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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

The Honorable R. Scott Sprouse
Circuit Court Judge

Appellate Case No. 2024-000057
Circuit Court Case No. 2019-CP-04-01942

Natalie Zitek, individually, and on
behalf of all others similarly situated, ... Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John Doe #1-50, ... Defendants,

and.

D.R. Horton, Inc. Third-Party
Plaintiff,

v.

A&J Framing, Inc.; A-Z, Inc.; AJ Landscaping & Grading, LLC,
A/K/A AJ Landscaping & Grading, LLC; Allpro Textures, LLC;
Alpha E.M.C.; Alpha Omega Construction Group, Inc.; American
Concrete And precast, Inc.; A/K/A ACP Concrete, Inc.; Atlanta
Floor Designs Center; A Grade Above Others, LLC; BFK Builders,
Inc.; BMC East LLC D/B/A Coleman Floor, LLC; Brand-Vaughn
Lumber Co, Inc.; Bravo Carpenters, Inc.; Builders Designhouse,
LLC; Builders FirstSource Southeast Group, LLC, A/K/A Builders
FirstSource, Inc.; Builders Services Group, LLC, F/K/A Masco
Contractor Services Central Inc. F/K/A Gale Industries, Inc. D/B/A
Gale Contractor Services; Cannaday Siding & Gutter, Inc.; Caryl
Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; CBU
Enterprises, Inc.; Cortes Painting, LLC; CPI Security Systems, Inc.;
Dom Group, LLC; Dupree Plumbing Company, Inc.; Ferguson
Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations,
LLC; Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II; GBS
Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply,
Inc.; General Shale Brick Inc.; Get Floored, LLC; Greener Pastures,
Inc., A/K/A Greener Pastures of Aiken, LLC; Installed Building
Products, LLC A/K/A Installed Building Products II, LLC; IBP
Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry,

Inc.; Kings Landscaping, LLC; L&M Electric, Inc.; Lade-Danlar, Inc.; Landshapers, LLC; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; M&L General Construction, LLC, A/K/A M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&L Enterprises, LLC; P&T Construction, Inc., A/K/A P&T Construction, Inc.; Probuild Company, LLC A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Silver Line Building Products Corporation; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services., Inc., A/K/A Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc; and Willow Tree Landscaping, Inc., ...	Third-Party Defendants,

and.

Aaron D. Peris; Harrelson Painting, LLC, Huttig Building Products; et al, ...	Fourth and Fifth-Party Defendants,
of whom	

JLS Masonry, Inc. is the	Appellants.

and

Natalie Zitek, individually, and on behalf of all others similarly situated and as assignee of the claims of Third-Party Plaintiff D.R. Horton, Inc., ...	Respondent,

RECORD ON APPEAL VOLUME I OF X

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2019-CP-04-1942
	)	
Natalie Zitek, individually, and on behalf of all	)	
others similarly situated,	)	
	)	
Plaintiff,	)	ORDER GRANTING PLAINTIFF'S
	)	MOTION FOR CLASS
v.	)	CERTIFICATION AND DENYING
	)	DEFENDANT'S MOTION TO
D.R. Horton, Inc.; Jane Doe #1-10; and John	)	COMPEL ARBITRATION
Doe #1-50,	)	
	)	
Defendants.	)	

This matter came before the Court on December 9, 2020 on Plaintiff's Motion for Class Certification and Defendant's Motion to Compel Arbitration.¹ Having reviewed the parties' submissions, heard oral arguments, and conducted a rigorous Rule 23 analysis under the South Carolina Rules of Civil Procedure, this Court finds that:

1. All five Rule 23 class certification requirements are met here;
2. This case is well-suited for class certification because multiple claims that center on Horton's conduct can be resolved in a single action that poses no unusual manageability problems;
3. Horton's arbitration provision is unenforceable because it was extinguished pursuant to the Doctrine of Merger; and,
4. Horton's arbitration provision is unenforceable because it is unconscionable.

Accordingly, the Court **GRANTS** Zitek's Class Certification Motion and certifies the class as proposed; and, the Court **DENIES** Horton's Arbitration Motion.

BACKGROUND

¹ At the December 9th hearing, Justin Lucey and Dabny Lynn with the Lucey Law Firm appeared on behalf of Plaintiff. Tom Dudley and Brian Aughtry with the Kenison, Dudley, & Crawford Law Firm appeared on behalf of Defendant.

This is a proposed class action that involves 234 single-family homes built and sold by Defendant, D.R. Horton, Inc. (“Horton”), in the Rose Hill subdivision located in Easley, South Carolina. These homes were completed between 2012 and 2017. Plaintiff, Natalie Zitek (“Zitek”), owns one of these homes. Zitek maintains that her home and all other Horton-built homes in Rose Hill contain common defects and damages such as leaky windows and patio doors; insufficiently supported brick that is cracking along walls; loosely embedded stone that is separating away from walls; and, insufficiently supported slab foundations that are cracking in many places. Zitek’s expert, Dr. Rhett Whitlock (“Dr. Whitlock”), catalogued all 234 homes and performed detailed inspections at 1/3rd of these homes.² According to Dr. Whitlock, all 234 homes share common construction, a common construction problem (*i.e.*, failing exterior envelopes), and common repairs for this problem that can be commonly priced from home to home. As such, Zitek argues class certification is appropriate and seeks certification of the following class:

Any persons or entities that own a home developed/built by D.R. Horton within the Rose Hill neighborhood in Easley, South Carolina.³

Horton argues that class certification is inappropriate, and separately, argues that the 174 or so proposed class members who contracted directly with Horton should be compelled to arbitrate their claims based on the arbitration provision in Horton’s purchase agreement. Zitek argues that this arbitration provision is unenforceable for two independent reasons: (1) it no longer exists under the Doctrine of Merger; and, (2) it is unconscionable under *Smith v. D.R. Horton*, 403 S.C. 10, 16, 742 S.E.2d 37, 41 (Ct. App. 2013), *aff’d*, 417 S.C. 42, 790 S.E.2d 1 (2016).

PROCEDURAL HISTORY

² Dr. Whitlock tested the windows and masonry at several of these inspected homes. Whitlock Aff., para. 22.

³The class excludes any home owned by D.R. Horton and/or their affiliates; any home owned by the Judge, any Rose Hill home developed by persons other than D.R. Horton; any former Rose Hill homeowner; any current Rose Hill homeowner who previously released D.R. Horton; and, all persons who properly and timely opt out of the Class.

On September 25, 2019, Zitek filed this proposed class action to recover damages owed to her and other Rose Hill homeowners due to defects existing in their homes. Zitek's Complaint asserts the following claims against Horton: negligence/gross negligence, breach of implied warranties, and unfair trade practices.⁴ On February 28, 2020, Horton filed a Motion to Stay for Compliance with the Right to Cure Act (the "Act"). On March 30, 2020, Zitek responded with a Class Certification Motion. In support of her Motion, Zitek filed several supporting exhibits, supporting Affidavits of Dr. Whitlock, Zitek, and Class Counsel, and pictures of the same or similar window defects and damages in a multitude of the homes.

Both parties' Motions were scheduled to be heard on May 29, 2020.⁵ On May 27, 2020, Horton filed its Opposing Memo to Class Certification and an Affidavit from a Horton Manager, Shawn Kruglewicz ("Kruglewicz"). Horton also filed a separate Motion to Compel Arbitration. On May 28, 2020, Zitek filed Dr. Whitlock's Reply Affidavit to Kruglewicz's Affidavit.

At the May 29th hearing, the Court took the Motions under advisement and encouraged the parties to reach an agreement on representative (class action) compliance with the Act. The parties agreed on a compliance plan that this Court enrolled on July 20, 2020. Under this plan, the Parties temporarily withdrew their Motions and Horton inspected and offered to cure 48 homes.⁶ This process ended on October 18, 2020. The next day, Horton re-filed its Arbitration Motion; and, on October 20, 2020, Zitek re-filed her Class Certification Motion.⁷

⁴ Plaintiff represented that if the class were certified that John and Jane Does would not be added and that SCUPTA claims would not apply to the class.

⁵ On May 19, 2020, Horton moved to Continue Zitek's Class Certification Motion, but Horton's Motion was denied.

⁶ These homes included 25 Lucey Law Firm clients which were randomly selected and 22 or so other homeowners which were selected by Horton.

⁷ On November 13, 2020, and after Horton received Zitek's discovery requests, Horton filed a Rule 26 Motion seeking to halt discovery given its pending Arbitration Motion.

Prior to the hearing of these Motions on December 9, 2020,⁸ Zitek filed two memoranda and additional materials supporting her Motion including: (1) Dr. Whitlock's Supplemental Affidavit regarding additional engineering inspections and over 100 photos showing a half dozen common defects and damages; (2) Horton's offers to cure also showing common conditions; and, (3) a chart challenging Horton's points opposing certification. Zitek also filed two memoranda and materials opposing Horton's Arbitration Motion including (1) Horton's One Year Warranty and (2) Zitek's Affidavit discussing her lack of bargaining power. Horton supplemented its Memo Opposing Class Certification with one expert Affidavit; and, in support of its Arbitration Motion, Horton filed a memorandum and an Affidavit of Horton Manager, Philip Deleskamp.

ANALYSIS

I. This Action Meets Rule 23's Class Certification Requirements

This Court finds that Zitek has met all Rule 23 requirements and class certification is an appropriate vehicle for the fair and effective adjudication of this matter. *See* Rule 23, SCRCP.⁹

A. Numerosity – Rule 23(a)(1)

The Court finds that the proposed class, which Horton admits consists of 234 or more members who own 234 houses, is so numerous that the joinder of all members is impractical. Rule 23(a)(1), SCRCP;¹⁰ *Kruglewicz Aff.*, para. 8 (Horton agreeing that there are 234 Horton-built homes in Rose Hill); *Mixson Aff.*, paras. 3-6 (“[T]he putative class is in excess of 234 members”).

The Court also finds that a class action is the appropriate procedure to efficiently litigate the claims of these homeowners. Many of these homeowners may not have the ability to bring their

⁸ This hearing was originally scheduled for November 30, 2020, then for December 2, 2020, but it was moved to December 9, 2020 to ensure that the parties had enough time to make their respective arguments.

⁹ *See also Salmonsens v. CGD*, 377 S.C. 442, 455, 661 S.E.2d 81, 88 (2008) (South Carolina favors class actions).

¹⁰ *See also Newberg on Class Actions* § 3:12 (“[A] class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone.”).

own claim because of a lack of time, expertise, or financial resources required. Even if each of these homeowners had the resources to proceed individually, this Court would be overrun with claims.

B. Commonality – Rule 23(a)(2)

The Court finds that there are common legal and factual questions that bind the proposed class together such as whether Horton’s construction practices damaged class members. Rule 23(a)(2), SCRCP;¹¹ Compl, para. 37 (alleging common questions of law and fact). Zitek also submitted evidence supporting the commonality of the claims at issue. *See, e.g.*, Whitlock Aff., para. 20 (opining that all 234 homes contain many of the same components and have experienced the same weather conditions); Whitlock Aff., paras. 27-32 (opining that defects and damages observed are typical and consistent and affect all 234 Rose Hill Homes); Whitlock Aff., para. 34 (opining that all-inclusive unit costs for the repair of these common defects are typical and consistent); Whitlock Reply Aff., para. 4-8 (opining that these defects can be classified singularly as defective exterior building envelopes); Whitlock Supp. Aff., Exs. B-G (over 100 photos showing six common defects Whitlock documented throughout these homes’ envelopes); *see also* Kruglewicz Aff., para. 18 (Horton admitting it hired subcontractors to perform nearly identical scopes of work); Offers to Cure (showing Horton observed sealant failure at windows in 96% of the homes it inspected and damaged patio doors in 52% of these homes).

C. Typicality – Rule 23(a)(3)

This Court finds that Zitek’s claims are typical of the claims of the proposed class. Rule 23(a)(3), SCRCP; Compl., para. 38. Zitek’s claims arise out of a common pattern of alleged wrongdoing by Horton, and the same legal and factual theories, *e.g.*, building code violations, are

¹¹ *See Napier, et al v. Adiz, et al*, Case No. 2016-CP-02-263 (S.C. Com. Pl.) (Judge Bucker Jan. 12, 2018 Order Granting Class Cert., p. 12) (“Napier Order”) (Aiken County); *Marcum, et al v. Adiz, et al*, Case No. 2012-CP-02-3191 (S.C. Com. Pl.) (Judge Early Apr. 21, 2014 Order Granting Class Cert., pp. 10-11) (“Marcum Order”) (Aiken County). (Compl, paras. 29-31); *see also McGann v. Mungo*, 287 S.C. 561, 568, 340 S.E.2d 154, 157-58 (Ct. App. 1986) (not every issue must be common to all class members; and even a single common issue will satisfy Rule 23).

asserted on behalf of all class members. Zitek has also presented evidence that further support these points.

D. Adequacy – Rule 23(a)(4)

The Court finds that Zitek and Zitek’s Counsel will fairly and adequately represent the class. Rule 23(a)(4), SCRCF.¹² Zitek voluntarily accepted her role as class representative and there is nothing to suggest that she has competing interests. Zitek Aff., paras. 10-13. No material conflict exists between Zitek (an owner of a Horton-built home) and the class members she seeks to represent (also owners of Horton-built homes). Horton’s argument that her upscale residence should disqualify her is inadequately supported and misplaced. Zitek also retained the Lucey Law Firm to prosecute her and the proposed class’ claims. Zitek Aff., paras. 10-13. The Lucey Law Firm is highly experienced in construction and class action litigation. Lucey Aff., paras. 1-16. The firm is reputed to have three of the four largest negotiated, residential construction recoveries in South Carolina, and the largest construction verdicts; and, Mr. Lucey has been qualified and appointed as class counsel in many cases. *Id.*

E. Amount in Controversy – Rule 23(a)(5)

This Court finds that the proposed class meets the \$100 amount in controversy requirement. Rule 23(a)(5), SCRCF. Dr. Whitlock opined that the cost to repair each of these homes is more than \$100 and Horton’s offers to cure implicitly confirm this. Whitlock Aff., p. 5, n. 1; *see also* Offers to Cure.

II. Horton’s Opposition to Class Certification is Overruled

Horton’s opposition primarily focuses on two grounds – commonality and typicality. Horton offers rhetorical arguments that “potential” differences in size, price, model type, etc. “may” require

¹² *See also Newberg on Class Actions* § 3:50 (The class representative (1) should not have any significant antagonistic or conflicting interests to class members; and (2) should vigorously prosecute the interests of the class through qualified counsel).

individualized inquiries. However, Horton offers no evidence showing how any of these purported differences impact the common and typical defect at issue – failing exterior envelopes (consisting of failing siding systems and failing fenestrations).

Moreover, Horton’s offers to cure show that there are at least two common and typical conditions relating to these homes’ envelopes – which Horton agreed to commonly repair. (Offers to Cure). Horton concedes these common conditions in its Opposing Memo.¹³ These concessions negate Horton’s expert’s opinion that individualized repairs “may” be required and that “there was not one issue that was common and present at all of the homes”. Moore Aff., paras. 23, 25.

This Court will not deny class certification based on speculation rather than facts. Zitek and Dr. Whitlock provided extensive evidence supporting all five Rule 23 requirements. Horton has had months to challenge this evidence or otherwise refute Dr. Whitlock’s opinions but failed to do so. Notably, Plaintiffs have shown that person(s) knowledgeable about the construction of these homes are still employed by Horton and could have submitted less speculative affidavits – but did not.

III. Arbitration is Unenforceable Under the Doctrine of Merger

This Court finds that the arbitration provision in Horton’s purchase agreement is unenforceable under the Doctrine of Merger because this provision merged with homeowner deeds.

[Under] [t]he doctrine of merger. . . The execution, delivery, and acceptance of a deed varying from the terms of the antecedent contract indicates an amendment of the original contract, and generally the rights of the parties are fixed by their expressions as contained in the deed.

¹³ Horton Opposing Memo, p. 17 (“Additionally, the expert affidavit (“Moore Affidavit”) prepared by Larry Steven Moore (“Moore”) with Applied Building Sciences, Inc., attached hereto as Exhibit A, indicates that there are no defects or issues common to every single home inspected. To the contrary, the only potential defect that might be common to most or all of the homes is a failure of an adhesive sealant around some of the windows of the homes. Although several of the homes have similar issues, like those arising from doors, whether it be framing or weatherproofing issues, these issues are not common to all the homes. Most, if not all, of the alleged defects would best be characterized as common to some, or maybe even half, of the homes. However, these alleged defects are certainly not common to all the homes in Rose Hill.”) (emphasis added).

Wilson v. Landstrom, 281 S.C. 260, 264, 315 S.E.2d 130, 132-33 (Ct. App. 1984) quoting *Charleston & Western Carolina Railway Co. v. Joyce*, 231 S.C. 493, 504, 99 S.E.2d 187, 193 (1957) (emphasis added). In other words, once parties execute a deed:

. . . [T]he written. . . agreement to convey is merged in the deed, the agreement to convey is discharged or is modified as indicated by the deed, the deed regulates the rights and liabilities of the parties, and [prior] agreement[s] [are] inadmissible. . .

Charleston & Western, 231 S.C. at 505, 99 S.E.2d at 193; *Wilson*, 281 S.C. at 364, 315 S.E.2d at 133 (“A deed executed [after a] contract for the sale of land supersedes that contract. . .”).

In 2005 and 2011, two South Carolina Circuit Courts refused to enforce the arbitration provision in Horton purchase agreements because they found that the provision was extinguished by the deed.¹⁴ Like these cases, Zitek’s deed was executed after Zitek’s purchase agreement. Zitek Purchase Agreement, p. 8 (Zitek purchase agreement executed on February 17, 2013); Zitek Deed, p. 2 (Zitek deed executed on July 25, 2013). Paragraph 15 of Zitek’s purchase agreement¹⁵ – even if it had any validity – is therefore extinguished and unenforceable under the Merger Doctrine.

IV. The Two Merger Doctrine Exceptions Do Not Apply

Horton argues two exceptions to the Merger Doctrine that this Court finds do not apply here.

A. Contrary Intent Exception

First, the Court finds the “contrary intent” exception to the Merger Doctrine does not apply because Horton has not clearly shown that Paragraph 15 was intended to survive closing. Under this exception, “the party denying merger has the burden of proving by clear and convincing evidence that merger was not intended.” *Hughes v. Greenville Country Club*, 283 S.C. 448, 451,

¹⁴ *Smith v. D.R. Horton*, Case No. 2010-CP-18-641 (S.C. Com. Pl.) (Judge Dickson Apr. 12, 2011 Order Denying Horton’s Arbitration Motion) (Dorchester County); *Upchurch v. D.R. Horton*, 2005 WL 5621497, at *3 (S.C. Com. Plea) (Judge Barber Sept. 28, 2005 Order Denying Horton’s Arbitration Motion) (Richland County).

¹⁵ Horton’s express arbitration provision is in Paragraph 15 of its purchase agreement. As discussed herein, this Court finds that Paragraph 15 does not stand alone; rather, it is intertwined with Paragraph 14. However, even assuming Paragraph 15 did stand alone, it is nevertheless unenforceable under the Doctrine of Merger.

322 S.E.2d 827, 828 (Ct. App. 1984). Horton has not met this burden. This is supported by the following facts:

- Zitek’s purchase agreement does not contain a general survival clause;
- Paragraph 15, itself, does not state that it “survives closing” or applies “after closing”;¹⁶
- Horton included survival sentences in other provisions like Paragraphs 9(b), 10, and 21;
- Paragraph 14(c) indicates that “after closing” Horton has no liability or obligation to Zitek “except as provided in. . .[her] deed”;
- Horton provided Zitek two, separate post-closing Warranties that have their own arbitration provisions that conflict with Paragraph 15;¹⁷ and
- Horton did not include Paragraph 15 in Zitek’s deed or anything else given to her at closing.

B. Part Performance Exception

Second, the Court finds that the “part performance” exception to the Merger Doctrine does not apply because Horton has no unperformed obligations. This exception provides that unperformed contractual obligations do not merge with deeds until they are performed. *New Prospect Area Fire Dist. v. New Prospect Ruritan Club*, 311 S.C. 402, 405, 429 S.E.2d 791, 792 (1993). “As to those provisions, the contract is not merged in the deed, and the contract remains in force until the contract has been fully performed.” 26A C.J.S. Deeds § 223 (1956) (emphasis added).

Horton defines its unperformed obligations in Paragraph 14(c) of the purchase agreement. According to this Paragraph, Horton has no post-closing obligations “except as provided in”: (1) Section 14 (*i.e.*, the Written Warranties); (2) Section 21 (*i.e.*, Punch List Repairs); and (3) the homeowners’ deeds.¹⁸ There are no Horton post-closing obligations expressly incorporated into

¹⁶ These facts distinguish this case from *Carlson v. S.C. State Plastering*, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013). There, the purchase agreement had a survival clause and the arbitration provision stated that it applied “after closing”.

¹⁷ To be clear, there was a total of three different arbitration provisions, and Horton does not seek to compel either of the other two arbitration provisions which were contained in the two written warranties.

¹⁸ Zitek’s purchase agreement indicates that Horton’s other rights and obligations end at “Closing”. *See, e.g.*, Zitek Purchase Agreement Paras. 5, 6, 8, 9, 12, 14(a), 16, 18.

Zitek's deed;¹⁹ and, Horton's post-closing Warranty obligations are set forth in separate documents. As such, Zitek's purchase "contract has been fully performed". 26A C.J.S. Deeds § 223, *supra*. Moreover, again, the Written Warranties have their own arbitration provisions, and the Punch List provision has its own survival clause.

V. Arbitration is Also Unenforceable Because the Arbitration Provision is Unconscionable

This Court also finds that arbitration is unenforceable because Zitek's purchase agreement is an adhesion contract and its arbitration provision contains oppressive terms that are not severable. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 ("[U]nconscionability is. . .the absence of meaningful choice. . .due to one-sided contract provisions, together with [oppressive] terms. . .").

A. Absence of Meaningful Choice/Adhesion Contract

First, this Court finds that Zitek's purchase agreement is an adhesion contract and she lacked a meaningful choice in her ability to negotiate arbitration. This is supported by the following facts:

- The agreement is a boilerplate contract that Horton offered to Zitek on a take-it-or-leave-it basis. Zitek Aff., paras. 5, 7;
- Zitek has no experience in real estate, construction or the law and was not represented by her own attorney at the time she signed the agreement. Zitek Aff., paras. 2, 8;
- Zitek is an unsophisticated purchaser whereas Horton is a sophisticated developer that has constructed nearly 800,000 homes in the United States. *Id.*; *see also* Horton Website; and,
- Similar Horton contracts have previously been found to be adhesion contracts by South Carolina courts.

B. Oppressive Terms

¹⁹ Implied warranties may survive deeds, but this does negate the Merger Doctrine's applicability to pre-deed warranty disclaimers (or arbitration clauses) as explained by the 4th Circuit in *Tower South POA v. Summey Building Systems, Inc.*, 47 F.3d 1165 (1995) (unpublished).

Second, this Court finds the agreement’s arbitration provision contains oppressive terms that disclaim all implied warranties and waive Horton’s liability “for monetary damages of any kind”.

The arbitration provision consists of Paragraphs 14 and 15 because, like *Smith*, cross-references “intertwine” these provisions. *Smith*, 417 S.C. at 49, 790 S.E.2d at 4.²⁰ The only pertinent differences between *Smith* and here is that Horton relocated (1) its express arbitration clause from Paragraph 14(g) to Paragraph 15; and (2) its disclaimers from Paragraph 14(i) to Paragraph 14(c). However, the relocation of these provisions does not negate *Smith*’s applicability. A comparison of *Smith*’s paragraphs to *Zitek*’s paragraphs shows that they contain the same cross-references.²¹

More importantly, Paragraph 15, unlike *Smith*’s Paragraph 14(g), contains a broad reference to Section 14 – it states that disputes regarding Horton’s warranty “pursuant to Section 14 above” shall be arbitrated. Thus, Paragraph 15 – does not stand alone – it references “Section 14 above” which includes oppressive terms.

C. Severability

The Court further finds that Paragraph 15 is not severable from Paragraph 14. This is supported by the fact that neither Paragraph 14 nor 15 (nor the body of *Zitek*’s purchase agreement) contain a severability clause. *Zitek* Purchase Agreement. This is also supported by the law:

We conclude the arbitration clause. . .should not be severed from the numerous unconscionable provisions and particularly Horton’s attempt to waive any seller liability for “monetary damages of any kind. . .”

Smith, 403 S.C. at 16, 742 S.E.2d at 41 (emphasis added).

²⁰ See also *Mirmow v. Great Southern Homes, Inc.*, 2019 WL 7611604, *2 (S.C. Com. Pl.) (Judge Kessley Dec. 9, 2019 Order Denying Arb. Motion) (Lexington County) (finding the arbitration agreement in limited warranty unconscionable under *Smith* based on “related” warranty and liability disclaimers).

²¹ See Pl. Memo. Opposing Arb., p. 13 (charts showing similarities between *Smith*’s and *Zitek*’s paragraphs).

Horton's argument that Paragraph 15 is a separable provision is the same argument considered and rejected by the *Smith* Court. *Smith* is good law; this case involves essentially the same contracts, paragraphs, cross-references and oppressive terms; and therefore, *Smith* controls.

