgewood
4 Condominium Association's rights.

5 A conscious failure to exercise due care
6 constitutes willfulness. It is the present
7 consciousness of wrongdoing that justifies the
8 assessment of punitive damages against the
9 wrongdoer. Punitive damages will be allowed even
10 when the Centex entities do not realize they are
11 evading Wedgewood Condominium Association's rights
12 so long as the act is committed in such a manner
13 that a person of ordinary prudence would conclude
14 that it was done in reckless disregard of the
15 rights of others.

16 Wedgewood Condominium Association cannot
17 recover punitive damages simply on negligent
18 conduct. I remind you, negligence is just the
19 doing of some act which a person of ordinary
20 prudence would not have done under similar
21 circumstances, or a failure to do what a person of
22 ordinary prudence would have done under similar
23 circumstances.

24 Ladies and gentlemen, mere negligence will
25 not support a punitive damages verdict. To recover

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1 punitive damages, Wedgewood must prove by clear and
2 convincing evidence that the Centex entities
3 actions were willful, wanton, or reckless. The
4 words "reckless," "willfulness," and "wantonness"
5 are synonymous. The terms are used to describe a
6 conscious failure to exercise and observe
7 reasonable care or due care.

8 Ladies and gentlemen, recklessness is
9 distinguished from negligence. As I told you,
10 negligence is the failure to use due care.
11 Negligence is carelessness. Negligence is failure
12 by omission or co-mission to exercise due care, as
13 a person of ordinary reason and prudence would
14 exercise in the same circumstances.

15 Recklessness is a higher degree of
16 culpability and responsibility. Again,
17 recklessness signifies a conscious failure to
18 exercise due care. Recklessness is a conscious
19 indifference to the rights of Wedgewood, or a
20 reckless disregard of the rights of Wedgewood.
21 Recklessness is an awareness of wrongful conduct
22 and a continuation to act regardless of
23 consequences.

24 The test for determining whether a tort may
25 be deemed reckless, willful, or wanton is whether

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1 it has been committed in such a manner and under
2 such circumstances that a person of ordinary reason
3 or prudence would have been conscious of it as an
4 evasion of the rights of the injured party.

5 Ladies and gentlemen, there is no formula or
6 standard that can be used as a measure for
7 assessing punitive damages; however, factors
8 relevant to your consideration of punitive damages
9 are: The character of the Centex entities' acts;
10 the nature and extent of the harm to Wedgewood
11 Condominium Association which the Centex entities
12 caused or intended to cause; the Centex entities'
13 degree of culpability; the punishment that should
14 be imposed; duration of the conduct; the Centex
15 entities' awareness or concealment; the existence
16 of similar past conduct; likelihood the award will
17 deter the Centex entities or others from like
18 conduct; whether the award is reasonably related to
19 the harm likely to result from such conduct, and
20 the Centex entities' wealth or ability to pay.

21 The financial condition of the Centex
22 entities is a factor you should consider in
23 awarding punitive damages; however, there is no
24 requirement that the Centex entities be a person of
25 means or a company of means before you are

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1 justified in awarding punitive damages. While the
2 wealth of the Centex entities is a relevant factor
3 in assessing punitive damages, it is not
4 necessarily controlling.

5 In other words, the financial worth of the
6 Centex entities is a fact properly to be considered
7 by you in determining the amount to be awarded as
8 punitive damages, if any, but evidence of net worth
9 is not a prerequisite to have a punitive damage
10 award.

11 When under proper allegations, Wedgewood
12 proves by clear and convincing evidence a willful,
13 wanton, reckless, or malicious violation of their
14 rights, it is not only the right, but the duty of
15 the jury to award punitive damages.

16 Accordingly, if you should find that
17 Wedgewood Condominium Association is entitled to
18 recover punitive damages, in addition to the actual
19 damages you have already awarded, it is your duty
20 to include such damages in your verdict and award
21 such amount as you may deem reasonable and proper
22 in light of the facts and circumstances.

23 Ladies and gentlemen, I remind you that your
24 verdict must be unanimous as to punitive damages as
25 well. It must be the verdict of all 12 jurors.

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1 There is yet another verdict form. It simply has
2 the case caption. It says -- and has one question:
3 "Now, that you have found that Wedgewood
4 Condominium Association sustained actual damages,
5 you may consider an award of punitive damages."

6 There is one question, and you checkmark one
7 of the two. The first is: "Upon clear and
8 convincing evidence, we, the jury, find for
9 Wedgewood Condominium Association in the amount of
10 blank punitive damages." Or, "We, the jury, find
11 for the Centex entities."

12 Ladies and gentlemen, if you check the second
13 box, you are saying that they are not entitled --
14 Wedgewood is not entitled to any punitive damage
15 this case.

16 Lastly, you are not required to give punitive
17 damages, but it is for you to consider in this case
18 if you, the jury, deems it appropriate. All right.

19 Mr. Foreperson, there is a line on this
20 verdict form, sign it, date it, sir, if you would,
21 and knock on the door when you have reached a
22 verdict. Thank you.

23 (The jury exits at 3:25 p.m., and the
24 following is heard out of the presence of the jury.)

25 MR. HILDEBRAND: Your Honor, I would object

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1 to all of those going back. He can just do the
2 recent year, but I think it is prejudicial and
3 confusing to the jury to see three years. What's
4 the point? Do it for one year, maybe the most
5 recent year that he had.

6 MR. CONNELL: I'll agree.

7 THE COURT: Okay.

8 (Whereupon, the jury deliberations start at
9 3:28 p.m.)

10 THE COURT: Okay. We will be at ease.

11 I will say that as far post-trial motions,
12 whatever happens, you have ten days to file your
13 post-trial motions. We need to hear them as soon
14 as I can find you a day and get up here. I think
15 it is better while it is fresh in everyone's head,
16 so I'll do everything I can do find a time and make
17 sure I have a court reporter.

18 MR. HILDEBRAND: Okay.

19 MR. CONNELL: Thank you, Your Honor.

20 (A recess was taken while the jury
21 deliberates.)

22 THE COURT: We have a verdict. All right.
23 Are we ready?

24 MR. CONNELL: Yes, sir.

25 THE COURT: Just to note for the record

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1 again, I'm giving you all ten days to make your
2 motions, file it, and I'll get it set as quickly as
3 I can get up here again, okay.

4 (The jury enters at 3:37 p.m., and the
5 following is heard in the presence of the jury.)

6 THE COURT: Mr. Foreperson, I understand the
7 jury reached a verdict?

8 FOREPERSON: Yes, Your Honor.

9 THE COURT: Thank you. If you will, hand it
10 to the bailiff.

11 Okay. Go ahead and publish it, please.

12 THE CLERK: State of South Carolina, County
13 of Horry County, in the Court of Common Pleas,
14 15th Judicial Circuit, Case No. 2018-CP-26-0307,
15 Wedgewood Condominium Association versus Centex
16 entities. We, the jury, find for the Centex
17 entities, signed by foreperson, dated May 26 of
18 2023.

19 Mr. Foreperson, ladies and gentlemen of the
20 jury, is this your verdict, please signify by
21 raising your right hand?

22 THE COURT: For the record, everyone raised
23 their right hand; is that correct?

24 Thank you. You can put your hand down.

25 Anything further required of this jury from

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1 the plaintiff?

2 MR. CONNELL: No, Your Honor.

3 THE COURT: Defense?

4 MR. HILDEBRAND: No, ma'am.

5 THE COURT: Ladies and gentlemen, I want to
6 personally thank you. I agree with Mr. Hildebrand
7 in his closing arguments that I think you have been
8 probably the most attentive jury I've seen. I've
9 been doing this over 16 years as a judge, and I was
10 a lawyer before that, and you were wonderful and
11 attentive, and we appreciate that.

12 At this time, when you go home, you are
13 permitted to discuss this case with family members
14 or friends. There is nothing prohibiting you.
15 Sometimes the attorneys or someone there from their
16 offices or the parties might want to ask you your
17 thoughts. They are allowed to do that, but you are
18 never required to talk if you don't have an
19 interest to talk. Say, I have no interest, thank
20 you very much.

21 I will tell you, you have earned your
22 exemption for the next three years. I want to say
23 one of you wrote me a kind note, and I want to tell
24 you how much it is appreciated by judges. We are
25 under a lot of fire these days, probably more so in

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1 the criminal cases than civil. People question
2 what we do, and we're never permitted to speak
3 about a case that is before us or appeal in any
4 way, shape, or form.

5 So I will tell you that my colleagues on the
6 bench, as far as this court, we are the highest
7 trial court in the state of South Carolina for
8 state court cases. We handle not only civil cases,
9 but also criminal cases, death penalties here in
10 South Carolina, because we are a death penalty
11 state.

12 I can tell you that no one does this job for
13 either money or glory. I think it is truly a
14 public service that you want to do some good and
15 help people. I can tell you have resolved this
16 matter, and I can tell you that no one in this room
17 has a better or can do their job without 12 people
18 willing to sit in that box and make the hard
19 decisions. So I want you to know that it really is
20 important, and we really thank you.

21 At this time, I'll excuse you. If you need a
22 work excuse, the bailiffs will have that for you
23 and anything else you need. I hope it has not
24 started raining. I hope you a wonderful Memorial
25 Day weekend, relax. We appreciate it. You are

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1 excused. Thank you, sir, and thank you all.

2 (The jury exits at 3:52 p.m., and the
3 following is heard out of the presence of the jury.)

4 THE COURT: One more time. You have ten days
5 to file any motion. I'll try to get to it as quick
6 as I can so everything is refreshed. Are you going
7 to want this transcript -- oh, she's saying there
8 is no way for ten days. I know they are backed up.
9 You might just have to go off memory, because it
10 would be better sooner than later. So you need to
11 tell me if you actually really need the transcript
12 before you argue post-trial motions.

13 MR. HILDEBRAND: Can I let you know?

14 THE COURT: Think about it. E-mail me
15 Tuesday, because Monday is a holiday, right. So
16 let me know, both of you.

17 Anything else?

18 MR. HILDEBRAND: No.

19 MR. CONNELL: No, Your Honor.

20 THE COURT: I would shake your hand, but I
21 was so sick. Thank you everyone.

22 (Whereupon, the trial concluded.)
23
24
25

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1 CERTIFICATE OF REPORTER

2 State of South Carolina)

3 County of Horry)

4
5 I, Natalie Dahl, Official Court Reporter for
6 the State of South Carolina, do hereby certify that
7 the foregoing is a true, accurate, and complete
8 Transcript of Record of the proceedings had and
9 evidence introduced in the trial of the captioned
10 case, relative to appeal, in the Court of Common
11 Pleas for Horry County, South Carolina, on the 22nd
12 day of May through the 26th day of May, 2023.

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

15
16 August 16, 2023.

17 *NATALIE DAHL, RPR*

18 -----
Natalie Dahl, RPR

19 Court Reporter
20
21
22
23
24
25

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1 State of South Carolina
In Common Pleas Court
2 County of Horry
3 Wedgewood Condominium Association,
plaintiff,
4 v. 2018-CP-26-00307
Centex Homes, a Nevada General
5 Partnership; Balfour Beatty Construction,
LLC as successor by merger to Centex
6 Construction Company, Inc. and Centex
Construction, L.L.C., Crescent Architects,
7 L.L.C. and CEMS Engineering, Inc.,
Defendants.

8 Centex Homes, a Nevada General
9 Partnership,
Third-Party Plaintiff,
10 vs.
Right Way Construction, Inc. a/k/a
11 RWG Inc. a/k/a Right Way Group, Inc.
a/k/a RWGR, Inc.; et al.
12 Third-Party Defendants.
defendants.

13 The Hearing
14 held before:
15 Honorable Carmen Mullen
16

17 Wednesday, June 14th, 2023
1301 Second Avenue, 3-A,
Conway, South Carolina
18 12:46 p.m. - 3:33 p.m.

19 This Hearing was taken before Roger Williamson,
20 Court Reporter and Notary Public for the State
21 of South Carolina, at 1301 Second Avenue, 3-A,
22 Conway, South Carolina, on Wednesday, June 14th,
23 2023.

24
25

A P P E A R A N C E S

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By: William G. DesChamps, IV, Esq.

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1 The Court: So we are here on the
2 defendant's motion for a J.N.O.V. or in the
3 alternative in a trial as well as, defendant's
4 motion for leave to deposit a judgment sum of
5 the Court and stay of execution of proceedings
6 to enforce the judgment. So gentlemen, this is
7 your motion. However you want to start. It's
8 good to see you all.

9 Mr. Hildebrand: Thank you very
10 much, Your Honor. Of course, Tom Hildebrand
11 here for Centex Homes. For the court reporter,
12 thank you for your patience. I'm sorry for the
13 mix up this morning. But thank you so much for
14 agreeing to come without the normal court
15 reporter. And I know it was a big flurry of
16 activity yesterday to try to get everything
17 done. Will DesChamps -- we're going to argue
18 various points if that's okay with you.

19 The Court: Of course.

20 Mr. Hildebrand: And however you
21 would like to do it. If you want to argue the
22 -- the -- have Will argue the statute of
23 limitations first and then have them respond or
24 if you want us to go through each one or to kind
25 of play it by ear. Or what's -- what's your

1 pleasure?

2 The Court: I actually think we'll
3 start with the statute of limitations. I think
4 that's probably the best idea. So let's start
5 with that.

6 Mr. Hildebrand: Okay. Thank you.

7 The Court: And then we can respond
8 to the statute of limitations. And then we can
9 go through as far as his motion just to address
10 certain points that I think we need to put on
11 the record. Okay? So you all can help me with
12 my memory a little bit as well. I know we were
13 hopeful that we were going to be able to have a
14 transcript of the trial by the time we did this,
15 but the court reporter for that trial is so far
16 behind and she said it would be months and
17 months. So everyone has graciously agreed that
18 we go forward to get this case going because we
19 anticipate an appeal. So with that said, Will,
20 whenever you're ready.

21 Mr. DesChamps: Okay. Thank you,
22 Your Honor. May it please the Court? And --

23 The Court: Yes, sir.

24 Mr. DesChamps: -- Will DesChamps
25 for Centex Homes, the defendants. Your Honor,

1 I'm going to start with Centex's motion for a
2 judgment notwithstanding the verdict under the
3 statute of limitations defense. Your Honor, as
4 you probably observed from your years helping us
5 with this case that we see this as a hugely
6 important aspect of this case and a huge part of
7 our defense. And we have devoted considerable
8 time and resources investigating and pursuing
9 this over the years. It would have certainly
10 been Centex's preference to have to have been
11 granted summary judgment in full rather than
12 partial. I can sympathize that the factual
13 record on that motion became somewhat unruly
14 with all of the numerous full pages of full days
15 of deposition and -- and affidavits submitted
16 after the hearing. And I can understand the
17 inclination to allow the parties to put their
18 evidence in at trial and let the chips fall
19 where they may and then take it up with this
20 stage. And -- and so that is what's happened.

21 We have a finite record before the
22 Court now and now is an appropriate time and --
23 and perhaps the ideal time to address this huge
24 part of the case. A judgment -- you know, a
25 J.N.O.V. is an appropriate time like I said, to

1 lay in on the statute of limitations defense.

2 Your Honor, I would direct you to
3 Gibson versus Bank of America, which is the
4 first case, I believe cited in my brief. That
5 was a case that was tried to verdict against
6 Bank of America. The plaintiff prevailed on
7 that to obtain a judgment and the defendant,
8 Bank of American moved for J.N.O.V. in the
9 statute of limitations. That denied and on
10 appeal the court of appeals said that was legal
11 error and reversed that and found that the case
12 was barred by the statute of limitations and the
13 trial court should have granted -- granted
14 direct verdict or -- or J.N.O.V. The -- the
15 standard there and I'll quote from Gibson, when
16 there is no conflicting evidence or when only
17 one reasonable inference can be drawn from the
18 evidence, the determination of when a party knew
19 or should have known that he or she had a claim
20 became a matter of law to be decided by the
21 trial court.

22 And getting to the specific standard
23 as to statute of limitations. The limitations
24 period begins to run when a person could or
25 should have known through the exercise of

1 reasonable diligence that a cause of action
2 might exist in his or her favor, rather than
3 when a person obtains actual knowledge of either
4 the potential claim or the facts giving rise
5 thereto. The Court continued the exercise of
6 reasonable diligence. It means simply that an
7 injured party must -- must act with some
8 promptness when the facts or circumstances of an
9 injury would put a person of common knowledge
10 and experience on notice that some right may
11 have been invaded and some cause of action might
12 exist.

13 And in -- in that case, that was --
14 I'm going to talk about several of the
15 construction cases, statute of limitations in a
16 moment. This was not. This was a banking case.
17 But -- but there, the Court looked and said,
18 look, it's a matter of notice. And in that
19 case, it was a -- a depositor had claims against
20 Bank of America that said, well my balance is
21 lower than it should be. It seemed the evidence
22 showed that the teller may have put it in --
23 into some unlawful withdrawal, some -- this
24 person's account. And they said notice was when
25 they received the bank notice in the mail. And

1 the plaintiff said, well, you know, as co-owner
2 with that with somebody, as far as I could have
3 known the -- the lower balance could have been
4 from, you know, a co-owner taking withdrawals.
5 I didn't know. They said, no, you know, that's
6 on you. That's your duty to investigate that.
7 You should have figured that out. You had --
8 you had knowledge that there was potential a
9 problem and you -- and that put -- you know,
10 with the duty to act with promptness that puts
11 you on notice of that claim.

12 In -- in -- in that one, the three
13 years after when they said that notice occurred
14 was -- they filed a lawsuit three months later.
15 And it may seem like a harsh resort -- result
16 and the court of appeals said, you know, we're
17 troubled by some of the circumstances of this.
18 I think it was an elderly person, who had
19 unlawful withdrawals from her account. But they
20 said, well, we'll constrain with the law. The
21 law is what it is. And you know, it's our
22 function to enforce the statute of limitations
23 as a -- as a matter of policy. And so that's
24 what the court -- court of appeals said. And
25 they said that that should have been done by the

1 trial court J.N.O.V. in that case.

2 In construction cases in particular,
3 there have been numerous occasions where appeals
4 courts have advised trial courts that
5 enforcement of the statute of limitations is a
6 matter of law. Another one that was -- went to
7 trial was the Dean versus Ruscon case. And that
8 one, directed verdict was granted in favor of
9 defendant on -- on statute of limitations. The
10 court of appeals reversed it and said, well, we
11 think maybe it's a factual question. The
12 supreme court said, no. They reversed that and
13 affirmed the trial court. In that case, it was
14 building down -- downtown Charleston and there
15 was some cracking of the façade. In the trial,
16 the -- the property owner, you know, the -- the
17 -- the evidence was that they were aware of
18 these cracks. And the property owner conceded
19 that she thought maybe it had something to do
20 with the pile driving activities nearby. And
21 that was the nature of her claim that she
22 brought more than three years after that. And
23 so you had the plaintiff with knowledge that --
24 you know, of the cracking, knowledge of a
25 potential problem and knowledge of the potential

1 culpability. And so it's just a matter of
2 applying the -- the statute of limitations
3 there. And the -- and the supreme court said,
4 yeah, the trial court was correct in -- in
5 granting judgment to the -- to the defendant as
6 a matter of law.

7 One thing I want to talk a lot about
8 today -- I'll just briefly talk about the
9 results is Barr versus Rock Hill. I really
10 think that may be the case most analogous to
11 ours. That was a construction defect claim.
12 The homeowner had received, per my inspection
13 reports, I think it was 87 to 90. And they
14 said, look, you've got some elevated moisture
15 problems underneath your house. You might want
16 to look into it. At trial the -- well, in
17 response to a summary judgment motion actually,
18 summary judgment was granted and affirmed in
19 Barr v. Rock Hill. And opposing the summary
20 judgment motion or in deposition, the -- the
21 homeowner said, you know, I -- I was aware of
22 those, but I just -- I didn't think it was that
23 big a deal. I didn't really understand the
24 magnitude of the problem until years later when
25 I got this structural engineer to give me a full

1 report of all the various defects that I'm
2 alleging in this lawsuit. At that time, I
3 didn't really know the magnitude of the issues.
4 And the plaintiffs relied on -- on that
5 testimony to say, well, it's a question of fact.
6 The trial court granted summary of judgment and
7 that was affirmed on -- on appeal. And -- and
8 so what the evidence showed there was that they
9 were told they had elevated moisture problems
10 underneath the house and the homeowners didn't
11 do anything about it. The Barr's -- the Barr's
12 was the homeowners. I'm quoting now, failed to
13 correct the problems or investigate further to
14 determine the extent of the problems. Ms. Barr
15 admitted that she was aware of the problems that
16 needed repair, but characterized the problems as
17 nothing of great concern. She stated that she
18 first realized the magnitude of the problem when
19 she received the forensic report in August 1992.
20 And here's the court's ruling. If the Barr's
21 had exercised reasonable diligence and
22 investigated the problems noted in the terminate
23 inspection reports, they could have realized the
24 magnitude of the problems and brought the suit
25 before the statute of limitations ran. They

1 failed to act, however, and let the statute of
2 limitations expire on any claim.

3 Another one, Republic Contracting
4 Corp versus South Carolina Department of --
5 well, I think it says S.C.D.O.T. or Department
6 of Highways. That was a claim by a general
7 contractor saying that they -- they were
8 building a connector over the -- over the -- the
9 Ashley River. And I guess there were some
10 problems with some of the pilings and the
11 general contractor brought a claim for
12 deficiencies in the plans against the design
13 professionals. And the important point there is
14 the general contractor said, well, look, we
15 don't have design professionals on staff. We
16 didn't really know -- we knew there might have
17 been something going on, but we really didn't
18 know that it was a problem or it was a design
19 deficiency until we hired a professional that we
20 relied on as our expert witness. Until then,
21 you know, it's kind of an expert specialized
22 thing and we couldn't have known until we had
23 our retained expert explain it to us. And
24 summary judgment was granted and that was
25 affirmed on appeal. And they said that they had

1 -- because they didn't know that there was a
2 problem and something was going on, they said
3 they had sufficient information no later than
4 three years before filing suit. Quote, to put
5 in an inquiry notice, which if developed, would
6 have revealed the defects in the defendant's
7 work. The plaintiff argues whether it should
8 have consulted an expert before that date should
9 have been a question of fact to be submitted to
10 the jury at trial. The court of appeals
11 disagreed with that and said, no, you had a duty
12 -- you had enough information to put you on
13 inquiry notice where you had a duty to
14 investigate who was culpable as -- as -- as you
15 allege and you've got to do that within three
16 years.