VI. Even if the Arbitration Provision Survived, It Would Only Apply to A Subclass of Original Purchasers, Not the Subclass of Downstream Purchasers

Even if the arbitration provision survived, it would only apply to the subclass of homeowners that purchased their homes directly from Horton ("Original Homeowners"). Horton does not have contracts with downstream homeowners, those that purchased their homes from other homeowners. The absence of a contractual agreement to arbitrate downstream claims is fatal to the Motion to Compel Arbitration against this subclass.²² Therefore, had there been an arbitration agreement that survived closing, it is only the subclass of Original Homeowners (estimated by Plaintiff to be the owners of approximately one hundred and sixty-five homes) which would have been sent by this Court to arbitration.

CONCLUSION

Having found that all Rule 23 requirements are satisfied here, this Court **GRANTS** Zitek's Class Certification Motion and certifies the following class:

Any persons or entities that own a home developed/built by D.R. Horton within the Rose Hill neighborhood in Easley, South Carolina.

The class excludes any home owned by D.R. Horton and/or their affiliates; any home owned by the Judge, any Rose Hill home developed by persons other than D.R. Horton; any former Rose Hill homeowner; any current Rose Hill homeowner who previously released D.R. Horton; and, all persons who properly execute and file a timely request for exclusion from the Class.

²² It appears that Horton does not contest the inapplicability of its arbitration provision to downstream purchasers.

This class shall consist of two subclasses, the first being original owners, and the second being downstream owners, so that should Horton appeal the denial of the Motion to Compel, the downstream subclass may continue to prosecute their claims during the pendency of the appeal.

Natalie Zitek is hereby appointed as Class Representative. Justin Lucey, Dabny Lynn, and Sohayla Townes of the Lucey Law Firm are hereby appointed as Class Counsel. The filed Notice Plan, Notice, and Opt-Out Form are approved for use by Class Counsel as detailed in the documents.

Having found that the arbitration provision in Horton's purchase agreement is unenforceable, this Court **DENIES** Horton's Motion to Compel Arbitration.²³

AND IT IS SO ORDERED!

Anderson, South Carolina
_____, 2021

The Honorable Cordell Maddox
Presiding Judge for the 10th Circuit

²³Since this Court finds arbitration is unenforceable, it need not address whether the South Carolina Uniform Arbitration Act ("SCUAA") or Federal Arbitration Act ("FAA"), or both, would apply. However, the purchase contracts set forth that the SCUAA applies and the Court sees no reason to disturb that provision.



Anderson Common Pleas

Case Caption: Natalie Zitek VS D.R. Horton, Inc. , defendant, et al

Case Number: 2019CP0401942

Type: Order/Other

So Ordered

s/ J. Cordell Maddox Jr.

Electronically signed on 2021-01-27 11:29:22 page 14 of 14

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
) CASE NO.: 2019-CP-04-01942

Natalie Zitek, individually and on behalf of all
 others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., et al.,

Defendants.

 D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

AJ Landscaping & Grading, LLC a/k/a A J
 Landscaping & Grading, LLC, et al.

Third-Party Defendants.

 ProBuild Company, LLC; et al.,

Fourth-Party Plaintiffs,

v.

Harrelson Painting, LLC, et al.,

Fourth-Party Defendants.

 Nicholas Soto a/k/a Nicolas Soto, Individually
 and d/b/a Soto HVAC,

Fifth-Party Plaintiff,

v.

Toribio Islas and Alejandro Soto,

 Fifth-Party Defendants.

**ORDER GRANTING DEFENDANT
 D.R. HORTON, INC.'S, MOTION TO
 ESTABLISH COMPLEX CASE
 DESIGNATION**

This matter came before the Court on Defendant D.R. Horton Inc.'s, Motion to Establish Complex Designation. Having reviewed the parties' submissions, hearing oral arguments, and receiving no objections, this Court **GRANTS** D.R. Horton Inc's Motion.

IT IS HEREBY ORDERED that this case be designated as complex and that this case be assigned to the Honorable Judge Sprouse to hear and handle all pre-trial motions and other matters pertaining to this case.

AND IT IS SO ORDERED!

Anderson, South Carolina
_____, 2022

The Honorable Judge McIntosh
Chief Administrative Judge for the 10th
Circuit



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Complex Case Designation

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2022-03-16 12:12:17 page 3 of 3

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019-CP-04-01942

Natalie Zitek, et al
PLAINTIFF(S)

DR Horton, et al
DEFENDANT(S)

Submitted By: the Court Address:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- x **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Court took the Motions to Decertify under advisement after hearing arguments from counsel on Monday, July 17, 2023. The Court considered the arguments of counsel, the thorough briefing of the matter, the exhibits and the applicable law.

This Court previously has certified the class. Significant discovery has taken place since the issuance of the Honorable Cordell Maddox's order on January 27, 2021. The Defendant, along with several other parties, have moved that the class be decertified due to new evidence that they allege shows that the Plaintiff's home is distinct from the other members of the class and that the conditions necessary for classification under Rule 23 of the SC Rules of Civil Procedure are not present.

Extensive analysis of the various homes was presented to the Court both in the presentations and the various briefs filed. While the Court notes that there are many variances between the homes in the subdivisions, there are some common issues. Aside from the issues expressed at the hearing regarding whether a decertification in this case would in essence be in violation of the long-established rule that one circuit judge cannot overrule another, I find that there is sufficient commonality and typicality present in the case for a class action under Rule 23 to be appropriate. I find that the issues are sufficiently similar that the class action as ordered is a more efficient means of trying the case. Extensive evidence showing commonality in brickwork, stonework, landscaping, windows, doors and other areas was presented. The Court notes that there is evidence of commonality even in the evidence from some defense experts. There also is sufficient evidence of the typicality of the Plaintiff's home to maintain the class. The long-established law is that every issue need not be identical with each class member. The individual differences in the homes, along with the sufficiency and accuracy of expert opinions are factual questions for trial.

Accordingly, the Defendant and Third/Fourth Party Defendants' Motions to Decertify are DENIED.

ORDER INFORMATIONThis order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

Circuit Court Judge2752
Judge Code_____
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

SCRCP Form 4C (03/2013) S2001045/JVS/W004EFL



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-07-19 15:47:52 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Anderson
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP0401942

Natalie Zitek et al
PLAINTIFF(S)

D R Horton Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Motions for Summary Judgment by 3rd Party Defendants JLS Masonry, Inc., MJ Cowboys, LLC and M&L Reyna Construction LLC against Defendant D.R. Horton.

The Court considered the filings of the of the parties, arguments of counsel and applicable law. The Court considered the evidence in a light most favorable to the non-moving parties and finds that a genuine issue of material fact exists. Accordingly, these 3rd Party Defendants' Motions for Summary Judgment are DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/28/2023 .

M&L General Construction Inc
M&L General Construction LLC
Lansing Building Products Inc
A-Z Inc
Kings Landscaping LLC
A&J Framing Inc
Alpro Textures LLC
A3 Landscaping & Grading LLC
Dupree Plumbing Company, Inc.
Blue Ridge Building Products
IBP Asset LLC
Greener Pastures Of Aiken LLC
Greener Pastures Inc
GBS Building Supply - US LBM LLC
Get Floored LLC
Five Star Construction Inc
Ferguson Enterprises Inc
DOM Group LLC
Caryl Mechanicals Inc
Latinos Roofing LLC
Edwin Edgardo Barahona
Edwin Barahona
GSF Renovations LLC
Jose Aristides Hernandez
Jose Hernandez
JJS Commercial Construction Inc
Brothers Contractors Inc
Brothers Contractors LLC
The App Phase Group
Alexander G. Koenig
Luis Solis Machado
J. Rene Padilla
Padilla Flooring LLC

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Electronic Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-07-28 15:06:27 page 3 of 3

FORM4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019-CP-04-01942

Natalie Zitek, et al
PLAINTIFF(S)DR Horton, et al
DEFENDANT(S)Submitted By:
Address:Attorney for: Plaintiff Defendant or
Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40U), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends ☒ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The Judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court for judgment details.

R. SCOTT SPROUSE

2752

8/17/2023

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____, and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____, to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

CourtReporter:-----

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

SCRCP Form 4C (03/2013) S2001045/JVS/W004EFL

Page 2 of 2

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT
CASE NO: 2019-CP-04-1942

Natalie Zitek, individually, and on
behalf of all others similarly situated,

PLAINTIFF

vs

D.R. Horton, Inc., Jane Doe #1-10; and,
John Doe #1-50

DEFENDANTS

TRIAL PLAN ORDER

DR Horton, Inc.,

THIRD-PARTY PLAINTIFF

vs

AJ Landscaping & Grading, LLC a/k/a
AJ Landscaping & Grading, Inc;
AllPro Textures, LCC; Alpha Omega
Construction Group, Inc; American
Concrete And Precast, Inc., a/k/a ACP
Concrete, Inc.; A&J Framing, Inc;
Alpha EMC; A-Z, Inc; Atlanta Floor
Designs Center; A Grade Above Others,
LLC; Brand-Vaughan Lumber Co.,
Inc. BKF Builders, Inc.; Builders
Designhouse, LLC; BMC East,
LLC D/B/A Coleman Floor, LLC;
Builders Firstsource
Southeast Group, LLC, a/k/a Builders
Firstsource, Inc;
Bravo Carpenters, Inc.; Caryl
Mechanics II, Inc.; Caryl
Mechanicals, Inc.; Cannaday
Siding and Gutter, Inc.; Cores Painting,
LLC; CBU Enterprises Inc.; CPI
Security Systems, Inc.; DOM Group,
LLC; Ferguson Enterprises, Inc.; Five
Star Construction, Inc.; Five Star

Foundations, LLC; Galloway Bell Inc.;
a/k/a Galloway-Bell, Inc. II; BGET
Floored, LLC; GBS
Building Supply-US LBM, LLC, a/k/a
GBS Building Supply, Inc. General Shale
Brick, Inc.;
Greener Pastures, Inc., a/k/a Greener
Pastures of Aiken, Inc; IBP Asset, LLC
D/B/A Blue Ridge Building Products; JLS
Masonry, Inc.; Kings Landscaping, LLC;
Landscapers, LLC; Lade-Danler, Inc.;
Lansing Building Products Inc.; Long
Heating & Air
Conditioning, Inc.; L&M
Electric, Inc.; Manale Landscaping,
LLC; MJ Cowboys, LLC; M&L General
Construction, LLC. a/k/a M&L General
Construction, Inc.; M&L Reyna
Construction, LLC; M&M Foundations,
LLC; Nazareth Builders, LLC, NB
Contractors, LLC; Poinsett Development,
LLC; Poinsett Homes, LLC; P&T
Construction, LLC; P&L Enterprises,
LLC; Probuild Company, a/k/a Probuild
Holdings, Inc.; Rite Rug Co.; Rodney
Howard Grading Co.; Sandlapper
Concrete, LLC; Sodfather, Inc.,
Landscape Contractors; Stock Building
Supply, LLC; Topbuild Home Services,
Inc., a/k/a Gale Contractors Service;
Tucker Materials, Inc., a/k/a Gypsum
UTM Enterprises, Inc.; Dupree Plumbing
Company, Inc.; Willow Tree
Landscaping, Inc.

THIRD-PARTY DEFENDANTS

This case involves complex issues and presents a significant challenge to the Court to ensure that the issues are presented to the jury in an organized and understandable manner. The Court heard from the parties at the July 21, 2023 hearing regarding a trial plan. Opportunity for the submission of additional trial plans was given to the parties. The following parties moved for bifurcation and/or submitted/joined in the submission of trial plans:

The Plaintiff Natalie Zitek, et al

The Defendant D.R. Horton

Third Party Defendants P&L Enterprises
 M&L Reyna Construction LLC
 Aaron D. Peris
 Installed Building Products LLC
 JLS Masonry Inc.
 Topbuild Home Services, Inc.

The Court received correspondence from the parties requesting that the Court not issue a final trial plan order until August 17, 2023, given that the parties were actively involved in settlement negotiations. The Court granted that request.

I. Trial Bifurcation

The Court finds that the most judicially economical method of presenting this case will be by bifurcating the trial. The Court previously denied the Plaintiffs motion to bifurcate the entire case, in that a complete bifurcation would require a new jury and new trial. The Court finds that the same jury should hear all of the issues in this case. However, the claims of the Defendant against the Third-Party Defendants (and the claims against the Fourth-Party/Fifth-Party Defendants that flow from those) are affected by any liability attributed to the Defendant by the jury. Accordingly, Phase I of the trial shall be that of liability of the Defendant to the Plaintiff. The issue of punitive damages shall be heard by the jury immediately after Phase I should the jury have found the Defendant liable to the Plaintiff and if the Defendant has elected bifurcation of that issue. The jury shall render a verdict on the issues of liability and punitive damages. Should the jury find for the Plaintiff on any issue of liability and/or punitive damages, Phase II of the trial shall consist of the Defendant proceeding with its claims against the Third-Party Defendants (and any Fourth/Fifth Party claims).

II. Pretrial Submissions

The parties shall make the following pre-trial submissions by the end of business on **Friday, August 25, 2023:**

- A. Witness lists.
- B. Proposed deposition designations under S.C.R.C.P Rule 32.

The parties shall make the following pre-trial submissions by the end of business on **Monday, August 28, 2023:**

- A. Notice by the Defendant of election of punitive damages bifurcation. Should the Defendant file no notice in this regard, punitive damages will not be bifurcated.
- B. Proposed voir dire questions.
- C. Exhibit lists.
- D. Motions in limine.
- E. Proposed verdict forms.

- F. Counter designations and objections to any deposition designations. Counter designations must clearly specify which designations are supplemental to the portions designated to be published to the jury (and need to be incorporated by original designating party) and which portions are simply counter-publications (to be published by the counter party at the conclusion of the original publication in the nature of rebuttal information). The parties are encouraged to make an earnest effort to reach an agreement on publication of deposition summaries in lieu of verbatim reading given the limited amount of time for the trial.

The parties shall file any objections to witness or exhibit lists by the end of business on **Tuesday, August 29, 2023.**

Service of any of these materials shall be by electronic transmission.

The parties shall confer before submissions of the above-listed items and determine where disagreements exist. The Court will hear arguments surrounding any of these items at the Pre-Trial Hearing.

III. Pre-Trial Hearing

The attorneys in the case shall appear at an in-person Pre-Trial Hearing on Friday, September 1, 2023 at 9:30 AM. The Court will rule on any disputes regarding the Pre-Trial submissions and announce the voir dire questions that will be used. The attorneys shall bring hard copies of any documents in dispute to the hearing, unless excused from this requirement by the Court. The parties are expected to have their exhibits ready to be marked by the Court reporter. All exhibits shall be marked. The parties shall be prepared to enter any stipulated exhibits and inform the Court which exhibits will require foundation testimony and a ruling on admissibility. No attorney shall exit the courthouse until all of his or her exhibits have been marked. The parties also should be prepared to notify the Court of whether or not they would be willing to accept a verdict of fewer than twelve jurors should issues arise where it is impossible for a full jury to finish the case. This will not be an option if any party objects.

The parties also shall bring any multimedia presentations and/or demonstrative exhibits requiring use of the courtroom's electrical system/outlets with them to this hearing. The courtroom shall be available to the parties after the hearing. Should a party plan on using a technician to operate their presentation, that person shall attend the Pre-Trial Hearing so that all of that party's technological equipment can be tested in the courtroom.

IV. Jury Selection

Due to the nature of the case, the Court has directed the Clerk of Court to summon a very large jury pool, making the facilities at the Anderson County Courthouse insufficient to house all of the persons in attendance. Therefore, the Court has directed jury qualification and selection to take place at the Anderson Civic Center, which is located at 3027 Martin Luther King, Jr. Blvd. Anderson, SC 29625, on Tuesday, September 5, 2023 at 9:30 AM.

The Plaintiff and Defendant shall have the customary four (4) strikes. The Third-Party Defendants shall be grouped according to trade, not to exceed five (5). The Third-Party Defendants shall submit proposed groups to the Court by the end of business on Monday, August 28, 2023 along with the other items in Paragraph II above. The Court will make a final decision on which group each party is assigned to at the Pre-Trial Hearing. Each group shall have four (4) strikes. The group shall elect one attorney to announce that group's strikes.

Due to the anticipated length of the trial, it is the Court's intention for four (4) alternates to be selected, departing from normal procedure. In the event a party has an objection to this unusual number of alternates, it must file that objection with the other materials set forth in Paragraph II above.

The Court's intention is that the jury be selected and sworn before lunch, with the trial to begin at 2 PM on the same day.

V. Trial Commencement and Opening Statements.

The Plaintiff and Defendant shall make opening statements at the commencement of Phase I of the trial. Then, one attorney from each trade group (to be elected by the group) shall be allowed to make an opening statement. Should the group be unable to agree on an attorney to make an opening statement, the Court will select one from the group randomly. The Plaintiff should be prepared to call the first witness at the conclusion of the opening statements on September 5, as time permits.

VI. Trial Procedure.

Court shall commence each day at 9 AM, unless the Court instructs otherwise. The attorneys should anticipate, and communicate to their witnesses, that the trial will extend past 5 PM on some days in order for a witness' testimony to be concluded. The time allotted to this case is limited given the large number of parties. Requests have been made for the Court to either set specific days for each party or to limit examination/cross-examination of witnesses by hours. The Court hesitates to set arbitrary time limits for each witness given the highly technical nature of this case and the need for counsel to make tactical decisions regarding witnesses in the prosecution and defense of this case. However, the Court recognizes the potential of the case bogging down in minutiae and the need for guidelines. The guidelines will be followed and counsel should prepare to complete their portion of the case inside the days allotted. Accordingly, the following schedule shall govern the trial:

September

5	Tuesday	Jury Selection, Opening Statements, First Witness (if time permits).
6	Wednesday	Plaintiffs Case.
7	Thursday	Plaintiffs Case.
8	Friday	Plaintiffs Case.

11	Monday		Plaintiff's Case.
12	Tuesday	AM	Plaintiff's Case.
		PM	Defendant's Case.
13	Wednesday		Defendant's Case.
14	Thursday		Defendant's Case.
15	Friday		Defendant's Case.
18	Monday		Defendant's Case.
19	Tuesday	AM	Plaintiffs Reply.
		PM	(Time available for site visit should the Court order such).
20	Wednesday		Closing Arguments/Jury Verdict on Phase I.
21	Thursday		Punitive Damages Phase (should the Defendant elect bifurcation).
22	Friday		Phase II Opening Statements/ Defendant/Third-Party Plaintiffs Case.
25	Monday		Defendant/Third-Party Plaintiffs Case.
26	Tuesday	AM	Defendant/Third-Party Plaintiffs Case.
		PM	Third-Party Defendants' Case.
27	Wednesday	AM	Third-Party Defendants' Case.
		PM	Fourth/Fifth-Party Defendants' Case.
28	Thursday		Defendant/Third-Party Plaintiff Reply.
			Third-Party Defendants/Fourth-Party Plaintiff Reply.
29	Friday		Phase II Closing Arguments/Submission to Jury

While the Court does not put specific hourly limits on any examination, the Court reserves the right to terminate the questioning of a particular witness by any attorney if the questions being asked are repetitive, unduly argumentative or merely for the purpose of slowing the pace of the trial. In Phase I, the Plaintiff and Defendant shall be allowed to fully examine each witness. One attorney representing each group shall be allowed to cross examine any witness regarding matters not covered in the direct or cross examination by the Plaintiff or Defendant. The attorney representing a party may participate in full if their client or expert is called as a witness by the Plaintiff or Defendant. In that case, that particular attorney will represent his client's group.

Should a part of the trial finish early, the next part of the trial will proceed at that time. For instance, should the Plaintiff rest a day early, the Defendant should be prepared to immediately move forward with its case.

VII. Post-Trial Motions

The parties shall have ten (10) days from the conclusion of the trial in which to file any post-trial motions.

The Court reserves the right to modify this plan. The parties should notify the Court immediately should any settlements be reached which removes parties and simplifies the case.

AND IT IS SO ORDERED!

This 17th day of August, 2023

Walhalla, South Carolina

R. Scott Sprouse, Judge

Tenth Judicial Circuit



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Jury Trial

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-08-17 14:27:11 page 10 of 10

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019-CP-04-01942

Natalie Zitek, et al
PLAINTIFF(S)

DR Horton, et al
DEFENDANT(S)

Submitted By: Address:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Motions to Reconsider:

All of DR Horton's motions

BKF Builders, Inc.

Nazareth Builders

Jesus Robles Montes

Bravo Carpenters

MJ Cowboys

ML Reyna

JLS Masonry

Jesus Jiminez

Therma-Tru

Rite-Rug

Cannaday

Builder's First Source

NM Alex Carpet

Harrelson Painting

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the parties' Motions to Reconsider, pursuant to Rule 59, SCRPC*, are DENIED.

*The Court decides these Motions to Reconsider based upon the briefs filed by the parties and without oral argument.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

R. SCOTT SPROUSE
Circuit Court Judge

2752
Judge Code

8/18/2023
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-08-18 15:53:51 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019CP0401942

Natalie Zitek, plaintiff, et al
PLAINTIFF(S)

Jane Doe 1, defendant, et al
DEFENDANT(S)

Submitted By:
Address:

Attorney for : ☐ Plaintiff ☐ Defendant
or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter is before the Court pursuant to the Third Party Defendant JLS Masonry, Inc.'s Motions for Judgment Notwithstanding the Verdict (JNOV) and New Trial Absolute and/or New Trial Nisi Remittitur. Also included in the motions was a renewal of the Motion to Decertify the Class. The motion contained thirteen (13) grounds, including, but not limited to, the Statute of Limitations, the Statute of Repose, contractual indemnity, and the insufficiency of the evidence.

The Court presided over the trial and considered the motion, briefs, applicable case law, and the arguments of counsel. The Court viewed the evidence in a light most favorable to the Plaintiff as required by law. The Court finds that there was evidence in the record that reasonably supports the jury's verdict. Accordingly, the Third Party Defendant's Motion for Judgment Notwithstanding the Verdict (JNOV) on all the stated grounds is DENIED.

The Court finds no evidence that the jury reached its verdict as the result of caprice, passion, prejudice, partiality, or any other improper motive. The verdict is not unduly liberal or excessive given the evidence presented in the trial. The Court notes that the jury found that the total amount of the damages in the areas of work pertaining to JLS Masonry was twenty-five (25%) percent less than that claimed by the Plaintiff (\$15,000,000.00 rather than the claimed \$20,000,000.00) indicating that the jury gave consideration to the Third Party

Defendant's arguments that the Plaintiff's expert had overstated the value of the damages. Further, the Third Party Defendant performed the work in question on a stipulated forty-six (46%) percent of the houses in the subdivision. The Plaintiff asserted, in assumption of Defendant D.R. Horton's claims as part of the settlement, that JLS Masonry should be responsible for the same percentage of the damages. JLS Masonry challenged that assertion. The jury, with its \$4,000,000.00 verdict, held JLS Masonry responsible for fifty-eight (58%) percent of the damages, again indicating that the jury gave consideration to the Third Party Defendant's arguments. The Court finds that the verdict is well within the range of verdicts possible from a reasonable consideration of the evidence and that the Third Party Defendant JLS Masonry's Motion for New Trial Absolute and/or New Trial Nisi Remittitur should be DENIED.

The Court has heard the Motion to Decertify the Class multiple times during the case and continues to DENY that motion.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order: _____ _____ _____		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

Circuit Court Judge

2752

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a blank sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-11-08 15:53:36 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019CP0401942

Zitek, et al.
PLAINTIFF(S)

DR Horton
DEFENDANT(S)

Submitted By:
Address:

Attorney for : ☐ Plaintiff ☐ Defendant
or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

See attached order below

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

Circuit Court Judge

2752
Judge Code

Date

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Natalie Zitek, individually, and on behalf of
all others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and, John
Doe #1-50,

Defendants.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

AJ Landscaping & Grading, LLC a/k/a A J
Landscaping & Grading, LLC; AllPro
Textures, LLC; Alpha Omega Construction
Group, Inc.; American Concrete and Precast,
Inc.; a/k/a ACP Concrete, Inc.; A&J Framing,
Inc.; Alpha E.M.C.; A-Z, Inc.; Atlanta Floor
Designs Center; A Grade Above Others,
LLC; Brand-Vaughan Lumber Co, Inc.; BKF
Builders, Inc.; Builders Designhouse, LLC;
BMC East LLC d/b/a Coleman Floor, LLC;
Builders Firstsource Southeast Group, LLC,
a/k/a Builders Firstsource, Inc.; Bravo
Carpenters, Inc.; Caryl Mechanics II, Inc.,
a/k/a Caryl Mechanicals, Inc.; Cannaday
Siding & Gutter, Inc.; Cortes Painting, LLC;
CBU Enterprises, Inc.; CPI Security Systems,
Inc.; DOM Group, LLC; Ferguson
Enterprises, Inc.; Five Star Construction Inc.;
Five Star Foundations, LLC; Galloway-Bell,
Inc., a/k/a Galloway-Bell, Inc. II; Get
Floored, LLC; GBS Building Supply – US
LBM, LLC, f/k/a GBS Building Supply, Inc.;
General Shale Brick Inc.; Greener Pastures,
Inc., a/k/a Green Pastures of Aiken, LLC;
IBS Asset, LLC d/b/a Blue Ridge Building
Products; Installed Building Products, LLC,
a/k/a Installed Building Products II LLC; JLS
Masonry, Inc.; Kings Landscaping, LLC;
Landshapers, LLC; Lade-Danlar, Inc.;
Lansing Building Products, Inc.; Long

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-04-01942

**ORDER DENYING THIRD-PARTY
DEFENDANT JLS MASONRY, INC.
MOTION FOR RECONSIDERATION**

Heating & Air Conditioning, Inc.; L&M Electric, Inc; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC, a/k/a M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC: Poinsett Homes, LLC; P&T Construction, Inc., a/k/a P & T Construction, Inc.; P & L Enterprises, LLC; Probuild Company, LLC a/k/a Probuild Holdings, Inc.; Rite Rug Company, Inc., a/k/a, Rite Rug Co.; Rodney Howard Grading Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractors Service; Tucker Materials, Inc, a/k/a Gypsum; Silver Line Building Products Corp.; Dupree Plumbing Co., Inc.; UTM Enterprises, Inc; and Willow Tree Landscaping, Inc., and Silver Line Building Products Corporation

Third-Party Defendants.

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Third-Party Defendant JLS Masonry's Motion, pursuant to Rule 59, SCRCP,¹ is DENIED.

AND IT IS SO ORDERED.

Honorable R. Scott Sprouse

December ____, 2023
Anderson, SC

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.
SCRCP Form 4C (03/2013) S2001045/JVS/W004EFL Page 5 of 3



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-12-12 09:24:18 page 6 of 6

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
) CASE NO. 2019-CP-04-01942

Natalie Zitek, individually and on behalf of all
others similarly situated,

Plaintiff,

vs.

D.R. Horton, Inc.,

Defendant.

VERDICT FORM

1. On the Plaintiff's claims against D.R. Horton, we find for the Plaintiff on the following causes of action (check the one you find in favor of):

☒ Negligence

☐ Implied Warranty

(Only answer the next question if you found in favor of the Plaintiff on one of the foregoing questions)

2. We award Plaintiff damages against Defendant D.R. Horton in the amount of:

fifteen million dollars (\$15,000,000.00)

(Only answer the next question if you found in favor of the Plaintiff on one of the foregoing questions)

3. On Defendant D.R. Horton's claims against Third-Party JLS Masonry, Inc. which have been assigned to Plaintiff, we find for the Plaintiff on the following causes of action (check any that apply):

☒ Breach of Implied Warranty

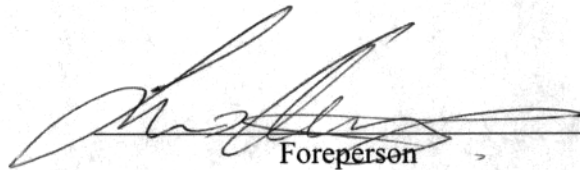
☐ Contractual Indemnity

☐ Equitable Indemnity

(Only answer the next question if you found in favor of the Plaintiff against JLS on one of the foregoing questions)

4. We find JLS Masonry, Inc. liable to Plaintiff on the claims that D.R. Horton assigned to Plaintiff in the amount of:

Four million dollars (\$ 4,000,000.00)


Foreperson

September 15, 2023

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

) FOR THE TENTH JUDICIAL CIRCUIT

) CASE NO.: 2019-CP-04-_____

Natalie Zitek, individually, and on behalf of all
others similarly situated,

)

)

)

Plaintiff,

)

SUMMONS
(Defective Construction)
(Class Action)
(Jury Trial Demanded)

v.

)

)

D.R. Horton, Inc.; Jane Doe #1-10; and, John
Doe #1-50,

)

)

)

Defendants.

)

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer upon the subscribers, at their offices at 415 Mill Street, Mount Pleasant, South Carolina 29464, within thirty (30) days after the service thereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint, plus interest and costs.

JUSTIN O'TOOLE LUCEY, P.A.

s/ Dabny Lynn

 Justin O'Toole Lucey
 Dabny Lynn, Esq.
 Sohayla R. Townes, Esq.
 415 Mill Street (29464)
 Post Office Box 806
 Mount Pleasant, SC 29465-0806
 (843) 849-8400 phone
 (843) 849-8406 fax
jlucey@lucey-law.com
dlynn@lucey-law.com
stownes@lucey-law.com
Attorneys for Plaintiff

September 25, 2019
 Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	CASE NO.: 2019-CP-04-_____
Natalie Zitek, individually, and on behalf of all	)	
others similarly situated,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	(Defective Construction)
v.	)	(Class Action)
	)	(Jury Trial Demanded)
D.R. Horton, Inc.; Jane Doe #1-10; and, John	)	
Doe #1-50,	)	
	)	
Defendants.	)	

Plaintiff, Natalie Zitek, individually, and on behalf of all others similarly situated, complaining of the above-named Defendants, would respectfully allege and show the Court as follows:

PARTIES AND JURISDICTIONAL STATEMENT

1. The Rose Hill subdivision (“Rose Hill”) is a neighborhood of approximately 270 single-family homes located off State Highway 74 in Anderson County, South Carolina.

2. Plaintiff Natalie Zitek (“Plaintiff Zitek”) is a citizen and resident of Anderson County, South Carolina.

3. Plaintiff Zitek owns a home within Rose Hill that is located at 104 Sturbridge Court, Easley, South Carolina, 29462.

4. Plaintiff Zitek purchased her home on or about February 17, 2013.

5. Plaintiff Zitek brings this action on behalf of herself and a proposed Class of other similarly situated Rose Hill homeowners (collectively “Plaintiff” or “Plaintiff Zitek and the Class”).

Developer Defendant

6. Defendant D.R. Horton, Inc. (“D.R. Horton”) is a corporation organized under the laws of the State of Delaware. At all times relevant to this action, D.R. Horton conducted business in Anderson County, South Carolina.

7. D.R. Horton is the developer, builder, and seller of the Plaintiff’s and Class’ homes and properties in Rose Hill (“the Residences”). At all times relevant to this action, D.R. Horton coordinated, performed, directed, managed, controlled, supervised and/or otherwise participated in the design, development, marketing, construction, sale, and/or repair of the Residences.

Jane Doe Defendants

8. Defendants Jane Doe #1-10, whose true names are unknown (“Jane Doe Defendants”), are other entities or individuals which are actual or *de facto* joint venturers and/or partners, control persons, and/or agents of D.R. Horton and/or each other in connection with the design, construction, and repair of the Residences.

9. The address and identity of each Jane Doe Defendant is unknown at this time.

10. All at times relevant hereto, Jane Doe Defendants were conducting business in Anderson County, South Carolina.

11. Upon information and belief, D.R. Horton, Jane Doe Defendants, and their officers, members, managers, directors, and/or shareholders (collectively “Developers”), operated a joint enterprise for the common, for-profit purpose of selling the Residences to Plaintiff Zitek and the Class.

12. Upon information and belief, Developers collectively developed the Residences, marketed the Residences to the public, placed the Residences into the stream of commerce, sold the Residences, and/or repaired the Residences.

13. Upon information and belief, Developers failed to observe corporate formalities; acted as agents of each other; and/or, comingled and combined their resources in developing, constructing, marketing, selling, and/or repairing the Residences.

14. Upon information and belief, the legal distinctions between Developers are blurred and they are, in effect, one and the same and their interests are amalgamated such that the actions of one should apply to the others.

15. Developers' collective conduct, blurring of corporate lines, and other abuses of the corporate form have resulted in fundamental unfairnesses to Plaintiff Zitek and the Class.

John Doe Defendants

16. Defendants John Doe #1-50 ("John Doe Defendants") are persons or entities who participated in the design, development, marketing, construction, repair, and/or sale of the Residences as contractors, subcontractors, manufacturers, material suppliers, consultants, architects, engineers, real estate agents, managers, marketers, laborers, or otherwise.

17. The address and identity of the John Doe Defendants are unknown at this time.

18. All at times relevant hereto, John Doe Defendants were conducting business in Anderson County, South Carolina.

19. This Honorable Court has jurisdiction over all parties hereto and over all subject matter alleged herein.

20. Venue is proper in Anderson County as the most substantial part of Plaintiff's and the Class' alleged injuries and Defendants' alleged acts or omissions took place in Anderson County.

21. Plaintiff Zitek is informed and believes that well over two-thirds of the Class are citizens of Anderson County, South Carolina.

22. Plaintiff Zitek is informed and believes that all or nearly all of the Class are citizens of South Carolina.

FACTUAL ALLEGATIONS

23. This matter arises out of the design, development, construction, sale and/or repair of the Residences.

24. At the time their Certificates of Occupancy were issued, the Residences contained latent and undisclosed defects. The latent and undisclosed defects, in combination with fortuitous weather, repeated water intrusion and/or other events, have resulted in consequential damage to non-defective portions of the Residences and other property.

25. Defendants should have known of the existence of the latent defects for many reasons, including their post-construction repair efforts.

26. Plaintiff Zitek and members of the Class have previously put D.R. Horton on notice of one or more of the deficiencies. In turn, D.R. Horton has put one or more of the other Defendants on notice. However, the Defendants have not rectified the problems and their various and sundry repair attempts have been inadequate, are failing, or have failed.

27. A preliminary inspection of the Residences evidences failure in load-bearing components; failure in exterior cladding systems; water intrusion into and through windows, doors, and the exterior building envelope; and, resulting consequential damage to non-defective building components and other property. Inspection also reveals failure of other various and sundry building components, with consequential damages resulting therefrom.

28. Defendants had a duty to design, develop, and construct the Residences in a workmanlike manner with suitable materials, free from all defects, and in accordance with the

applicable building code, permitted building plans, good workmanship, and construction industry and engineering standards.

29. Plaintiff Zitek is informed and believes that various building components of the Residences, including those listed above, are not in compliance with applicable building codes, proper workmanship, and industry standards and must be corrected or replaced.

30. Defendants' acts and omissions have resulted in building deficiencies, consequential damages, and partial loss of use and enjoyment.

31. The aforementioned deficiencies and resulting damages show that Defendants breached their duties to Plaintiff Zitek and the Class.

32. Remedying the above wrongs will result in additional consequential damages and loss of use.

33. As a direct and proximate result of Defendants' violation of their legal duties, Plaintiff Zitek and the Class have been proximately damaged in an amount to be determined by the trier of fact, and have had to incur reasonable attorneys' fees and costs for the retention of experts to determine the damage and scope of work for repair.

34. Upon information and belief, the water intrusion and resulting consequential damages commenced shortly after completion of the Residences and have occurred and have been occurring in each and every year since commencement and constitute "occurrences" and "property damage" under the standard and/or typical commercial general liability policies.

CLASS ACTION ALLEGATIONS

35. Pursuant to the common law of South Carolina and Rule 23 of the South Carolina Rules of Civil Procedure ("SCRCP"), Plaintiff Zitek brings this action, both individually, and on behalf of a Class of similarly situated claimants. The Class is more particularly defined as follows:

All persons and entities that own a single-family house developed by Defendants within the Rose Hill subdivision in the City of Easley, Anderson County, South Carolina.

Plaintiff proposes that the class be divided into subclasses if, and as necessary, to align class interest.

Excluded from the Class are: (a) any Judge presiding over this action and members of their families; (b) Defendants and any entity in which Defendants have a controlling interest or which have a controlling interest in Defendants and their legal representatives, assigns and successors of Defendants and Defendants' current or former employees, investors, members, or officers; (c) any Rose Hill residence owned by any of the Defendants or an entity related to any of the Defendants; (d) any Rose Hill residence developed by persons other than Defendants; (e) any former Rose Hill homeowner; (f) any current Rose Hill homeowner that has previously released all the claims set forth herein; and, (g) all persons who properly execute and file a timely request for exclusion from the Class.

36. *Numerosity:* The Class concerns approximately two hundred and fifty (250) properties, owned by people geographically dispersed throughout the State of South Carolina, the joinder of whom in one action is impractical. When spouses and co-owners are considered, the Class is expected to be in excess of four hundred members (400) members.

37. *Commonality:* Questions of law and fact common to the Class exist as to all members of the Class and predominate over any questions affecting only individual members of the Class. These common legal and factual issues include the following:

- a. Whether Defendants negligently designed, constructed and/or repaired the Residences;
- b. Whether Defendants breached their implied warranties in connection with the Residences;
- c. Whether Defendants knew or should have known of the latent defects;
- d. Whether Defendants failed to disclose defects and/or unsuccessful repairs;

- e. Whether Defendants have acted or refused to act on grounds generally applicable to the Class;
- f. Whether Plaintiff Zitek and the Class are entitled to recover the estimated cost to repair and (i) compensation for all out-of-pocket monies expended for repair of their homes, as well as repair/replacement of other property damage; (ii) temporary repairs; and, (iii) compensation for loss of use; and,
- g. Whether Defendants' conduct was reckless, willful, wanton, or the like, entitling Plaintiff Zitek and the Class to punitive damages.

38. *Typicality*: Plaintiff Zitek's claims are typical of the claims of the Class, as all such claims arise out of Defendants' wrongful conduct in developing, building, repairing, and/or selling the Residences and Plaintiff Zitek's and Class' ownership of these Residences that contain latent defects.

39. *Adequate Representation*: Plaintiff Zitek will fairly and adequately protect the interests of the Class and has no interests antagonistic to those of the Class. Plaintiff Zitek has retained counsel experienced in the prosecution of construction defect claims and complex litigation, including consumer class actions involving product liability and product design defects.

40. *Predominance and Superiority*: This class action is appropriate for certification because questions of law and fact common to the Class predominate over questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of this controversy, since individual joinder of all members of the Class is impracticable. Should individual Class members be required to bring separate actions, this Court would be confronted with a multiplicity of lawsuits burdening the court system while also creating the risk of inconsistent rulings and contradictory judgments. In contrast to proceeding on a case-by-case basis, in which inconsistent results will magnify the delay and expense to all parties and the court system, this class action presents far fewer management difficulties while providing unitary adjudication, economies of scale, and comprehensive supervision by a single Court.

41. Defendants have acted on grounds generally applicable to the Class. Class certification is appropriate under South Carolina law because Defendants engaged in a uniform and common practice. All Class members have the same legal right to and interest in redress for damages associated with the defective conditions existing within their Residences.

42. Plaintiff Zitek and the Class envision no unusual difficulty in the management of this action as a class action.

43. Each Class member has an interest of more than \$100.00.

44. The amount of money at stake for each Class member is not sufficient for each member to hire their own counsel and engineers and bring their own action.

**ESTOPPEL FROM PLEADING AND TOLLING OF
APPLICABLE STATUTES OF LIMITATIONS**

45. Defendants are estopped from relying on any statutes of limitations or repose by virtue of their acts. Upon information and belief, Defendants should have known the Residences were defectively constructed and failed to alert Plaintiff Zitek and the Class of the Residences' defective condition.

46. Defendants had a duty to inform Plaintiff Zitek and the Class of the defects described herein, which they should have known. Notwithstanding their duty, Defendants never disclosed the defects to Plaintiff Zitek or the Class.

47. Despite exercising reasonable diligence, Plaintiff Zitek and the Class could not have discovered the defective condition of Residences.

48. Given Defendants' failure to disclose this non-public information about the defective nature of the Residences – information over which they had exclusive control – and because Plaintiff Zitek and the Class could not reasonably have known of the Residences' defective nature, Defendants are estopped from relying on any statutes of limitations or repose that

might otherwise be applicable to the claims asserted herein.

49. Defendants are further estopped from relying upon any statute of limitations as they have repeatedly represented to Plaintiff Zitek and the Class that they had or were correcting the work.

50. The equitable tolling doctrine further precludes Defendants from relying on a statute of limitations defense.

ESTOPPEL FROM ASSERTING THE ARBITRATION PROVISION AND WARRANTY DISCLAIMERS CONTAINED IN D.R. HORTON'S PURCHASE CONTRACTS

51. Defendants are estopped/barred from asserting the Arbitration Provision and Warranty Disclaimer Provisions contained in D.R. Horton's purchase contracts because these Provisions are unconscionable and unenforceable.

52. Plaintiff Zitek's purchase contract contains the same or similar "Warranties and Disclaimers" and "Arbitration" Provisions that the South Carolina Supreme Court has already deemed are "clearly one sided and oppressive". *Smith v. D.R. Horton*, 417 S.C. 42, 50, 790 S.E.2d 1, 5 (2016).

53. Plaintiff Zitek's purchase contract attempts to disclaim implied warranty claims and prohibits any monetary damage by providing that "D.R. Horton shall not be liable for any reason under any circumstance to Purchaser or anyone claiming through Purchaser for monetary damages of any kind. . .".

54. Any such provisions purporting to waive all implied warranties and all relief are void pursuant to public policy and South Carolina law.

55. As a result, Defendants cannot rely on their warranty disclaimers, and cannot compel Plaintiff Zitek or the Class into arbitration, based on D.R. Horton's purchase contracts. *Id.* ("We. . .hold the arbitration provision is unconscionable, and thus, unenforceable").

**ESTOPPEL FROM ASSERTING THE ARBITRATION PROVISIONS AND
WARRANTY LIMITATIONS IN EXPRESS WARRANTIES**

56. Defendants are estopped/barred from asserting the Arbitration Provisions and Warranty Limitations contained in their express warranties because Plaintiff Zitek and the Class do not currently allege a breach of express warranty claim.

57. Defendants are also estopped/barred from asserting the Arbitration Provisions and Warranty Limitations contained in their express warranties or the like because these provisions and limitations are conflicting, procedurally burdensome, unconscionable, and/or not geared towards an unbiased decision by a neutral decision-maker.

58. Defendants are further estopped/barred from relying on Warranty Limitations contained in their express warranties or the like by virtue of their conduct and such warranties' failure to serve its essential purpose.

59. By virtue of Defendants' acts, the work performed at the Residences have not lived up to Defendants' warranties. Given the Residences' defective condition, their building components have not proven to be of reasonable or acceptable quality.

60. Defendants, in the exercise of required diligence, which failed to occur, should have known the Residences were defective, uninhabitable, unfit, and unmerchantable.

61. Defendants' warranties are woefully inadequate to repair and replace failed building components in the Residences, let alone to reimburse for any damage suffered to the underlying components and other property. The remedies available in Defendants' warranties are limited to such an extent that they do not provide a minimum adequate remedy and fail their essential purpose.

62. As such, Defendants are precluded from relying on the Arbitration Provisions and Warranty Limitations contained in their express warranties or the like as a defense to the claims asserted herein.

FOR A FIRST CAUSE OF ACTION
(Negligence and Gross Negligence as to Defendants)

63. Plaintiff repeats and re-alleges the above paragraphs as if fully set forth verbatim.

64. Defendants, either on their own or through their agents, servants, and employees undertook and owed duties to Plaintiff in connection with the work they performed at the Residences.

65. Defendants had a duty to perform their work at the Residences in accordance with applicable codes, approved plans and specifications, industry standards, and in a careful, diligent, and workmanlike manner, free from defects.

66. Defendants also had a duty to provide accurate information about the Residences' condition and to disclose defective conditions.

67. Defendants breached their duties to Plaintiff in a manner that was negligent, grossly negligent, careless, reckless, willful, and wanton in the following particulars:

- a. In failing to use due care in developing the Residences;
- b. In failing to provide adequate load-bearing systems, exterior claddings, windows, doors, structural components and/or other building components for the Residences;
- c. In failing to develop the Residences in accordance with applicable building codes, standard building practices, and accepted construction and design industry standards and practices;
- d. In failing to properly supervise the work performed at the Residences;
- e. In failing to properly coordinate the subcontractors and trades;

- f. In failing to act as a reasonable person would in the circumstances then and there prevailing;
- g. In failing to provide accurate information about the Residences;
- h. In failing to make proper repairs; and,
- i. Other deficiencies or failures as will be proven at trial.

68. Plaintiff has been damaged as a direct and proximate result of the negligence, carelessness, recklessness, gross negligence, willfulness, and wantonness of the Defendants.

69. The violation of applicable building codes constitutes negligence *per se* and may constitute evidence of gross negligence.

70. If it is shown that said failures were committed with gross negligence and/or reckless disregard for the rights of others, Plaintiffs are entitled to an award of punitive damages against the Defendants.

71. As a result of Defendants' negligence and/or gross negligence, Plaintiff is entitled to a judgment against Defendants for all actual, direct, indirect, resulting, consequential, and punitive damages in an amount to be determined at the trial of this case.

FOR A SECOND CAUSE OF ACTION
(Breach of Implied Warranties as to Defendants)

72. Plaintiff repeats and re-alleges the above paragraphs as if fully set forth verbatim.

73. Defendants implicitly warranted that the Residences would be developed in a careful, diligent, and workmanlike manner, with suitable materials and components that complied with applicable building codes, industry standards, and industry practice.

74. Defendants implicitly warranted that the Residences would be merchantable, free from latent defects, and fit for the particular purpose.

75. D.R. Horton impliedly warranted that the Residences would be habitable.

76. Defendants breached their implied warranties by developing the Residences in a defective manner as set forth above.

77. As a direct and proximate result of Defendants' breach of their implied warranties, Plaintiff has been damaged and is entitled to a judgment against Defendants for all actual, direct, indirect, resulting, and consequential damages in an amount to be proven at trial.

FOR A THIRD CAUSE OF ACTION
(Unfair Trade Practices as to D.R. Horton)

78. Plaintiff repeats and re-alleges the above paragraphs as if fully set forth verbatim.

79. D.R. Horton is a person within the meaning of the South Carolina Unfair Trade Practices Act (the "Act").

80. D.R. Horton developed and sold the Residences and, therefore, engaged in commerce as defined by the Act.

81. D.R. Horton's above-described actions, including placing defective Residences into the stream of commerce; failing to oversee and control the workmanship and material quality of the Residences; failing to properly repair defective conditions; failing to comply with the building codes, industry standards, and industry practice; attempting to disclaim and eviscerate any and all relief to the owners of the Residences; and, other acts to be shown through the course of discovery and at trial, constitute unfair and deceptive practices within the meaning of the Act.

82. D.R. Horton knew or should have known that its conduct was in violation of the Act.

83. D.R. Horton's conduct is capable of repetition and, upon information and belief and in accord with the allegations herein, has been repeated.

84. D.R. Horton's conduct adversely affects the public interest as well as many South Carolina citizens.

85. As a direct, foreseeable, and proximate result of D.R. Horton's unfair and deceptive practices, the individual owners of the Residences, including Plaintiff Zitek, have been damaged and are entitled to a judgment against D.R. Horton in amount to be proven at trial.

WHEREFORE, Plaintiff demands a trial by jury and prays for actual and consequential damages expected to exceed five million dollars, statutory and punitive damages, reasonable attorneys' fees, costs of suit, prejudgment interest, and granting of such further relief as the Court deems just and proper.

Respectfully submitted,

JUSTIN O'TOOLE LUCEY, P.A.

s/ Dabny Lynn

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Attorneys for Plaintiff

September 25, 2019
Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

C.A. No. 2019-CP-04-1942

Natalie Zitek, individually, and on behalf of
all others similarly situated,)**AMENDED SUMMONS**

Plaintiff)

vs)

D.R. Horton, Inc., Jane Doe #1-10; and, John
Doe #1-50,)

Defendant)

D.R. HORTON, INC.)