17 The last one I'll talk about here
18 and then I'll get into the -- the evidence of
19 this case is the Allwin case, that's Allwin
20 versus Russ Cooper. That's the house down in
21 Kiawah. And they had a series of leaks and
22 repairs and investigations and so and so forth.
23 The critical point there was in opposing the
24 motion for summary judgment in that case, which
25 was granted and affirmed on appeal, the

1 plaintiff said through the testimony from both
2 their expert and from the -- from the home --
3 homeowner was look, yeah, we were aware that
4 there was some water leaks or whatever, but we
5 thought we were doing the right thing. We
6 investigated it. We repaired it. You know, we
7 -- we thought it was maintenance. We thought we
8 -- we took a conversative approach rather than
9 suing. Whether or not that was the appropriate
10 tact should have been a question for the jury to
11 decide. You know, we did respond to these. We
12 didn't ignore them. The court of appeals said,
13 well, that's not the relevant question. The
14 question is, did you have notice of a claim.
15 Not whether you were, you know, an appropriate
16 homeowner by doing maintenance. And so saying,
17 well, we thought we were doing maintenance, you
18 know, because we thought it was just normal
19 building maintenance is not a defense to this.
20 If you have notice of your claim, then as a
21 matter of law, the statute of limitations
22 applies.

23 So with that background and that
24 context, I will now look at the evidence at
25 trial in this case. And Your Honor is probably

1 going to be surprised to know I'm going to go to
2 the board meeting minutes from October of 2006.
3 I've thought about that a lot. I think, Your
4 Honor, characterizes what we think is our
5 smoking gun. So that was in October 2006 when
6 the property manager told the board that look,
7 you got leaking windows and you need to hire an
8 engineering expert to see if it's a Centex
9 problem. So I'm going to talk about that in
10 detail in a minute. But before I do, I just
11 want to take two steps back just for a moment
12 and talk about the facts and circumstances
13 leading up to that time.

14 And so what the evidence showed and
15 what was admitted at trial was -- so about a
16 year and a half later -- I'm sorry, a year and a
17 half before, so this would be back to April
18 2005, there was a discussion in a board meeting
19 and this was memorialized in the board meeting
20 minutes that were a part of the case, part of
21 evidence, the caulking around the windows is
22 going bad, causing leaks. All right. So that's
23 2005 in a board meeting. And it's going bad, so
24 it's not time to replace the caulking. I mean,
25 bad. Caulking is bad is what they're saying and

1 it's resulting in a bad result causing leaks.
2 So that, at the very least, should be putting
3 the board at alert about something that's going
4 on with the windows.

5 Fast forward to about eight months
6 later, January of 2006. Again, in a board
7 meeting, you've got the owner of unit 813, I
8 believe it was, who says my window is still
9 leaking even after being caulked. So again, in
10 a board meeting, you've got caulk's not fixing
11 it. Something's going on with these windows.
12 And -- and as an aside, in those same board
13 meeting minutes, you see that the owner of that
14 813 actually became a board member. So the
15 owner of that unit came aboard at that time.

16 Fast forward another six or seven
17 months, this is September of 2006, some pretty
18 extensive building repairs are going on at
19 Wedgewood. And the evidence of that is
20 reflected in those board meeting minutes from
21 October of 2006. So that's -- that's exhibit 1
22 in the motion. Those are made part of evidence
23 at trial.

24 The Court: Where were those repairs
25 in September of 2006?

1 Mr. DesChamps: So Your Honor, if --

2 The Court: Is that from when they
3 replaced the carpet?

4 Mr. DesChamps: No, this was -- so
5 this comes from the board meeting minutes of
6 October --

7 The Court: Right.

8 Mr. DesChamps: -- 2006. And on the
9 first page, Chuck Gornick presented the
10 September 2006 financial statement. Mr. Gornick
11 stated that there is a negative variance in
12 maintenance and building repairs due to repairs
13 to building one. So that's what the evidence
14 shows that they've got a negative variance on
15 their budget --

16 The Court: Right.

17 Mr. DesChamps: -- due to some
18 repairs that are going on. And so that's at
19 building one. And then if you go to the second
20 page of those same minutes, that's when it talks
21 about updates and repairs to building one, nine
22 and eight. And that's the relevant portion
23 we're going to talk about.

24 So during this same meeting that
25 they're talking about these building repairs due

1 to the window leaks, I mean, they are told
2 repairs are going on and it's busting the
3 budget. So it's not just some hypothetical
4 thing they're talking about. This is real life
5 consequences to these buildings and to their
6 budget.

7 Okay. So that brings us to the
8 board meeting minutes that I want to focus on
9 now. And so during this, it's -- again, this is
10 October two -- 28, 2006, Chuck Gornick is the
11 property manager. And so he told the board
12 during this meeting that the double and triple
13 hung windows, there is a gap at the top of the
14 strip of the windows. It is believed this is
15 where the leaking is occurring. Mr. Gornick
16 recommended having an engineering expert look at
17 these windows to try and determine if this is a
18 Centex problem. The board recommended notifying
19 Centex that an expert would be looking at the
20 windows. Chuck Gornick stated that he would
21 keep the board posted on all developments.

22 All right. At trial, we heard from
23 Randall Spencer. He testified that he was the
24 president of the board at the time of this
25 meeting and he testified that he was present at

1 this meeting. His name is on -- on the meeting
2 minutes. And importantly, he testified yeah, if
3 that's what the minutes say, that's what
4 happened. You can expect that these minutes
5 would accurately reflect what was discussed in
6 those meetings. So we had no conflicting
7 evidence about what was discussed and what was
8 told to the board during this meeting. And he
9 said, yeah, the property manager told us, you've
10 got leaking windows. We think it's because of
11 this gap in between the -- them old windows.
12 And he conceded, yeah, he recommended to us that
13 we hire an engineering expert to look and see if
14 it's a Centex problem.

15 All right. So the -- Judge, the
16 only reasonable reading of that provision -- of
17 that passage, is that he was recommending hiring
18 an engineer to investigate and pursue potential
19 legal claims against Centex. Centex has been
20 away from this property for five years now.
21 When this says a -- see if it's a Centex
22 problem, that could only mean one thing. A
23 problem here with leaky windows for a building
24 that they're not involved with anymore was
25 exposure to legal claims. There -- there --

1 there's no other reasonable reading of that.

2 And also just as a side, look at the
3 phraseology here. It's not let's hire an
4 engineer to investigate what we need to do to
5 fix this. There's no remedial measures being
6 discussed here. It's talking about hiring an
7 engineering expert. Notice the word expert
8 being used twice here. Not let's hire a
9 contractor to fix this. Let's hire a contractor
10 to investigate this and tell us what to fix.
11 Let's hire an expert. And the whole discussion
12 here in outward facing talking about Centex.
13 It's not talking about what do we do to fix
14 this? The only reasonable reading of this is
15 okay, I think you've got a potential claim here.
16 You need to hire an expert to pursue this.

17 The standard is, did they know or
18 should have known that they might have a claim?
19 Here's the property manager telling them they
20 might have a claim. I mean, in some respects,
21 the statute of limitation of defense is no more
22 complicated than that. Did they know or should
23 they have known that they might have a claim?
24 Yes, they did in October of 2006 because their
25 property manager told them they might have a

1 claim. It's -- it's paint by numbers there.
2 It's -- it's -- it -- it's -- it perfectly
3 matches the standard that they might have a
4 claim. They were told.

5 The property manager -- let's talk
6 about what we didn't hear from Mr. Spencer at
7 trial. He didn't say, oh, that property manager
8 -- that guy was wanting to sue somebody else
9 every other day. No. He didn't say, no, we --
10 we -- you know, that went in one ear, out of the
11 next. We didn't -- we didn't really care what
12 that guy had to say. He said the opposite. He
13 said, look, we're laypeople. We hire these
14 professional property managers and we rely on
15 their expertise, their experience and their
16 advice because that's what we hire them to do.
17 And so what you have here is the trusted source,
18 the person that they can see, they should listen
19 to telling them, you need to hire an engineering
20 expert to see if it's a Centex problem.

21 And we also see that the -- the
22 response of the board there is memorialized in
23 the -- in the meeting minutes. The board said,
24 yeah, let's let -- let's let Centex know. So
25 they agreed. And so really like I said, if you

1 look at just kind of in the first of this, did
2 you know or should -- or should you have known
3 that you might have a claim? Yes. Because your
4 property manager told you, you were.

5 So there's also what Mr. Spencer
6 also testified was, well, I don't think we did
7 anything in response to this. Did you hire an
8 engineering expert? Did you notify Centex? He
9 said, no. No. He -- and he testified -- he
10 told me this in his deposition, I said, well,
11 being you -- you admit -- you said that the
12 whole thing could have just been dropped.
13 Right? He said, again, that's right. And so
14 that's what the evidence is.

15 And so -- but the -- but the statute
16 of limitations standard is not, did you know.
17 It's did you know or should you have known after
18 reasonable diligence? And that is really an
19 important part of this beyond what I think is
20 the first argument, just it's as clear as did
21 they know? Well, yeah, they did know because
22 they were told. But here, there is also a
23 secondary part of this where you have a duty to,
24 quote, act with some promptness. And the courts
25 have really enforced that.

1 And so that -- when it goes back --
2 I go back to the Barr versus City of Rock Hill
3 case. If the homeowners had reasonably -- or
4 had timely investigated by exercising reasonable
5 diligence, they would have discovered the claim
6 within the statute of limitations. Or go back
7 to Republic Contracting versus South Carolina
8 Department of Highways and Public
9 Transportation. They had reasonable
10 information, which if developed, they would have
11 revealed the defects that they were alleging
12 more than three years later. And so I think
13 through these board meeting minutes, I have it
14 both ways. Did they actually know or should
15 they have known? Well, yeah. Because the
16 person they're trusting and counting on told
17 them that they might have a claim. But even
18 more so or in addition to that, did they have
19 some duty to act in response to that
20 recommendation? And the -- and the courts have
21 made it clear that they did because -- well,
22 let's talk about what actually happened when
23 they finally filed suit more than 10 years after
24 this.

25 All they said was, yeah, well, we

1 had some building repairs and so the property
2 manager recommended that we hire a lawyer. And
3 -- and -- and then the lawyer hired a forensic
4 building inspector. And you know, we didn't
5 really talk to him, but he came out and found
6 everything you could. And that's what led to
7 the lawsuit. It's the same thing that happened
8 in 2006. The only difference is in 2006, they
9 ignored the advice to hire a professional to
10 look into it. In 2016, they acted on the
11 advice. All the other circumstances are the
12 exact same. I mean, the clear evidence at trial
13 is, if they would have just acted and done what
14 the property manager recommended that they do in
15 2006, they would have hired the engineering
16 expert to look at the windows and the claim
17 would have been discovered.

18 And think about what they were
19 actually talking about. Water intrusion in the
20 mullins of the gang windows. Well, we -- we all
21 saw at the trial, that was the issue. That was
22 the most important issue that all of those
23 photographs of the wood rot right under the
24 molding, under the windows. That's photograph
25 after photograph. It was there. No question

1 about it. That was precisely what was being
2 discussed in 2006. And so this is just -- it's
3 right on the nose.

4 And -- and then getting well --
5 okay. Well, we didn't -- we didn't know of this
6 claim until, you know, we hired the lawyer. The
7 lawyer told us to hire the -- hire the -- you
8 know, hire the forensic expert. You know, maybe
9 we should have done that earlier. Maybe we
10 shouldn't have. But that's a question for the
11 jury to -- to decide is what -- what you may
12 hear and respond. But the courts have already
13 said, no, that is not it.

14 That goes straight back to what I
15 mentioned earlier, Republic Contracting. The
16 question of well, should we have acted sooner or
17 not -- you know, let's -- let's call that -- we
18 put that to the jury. You know, that's a
19 question of fact. And that's not what the law
20 said. That's crystal clear between Barr v. Rock
21 Hill and Republic Contracting versus South
22 Carolina Department of Highways, that that's not
23 a question of fact. It's that first notice that
24 puts them on legal notice to bring the claim
25 within three years. And so the -- so the law is

1 clear on that.

2 And so Your Honor, I think really
3 just through that, I mean, you're being told in
4 2006, hey, you might have a claim, that goes --
5 just those facts and the -- and the context
6 around that, the repairs and the knowledge of
7 the leaks before that and then being expressly
8 told, you've got problems, you might have a
9 claim, you need to investigate it. And then
10 failing to do that for -- bringing the claim --
11 the case 12 years later is -- is -- that's the
12 statute of limitations defense. And so I'm
13 going to continue because there are things that
14 happened after that. But that alone is right on
15 the button. That is the statute of limitations
16 defense. That is the trial court's duty to
17 enforce the statute of limitations here on that
18 recommendation. Hey, you need to hire an
19 engineering expert because you -- you need to
20 see if this is a Centex problem. A/K/A you need
21 to see if you can sue Centex. And that's the
22 only thing that provision could mean. And at
23 the very least, put them on a duty to
24 investigate that and act on that. Barr failed
25 to act. Republic failed to act. The plaintiffs

1 here have failed to act. All three of them as a
2 matter of law, the statute of limitations
3 applies.

4 Okay. Let's continue. The next
5 piece of evidence I want to talk about just
6 quickly, at the end of the following year, 2007,
7 the evidence shows, we put in evidence of the
8 yearend financial reports of the H.O.A. In an
9 operating loss -- an operating loss of 50 -- of
10 53 -- nearly 54,000 dollars. I mean, that's --
11 and it shows -- you can -- it's all in there.
12 It's an outsize expenditures that year for
13 maintenance and repairs. And that's -- you
14 know, an H.O.A. can't even operate too long
15 having an operating loss. I mean, here's one of
16 50,000 dollars, so again, that's further notice
17 that things are not going the way they should.
18 I mean, this -- the alarm bells should be going
19 off.

20 Let's continue to 2010. The
21 evidence shows that they spent over 87,000
22 dollars replacing the exterior trim on these
23 buildings. And you may remember there's a lot
24 of testimony, I put in a lot of evidence of
25 their reserved replacement schedules and -- that

1 -- that anticipated schedule for when they're
2 going to replace these building -- various
3 building components. The exterior trim was
4 supposed to last 50 years. I mean, they have
5 notice there that they're spending 87,000
6 dollars way before they're expected schedule for
7 replacing that exterior trim. Something's going
8 on there. And again, that is precisely one of
9 the things they're complaining of in the case.
10 We heard a lot about the, M.D.F. trim, the --
11 the decolorization on the exterior trim from
12 Mr. Clements. He said that stuff is taking in
13 water. It's -- it's deteriorating. That
14 shouldn't happen. Well, that's exactly what
15 happened. I mean, they're replacing that trim
16 eight years before they -- before they brought
17 suit.

18 Of course, we had a lot of
19 testimony, claimed damages about the front
20 walkways. Well, what the evidence showed was
21 that they started having -- well, they had
22 problems with that walkway well before three
23 years before bringing suit. Put into evidence,
24 and this is all in the memo and -- and the
25 invoices are -- are the part of evidence and

1 part of my memo. December 2010, they spent
2 2,300 dollars in repairing -- lifting up the
3 carpet and repairing rotten wood under the --
4 under the front walkway carpet.

5 January 2012, they spent 12,595
6 dollars. This is in all nine building replacing
7 all of the ceilings within those walkways. And
8 it says damaged dry wood and damaged exterior
9 within there. And again, you look at the --
10 you're looking at the actual invoice. It talks
11 about deficiencies and damages. I mean, you're
12 on notice that that's not some routine
13 expenditure. It's responding to something that
14 is wrong. Also if you look at the replacement
15 schedule that is in evidence, the schedule for
16 how long those ceilings should last was 15 years
17 after -- after being in place. This was way
18 before that. So again, you have notice that
19 these expenditures are not normal routine
20 maintenance. Something -- the alarm bells
21 should be going off. Something's going on with
22 water intrusion around these front walkways.

23 February 2013, over four buildings,
24 plaintiff spent 8,195 dollars to remove and
25 replace rotted flooring, remove the rail post,

1 put in new waterproofing membranes. Again, that
2 is -- it's -- it's clear from reading the
3 invoices, they had notice this was something
4 responding to a problem. It's repairing damage.

5 The same thing the following year,
6 4,220 dollars, May of 2014. Same thing. You've
7 got notice of -- notice of problems that are
8 occurring and they're having to spend money out
9 of schedule to repair them.

10 The plumbing around the same time,
11 2012, the court agreed and granted partial
12 summary judgment on the plumbing around the same
13 time. They're told, hey, you've got a reverse
14 pitch on one of these plumbing lines. You need
15 to hire somebody to investigate it if this was a
16 problem with the builder. I mean, it was
17 clearcut. You know, there -- they're saying,
18 you got a problem, maybe it's Centex's --
19 Centex's fault. So again, this is all well
20 before three years before. Now, we've moved
21 past just the clear recommendation and clear
22 notice of windows, water leaks. Now you've got
23 other problems and they're all mounting. And
24 again, if these other issues I'm talking about
25 should be covered with the context that they

1 already knew and we already knew they knew, that
2 if there is problems, Centex is the party you
3 should be looking at. Because they were told,
4 look, you know, you need to investigate whether
5 these problems are -- or these issues are Centex
6 problems. So these later repairs and these
7 later issues that should be viewed under that
8 context as well.

9 Okay. They're making repairs. You
10 know, the -- the gentleman, says, well, we --
11 you know, we had a problem so we fixed it. We
12 didn't think about it too much more than that.
13 But that goes back to an all-in fee with Russ
14 Cooper that, you know, maybe they were -- not
15 ignoring those, like they ignored what happened
16 in 2006. They were making the repairs, but that
17 is not means to evade the statute of
18 limitations. The court of appeals has been
19 clear on that. It -- it's not whether or not
20 you're responsible in making the repairs or
21 doing maintenance or if you thought it was
22 maintenance of whatever. It's that you have
23 notice of a claim. And so on these, that's real
24 similar to Barr as well. Think about in Barr
25 the evidence wasn't the annual termite

1 inspection that said hey homeowner, you've got
2 -- you've got a defect and you need to sue. It
3 said, hey, you've got some water intrusion
4 problems -- or not water intrusion. You've got
5 some elevated moisture problems underneath the
6 house. You should do something about it.
7 That's the same thing as basically these
8 repairs. Hey, you've got -- you need to replace
9 the ceilings. You need to replace the walkways.
10 You know, nobody in Barr told the homeowners
11 you've got a construction defect or you've got
12 reserved lap or you've got a in--- incorrect
13 application. They're saying, you've got
14 elevated moisture. Just through that and it was
15 three years in a row and -- and they said
16 through that you've got a duty to investigate.
17 The fact that you didn't do anything about it
18 and you didn't investigate. You had notice of
19 the claim, you didn't act on it. And you can't
20 get out of the statute of limitations just by
21 saying, well, we didn't really know until we got
22 our expert's full report years later. So more
23 of the same and that's really -- fits in pretty
24 cleanly with Barr, these later repairs that
25 continued to -- to occur.

1 The -- as -- as I mentioned earlier,
2 you recall that when we did have this -- when we
3 did have the summary judgment hearing and motion
4 last year, Your Honor did rule that they knew or
5 should have known and no later than November of
6 2012, that they had notice of a claim of the
7 plumbing. And you also ruled that some of the
8 alleged -- or one of the alleged defects was
9 open and obvious and so they had notice of that
10 claim. So the -- Ross Clements was the person
11 who investigated the plumbing claim and the
12 person who investigated the buildup curbs ramps,
13 the open and obvious defect. And the
14 plaintiff's presented all of those -- all --
15 those two together with all the other defects as
16 a single claim, a single claim for gross
17 negligence. And then they just hired one person
18 to investigate it all and presented all of those
19 together as a -- as a single claim.

20 And so when finding that -- when
21 making the finding that they should knew or
22 should have known of the plumbing claim and the
23 open and obvious defect claim, that is a finding
24 that they knew or should have known of their
25 claim in this case. And the way that the courts

1 address these construction defect claims is they
2 don't, you know, roll up their sleeves and say,
3 okay, let's lay out all the different claim
4 defects and let's look separately on which date
5 the plaintiffs knew or should have known each of
6 these claim defects. That's not the way that
7 they approach it.

8 And another example of that is the
9 Barr case I keep discussing. The termite
10 inspection reports that the Court found gave
11 notice to the claim. As I said before, all it
12 said was look, you've got moisture issues
13 underneath the home. It wasn't years late --
14 until years later they hired a structural
15 engineer that detailed a lot of different
16 problems. Some of them had nothing to do with
17 moisture. It was structural issues. It was
18 issues with floor joists -- structural issues.
19 And the Court didn't say okay, well, maybe your
20 moisture claims are, but not your other ones
21 because they're different. The whole claim was
22 barred because that was the way it was presented
23 and the same thing has happened here.

24 So for the reasons I've gone through
25 in detail, I think that the claim began to --

1 notice of the claim began in 2006. But here, we
2 do have a judicial finding. It wasn't appealed.
3 It was immediately appealable. It wasn't. It's
4 the law of the case that -- that they did have
5 notice of their claim, the plumbing claim and
6 the -- and the other and no later than November
7 of 2012. So again, that's one more -- one more
8 reason why the statute of limitations does apply
9 here as a matter of law.

10 Okay. So -- so of course, there are
11 some cases that say, well, application of the
12 statute of limitations can be a question of the
13 fact. Of course, it can be. It depends on the
14 facts. One that came out a couple of years ago
15 is the Stone Ledge case. In that case, the
16 defendants did move for directed verdict. They
17 included it in their -- in their series of
18 directed verdicts, hey, also statute of
19 limitations.