Third-Party Plaintiff)

vs)

AJ LANDSCAPING & GRADING, LLC,)
A/K/A A J LANDSCAPING & GRADING,)
LLC; ALLPRO TEXTURES, LLC; ALPHA)
OMEGA CONSTRUCTION GROUP, INC.;)
AMERICAN CONCRETE AND PRECAST,)
INC.; A/K/A ACP CONCRETE, INC.; A &)
J FRAMING, INC; ALPHA E.M.C.; A-Z,)
INC.; ATLANTA FLOOR DESIGNS)
CENTER; A GRADE ABOVE OTHERS,)
LLC; BRAND-VAUGHAN LUMBER CO,)
INC.; BKF BUILDERS, INC.; BLUE)
RIDGE BUILDING PRODUCTS, LLC;)
BUILDERS DESIGNHOUSE, LLC; BMC)
EAST LLC; BUILDERS FIRSTSOURCE)
SOUTHEAST GROUP, LLC, A/K/A)
BUILDERS FIRSTSOURCE, INC.,;)
BRAVO CARPENTERS, INC.; CARYL)
MECHANICS II, INC., A/K/A CARYL)
MECHANICALS, INC.; CANNADAY)
SIDING & GUTTER, INC.; COLEMAN)
FLOOR, LLC; CORTES PAINTING, LLC;)
CBU ENTERPRISES, INC.; CPI)
SECURITY SYSTEMS, INC.; DOM)
GROUP, LLC; FERGUSON)

ENTERPRISES, INC.; FIVE STAR)
 CONSTRUCTION INC.; FIVE STAR)
 FOUNDATIONS, LLC; GALLOWAY-)
 BELL, INC., A/K/A GALLOWAY-BELL,)
 INC. II; GET FLOORED, LLC; GBS)
 BUILDING SUPPLY – US LBM, LLC,)
 F/K/A GBS BUILDING SUPPLY, INC.;)
 GENERAL SHALE BRICK INC.;)
 GREENER PASTURES, INC., A/K/A)
 GREENER PASTURES OF AIKEN, LLC;)
 INSTALLED BUILDING PRODUCTS,)
 LLC, A/K/A INSTALLED BUILDING)
 PRODUCTS II, LLC; JLS MASONRY,)
 INC.; KINGS LANDSCAPING, LLC;)
 LANDSHAPERS, LLC; LADE-DANLAR,)
 INC.; LANSING BUILDING PRODUCTS,)
 INC.; LONG HEATING & AIR)
 CONDITIONING, INC.; L & M)
 ELECTRIC, INC; MANALE)
 LANDSCAPING, LLC; MJ COWBOYS,)
 LLC; M & L GENERAL)
 CONSTRUCTION, LLC, A/K/A M & L)
 GENERAL CONSTRUCTION, INC.; M&L)
 REYNA CONSTRUCTION, LLC; M&M)
 FOUNDATIONS, LLC; NAZARETH)
 BUILDERS, LLC; NB CONTRACTORS,)
 LLC; POINSETT DEVELOPMENT, LLC;)
 POINSETT HOMES, LLC; P&T)
 CONSTRUCTION, INC., A/K/A P & T)
 CONSTRUCTION, INC.; P & L)
 ENTERPRISES, LLC; PROBUILD)
 COMPANY, LLC A/K/A PROBUILD)
 HOLDINGS, INC.; RITE RUG COMPANY,)
 INC., A/K/A RITE RUG CO.; RODNEY)
 HOWARD GRADING INC., A/K/A)
 RODNEY HOWARD GRADING CO.;)
 SANDLAPPER CONCRETE, LLC;)
 SODFATHER INC., LANDSCAPE)
 CONTRACTORS; STOCK BUILDING)
 SUPPLY, LLC; TOPBUILD HOME)
 SERVICES, INC., A/K/A GALE)
 CONTRACTORS SERVICE; TUCKER)
 MATERIALS, INC., A/K/A GYPSUM;)
 UTM ENTERPRISES, INC; AND)
 WILLOW TREE LANDSCAPING, INC;)
)

Third-Party Defendants

TO: NAMED THIRD-PARTY DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Third-Party Complaint contained in the Answer of D.R. Horton, Inc., to Plaintiff's Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Third-Party Complaint on the subscriber hereto at this office at 704 East McBee Avenue, Greenville, South Carolina, 29601, within thirty (30) days after service hereof, exclusive of the day of such service; and if you fail to answer the Third-Party Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Third-Party Complaint.

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

John T. Crawford Jr. (SC Bar # 69682)

Jason Imhoff (S.C. Bar # 69355)

Kyle McGann (SC Bar # 103113)

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Attorneys for D.R. Horton

March 11, 2021

Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Natalie Zitek, individually, and on behalf of
all others similarly situated,

Plaintiff

vs

D.R. Horton, Inc., Jane Doe #1-10; and, John
Doe #1-50,

Defendant

D.R. HORTON, INC.

Third-Party Plaintiff

Vs

AJ LANDSCAPING & GRADING, LLC,
A/K/A A J LANDSCAPING & GRADING,
LLC; ALLPRO TEXTURES, LLC; ALPHA
OMEGA CONSTRUCTION GROUP, INC.;
AMERICAN CONCRETE AND PRECAST,
INC.; A/K/A ACP CONCRETE, INC.; A &
J FRAMING, INC; ALPHA E.M.C.; A-Z,
INC.; ATLANTA FLOOR DESIGNS
CENTER; A GRADE ABOVE OTHERS,
LLC; BRAND-VAUGHAN LUMBER CO,
INC.; BKF BUILDERS, INC.; BLUE
RIDGE BUILDING PRODUCTS, LLC;
BUILDERS DESIGNHOUSE, LLC; BMC
EAST LLC; BUILDERS FIRSTSOURCE
SOUTHEAST GROUP, LLC, A/K/A
BUILDERS FIRSTSOURCE, INC.,;
BRAVO CARPENTERS, INC.; CARYL
MECHANICS II, INC., A/K/A CARYL
MECHANICALS, INC.; CANNADAY
SIDING & GUTTER, INC.; COLEMAN
FLOOR, LLC; CORTES PAINTING, LLC;
CBU ENTERPRISES, INC.; CPI
SECURITY SYSTEMS, INC.; DOM
GROUP, LLC; FERGUSON

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

C.A. No. 2019-CP-04-1942

**AMENDED ANSWER AND THIRD-
PARTY COMPLAINT OF
DEFENDANT D.R. HORTON, INC.**

ENTERPRISES, INC.; FIVE STAR)
 CONSTRUCTION INC.; FIVE STAR)
 FOUNDATIONS, LLC; GALLOWAY-)
 BELL, INC., A/K/A GALLOWAY-BELL,)
 INC. II; GET FLOORED, LLC; GBS)
 BUILDING SUPPLY – US LBM, LLC,)
 F/K/A GBS BUILDING SUPPLY, INC.;)
 GENERAL SHALE BRICK INC.;)
 GREENER PASTURES, INC., A/K/A)
 GREENER PASTURES OF AIKEN, LLC;)
 INSTALLED BUILDING PRODUCTS,)
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 PRODUCTS II, LLC; JLS MASONRY,)
 INC.; KINGS LANDSCAPING, LLC;)
 LANDSHAPERS, LLC; LADE-DANLAR,)
 INC.; LANSING BUILDING PRODUCTS,)
 INC.; LONG HEATING & AIR)
 CONDITIONING, INC.; L & M)
 ELECTRIC, INC; MANALE)
 LANDSCAPING, LLC; MJ COWBOYS,)
 LLC; M & L GENERAL)
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 GENERAL CONSTRUCTION, INC.; M&L)
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 BUILDERS, LLC; NB CONTRACTORS,)
 LLC; POINSETT DEVELOPMENT, LLC;)
 POINSETT HOMES, LLC; P&T)
 CONSTRUCTION, INC., A/K/A P & T)
 CONSTRUCTION, INC.; P & L)
 ENTERPRISES, LLC; PROBUILD)
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 SANDLAPPER CONCRETE, LLC;)
 SODFATHER INC., LANDSCAPE)
 CONTRACTORS; STOCK BUILDING)
 SUPPLY, LLC; TOPBUILD HOME)
 SERVICES, INC., A/K/A GALE)
 CONTRACTORS SERVICE; TUCKER)
 MATERIALS, INC., A/K/A GYPSUM;)
 UTM ENTERPRISES, INC; AND)
 WILLOW TREE LANDSCAPING, INC;)
)

Third-Party Defendants

**TO: JUSTIN O'TOOLE LUCEY, ESQUIRE, AND DABNY LYNN, ESQUIRE,
ATTORNEYS FOR PLAINTIFF:**

Pursuant to Rule 15, SCRCP, Defendant D.R. Horton, Inc. ("D.R. Horton" or "Defendant"), hereby amends its answer and asserts a third-party complaint and answers the Complaint of Natalie Zitek, individually, and on behalf of all others similarly situated ("Plaintiff"), as set forth below, by denying each and every allegation not hereinafter specifically admitted, demanding strict proof thereof, and further responds as follows:

FOR A FIRST DEFENSE

1. Each and every allegation contained within Plaintiff's Complaint not hereinafter specifically admitted, qualified, or explained is denied.
2. Upon information and belief, D.R. Horton admits the allegations contained within Paragraphs 1, 2, 3, and 4 of the Complaint.
3. D.R. Horton denies that this matter is a proper matter for a class action lawsuit as alleged in Paragraph 5 of the Complaint and therefore denies the same.
4. D.R. Horton admits the allegations of Paragraph 6 of the Complaint.
5. D.R. Horton admits so much of the allegations contained in Paragraph 7 of the Complaint in that D.R. Horton constructed various residences and developed certain portions of Rose Hill. All remaining allegations contained in Paragraph 7 are denied.
6. D.R. Horton denies the allegations of Paragraphs 8, 9, 10, 11, 12, 13, 14, 15 of the Complaint.
7. D.R. Horton lacks sufficient information to admit or deny the allegations contained in Paragraphs 16, 17 and 18 of the Complaint and therefore denies the same.

8. Paragraphs 19 and 20 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

9. D.R. Horton lacks sufficient information to admit or deny Paragraphs 21 and 22 of the Complaint and therefore denies the same.

10. D.R. Horton admits so much of the allegations contained in Paragraph 23 of the Complaint that Plaintiff claims arises out of construction of the Zitek residence. All remaining allegations contained in Paragraph 23 are denied.

11. D.R. Horton denies the allegations of Paragraph 24 of the Complaint.

12. D.R. Horton denies the allegations of Paragraph 25 of the Complaint.

13. D.R. Horton denies the allegations of Paragraph 26 and 27 of the Complaint.

14. Paragraph 28 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

15. D.R. Horton denies the allegations of Paragraph 29 of the Complaint.

16. D.R. Horton denies the allegations of Paragraphs 30 and 31 of the Complaint.

17. D.R. Horton denies the allegations of Paragraph 32 of the Complaint.

18. D.R. Horton denies the allegations of Paragraphs 33 and 34 of the Complaint.

19. D.R. Horton denies any and all allegations in Paragraphs 35, 36, 37, 38, 39 and 40 and denies that this matter is proper as a class action lawsuit as alleged in Paragraphs 35, 36, 37, 38, 39 and 40 of the Complaint and therefore denies the same.

20. Paragraph 41 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

21. D.R. Horton denies that this matter is proper as a class action lawsuit as alleged in Paragraph 42 of the Complaint and therefore denies the same.

22. D.R. Horton denies the allegations of Paragraph 43 of the Complaint.

23. D.R. Horton lacks sufficient information to admit or deny Paragraph 44 of the Complaint and therefore denies the same.

24. D.R. Horton denies the allegations of Paragraph 45 of the Complaint.

25. D.R. Horton denies knowledge of the existence of any defects, as alleged in Paragraphs 46 and 47 of the Complaint. Further, Paragraphs 46 and 47 of the Complaint call for a legal conclusion which can neither be admitted or denied. To the extent a response is required, it is denied and strict proof of demanded.

26. Paragraphs 48, 49, 50 and 51 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to these paragraphs they are denied and strict proof is demanded.

27. D.R. Horton denies the allegations of Paragraph 52 of the Complaint.

28. Dr. Horton craves reference to the documents referenced in Paragraphs 53 and 54 of the Complaint and denies any allegations inconsistent thereof. Further, Paragraphs 53 and 54 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

29. D.R. Horton denies the allegations of Paragraphs 55, 56, 57, 58 and 59 of the Complaint.

30. D.R. Horton denies the knowledge of the existence of any defects and denies that D.R. Horton's warranties are inadequate, as alleged in Paragraphs 60 and 61 of the Complaint, and therefore denies the same.

31. D.R. Horton denies the allegations of Paragraph 62 of the Complaint.

32. Paragraph 63 of Plaintiff's Complaint is an administrative paragraph to which no response is required. To the extent a response is required, D.R. Horton realleges and reasserts its answers and defenses to the prior allegations of the Complaint.

33. Paragraphs 64, 65, and 66 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph, it is denied and strict proof is demanded.

34. D.R. Horton denies the allegations of Paragraph 67 and 68 of the Complaint.

35. Paragraph 69 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

36. D.R. Horton denies the allegations of Paragraph 70 of the Complaint.

37. D.R. Horton denies that Plaintiff is entitled to any relief as sought in Paragraph 71 of the Complaint.

38. Paragraph 72 of Plaintiff's Complaint is an administrative paragraph to which no response is required. To the extent a response is required, D.R. Horton realleges and reasserts its answers and defenses to the prior allegations of the Complaint.

39. Paragraphs 73, 74, and 75 of the Complaint calls for a legal conclusion to which can neither be admitted nor denied. To the extent a response is required to this paragraph, it is denied and strict proof is demanded.

40. D.R. Horton denies the allegations of Paragraph 76 of the Complaint.

41. D.R. Horton denies that Plaintiff is entitled to any relief as sought in Paragraph 77 of the Complaint.

42. Paragraph 78 of Plaintiff's Complaint is an administrative paragraph to which no response is required. To the extent a response is required, D.R. Horton realleges and reasserts its answers and defenses to the prior allegations of the Complaint.

43. Paragraphs 79 and 80 of the Complaint call for a legal conclusion which can neither be admitted nor denied. To the extent a response is required to this paragraph it is denied and strict proof is demanded.

44. D.R. Horton denies the allegations of Paragraphs 81, 82, 83, and 84 of the Complaint, including the existence of any alleged defects.

45. Denies that Plaintiff is entitled to any relief as sought in Paragraph 85 of the Complaint.

46. Denies all remaining allegations of the Complaint, including Plaintiff's Prayer for Relief as set forth in the Paragraph beginning "WHEREFORE" which claims entitlement to actual damages, attorneys' fees, costs, and any other relief and prays that this action against D.R. Horton be dismissed.

FOR A SECOND DEFENSE
(Motion to Dismiss, Alternatively to Stay and Compel Arbitration)

47. D.R. Horton moves to dismiss this action pursuant to Rule 12(b)(6), SCRCPP, or, alternatively, stay this action as Plaintiff entered into a contract with D.R. Horton regarding the construction of a home, which is the subject of this suit ("Contract"). The contract contains a binding and enforceable arbitration agreement. Therefore, this Court does not have jurisdiction to hear this matter and/or should stay the case and transfer it for arbitration.

48. D.R. Horton asserts that Defendants John Doe #1-50 and Jane Doe #1-10 have not been served pursuant to the South Carolina Rules of Civil Procedure. Therefore, D.R. Horton moves to dismiss Co-Defendants John Doe #1-50 and Jane Doe #1-10 pursuant to Rule 12(b)(4)

and (5) of the South Carolina Rules of Civil Procedure for insufficiency of process and insufficiency of service of process. D.R. Horton further alleges lack of service as a defense in this matter as to Defendant John Doe #1-50 and Jane Doe #1-10.

FOR A THIRD DEFENSE
(Lack of standing)

49. Plaintiff lacks standing to make the claims asserted against D.R. Horton in this action.

50. D.R. Horton asserts that Defendants John Doe #1-50 and Jane Doe #1-10 have not been served pursuant to the South Carolina Rules of Civil Procedure. Therefore, D.R. Horton moves to dismiss Co-Defendants John Doe #1-50 and Jane Doe #1-10 pursuant to Rule 12(b)(4) and (5) of the South Carolina Rules of Civil Procedure for insufficiency of process and insufficiency of service of process. D.R. Horton further alleges lack of service as a defense in this matter as to Defendant John Doe #1-50 and Jane Doe #1-10.

FOR A FOURTH DEFENSE
(Failure to State a claim or cause of action)

51. Plaintiff fails to state a claim upon which relief may be granted.

52. Plaintiff fails to state a cause of action against D.R. Horton.

53. D.R. Horton asserts that Defendants John Doe #1-50 and Jane Doe #1-10 have not been served pursuant to the South Carolina Rules of Civil Procedure. Therefore, D.R. Horton moves to dismiss Co-Defendants John Doe #1-50 and Jane Doe #1-10 pursuant to Rule 12(b)(4) and (5) of the South Carolina Rules of Civil Procedure for insufficiency of process and insufficiency of service of process. D.R. Horton further alleges lack of service as a defense in this matter as to Defendant John Doe #1-50 and Jane Doe #1-10.

FOR A FIFTH DEFENSE
(Laches, Estoppel, Waiver)

54. That all claims asserted against D.R. Horton are barred by the equitable doctrines of laches, waiver, and/or estoppel.

FOR A SIXTH DEFENSE
(Spoliation)

55. Plaintiff's claims are barred by the doctrine of spoliation of evidence.

FOR A SEVENTH DEFENSE
(Unclean Hands)

56. Plaintiff's claims against D.R. Horton are barred by the Doctrine of Unclean Hands.

FOR AN EIGHTH DEFENSE
(Negligence of Others)

57. D.R. Horton alleges that the direct and proximate cause of Plaintiff's damages, if any, was the negligence, gross negligence, wanton and reckless conduct of some other person or corporation and, accordingly, D.R. Horton is not liable to Plaintiff.

FOR A NINTH DEFENSE
(Comparative Negligence)

58. Plaintiff's claims and damages, if any, are barred, or should be reduced, by Plaintiff's own contributory and comparative negligence and recklessness which combined, contributed and concurred with any alleged negligence on the part of the D.R. Horton, if any, and which is expressly denied.

FOR A TENTH DEFENSE
(Offset)

59. D.R. Horton is entitled to offset in the amount of any and all damages recovered by the Plaintiff from other for the same injuries and/or damages claimed in this suit.

FOR AN ELEVENTH DEFENSE
(Mitigate Damages)

60. D.R. Horton allege that Plaintiff had an obligation to mitigate damages but failed to do so.

FOR A TWELVETH DEFENSE
(Compliance with Industry Standards)

61. Any and all materials, work or services provided by D.R. Horton met all relevant industry customs, practices and standards.

FOR A THIRTEENTH DEFENSE
(Acceptance of Work)

62. That the final completion and acceptance of the work undertaken by D.R. Horton constitutes a complete defense to all claims asserted by Plaintiff.

FOR A FOURTEENTH DEFENSE
(Proximate Cause)

63. Even if D.R. Horton were negligent or in breach, D.R. Horton alleges that Plaintiff's claims are barred due to the lack of proximate cause between Plaintiff's alleged damages and the alleged actions/inactions of D.R. Horton.

FOR A FIFTEENTH DEFENSE
(Scope of Work)

64. D.R. Horton's obligations to Plaintiff are limited to the services provided pursuant to D.R. Horton's scope of work; therefore, to the extent that any of Plaintiff's claims include

allegations against D.R. Horton that are outside the scope of services and work performed by D.R. Horton, those claims are barred.

FOR A SIXTEENTH DEFENSE
(Limitation of Warranty)

65. Plaintiff's claims are, upon information and belief, barred as they failed to make a claim against D.R. Horton within the applicable, implied and express warranty period and would be reduced to the extent that D.R. Horton provided a warranty which was in lieu of all other warranties.

FOR A SEVENTEENTH DEFENSE
(Intervening/Superseding Cause)

66. D.R. Horton asserts that even if it was negligent or reckless any respect, which is expressly denied, it is not liable to Plaintiff for any resulting damages, if any, because of the intervening negligent, grossly negligent, reckless, willful, and wanton acts of third parties, including those parties whose identities are unknown at the present time, which negligent and reckless acts on their part were not reasonably foreseeable, and intervened and acted as the direct and proximate cause of the damages, if any, sustained by Plaintiff.

67. D.R. Horton asserts that the intervening acts of a third party or parties were the sole and proximate cause of injuries to Plaintiff and the action should be dismissed.

FOR AN EIGHTEENTH DEFENSE
(Legal Duty)

68. D.R. Horton owed no legal duty as a matter of law to the Plaintiff.

FOR A NINETEENTH DEFENSE
(Statute of Limitations/Repose)

69. D.R. Horton allege that the Plaintiff's claims are barred by the applicable Statute of Limitations and Statute of Repose.

FOR A TWENTYTH DEFENSE
(Punitive Damages)

70. D.R. Horton would show that if the Plaintiff is making any claim for punitive damages, which are inappropriate, such violates the due process and equal protection laws of the United States Constitution and the Constitution of the State of South Carolina.

71. Punitive damages are inappropriate in this case, as a matter of law and also because the D.R. Horton did not engage in any malicious, reckless, wrongful, or intentional conduct upon which an award of punitive damages would be based.

72. D.R. Horton would show that any award of punitive damages, which D.R. Horton deny is appropriate, is subject to the limitations set forth in South Carolina Code §15-32-530.

FOR A TWENTY- FIRST DEFENSE
(Workmanlike Manner)

73. D.R. Horton asserts that all work performed was done in a workmanlike manner and therefore no breach of warranty may exist.

FOR A TWENTY- SECOND DEFENSE
(Disclaimer of Warranty)

74. The Contract disclaims any implied warranties made by D.R. Horton. Therefore, Plaintiff may not maintain any claims relating and/or referring to an implied warranty.

FOR A TWENTY-THIRD DEFENSE
(Failure to comply with conditions precedent)

75. D.R. Horton asserts that Plaintiff failed and refused to comply with the contractual conditions precedent to this action.

FOR A TWENTY-FOURTH DEFENSE
(Economic loss rule)

76. D.R. Horton asserts the Economic Loss Rule as a complete and total bar to all of Plaintiff's causes of action outside Breach of Contract.

FOR A TWENTY-FIFTH DEFENSE
(Additional Affirmative Defenses)

77. D.R. Horton hereby gives notice that it intends to rely on such other affirmative defenses pled by other defendants in this matter and as may become available or apparent during the course of discovery, and thus reserves the right to amend its Answer to assert such defenses.

FURTHER ANSWERING THE COMPLAINT AND BY WAY OF THIRD-PARTY COMPLAINT AGAINST AJ LANDSCAPING & GRADING, LLC, A/K/A A J LANDSCAPING & GRADING, LLC; ALLPRO TEXTURES, LLC; ALPHA OMEGA CONSTRUCTION GROUP, INC.; AMERICAN CONCRETE AND PRECAST, INC.; A/K/A ACP CONCRETE, INC.; A & J FRAMING, INC; ALPHA E.M.C.; A-Z, INC.; ATLANTA FLOOR DESIGNS CENTER; A GRADE ABOVE OTHERS, LLC; BRAND-VAUGHAN LUMBER CO, INC.; BKF BUILDERS, INC.; BLUE RIDGE BUILDING PRODUCTS, LLC; BUILDERS DESIGNHOUSE, LLC; BMC EAST LLC; BUILDERS FIRSTSOURCE SOUTHEAST GROUP, LLC, A/K/A BUILDERS FIRSTSOURCE, INC.; BRAVO CARPENTERS, INC.; CARYL MECHANICS II, INC., A/K/A CARYL MECHANICALS, INC.; CANNADAY SIDING & GUTTER, INC.; COLEMAN FLOOR, LLC; CORTES PAINTING, LLC; CBU ENTERPRISES, INC.; CPI SECURITY SYSTEMS, INC.; DOM GROUP, LLC FERGUSON ENTERPRISES, INC.; FIVE STAR CONSTRUCTION INC.; FIVE STAR FOUNDATIONS, LLC; GALLOWAY-BELL, INC., A/K/A GALLOWAY-BELL, INC. II; GET FLOORED, LLC; GBS BUILDING SUPPLY – US LBM, LLC, F/K/A GBS BUILDING SUPPLY, INC.; GENERAL SHALE BRICK INC.; GREENER PASTURES, INC., A/K/A GREENER PASTURES OF AIKEN, LLC; INSTALLED BUILDING PRODUCTS, LLC, A/K/A INSTALLED BUILDING PRODUCTS II, LLC; JLS MASONRY, INC.; KINGS LANDSCAPING, LLC; LANDSHAPERS, LLC; LADE-DANLAR, INC.; LANSING BUILDING PRODUCTS, INC.; LONG HEATING & AIR CONDITIONING, INC.; L & M ELECTRIC, INC.; MANALE LANDSCAPING, LLC; MJ COWBOYS, LLC; M & L GENERAL CONSTRUCTION, LLC, A/K/A M & L GENERAL CONSTRUCTION, INC.; M&L REYNA CONSTRUCTION, LLC; M&M FOUNDATIONS, LLC; NAZARETH BUILDERS, LLC; NB CONTRACTORS, LLC; POINSETT DEVELOPMENT, LLC; POINSETT HOMES, LLC; P&T CONSTRUCTION, INC., A/K/A P & T CONSTRUCTION, INC.; P & L ENTERPRISES, LLC; PROBUILD COMPANY, LLC A/K/A PROBUILD HOLDINGS, INC.; RITE RUG COMPANY, INC., A/K/A RITE RUG CO.; RODNEY HOWARD GRADING INC., A/K/A RODNEY HOWARD GRADING CO.; SANDLAPPER CONCRETE, LLC; SODFATHER INC., LANDSCAPE CONTRACTORS; STOCK BUILDING SUPPLY, LLC; TOPBUILD HOME SERVICES,

INC., A/K/A GALE CONTRACTORS SERVICE; TUCKER MATERIALS, INC., A/K/A GYPSUM; UTM ENTERPRISES, INC; AND WILLOW TREE LANDSCAPING, INC.

78. D.R Horton herein realleges its answers and defenses to the above complaint in the preceding paragraphs as if fully set forth herein.

79. D.R. Horton individually contracted with AJ Landscaping & Grading, LLC, A/K/A A J Landscaping & Grading, LLC; AllPro Textures, LLC; Alpha Omega Construction Group, Inc.; American Concrete And Precast, Inc.; A/K/A ACP Concrete, Inc.; A & J Framing, Inc; Alpha E.M.C.; A-Z, Inc.; Atlanta Floor Designs Center; A Grade Above Others, LLC; Brand-Vaughan Lumber Co, Inc.; Bkf Builders, Inc.; Blue Ridge Building Products, LLC; Builders Designhouse, LLC; BMC East LLC; Builders FirstSource Southeast Group, LLC, A/K/A Builders FirstSource, Inc.; Bravo Carpenters, Inc.; Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; Cannaday Siding & Gutter, Inc.; Coleman Floor, LLC; Cortes Painting, LLC; CBU Enterprises, Inc.; Cpi Security Systems, Inc.; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc., A/K/A Galloway-Bell, Inc. II; Get Floored, LLC; GBS Building Supply – Us LBM, LLC, F/K/A GBS Building Supply, Inc.; General Shale Brick Inc.; Greener Pastures, Inc., A/K/A Greener Pastures Of Aiken, LLC; Installed Building Products, LLC, A/K/A Installed Building Products II, LLC; JLS Masonry, Inc.; Kings Landscaping, LLC; Landshapers, LLC; Lade-Danlar, Inc.; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; L & M Electric, Inc; Manale Landscaping, LLC; MJ Cowboys, LLC; M & L General Construction, LLC, A/K/A M & L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC; NB Contractors, LLC; P&T Construction, Inc., A/K/A P & T Construction, Inc.; P & L Enterprises, LLC; Probuild Company, LLC A/K/A Probuild Holdings, Inc.; Rite Rug Company, Inc., A/K/A Rite Rug Co.; Rodney Howard Grading Inc., A/K/A Rodney Howard

Grading Co.; Sandlapper Concrete, LLC; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., A/K/A Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc; And Willow Tree Landscaping, Inc. (collectively referred to as “Subcontractors”) for Subcontractors to provide certain labor and/or supply certain materials (collectively and individually the “Work”) concerning homes (the “Homes”) located in the Rose Hill subdivision (“Rose Hill”) located off State Highway 74 in Anderson County, South Carolina.