20 Now, one thing that the supreme
21 court makes clear in that, they didn't even
22 charge the jury on statute of limitations
23 anyway. It was not a big part of the case. It
24 was an also throw in -- and a directed verdict.
25 The evidence that they were evaluating there and

1 whether or not it was, you know, statute of
2 limitations of the matter of law. Okay. So it
3 was a -- it was a horizontal property regime.
4 It was a condo case like this. A homeowner has
5 testified, yeah, I -- I -- you know, I -- I did
6 know that there were some -- some moisture
7 issues. You know, I looked up and I saw some
8 standing in my ceiling. Okay. And did you tell
9 the board that? Yeah, I think I did. I said,
10 sure, yeah, that's a question of fact. I mean,
11 they didn't even pursue it. And that's a
12 totally different set of facts than what we have
13 here. And so it's not just Stone Ledge said,
14 oh, no, the statute of limitations doesn't apply
15 to construction defects claims. Of course, they
16 didn't. I mean, they said, look, the facts here
17 weren't so one-sided that the only reasonable
18 conclusion is the trial court must find that the
19 statute -- statute of limitations applies as a
20 matter of law. So it's a pretty limited ruling
21 and -- and based on facts that just simply don't
22 apply here.

23 Another one is the -- the Hollywood
24 case. That -- that was a property regime case.
25 There -- there were some issues with -- I think

1 it was something like a drainage issue and part
2 of the pool complex years before. You know, the
3 -- the H.O.A. was told it's got some issues with
4 these unrelated components of the property.
5 Years later, they filed suit, so the defendant
6 said well, you -- you were told earlier you had
7 these problems. And so they said, yeah, but
8 that's -- that's totally unrelated. That's
9 something to do with the pool and some kind of
10 -- I mean, you know, foundation issue. I mean,
11 it was just unrelated. And in -- in opposing
12 the -- this statute of limitations, the defense
13 in that case, the expert for the plaintiff said
14 well, yeah, I -- I actually did know about that.
15 The things I'm talking about are just unrelated.
16 And -- and they went so far in that case to say
17 plus, we concede, we're not -- we're not seeking
18 damages for anything except for what's occurred
19 in the prior three years. And so they went out
20 of their way -- that evidence is not in trial
21 here. Here they were -- you know, restricted,
22 restrained their damages model to only things
23 that happened during those three years. And so
24 it's just a totally different, you know --
25 clearly a different thing.

1 As I talked about earlier, the
2 primary issue in this case was a very specific
3 issue with the molding in between the windows.
4 And -- and those -- those board meeting minutes
5 in 2006 just couldn't be more of a notice of
6 precisely what was -- what was at issue in the
7 trial and what was being discussed in that -- in
8 those board meetings back in 2006.

9 So one, you may recall there was a
10 lot of discussion about this case last year
11 during our summary judgment motion. It was a
12 district court case. I think it was Judge
13 Wooten if I remember correctly. Centex was the
14 party opposing the summary judgment. And I take
15 it that they made -- continued to bring up this
16 case because this Centex, you know, seeking
17 summary judgment here and seeking to opposing
18 there -- and thinking that, you know -- may be
19 some inconsistency. Of course, it's not. I
20 mean, it's a different set of facts. I mean,
21 the party can pursue a legal theory in one case
22 and defend against it in another. I mean, it's
23 -- obviously, it's a -- a totally separate set
24 of facts. I'll talk about the difference in
25 those in a minute.

1 But it's worth reminding too this
2 was a federal district court opinion denying a
3 motion for summary judgment. I mean, it's not
4 -- you know, it wasn't a important decision for
5 the court of appeals laying out some body of
6 law. I mean, it was just Judge Wooten saying,
7 oh, I've got to grant summary judgment here.

8 But in that case, it was -- what was
9 at issue was Centex was pursuing indemnity
10 against the subcontractor for damage that
11 occurred to buildings one and three. Well, they
12 knew -- I think it was building three, one to
13 three years before. But the question was
14 whether or not -- basically, whether or not they
15 should have known, through the knowledge about
16 building three, that the claim about building
17 one -- you know, should they have proceeded
18 before that. And so -- but the key distinction
19 here is Centex submitted evidence to show that
20 there was conflicting evidence about their --
21 you know, whether or not they should have --
22 should have known about -- if there was going to
23 be damage to building one more than three years
24 before. And that was through them saying, well,
25 there are more than one way to properly, you

1 know, flash a building. There was no evidence
2 of any problems at building one at the time that
3 they were -- did have this knowledge of building
4 three. And so you know, there was good reasons
5 to think that it was not -- at the time, that it
6 was not going to happen to building one. And so
7 it was just a very developed factual issue where
8 it was -- it was a conflicting -- and it -- it
9 was something that Judge Wooten said, well, at
10 the very least, I'm -- you know, I'm not going
11 to kick it on summary judgment.

12 Obviously, you didn't have what we
13 have here, somebody saying you might have a
14 claim and then they didn't bring a -- you know,
15 you might have a claim. You need to hire an
16 engineering expert to see if it's a Centex
17 problem. And they know it's 12 years later when
18 this suit is filed. So I mean, it's just a --
19 there's so many cases more on the point that it
20 -- you know, looking at this completely
21 factually distinguishable case from the federal
22 district court denying a motion of summary
23 judgment. Just it doesn't make a lot of sense.
24 And again, I think the reason it keeps coming up
25 is just because Centex happened to be the party

1 opposing summary judgment in that case. But
2 it's -- it's -- it's really no inconsistency
3 there.

4 The special limitations and -- and
5 this kind of goes back to the Gibson case I
6 talked about first. I mean, sure, can it result
7 in what might be perceived as a harsh result in
8 an individualized basis? Perhaps. But the
9 courts are clear. I mean, it is a public policy
10 to enforce this.

11 And according from State v -- State
12 v. McClinton, the S.O.L., the statute of
13 limitations, is designed to promote justice by
14 forcing parties to pursue claims in a timely
15 manner. The parties should act before memory is
16 dim, evidence grows stale or becomes
17 non-existent or other parties act in reliance on
18 what they believe is the subtle state of -- of
19 affairs.

20 Another case and it's Port -- Santee
21 Portland Cement case. One policy underlying the
22 statute of limitations is to protect defendant
23 from false claims that might be difficult to
24 disprove if -- if -- if brought after relevant
25 evidence or witnesses are no longer available.

1 I can't think of a more apt description of
2 what's been heard here.

3 And the nature of these construction
4 defect claims against the developer and general
5 contractor is because, you know, there are
6 implied warranties and there are -- I mean, you
7 heard plain--- plaintiff's counsel describing
8 it. We're the general contractor. We're the
9 general, the five-star general. The buck stops
10 with us. There's a presumption that anything
11 that is found to be wrong with the building is
12 the responsibility of the builder or developer.
13 And then the burden kind of shifts to us to try
14 to disprove it. And the -- the longer the
15 building has been in place and the more hands
16 that have touched it, the more that the -- the
17 plaintiff is responsible for the maintenance.
18 We heard -- you know, of course, you heard a lot
19 of evidence about, should they replace the
20 membrane at the same time they replaced the
21 carpet? And should they have re-caulked or
22 should have act in response to being told that
23 they have this window intrusion? Those type
24 things, the more the building is in place, the
25 -- the more we need to look to the -- the

1 history of the buildings to -- to try to, you
2 know, bring in additional evidence about our --
3 to help in defense. But at some point, it
4 becomes impossible. You've got, you know,
5 people move on. People die. People say, well,
6 that was 15 years ago. I don't know. I mean,
7 we -- the lengths we went to, to try to find
8 people to talk about some of the evidence of
9 this building maintenance and repairs is, you
10 know -- so many of the repair contractors were
11 dead.

12 And then think about the -- think
13 about some of the evidence at -- at trial. We
14 put in evidence of a building inspection report
15 from the -- from the city inspection. And then
16 plaintiff's counsel takes that same piece of
17 paper and says, look, it's only that one
18 building. Must not have happened at the others.
19 If so, they would have showed you that. Well, I
20 mean, that happened 20 years ago. And -- and
21 think about what happened in that 20 years. I
22 mean, this was at a time when there was no
23 digital repository of documents. There was no
24 email that everybody can just, you know, send it
25 to a -- you know, e-discovery team and

1 everything is pulled like magic. I mean, these
2 -- this was 1999, 2000. Different -- different
3 society back then and everything was hard
4 records. And we know, I mean, it's -- it's
5 hard. I mean, things are not going to -- you're
6 not going to keep these records for forever.

7 And here's just a perfect example of
8 -- of prejudice being born by the defendant
9 because of the time between when they should
10 have brought the case and when they did. Skip
11 Lewis, he was responding -- he's the structural
12 engineer and he was trying to respond to Ross
13 Clements saying, oh, well, yeah, I think all of
14 these structural are -- are needed because I
15 found this document. You know, these -- these
16 are the plans. And Skip Lewis says, it's not
17 really how a structural engineer would evaluate
18 this. You -- you have to look at the shop
19 drawings. You'd have to look at the
20 correspondence with the -- with the -- the
21 designer of the -- you know, the -- the trust
22 designer, shop drawings, the structural -- like,
23 that's not how things are done. And then on --
24 on cross, he said, yeah, but you didn't do any
25 of that. And he said, well, I don't have the

1 documents. It's been too long. I mean -- and
2 so again, it's just more prejudice of -- of
3 Centex's inability to defend this in the way
4 they could have and would have if this was
5 brought in 2006.

6 Final one, the -- the biggest --
7 clearly, the biggest issue here was the
8 photographs of the -- of the wood rot. I mean,
9 nobody likes to see that. And the jury
10 certainly -- it appears they didn't either.
11 This is expert testimony and it's just common
12 sense. I mean, that doesn't happen overnight.
13 This was slow, progressive water intrusion. The
14 longer the building sits out there, the more a
15 problem is going to result and -- and more and
16 more weather wood rot.

17 And so again, it's -- it's almost --
18 it would be like if you are a personal injury
19 claim and you said, well, let's -- you know,
20 let's get 20 years of medical bills before
21 filing suit instead of three years. You know,
22 it's -- it's going to be a -- more demonstrable
23 damages the more you get -- the more the
24 building is out there before it's fixed.

25 I mean, we know in 2006, they're

1 saying you've got the window leaks. You've got
2 -- water is coming through -- through those
3 windows. You need to do something about it.
4 They didn't. And so you've got, you know, 17
5 years of water intrusion through those windows
6 that occurred rather than if they had brought
7 suit within three years of being told, it'd be a
8 totally different building that would have been
9 investigated if that was brought.

10 And so this is the policy of it.
11 It's important. You know, we -- we've got a
12 statute of repose here, but you can see that
13 there are some exceptions to that, that -- that
14 make it, you know, where -- look the statute of
15 limitations, Your Honor, I think is an important
16 guardrail to not having just a -- this unlimited
17 liability if you're building a building in this
18 state.

19 You know, if -- in a certain
20 scenario, if the homeowners had no idea, okay.
21 But here, it's -- it's -- it couldn't be more of
22 an opposite set of evidence here. I mean, they
23 were told exactly in 2006, look, you've got
24 window leaks. You've got problems. You're
25 spending more money than you have. You need to

1 hire an engineering expert and you need to
2 figure out if -- if this is a Centex problem.
3 That can only mean one thing, they had -- they
4 had notice of this claim way more so than the
5 four or five cases I talked about before that
6 did find as a matter of law, that the statute of
7 limitations applied. And if those cases where
8 statute of limitations is the matter of law, it
9 -- it's clear -- clearcut that this one is. So
10 Your Honor, I -- I would -- I would employ your
11 -- I would respectfully request that J.N.O.V. be
12 granted here on the statute of limitations.
13 Thank you.

14 The Court: You want to go ahead and
15 respond?

16 Mr. Connell: Your Honor, I got the
17 brief last night about 5:00. So I put something
18 together for you Your Honor. I've given it to
19 them. This is my little memorandum, Power Point
20 presentation.

21 The Court: Thank you.

22 Mr. Connell: So I think it's
23 probably best that I think it's probably best
24 that I start out with the standard of review
25 that the Court has to consider. And as Your

1 Honor knows, you've been a trial judge long
2 time, you're supposed to give difference to the
3 jury. It's the duty of the court to sustain the
4 verdict and all inferences must be in favor of
5 the non-moving party. And there's substantial
6 difference on the issue of damages.

7 And so in this case, Your Honor, as
8 you probably remember after five days of sitting
9 here, we asked the jury for \$9,376,719.85. The
10 jury awarded 6,750,000 dollars, a difference of
11 2,626,719.85. So -- and it was on the actual
12 damages. So Your Honor, his argument as you
13 know, the Court charged the statute of
14 limitations defense. We don't know how the jury
15 came up with these numbers. It was not a full
16 verdict. Certainly, the jury could have taken
17 in consideration some of these statute of
18 limitations issues by finding that some of these
19 monies were not owed.

20 And so we would first say to the
21 Court that -- that the Court should have
22 difference to the decision of the jury. They
23 did not give a full verdict. And -- and as Your
24 Honor knows, they did give punitive damages. So
25 I -- I think that's important because the jury

1 certainly sat there for five days. They
2 listened to the evidence and testimony. And
3 they didn't give us everything we wanted. So
4 they did give the defendants something that they
5 wanted, which was a reduction of the amount that
6 -- that -- that we thought was unwarranted.

7 So I mean, there is a 2,626,000
8 dollar difference. And -- and we don't know how
9 they came up with that. And -- and Your Honor,
10 wouldn't have to worry about it. We do know
11 they did that. They listened to the law
12 obviously. And -- and without giving away
13 anything on the statute of limitations, they
14 certainly could have said, hey, we find these --
15 some of these problems are not -- you know, you
16 can't win on.

17 So we would also point out, Your
18 Honor, that there was testimony -- and I know
19 Your Honor wanted the transcript. I've done
20 this a long time and I've never had a transcript
21 in any of these cases ever. It's just not
22 available. You can't get it. And so our
23 remembrance of the testimony may be somewhat
24 different than theirs.

25 But we would offer that -- that

1 there was testimony from the expert witness.
2 And that's Ross Clements and he testified,
3 quote, the latent construction defects I found
4 are far broader in scope and not tailored to
5 specific repairs previously met at Wedgewood
6 that are cataloged in the motion for summary
7 judgment. And that was part of his testimony.
8 And he also testified that you couldn't find any
9 latent defects unless you did destructive
10 testing.

11 Now, important in all of that, Your
12 Honor, is -- is that the Power Point
13 presentation shows you 10 different sets of
14 problems. Exterior walls, roofs, walkways,
15 stairs, attics, sheer walls, floor/ceiling
16 assemblies, accessibility, vapor barrier and
17 window installation. And Your Honor, we would
18 submit to you that any combination of those, if
19 they don't include the windows, that that's they
20 argue about, would be an equal of 6.75 million
21 dollars. So obviously, there's a discrepancy as
22 to what they say about the windows versus what
23 happened to the rest of them.

24 I -- I would also point out, Your
25 Honor, that -- that the -- that Mr. Spencer

1 testified -- he's testified he didn't remember
2 about that particular note that, Your Honor, has
3 -- that so much has been talked about. He
4 testified that the board of direct--- directors
5 was worried about maintenance. They always did
6 stuff with maintenance. He testified that
7 maintenance was important. He testified they
8 spent 156,000 dollars in one year on
9 maintenance. He testified that they wanted to
10 make sure that all of the maintenance problems
11 were -- were solved. So you know, Mr. Spencer's
12 testimony coupled with Mr. Clement's testimony
13 that there was -- that you couldn't -- couldn't
14 find latent defects is really important in the
15 case.

16 And so at the end of their argument,
17 Your Honor, what they talk about is they finally
18 come to the -- they -- they cite all of these
19 cases, but they come to the two cases that are
20 the most important for Your Honor to consider.
21 The Stone Ledge case and the Hollywood's case.
22 The two cases about construction defects were
23 association people saying we didn't know that
24 this problem related to this problem or there
25 were different problems. And in both of those

1 cases, the supreme court and the court of
2 appeals affirmed the fact that that was an issue
3 for the jury to decide. And in fact, in the --
4 in the Centex court of appeals case, the -- the
5 Court said and I quote, latent defects might
6 give rise to a cause of action. So that's the
7 -- that's the 2018 Cen--- Stone Ledge case
8 that's been going on for years.

9 The Hollywood's case is really
10 informative for Your Honor. I -- I'm sure
11 you've probably looked at it. The same thing
12 that happened in this case happened in that and
13 in the other one. And that -- and that case,
14 the Hollywood's plaintiffs got a verdict of
15 971,000 dollars actual damages. And they got it
16 -- got it based on code defects. And no
17 punitive damages. And the Court said in that
18 case, that they had a -- a difference of opinion
19 as to what problems were caused by what and how
20 they knew about those. And they said in those
21 type situations, you always let the jury decide
22 that. And so both cases were affirmed, the
23 Stone Ledge and the Hollywood's case.

24 Now, the Centex case that -- that is
25 cited Your Honor, in my memorandum, it's quite

1 interesting because it actually deals with
2 Barefoot. The Centex people paid the Edgewater
3 Homeowner's Association. We don't know what.
4 It's a secret settlement. And then afterwards,
5 they decided later on, some six or seven years
6 later, they're going to go after the -- the
7 plastering company. And the Court said, you
8 know, that you certainly could do that. And
9 they used the same arguments they're using
10 against us here.

11 In fact, the case that was just
12 cited, the Santee Portman case, in that case the
13 -- the -- some sort of -- a silo was built in
14 1965 and 25 years later, it collapses and people
15 died. And the district court said, you know
16 what, this is a situation where it was a latent
17 defect, you couldn't have known. And by the
18 way, Centex, you win your motion for summary
19 judgment and you can proceed on in your case
20 against S.C. Plastering.

21 So the J.N.O.V. part of the case,
22 the evidence has got to -- it's got to yield
23 more than one inference. And in -- and in this
24 case and with the testimony that was brought,
25 that their exterior walls, roofs, walkways,

1 stairs, attics, sheer walls, floor/ceiling
2 assemblies, accessibility, vapor barrier, window
3 insulation and the testimony of Mr. Clements in
4 great detail that these problems were different.
5 That all goes to the Pillar Woods case and it
6 all goes to the Stone Ledge case.

7 Let me see here. Also Mr. Clements
8 said, a gap in a window doesn't mean that you'll
9 have defective construction below that and the
10 homeowners couldn't know. And there are 11
11 buildings here and that was only found in two is
12 what I understand, what I remember.

13 There were some discussion about
14 deposition testimony. Of course as, Your Honor,
15 knows, deposition testimony is not testimony for
16 a trial. There were some argument about
17 financial records and that the homeowner's
18 association would have a loss. That doesn't
19 show that the homeowners knew anything about any
20 hidden damage. If someone had known about
21 that -- all homeowner's association that I have
22 been involved in have a zero budget.

23 Then there's the other things that
24 were testified to, Mr. Clements and the
25 homeowner's representative both test---

1 testified that yeah, we did some trim work and
2 we did this other work. We were performing what
3 we thought was normal maintenance on the
4 project. So there was never an admission by any
5 -- by Randall Spencer that he knew about that
6 particular homeowner's minute. He said he
7 didn't remember that. In fact, if you look at
8 the next minute in the next meeting, he says
9 something of the effect that I found out by the
10 way, that those windows, there's a warranty on
11 them and you can get new windows. So -- and
12 there was no testimony of the homeowner's
13 association management person that he knew or
14 had -- that there was anything -- anything he
15 could offer about that. There was no testimony
16 about that.

17 So I -- I think when you come -- and
18 when it comes down to it, it's the testimony of
19 Mr. Clements and the testimony of Mr. Spencer.
20 Mr. Clements in his Power Point presentation,
21 which you have Your Honor, attached to my
22 memorandum, that lists all of the various
23 problems besides the windows that had been
24 talked about. And all of those -- and then you
25 of course, have the expert's opinion as to value

1 of the damages. And when you take all of that,
2 it's -- it dovetails right into where the jury
3 found 6.75 million dollars.

4 So we would ask Your Honor to deny
5 that. You've -- you've already -- we already
6 argued this at nauseam. You heard this last
7 year in September.

8 The Court: I've heard it at the
9 summary judgment motion stage. I heard it at
10 the first directed verdict stage. I heard it at
11 the second directed verdict stage.

12 Mr. Connell: You've heard it --

13 The Court: So this is the fourth
14 time.

15 Mr. Connell: You've heard it --
16 you've heard it so many times. And I -- so I --
17 I've attached -- I did attach all -- I did
18 attach the affidavit of Mr. Spencer. I did
19 attach the affidavit of -- of the plaintiff's
20 expert, you know, both to the -- to my motion
21 and my -- my response. I just don't think that
22 based on the case law and I mean -- the other
23 thing is you might consider this, in the Stone
24 Ledge case, the jury -- the jury was asked for
25 6,350,000 dollars. And I know you probably

1 haven't read this.

2 The Court: And they came back with
3 a verdict of five million.

4 Mr. Connell: Right. And so one of
5 the arguments is, hey, we gave you some credit
6 for what happened. You might know about
7 buildings one, eight and nine, but you didn't
8 know about the other seven buildings. And so
9 this verdict is exactly in the middle. It's a
10 value dispute, if you will, between the parties
11 as to what the number was. You remember
12 Thompson -- Thompson, the great argument was
13 well, we don't owe anything, but if we do, we
14 owe 389,000 dollars, you know. And -- and so
15 you know, it's good lawyers playing both ends of
16 it. Don't give them anything, but if you have
17 to, give them 389. Almost an admission, if you
18 will, that you should give them some money.

19 And then the other thing and -- and
20 Your Honor, sat through all of this, I won't go
21 through all the testimony again, but not one
22 person, not one person, not their experts, not
23 my expert, not their H.O.A. repre--- not
24 Centex's representative said, oh, that yeah, we
25 had code defects. We had manufacturing

1 specifications and we had the industry
2 construction standards. And so they all admit
3 in the testimony that we had all of these
4 problems, which says -- Your Honor, knows goes
5 to the statute of repose argument you're going
6 to hear sometime, I guess later on. But it just
7 goes to -- they all admit that these were
8 problems all the way through.

9 And then of course, they want to
10 talk about a smoking gun. How about the email
11 that -- how about the letter between the two
12 experts about the vapor barrier. Oh, by the
13 way, this is a big deal. It's a lot of money.
14 I asked their expert on cross-examination if
15 it'd be worth more than five million dollars.
16 Yeah, maybe. It's a lot of money. So I mean,
17 the point is, is that the statute of limitations
18 issue was clearly an issue of fact with all the
19 testimony that Your Honor heard. And Your Honor
20 has heard it over and over.