80. Subcontractors each entered into individual and respective contracts with D.R. Horton, as referred to directly above, to perform the Work. These respective contracts shall be collectively referred to as the “Agreements.”

81. Certain Homes located within Rose Hill were developed and constructed, at least in part, by Poinsett Development, LLC and Poinsett Homes, LLC (collectively “Poinsett”).

82. Poinsett and Subcontractors shall be collectively referred to as “Third-Party Defendants.”

83. The Homes located in Rose Hill are the subject of Plaintiff’s lawsuit.

84. This Court has jurisdiction over the claims asserted in this Third-Party Complaint because the claims asserted herein are so related to the claims in the action within the Court’s original jurisdiction that they form part of the same case or controversy.

85. Subcontractors agreed to perform their work on the Homes in a good and workmanlike manner.

86. Subcontractors were aware of the need and the importance of constructing the Homes in Rose Hill in accordance with construction plans, contract requirements, industry standards, and/or building code requirements so as to avoid construction defects.

87. D.R. Horton contracted with subcontractors to perform their Work on the project. Subcontractors' Work on the project for D.R. Horton gave rise to contractual and common law duties in tort and/or warranty. D.R. Horton was recently made aware that subcontractors' Work on the project may be defective. If subcontractors' work was defective, subcontractors breached their contractual and common law duties to D.R. Horton and caused it damages at the time it performed its work. Subcontractors' allegedly deficient work gave rise to causes of action in favor of D.R. Horton against subcontractors at the time the work was performed and caused D.R. Horton damages, which would not become apparent for years. Those damages include extra workload, repair or repair costs of the defective work, previously unknown breaches of D.R. Horton's common law duties, express and implied warranties, and contractual relationships with other parties, costs of investigation, damage and harm to reputation, and potentially attorneys' fees and litigation costs incurred due to subcontractors' defective, latent, and previously unknown errors.

88. Plaintiff, and others similarly situated, sent D.R. Horton a Notice and Opportunity to Cure letter, and, in the underlying action, have filed a Complaint against D.R. Horton seeking damages related to the construction and workmanship (a/k/a the "Work") of the Homes in Rose Hill, alleging that the Homes have been constructed defectively.

89. Upon information and belief, Plaintiff's Notice and Opportunity to Cure letter and Complaint implicates each respective Subcontractors' Work.

90. Plaintiff's allegations contend that Subcontractors were grossly negligent, have failed to meet the requirements of the Agreements, including failing to construct the Homes in Rose Hill in accordance with construction documents, contract requirements, industry standards, and/or building code requirements so as to avoid construction defects.

91. Upon information and belief, each individual Agreement contains an indemnification clause, wherein Subcontractors agreed to indemnify D.R. Horton for the Work.

92. D.R. Horton has fully satisfied and performed all requirements associated with each respective Agreement.

93. D.R. Horton purchased partially developed lots and undeveloped lots within Rose Hill from Poinsett's successor in interest.

94. D.R. Horton purchased the partially completed lots with the understanding that these properties were built in accordance with construction plans, contract requirements, industry standards, and/or building code requirements so as to avoid construction defects. This understanding was a material fact in the purchase of the units.

95. Plaintiff has sued D.R. Horton claiming damages related to the and lots that were partially completed by Poinsett and such claims include allegations based upon the work performed by Poinsett.

96. Although D.R. Horton is without fault, by virtue of the alleged acts and omissions of the Subcontractors, D.R. Horton has been subjected to damages including, but not limited to, extra workload, repair or repair costs of the defective work, previously unknown breaches of D.R. Horton's common law duties, express and implied warranties, and contractual relationships with other parties, costs of investigation, damage and harm to reputation, and potentially attorneys' fees and litigation costs incurred due to subcontractors' defective, latent, and previously unknown errors.

FOR A FIRST CAUSE OF ACTION
(Contractual Indemnification as to Subcontractors)

97. D.R. Horton re-alleges the foregoing paragraphs consistent with this cause of action as if fully restated verbatim herein.

98. Plaintiff, individually, and on behalf of all others similarly situated, sent D.R. Horton a Notice and Opportunity to Cure letter and has sued D.R. Horton claiming damages related to construction work alleged to have been performed by Subcontractors in Rose Hill.

99. Subcontractors contracted with D.R. Horton to perform certain construction services on the Homes in Rose Hill.

100. Plaintiff has alleged that certain deficiencies in the work of Subcontractors have caused the damage to the Plaintiff.

101. D.R. Horton is informed and believes that if, in fact, Plaintiff, individually, and on behalf of all others similarly situated, is correct regarding the allegations of the Complaint, that the defects, if any, are the result of the wrongful acts, breach of warranties, omissions, negligence, gross negligence, and/or representations of Subcontractors, all of which are contrary to the statutory and common laws of the State of South Carolina.

102. As D.R. Horton has suffered damages, including but not limited to, any future adjudication of liability to Plaintiff, individually, and on behalf of all others similarly situated, in this action, such liability would be the direct and proximate result of the wrongful acts, errors, and/or omissions, negligence and/or gross negligence of Subcontractors, which have damaged D.R. Horton as set forth more fully above.

103. Pursuant to each Agreement with D.R. Horton, Subcontractors agreed to indemnify D.R. Horton from damages arising out of Subcontractors' Work on the Homes in Rose Hill.

104. D.R. Horton is entitled to a judgment for full contractual indemnification from subcontractors, and D.R. Horton would be entitled to damages for the acts, errors, and/or omissions, breach of warranties, breach of contract, negligence and/or gross negligence of

Subcontractors, as described hereinabove, entitling D.R. Horton to recover from Subcontractor its damages as set forth above.

105. The alleged acts or omissions of Subcontractors are the independent, active, primary, superseding, and/or intervening cause of damages allegedly suffered by Plaintiff, and the cause of D.R. Horton's separate and distinct damages set forth above and any wrongful acts or omissions by D.R. Horton, which are expressly denied, were passive and secondary only.

FOR A SECOND CAUSE OF ACTION
(Equitable Indemnification as to all Third-Party Defendants)

106. D.R. Horton repeats and re-alleges the allegations contained in the preceding paragraph as if fully set forth herein.

107. Plaintiff, individually, and on behalf of all others similarly situated, sent D.R. Horton a Notice and Opportunity to Cure letter and has sued D.R. Horton claiming damages related to the Homes in Rose Hill and such claims include allegations based upon each respective Subcontractors' Work and Poinsett's Work.

108. D.R. Horton has denied all substantive allegations against it that were made by Plaintiff.

109. A sufficient special relationship exists between D.R. Horton and Subcontractors and Poinsett, such that D.R. Horton could be held liable for subcontractors' and Poinsett's work and/or errors without any error by it.

110. D.R. Horton is informed and believes that if, in fact, Plaintiff is correct about her allegations, that the allegations are the result of the wrongful acts, omissions, breach of contract, breach of warranty, negligence, gross negligence, and/or representations of Subcontractors, all of which are contrary to the statutory and common laws of the State of South Carolina.

111. As D.R. Horton has suffered damages, including but not limited to, any future adjudication of liability to Plaintiff, individually, and on behalf of all others similarly situated, in this action, such liability would be the direct and proximate result of the wrongful acts, errors, and/or omissions, negligence and/or gross negligence of Subcontractors, which have damaged D.R. Horton as set forth more fully above. To the extent, if any, that D.R. Horton is held liable to Plaintiff in this action, the alleged acts or omissions of Subcontractors and Poinsett are the independent, active, primary, superseding, and/or intervening cause of damages allegedly suffered by Plaintiff, and any wrongful acts or omissions by D.R. Horton, which are expressly denied, were passive and secondary only.

112. D.R. Horton is entitled to a judgment for full common law indemnification from Subcontractors and Poinsett for all damages, as set forth above, including any liability D.R. Horton could be found to have to Plaintiff in this action, and D.R. Horton would be entitled to damages for the acts, errors, and/or omissions, negligence and/or gross negligence of Subcontractors as described above, entitling D.R. Horton to recover from Subcontractors and Poinsett damages including, but not limited to, extra workload, repair or repair costs of the defective work, previously unknown breaches of D.R. Horton's common law duties, express and implied warranties, and contractual relationships with other parties, costs of investigation, damage and harm to reputation, and potentially attorneys' fees and litigation costs incurred due to subcontractors' defective, latent, and previously unknown errors.

FOR A THIRD CAUSE OF ACTION
(Breach of Contract as to Subcontractors)

113. D.R. Horton repeats and re-alleges the allegations contained in the preceding paragraph as if fully set forth herein.

114. Subcontractors were contractually responsible for executing the requirements in the Agreements correctly.

115. To the extent that Plaintiff proves that the work was not performed correctly, Subcontractors materially breached the Agreements in failing to construct the Homes in Rose Hill in accordance with contract requirements, industry standards, and/or building code requirements so as to avoid construction defects.

116. D.R. Horton is entitled to judgment against Subcontractors for breach of contract plus costs, expenses, attorneys' fees, and other damages associated therewith.

FOR A FOURTH CAUSE OF ACTION
(Breach of Express Warranties as to all Subcontractors)

117. D.R. Horton repeats and re-alleges the allegations contained in the preceding paragraph as if fully set forth herein.

118. Subcontractors made express warranties that any materials, installation, and workmanship they performed at the Homes in Rose Hill were proper as required by the Agreements, applicable building codes, and industry standards.

119. If the materials, installation, and/or workmanship were not in accordance with contract requirements, industry standards, and/or building code requirements, then Subcontractors have materially breached their express warranties.

120. D.R. Horton is entitled to judgment against Subcontractors for breach of express warranties, along with costs, expenses, attorneys' fees, and other damages associated therewith.

FOR A FIFTH CAUSE OF ACTION
(Breach of Implied Warranties as to all Third-Party Defendants)

121. D.R. Horton repeats and re-alleges the allegations contained in the preceding paragraph as if fully set forth herein.

122. Subcontractors and Poinsett implicitly warranted that any materials, installation, and workmanship they performed at the Homes in Rose Hill were proper as required by the Agreements, applicable building codes, common law, warranty of workmanlike service, and industry standards.

123. If the materials, installation, and/or workmanship were not in accordance with contract requirements, construction plans, industry standards, and/or building code requirements, then Subcontractors and Poinsett have materially breached their express warranties.

124. D.R. Horton is entitled to judgment against Subcontractors and Poinsett for breach of express warranties, along with costs, expenses, attorneys' fees, and other damages set forth above.

FOR A SIXTH CAUSE OF ACTION
(Negligence/Gross Negligence/Recklessness as to all Third-Party Defendants)

125. D.R. Horton repeats and re-alleges the allegations contained in the preceding paragraphs as if fully set forth herein.

126. Upon information and belief, Subcontractors owed a duty to use due care in ensuring that proper levels of workmanship were achieved under the terms of the Agreements.

127. If due care was not used in ensuring proper levels of workmanship were achieved, then Subcontractors breached that duty of care by failing to ensure that proper levels of workmanship were achieved pursuant to the requirements under the Agreements.

128. D.R. Horton has been damaged as a direct and foreseeable and proximate result of Subcontractors and Poinsett's negligence/gross negligence/recklessness, and D.R. Horton is entitled to judgment against Subcontractors for their damages, including costs, expense, attorneys' fees, and other damages set forth above.

WHEREFORE, D.R. Horton has been damaged as a direct and foreseeable and proximate result of Third-Party Defendants' acts, in that, among other damages, D.R. Horton was deprived of the benefit of the bargain, has and will suffer substantial damages including, but not limited to, extra workload, repair or repair costs of the defective work, previously unknown breaches of D.R. Horton's common law duties, express and implied warranties, and contractual relationships with other parties, costs of investigation, damage and harm to reputation, and potentially attorneys' fees and litigation costs incurred due to subcontractors' defective, latent, and previously unknown errors and D.R. Horton is entitled to judgment against Third-Party Defendants for its damages, including costs, expense, attorneys' fees, and other damages associated therewith. WHEREFORE, D.R. Horton prays for:

- (a) Having fully answered the allegations of the Third Amended Complaint, dismissal of the Third Amended Complaint and all causes of action contained therein, with prejudice, and an award to D.R. Horton, Inc of its attorney fees, costs, and other expenses incurred in defending this action;
- (b) On D.R. Horton's First Cause of Action, judgment in favor of D.R. Horton and against the Subcontractors in the amount of any liability D.R. Horton is found to have to the Plaintiff in this action and requiring the D.R. Horton Subcontractors to defend and indemnify D.R. Horton against any liability which D.R. Horton may be liable for and for any costs, losses, or damages D.R. Horton may incur as it relates to the Plaintiff in this action, to include D.R. Horton's attorneys' fees, costs, and any and all other expenses incurred in defending this action;
- (c) On D.R. Horton's Second Cause of Action, judgment in favor of D.R. Horton and against Third-Party Defendants in the amount of any liability D.R. Horton is found to have to the Plaintiff in this action and requiring the Third-Party Defendants to defend and indemnify D.R. Horton against any liability which D.R. Horton may be liable for and for any costs, losses, or damages D.R. Horton may incur as it relates to the Plaintiff in this action, to include D.R. Horton's attorneys' fees, costs, and any and all other expenses incurred in defending this action;
- (d) On D.R. Horton's Third and Fourth Causes of Action, judgment for D.R. Horton and against the Subcontractors in an amount to be determined at trial;

- (e) On D.R. Horton's Fifth Cause of Action, judgment for D.R. Horton and against the Third-Party Defendants in an amount to be determined at trial;
- (f) On D.R. Horton's Sixth Cause of Action, judgment for D.R. Horton and against Third-Party Defendants awarding actual, special, consequential and punitive damages in an amount to be determined at trial;
- (g) Attorneys' fees;
- (h) Costs of this action; and
- (i) Such other and further relief that this Court deems just and proper.

Respectfully submitted,

KENISON, DUDLEY & CRAWFORD, LLC

s/ Jason M. Imhoff

John T. Crawford Jr. (SC Bar # 69682)

Jason Imhoff (S.C. Bar # 69355)

Kyle McGann (SC Bar # 103113)

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Attorneys for D.R. Horton

March 11, 2021
Greenville, South Carolina

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

Natalie Zitek, individually, and on behalf of all)
others similarly situated,)

Plaintiff,)

v.)

D.R. Horton, Inc., Jane Doe #1-10; and, John)
Doe #1-50,)

Defendant.)

D.R. Horton, Inc.,)

Third-Party Plaintiff,)

v.)

AJ Landscaping & Grading, LLC, a/k/a A J)
Landscaping & Grading, LLC, Allpro Textures,)
LLC, Alpha Omega Construction Group, Inc.,)
American Concrete and Precast, Inc.; a/k/a ACP)
Concrete, Inc.; A & J Framing, Inc.; Alpha)
E.M.C.; A-Z, Inc., Atlanta Floor Designs)
Center; A grade Above Others, LLC; Brand-)
Vaughan Lumber Co., Inc.; BKF Builders, Inc.;)
Blue Ridge Building Products, LLC; Builders)
Designhouse, LLC; BMC East LLC; Builders)
FirstSource Southeast Group, LLC, a/k/a)
Builders FirstSource, Inc.; Bravo Carpenters,)
Inc.; Caryl Mechanics II, Inc., a/k/a Caryl)
Mechanicals, Inc.; Cannaday Siding & Gutter,)
Inc.; Coleman Floor, LLC; Cortes Painting,)
LLC; CBU enterprises, Inc.; CPI Security)
Systems, Inc.; DOM Group, LLC; Ferguson)
Enterprises, Inc.; Five Star Construction Inc.;)
Five Star Foundations, LLC; Galloway-Bell,)
Inc., a/k/a Galloway-Bell, Inc. II; Get Floored,)
LLC; GBS Building Supply – US LBM, LLC,)
f/k/a GBS Building Supply, Inc.; General Shale)
Brick Inc.; Greener Pastures, Inc., a/k/a Greener)

IN THE COURT OF COMMON PLEAS)
TENTH JUDICIAL CIRCUIT)

C. A. No. 2019-CP-04-01942)

**JLS MASONRY, INC.'S ANSWER TO)
THIRD-PARTY PLAINTIFF D.R.)
HORTON, INC.'S SECOND AMENDED)
THIRD-PARTY COMPLAINT)**

Pastures of Aiken, LLC; Installed Building)
 Products, LLC, a/k/a Installed Building Products)
 II, LLC; JLS Masonry, Inc.; Kings Landscaping,)
 LLC; Landshapers, LLC; Lade-Danlar, Inc.;)
 Lansing Building Products, Inc.; Long Heating)
 & Air Conditioning, Inc.; L & M Electric, Inc.;)
 Manale Landscaping, LLC; MJ Cowboys, LLC;)
 M & L General Construction, LLC, a/k/a M & L)
 General Construction, Inc.; M&L Reyna)
 Construction, LLC; M&M Foundations, LLC;)
 Nazareth Builders, LLC; NB Contractors, LLC;)
 Poinsett Development, LLC; Poinsett Homes,)
 LLC; P&T Construction, Inc., a/k/a P & T)
 Construction, Inc.; P & L Enterprises, LLC;)
 Probuild Company, LLC a/k/a Probuild)
 Holdings, Inc.; Rite Rug. Company, Inc., a/k/a)
 Rite Rug Co.; Rodney Howard Grading Inc.,)
 a/k/a Rodney Howard Grading Co.; Sandlapper)
 Concrete, LLC; Sodfather Inc., Landscape)
 Contractors; Stock Building Supply, LLC;)
 Topbuild Home Services, Inc., a/k/a Gale)
 Contractors Service; Tucker Materials, Inc.,)
 a/k/a gypsum; UTM Enterprises, Inc.; and)
 Willow Tree Landscaping, Inc., and Silver Line)
 Building Products Corporation,)
)
)
 Third-Party Defendants.)
)
)

Third-party defendant JLS Masonry, Inc. (“JLS”), answering the second amended answer and third-party complaint of third-party plaintiff D.R. Horton, Inc., (“D.R. Horton”), would respectfully allege and show unto the Court as follows:

FOR A FIRST DEFENSE

1. The allegations of paragraphs 1 – 77 of D.R. Horton’s second amended answer and third-party complaint are not directed at JLS and, therefore, no response is required. To the extent a response is required, JLS lacks sufficient information to form a belief as to the truth of the allegations of paragraphs 1 – 77 and, therefore, denies the same.

2. In response to paragraph 78, JLS restates and realleges its responses to paragraphs 1 – 77.

3. JLS lacks sufficient information to form a belief as to the truth of the allegations of paragraphs 79 – 81 and, therefore, denies the same.

4. The allegations of paragraph 82 are not directed at JLS and, therefore, no response is required. To the extent a response is required, JLS admits, upon information and belief, the allegations of paragraph 82.

5. Upon information and belief, JLS admits the allegations of paragraph 83.

6. JLS lacks sufficient information to form a belief as to the truth of the allegations of paragraphs 84 – 86 and, therefore, denies the same.

7. The allegations of paragraph 87 state a legal conclusion to which no response is required. To the extent a response is required, JLS denies the allegations of paragraph 87 as relate to JLS. JLS lacks sufficient information to form a belief as to the truth of the remaining allegations of paragraph 87 and, therefore, denies the same.

8. The allegations of paragraph 88 are not directed at JLS and, therefore, no response is required. To the extent a response is required, JLS lacks sufficient information to form a belief as to the truth of the allegations of paragraph 88 and, therefore, denies the same.

9. JLS lacks sufficient information to form a belief as to the truth of the allegations of paragraphs 89 – 95 and, therefore, denies the same.

10. The allegations of paragraph 96 state a legal conclusion to which no response is required. To the extent a response is required, JLS denies the allegations of paragraph 96 as relate to JLS. JLS lacks sufficient information to form a belief as to the truth of the remaining allegations of paragraph 96 and, therefore, denies the same.

11. In response to paragraph 97, JLS restates and realleges its responses to paragraphs 1 – 96.

12. JLS lacks sufficient information to form a belief as to the truth of the allegations of paragraphs 98 – 99 and, therefore, denies the same.

13. The allegations of paragraphs 100 – 105 state a legal conclusion to which no response is required. To the extent a response is required, JLS denies the allegations of paragraphs 100 – 105 as relate to JLS. JLS lacks sufficient information to form a belief as to the truth of the remaining allegations of paragraphs 100 – 105 and, therefore, denies the same.

14. In response to paragraph 106, JLS restates and realleges its responses to paragraphs 1 – 105.

15. JLS lacks sufficient information to form a belief as to the truth of the allegations of paragraphs 107 – 108 and, therefore, denies the same.

16. The allegations of paragraphs 109 – 112 state a legal conclusion to which no response is required. To the extent a response is required, JLS denies the allegations of paragraphs 109 – 112 as relate to JLS. JLS lacks sufficient information to form a belief as to the truth of the remaining allegations of paragraphs 109 – 112 and, therefore, denies the same.

17. In response to paragraph 113, JLS restates and realleges its responses to paragraphs 1 – 112.

18. The allegations of paragraphs 114 – 116 state a legal conclusion to which no response is required. To the extent a response is required, JLS denies the allegations of paragraphs 114 – 116 as relate to JLS. JLS lacks sufficient information to form a belief as to the truth of the remaining allegations of paragraphs 114 – 116 and, therefore, denies the same.

19. In response to paragraph 117, JLS restates and realleges its responses to paragraphs 1 – 116.

20. The allegations of paragraphs 118 – 120 state a legal conclusion to which no response is required. To the extent a response is required, JLS denies the allegations of paragraphs 118 – 120 as relate to JLS. JLS lacks sufficient information to form a belief as to the truth of the remaining allegations of paragraphs 118 – 120 and, therefore, denies the same.

21. In response to paragraph 121, JLS restates and realleges its responses to paragraphs 1 – 120.

22. The allegations of paragraphs 122 – 124 state a legal conclusion to which no response is required. To the extent a response is required, JLS denies the allegations of paragraphs 122 – 124 as relate to JLS. JLS lacks sufficient information to form a belief as to the truth of the remaining allegations of paragraphs 122 – 124 and, therefore, denies the same.

23. In response to paragraph 125, JLS restates and realleges its responses to paragraphs 1 – 124.

24. The allegations of paragraphs 126 – 128 state a legal conclusion to which no response is required. To the extent a response is required, JLS denies the allegations of paragraphs 126 – 128 as relate to JLS. JLS lacks sufficient information to form a belief as to the truth of the remaining allegations of paragraphs 126 – 128 and, therefore, denies the same.

25. The “WHEREFORE” paragraph, which is not numbered, constitutes a prayer for relief to which no response is required. To the extent a response is required, JLS denies the same.

26. JLS denies each and every allegation of D.R. Horton’s second amended answer and third-party complaint not specifically admitted, modified, or explained hereinabove.

FOR A SECOND DEFENSE

27. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

28. JLS alleges that D.R. Horton's third-party complaint fails to state facts sufficient to constitute a cause of action against it and should be dismissed pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure*.

FOR A THIRD DEFENSE

29. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

30. JLS alleges that even assuming it was negligent, careless, grossly negligent, willful, wanton or reckless in any respect, and that any such conduct on its part operated as a proximate cause of the plaintiff's and/or D.R. Horton's damages, if any, all of which is expressly denied and admitted solely for the purpose of this defense and no other, that the plaintiff's and/or D.R. Horton's negligent, grossly negligent, reckless, willful, and wanton conduct contributed more than 50% to the cause of the plaintiff's and/or D.R. Horton's alleged damages if any. For that reason, JLS is not liable to D.R. Horton in any sum whatsoever.

FOR A FOURTH DEFENSE

31. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

32. JLS alleges that even if it was negligent, careless, grossly negligent, reckless, willful, or wanton in any respect whatsoever, which is expressly denied and admitted solely for the purpose of this defense and no other, and even if any such conduct on its part operated as a greater than 50% cause of the plaintiff's and/or D.R. Horton's resulting damages, if any, which is also expressly

denied and admitted solely for the purpose of this defense and no other, it is entitled to a determination as to the percentage that the plaintiff's and/or D.R. Horton's negligent, grossly negligent, reckless, willful, and wanton conduct contributed to its damages and to a reduction of any amount awarded to the plaintiff and/or D.R. Horton in an amount equal to that percentage of the plaintiff's and/or D.R. Horton's own negligent, grossly negligent, reckless, willful, and wanton conduct.