21 The Court: Like to respond?

22 Mr. DesChamps: Very briefly. I had
23 said this is what I want to -- my first. The --
24 the concept that well, maybe they were
25 attributing the statute of limitations to some

1 production that we've known. That just doesn't
2 square with the -- really the Barr case where as
3 I mentioned, it was -- summary judgment was
4 affirmed against them even though a lot of what
5 the retaining expert, in his detailed expert
6 report identified with the plaintiff years
7 later, wasn't a part of that initial notice of
8 the moisture issues underneath the house. So it
9 under his argument that Mister -- Mr. Connell is
10 making it, that the ruling would have been okay,
11 well, we're going to -- we're going to affirm
12 summary judgment as to the moisture issues, but
13 we're going to let the case go forward on the
14 others. That's not what -- what was done there.
15 It was total summary judgment was affirmed as to
16 the whole claim even though some of them weren't
17 specifically part of the prior notice.

18 And over and over again, when
19 reciting the -- the standard, you know, fact of
20 the law and statute of limitations, you see over
21 and over again, the fact that the plaintiff may
22 not have comprehended or was aware of the full
23 extent of their damages, immaterial. And so
24 it's notice of a claim, it's not -- we don't
25 have to show a one-to-one absolute perfect, you

1 know, prior notice three years before filing
2 suit to each one of these defects in order to --
3 in order to have summary judgment. So the --
4 the -- the -- the case law just doesn't square
5 with the argument that well, maybe -- maybe they
6 -- maybe they agree with you and they -- that's
7 why it wasn't a full verdict because we were
8 subtracting based on the statute of limitations.
9 That's just not the way that the statute of
10 limitations is dealt with by the courts. So I
11 think it's -- it's a full thing. Beyond notice
12 it's -- it's full --

13 The Court: So just so I understand
14 it for the record for the appellate courts, so
15 this is Barefoot Landing. How many projects did
16 Centex do on Barefoot Landing?

17 Mr. DesChamps: Your Honor, it's --
18 there's a lot of single-family homes of the
19 multifamily --

20 The Court: Not the single-family
21 homes. I -- just multifamily. Just --

22 Mr. DesChamps: I -- I -- I may
23 hazard a guess of 12 or 15 if somebody wants
24 to --

25 Mr. Hildebrand: I think it's maybe

1 18 --

2 The Court: Okay.

3 Mr. Hildebrand: -- or 20.

4 The Court: And just so when I
5 understand, when was the very first lawsuit
6 filed? And I understand it -- it was all
7 Centex, but it's potentially different
8 subcontractors. Obviously, different people
9 working on the projects. Which in this project
10 the same thing could happen. You could have one
11 subcontractor that's doing, you know, the
12 placement of the windows on building one, but
13 not one and two and not on building six, seven,
14 eight, nine, ten. But not -- only one to nine.
15 But when was the first lawsuit filed where --
16 and do you know which the first lawsuit was in
17 Barefoot Landing that was brought against
18 Centex.

19 Mr. Hildebrand: There was, I guess,
20 because I think I've been involved in all of
21 them --

22 The Court: Okay.

23 Mr. Hildebrand: -- there was one
24 that was in Edgewater --

25 The Court: Okay.

1 Mr. Hildebrand: -- where there were
2 two buildings that were built improperly and
3 Centex sued the subcontractors for the repair
4 work that it had to do for those first two
5 buildings.

6 The Court: Okay.

7 Mr. Hildebrand: That was the first
8 suit. But the first plaintiff's suit, first
9 homeowner's suit --

10 The Court: When was that though?
11 When was that?

12 Mr. Hildebrand: Oh, gosh.

13 The Court: When Centex sued --

14 Mr. Hildebrand: Two thousand --

15 Mr. DesChamps: 2010 was the denial
16 -- denial of the motion for summary judgment.

17 The Court: Okay. 2010. Okay. And
18 then the first plaintiff's claim against Centex?

19 Mr. Hildebrand: I think was
20 Edgewater.

21 The Court: And it was Edgewater
22 again. Okay.

23 Mr. Hildebrand: But that was -- I
24 actually, I think Bobby Wiley was the
25 plaintiff's attorney and I think that --

1 The Court: And roughly what time
2 period was that?

3 Mr. Hildebrand: Gosh, when was that
4 one?

5 Mr. DesChamps: I really don't know,
6 but I would --

7 Mr. Hildebrand: I --

8 Mr. DesChamps: I don't know, but I
9 -- I -- I think probably the first half of the
10 2010's.

11 The Court: Okay. Okay. I'm just
12 wondering if any of the other lawsuits would
13 potentially put the Ledge Wood people on notice
14 that maybe they have similar problems. It is a
15 similarly built building. I know not all
16 building is the same. And again, you use
17 different subcontract -- tractors. But I just
18 wanted to make sure that that was not part of
19 the issue of this statute of limitations putting
20 them on notice that, you know, there could be
21 things wrong. Okay. All right. So do you want
22 to -- do you want me to rule on this or do we
23 want to just start going through all the other
24 ones as well? What are y'all looking for? I
25 think -- I think we're -- I would say we just

1 keep going in my opinion.

2 Mr. Connell: Okay.

3 The Court: If that's okay.

4 Mr. Hildebrand: All right.

5 The Court: And I'll just make sure
6 I've got them listed. Okay.

7 Mr. Hildebrand: Thanks, Your Honor.
8 There are two other -- three other basis rather
9 for J.N.O.V. And I'll try to go through them
10 with some brevity. One is that -- and this is
11 on page 14 of our brief, that the evidence at
12 trial did not adequately support a verdict in
13 plaintiff's favor for gross negligence.

14 The Court: I'm sorry. Go ahead.

15 Mr. Hildebrand: I've got an extra
16 copy if you --

17 The Court: That would be great.
18 Thank you. I'm sorry. I just didn't have a
19 copy --

20 Mr. Hildebrand: No problem.

21 The Court: -- of it in front of me.

22 Mr. Hildebrand: And this is on page
23 14. The statute of repose, Your Honor, is a --
24 is a really interesting sort of animal in South
25 Carolina Law. Because it said the -- the

1 statute says that the violation of an applicable
2 building code may be some evidence.

3 The Court: Right.

4 Mr. Hildebrand: Right.

5 The Court: May be.

6 Mr. Hildebrand: But then it says
7 some evidence of gross negligence or
8 recklessness.

9 The Court: Uh-huh.

10 Mr. Hildebrand: But then when you
11 look at the case law that describes what is
12 gross negligence and recklessness, it's not just
13 that there is a building code violation. The
14 case law is very clear and you charged this as I
15 noted on -- in our brief, gross negligence
16 involves an intentional conscious failure to do
17 something, which one ought to do or the doing of
18 something one ought not to do. Recklessness
19 implies the doing of a negligent act knowingly.
20 So the case law is that there has to be an
21 intentional, conscious knowing action or failure
22 to act.

23 And I would submit to Your Honor,
24 that there was no evidence of that in this case.
25 There is absolutely no evidence that Centex

1 intentionally, consciously, knowingly performed
2 bad construction. There is no evidence at all
3 about what it actually did know or -- or that it
4 intentionally did anything wrong. And in fact,
5 the -- the evidence was that Centex went above
6 and beyond. I mean, my gosh. I spent a lot of
7 time with this with Jeremy Martin about -- we
8 have so many checks and balances on trying to
9 have good construction done. We have a --
10 what's called the monthly technical training,
11 which is for three hours each month. You have
12 training on good construction techniques. You
13 have the E.E.E. acronym, every building, every
14 room, every day. Toolbox talks with outside
15 vendors.

16 The Court: Tailgate talks.

17 Mr. Hildebrand: Tailgate talks with
18 subcontractors. In-line inspections, while the
19 construction is going on to -- as each major
20 phase is completed, to make sure that they're
21 doing the -- the construction is being done
22 appropriately. Yearly COR, C-O-R inspections,
23 which are unannounced inspections of Centex
24 projects to make sure that things are going
25 right and they're graded.

1 And then on here, we actually had --
2 you have another inspection. We hired an
3 independent inspector, completely above and
4 beyond, a guy by the name of Hershel
5 Morningstar, who is an engineer to come in and
6 every month review the buildings and then meet
7 with the subcontractors to try to ensure that
8 these buildings were being built appropriately.

9 Then on top of that, we had the
10 building inspector and we introduced the reports
11 that were available that show that the building
12 inspector signed off in detail on each and every
13 item that the plaintiff's allege were bad. And
14 then on top of that, we -- just some more
15 antidotal evidence than anything, we had six
16 Centex employees, who bought new units here.

17 But Your Honor, there's -- I -- I
18 just don't -- if you look at what is required
19 under the case law or gross negligence or
20 recklessness and again, it's an intentional
21 knowing, conscious disregard, I don't think that
22 there is any evidence of that that was
23 introduced. So I think that on that basis,
24 J.N.O.V. should be granted.

25 The Court: Okay. Any response?

1 Mr. Connell: Yeah, just shortly.
2 Just briefly. Gross negligence, as Your Honor
3 charged and as we all know, was always a jury
4 issue. The case law, Sumter versus -- or
5 Clyburn versus Sumter County and all its
6 prodigies say it's a jury issue. In this case,
7 as I have said before, every expert offered by
8 plaintiff or defendant indicated that there were
9 both code violation and factory specification
10 violations and violations of in -- in
11 construction industry standards. Even Centex's
12 own experts offered that. And as Your Honor
13 knows and as you pointed out, may it -- it may
14 be evidence of gross negligence, the violation
15 of those things. That was a jury issue. The
16 jury thought about it. They took it up. They
17 decided. We had one little verdict form, really
18 clean. Do you find for the plaintiff on gross
19 negligence? Your -- Your Honor charged them.
20 And there was evidence of reck--- recklessness
21 or willfulness.

22 And quite frankly, as Your Honor
23 knows, if the jury had said no, we would have
24 lost. But there was evidence because all of the
25 experts on every side testified that there were

1 these problems. Everybody agreed. So Your
2 Honor, we would say that, you know, that's not
3 -- that's not appropriate to grant -- to grant
4 anything on that issue.

5 The Court: Okay. You want to go to
6 the next one?

7 Mr. Hildebrand: All right.

8 The Court: Yeah.

9 Mr. Hildebrand: The next one, Your
10 Honor -- I want to move through these unless you
11 have a question.

12 The Court: No, I'm good.

13 Mr. Hildebrand: All right. I'd
14 like to jump to number four, which is at the
15 bottom of page 15.

16 The Court: Yeah.

17 Mr. Hildebrand: The -- there was
18 discussion and evidence about Centex Homes in
19 this project. There was no evidence -- there's
20 no -- I -- I don't Balfor Beatty Construction,
21 L.L.C. as successor by merger to Centex
22 Construction Company, Inc. and Centex
23 Construction, L.L.C. were ever even mentioned.
24 There's -- there's no evidence, no documentation
25 as to them. Our motions for directed verdict

1 was -- generally, there was no evidence against
2 all the defendants. That would included these.
3 But there is no evidence at all that these
4 entities did or did not do anything
5 inappropriate, much less it would rise to a
6 level of gross negligence for recklessness. And
7 it's -- I noticed that there is no response to
8 that. I don't believe that the memorandum in
9 opposition related to those entities.

10 We've admitted that Centex Homes is
11 an appropriate party. It was the general
12 contractor. It was the developer. It's a large
13 company. Like I said, it's been in business for
14 78 years. It's not a sham company by any
15 stretch. But on those -- on those entities, I
16 don't think that -- there was no evidence
17 introduced that I think that J.N.O.V. is
18 appropriate as to them.

19 The Court: Okay.

20 Mr. Connell: Well, Your Honor, the
21 trial of a case is a tricky matter for lawyers
22 and for the Court. And if the defendants wanted
23 to argue that Balfor Beatty Construction Company
24 had nothing to do with it, they should have
25 asked you about that before it was submitted to

1 the jury.

2 The Court: And they should have
3 agreed on the verdict form for it not to say
4 Centex entities.

5 Mr. Connell: That's correct.

6 The Court: We talked about this.

7 Mr. Connell: Right.

8 The Court: And I understood it as
9 not an issue in this case because it didn't
10 matter who it was against. Centex could answer
11 for it because obviously --

12 Mr. Connell: Correct.

13 The Court: -- they're a company,
14 you know, that can answer a judgment.

15 Mr. Connell: And so at this point
16 to ask Your Honor to do that now after not
17 asking for it, agreeing to the verdict form as I
18 put down in my -- in my response as not asking
19 for summary judgment. And I think their answer
20 admits that they are successors. So if they
21 wanted to parse out each defendant, they should
22 have said, Your Honor, you know, don't put this
23 defendant in here because you don't have any
24 evidence. Instead, they agree to the verdict
25 form. It was submitted. They can't complain

1 about it now.

2 The Court: You need to respond or
3 -- I think I understand.

4 Mr. Hildebrand: All right. Okay.
5 I'd like to now move into the new trial grounds.
6 In this first one, Your Honor, I -- I think that
7 certainly the statute of limitations is a
8 critical issue. I know you've heard that, but I
9 know that it's not unusual for a judge to hear a
10 summary judgment and then direct a verdict and
11 then to hear -- decide on J.N.O.V. I think that
12 that is --

13 The Court: I've done both of those.

14 Mr. Hildebrand: So I think that
15 that's -- that's probably our -- our strongest
16 ground. But there are two other grounds that,
17 probably three that I think are very, very
18 strong. And this next one, with all due
19 respect, I think constituted clear prejudice as
20 against Balfor.

21 So what happened here? And -- and
22 the -- the -- the argument is or the point is
23 that Mr. Connell read through -- introduced
24 through our expert that our expert had actively
25 worked with Centex and on behalf of Centex as an

1 expert to investigate, I think seven or eight
2 other projects that were in Barefoot.

3 The Court: Uh-huh.

4 Mr. Hildebrand: And you may recall
5 that in his opening statement -- I'm sure it was
6 in his opening statement, he walked in front of
7 the jury and said, look here, I've got a copy of
8 -- here is a diagram of the whole Barefoot
9 project and it's comprised of a whole bunch of
10 different sections including Wedgewood. And I
11 -- I don't know if he read all of them off, but
12 he -- he made it clear that Centex had built a
13 bunch of projects in the same project.

14 So Your Honor, I -- and I'm not just
15 blowing smoke at you. I think that you were
16 extremely conscientious in evaluating that
17 evidence. And I remember your -- your comments
18 were that perhaps the -- in the Murdaugh case
19 you may not have allowed all the other
20 extraneous evidence and you recognized -- you
21 said, gosh, you know, this is evidence of
22 projects after Wedgewood. And I -- and I'm --
23 I'm -- I'm positive that you said that the
24 introduction of that evidence of deficiencies
25 and those other lawsuits would be prejudicial

1 and I'm not going to allow it.

2 The Court: Uh-huh.

3 Mr. Hildebrand: So you ruled
4 that -- you ruled --

5 The Court: Based on a 404-B, yeah.

6 Mr. Hildebrand: Right. Yes. The.

7 The Court: -- ruling.

8 Mr. Hildebrand: Yes, ma'am.

9 Absolutely.

10 The Court: Okay.

11 Mr. Hildebrand: So then we get to
12 our expert and Mr. Connell says he wants to ask
13 him about these other projects. And he cited
14 the Yoho case.

15 The Court: And this was Bob -- as
16 to Bob Carter. Correct -- in the testimony?

17 Mr. Hildebrand: Yes, ma'am.

18 The Court: Okay. Keep going.

19 Mr. Hildebrand: Yes, ma'am. So Mr.
20 Connell said -- started asking, well, haven't
21 you worked with Centex on these other projects?
22 So he was going right back to the same issue
23 that -- I mean, it's -- it's patently clear why
24 he wants to introduce that. I mean, he says it
25 before we even get started in the case in his

1 trial brief. He says, plaintiff intends to
2 offer evidence of numerous lawsuits against
3 Centex regarding similar code defects and
4 construction issues.

5 The Court: I don't think we even in
6 though -- in the original case for actual
7 damages. He even said anything about the word
8 lawsuits. He talked about -- I think your
9 expert opened the door. I think he talked about
10 the work he did at the projects trying to
11 bolster himself of how hard Centex is working to
12 make sure they do a job -- good job and they
13 build quality buildings. And so I generally
14 allowed it, but I don't think the word lawsuit
15 even came up. I thought it was just he had
16 worked and inspected and had done -- it wasn't
17 even expected. He had worked with Centex on a
18 number of projects is how I understood it to
19 come out with Bob Gallagher -- sorry, not Bob
20 Gallagher. Rob Carter. I apologize. That's
21 Centex's engineer, the first one. And Skip
22 Lewis is also an engineer. So I don't think it
23 was a violation. You're right. I kept the jury
24 hard and I didn't want to dirty up this trial
25 with showing any other subsequent, you know, bad

1 acts or something that happened in the future.
2 And I think we were all very careful not let it
3 in until at the very end, we did and agreed that
4 at the punitive damages stage, that it might be
5 potentially something that could be put out
6 there.

7 I mean, I also remember in the
8 trial, you were trying to put in Hershel
9 Morningstar's report that actually had proof of
10 what he had done inspecting other projects. And
11 you were going to enter it and I think
12 Mr. Connell or someone pointed out that hey --

13 Mr. Connell: I did.

14 The Court: -- he didn't realize
15 there's other stuff in there. And it's the
16 same, inspecting other projects of what he has
17 seen. And you understand, if you put this in,
18 you really are opening up a Pandora's Box and
19 you very of course, quickly withdrew it as a
20 motion and said, we're not getting into that and
21 just moved on. So I think it was put out there
22 and I think there were questions, unfortunately.
23 I don't think it rose to the level though, that
24 there was any prejudice. I certainly don't
25 because I don't think the word lawsuit was ever

1 used. I think it was just that your experts had
2 worked other projects.

3 Mr. Hildebrand: But Your Honor,
4 here's the -- the reason that that was
5 introduced, very clearly by Mr. Connell, there's
6 no question that he wanted that jury to think
7 that the same deficiencies that existed at
8 Wedgewood existed at those other projects.

9 The Court: Oh, I have no
10 disagreement that that's why he wanted it in.
11 But I can tell you that what did get in, did not
12 go to that level. I did not get into anything
13 close to what he wanted in any of that and I
14 stopped him at every stretch.

15 Mr. Hildebrand: But what he -- what
16 we very -- very easily could have done to have
17 prevented this and this is what I suggested was,
18 just say that he's worked with Centex on
19 numerous other projects and he's made a lot of
20 money, he's charged them so much money. That's
21 all he had to establish bias. That was the
22 simple bias that was articulated as the reason
23 to allow that in. That Mr. Carter had done a
24 lot of work for Centex and made a lot of money
25 therefore, he's biased. And okay, I agree with

1 that. He can ask him, have you worked for other
2 projects? Yes. And been paid a lot of money.
3 The problem comes in where he articulates the --
4 why didn't you ask him about all the other
5 houses that -- Mr. Carter has looked at a lot of
6 single family houses and other projects. He
7 didn't ask him about any of those. And the
8 reason is that he wanted this jury to -- the
9 leap is so easy and clear if he says -- if he's
10 got a chart with all the Barefoot projects,
11 Wedgewood, Clearwater, Edgewater, Willow Bend,
12 Woodlands, Tanglewood and he says, okay, you
13 just finished talking -- asking -- answering
14 questions about Wedgewood. Did you work on --
15 have you investigated for Centex -- and then he
16 names the ones right next to it. If I'm sitting
17 on that jury, it's the implication and where the
18 jury is going to go with that, again, is very
19 simple, that the -- it's the same defects in
20 those other projects are they -- as they are
21 here. And it could have been very simply worked
22 around by him simply asking Mr. Carter about
23 generally other projects and money that he made.
24 But he intentionally limited it to these
25 specific projects in Barefoot Landing and that's

1 the prejudice.

2 And the fact it's -- it -- it puts
3 -- put me in the impossible des--- position
4 because then I've got say, oh, my gosh the --
5 the jury -- all of those jurors are putting two
6 and two together saying, my gosh, if he just
7 talked about -- discussed all of these issues on
8 Wedgewood and he admits that he's worked on
9 these other projects, they must be the same
10 issues and they must have the same problems. So
11 then I've got to decide well, do I cross -- do I
12 ask him about all those other projects and say
13 how they were different and under different
14 codes and under different subcontractors and --
15 and such? It put me and -- and it put Centex in
16 an impossible position. The jury is sitting
17 there left thinking that it's these same issues.

18 Your Honor, I think it's -- I think
19 it's highly prejudicial. I don't think that
20 that Yoho case -- and that was cited all of a
21 sudden to allow that in, would allow through the
22 back door what you so clearly said that he could
23 not in get in through the front door. And I --
24 I think it's inappropriate. I'm not going to --

25 The Court: Okay.

1 Mr. Hildebrand: -- argue any --

2 The Court: Do you want to respond
3 to that?

4 Mr. Connell: Your Honor, I think
5 you understand the issue. I don't think I need
6 to --

7 The Court: I'm sure I do.

8 Mr. Connell: Yes.

9 The Court: I mean, I think the
10 record on that issue is going to speak for
11 itself. I think it was very clear that this
12 jury would not be able to make that -- what you
13 consider to be an easy lead, Mr. Hildebrand,
14 which I don't find based on the testimony that
15 was given by -- by your own expert, that the
16 same construction deficiencies or problems. And
17 certainly, this jury didn't know the other ones
18 were litigated. They're were also asked of voir
19 dire, what familiarity they had with any of the
20 Barefoot Landing projects and Centex and they
21 all said none. So it's not like they would have
22 other outside or side knowledge about it because
23 no one seemed to have any, you know, inclination
24 or understanding that there were prior
25 lawsuits -- or I'm sorry, subsequent lawsuits

1 for projects that were later, but brought
2 earlier.

3 So again, I -- I think it was pretty
4 clear on the record on that and I think I was
5 really careful. And you are correct,
6 Mr. Connell tried very hard to get that in a few
7 different ways, but I can tell you that I think
8 what eventually did come out, I think was
9 incredibly limited. And I don't think there was
10 any interest or there was any speaking about the
11 litigation, so -- or the lawsuit. So okay.
12 What's our next --

13 Mr. Hildebrand: All righty. The
14 next, Your Honor, would be on page 18, the
15 bottom of two. Again, allowing Mr. Clements to
16 testify about structural deficiencies. And we
17 discussed this in limine and the testimony
18 was --

19 The Court: In that proffer. We have
20 a proffer. Right.

21 Mr. Hildebrand: Yes, ma'am.

22 The Court: Correct?

23 Mr. Hildebrand: Yes, ma'am.

24 The Court: Uh-huh.

25 Mr. Hildebrand: And he -- his

1 testimony was that he was not a structural
2 engineer and could not testify that any of these
3 differences -- all he simply -- all he simply
4 said was the -- what I see on the structural
5 plans is not what is constructed. It was
6 constructed differently that what showed on the
7 plans.