FOR A FIFTH DEFENSE

33. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

34. JLS alleges that the damages allegedly sustained by the plaintiff and/or D.R. Horton were the result of an unexpected, untoward, and unfortunate event or events or Acts of God.

FOR A SIXTH DEFENSE

35. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

36. JLS alleges that D.R. Horton's third-party complaint is barred by the doctrines of waiver, estoppel, and laches.

FOR A SEVENTH DEFENSE

37. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

38. JLS alleges that the damages alleged in D.R. Horton's third-party complaint, if any, resulted from intervening and superseding acts of persons or entities for whom JLS is not liable or responsible.

FOR AN EIGHTH DEFENSE

39. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

40. JLS alleges that the plaintiff and/or D.R. Horton failed to mitigate their damages as required by law.

FOR A NINTH DEFENSE

41. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

42. To the extent JLS is found liable, which is denied, it is entitled to a determination of its percentage of fault pursuant to the Uniform Contribution Among Tortfeasors Act found at S.C. Code Ann. § 15-38-50, et seq.

FOR A TENTH DEFENSE

43. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

44. The plaintiff's and/or D.R. Horton's claims are barred by the applicable statute of limitations and/or statute of repose.

FOR AN ELEVENTH DEFENSE

45. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

46. JLS alleges that insofar as the third-party complaint seeks punitive damages, such damages are violative of both the United States and South Carolina Constitutions, and JLS pleads S.C. Code Ann. § 15-32-530, et. seq. as a cap to the punitive damages potentially available in this matter.

FOR A TWELFTH DEFENSE

47. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

48. The Plaintiffs and/or DR Horton have failed to properly comply with the notice provisions of S.C. Code Ann. § 40-59-810 et seq. in regard to JLS. DR Horton's claims are either stayed or barred due to their failure to provide statutory notice of the alleged defects.

FOR A THIRTEENTH DEFENSE

49. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

50. DR Horton's claims are barred by the Economic Loss Rule.

FOR A FOURTEENTH DEFENSE

51. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

52. Although JLS denies the existence of any deficiencies in its work, if any, alleged by DR Horton, DR Horton knew or should have known of any such alleged deficiencies and accepted the same with knowledge. Therefore, JLS pleads acceptance as a complete defense and bar to DR Horton's claims.

FOR A FIFTEENTH DEFENSE

53. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

54. JLS alleges that DR Horton had full knowledge of the conduct complained of and directed it, consented to it, authorized it, and gave permission for it. Therefore, its claims should be dismissed.

FOR A SIXTEENTH DEFENSE

55. JLS adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

56. JLS pleads all affirmative defenses not otherwise pled in this answer.

WHEREFORE, having fully answered D.R. Horton's second amended answer and third-party complaint, Third-Party Defendant JLS prays:

- a. That D.R. Horton's claims be dismissed with prejudice as to JLS;
- b. That JLS be awarded its attorney fees, costs, and expenses and be indemnified by D.R. Horton;
- c. That this matter be tried by jury; and
- d. That JLS be granted such other and further relief as the Court deems just and proper.

Respectfully submitted,

/s/ J. Patrick Bradley
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March 9, 2022

Greenville, South Carolina

Attorneys for Third-Party Defendant JLS
 Masonry, Inc.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ANDERSON COUNTY

Court of Common Pleas

The Honorable R. Scott Sprouse, Circuit Court Judge

Case No. 2019-CP-04-01942

Natalie Zitek, individually, and on
behalf of all others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and John
Doe #1-50,

Defendants,

and

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

A&J Framing, Inc.; A-Z, Inc.; AJ Landscaping
& Grading, LLC, A/K/A AJ Landscaping &
Grading, LLC; Allpro Textures, LLC; Alpha
E.M.C.; Alpha Omega Construction Group,
Inc.; American Concrete And precast, Inc.;
A/K/A ACP Concrete, Inc.; Atlanta Floor
Designs Center; A Grade Above Others, LLC;
BFK Builders, Inc.; BMC East LLC D/B/A
Coleman Floor, LLC; Brand-Vaughn Lumber
Co, Inc.; Bravo Carpenters, Inc.; Builders
Designhouse, LLC; Builders FirstSource
Southeast Group, LLC, A/K/A Builders
FirstSource, Inc.; Builders Services Group,
LLC F/K/A Masco Contractor Services Central
Inc. F/K/A Gale Industries, Inc. D/B/A Gale

Contractor Services; Cannaday Siding & Gutter, Inc.; Caryl Mechanics II, Inc., A/K/A Caryl Mechanicals, Inc.; CBU Enterprises, Inc.; Cortes Painting, LLC; CPI Security Systems, Inc.; Dom Group, LLC; Dupree Plumbing Company, Inc.; Ferguson Enterprises, Inc.; Five Star Construction Inc.; Five Star Foundations, LLC; Galloway-Bell, Inc. A/K/A Galloway-Bell Inc. II; GBS Building Supply – Us LBM, LLC, F/K/A/GBS Building Supply, Inc.; General Shale Brick Inc.; Get Floored, LLC; Greener Pastures, Inc., A/K/A Greener Pastures of Aiken, LLC; Installed Building Products, LLC A/K/A Installed Building Products II, LLC; IBP Asset, LLC D/B/A Blue Ridge Building Products; JLS Masonry, Inc.; Kings Landscaping, LLC; L&M Electric, Inc.; Lade-Danlar, Inc.; Landshapers, LLC; Lansing Building Products, Inc.; Long Heating & Air Conditioning, Inc.; M&L General Construction, LLC, A/K/A M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Manale Landscaping, LLC; MJ Cowboys, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&L Enterprises, LLC; P&T Construction, Inc., A/K/A P&T Construction, Inc.; Probuild Company, LLC A/K/A Probuild Holdings, Inc.; Rite Rug Co.; Rodney Howard Grading, Inc. A/K/A Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Silver Line Building Products Corporation; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services., Inc., A/K/A Gale Contractors Service; Tucker Materials, Inc., A/K/A Gypsum; UTM Enterprises, Inc; and Willow Tree Landscaping, Inc.,

Third-Party Defendants,

and

Aaron D. Peris; Harrelson Painting, LLC;
Huttig Building Products; et al.,

Fourth- and Fifth-Party
Plaintiffs and Defendants,

Of whom

JLS Masonry, Inc., is the

APPELLANT,

v.

Natalie Zitek, individually, and on behalf of all
others similarly situated and as assignee of the
claims of Third-Party Plaintiff D.R. Horton,
Inc.,

RESPONDENT.

NOTICE OF APPEAL

Third-party Defendant/Appellant JLS Masonry, Inc. ("JLS") appeals the following matters from the Honorable R. Scott Sprouse:

1. The Order denying Third-party Defendant/Appellant JLS' written Motion to Decertify dated July 19, 2023. Counsel for Appellant received written notice of the entry of this Order on July 19, 2023.
2. All Orders denying all oral motions made during and after trial, dated September 1 through September 15, 2023, including, without limitation arguments made during pre-trial, during trial, and those incorporated therein including generally but not limited to the following:
 - a. The Order denying Third-party Defendant/Appellant JLS' Motion for Decertification and Motion for Directed Verdict on the basis of Statute of Limitations/Statute of Repose, all made following the testimony of Plaintiff Natalie Zitek;
 - b. The Order denying Third-party Defendant/Appellant JLS' Motion for Decertification made following Plaintiff's Motion for Directed Verdict;
 - c. The Order denying Third-party Defendant/Appellant JLS' Motion to disclose the settlement agreement and/or enter the settlement agreement into evidence between Plaintiff and D.R. Horton, made following the on-the-record settlement between Plaintiff and D.R. Horton;
 - d. The Order denying Third-party Defendant/Appellant JLS' Motion for Decertification and Motion for Directed Verdict, made immediately prior to the on-the-record settlement between Plaintiff and M&M Foundations, LLC, including, without limitation, JLS' arguments for the contractual

indemnity provision to be invalidated; the arguments that the claims brought by D.R. Horton are barred as disguised indemnity claims; for the disclosure of the settlement amount between Plaintiff and D.R. Horton and/or entry of the settlement agreement into evidence; as well as for the dismissal of the claims under the statute of limitations and/or statute of repose; and the failure of Plaintiff to establish D.R. Horton's claims against Third-party Defendant/Appellant JLS as the assignee of D.R. Horton's claims;

- e. The Order denying Third-party Defendant/Appellant JLS' Renewal of JLS' prior Motions and arguments and the Order denying Third-party Defendant/Appellant JLS' Motion for Directed Verdict, made following Plaintiff's Motion for Directed Verdict, including, without limitation, arguments under the statute of limitations and/or statute of repose; the arguments that the claims brought by D.R. Horton are barred as disguised indemnity claims; that the failure of Plaintiff to establish D.R. Horton's claims against Third-party Defendant/Appellant JLS as the assignee of D.R. Horton's claims; and for the disclosure of the settlement amount between Plaintiff and D.R. Horton and/or entry of the settlement agreement into evidence.
3. The denial of Third-party Defendant/Appellant JLS' written Motion for Directed Verdict dated September 14, 2023, and incorporated into JLS' oral motions.
4. Judgment rendered against Third-party Defendant/Appellant JLS on September 19, 2023, as to D.R. Horton's claims against JLS, assigned to Plaintiff.
5. Form 4 Order denying Third-party Defendant/Appellant JLS' Motion for Judgment Notwithstanding the Verdict dated November 8, 2023. Counsel for the Appellant received written notice of the entry of this Order on November 8, 2023.
6. Form 4 Order denying Third-party Defendant/Appellant JLS' Rule 59(e), SCRCp, Motion dated December 12, 2023. Counsel for the Appellant received written notice of the entry of this Order on December 12, 2023.

(Signature Page to Follow)

Respectfully submitted,
ROSS & CRISTALDI, LLC

s/ Brenten H. DeShields
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Other Counsel of Record:

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***Attorneys for Respondent Natalie Zitek,
individually, and on behalf of all others
similarly situated and as assignee of the claims
of Third-Party Plaintiff D.R. Horton, Inc.***

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019-CP-04-01942

Natalie Zitek, et al
PLAINTIFF(S)

DR Horton, et al
DEFENDANT(S)

Submitted By: the Court Address:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- x **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

The Court took the Motions to Decertify under advisement after hearing arguments from counsel on Monday, July 17, 2023. The Court considered the arguments of counsel, the thorough briefing of the matter, the exhibits and the applicable law.

This Court previously has certified the class. Significant discovery has taken place since the issuance of the Honorable Cordell Maddox's order on January 27, 2021. The Defendant, along with several other parties, have moved that the class be decertified due to new evidence that they allege shows that the Plaintiff's home is distinct from the other members of the class and that the conditions necessary for classification under Rule 23 of the SC Rules of Civil Procedure are not present.

Extensive analysis of the various homes was presented to the Court both in the presentations and the various briefs filed. While the Court notes that there are many variances between the homes in the subdivisions, there are some common issues. Aside from the issues expressed at the hearing regarding whether a decertification in this case would in essence be in violation of the long-established rule that one circuit judge cannot overrule another, I find that there is sufficient commonality and typicality present in the case for a class action under Rule 23 to be appropriate. I find that the issues are sufficiently similar that the class action as ordered is a more efficient means of trying the case. Extensive evidence showing commonality in brickwork, stonework, landscaping, windows, doors and other areas was presented. The Court notes that there is evidence of commonality even in the evidence from some defense experts. There also is sufficient evidence of the typicality of the Plaintiff's home to maintain the class. The long-established law is that every issue need not be identical with each class member. The individual differences in the homes, along with the sufficiency and accuracy of expert opinions are factual questions for trial.

Accordingly, the Defendant and Third/Fourth Party Defendants' Motions to Decertify are DENIED.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

Circuit Court Judge2752
Judge Code_____
Date

ELI ELECTRONICALLY FILED - 2023 Jan 19 5:23 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter: _____

[illegible]



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-07-19 15:47:52 page 4 of 4

23 SEP 19 PM 3:20:59
 (Order Entry, SC, COC, CP/BS)

STATE OF SOUTH CAROLINA
 COUNTY OF ANDERSON

) IN THE COURT OF COMMON PLEAS
) FOR THE TENTH JUDICIAL CIRCUIT
) CASE NO. 2019-CP-04-01942

Natalie Zitek, individually and on behalf of all
 others similarly situated,

VERDICT FORM

Plaintiff,

vs.

D.R. Horton, Inc.,

Defendant.

1. On the Plaintiff's claims against D.R. Horton, we find for the Plaintiff on the following causes of action (check the one you find in favor of):

☒ Negligence
☐ Implied Warranty

(Only answer the next question if you found in favor of the Plaintiff on one of the foregoing questions)

2. We award Plaintiff damages against Defendant D.R. Horton in the amount of:

fifteen million dollars (\$15,000,000.00)

(Only answer the next question if you found in favor of the Plaintiff on one of the foregoing questions)

3. On Defendant D.R. Horton's claims against Third-Party JLS Masonry, Inc. which have been assigned to Plaintiff, we find for the Plaintiff on the following causes of action (check any that apply):

☒ Breach of Implied Warranty
☐ Contractual Indemnity
☐ Equitable Indemnity

23 SEP 19 AM 9:21:04
Hinder son, SC CDC, CP/BS

(Only answer the next question if you found in favor of the Plaintiff against JLS on one of the foregoing questions)

4. We find JLS Masonry, Inc. liable to Plaintiff on the claims that D.R. Horton assigned to Plaintiff in the amount of:

Four million dollars (\$ 4,000,000.00)


Foreperson

September 15, 2023

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019CP0401942

Natalie Zitek, plaintiff, et al
PLAINTIFF(S)

Jane Doe 1, defendant, et al
DEFENDANT(S)

Submitted By:
Address:

Attorney for : ☐ Plaintiff ☐ Defendant
or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

This matter is before the Court pursuant to the Third Party Defendant JLS Masonry, Inc.'s Motions for Judgment Notwithstanding the Verdict (JNOV) and New Trial Absolute and/or New Trial Nisi Remittitur. Also included in the motions was a renewal of the Motion to Decertify the Class. The motion contained thirteen (13) grounds, including, but not limited to, the Statute of Limitations, the Statute of Repose, contractual indemnity, and the insufficiency of the evidence.

The Court presided over the trial and considered the motion, briefs, applicable case law, and the arguments of counsel. The Court viewed the evidence in a light most favorable to the Plaintiff as required by law. The Court finds that there was evidence in the record that reasonably supports the jury's verdict. Accordingly, the Third Party Defendant's Motion for Judgment Notwithstanding the Verdict (JNOV) on all the stated grounds is DENIED.

The Court finds no evidence that the jury reached its verdict as the result of caprice, passion, prejudice, partiality, or any other improper motive. The verdict is not unduly liberal or excessive given the evidence presented in the trial. The Court notes that the jury found that the total amount of the damages in the areas of work pertaining to JLS Masonry was twenty-five (25%) percent less than that claimed by the Plaintiff (\$15,000,000.00 rather than the claimed \$20,000,000.00) indicating that the jury gave consideration to the Third Party

Defendant's arguments that the Plaintiff's expert had overstated the value of the damages. Further, the Third Party Defendant performed the work in question on a stipulated forty-six (46%) percent of the houses in the subdivision. The Plaintiff asserted, in assumption of Defendant D.R. Horton's claims as part of the settlement, that JLS Masonry should be responsible for the same percentage of the damages. JLS Masonry challenged that assertion. The jury, with its \$4,000,000.00 verdict, held JLS Masonry responsible for fifty-eight (58%) percent of the damages, again indicating that the jury gave consideration to the Third Party Defendant's arguments. The Court finds that the verdict is well within the range of verdicts possible from a reasonable consideration of the evidence and that the Third Party Defendant JLS Masonry's Motion for New Trial Absolute and/or New Trial Nisi Remittitur should be DENIED.

The Court has heard the Motion to Decertify the Class multiple times during the case and continues to DENY that motion.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX		
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If applicable, describe the property, including tax map information and address, referenced in the order: _____ _____ _____		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court for judgment details.**

Circuit Court Judge

2752

Judge Code

Date

EL ELECTRONICALLY EDITED - 2024 NOV 08 4:23 PM - ANDERSON - COMMON PLEAS - CASE#2019CP0401942

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter: _____

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-11-08 15:53:36 page 4 of 4

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CIVIL ACTION NO.: 2019CP0401942

Zitek, et al.
PLAINTIFF(S)

DR Horton
DEFENDANT(S)

Submitted By:
Address:

Attorney for : ☐ Plaintiff ☐ Defendant
or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED** (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN** (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

See attached order below

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE PUBLIC INDEX

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Circuit Court Judge

2752
Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20 ____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter: _____

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

[illegible]

STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

Natalie Zitek, individually, and on behalf of
all others similarly situated,

Plaintiff,

v.

D.R. Horton, Inc., Jane Doe #1-10; and, John
Doe #1-50,

Defendants.

D.R. Horton, Inc.,

Third-Party Plaintiff,

v.

AJ Landscaping & Grading, LLC a/k/a A J
Landscaping & Grading, LLC; AllPro
Textures, LLC; Alpha Omega Construction
Group, Inc.; American Concrete and Precast,
Inc.; a/k/a ACP Concrete, Inc.; A&J Framing,
Inc.; Alpha E.M.C.; A-Z, Inc.; Atlanta Floor
Designs Center; A Grade Above Others,
LLC; Brand-Vaughan Lumber Co, Inc.; BKF
Builders, Inc.; Builders Designhouse, LLC;
BMC East LLC d/b/a Coleman Floor, LLC;
Builders Firstsource Southeast Group, LLC,
a/k/a Builders Firstsource, Inc.; Bravo
Carpenters, Inc.; Caryl Mechanics II, Inc.,
a/k/a Caryl Mechanicals, Inc.; Cannaday
Siding & Gutter, Inc.; Cortes Painting, LLC;
CBU Enterprises, Inc.; CPI Security Systems,
Inc.; DOM Group, LLC; Ferguson
Enterprises, Inc.; Five Star Construction Inc.;
Five Star Foundations, LLC; Galloway-Bell,
Inc., a/k/a Galloway-Bell, Inc. II; Get
Floored, LLC; GBS Building Supply – US
LBM, LLC, f/k/a GBS Building Supply, Inc.;
General Shale Brick Inc.; Greener Pastures,
Inc., a/k/a Green Pastures of Aiken, LLC;
IBS Asset, LLC d/b/a Blue Ridge Building
Products; Installed Building Products, LLC,
a/k/a Installed Building Products II LLC; JLS
Masonry, Inc.; Kings Landscaping, LLC;
Landshapers, LLC; Lade-Danlar, Inc.;
Lansing Building Products, Inc.; Long

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-04-01942

**ORDER DENYING THIRD-PARTY
DEFENDANT JLS MASONRY, INC.
MOTION FOR RECONSIDERATION**

Heating & Air Conditioning, Inc.; L&M Electric, Inc; Manale Landscaping, LLC; MJ Cowboys, LLC; M&L General Construction, LLC, a/k/a M&L General Construction, Inc.; M&L Reyna Construction, LLC; M&M Foundations, LLC; Nazareth Builders, LLC; NB Contractors, LLC; Poinsett Development, LLC; Poinsett Homes, LLC; P&T Construction, Inc., a/k/a P & T Construction, Inc.; P & L Enterprises, LLC; Probuild Company, LLC a/k/a Probuild Holdings, Inc.; Rite Rug Company, Inc., a/k/a, Rite Rug Co.; Rodney Howard Grading Inc., a/k/a Rodney Howard Grading Co.; Sandlapper Concrete, LLC; Sodfather Inc., Landscape Contractors; Stock Building Supply, LLC; Topbuild Home Services, Inc., a/k/a Gale Contractors Service; Tucker Materials, Inc, a/k/a Gypsum; Silver Line Building Products Corp.; Dupree Plumbing Co., Inc.; UTM Enterprises, Inc; and Willow Tree Landscaping, Inc., and Silver Line Building Products Corporation

Third-Party Defendants.

After careful consideration of the able argument and filings of Counsel and review of the record, the Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or fact not appropriately considered. Accordingly, the Third-Party Defendant JLS Masonry's Motion, pursuant to Rule 59, SCRCP,¹ is DENIED.

AND IT IS SO ORDERED.

Honorable R. Scott Sprouse

December ____, 2023
Anderson, SC

¹ The Court, in its discretion, has determined this Motion on the filings, without oral argument, pursuant to Rule 59(f), SCRCP.
SCRCP Form 4C (03/2013) S2001045/JVS/W004EFL Page 5 of 3



Anderson Common Pleas

Case Caption: Natalie Zitek , plaintiff, et al VS Jane Doe 1 , defendant, et al

Case Number: 2019CP0401942

Type: Order/Form 4

s/R. Scott Sprouse, Judge #2752

Tenth Judicial Circuit

Electronically signed on 2023-12-12 09:24:18 page 6 of 6

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

NATALIE ZITEK,)
INDIVIDUALLY AND ON)
BEHALF OF ALL)
OTHERS SIMILARLY SITUATED)
PLAINTIFFS,)
-VS-)
D.R. HORTON, ET AL,)
DEFENDANTS.)
_____)

2019-CP-04-01942

TRANSCRIPT OF RECORD

SEPTEMBER 5, 6, 7, & 8, 2023
ANDERSON, SOUTH CAROLINA

B E F O R E:

THE HONORABLE R. SCOTT SPROUSE, JUDGE

A P P E A R A N C E S:

ATTORNEY FOR THE PLAINTIFF: JUSTIN O'TOOLE LUCEY
ATTORNEY FOR THE PLAINTIFF: DABNEY LYNN
ATTORNEY FOR THE DEFENDANT, D.R. HORTON: JOHN T. CRAWFORD, JR.
ATTORNEY FOR THE DEFENDANT, D.R. HORTON: JASON MICHAEL IMHOFF
ATTORNEY FOR THE DEFENDANT, D.R. HORTON: KIM WOOTEN
ATTORNEY FOR THE DEFENDANT, JIMINEZ, STACY P. CANNADY
ATTORNEY FOR THE DEFENDANT, PROBUILD/BFS, WILLIAM HEWITT COX, III.
ATTORNEY FOR THE DEFENDANT, PROBUILD/BFS, STEPHEN P. HUGHES
ATTORNEY FOR THE DEFENDANT, HUGH GALLIGER
ATTORNEY FOR THE DEFENDANT, THERMA-TRU, BRANDON P. JONES
ATTORNEY FOR THE DEFENDANT, JLS/MJ COWBOYS ELIZABETH MARTINEAU
ATTORNEY FOR THE DEFENDANT, ML REYNA, KEVIN MIMS
ATTORNEY FOR THE DEFENDANT, ML REYNA, WHIDBEE PERRIN, SR.
ATTORNEY FOR THE DEFENDANT, MM FOUNDATIONS/JLS, JEFF ROSS
ATTORNEY FOR THE DEFENDANT, SILVERLINE, KIRBY D. SHEALY, III.

TARA T. SCOTT, CVR
CIRCUIT COURT REPORTER

I N D E X

TRIAL DAY 1: September 5, 2023

JURY SELECTION AT CIVIC CENTER (NOT TRANSCRIBED)

PRE-TRIAL MOTIONS.....PAGE 4

OPENING STATEMENTS.....PAGE 17

TRIAL DAY 2: September 6, 2023

WITNESS: Larry Stephen Moore

DIRECT EXAMINATION.....PAGE 73

CROSS EXAMINATION.....PAGE 180

REDIRECT EXAMINATION.....PAGE 246

RECROSS EXAMINATION.....PAGE 296

TRIAL DAY 3: September 7, 2023

WITNESS: Natalie Zitek

DIRECT EXAMINATION.....PAGE 313

CROSS EXAMINATION.....PAGE 364

REDIRECT EXAMINATION.....PAGE 454

TRIAL DAY 4: September 8, 2023

WITNESS: Dr. Rhett Whitlock

DIRECT EXAMINATION.....PAGE 493

CERTIFICATE OF REPORTER.....PAGE 683

E X H I B I T S

(EXHIBITS LISTED BELOW INTRODUCED DURING PROCEEDINGS
SEPTEMBER 5-8, 2023. AN EXHIBIT HEARING WAS HELD PRE-TRIAL.)

COURT'S EXHIBIT NO. 1 JURY NOTE

COURT'S EXHIBIT NO. 2 JURY NOTE

COURT'S EXHIBIT NO. 3 JURY NOTE

COURT'S EXHIBIT NO. 4 JURY NOTE

COURT'S EXHIBIT NO. 5 JURY NOTE

PLAINTIFF'S EXHIBIT NO. 25.34 A-Q HARD DRIVE

PLAINTIFF'S EXHIBIT NO. 127.5A PHOTOGRAPHS

PLAINTIFF'S EXHIBIT NO. 243 PHOTOGRAPHS

PLAINTIFF'S EXHIBIT NO. 267 ADVERTISING MATERIALS

1 TRIAL DAY 1: September 5, 2023

2 (WHEREUPON, the trial reconvened after jury selection
3 at 3:00 p.m. at the Anderson County Courthouse.)