8 What he then made the leap was that
9 those were structural deficiencies that needed
10 to be repaired. And there was a huge portion of
11 his repair costs that related to those
12 structural deficiencies. So again, he admitted
13 that they -- he -- he couldn't say that they
14 needed to be repaired because he couldn't tell
15 -- tell you whether they were structural
16 deficiencies or not.

17 So we -- we moved in limine to
18 exclude them. We moved at trial to exclude
19 them. And -- and the Court said, well, you can
20 cross examine him on that.

21 The Court: Uh-huh.

22 Mr. Hildebrand: Well, that's true,
23 but the -- I -- the Court has the obligation as
24 the gatekeeper to -- you can't un-ring the bell.
25 Once the jury has heard that these are

1 structural issues, then they think that those
2 could be structural issues. And this is
3 something that Mr. Connell specifically argued
4 in his closing argument. He said, these are
5 code -- all of these are code issues. You've
6 got structural issues. If a -- if we have a
7 hurricane here, the wind -- the -- these roofs
8 could blow off and it could injure all -- it
9 could injure these people.

10 So he's relating back to this exact
11 structural issue that Mr. Clements was not
12 qualified by education or experience or
13 otherwise to testify about. The plaintiffs very
14 easily could have called their own structural
15 engineer to -- to have testimony on that one way
16 or the other. But with all due respect, I think
17 it was inappropriate to allow that expert to
18 testify about those structural issues. It was
19 obviously, a big part of the plaintiff's case
20 and his argument to the jury and otherwise. And
21 I think that it prejudiced Centex and warrants a
22 new trial.

23 The Court: Mr. Connell?

24 Mr. Connell: I mean, Your Honor, as
25 you know, you have a proffer and you allowed him

1 to testify. And as a -- as a architect, he
2 could say that the plans and the as-built were
3 not correct or not the same and that's a
4 building code violation. And in response to
5 that what Mr. Carter says was that was not a
6 problem. So that goes to the weight of the
7 evidence, not the admissibility.

8 The other thing I -- I find
9 interesting is about the -- about the hurricane
10 and all. Mr. Carter, an expert for the
11 defendant said that the lintels were improper
12 and you needed to be worried about that because
13 you could have a hurricane problem. So it
14 wasn't my expert that said a thing about that.
15 It was when I was cross examining Mr. Carter, he
16 admitted the reason why the lintels were not
17 correct, could cause a hurricane problem. So
18 that was -- that was from their mouth, not from
19 mine.

20 The Court: Okay. Again, my concern
21 when I started was whether or not Mr. Clements
22 was going to contradict his earlier deposition
23 testimony where he said, I'm not a structural
24 engineer. I didn't do the loads. I didn't do,
25 you know, obviously, the numbers -- that I asked

1 I believe either in pre-trial or on your motion
2 in limine or during the proffer whether or not
3 he allowed anyone else's numbers to do that. He
4 said, no, he didn't do them, but he didn't need
5 to do them. He said all he's testifying to is
6 that they were -- the plans were not as-built
7 and so -- and there were code violations. So I
8 think he kept it within his scope of expertise,
9 which I think he can as an architect. Okay.
10 What else?

11 Mr. Hildebrand: All right. The
12 next one is number three on page 20 at the top.

13 The Court: All right.

14 Mr. Hildebrand: Another issue with
15 Mr. Clements testifying that the installation of
16 the vapor barrier was a code defect. And he
17 specifically referenced 502.1.4. And I attached
18 that as a copy -- as an exhibit to our
19 memorandum. He basically says that the building
20 code required a -- a vapor barrier to be
21 installed in certain parts of the country, but
22 that it did not require it for -- for Myrtle
23 Beach and therefore, he believes it's
24 inappropriate.

25 I don't think that that constitutes

1 -- he's basically interpreting the building code
2 contrary to what it says. The building code
3 just simply says, it has to be used in certain
4 areas. It doesn't have to be used in other areas.
5 So for him to state that that is a building code
6 violation, I believe is -- was improper and
7 should not have been allowed.

8 The Court: Mr. Connell.

9 Mr. Connell: You know, experts say
10 all sorts of things. And you go to cross
11 examine them and you get to ask them questions
12 about that and that's his professional opinion.

13 The Court: I've even had experts
14 disagree on what building code applies to a
15 project, so...

16 Mr. Connell: Yes, ma'am. And --
17 and more in line with this case and -- and our
18 smoking gun is the October 10th email between
19 their experts about this very issue. This very
20 issue about the vapor barriers. So you know,
21 that's the way a trial goes. I mean, they had
22 their own expert testify. The jury didn't like
23 that. They -- you know -- or I don't know what they
24 did. But I mean, that's not something for the
25 Court to take up, I don't believe.

1 The Court: Okay. What's the next
2 issue?

3 Mr. Hildebrand: The next one Your
4 Honor, is number four on the bottom of page --

5 The Court: Uh-huh.

6 Mr. Hildebrand: -- bottom of page
7 20. And this is another issue that I -- I think
8 the Court very conscientiously and appropriately
9 evaluated and discussed and talked about this
10 licensing issue. And --

11 The Court: And I'm the one that
12 went ahead and said I agree at the time your
13 subcontractors were not required to be licensed
14 if your contractor was licensed, your head
15 G.C. was licensed, except obviously, for certain
16 subspecialities, mechanical, plumbing and that.
17 So I agreed with you on that. But I believe it
18 was your expert that opened up the door that
19 again, from the very beginning from what I
20 understood was in his earliest deposition -- and
21 this is Bob Carter said, he, in his experience,
22 had never used unlicensed contractors nor would
23 he ever use unlicensed contractors. I think
24 it's pretty straightforward. I think there's a
25 question that this jury understood that they

1 weren't required to. But I think they did
2 believe it went potentially -- I guess, could
3 have believe it potentially went to whether or
4 not -- then it was grossly negligent in hiring
5 unlicensed contractors. I don't think it was
6 obvious in any way. I understand the argument
7 clearly. But I think it was pretty clear that
8 they weren't required to.

9 Mr. Hildebrand: I'm -- I'm sorry?
10 What?

11 Mr. Hildebrand: I think it was
12 pretty clear that they weren't required to hire
13 licensed subcontractors by code and by law. I
14 think it was Mr. Carter that opened up the door.
15 And I think he caused it -- from everything I
16 understood and how you got into all of this was
17 in his own deposition at the very beginning
18 of -- whenever that was taken. Correct --

19 Mr. Connell: Yes, ma'am.

20 The Court: -- Mr. Connell?

21 Mr. Connell: Yes, ma'am.

22 The Court: Okay.

23 Mr. Connell: That's true.

24 Mr. Hildebrand: Well -- well, I
25 don't think that he opened the door. He simply

1 responded to questions from opposing counsel.
2 Look, would you use them? You know, my
3 recollection was that the testimony was fairly
4 vanilla.

5 The Court: Yes. He could have said
6 yes, he used the licensed contractors.

7 Mr. Hildebrand: Well, whether he
8 does or not does not -- I don't believe, Your
9 Honor, would establish the standard of care.
10 The standard of care is established by South
11 Carolina Law. I mean, my expert can't say that
12 a -- a subcontractor should carry insurance
13 limits of five million dollars and if he don't
14 that that aggregates the standard of care. He
15 doesn't -- my -- my expert doesn't determine the
16 statute, the standard of care, if there is a
17 statute on it.

18 Here there's a clear statute that
19 allows the -- the use of unlicensed
20 subcontractors. So to allow plaintiff's counsel
21 to say that that was a breach of the standard of
22 care through cross examination or otherwise --

23 The Court: I don't know that he
24 said it was a breach of the standard of care.

25 Mr. Hildebrand: Absolutely he did.

1 I -- I believe he did.

2 The Court: Russ Clements did?

3 Mr. Hildebrand: No, no, no.

4 Plaintiff's counsel --

5 The Court: Oh.

6 Mr. Hildebrand: -- in his
7 arguments.

8 The Court: In his closing. In his
9 closing or his opening?

10 Mr. Hildebrand: Yes, in -- in his
11 closing.

12 The Court: Oh, okay. Well,
13 Mr. Connell may have said that. That may have
14 been his argument.

15 Mr. Hildebrand: Right.

16 The Court: I didn't hear Ross
17 Clements testify to that.

18 Mr. Hildebrand: I -- I frankly just
19 don't remember about Ross Clements' testimony.

20 The Court: We'll just have to rely
21 on the record for that. Okay.

22 Mr. Hildebrand: But there are
23 several issues here. One is, I think that the
24 -- the South Carolina Law establishes the duty
25 as to whether subcontractors should be used or

1 not. We just talked about that. But there are
2 a couple of other large issues relating to this
3 specific testimony. So that's one issue.

4 The second issue is what happened
5 here is that Mr. Connell just went up to the
6 witness Jeremy Martin and handed him a stack of
7 a whole bunch of documents about light -- about
8 subcontractors on this job and I objected. And
9 I said, there's been no foundation for these
10 documents. It's inappropriate to ask this
11 witness about them. He then said, well, let me
12 ask him a few questions. Do you know -- do you
13 know what subcontractors worked on this job?
14 No. Do you know if this subcontractor or that
15 subcontractor worked on it? No.

16 So he's asked the witness who the
17 subcontractors are and he said, no. And then he
18 hands him a stack of documents and starts cross
19 examine him. Well, doesn't this show that
20 con--- subcontractor A, B, C didn't have a
21 license? If you say so. And doesn't it show
22 that subcontractor X, Y, Z didn't have a
23 license? Okay, if you say so.

24 The Court: Were some of those
25 people on that same subcontractor list, though

1 that he was asking about were people that you
2 sued for indemnity and settled with prior to
3 trial?

4 Mr. Hildebrand: I did, but he
5 didn't establish that in -- in his case. The --
6 it's what -- what we -- what I could have done
7 or might have done earlier is -- is not germane
8 to what was established on the record, that's
9 what we're talking about, in this case. And he
10 had -- so what happened here was he asked a
11 witness, who provided no foundation whatsoever
12 about what subcontractor specifically worked on
13 this job. And then he just handed him a stack
14 of documents that was introduced into evidence
15 and went back to the jury room with no
16 foundation at all about who -- what
17 subcontractors actually worked on the project.
18 Whether those subcontractors performed the work
19 that was alleged to have been problematic on
20 this -- on this job. Whether the subcontractors
21 were actually direct subcontractors of Centex or
22 were a sub sub. There's just no foundation for
23 it.

24 And there is -- and then again, Your
25 Honor, I think it's highly prejudicial given the

1 fact that this again, was harped on in closing.
2 The obvious value to the plaintiff is -- is
3 evident in the closing arguments when
4 Mr. Connell says not only that, they didn't hire
5 licensed subcontractors. He obviously did that
6 to establish gross negligence and so the jury
7 heard that and may well have decided that that
8 was a good reason to find for gross negligence.
9 So I'm just covering my grounds, Your Honor. I
10 think that was prejudicial and warrants a new
11 trial.

12 The Court: Mr. Connell.

13 Mr. Connell: Your Honor, I don't --
14 Mr. Martin -- whatever he said about Mr. Martin
15 and whatever I handed to him, that's not part of
16 the grounds in the new trial motion. So I don't
17 really know how to respond to that other than to
18 say that I was cross examining Mr. Martin. I
19 did -- it's wide latitude to do that. And --

20 The Court: I remember Mr. Martin
21 deferring. He said, I defer to the experts on,
22 you know, what is best practice and what you
23 should do, if you should hire a licensed or an
24 unlicensed. And you know, whatever they say
25 goes. That's what I recall.

1 Mr. Hildebrand: But Your Honor, but
2 --

3 The Court: Uh-huh.

4 Mr. Hildebrand: -- still there's no
5 foundation for it. There -- there is no -- I
6 would like for Mr. Connell to tell me and show
7 me where the evidence was that was introduced at
8 the trial of this case that's on the record
9 about what subcontractors actually worked on
10 this job. And whether any of the subcontractors
11 in the stack of documents that he handed Mister
12 -- Mr. Martin actually worked on this job.
13 Which ones were subcontractors of Centex. Which
14 ones worked on what scope of work. Whether they
15 worked on the things that are alleged to have
16 been violated here or not. He established none
17 of that. All he did was hand him a stack of
18 documents.

19 The Court: Right. And I understand
20 he has the burden, but I also understand that
21 when you've got a contractor/developer who hires
22 all their own subcontractors and when the
23 H.O.A. has no relationship with the
24 subcontractors, the person in the best place to
25 know who worked on the project is going to be

1 the defendant Centex. Because this is not like
2 they were direct -- had direct contracts with
3 the H.O.A. Again, it was the developer that had
4 all of the contracts, had all of the experience
5 and knowledge. And later on the project was
6 turned over to the H.O.A. So --

7 Mr. Hildebrand: I agree with that,
8 Your Honor, but he has -- as lawyers, it's his
9 case and it's his obligation to introduce the
10 foun--- the foundation. Centex might have known
11 a whole lot of stuff and it might know what the
12 social security numbers are of the
13 subcontractors and how old they are and where
14 they live. You know, that's -- the relevant
15 issue here is whether he established in his case
16 or otherwise which subcontractors worked on this
17 case and I don't think that he did. So for him
18 then to say that he's got some records of a
19 bunch of entities that did not have licenses or
20 may not have licenses --

21 The Court: I don't remember there
22 being testimony. There's maybe one or two --

23 Mr. Connell: Two.

24 The Court: -- it was --

25 Mr. Connell: Two, Your Honor.

1 The Court: That's -- that's what I
2 heard. And who were they again?

3 Mr. Connell: The brick --

4 The Court: The --

5 Mr. Connell: -- and the framer.

6 The Court: The brick and the
7 framer.

8 Mr. Connell: A&K Construction.

9 The Court: Right.

10 Mr. Connell: B.R. Brick. They were
11 both sued --

12 The Court: Right.

13 Mr. Connell: -- by them, which you
14 wouldn't let me say to the jury, which I get
15 that.

16 The Court: Right.

17 Mr. Connell: So you know, there's
18 -- this -- this is harmless whatever it was.
19 And the other thing is, Your Honor, is as you
20 know, when you're on cross examination you
21 pretty much ask anything you want unless you
22 tell me I can't. And -- and it came into
23 evidence, regardless of whatever happened there,
24 by their own expert, who said that he wouldn't
25 hire unlicensed contractors. So I don't see the

1 issue.

2 The Court: Can we take a quick
3 break, y'all? Just -- let's just take five
4 minutes --

5 Mr. Hildebrand: Absolutely.

6 The Court: -- and I'll be right
7 back. Okay?

8 Mr. Hildebrand: Yes, ma'am.

9 The Court: Is that okay with
10 everyone?

11 (Whereupon, a break was taken
12 from the proceedings.)

13 The Court: All right. Your next
14 basis? Whenever you're ready, sir.

15 Mr. Hildebrand: Thank you, Your
16 Honor. Our next grounds for a new trial is on
17 -- found on page 22. And we'd ask -- we just
18 talked about the licensing statute. And we had
19 requested that, that be charged and I don't
20 believe it was. And I believe that it should
21 have been and that would be an appropriate basis
22 for a new trial as well.

23 The Court: You want to respond to
24 that, Mr. Connell?

25 Mr. Connell: Your Honor, my

1 remembrance is that after the charge you asked
2 for any exceptions and nobody asked for an
3 exception.

4 The Court: That's true.

5 Mr. Connell: And so if they didn't
6 ask for it after the charge before the jury got
7 it, they can't ask for it now.

8 The Court: Okay. Keep going.

9 Mr. Hildebrand: All right.

10 The Court: Yeah, I don't think
11 anyone made any exceptions. But I'll also state
12 for the record that I'm hoping the appellate
13 courts know this, but I tried very hard to make
14 sure that the lawyers had the entire jury charge
15 prior to their arguing and preferably the night
16 before, which we did in this case. Because I
17 think particularly, in this case, when we had
18 causes of actions that were going away or being
19 withdrawn or that I, myself expressed some
20 serious concern about, whether or not there was
21 adequate evidence for it to go to a jury. I
22 think it was a bit of a moving target. But I
23 know we worked on it for a long time during the
24 entire trial. And I know the attorneys had it
25 well ahead of time. You know, I also sent mine

1 back to the jury. And probably the number one
2 reason I wanted to make sure the attorneys have
3 it is, is because I am sending it back to the
4 jury. I don't think there's any difference
5 between me reading it to them and having a hard
6 copy. It's still what I charge them. So for
7 appellate purposes, it is what it is. But I do
8 try really hard. I know a lot of judges don't
9 allow lawyers to have those charges. And I just
10 learned, I think, that as long as we have a
11 better understanding of what needs to be argued
12 and what is the proper law, I make less
13 mistakes, as well as, the attorneys make less
14 mistakes in arguments. So respectfully.

15 Mr. Hildebrand: Yeah. Yeah.

16 The Court: Yeah.

17 Mr. Hildebrand: I understand that,
18 Your Honor.

19 The Court: Yeah.

20 Mr. Hildebrand: And I -- I -- I
21 meant to cast no --

22 The Court: Right.

23 Mr. Hildebrand: -- dispersions
24 whatsoever.

25 The Court: Oh, no, no, no. I

1 understand.

2 Mr. Hildebrand: You've very
3 conscientious about that. I just don't think
4 that -- and I -- I don't have as clear of a
5 recollection, but Mr. DesChamps says he thinks
6 that after -- even after we got published, we
7 had said we'd like to have that -- was that your
8 recollection?

9 Mr. DesChamps: Yeah, when we were
10 -- when you had given us -- when we made
11 proposed additions to it --

12 The Court: Right.

13 Mr. DesChamps: -- we had asked for
14 charging the -- the licensing statute. And
15 that's when we asked for it. And so that's the
16 way I recall it.

17 The Court: Okay.

18 Mr. DesChamps: So...

19 The Court: Yeah, I think you have
20 to renew it afterwards too, but we'll just leave
21 that where it is. Whatever the --

22 Mr. Hildebrand: Okay.

23 The Court: -- Court wants to do,
24 that was fine.

25 Mr. Hildebrand: All right. Six, my

1 next grounds are found on page 23. And number
2 six is plaintiff's --

3 The Court: Go ahead.

4 Mr. Hildebrand: -- argued that the,
5 I believe that all of the deficiencies
6 articulated by his expert were, in fact, code
7 violations. And I don't think that that was an
8 accurate statement.

9 The Court: He said that in his
10 closing statement?

11 Mr. Hildebrand: I believe so. And
12 I -- and I believe he also said that they were
13 safety violations.

14 Mr. Connell: Your Honor, I don't
15 remember if I said that or not. But he didn't
16 object during the closing argument and you have
17 issued a curative instruction. And that wasn't
18 done, so I'd argue that is not an issue.

19 Mr. Hildebrand: I thought that I
20 did.

21 The Court: Really quick, let me
22 just look at my notes. Okay. So one of the --
23 we just went back in preparation for today, went
24 through probably my law clerk's and my trial
25 notes just to see best as we remembered and what

1 testimony it was. I remember the most testimony
2 about code violations coming through the -- who
3 was it, defendant's -- it was Bob Carter.
4 That's what I thought. And I think on some of
5 them, he said I can't tell you whether it is or
6 is it not a code violation. I remember him
7 saying that on certain things. I don't recall
8 you saying that every deficiency was a code
9 violation out there. I -- I certainly don't
10 recall that. But I certainly know what your
11 objection is if it's in there. Again, I don't
12 know that you said that, Mr. Connell. I don't
13 if you -- you know that that you would -- know
14 you said it either. But again, if it wasn't
15 objected to and it wasn't a contemporaneous
16 objection, then it's not reserved. But anything
17 else you need to answer, Mr. Connell, to that?

18 Mr. Connell: No, Your Honor.

19 The Court: Okay. Let's do the next
20 one. And that was that he included the safety
21 violations?

22 Mr. Hildebrand: Yes, ma'am.

23 The Court: Did Ross Clements cite
24 any safety violations in this project? Do you
25 know?

1 Mr. Connell: Yes, ma'am. The
2 stairs.

3 The Court: The stairs.

4 Mr. Connell: That's --

5 The Court: Okay. That's what I
6 recall. Okay. But the --

7 Mr. Connell: The lintels.

8 The Court: And the lintels. Okay.

9 Mr. Connell: I can think of some
10 others, but I -- I -- those two I can think of
11 right off the bat.

12 The Court: Okay. He didn't say
13 that the walkways with any, you know, loose --

14 Mr. Connell: There was some
15 testimony about --

16 The Court: -- on exterior --

17 Mr. Connell: -- some walkways and
18 -- and the -- the -- going to the driveways.

19 The Court: Oh, okay.

20 Mr. Connell: Like 30 feet.

21 The Court: That wasn't what I was
22 thinking. I -- so I -- okay. Okay. All right.
23 Thank you.

24 Mr. Connell: Uh-huh.

25 The Court: The Court erred in

1 charging the jury regarding the statute of
2 repose. As you all well know, we all had a lot
3 of angst over that and whether or not to. If
4 you want to go ahead and go put that on the
5 record, Mr. Hildebrand.

6 Mr. Hildebrand: Just that Your
7 Honor, if I -- if I incorporate the grounds of
8 my memorandum, of course, as my argument, that
9 is acceptable.

10 The Court: Okay. Well, I can just
11 tell you, based on that, I -- I think any error
12 in charging regarding the statute of repose, I
13 think it errs to Centex. I think it went to
14 your betterment, certainly not the plaintiff's.
15 You know, it was a proper charge on the statute
16 of repose. I'm sure of that. But I think, if
17 anything, it probably went against the
18 plaintiff. So if it was error, I believe it was
19 probably harmless, so...

20 Mr. Hildebrand: At the bottom of
21 page 26 --

22 The Court: Okay.

23 Mr. Hildebrand: -- the Court erred
24 in charging that developers are responsible for
25 the condition of the common areas. At the time,

1 these areas are deeded over to the homeowner's
2 association. Again, I -- I know you're very
3 conscientious about the charge, but I think that
4 is one that we specifically objected to.

5 The Court: And then you argued that
6 again, went just for the claim of breach of
7 fiduciary duty, which I think they had abandoned
8 at some point. But I still think it's a good
9 charge of the facts and I don't think it changes
10 the fact that when it's turned over from the
11 developer controlling the board to the H.O.A.,
12 they're required to turn it over in good
13 condition. So I don't know where it would be
14 harmful to the jury to have heard it.

15 Mr. Connell: And Your Honor, they
16 didn't object to it after you charged it. And
17 they asked if you had any objections -- you
18 asked if they had any objections. So it's a
19 great statement of the law anyway. I don't know
20 whether it makes a difference.

21 The Court: Okay. What about the
22 next one? Oh, here we go.

23 Mr. Hildebrand: There is a 13th
24 juror --

25 The Court: Right.

1 Mr. Hildebrand: -- doctrine, Your
2 Honor.

3 The Court: Okay.

4 Mr. Hildebrand: -- which
5 incorporates --

6 The Court: There you go.

7 Mr. Hildebrand: -- largely all my
8 prior arguments and particularly the ones on the
9 lack of any evidence or intentional conscious
10 knowing wrongful acts on this project.

11 The Court: And I see in your
12 argument that you said if the repair cost
13 dedicated solely to the claimed defects that
14 Ross Clements, the plaintiff's expert, either
15 did not or should not opine that a code
16 violation had occurred. You had structural
17 deficiencies, vapor barrier installation,
18 exterior trim removal and sheet metal facia.
19 You think that should have been taken out of his
20 estimate?

21 Mr. Hildebrand: That's
22 Mr. DesChamp's, if I could --

23 Mr. DesChamps: Yeah, I can speak to
24 that.

25 The Court: Oh, I'm sorry. Okay.

1 Sorry.

2 Mr. DesChamps: I loop into our
3 final one --

4 The Court: Okay.

5 Mr. DesChamps: -- and if you're
6 good if I go to the nisi remittitur?

7 Mr. Connell: Yeah. Sure.

8 Mr. DesChamps: So the -- the last
9 motion is the new trial nisi remittitur, Your
10 Honor.

11 The Court: Right.

12 Mr. DesChamps: And just to quickly
13 go through the standard. The trial courts in
14 South Carolina have the power and -- and with
15 the responsibility of reducing damage awards
16 that was unduly liberal or unduly excessive. A
17 new trial nisi remittitur is proper when the
18 jury's verdict is excessive or unduly liberal,
19 but not necessarily actuated by passion,
20 caprice, prejudice. That would be a new trial
21 absolute.

22 The Court: Right.

23 Mr. DesChamps: Compelling reasons
24 should be given if you're going to -- well -- in
25 -- in reduce the judgment. And a critical

1 inquiry is whether the award excessively
2 compensates the injured party. So in trial
3 court, which had wide latitude and it was the
4 one who heard the evidence, was sitting in here
5 and the -- and --

6 The Court: Uh-huh.

7 Mr. DesChamps: -- the court of
8 appeals doesn't accept it. A lot of discretion
9 of the trial court to do that. And so like I
10 mentioned, it's -- the trial court said that it
11 should be some, you know, rational basis that
12 can be explained and why it's being reduced.
13 And so for each these I provided that.

14 The first one is the one you
15 mentioned, Your Honor. And this kind of loops
16 back into one of our arguments we made earlier.
17 So there is, of course, the statute of repose
18 that -- that applies to all of these claims. It
19 becomes a jury issue because there is evidence
20 of claim -- code violation. So that's just of
21 kind of the way the statute works. But not
22 every claimed damage that the plaintiff sought
23 was even claimed to be a code violation.

24 The Court: Uh-huh.

25 Mr. DesChamps: And because -- as

1 Mr. Hildebrand went through in detail, to get
2 past the statute of limitations to get past
3 gross negligence because there was no
4 traditional evidence of intentional or conscious
5 wrongdoing. I think they had to rely on these
6 claimed code violations and this portion of this
7 statute that's somewhat -- that says, well, code
8 violations may be evidence of -- of gross
9 negligence. So I think that's really the only
10 part of potential gross negligence they could
11 even try to argue.

12 But again, so this goes to sure,
13 some of what they complained of, Mr. Clements
14 contends were the code violation. But some of
15 it was not and -- and they didn't even -- of
16 course, we don't have the -- we don't have the
17 transcript, so you know, I can't really prove
18 what he didn't say. But so I know in the
19 structural deficiencies, of course, we briefed
20 that in detail and submitted the deposition
21 testimony. I understand that the deposition
22 testimony was not part of the trial, but the
23 point is, it's the absence of what he said at
24 trial. He -- he did not contend that those were
25 -- the structural issues were code issues. And

1 I think that was when we did the proffer --

2 The Court: Uh-huh.

3 Mr. DesChamps: -- he was basically
4 saying, look, all I'm saying is they didn't
5 comply with the structural drawings. And
6 Mr. Connell mentioned earlier that -- he went
7 one step farther and said, well, if it didn't go
8 -- if it did deviate from the plans, that is a
9 code violation. I don't think that's what he
10 said. So I think that would be going beyond
11 what he said he was going to in the proffer.

12 The Court: Uh-huh.

13 Mr. DesChamps: But anyway, he
14 either didn't or -- I think that he should not
15 have claimed that to be a code violation because
16 I don't think that was pulled up.

17 The same things with the vapor
18 barrier for reasons we -- we detailed in -- in
19 the motion of limine and the proffer and all the
20 rest, that also -- he either didn't say it was a
21 code violation or he shouldn't have. We'd just
22 have to check the transcript on that. But in
23 any case, it -- there's really no evidence of
24 that being a code violation.

25 The -- the other big category on

1 this is the trim replacement. You remember
2 that --

3 The Court: Yeah.

4 Mr. DesChamps: -- Mr. Clements
5 said, well, look I -- sure I didn't know at the
6 time, but I know now that they replaced a bunch
7 of trim. And again, I know that the deposition
8 testimony is not part of the trial. I don't
9 have the transcript. But I do know that when we
10 went through this with him in the deposition, he
11 said, yeah, I'm not claiming that the trim
12 issues are code violations because I don't even
13 know who the manufacturer was. And I can't -- I
14 can't say it. I don't know what was original
15 and what wasn't.

16 The Court: Uh-huh.

17 Mr. DesChamps: All I'm saying is
18 you know, I think there's -- for some of the
19 trim he said, I think there's some premature
20 deterioration. And for some of the trim he said
21 I think some of the fasteners are -- are spaced
22 too much. I -- I can't call it a code
23 violation. So --

24 The Court: Uh-huh.

25 Mr. DesChamps: -- when we get to

1 the trial transcript, we'll see an absence of --
2 of a contention it was a code violation.

3 The Court: Okay.

4 Mr. DesChamps: And the same thing
5 with the metal facia. That's a smart value.
6 But I just know that was one of the ones he
7 conceded wasn't. So given that we don't have
8 any traditional evidence of gross negligence
9 where there's the intentional violation of
10 something in the like, I do think it would be
11 appropriate for the Court to reduce out the
12 claimed damages that relate only to these issues
13 that already -- you know, arguably code
14 violations.

15 And so what I've done there --

16 The Court: Uh-huh.

17 Mr. DesChamps: -- is I take the
18 plaintiff's repair cost estimate --

19 The Court: Uh-huh.

20 Mr. DesChamps: -- that's in
21 evidence.

22 The Court: Uh-huh.

23 Mr. DesChamps: And there is a
24 specific value to each one of the separate claim
25 defects repair costs. It's a -- it's not that

1 complicated, but it's -- it's more than just
2 looking at the number. Because a lot of the
3 costs in there are like, contractor profit,
4 contractor overhead, salaries and the like. And
5 basically, what all of these repair contractors
6 say is yeah, it would be a fair way to allocate
7 those costs just on a pro rata basis.

8 The Court: Right.

9 Mr. DesChamps: So that's what I
10 did. And --

11 The Court: So you're saying that it
12 would have brought -- the way -- it just reads
13 odd. Are you telling me that it would have
14 roughly lowered their repair estimate to
15 5,610,000 instead of the 9,376,000? Is that
16 what you're saying?

17 Mr. DesChamps: That's right. If --
18 if we take out the structural deficiencies
19 repair costs --

20 The Court: Uh-huh.

21 Mr. DesChamps: -- the vapor barrier
22 installation costs. And that's just going to be
23 the marginal increase, the additional amount
24 that was dedicated solely to the vapor barrier.

25 The Court: I understand that.

1 Okay.

2 Mr. DesChamps: Right. The exterior
3 trim removal and replacement --

4 The Court: Uh-huh.

5 Mr. DesChamps: -- and the sheet
6 metal facia, the 68 grand for that.

7 The Court: Okay.

8 Mr. DesChamps: The -- the total
9 amount of what's left. All the other claimed
10 defects that they do contend were code
11 violations --

12 The Court: Uh-huh.

13 Mr. DesChamps: -- under this theory
14 that I'm putting forth, it would be the 5.6
15 million. So let's say, if you're surviving the
16 statute of repose based on evidence of claimed
17 code violations, this would be the maximum
18 recoverable amount for those code violations.

19 The Court: All right.

20 Mr. DesChamps: And so I think that
21 would be an appropriate and -- and you know,
22 rationally way to apply a nisi remittitur to go
23 from the 6.75 million down to the 5.6 million.

24 The Court: Okay.

25 Mr. DesChamps: That is the first

1 part of that. The second relates to the case
2 that we cited. It's Campus Swagger and
3 Sportswear versus V.M.B. Kohn.

4 The Court: Uh-huh.

5 Mr. DesChamps: In that case it was
6 a -- it was a single issue about a roof. And
7 the roof had been in place for about five years.
8 It was supposed to be a 20-year roof. They
9 obtained a judgment to remove and replace the
10 roof. And under nisi remittitur, the district
11 court -- federal court case, did reduce the
12 judgment himself to credit basically the five
13 years that the roof was in place.

14 So it was supposed to a 20-year
15 roof. It was only five. The -- they basically
16 took the 25 percent reduction of the verdict
17 because the roof was in place and performed
18 satisfactory for those five years. So applying
19 the same principles here, Your Honor, you
20 remember that there was discussion about the
21 roofs.

22 Under the -- the numerous reserved
23 studies that were introduced and the H.O.A.'s
24 own reserve replacement schedules, there is
25 three components that their damages model called

1 for the complete replacement of. That under
2 their own schedules had met or exceeded the
3 expected use of a life according to their own
4 figures and their own reserved specialist
5 recommendations. That's the rouse.

6 The exterior stairways and the
7 exterior carpet/waterproofing membrane
8 underneath it. And so for those I have gone --
9 done the same method of referring to the
10 plaintiff's repair cost estimate and pulling out
11 those figures. And that's what I have there.
12 And so that will be a total reduction of the
13 combination of those three components of 1.277
14 million dollars.

15 The Court: Uh-huh.

16 Mr. DesChamps: Subtracting that
17 from the 5.6 that I mentioned earlier and that
18 comes to the 4.3.

19 The Court: Uh-huh.

20 Mr. DesChamps: Under the same line
21 of case and the same theory is the largest
22 single repair cost item in their -- in their
23 estimate would be the removal and replacement of
24 all of the lapped siding on the buildings.

25 The Court: Uh-huh.

1 Mr. DesChamps: And for that it's a
2 little under 1.7 million dollars. I introduced
3 evidence of numerous documents. It's the same
4 documents. It's the reserve study and then the
5 H.O.A.'s own reserve replacement schedules
6 adopting that, that has the expected life for
7 all the various components.

8 The Court: Uh-huh.

9 Mr. DesChamps: For this -- for the
10 lapped siding it's 50 years. They were planning
11 on it being 50 years. What they got out of it,
12 if they replaced today, would be 22 years or --
13 so that be 44 percent of its expected life. The
14 testimony wasn't that this lapped siding was --
15 that they're having problems. It was more that
16 Mr. Clements did some testing and -- and what he
17 said was a latent defect. He said, well, the
18 spacing was more than 16 inches. And so in my
19 opinion, the whole thing needs to be removed and
20 replaced.

21 But the point is they had
22 satisfactory service life of the lapped siding
23 for those 20 years. And so if they replace it,
24 it's just because Clements -- Mr. Clements
25 identified these fastener spacing issues. But

1 it's not because of a -- of a failure of
2 performance. And so under the some line of
3 case, same theory, you did get, at the very
4 least, satisfactory performance of that exterior
5 lapped siding for 44 percent of its expected
6 service life. And so applying the same theory,
7 44 percent times the 1.7 million dollars --

8 The Court: Uh-huh.

9 Mr. DesChamps: -- that is
10 attributable to that single figure -- or that
11 single repair item is the 747 -- 747,000
12 dollars.

13 The Court: So can I ask you a
14 question? So between all of those -- looked --
15 looked like those three separate sets that you
16 want to remove, what were each of the -- or the
17 totals then. If you removed anything that
18 wasn't a code violation, how much was that?

19 Mr. DesChamps: 5.6 million.

20 The Court: No, no, no. That -- no,
21 no, no. That -- I want to know the amount that
22 you are carving out, not --

23 Mr. DesChamps: Oh, I got it.

24 The Court: -- what are you down
25 from? In other words, if I wanted to take the

1 number from 9,376,000 dollars, I want to know
2 what it would be. It's kind of what I'm looking
3 at. So I just need to know what those dollar
4 amounts are because who knows if the jury
5 already included those in their number.

6 Mr. DesChamps: I -- I think I
7 understand question.

8 The Court: Right.

9 Mr. DesChamps: And -- and so --

10 The Court: So do you know which
11 ones were yours?

12 Mr. DesChamps: -- it -- because
13 the --

14 The Court: What I want to know is
15 what each of those total.

16 Mr. DesChamps: I think I do have
17 the answer.

18 The Court: Okay.

19 Mr. DesChamps: Because the first --
20 the 5.6 million, it was not based on a
21 subtraction. It was --

22 The Court: Okay.

23 Mr. DesChamps: -- it was based on
24 adding all of the --

25 The Court: Got it. So that --

1 Mr. DesChamps: -- all the figures
2 that they were contending was a code violation.

3 The Court: Got it. Okay.

4 Mr. DesChamps: So --

5 The Court: Take that out.

6 Mr. DesChamps: So that would be the
7 5.6 --

8 The Court: Got it.

9 Mr. DesChamps: -- million.

10 The Court: Okay.

11 Mr. DesChamps: And so --

12 The Court: And then --

13 Mr. DesChamps: So that necessarily
14 means that they did not restrain their reward to
15 only those for which there was claimed code --
16 code violations because they're so -- it
17 couldn't have exceeded 5.6 million dollars.

18 The Court: Uh-huh. Okay.

19 Mr. DesChamps: Does that answer
20 your question?

21 The Court: That -- that number
22 would be subtracted from -- I -- I think I
23 understand. I'm just going to have to do --
24 I'll just take that. That number would be
25 subtracted from -- I -- I think I understand.

1 I'm just going to have to my math myself. But I
2 understand what --

3 Mr. DesChamps: And --

4 The Court: -- you're saying. Okay.

5 Mr. DesChamps: All right. And then
6 the final, Your Honor -- and I'll get to the --
7 go to the end of this, was this one was, of
8 course, there's a duty to mitigate. And then
9 there's the -- the evidence, the arguments and
10 the evidence that we introduced of the failure
11 to follow the maintenance and repair
12 recommendations. I've got the admitted --
13 admitted lack of response to the 2006
14 recommendation to address the -- the windows.
15 We have the -- the issue with not replacing the
16 membranes at the same time as the carpet and all
17 of -- and all the rest. I -- I -- I think it
18 would be within the Court's appropriate prevue
19 to recognize the lack of mitigation, the lack of
20 prompt action and the lack of maintenance
21 contributed to the progressive water damage.
22 And I think a -- a reduction in -- in light of
23 evidence would be appropriate. I suggested a
24 50/50. I can acknowledge that that would --
25 there would be more than one way to skin the cat

1 there.

2 The Court: Uh-huh.

3 Mr. DesChamps: If 50/50 was
4 applied, it would take the number that I
5 previously had and -- and it goes down to about
6 1.8 million.

7 The Court: Okay.

8 Mr. DesChamps: So Your Honor, of
9 course, this motion is made in the alternative,
10 we're asking for J.N.O.V. over a new trial, but
11 in the event those are denied, we would ask for
12 nisi remittitur. And of course, we would
13 reserve -- preserve all appellate rights on any
14 denial of J.N.O.V. or new trial, if this
15 granted. But we -- we would respectfully ask,
16 Your Honor, to grant -- exercise your right to
17 do a ni--- nisi remittitur.

18 The Court: Okay. All right, Mr.
19 Connell.

20 Mr. Connell: So Your Honor, you
21 know, I think I've got to go back to the -- to
22 the touchstone rule with -- Your Honor to uphold
23 the verdict and to give great deference to the
24 jury. And so what you've got in this case is
25 they want you to be the jury now and decide --

1 take 50 percent off the verdict for a duty to
2 mitigate. I don't -- I don't think that's the
3 law. They also want you to take something,
4 dollar amounts of code violation, but they
5 didn't introduce any evidence of that. It would
6 have been up to them to introduce evidence at
7 the trial that, if you decide, the code
8 violations are this, it's 5 million, what---
9 whatever the number is. And -- and so I rely
10 back on my statement on page eight of my brief.
11 When the amount of the verdict falls within the
12 range of damages testified to, the verdict
13 cannot be disturbed on the grounds of
14 excessiveness.

15 So I had this happen one time before
16 in case before Judge Inman. We had two experts.
17 One expert said 3,000,000 dollars, one expert
18 said 2,000,000 dollars. A jury said 4,000,000
19 dollars. I mean, that's clearly an excessive
20 verdict because of the experts.

21 In this case, we don't have that,
22 though. We've got a -- you've got a demand for
23 nine million and some change and their offer.
24 And we don't know, nor should we be allowed to
25 go and decide what the jury decided about how

1 much they took off or how they took it off. And
2 there was no testimony offered by defendants
3 that these code violations equal this dollar
4 amount. Nobody said that.

5 And so to do that at this point, I
6 don't think it's appropriate. I don't think you
7 could -- of course, you can do whatever you want
8 to, you're the Judge. But I don't think there's
9 any evidence in the record to do that. I mean,
10 I -- it's -- of course, I just got this last
11 night too. But as I think about it, it -- it's
12 -- it's a value decision by the jury. They did
13 take some money off. They did give them some
14 credit.

15 So I just don't think you can do
16 that under what -- based on the facts. How
17 would get those numbers? You'd have to -- you'd
18 have to be sitting as a finder of fact to do
19 that. And they didn't offer any testimony about
20 that. They should have thought about that at
21 the trial and said, you know, the code
22 violations are whatever the dollar amount is.
23 But they didn't do that. They didn't accept to
24 it and they didn't offer any evidence. So I
25 would say you can't do that based on the -- the

1 -- the rule is you're supposed to defer to the
2 jury.

3 And as I -- as I said earlier, the
4 case law in South Carolina courts ad--- adhere
5 to affirming the jury verdict. There is logical
6 reasons for doing so. And -- and as Your Honor
7 knows, we got no punitive damages in this case.
8 We didn't get a full verdict. The jury
9 considered all of these facts in coming to their
10 conclusion. So I would say that that's not a --
11 you shouldn't do that.

12 The Court: Is there any basis for
13 finding that the defendants were grossly
14 negligent over than the building code
15 violations.

16 Mr. Connell: Well, the statute says
17 reckless I believe, does it not?

18 The Court: It does.

19 Mr. Connell: And so that would
20 be --

21 The Court: So what was reckless?

22 Mr. Connell: Building in violation
23 of manufacturer's specifications and standard
24 construct -- industry construction standards.
25 And as, Your Honor, has already indicated,

1 Mr. Carter was as good a witness for me as he
2 was for them, as was their other defense --
3 everybody said they had those three things. So
4 I don't see how the jury could not decide it was
5 reckless. Anyway, thank you, Your Honor.

6 The Court: You want to respond?

7 Mr. DesChamps: Just very quickly.

8 The Court: Sure.

9 Mr. DesChamps: Other than the
10 exception of the statute about the other code
11 violations, I think that it's still subject to
12 the case law by definition of gross negligence.
13 But even if you accept the -- their argument,
14 you're limited to the building code violation as
15 -- as the argument to get around the statute of
16 repose. You have utterly no evidence of
17 intentional wrongdoing.

18 And then as far as the line item and
19 separate cause for separate -- separate repair
20 costs, I just remind that when Mr. Stacy was in
21 direct with Mr. Gallagher --

22 The Court: Uh-huh.

23 Mr. DesChamps: -- you recall that
24 he -- he went through each one of them and
25 separately assigned a cost for each one. So

1 there is the -- the evidence that the jury could
2 apportion numbers to various repair costs. I
3 mean, that was -- it was done separately. It's
4 a line item in the -- in the estimate and they
5 went through it line by line. So it can do
6 that. As far as which ones were code violations
7 and which ones weren't, that's their burden.
8 And -- and it's just a matter of which ones they
9 proved were or were not. And -- and the absence
10 of evidence of a code violation means that
11 there's no evidence that there's a code
12 violation. So you can't do that.

13 The Court: Okay. I -- I will say
14 that both your experts, Carter and Skip Lewis
15 both said that there was -- there was no
16 question on the code violations on this
17 property.

18 Mr. DesChamps: There certainly were
19 some. I mean --

20 The Court: Right.

21 Mr. DesChamps: -- you had a
22 stairwell that --

23 The Court: Right.

24 Mr. DesChamps: -- that was a
25 quarter inch -- the riser was too high. If you

1 ask Mr. Carter is that a code violation, he's --

2 The Court: Of course --

3 Mr. DesChamps: -- he said yes.

4 The Court: -- he's got to say yes.

5 Okay.

6 Mr. DesChamps: But that -- you
7 know, that doesn't -- it -- it means that that
8 quarter of an inch is a code violation.