4 THE COURT: Anything for the jury before we bring our
5 jury in?

6 MS. WOOTEN: Your Honor, we do.

7 THE COURT: Yes, ma'am.

8 MS. WOOTEN: Unfortunately, we do have just a few things
9 to bring up. The first thing is, Your Honor, over the
10 weekend we filed a jury plan. Our concern in this case is
11 that in the past we have been unable to get a hold of
12 homeowners in time to be able to let us into their homes,
13 particularly class members. I know Your Honor said you were
14 going to wait some time to decide if we were going to be
15 able to do a jury view or not. So, we submitted a plan in
16 that regard, and I just wondered if Your Honor had some idea
17 of when maybe that will be done so can have enough time to
18 get with the homeowners or have the clerk get with the
19 homeowners or whoever Your Honor decides to do that so that
20 we can give them adequate notice that their home is going to
21 be looked at and looked at inside and out.

22 THE COURT: Mr. Lucey?

23 MR. LUCEY: Yes, Your Honor. The law on that is clear.
24 The decision of having a jury visit or not should be based
25 upon the evidence induced at trial. This trial has had no

1 evidence induced and the Court has already indicated it
2 would make that decision later on in the case.

3 MS. WOOTEN: I don't agree.

4 THE COURT: Well, I haven't had an opportunity to look
5 at your plan yet, but I will look at it. But I have ruled
6 I'm going to wait until the testimony is in until I make a
7 decision about A, whether or not there will be a visit and
8 B, the conditions. That is the way I've always done that in
9 cases where a site view has been requested. But if there is
10 some unusual circumstance that has arisen, I will certainly
11 consider that. But I will look at it and we will talk about
12 it tomorrow.

13 MS. WOOTEN: Thank you, Your Honor. The next thing is,
14 Your Honor, we had asked that the order, the class order, be
15 followed for the two sub classes. And we don't feel like we
16 can continue to prepare for the trial adequately if we don't
17 know if the Court is going to enforce those two sub classes.

18 MR. LUCEY: Your Honor, this issue has been raised
19 numerous times with this court. The Court clearly
20 instructed counsel a week ago when they called a special
21 phone conference for this issue to submit to the Court their
22 proposed jury charges, their proposed legal jury charges,
23 that would differentiate between one sub class or another
24 and would make it a relevant proposition for the court to
25 rule on, because it's clear that Judge Maddox's order that

1 the issue of sub classes was purely an if the event occurred
2 where D.R. Horton appealed the order denying arbitration,
3 which never happened which is why there was never a sub
4 class formalized or a sub class representative appointed.
5 Counsel has yet to hand this court any legal precedent that
6 shows the down stream homeowner stands in any different
7 legal position than the original homeowner.

8 Your Honor, I've noticed to the Court that we do not
9 have a negligence misrepresentation claim in this case one,
10 and two, Plaintiff has submitted all of their jury charges
11 to the court. The Defendant hasn't submitted any charges to
12 this court requested ten days ago, which is legal precedent
13 and the sub classes have different such that this court
14 should recognize. This is a last minute attempt, after the
15 close of discovery, to attack plaintiff's damage model.
16 There wasn't one sub class question asked of our expert
17 throughout all the depositions in this case. This issue
18 never came back up until they mentioned it once in their
19 motion to decertify the class and then they asked this court
20 for a phone hearing after discovery closed after
21 decertification was denied on this issue. Thank you.

22 MS. WOOTEN: Your Honor, that is absolutely untrue. We
23 actually asked all sorts of questions during depositions and
24 discovery to see about the two subclasses. We did submit,
25 Your Honor, a verdict form that we believe sets forth those

1 issues that Your Honor had asked about. This is not a last
2 minute attempt for anything. This is an attempt to abide by
3 a court's previous order in this case. Everybody knew what
4 it was. Mr. Lucey never objected to it, never tried to have
5 it amended, because he knew that there were supposed to be
6 two sub classes and he didn't have a way to get around that.
7 The legal burdens are different. The damages model should
8 be knocked out, because it does not represent two separate
9 classes. So, this is no last minute attempt at anything.
10 This is just an attempt to enforce the previous order of the
11 court.

12 MR. LUCEY: Plaintiff submits to the Court that if we
13 look at all depositions, and I'm guessing there are 65 or 85
14 depositions in the case, this court will probably not find
15 the word subclass, if at all, and possibly once.

16 THE COURT: As I indicated earlier, and Ms. Wooten, you
17 did what the Court instructed you to do in that you
18 submitted the proposed verdict form, and if there -- of
19 course the verdict form has to conform to the testimony that
20 is brought out at trial, what evidence is put into the
21 record. And I am going to evaluate the verdict forms after
22 I have heard all of the testimony. And I will have a charge
23 conference at the conclusion before closing arguments, and I
24 will allow charges to be submitted by any party and I will
25 consider that. But that's how I am going to deal with the

1 issue of the verdict form and the charges. If the testimony
2 reveals that they should be treated differently, I certainly
3 will have a verdict form that reflects that.

4 MS. WOOTEN: Are we going to be able to question, Your
5 Honor, different homeowners that we have that are in one sub
6 class or another, whether they were told they are in a sub
7 class, whether they know they are in a sub class. I mean,
8 all of these are things are evidence that we intend to
9 introduce that these people are in a different class than
10 the others. They don't have a class representative for the
11 one sub class, and those are, I think, vital to our case.

12 THE COURT: Well, certainly you're going to be able to
13 question any witness about their home and their relationship
14 with the Defendant and any relevant factor about -- I'm sure
15 that from reading the pleadings that -- also what has been
16 argued in the motion hearings regarding mitigation and
17 regarding changes in landscape and other -- there's been a
18 lot of argument about that. You're certainly able to cross
19 examine or examine any witness on any relevant issue. When
20 they purchased their home, whether they purchased it from
21 the Defendant. Again, we'll conform the verdict form to
22 what is brought out in the testimony.

23 MS. WOOTEN: Your Honor, the next thing that we have to
24 bring up is that the case has changed again. As I'm sure
25 Your Honor is aware, regarding windows in this case the only

1 issues left are manufacturing product issues. So, at this
2 time we will renew our summary judgement motion based on the
3 fact that Mr. Lucey did not properly plead this case as to
4 manufacturers. We did not sell the windows to any
5 homeowner. The windows were sold to D.R. Horton's
6 subcontractors by a manufacturer. That is the only issue
7 left here. We briefed this issue in our summary judgement,
8 Your Honor. If there is no issues about installation of the
9 windows, there's no product claim here. And Mr. Lucey has
10 obviously realized that. He's filed another case like this
11 and he put the manufacturer in that time, so I think he
12 realized the pickle that he got himself into here by not
13 properly pleading his case against a window manufacturer.
14 It's not a products liability case. We are not a product
15 seller. The law is clear that he can't sue us for product
16 liability. So, we are renewing our summary judgement.
17 Based on the fact that now the installers are out.

18 THE COURT: Mr. Lucey?

19 MR. LUCEY: Yes, Your Honor. First of all, the Court
20 has already heard this motion. Secondly, with regards to
21 the windows is the fact that the only thing that got settled
22 is defective window installation is no longer a part of this
23 case. We have two causes of action against D.R. Horton,
24 negligence and breach of implied warranties. We have over
25 5,000 odd windows, and roughly twenty, twenty-five percent

1 of them are fracturing and emitting water and that breaches
2 our implied warranty as to the windows. Implied warranty,
3 the Court will recall, is no fault cause of action. It is
4 whether or not the product is performing as intended, not
5 whether or not there was fault in the design and
6 manufacturing. We don't have a defective product claim as
7 such like strict liability as D.R. Horton. We have a
8 negligence claim for them selecting improper windows and
9 then installing improper windows. The windows were not
10 labeled as the building code requires. We'll lay that
11 foundation and that will go into evidence. In fact, it was
12 in our opposition of summary judgement. They did a
13 defective job of installing, excuse me, selecting them. The
14 person who selected them didn't even ask about the DP
15 ratings or the performance ratings. That's undisputed in
16 this case. And they then installed windows that were not
17 labeled in accordance with the building code. They had no
18 labels on them that satisfied what the building code
19 requires, which should have given them notice that they were
20 installing inappropriate windows. Thereafter, those
21 windows, a large number of those windows, have fractured
22 and, Your Honor, we believe we have properly stated the
23 cause of action as to this defendant for the breach of
24 implied warranty. Yes, they did sell us a window. They
25 sold us the houses and these windows in it. The windows are

1 failing their intended purpose by fracturing.

2 MS. WOOTEN: There's no such thing, Your Honor, in
3 South Carolina as res ipsa loquitur. No fault cause of
4 action, that is not true at all. Mr. Lucey has to prove
5 under the law in South Carolina that there was some defect
6 that was in the manufacturing of this window and that we did
7 something to contribute to that. He can't prove that and he
8 knows it. And at this point, since he's let everybody else
9 out of the case, he doesn't have a claim on the
10 manufacturing of the window.

11 THE COURT: Well, I've heard this, and Ms. Wooten I
12 understand that some parties have settled out, but I'm not
13 granting summary judgement at this stage. You can renew,
14 certainly. The plaintiff has the burden of proving their
15 case and the Court will take any appropriate motions at the
16 conclusion of the Plaintiff's case.

17 MS. WOOTEN: Just one more thing, Your Honor. At this
18 time, for the record, we are renewing our motion to
19 decertify the class in this case. The law allows us to do
20 that at any time in the case.

21 THE COURT: Yes, ma'am. Noted for the record. That is
22 denied.

23 MS. WOOTEN: Thank you. Your Honor, there are some
24 witnesses present here. Once the jury comes in we would ask
25 that the witnesses be removed. Lastly, we would like to

1 renew our motion to stay the case. We have filed a motion
2 for writ of supercedes today. We have also filed a Motion
3 to Reconsider the Stay of the Case, Your Honor, so at this
4 time we just need to, for the record, renew that motion.

5 THE COURT: Yes, ma'am. The Court has ruled that the
6 appealable issues can be tried distinctly from what -- that
7 the Court can proceed with other issues that are
8 interlocutory in nature. That the final issues can be dealt
9 with separately. So, the Motion for Stay is denied for the
10 record.

11 MS. WOOTEN: Thank you for listening to our pretrial.

12 THE COURT: Yes, ma'am. Now, as I have ruled earlier,
13 each party is allowed in the courtroom a representative of
14 each company, the plaintiff, and one representative of the
15 defendant, and each third party defendant will be allowed to
16 have their principal party in the courtroom. All other
17 witnesses will need to be sequestered. So, if there are
18 any other witnesses that are not in that group, they'll need
19 to exit the courtroom at this point.

20 MR. LUCEY: There are two client representatives for
21 D.R. Horton in the room, Your Honor. I think they are both
22 witnesses, so it would be appropriate for one of them
23 witness openings and one to be excused, I believe.

24 THE COURT: One representative from each party.
25 Anything else before we bring our jury in?

1 MR. JONES: Your Honor, Brandon Jones. This might be
2 the last time you hear from me in this case. I just want to
3 put on the record about the settlement and if I could
4 approach.

5 (WHEREUPON, bench conference.)

6 THE COURT: Mr. Jones, was there something you wanted
7 to put on the record?

8 MR. JONES: For the record, Brandon Jones for fourth
9 party defendant, Therma-tru. There's been an agreed upon
10 settlement of the remainder of the door issues involving
11 Therma-Tru products, ProBuild, and Builders First Source.
12 It is a confidential settlement. I just want to put on the
13 record.

14 MR. LUCEY: Yes, that's been confirmed by the Plaintiff
15 and it's actually already been signed by Therma-Tru and
16 Huttig and we're asking for Probuild to confirm their
17 agreement to appear on the record and we will add the name
18 at the top like you asked for.

19 MR. COX: Correct. Whitt Cox for ProBuild and Builders
20 First Source, and we agree with Mr. Jones and Mr. Lucey on
21 the record.

22 THE COURT: Send me an order. Thank you. Mr. Imhoff?

23 MR. IMHOFF: Yes, sir. We exchanged demonstrative
24 exhibits for our openings just a moment ago. We don't have
25 any objections but one, to one demonstrative exhibit that

1 Mr. Lucey wants to show the jury and that is deposition
2 testimony to our expert Steve Moore, but I objected to that.
3 I'll paraphrase. We've seen hundreds and hundreds of
4 houses, Your Honor. That is not what I -- that wasn't what
5 he asked him, and I objected to it. I would ask that it be
6 taken out, Your Honor.

7 MR. LUCEY: Your Honor, at the conclusion of Mr. Moore's
8 deposition I said Mr. Moore, you and I have looked at
9 hundreds of building codes in the past several days,
10 correct, and their expert Larry Moore said, yes. That is
11 omission by an agent of a party opponent within the scope of
12 his duty. He was hired to investigate the defects and to
13 testify about the allegations in this case. That was at the
14 conclusion of his three-day deposition. That was totally
15 improper omission by a party opponent.

16 MR. IMHOFF: It was a misrepresentation of what
17 happened and what he just said is not what his -- in his
18 deposition testimony. If he could show the deposition
19 testimony, you can see exactly what he asked him. But I
20 objected to it then and I object to it now.

21 THE COURT: Mr. Lucey, you may be able to bring that up
22 through the testimony of the witness, just leave that out of
23 the opening. I will grant the motion at this time regarding
24 opening statements only. Let's have the jury.

25 (WHEREUPON, jury entered the courtroom at 3:23 a.m.)

1 THE COURT: All right, ladies and gentlemen of the
2 jury. Before we begin, let me give you some brief
3 instructions. You have been selected as the jury for this
4 case. That means you are the judges of the facts. You will
5 hear the evidence in the case and determine the facts of the
6 case from the evidence. You will apply that evidence and
7 apply those facts to the law that I give you. I'm the judge
8 of the law.

9 Now, what is evidence? Evidence is testimony that you
10 hear from witnesses, and it is any exhibits that are entered
11 into evidence. What the attorneys say is not evidence.
12 Their statements are designed to help you interpret the
13 evidence, but they are not, in and of themselves, evidence.

14 Now, there will be times that you have to exit the
15 courtroom and when we take breaks, when we go to lunch, when
16 you go home for the evening. There's three things that you
17 are strictly prohibited from doing when you walk out of this
18 courtroom. The first is you are prohibited from doing
19 independent research. It's easy for someone to get on the
20 Internet and try to research either the law or the facts of
21 the case. You're strictly prohibited from doing that.
22 Second thing is you're prohibited from talking to third
23 parties about the case. There's a reason you have this
24 juror button on you. One day you may go outside the
25 elevator, you see one of these attorneys, they're going to

1 go the other direction. They're not trying to be rude to
2 you. They just know they can't have any contact with you.
3 If someone comes up to you, a third party trying to talk
4 about this case, you let the bailiff know. They'll let me
5 know and I'll handle that. But you're strictly prohibited
6 from talking about the case to any third party, and that's
7 going to be tough because your family's going to want to
8 know all about it when you go home. Just tell them you
9 can't talk about it.

10 And the last thing is, you are prohibited from
11 deliberating amongst yourselves until I tell you to do so at
12 the end. Deliberation means that you discussed the case
13 amongst yourselves. When we take a break, don't go to the
14 jury room and start talking about the witness that you just
15 heard. You cannot discuss this case until deliberations at
16 the end. You can talk about anything you want to talk about
17 except this case. And the reason for these rules is that
18 you should first only base your decision on what's presented
19 to you in the way of evidence in the courtroom and not
20 outside the influences. And secondly, you should not make
21 your decision prematurely. You should not decide the case
22 until all of the evidence is in. So, I'll tell you when you
23 may deliberate at the end.

24 Just a few more things and then we'll get started.

25 There may come times in the trial when one attorney makes an

1 objection. They may object to a question or piece of
2 evidence or some issue. I have to make a ruling on that.
3 That should not be interpreted to mean that the court favors
4 one side or the other, or one party over another. My job is
5 to ensure that all of the parties in this case receive a
6 fair trial in accordance with the rules of evidence.
7 There may be times also that you are asked to leave the
8 courtroom and bailiff takes you to the jury room so that we
9 can take up a matter of law. It's not to hide things from
10 you, it's just to ensure that the rules of evidence are
11 followed.

12 So, with those instructions, the first thing we're
13 going to do today, the first stage of the trial will be
14 opening statements and the attorneys will have an
15 opportunity to speak to you and give an opening statement on
16 behalf of their client. Is the Plaintiff ready to proceed?
17 Mr. Lucey?

18 OPENING STATEMENTS

19 BY MR. LUCEY:

20 May it please the Court. 221 people, 221 spouses, 221
21 families tried to get their piece of the American Dream in a
22 neighborhood called Rose Hill. It's about 31 minutes north
23 of here, just shy of Easley or Powdersville. They bought
24 their houses there, but that part of the American dream
25 hasn't exactly worked out and that's why we're here this

1 week. The other reason we're here this week is because one
2 person, one person kept after D.R. Horton to make the house
3 right, to fix things that weren't right, to work within the
4 system as it were. And it didn't work. The house wasn't
5 made right. And that one person, Natalie Zitek, sitting
6 with us here at this table, after she tried to make it
7 right, to get it right, which we'll talk about over a period
8 of five years, began to notice and learn of similar
9 construction issues elsewhere in her neighborhood.
10 Elsewhere in Rose Hill. Similar defects. So, in the fall
11 2019 Ms. Zitek hired my firm, Dabney and I, and some of the
12 other people y'all met this morning. Hired our firm to bring
13 what the judge has told you is a class action, a
14 construction defect class action, against D.R. Horton for
15 deficiencies that the homeowners claim exists in their
16 houses in Rose Hill. If, for good or bad, you're going to
17 learn a little bit more about class action as the week
18 evolves, but it's basically as some of what you've heard
19 already today. It's where one person brings a lawsuit on
20 behalf of those others that are similarly situated to seek a
21 remedy for the group for the alleged wrong. And that's what
22 brings us here.

23 But I want to give you a little bit of background
24 before we get back into the class defects. I want to tell
25 you about the five years where Natalie tried to work within

1 the system. That brings us here to the suit, so you'll have
2 some perspective with which to view Plaintiff's evidence.
3 After they constructed her home in approximately 2013 or so,
4 the brick over the garage started cracking. Now, we can
5 bring in a lot of engineers, and we can bring in a lot of
6 architects, and we can bring in a lot of fancy construction
7 people. But basically, you know, everybody knows brick is
8 not supposed to crack, right? Brick is supposed to be that
9 solid, brittle exterior surface on your house that protects
10 your house from the weather and from anything else that
11 comes this way. Well, her brick started to crack over the
12 garage. You can see the step cracks in the mortar joints
13 going up the wall.

14 And so, she brought that to D.R. Horton's attention and
15 they came and they put some more mortar in the cracks and
16 said you're all set. See you later. Well, a couple years
17 goes by and Natalie sees the cracks reappearing, brings it
18 to D.R. Horton's attention again. And at first they said,
19 well, you're out of warranty. When she points out to him
20 that brick is not supposed to crack, they say okay, we'll
21 try fixing it. And so a second time they try to fix her
22 cracking brick. And they did just such a bad job of it that
23 they brought in and came in and try to fix it a third time
24 in 2017 and a fourth time in 2018. This is all the side
25 wall of the garage now where the brick is cracking and to

1 this day you'll still see some little hairline cracks where
2 those repairs have taken place. Everybody was so focused on
3 Natalie's brick side wall, nobody noticed what was happening
4 to her front wall under her second story window. This crack
5 wasn't found until later, and you heard me say the word step
6 crack few minutes ago. You can see the crack stepping up
7 through the different courses of brick up to that window.

8 Now, before I allow you to be misled into thinking that
9 this is something cosmetic, let me tell you what the
10 engineers and the evidence is going to show you about some
11 of that cracking this week. To start with, I'm only telling
12 you about one of twelve brick construction defects right
13 now. I'm just focusing on one so that we can walk through
14 it together and understand it, because we can't cover
15 everything in opening. So, let's call it an exemplar. All
16 right, so this one exemplar, this cracking. I want to talk
17 about why it's not cosmetic and what the evidence and the
18 engineers are going to explain to you this week. They're
19 going to tell you that the reason some of these cracks are
20 occurring is because there's two types of brick at Rose
21 Hill. Now, that's actually a mis-wording. I said two types
22 of brick. There's really only one type of brick, but
23 there's two types of supported brick at Rose Hill.

24 Some brick facades are supported. Some portions of
25 brick facades are supported by the foundation, like down

1 where your slab is, where your footers are. They put a
2 ledge down there and the brick gets built on that. It gets
3 built all the way up. And then you can imagine brick built
4 on foundations is rather sturdy, doesn't move, not supposed
5 to move.

6 But there's another kind of brick on houses. It is
7 brick that is supported by wood framing. The brick
8 exteriors that we see in these photographs, even the
9 photograph I just had. The brick exteriors, they're what we
10 call the facades. They're just a covering on a wood frame
11 house and most facades, at least on the first floor, most
12 facades are supported by our foundation. But, when you have
13 a 20-foot garage door opening, or where you have a second
14 floor wall of brick over top of a wood roof, you don't
15 support the brick on the foundation. You support the wood -
16 - excuse me -- the brick by hanging it off the wood framing
17 in one way or another. And the evidence will show that wood
18 framing compresses and dries out. So, while you got your
19 foundation supported brick staying here, your wood framing
20 brick has a tendency to go down.

21 Lo and behold, what happens? Exactly what we see on
22 Natalie's second floor. Step cracking in the brick where
23 the frame supported brick over the front porch is getting
24 stresses from nearby foundation supported brick. Why do we
25 go into that? Just to show you we're not here on a cosmetic

1 issue, we're here on real construction defect issues.

2 So, Natalie brought this class action, hired the
3 attorneys to represent the class of 2221 odd members, and
4 had her attorneys get engineers to investigate these matters
5 and brought her claim to court and showed the court the
6 different construction defects that she and her attorneys
7 and her engineers alleged were common throughout Rose Hill.
8 And in all those photographs that Natalie's engineers and
9 her attorney showed the court are in evidence. These are
10 the photographs that were filed in 2020. We'll get to a
11 chronology in a second. Remember we talked about the
12 lawsuit getting filed in 2019, and now I'm talking about the
13 class photographs being filed in the court in 2020. They're
14 all in evidence, and you're going to see them. And
15 basically what she did was, through her attorneys and her
16 engineer, she brought pictures of all the construction
17 defects that she believed the houses had in common. You've
18 heard about one, brick. Out of the 221 class -- I'm just
19 going to say 220 to round it off from now on. Out of the
20 200 odd class houses in Rose Hill, the evidence will show
21 that approximately -- I'm going to say roughly two thirds of
22 them have a brick facade.

23 Now, it may just be the front to make the house look
24 nice, or may actually go all the way around the house, but
25 roughly two thirds of the houses or so roughly have brick on

1 them and have some of, or all of, the dozen or so brick
2 construction defects that we will show you this week. In
3 this case, about one third of the houses are actually, yes,
4 about 69 of the houses in the class have something called
5 MSV, masonry stone veneer, stone facade. There's defects in
6 the stone facade that we'll be showing to you this week that
7 we believe are common amongst the 70 odd houses that have
8 the MSV. And, by the way, some of the houses have both
9 brick and MSV, and they have the overlap. They have the
10 brick defects on one side of the house and they've got the
11 MSV defects on a different side of the house.

12 There's another issue in the case, windows. These
13 houses have vinyl windows. The vinyl windows are cracking,
14 the frames are what we call fracturing, and you'll see the
15 seepage that is occurring at or near these fractures. And
16 there's a second issue, but at this point we're getting into
17 some more details, so let me show you some more pictures
18 that I hope will help walk you through this case. Let's
19 back up for a second. Before we get to some pictures of
20 those window frames that were just talking about. I'm
21 showing you on the screen now essentially a Google Earth
22 photograph from up in the sky of the Rose Hill neighborhood.
23 And that's the roughly 220 odd homes. There's actually some
24 homes there that were not part of -- built by D.R. Horton
25 that are not part of the suit, and we'll get to that in a

1 few moments.

2 That is just a more simplified layout of Rose Hill,
3 showing the different phases within the neighborhood that we
4 will talk about this week. This is just showing you a
5 couple of the typical -- what a typical house in Rose Hill
6 looks like. We have on the screen now an exemplar, an entry
7 level house, so to speak, which is single story. We have an
8 example now on the screen of a moderate house, two-story
9 with a few architectural features. And you heard me talk a
10 few minutes ago about some houses having both brick and
11 stone veneer, and you see that on this house at 159
12 Haverhill. And here we have a more complex house with more
13 architectural features. And these are basically the three
14 level of houses that we'll be looking at this week in
15 Roseville.

16 Here's some pictures of the windows and the leaks in
17 the windows at Rose Hill, and you're going to see -- if I
18 can use this pointer. You're going to see it doesn't work
19 very well on the TV screen. You're going to see right there
20 that besides the leaking taking place here on the right,
21 there is a pad -- a pad in the joint between the front of
22 that window and the corner that's out of position. You
23 heard me talk earlier about the fractured window frames. I
24 didn't yet address the pads are out of position. You'll see
25 evidence and hear testimony regarding those pads in that

1 joint that some people will call the slot joint, that those
2 pads are out of position and they're permitting water into
3 the home. And you can see the damage in these pictures
4 that's resulting from the water coming down through these.
5 That was a -- this picture on the screen now from 5
6 Kettering. That's actually a fractured window frame. The
7 vinyl has broken through the piece, and those fractures
8 you'll hear about this week, they're occurring near
9 something called a heat weld where the vinyl is welded
10 together to form that corner. That extra stresses occur and
11 that's what's going on. You can see here damage to the
12 substrate below the window sill. Here's a better picture of
13 that at 109 Amherst. Water damage at the location of the
14 corners, the lower corners of these windows, and this
15 particular picture here we'll call an engineer to testify
16 and tell you all about how the water drips in this picture
17 actually were originally poured in the window in the sill of
18 a window in a test, and it came out, one, on the shingles
19 from behind the stone veneer and two, came out in the living
20 room below when this test occurred.