9 The Court: Right. Okay. All
10 right. Anything else as to the motions for
11 J.N.O.V., a new trial and remittitur? No?

12 Mr. DesChamps: Nothing, Your Honor.

13 The Court: Okay. Well, I can just
14 tell you -- obviously, I've had this case from
15 -- a little over four years through this -- this
16 court. We've argued the statute of limitations
17 issue, which arguably has been the biggest
18 hurdle for the plaintiffs in this case. There's
19 no question. I looked at the summary judgment
20 stage. I looked at it at the first directed
21 stage and the second directed verdict stage. I
22 know that at the summary judgment motion, I went
23 out the handicap ramps and the parking striping
24 because I thought that was open and obvious. So
25 I took that out of the original granted summary

1 judgment. I took out all the plumbing backups.
2 And backlogs because I think there was clear
3 evidence in the record that they knew or should
4 have known -- this is the H.O.A., knew or should
5 have known that there were plumbing problems
6 before the statute of limitations ran.

7 I also threw out the window
8 manufacturer because I didn't see that there was
9 any evidence that there was any defects. I
10 don't know, maybe y'all don't agree with that,
11 not agree with that. But at the time of summary
12 judgment, it just wasn't proven to me. So I can
13 tell you that at trial, the plaintiffs
14 voluntarily took out the rear balconies, which
15 they believed were individual homeowner claims
16 and not an H.O.A. claim because they are common
17 space. They voluntarily did that at trial.

18 I really think in this case under
19 J.N.O.V. motion, I'm going to defer to the jury
20 verdict. I think for me to go back behind it
21 would be me guessing. I feel like we were
22 really careful in not allowing this jury to be
23 overburdened with anything that rises to the
24 level of inflaming a jury. I also have a hard
25 believing that construction cases inflame

1 juries. You know, while each of these people do
2 have an interest, I don't think it's the same
3 thing where you've got, you know, people dead on
4 the side of the road or permanently maimed. You
5 know, we're talking about condo units that are
6 now worth, you know, 250 dollars a piece to each
7 individual homeowner. And I just don't think
8 that -- I guess, in some cases, there could be
9 some kind of outrage verdict, but I just don't
10 see it in this case. I think everyone was very
11 calm and cool. I think this jury was very
12 respectful in exactly what they were doing and
13 worked hard.

14 As far as a new trial is concerned,
15 I don't have anything in this that causes me any
16 huge concern whatsoever. As you know, the big
17 issue we talked about this entire time during
18 this trial was other projects at Barefoot
19 Landing that have brought lawsuits against
20 Centex. And I think we were real careful to
21 keep that very, very limited and we even limited
22 to the point where we didn't talk about that
23 there was any litigation. It was simply brought
24 out that the defendant's experts had worked on
25 those projects or at least inspected them. I

1 think you run the risk when you have an expert
2 who is the same expert in all of your cases and
3 when they ask you whether or not there is
4 prejudice based on someone repeatedly working
5 for the same person. I think it's the same
6 thing as to -- I'm sure Mr. Clements' bill was
7 incredibly high in this case. So I think all of
8 that goes potentially for the jury to consider
9 it.

10 The statute of limitations, like I
11 said, I -- I just think it's a question of facts
12 as to all the issues. I just didn't direct a
13 verdict -- I'm sorry, that I didn't grant
14 summary judgment on. I think in construction
15 cases, you know, obviously, you almost always
16 look to the homeowner's association meeting
17 minutes to see what they discussed. And you
18 know, then you look and see what was discussed.
19 And along with that, you also look to see what
20 the cost of repairs were and what kind of
21 repairs they did. And you know, I don't find
22 that in this case, based on the extent damage,
23 that those were anything more than just
24 maintenance and just trying to, you know, do
25 what they needed to do. And I don't think it

1 put them on notice necessarily. Or if it did,
2 it was a question of the fact for the jury to
3 determine that and not me. I just think that
4 that was within the -- I think it's the jury's
5 purview. Again, I grant summary judgment on the
6 ones that I said absolutely not, that there's no
7 way they didn't know. And for the rest of it, I
8 think it was a jury issue.

9 As far as the remittitur, again, as
10 concerned -- it is so hard to push backwards
11 what a jury does. I will say that it's probably
12 easier in construction cases than any because we
13 do have line items. But in this case, you know,
14 the plaintiffs asked for 9,376,719.85. The
15 defense asked them, if they were going to award
16 anything, to award 384,963.94. The jury came
17 back with a 6,750,000 dollar actual damages
18 verdict. This certainly wasn't more than the
19 plaintiffs asked for. I don't see it inflated
20 in any way. It certainly doesn't shock my
21 conscious.

22 Additionally, they were back there
23 for roughly -- how long were they back there?
24 Was it about three hours on the actual damages
25 portion verdict? And I can tell you, after the

1 punitive damage award where they found for
2 Centex, it was not five minutes that they were
3 -- you know, sent it to them and back after I
4 allowed Mr. Connell to put in some limited
5 information. Obviously, Mr. Hildebrand to cross
6 it or present whatever he wanted to and then
7 very small re-closings on punitive damages
8 issue. And the jury came back and say, no. And
9 it came back fast.

10 So at this point, I'm not going to
11 disturb the verdict. We're going to leave it as
12 it is. I know it's going to be appealed. And
13 so that goes to our next motion as far as paying
14 the judgment into the court, so.

15 Mr. Hildebrand: Thank you, Your
16 Honor. And I've got extra copies of our...

17 The Court: I can tell you
18 Mr. Hildebrand, my law clerk took the liberty of
19 uploading your proposed order into my que. So
20 if I grant the motion, I can sign it
21 immediately. Okay?

22 Mr. Hildebrand: Okay. Thank you.

23 The Court: So -- and I appreciate
24 the proposed order. So whenever you're ready.

25 Mr. Hildebrand: Thank you, Your

1 Honor. This is a motion by Centex to do two
2 things. One is under Rule 67 to pay the full
3 amount of the judgment -- the -- the jury
4 verdict, 6,750,000 dollars into the court along
5 with accrued interest and to deposit it into the
6 court. And I would propose an order where the
7 order would read that the clerk of court put it
8 in a separate account, a new account that's
9 interest bearing. And then at the end of any
10 appeals or when the case is finally decided,
11 that you would decide what -- how that interest
12 gets allocated and we'll come to you on a
13 different date on that. But I think that's
14 allowed under the rule. The rule does require
15 us to get court approval. So that's what I'm
16 asking you to approve. And I think that the
17 case law is clear that if we pay that sum in
18 cash and in full, that it stops the accrual of
19 post-judgment interest.

20 So it's -- it's beneficial to us
21 because it stops the interest. It's beneficial
22 to the plaintiffs because they've got cash in
23 the bank. I mean, even though --

24 The Court: Uh-huh.

25 Mr. Hildebrand: -- Pulte's a big

1 company, sometimes big companies have problems,
2 Enron and some others. And so it's -- it's
3 something I think that the courts have done
4 balancing acts as this is something that
5 provides benefit to everybody because they've
6 got the cash in the bank.

7 The Court: Uh-huh.

8 Mr. Hildebrand: So we would one,
9 ask that we -- that you sign that order allowing
10 us to pay it with the accumulated interest. And
11 to rule that it won't be dispersed until later
12 on and that the judgment interest would
13 therefore cease.

14 The second aspect of our motion is
15 also provided under the rules, which is, that if
16 we pay this money into the court pending the
17 appeal, then obviously, we don't want the
18 plaintiffs to try to levy against our
19 property -- Centex's property or to execute on
20 the judgment otherwise. And so the Rule 67 --
21 I'm sorry, Rule 62(b) and (d) and South Carolina
22 Code section 18-9-130 says that the Court by the
23 posting of property proper security in rule that
24 the plaintiffs are -- can't attempt to recover
25 on the judgment or to I guess, through whatever

1 proceedings, foreclose on the judgment pending
2 the appeal. So that's all I simply is -- is
3 asking. So we would ask for those two things.

4 The Court: Okay. And you say it's
5 Rule 62(b) and (d) and the code section of
6 18-9-130 that allows for that? And just --

7 Mr. Hildebrand: Yes. Yes, ma'am.

8 The Court: Okay. All right,
9 Mr. Connell.

10 Mr. Connell: So let me talk about
11 the -- the motion of deposit first. So Your
12 Honor, I understand the Russ versus Sutton,
13 which apparently allows this.

14 The Court: Yes.

15 Mr. Connell: Although, I don't -- I
16 -- I think I would ask -- ask the Court to make
17 a ruling on whether or not Rule 67 supersedes
18 South Carolina Code section 34-31-30, which is
19 the interest statute. Because Your Honor, our
20 position would be on appeal if this is going to
21 go up on appeal.

22 The Court: Yeah.

23 Mr. Connell: Is that the rules of
24 civil procedure cannot -- are not superior to
25 the interest statute. The interest statute says

1 all judgment collect whatever -- whatever
2 Justice Beatty sets every year in January.

3 The Court: Right.

4 Mr. Connell: And so this -- these
5 cases -- the case that's been cited goes to Rule
6 67 and talks about you can deposit money to the
7 court. Your Honor, we believe that that deals
8 with interpleaders and things like that. And
9 that the Court has never -- the supreme court
10 has never discussed the interplay between Rule
11 67 of the rules of civil procedure --

12 The Court: Uh-huh.

13 Mr. Connell: -- and the interest
14 statute. And we believe that if the Court, when
15 faced with that issue, would find that interest
16 would accrue at a regular rate, whatever that is
17 as of Justice Beatty's decision in January. So
18 we do not agree that they should be able to
19 deposit the money into the court. And it -- all
20 it does, it gives you a free appeal. And so
21 that does -- and I -- I must say, I looked at
22 this for a good while and I only found three
23 cases on it.

24 The Court: Uh-huh.

25 Mr. Connell: It's a very unusual --

1 and I don't know, maybe you've had cases on this
2 particular situation.

3 The Court: Just give me one second.
4 Okay.

5 Mr. Connell: So the -- so the other
6 thing I would argue, Your Honor, if you're going
7 to do that, if you'll just note our objection to
8 you doing that, so we can perfect that if that's
9 an issue. Because it does require your -- in
10 case law, apparently people have done in the
11 past, they didn't get the court's approval.

12 The Court: Right.

13 Mr. Connell: And they said you
14 can't do it. So --

15 The Court: Right.

16 Mr. Connell: -- we would ask the
17 Court if you're going to do that, that you put
18 in the order that the clerk of court or the
19 Treasurer of Horry County is required to find
20 the highest interest-bearing account available
21 versus just letting them decide -- or in the
22 alternative, letting the parties decide where
23 that money's going to be placed pending the
24 appeal. Because there -- as Your Honor knows,
25 there are different levels of interest. If the

1 -- if the clerk of court's office is going to
2 put that money in a -- in a interest-bearing
3 account here as money market. It's going to
4 draw .5 percent.

5 The Court: Right.

6 Mr. Connell: If they're going to
7 put it -- if this thing's going to go on for
8 years, you can get four and a half, five
9 percent, you know, which is going to make a big
10 difference at the end of the case. So -- so our
11 first argument is, is that you should make a
12 decision about the statute, this rule --
13 interest rule statute, number one. And number
14 two, if you decide you're going to do that, then
15 would you order the clerk of court or the
16 parties to come to some resolution about where
17 the money should be placed?

18 The Court: My concern about your
19 question is, is that, at the prime rate right
20 now, what are we at? Isn't that like --

21 Mr. Connell: It's 11.5.

22 The Court: It's going to be high.

23 Mr. Connell: Yes.

24 The Court: So it's 11.5. I don't
25 know of anywhere you're going to get a return.

1 And --

2 Mr. Connell: Well, you know --

3 The Court: -- at 11.5, that's not
4 going to happen. And I can tell you right now
5 the closest I have seen, just in my own personal
6 opinion, to a -- even right now, either a -- you
7 know, a high bearing savings checking account, I
8 think the top right now is about five percent --

9 Mr. Connell: Yes, ma'am.

10 The Court: -- is what I'm looking
11 at, roughly.

12 Mr. Connell: That's true.

13 The Court: You can put it in a
14 C.D., but I don't think you can tie up your
15 money in this kind of case like that. So
16 obviously, you want your money to earn interest
17 whoever it ends up with, with the most possible
18 interest. And I would agree with Mr. Hildebrand
19 based on the amount of money in this case, I 100
20 percent agree the clerk of court should have it
21 in a separate account from anything else and it
22 not be dispersed other than by court order.
23 Hold on a second.

24 I don't think I need to make a
25 finding that the Rule 62 supersedes the code

1 section. I think that you're talking about
2 34-31 -- pardon? Rule 67. I'm sorry, rule 67
3 supersedes this code section, correct, the
4 34-31-20. I think they can live harmoniously
5 together. I would agree that I think they can.
6 It doesn't run a foul. The Manning case is the
7 one I was just looking at where they --

8 Mr. Hildebrand: Yeah.

9 The Court: -- tell them they were
10 depositing it into the court. They didn't get
11 lead from the court to do it. In this case,
12 Mr. Hildebrand's done everything he needs to do.
13 I'm not a banker. I don't think any of you are
14 bankers. I'm trying to figure what do you think
15 as far as, do you two want to try to -- where
16 you put this money, the two of you?

17 Mr. Connell: Again --

18 The Court: And if you want to
19 direct the clerk of court where you would like
20 it put.

21 Mr. Connell: I'm willing to do that
22 if you are. I think that's the best way.
23 Because what will happen is, no offense to the
24 clerk of court's office, they're going to send
25 it to the Treasurer of Horry County and they're

1 not going to do anything with it except put it
2 in a .3 money market.

3 The Court: I can tell you what the
4 clerk of courts do with all of their various
5 accounts and things. They like to spread it
6 around, is my experience because they want to
7 give everybody a little bit of business. But
8 you're right, they're not going to go shopping
9 for the highest rate.

10 Mr. Connell: No.

11 The Court: That's for sure. And
12 nor are they responsible for it. That's why I
13 think the best case scenario would be for the
14 two of you to agree to it.

15 Mr. Hildebrand: I'm fine with that.
16 But we can go ahead and pay it into the court,
17 the clerk of court.

18 The Court: Absolutely.

19 Mr. Hildebrand: Okay.

20 The Court: Absolutely. We're --
21 you're going to pay it in today.

22 Mr. Hildebrand: Right.

23 The Court: Into the court right
24 now. And then you two go agree on something.
25 And I mean, you can just do a quick, you know,

1 look. Like I said, last night I -- honestly, I
2 looked last Thursday because I was trying to
3 decide where to put some money and the highest I
4 saw, which was through -- I think it was through
5 Forbes or they listed the top five.

6 Mr. Connell: Right.

7 The Court: So --

8 Mr. Connell: Yeah, I have looked
9 too and found that -- I talked to somebody at
10 United Bank, a big bank and they said that they
11 had 4.1 on a high yield savings account.

12 The Court: Is that United
13 Community?

14 Mr. Connell: Yeah. Yes.

15 The Court: Okay. I know there's a
16 few others that are a little bit higher than
17 that.

18 Mr. Connell: So -- but the others,
19 I don't know.

20 Mr. Hildebrand: Okay. And if we
21 can't come to an agreement, I -- I can't imagine
22 why, but we can --

23 The Court: Can I just --

24 Mr. Hildebrand: -- we can just call
25 you and --

1 The Court: I'll just direct one.

2 Mr. Hildebrand: Okay. That's fine.

3 The Court: Okay.

4 Mr. Connell: We'll come to some
5 agreement about that.

6 Mr. Hildebrand: Okay. I think we
7 can.

8 The Court: You guys -- you guys --
9 I mean --

10 Mr. Hildebrand: I -- I --

11 The Court: -- it benefits both of
12 you because --

13 Mr. Connell: Yes.

14 The Court: -- whoever --

15 Mr. Hildebrand: Right.

16 The Court: -- wins is going to --

17 Mr. Hildebrand: Right.

18 The Court: -- want the interest.

19 Mr. Hildebrand: Right.

20 The Court: So it makes sense.

21 Mr. Hildebrand: Okay.

22 The Court: Right?

23 Mr. Connell: All right. I -- I
24 mean, we -- I don't --

25 The Court: Okay.

1 Mr. Connell: -- think there's any
2 issue about that.

3 The Court: Okay.

4 Mr. Hildebrand: I'll -- I'll get
5 the check promptly, but I -- I don't have it
6 with me.

7 Mr. Connell: So did you figure the
8 dollar amount from the verdict to today's
9 date --

10 Mr. Hildebrand: I've got --

11 Mr. Connell: -- and average that --

12 Mr. Hildebrand: -- the per diem
13 figured out. I -- but I don't know what it
14 is --

15 Mr. Connell: Okay.

16 Mr. Hildebrand: -- up until today.

17 The Court: What do I need to change
18 in the order Mr. Hildebrand, that states that
19 it's being deposited as directed by the
20 attorneys to choose and -- I mean, I -- I don't
21 know, when do you plan on writing this check or
22 do you have it?

23 Mr. Hildebrand: I'm told that I --
24 I can have it any time now.

25 The Court: Okay.

1 Mr. Hildebrand: It can be FedEx'd.

2 So I can --

3 The Court: Okay.

4 Mr. Hildebrand: -- have it very
5 promptly.

6 The Court: So it sounds to me like
7 you can, in fact, get me an order and you two
8 can probably decide today where you want to put
9 it. Is that fair to say?

10 Mr. Connell: I don't have any
11 objection in putting it in the clerk of court,
12 so it can stop the interest.

13 The Court: Right.

14 Mr. Connell: Although, I do object
15 to the whole process, but --

16 The Court: Right. I understand.

17 Mr. Connell: -- that's whole
18 another -- whole other issue.

19 The Court: I understand. Okay.

20 Mr. Connell: So and then we could
21 get orders saying that the Court could belabor
22 it to whatever bank we agree upon.

23 The Court: Okay.

24 Mr. Connell: If that's --

25 Mr. Hildebrand: Yeah, we can -- I

1 think we just need to add -- if the -- if the
2 order is otherwise okay --

3 The Court: Yeah.

4 Mr. Hildebrand: -- then I think
5 that --

6 The Court: Okay. We're just going
7 to change it then. We're just going to add to
8 it.

9 Mr. Connell: So it -- the -- the
10 other --

11 Mr. Hildebrand: Yeah, I think what
12 you would simply say would be the clerk will
13 deposit --

14 The Court: Right.

15 Mr. Hildebrand: -- the money
16 into --

17 The Court: -- a savings bearing
18 account as -- to be determined by -- or approved
19 by the parties.

20 Mr. Hildebrand: Right.

21 The Court: Yes?

22 Mr. Hildebrand: Yeah.

23 The Court: Or something --

24 Mr. Connell: So the other ar--- the
25 other issue would --

1 The Court: Yes, sir.

2 Mr. Connell: The other issue we
3 would -- we would point out to Your Honor is --

4 The Court: Uh-huh.

5 Mr. Connell: -- Rule 62(b) that
6 they cite talks about execution being stayed
7 until the motion for a new trial is decided.
8 And so if you look at the language of the rule,
9 it does not go any further than that. And you
10 would have to go down to the supersedes section
11 of the rule I think, to decide what you're going
12 to do at that point.

13 The Court: Okay.

14 Mr. Connell: If you -- if you
15 follow what I'm saying.

16 The Court: We're looking at 62?

17 Mr. Connell: He's -- he's arguing
18 you to about 62(b), stay --

19 Mr. Hildebrand: Well, that's 62(b)
20 and (d) was what we decided. But I think D is
21 the supersedes.

22 Mr. Connell: Right. That's right.

23 The Court: What am I missing? I
24 thought as long as -- agreed. It's -- once it's
25 -- once I allow it, it stops.

1 Mr. Connell: So -- so Your Honor,
2 when you're looking at 62(b) --

3 The Court: Yeah.

4 Mr. Connell: -- you'll also need to
5 look at appellate Rule 241.

6 The Court: So what are you asking
7 me? You want me to find that Rule 62(d) of the
8 civil rules of procedure trumps Rule 241 of the
9 appellate court rule?

10 Mr. Connell: I think 241(b), this
11 is a money judgment number one.

12 The Court: I understand that.

13 Mr. Connell: And then I think it
14 says that the exception applies, those
15 conditions must be strictly complied with. So
16 that's as to the super--- supersedes bond. I
17 think.

18 The Court: Okay. So I don't know
19 what you're arguing.

20 Mr. Connell: I --

21 The Court: Help me out.

22 Mr. Connell: It -- it -- what I'm
23 just saying, Your Honor, is, is that if you're
24 going to stay execution, then they're going to
25 have to file an appeal, number one.

1 The Court: Immediately. Yeah.

2 Mr. Connell: Exactly. Otherwise,
3 because there is an exception to the statute for
4 money judgments.

5 The Court: I saw that.

6 Mr. Connell: And then you're going
7 to have to decide what amount should be of the
8 supersedes bond. Should the amount be the money
9 you just ordered to pay into the Court --

10 The Court: Right.

11 Mr. Connell: -- or should it be a
12 higher -- higher amount depending on -- and it's
13 the discretion --

14 The Court: You're saying once he
15 files his appeal?

16 Mr. Connell: Correct. So I don't
17 think it gets stayed until --

18 The Court: His appeal is filed.

19 Mr. Connell: Yes, ma'am.

20 The Court: Is what you believe?

21 Mr. Connell: And then you could
22 come back to him. He could come back to you and
23 say, I need to get an exception because we paid
24 this money into the court --

25 The Court: Uh-huh.

1 Mr. Connell: -- and then you're
2 going to decide, is that enough for the
3 supersedes bond? It's a little bit disjointed
4 because of the way it's being done here.

5 The Court: Right. I understand.

6 Mr. Connell: So --

7 The Court: But I'm going to -- I'm
8 going to find that it is adequate. I mean, it
9 is what it is.

10 Mr. Connell: I -- I figured you
11 would.

12 The Court: So -- so yeah.

13 Mr. Connell: I'm not agreeing to
14 it, but I --

15 The Court: Right. I understand.
16 Yeah. It makes sense.

17 Mr. Connell: So he's going to file
18 your appeal tomorrow, I guess or whenever.
19 Right?

20 Mr. Hildebrand: Well, I think
21 you'll need to sign --

22 The Court: He has to notice --

23 Mr. Hildebrand: -- the order --

24 The Court: -- appeal.

25 Mr. Hildebrand: Yeah, there has to

1 be an order that -- I'm sorry. There needs to
2 be just an order signed from which we can
3 appeal. So I think you'll just need to --
4 whether it's a form or whatever on the
5 post-trial motions. And then that will trigger
6 the date.

7 The Court: Right.

8 Mr. Hildebrand: And then we'll file
9 our appeal. But I think the way this is written
10 is that we're paying the money into court. It
11 can't be taken out.

12 The Court: Uh-huh.

13 Mr. Hildebrand: And it -- until --
14 until further order of the Court. So at the end
15 of the appeal or --

16 The Court: Uh-huh. Are you -- have
17 you read his proposed order? Are you concerned
18 about the language in it, Mr. Connell?

19 Mr. Connell: I haven't seen it
20 because I --

21 The Court: Oh.

22 Mr. Hildebrand: Oh, here it is.

23 The Court: Okay. Why don't you
24 look at it?

25 Mr. Connell: So Your Honor, two

1 things I would just ask if they -- the order has
2 June 1st as the date, but I thought the verdict
3 was entered on May the 26th. Am I -- wouldn't
4 that be the date, the date the jury entered the
5 verdict?

6 The Court: Yeah, it would be the
7 date of the verdict. It wouldn't be the date of
8 the -- or I don't think.

9 Mr. Connell: Okay. And we'd ask
10 that the order be changed to number one, to --
11 on May 26th, 2023.

12 Mr. Hildebrand: I'm fine with that.

13 Mr. Connell: And then on page five,
14 I just put where it says new interest-bearing
15 account agreed to by the parties --

16 The Court: Number five. Which --
17 what paragraph? What paragraph on page five?

18 Mr. Connell: This last full
19 paragraph.

20 The Court: Paragraph four.

21 Mr. Connell: A new interest-bearing
22 account agreed to by the parties. And I would
23 just take out --

24 The Court: Does it already say
25 somewhere in there that it'd be put in a

1 separate account?

2 Mr. Connell: It says a separate new
3 interest --

4 The Court: Okay.

5 Mr. Connell: -- interest account.
6 And I -- I just took out where the word -- with
7 a bank and -- and put agreed to by the parties
8 and to not distribute --

9 The Court: I had seen where that is
10 on here. I thought you said -- I thought you
11 said paragraph four and that --

12 Mr. Hildebrand: It -- it -- it's in
13 two places, Your Honor. It's --

14 The Court: Where's the other one?

15 Mr. Hildebrand: It's -- yeah,
16 it's --

17 Mr. Connell: It's in the order
18 section right here.

19 Mr. Hildebrand: It's on the bottom
20 of page three, number eight --

21 The Court: I got it.

22 Mr. Hildebrand: -- and then the
23 very last paragraph.

24 The Court: Right. And then -- then
25 -- okay. I think we've got it to both places.

1 And you just need to let us know as quick as
2 possible, so we know where to tell the clerk to
3 direct it. All right?

4 Mr. Connell: All right.

5 Mr. Hildebrand: Yes, ma'am.

6 The Court: Okay. I was just going
7 to look it through -- just reread it through
8 once. We've changed it I think in those two
9 places. It was paragraph eight in the second
10 paragraph. And the portion that says order.
11 All right. Anything else with that? I just
12 want to read through it once just to make sure
13 it's clear. Anything else on behalf of
14 plaintiffs?

15 Mr. Connell: No, Your Honor.

16 The Court: Defendants?

17 Mr. Hildebrand: No, ma'am.

18 The Court: All right. Well, we're
19 going to sit back here and we're just going to
20 reread this one time just to make sure it's
21 clean.

22 Mr. Connell: Yes, ma'am.

23 The Court: And -- and then we'll
24 sign it and it should be issued, you know,
25 before we leave today. So --

1 Mr. Connell: All right.

2 The Court: Okay? Okay. Okay. All
3 right. Well, thank you everyone.

4 Mr. DesChamps: Thank you, Judge.

5 The Court: I appreciate it.

6 Mr. Hildebrand: Thank you, Your
7 Honor.

8 The Court: Thank you.

9 (Whereupon, at 3:33 p.m.,
10 the taking of the foregoing
11 hearing was concluded.)
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CERTIFICATE OF REPORTER

State of South Carolina

County of Florence

I, Roger Williamson, Court Reporter and
Notary Public for the State of South Carolina,
do hereby certify that the foregoing hearing
was, by me, that said hearing transcript
contains a true record of the proceedings of
said hearing.

I further certify that I am neither
attorney nor Counsel for, nor related to or
employed by any of the parties connected to the
action, nor am I financially interested in the
action.

Witness my hand at Florence, South
Carolina, this the 12th day



Roger Williamson
MY COMMISSION EXPIRES:
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South Carolina Rules of Civil Procedure

Part V. Depositions and Discovery

Court Rule 30

(e) Submission to Witness; Changes; Signing.

When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds

that the reasons given for the refusal to sign
require rejection of the deposition in whole or in
part.

DISCLAIMER: THE FOREGOING CIVIL PROCEDURE RULES
ARE PROVIDED FOR INFORMATIONAL PURPOSES ONLY.
THE ABOVE RULES ARE CURRENT AS OF APRIL 1,
2019. PLEASE REFER TO THE APPLICABLE STATE RULES
OF CIVIL PROCEDURE FOR UP-TO-DATE INFORMATION.

VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Wedgewood Condominium Association,

Plaintiff,

vs.

Centex Homes, a Nevada General
Partnership, et al.,

Defendants.

Centex Homes, a Nevada General
Partnership,

Third-Party Plaintiff,

vs.

AK Construction Inc. a/k/a AK Framing
and Siding Co., et al.,

Third-Party Defendants.

IN THE COURT OF COMMON PLEAS

Case No.: 2018-CP-26-00307

**CENTEX HOMES, A NEVADA
GENERAL PARTNERSHIP'S
JURY CHARGES**

Defendant Centex Homes, a Nevada General Partnership ("Centex Homes"), by and through their undersigned counsel, hereby submit the following proposed jury charges.

The Wedgewood Condominium Association v. Centex Homes, et al.
Case No.: 2018-CP-26-00307

CENTEX'S REQUEST TO CHARGE NO. ____
(Unfair Trade Practices Act – When Act or Practice is Unfair)

An act or practice is "unfair" when it is offensive to public policy or when it is immoral, unethical, or oppressive. It is well settled that the SCUTPA was not intended to apply to mere acts of negligence. Under South Carolina law, a person does not violate the SCUTPA if he performs his job poorly or overlooks something which should have attracted his attention.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 34-2 (2d ed. 2016); see *Holmes v. Haynsworth*, No. 07-CP-10-1444, 2009WL6423945 (S.C.Com.Pl. July 14, 2009) (Order granting directed verdict on SCUTPA claim); see also *Clarkson v. Orkin Exterminating Co.*, 761 F.2d 189 (4th Cir. 1985) ("There is no support in South Carolina law for the proposition that a service person violates the unfair trade practice statute if he performs his job poorly or overlooks something which should have attracted his attention.").

The Wedgewood Condominium Association v. Centex Homes, et al.
Case No.: 2018-CP-26-00307

CENTEX'S REQUEST TO CHARGE NO. ____
(Duty to Mitigate Damages)

A party who has suffered injury or damage from the actionable conduct of another is under a duty to make all reasonable efforts to minimize the damages incurred. To the extent that he reasonably could have so minimized those damages and failed to do so, he is not entitled to recover from the other party. In other words, one cannot recover any damages that might have been avoided by the use of reasonable care and diligence. A plaintiff's failure to mitigate damages allows the defendant to avoid only those damages that reasonably could have been avoided by the plaintiff.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 13-12 (2d ed. 2016).

The Wedgewood Condominium Association v. Centex Homes, et al.
Case No.: 2018-CP-26-00307

CENTEX'S REQUEST TO CHARGE NO. ____
(Gross Negligence)

Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Negligence is the failure to exercise due care, while gross negligence is the failure to exercise even the slightest care. Gross negligence is a relative term, and means the absence of care that is necessary under the circumstances.

Gross negligence connotes the failure to exercise a slight degree of care. Gross negligence involves an intentional, conscious failure to do something which one ought to do or the doing of something one ought not to do. A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 21-1 (2d ed. 2016).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Recklessness)

The words recklessness, willfulness and wantonness are synonymous. The terms are used to describe a conscious failure to exercise and observe reasonable or due care.

Recklessness implies the doing of a negligent act knowingly. When a person acts negligently and he realizes that he is acting negligently, the law says he is reckless, willful, and/or wanton, whichever term you prefer, they all mean the same thing, that is, the conscious failure to exercise due care.

Recklessness is distinguished from negligence. Negligence is the failure to use due care. Negligence is carelessness. Negligence is failure by omission or commission to exercise due care as a person of ordinary reason and prudence would exercise in the same circumstances.

Recklessness is a higher degree of culpability and responsibility. Recklessness signifies a conscious failure to exercise due care. Recklessness is a conscious indifference to the rights of the plaintiff, or a reckless disregard of the rights of the plaintiff. Recklessness is an awareness of wrongful conduct and a continuation to act regardless of consequences.

In other words, while a negligent person is one who acts carelessly, a person whose behavior is reckless, willful and/or wanton is not only careless in his actions, but is also aware that he is careless. The test for determining whether a tort may be deemed reckless, willful or wanton is whether it has been committed in such a manner and under such circumstances that a person of ordinary reason or prudence would have been conscious of it as an invasion of the rights of the injured party.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 22-2 (2d ed. 2016).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Violation of Building Code Is Not Recklessness Per Se)

Violation of an alleged building code is not gross negligence, recklessness, willfulness, or wantonness *per se* and can only be considered in connection with all of the other facts.

Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (1986).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Burden of Proof)

Members of the jury, the plaintiff in this case, having initiated and brought the action, has the burden of proof. That is to say, the plaintiff has the burden of proving her case by what is known in the law as the greater weight or preponderance of the evidence. When we say that a party must prove a proposition by the greater weight or preponderance of the evidence, we mean that the evidence on that proposition must be more convincing on that party's side than on the other side.

There is no procedure to weigh or evaluate evidence, except through the exercise of your good judgment and common sense. It is entirely a mental process. That evidence weighs with you which convinces you of its truth. What is meant by the greater weight or preponderance of the evidence may be illustrated by an ordinary set of merchant scales used in a place of business. When the case begins, the scales are evenly balanced. When the case ends after all the evidence has been presented and as you deliberate, if those scales remain evenly balanced or if those scales tip ever so slightly in the defendant's favor, then the plaintiff has not met the required burden of proof and your verdict would be for the defendant.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 1-3(A)(1) (2d ed. 2016).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Conflict in Testimony of Expert Witnesses)

In this case, there has been a conflict in the testimony of expert witnesses. To that end, you must weigh one expert's opinion against that of the other, and you must consider the reasons given by one as compared with those of the other. You should consider the relative credibility and knowledge of the experts who have testified. Thereupon, you should find in favor of that expert testimony which, in your opinion, is entitled to the greater weight.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 1-6(A) (2d ed. 2016).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Statements of Counsel)

You must not consider as evidence any statement of counsel made during the trial. Statements of counsel do not constitute evidence, rather counsel is articulating the position and contention of his client. This rule applies to the opening statement of counsel and the closing argument.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 1-8 (2d ed. 2016).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Sympathy)

A verdict in this case cannot be based upon sympathy, passion, prejudice or emotion, or some other consideration not found in the evidence.

Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (1969).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Speculative Damages)

The existence or amount of damages cannot be left to conjecture, guess or speculation. However, proof of amount of loss with absolute or mathematical certainty is not required. Damages must be susceptible of ascertainment with a reasonable degree of certainty.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 13-10 (2d ed. 2016).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Burden of Proof)

The Plaintiff has the burden of proof to establish his case by a "preponderance of the evidence" which means the greater weight and degree of credible testimony or evidence introduced before you and admitted into evidence in this case. The mere fact that the Plaintiff brings a suit for damages in this court in and of itself does not in any degree establish his right to such damages. The mere fact of initiating a suit at law is not to be considered by you as in the least degree establishing the right of this Plaintiff to recover.

Gilliland v. Peters Dry Cleaning Co., 195 S.C. 417, 11 S.E.2d 857 (1940) (the fact that a person receives an injury or is damaged or the fact that an incident occurs is insufficient to prove negligence).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Recoverable damages)

"Generally, the cost of correcting a defect or completing an omission is preferred as a measure of damages over the difference in value between what was done and what was required by the contract. However, if the correction involves an unreasonable destruction of the work done by the contractor, and if the cost of repair is grossly disproportionate to the results to be obtained, the difference in value measure of damages is preferred in order to avoid economic waste."

17 S.C. Jur. Construction Law § 46.

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CENTEX'S REQUEST TO CHARGE NO. ____
(Fraud - Defined)

Fraud is a false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. It involves the elements of dishonesty and deceit. Fraud is something said, done, or omitted by a person with the design of perpetrating what he knows to be a cheat or deception contrary to the plain rules of common honesty.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 18-1 (2d. ed. 2016).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Fraud - Elements)

To establish fraud, the plaintiff must prove the following nine elements:

- (1) a representation;
- (2) the falsity of the representation;
- (3) the materiality of the representation;
- (4) the speaker's knowledge of its falsity or a reckless disregard for its truth or falsity;
- (5) the speaker's intent that the representation be acted upon by the person hearing the representation;
- (6) the hearer's ignorance of its falsity;
- (7) the hearer's reliance on its truth;
- (8) the hearer's right to rely thereon; and
- (9) the hearer's consequent and proximate injury.

Each and every one of these elements must be proven by clear, cogent, and convincing evidence. The failure to prove any element of fraud is fatal to recovery. Fraud is never presumed in the law.

Were the representations made which the plaintiff claims? If you find that no statements or representations were made to the plaintiff, you need not consider the case further. There would be no basis for fraud.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 18-2 (2d. ed. 2016).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Fraud – Nondisclosure as Misrepresentation)

Generally, the failure to disclose is not necessarily a misrepresentation. Nondisclosure becomes fraudulent concealment only when a party has knowledge of materials facts not readily available to the other party and the first party knows the second party is acting on the basis of the mistaken knowledge.

Ralph King Anderson, Jr., *South Carolina Requests to Charge – Civil* § 18-4 (2d. ed. 2016).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Statute of Limitations)

Generally, a cause of action for negligence or breach of implied warranties must be brought within three years or risk dismissal based upon the statute of limitations.

The three-year statute of limitations begins to run when the underlying cause of action reasonably ought to have been discovered. Under the discovery rule, the three-year clock starts ticking on the date the injured party knows or should have known by the exercise of reasonable diligence that some claim against another party might exist. The test for whether the injured party knew or should have known about the cause of action is objective rather than subjective. The South Carolina Supreme Court has interpreted the “exercise of reasonable diligence” to mean that the injured party must act with some promptness when on notice of a potential claim. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

See S.C. Code Ann. § 15-3-530 (2005); *Stoneledge at Lake Keowee Owners' Ass'n, Inc. v. IMK Dev. Co., LLC*, 425 S.C. 268, 271, 821 S.E.2d 504, 506 (Ct.App. 2018), *aff'd in part, rev'd on other grounds*, 435 S.C. 176, 866 S.E.2d 577 (2021); *Allwin v. Russ Cooper Assocs., Inc.*, 426 S.C. 1, 12–13, 825 S.E.2d 707, 713 (Ct.App. 2019); *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645, 647 (1996).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Remaining Useful Life)

If you find that a building component performed satisfactorily for any portion of its estimated life, you may consider the benefit that Plaintiff received from the building component and the building component's remaining useful life in determining damages.

Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co., 515 F. Supp. 64, 103 (D.S.C. 1979), *aff'd sub nom. Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 644 F.2d 877 (4th Cir. 1981).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Statute of Repose – Preamble)

The preamble to S.C. Code Ann. § 13-5-640 (Supp. 2000) provides, in part:

Whereas, the General Assembly finds that persons involved in improvements to real property are subject to the economic and emotional burdens of litigation and liability for an indefinite period of time upon allegations of defective or unsafe conditions; and

Whereas, the General Assembly finds it in the public interest to provide a measure of protection against claims and litigation arising years after substantial completion of an improvement to real property; and

Whereas, the General Assembly finds that substantial differences exist between improvements to real property and other activities for which liability may be alleged, including the fact that improvements to real property have lengthy useful lives and are utilized, changed, and affected by many people, forces, and things after completion; and

Whereas, the General Assembly finds it reasonable and necessary to distinguish between a person in actual possession or control of an improvement to real property and those otherwise involved in an improvement to real property, for the following reasons: because acceptance of some future responsibility for the condition of the premises is implied in the acceptance of an improvement to real property; because possession or control of the premises is a reasonable and fair basis for imposing some additional liability; because after the date of acceptance of the work by the owner, there exists the possibility of neglect, abuse, poor maintenance, mishandling, improper modification, or unskilled repair of an improvement; because owners and persons in control have the opportunity to avoid liability by taking care of the improvement and by regulating its use....

S.C. Pipeline Corp. v. Lone Star Steel Co., 345 S.C. 151, 152–53, 546 S.E.2d 654, 655–56 (2001) (quoting former S.C. Code Ann. §§ 27-27-10 through 100 (1991)). See also *Ocean Winds Corp. of Johns Island v. Lane*, 347 S.C. 416, 419–20, 556 S.E.2d 377, 379 (2001) (same); *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994) (“In determining legislative intent, the Court may be guided by a statute's preamble.”).

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CENTEX'S REQUEST TO CHARGE NO. ____
(Use of Unlicensed Subcontractors)

S.C. Code Ann. § 40–11–270 provides that a licensed contractor “may utilize the services of unlicensed subcontractors to perform work ... ; provided, the licensee provides supervision.”

See Teseniar v. Prof'l Plastering & Stucco, Inc., 407 S.C. 83, 754 S.E.2d 267, 274 (Ct.App. 2014), *reh'g denied* (Feb. 20, 2014). *Midsouth Steel v. DPR Construction, Inc.* 222 F.Supp.3d 536, 538–41 (D.S.C. 2016).

**Wedgewood Condominium Association v. Centex Homes, a Nevada General Partnership;
Balfour Beatty Construction, LLC as successor by merger to Centex Construction Company
Inc. and Centex Construction, LLC**

2018CP2600307

Horry County Week of May 22, 2023

Mister Foreperson and Members of the Jury, you have heard the evidence and arguments of both parties. I will now explain to you the law which applies to this case.

Wedgewood Condominium Association, a homeowner association, alleges that in this case the Centex Entities, a contractor-developer, were grossly negligent in the construction of the Wedgewood Condominiums.

THE JURY: FINDER OF THE FACTS AND CREDIBILITY

Under our Constitution and Code of Laws, only you, the Jury, can make the findings of fact in this case. I am not permitted to tell you how I feel about the evidence which has been presented, and throughout this trial, I have intended to be fair and impartial toward each of the parties involved.

Ladies and Gentlemen, to determine the facts in this case, you will have to evaluate the credibility, or believability, of witnesses. I have already discussed with you some of the things you may consider as you decide whether or not to believe a witness' testimony about a particular matter.

You can believe as much or as little of each witness' testimony as you think proper. You may believe the testimony of a single witness against that of many witnesses, or just the opposite. You may believe a part of a witness's testimony and disbelieve the rest. You should not determine the truth merely by counting the number of witnesses presented by each side. Throughout this trial, you have but one objective, to seek the truth, regardless of its source.

THE JUDGE: INSTRUCTOR OF THE LAW

The same Constitution and Laws which designate and make you the finders of the facts also make me the instructor of the law. You must accept the law as I give it to you. If I am wrong, there is another place and time for that error to be considered, and if necessary, corrected. But for now, you must accept the law as I give it to you. This means that you should not be concerned with what you may think the law should be, but only with what I charge you that the law is.

BURDEN OF PROOF: PREPONDERANCE OF THE EVIDENCE

The burden of proof of Wedgewood Condominium Association's claims against The Centex Entities in this case is by a preponderance of the evidence. A preponderance of the evidence simply means the greater weight of the evidence, which, as a whole, shows that the fact sought to be proved is more likely true than not true.

This can be illustrated by imagining a set of scales. When the case begins, the scales are even. After all the evidence has been presented, if the scales should remain even or if they should tip, even slightly, in favor of the opposing party as to those claims, then the claimant will have failed to meet their burden of proof. If, on the other hand, those scales should tip even slightly in favor of the claimant, then they will have met their burden of proof.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is testimony by a witness about what the witness personally saw, heard, or did. Circumstantial evidence is indirect evidence, that is, it is proof of one or more facts from which one can find another fact. You are to consider both direct and circumstantial evidence. The law permits you to give equal weight to both, but it is for you to decide how much weight to give any evidence.

CREDIBILITY OF WITNESSES

Necessarily, you must determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.

In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider whether any witness has exhibited to you any interest, bias, prejudice, or other motive in this case. You may also consider the appearance and manner of a witness while on the witness stand.

EXPERT WITNESSES

The Rules of Evidence ordinarily do not permit witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call expert witnesses. A witness who, by education and experience, has become expert in some art, science, or profession, may give an opinion as to the subject the witness claims to be an expert in, and may also give the reasons for the opinion.

You should consider an expert opinion given by a witness and, like any other evidence, give it the weight you think it deserves. If you decide that an expert witness' opinion is not based on sufficient education and experience, or if you decide that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

An expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert, and you do not have to accept an expert's opinion, even though it is uncontradicted.

Expert witnesses must be paid per South Carolina law. However, the fact that they are paid should not be weighed against their credibility, unless you find that the amount which they are paid has caused them to be biased in favor of the party by which they are paid.

DEPOSITION TESTIMONY

Testimony was presented to you by written deposition. A deposition is a record containing sworn testimony given by a witness outside of court in the presence of lawyers for each party who may ask questions of the witness. This testimony is entitled to the same consideration and is to be judged as to credibility and weighed by you in the same way as if the witness were present and gave that testimony from the witness stand. It is then for you, the jury, to determine the effect, value, weight, and truth of the testimony given in the deposition.

STIPULATIONS

There have been some stipulations entered into in this case. A stipulation is an agreement as to a fact. Once a fact is stipulated to, that fact becomes established for purposes of the case, and cannot be questioned or contradicted. In this case, the parties have stipulated to the evidence found in Plaintiff's Exhibit 7.

GROSS NEGLIGENCE

Wedgewood Condominium Association claims that the Centex Entities were grossly negligent in the construction of the Wedgewood condominiums.

Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. While negligence is