21 Another issue that Natalie is bringing to you this week
22 is cracking concrete, excessively cracking concrete in the
23 neighborhood. And we're only going to see a couple pictures
24 now, but you'll see that the cracking is occurring on the
25 side of the slabs, the foundation slabs, and across the top

1 of the foundation slabs. And you'll hear testimony that
2 one, the cracking -- while concrete does crack time to time,
3 this cracking is excessive and it's occurring in Easley,
4 which is a known radon risk area. And that you can't have
5 cracks in your concrete when there's radon in the ground
6 underneath your area.

7 Here is a picture of 8 Duxbury where the stone facade,
8 the MSV, on the front of the house meets the brick wall on
9 the side of the house. And while we will call engineers
10 this week to talk to us about the condition you're seeing,
11 frankly, you don't need an engineer to know that's the gaps
12 that we see up and down and the crumbling mortar in this
13 intersection is not proper. And I don't think any witness
14 this week will dispute that. Here's a similar condition at
15 the right corner of 2 Duxbury where the stone veneer meets
16 the brick.

17 You're actually going to hear testimony that not only
18 do we have some of these unattractive, dysfunctional areas
19 that are not keeping water out, but also that the stones are
20 actually falling off the building, they're installed in
21 violation of the building code, and that they've actually
22 hit a couple of people. That is actually a risk out there,
23 falling stone. Here's another picture of the similar
24 condition at 201 Buxton. Cracking stone at 107 Barwick, and
25 you'll hear this week again that the conditions we just saw

1 a moment ago with the stone cracking right on top of the
2 concrete foundation. That stone was installed in violation
3 of the building code. It's not supposed to be touching the
4 concrete down there. And you'll see. And the engineers
5 will help us understand how all these issues come together
6 to create the problems that we're seeing.

7 On the screen now is the same picture I showed you with
8 the poster board, the defect at 104 Sturbridge that's
9 evident in the brickwork above the first floor roof. Here's
10 a cracking photograph, brick cracking, separating at the
11 right hand lower corner of 3 Harwick. And you'll notice
12 that the gap between the two courses of brick actually gets
13 wider as it goes from left to right. The separation is what
14 the engineers will tell you is a differential separation.
15 The components are moving away from each other at different
16 rates. Here's a crack above 4 Kettering on the top right of
17 the window, and you can see the step cracking going all the
18 way up to the roof through what, seven or eight courses of
19 brick there. Again, you'll hear and see more about this,
20 that -- there's the cracking at 2 Dartford.
21 You can see the extreme separation at the top right, and
22 you'll hear and see more about this cracking occurring at
23 the corners above the garages and at the underneath and
24 above the second floor windows in the brick facades.

25 The claim also includes a claim relating to inadequate

1 storage drainage. You see on the screen now the side yard
2 from 27 Duxbury that is simply puddling water after a storm.
3 You'll hear from a civil engineer as to the storm drainage
4 throughout Rose Hill and whether or not it was properly
5 designed and implemented. And what are these problems that
6 we're seeing with the flooding in the yards should have been
7 avoided

8 We're going to focus on building code violations,
9 because as the engineers will tell you this week, the
10 building code is what you're supposed to do in the state of
11 South Carolina when you construct any building or residence.
12 And that it is, in fact, the minimum standard of care.
13 That's what builders are supposed to do. You can do better
14 than the building code. That's okay. You can have much
15 better, but you can't have worse. And so we're going to
16 focus on building codes this week and show you that the
17 windows, stone veneer, brick, grading, and floors all have
18 multiple building code violations in the installation of
19 those components.

20 A brief chronological background on this matter, just
21 to put everything in perspective. You've already heard
22 Natalie's background of brick cracking from 2013 in 2018 and
23 those repairs. Rose Hill, was actually formed in 2005 by
24 original developer named Poinsett. Poinsett went under and
25 essentially D.R. Horton picked up the remaining lots, which

1 was most of the lots, in a purchase from the bank a few
2 years later and started construction in Rose Hill in late
3 2011. This is a picture of the different phases in Rose
4 Hill. The pink was built out first, the second build out
5 was the blue in the top left, and the green in the middle,
6 and in the southern portions was the third build out in the
7 neighborhood. So, D.R. Horton begins construction in 2011-
8 2012, they began phase two and 2013, and by the spring of
9 2017, most of the neighborhood is built out. And you'll see
10 that that is approximately what, four years after the first
11 attempt at repairing Natalie's brick. In the summer of 2017
12 was the second attempt at repair.

13 You've heard from the judge already today that
14 Plaintiff's case is -- and you've heard from me, that it's
15 purely against D.R. Horton. We sued the developer, the
16 seller, the person that developed -- the entity that
17 developed this neighborhood, built the houses and sold them.
18 The evidence will show that D.R. Horton pulled these
19 building permits in their own behalf and they built them
20 through subcontractors. So, our claim is only against D.R.
21 Horton, but you've heard that there's what is, in this case,
22 called third party defendants and fourth party defendants.
23 In other words, D.R. Horton has turned around and sued its
24 subcontractors relating to our claims. We're not part of
25 that suit directly, although we're in the same courtroom.

1 And then its subcontractors or suppliers have turned around
2 and sued their subcontractors or suppliers relating to what
3 they believe is their responsibility for any portion of our
4 claim. While you may see this third and fourth parties in
5 the courtroom this week and you may hear from their
6 attorneys, plaintiff doesn't actually have a claim against
7 those parties. Our claim is only against D.R. Horton. It's
8 D.R. Horton that has claims over against these other parties
9 that you'll see in the courtroom.

10 On the screen now is a graphical picture of the same
11 D.R. Horton neighborhood we showed you with the Google Earth
12 presentation earlier, only now all of the houses inspected
13 on the interior by Plaintiff's engineer, WDP Engineers, is
14 colored in green. And the locations where WDP Plaintiff's
15 engineers perform test cuts have circles on them and
16 locations where D.R. Horton performed test cuts have X's on
17 them. And we show this to you simply to lay the foundation
18 from the beginning, from the very beginning, as to how
19 thorough Plaintiff's investigation has been, even though
20 this is in the context of a class action where things are
21 handled on a representative basis.

22 I want to talk to you for a second about Plaintiff's
23 claims. What claims did they actually bring in this thing
24 that we call a lawsuit. But before I do so, let me tell you
25 first. While we intend to give you a road map of what we

1 think we have to prove, it's actually the judge is going to
2 charge you on the law of the case at the end of the case.
3 No representation I make to you about what the law is would
4 be binding. He'll tell you what the law is, but we think we
5 understand enough of the law so that we can make a
6 presentation to you as to what we're going to intend to show
7 you this week. And basically we have brought two claims.
8 One is negligence, and one is implied warranty.

9 And negligence, we can get into some details, but the
10 long and short of it is, is it's a claim that somebody
11 didn't do what they were supposed to do. For instance, you
12 heard me talking about the building code a while ago. South
13 Carolina says you got to build per the building code, right?
14 It's a minimum standard of care. So, one of the Plaintiff's
15 allegations is you didn't follow a building code and that
16 was a deviation from the standard of care which you're
17 responsible for the resulting damage and the judge will tell
18 you about how duties might arise and what duties are out
19 there. But we think that the building code and industry
20 standards will be key to those duties that you'll hear from
21 the experts about and hear from the judge about at the close
22 of the case.

23 The other cause of action that Plaintiff has brought
24 against D.R. Horton is called breach of implied warranty.
25 Your product has not performed as it was supposed to. In

1 other words, that brick's not supposed to be cracking. The
2 windows aren't supposed to be fracturing. The water's not
3 supposed to be getting in. That is a breach of your implied
4 warranties to us on how things would work and that you know
5 we have a reasonable product and that we think you should be
6 responsible for it. We'll note to you at the end of the
7 case, you'll hear from the judge on implied warranty, but
8 it's different from negligence. It's not really so much
9 you're looking for a fault. You're looking at the
10 existence, the objective existence, of what's there. Are
11 the windows performing as intended? No. Okay, well, that's
12 the end of the question. If that's the answer.

13 So, those are the two causes of action and we're going
14 to show you in this case that the defects that have occurred
15 at Rose Hill have occurred for three primary reasons;
16 a lack of proper design and specifications before he dug the
17 first shovel of dirt, a lack of quality control and product
18 vetting during the construction of these residences, and
19 inadequate supervision and involvement during construction.
20 And we're going to focus on something called QA or QC,
21 quality assurance or quality control. And one of the things
22 we're going to show you is a disconnect between the D.R.
23 Horton superintendent on site that they call a builder, and
24 the D.R. Horton system. We're going to show you a lack of
25 training, and we're going to show you the elusive D.R.

1 Horton quality standards, or lack thereof, that all their
2 documents refer to, but nobody can seem to find. And we're
3 going to show you that it's the lack of standards and the
4 lack of quality control and QA that contributed to what
5 Natalie and her homeowners endure now at Rose Hill. And
6 we're going to do that by use of D.R. Horton's own testimony
7 throughout this case.

8 And with regards to the plans which are in evidence and
9 the details that go with those plans that are in evidence,
10 we will show you that almost none of plaintiff's
11 construction deficiencies, construction defects actually had
12 a detail on the plans for how it should have been done. Not
13 there. There's a detail for how you should put some cornice
14 up, and how you do some other decorative stuff, but the
15 detail on one of the things that might matter most in
16 building a brick house, the separation of the frame
17 supported brick from the foundation supported brick, it's
18 not there. There was no guidance to the subcontractors.

19 We're also going to show you these windows that were
20 installed were installed without the building code required
21 performance labels on them. Now, we're under something
22 called the International Residential Building Code, IRC, if
23 I get it right. And, ever since a couple years after
24 Hurricane Hugo, the international building codes require
25 what people often refer to as an AMMA label. You can have

1 it -- you can get it from other certification agencies, but
2 it needs to comply with the information that's supposed to
3 be on an AMMA label regarding the performance criteria of
4 the window products. We will show you that on the AMMA
5 labels on these windows, there's a warranty label. The
6 building code require the AAMA label to be on there so that
7 the people at the job would know what the performance rating
8 was of these windows. These windows that are now fracturing
9 and leaking. And they weren't there.

10 I'm going to skip through some of this. As part of --
11 would you blank the screen for a moment? We'll come back to
12 you in just a second. As part of Natalie's attorneys and
13 engineering firm presenting -- preparing and presenting
14 their case for you, they have to ask the next question.
15 Well, what do you do about all this? There's only one thing
16 to do about it you'll hear this week, which is the tear it
17 off and put it back on right. You can't just take a stick
18 of Elmer's glue and go up there and glue all this stuff back
19 together. Especially, for instance, the foundation
20 supported brick versus a framing supported brick. So, the
21 testimony is going to show -- the evidence is going to show
22 Plaintiff's engineer, Dr. Rhett Whitlock. He has his
23 Doctorate from Clemson University. We won't talk about that
24 game last night. But he's got his Bachelor's, Master's, and
25 Doctorate from Clemson, and he'll tell you and his specialty

1 has been masonry frankly, for a lot of his career. He'll
2 tell you that it needs to come off and be put back on right.
3 And the evidence will also show that it's a lot cheaper to
4 do it right the first time than it is to repair.

5 But, at any rate we'll show you. We're going to have
6 Dr. Whitlock on the stand and to get the Plaintiffs to the
7 position where they believe they should be in had the houses
8 been properly constructed. He had to formulate for us a
9 damage model on what it's going to cost to correct these
10 deficiencies for the Class. A class-wide damage model. And
11 we'll show you that he's a member of something called CSI,
12 the Construction Specification Institute, and that he is
13 very experienced in forecasting probable costs for his
14 clients. And he has forecasted the probable cost of repair
15 for what we've shown you today. And it's not cheap. It's
16 over twenty million dollars, but that is the cost. And
17 additionally, there's also loss of use that the residents
18 should frankly be moving out of these homes while this
19 construction is going on. They should take their kids and
20 go to a motel, or whatever it happens to be. And we're
21 going to price that for you this week and show you those
22 portion of the damages.

23 What I just took off the screen, let me tell you about
24 the introduction to that for a second, so we can go back to
25 it. During litigation, both parties get a chance to conduct

1 what's called discovery. They ask each other questions and
2 they produce documents back and forth to each other so they
3 can learn each other's positions in this matter. Put that
4 back up, please. And we have had the opportunity therefore,
5 in this case, to learn in advance and to work on the
6 defenses that we're expecting to see in the case. And one
7 of the main defenses is D.R. Horton blaming its subs as
8 opposed to its own superintendents or area construction
9 managers that ran these job sites. And, in fact, they've
10 actually articulated this in a further defense that a
11 national builder like D.R. Horton can't be expected to know
12 all the nooks and crannies of all the local building codes
13 in this net. Plaintiff will show you this week there's no
14 exception in the building code for national builders.
15 There's nothing in the building code that says if you build
16 in fifty other states, you don't have to comply with our
17 laws. The building code applies. And if there's a local
18 nuance that they needed to learn to build these houses
19 properly, they should have learned that.

20 We're also going to show that one of the defenses is
21 that homeowner maintenance. It's all the homeowner's fault.
22 When we show you the defects pictures this week, we want to
23 keep in the back of your mind, such as this fractured window
24 right here. Just ask yourself, what does that have to do
25 with homeowner maintenance? What does this decorative stone

1 falling off the front face of your garage where it was
2 adhered to the brick, what does that have to do with
3 homeowner maintenance? What do these cracking foundation
4 pictures have to do with homeowner maintenance? My client
5 believes that the evidence will show that they have nothing
6 to do with homeowner maintenance.

7 On the screen now, 8 Duxbury. Cracking between the two
8 components, the masonry and the brick. Window problems,
9 step cracking. I mentioned to you earlier that there was
10 actually dozens -- or a dozen approximately brick building
11 code violations and another six or so stone veneer building
12 code violations. I'm holding up for you the schematics
13 where the red represents each defect that Dr. Rhett Whitlock
14 will come explain to you this week relating to these brick
15 veneer houses and these stones veneer.

16 The judge mentioned to you this morning the importance
17 of you all being here this week. That the system wouldn't
18 work without you. And Natalie and the rest of the class at
19 Rose Hill appreciate your attention this week. And they
20 agree with the judge. The system won't work without you.
21 Natalie they tried to work inside the system. She
22 repeatedly had Dr. Horton back to make the repairs. The
23 house never got fixed. To this day, this brick crack is
24 still there at her house. And you'll hear testimony from
25 Dr. Whitlock that every brick facade house in this

1 neighborhood has cracking. Every. You'll hear testimony
2 from Dr. Whitlock and others, all the stone veneer, all of
3 it, is improperly applied and needs to come up. This week
4 you will be the conscious of the community in receiving and
5 evaluating this evidence and in dictating what standards
6 this community will and will not accept from those national
7 builders. Thank you.

8 THE COURT: Thank you. Defendant's opening.

9 OPENING STATEMENT

10 BY MR. IMHOFF:

11 Ladies and gentlemen of the jury, thank you for being
12 here. I know it's late. We'll try to get you out of here
13 as soon as we can. My name is Jason Imhoff. I introduced
14 myself to you earlier. I, along with my partners Kim Wooten,
15 and John Crawford, are representing D.R. Horton in this
16 case. Let me tell you right from the beginning. What Mr.
17 Lucey said is not the whole story. It's not true, and we're
18 going to prove that to you.

19 Is he going to be able to show you a house that has
20 cracking brick? He just did. Is he going to be able to show
21 you a house that has cracking stone? He just did. There are
22 221 different houses out there, and we're going to show you
23 the rest of the 210 houses out there. But they're suing, I
24 think I heard twenty million for it. These are destructive
25 testing and visual inspection locations that we were allowed

1 to do out at Rose Hill. Go ahead and flip the next slide, if
2 you will, please.

3 These are all the different houses out there in this
4 entire neighborhood. You can see this house has no stone on
5 it. All of the houses don't have stone issues. This stone,
6 this house, is mostly vinyl. You saw him talk about site
7 issues, water sitting against houses. The name of the
8 neighborhood is called Rose Hill. It is logical that the
9 top of the hill does not get all the water when it rains
10 like the bottom of the hill. What he's going to try to do
11 is he's going to try to play a game of smoke and mirrors and
12 he's going to show you a picture here and a picture there
13 and he's going to say they're all wrong. Twenty million
14 dollars. Next slide please.

15 This is 111. This house has brick, siding, vinyl
16 siding, and again, green grass. Water's not sitting on this
17 yard next to the foundation or killing the grass. Next
18 house please. This is a brick house, 2 stall garage, one
19 stall garage, vinyl siding. Again, no issues with the site
20 on this one. No issues with the brick on this one. I can't
21 see because it's not close enough. I don't see any issues
22 with the stone on this one. Next, here's a nice house. Big
23 house out there that's all brick and then has stone applied
24 to the front of it for an aesthetic, architecturally
25 designed house. That's a nice house. That's very different

1 than the one-story vinyl house that you saw earlier. Please
2 show the next slide. Here's a mix. So, you've got that
3 stone up top, maybe stone down the bottom, the vinyl siding,
4 and then stone up the sides here. Again, this house has two
5 hills on each side. Water can't possibly be sitting against
6 the base of that house. But he didn't show you that
7 picture. Next picture, please.

8 Here's another house. This one has brick. We can't
9 tell if there's any manufactured stone on it or not, but
10 again, vinyl side, there's your roof. There's a garage that
11 he's talking about, right? All of the houses have cracks.
12 That's what he told you. Next slide, please. 8 Duxbury, the
13 brick house, the left side of it has some stone on it.
14 Again, a different lot. I will tell you, D.R. Horton didn't
15 put these extra parking pads in, which we're going to talk
16 about when we get the site work and landscaping and what has
17 changed out there in the ten years since this lot and
18 neighborhood was constructed.

19 Folks buy houses. They plant bushes, trees, playsets,
20 fences, sheds, and we're going to show you things house by
21 house. Next slide. This is 5 Harwick. Again, a very, very
22 different house. This has no brick on it. It's vinyl. I
23 think that might be hardy board up at the top. Again a
24 different lot that slopes differently. Next slide, please.

25 This is a one-story house. Very, very different than

1 the other houses. Stone around the brick and then
2 essentially the rest of it is vinyl. Remember, Mr. Lucey
3 represented to you that there's water sitting in all these
4 yards killing all the grass and causing issues to this
5 house, or all of the houses. Next slide, please. Go back
6 one, please. Again, you can tell that was added. That
7 concrete parking pad was added after this house was sold and
8 bought by this homeowner. Or frankly, this could be the
9 third homeowner out there. These houses have sold. We'll
10 talk about that in just a minute. That's part of the HOA
11 we're talking about. The HOA is actually supposed to make
12 sure that people do not change the grading plan and the
13 neighborhood plan for this. And they, for years, just
14 rubber stamp changes that change the grading plan. Another
15 slide, please.

16 This is 112 Dartmouth. Again, very different house.
17 It's going to have a different architectural plan.
18 It's going to have a different crew possibly working on it.
19 Different framing crew, different stone crew, different
20 people work on each one of these houses over the course of
21 six years. Mr. Lucey wants to make it sound like everything
22 was done by the same person. They're all the same. That's
23 not true. The evidence is going to show that the houses,
24 the reason you met three masons this morning, are built by
25 different subcontractors. So, you can't extrapolate the

1 work of one to everyone else out there. Next slide, please.

2 I think this is an all stone. Two-story, all stone
3 house. Very different house. Again, nice green, Hardy
4 board. I think that's called ship shingle out there. So, we
5 got a metal roof. Very, very, very different than the other
6 houses we've shown you. Next slide, please. This is 4
7 Dartford, another big house with a side garage. Very
8 different, very flat lot. There is a flat section of Rose
9 Hill. When you're shown pictures of water running in
10 people's yards or sitting in people's yards, remember not
11 everybody's lot looks the same, despite what they're trying
12 to convince you. Next one, please.

13 Brick, that's a brick veneer. It goes all the way up
14 three stores. Now, let's talk about Natalie's Zitek. Pardon
15 me, it's Natalie Zitek. I apologize. Let's talk about
16 Natalie Zitek's house. They came down, picked the plan and
17 had this house built for them. This is the house that
18 Natalie and Paul Zitek live in right now and suing this
19 builder you've heard for at least twenty million dollars
20 that they say has destroyed their American dream. This is
21 the house right here. But look, nothing in the yard. All
22 the grass is green. There's no water sitting in that yard.
23 Flip to the next one, please.

24 It's a beautiful house. All brick except for the stone
25 at the top and you can't see it because the bushes that were

1 planted, but there's a knee wall about this high of purely
2 decorative stone applied at the bottom. Around the bottom
3 of the garage and up to the door. Next slide, please.
4 Literally, they are going to ask you for about \$18,000 to
5 regrade every yard out there, including Natalie and Paul
6 Zitek's backyard. This is their backyard. D.R. Horton did
7 not build that that pool. D.R. Horton doesn't know how to
8 build pools. They did not put that deck in. They did not
9 put that fence in. Next slide please. They did not put
10 that beautiful waterfall in. They did not put that
11 landscaping in, and I'm surprised that at that palm trees
12 lives there, but they didn't put that palm tree there
13 either.

14 And you will see as we go through this, that one thing
15 that home builders do and tell people, we do not warranty
16 the grade. Because when people buy houses, this is what
17 they do. It's their yard. It's where you live. You want
18 to plant flowers and put things in your yard, or put sheds.
19 \$18,000 per lot is what they're going to ask you to award
20 Ms. Zitek. And you'll hear her testimony, when I asked her
21 if she still wanted \$18,000 to regrade her yard, that looks
22 like that. Guess what she said. Next slide, please. More
23 of her backyard. Rock landscaping. You can see another
24 palm tree here. Next slide, please.

25 This is why we're here. This literally is why we're

1 here. When D.R. Horton built Natalie and Paul Zitek's
2 house, a mistake was made. A mistake was made that D.R.
3 Horton took responsibility for and D.R. Horton fixed.
4 There's a beam. It's called an "L" beam, but it's a big,
5 essentially a wooden beam that runs above the garage behind
6 the brick. It was the wrong size. So you heard Mr. Lucey
7 talk about she tried to work within the system. She tried
8 and they would not give her what she wanted. The truth is,
9 D.R. Horton came out to look at the brick like they always
10 do. D.R. Horton has a dedicated warranty department. That
11 woman over there is Pam Williamson and she runs the warranty
12 department, and she will tell you and testify D.R. Horton
13 doesn't want to make it any harder for the warranty people
14 than has to be. Pam went out. She sent a couple of her
15 techs out the first time in 2014, 2016, and what they did is
16 they tuckpointed the brick. Brick mortar does crack, so
17 they put more mortar in. In 2017, they were called again.
18 The cracks have come back. Pam went to her house. This is
19 four years after this house was sold. There's a warranty
20 given, an express warranty given, so that technically this
21 house is out of the warranty. Huh-uh. D.R. Horton went out
22 there. Pam went out there. They took their mason out there
23 and they hired a structural engineer. A structural
24 engineer. And they went inside that garage, and they pulled
25 it apart, and they found out that the reason that Natalie

1 Zitek's brick was cracking is because the correct beam had
2 not been installed.

3 You know what the repair for that is? You pull off the
4 brick above the garage, you put the correct beam in, and you
5 put the brick back. Natalie and Paul Zitek wouldn't accept
6 that, and they demanded that the entire side of their home
7 have the brick taken off of it and replaced. What does the
8 D.R. Horton do? What they asked for. Go ahead. Next
9 slide. That's the new brick there. Next slide, please. I
10 may have gotten a little ahead of myself. If you can go
11 forward to the one, Max. If you can go forward and we'll
12 come back to the brick off the house. That one. They took
13 all of the brick off at Paul and Natalie's request. They
14 didn't have to. Matter of fact, they told them not to.
15 Because, once you put that brick back, it doesn't
16 necessarily match the front and back of the house. The
17 Zitek's demanded it.

18 D.R. Horton did it. They put the brick back on. The
19 reason I show you this is there's going to be some arguments
20 about how they put the brick on and what the masons did or
21 didn't do when they put the brick on. The brick goes back
22 up. It looked terrible. It looked terrible. Pamela Anderson
23 came down. She was on -- she's going to testify. She was
24 on site for a minute and said tear it off. It looks terrible
25 At D.R. Horton's cost. And they put it back up and they put

1 it back up right. Will you go back up to the side picture,
2 please, Max of Ms. Zitek's house. And that's what it looks
3 like today.

4 There aren't cracks in it. You didn't even hear Mr.
5 Lucey say there are cracks in it. He said there might be
6 some hairline cracks in it. Be careful with that. What Mr.
7 Lucey says is not evidence and it's not testimony. We want
8 you to look at it, okay. But D.R. Horton went back and they
9 put it back and they did what the Zitek's asked for, and
10 they did it right for the Zitek's.

11 You might be asking yourself, why are we here? You're
12 going to find out why we're here, and you're going to find
13 out why we're only here with Natalie Zitek and Paul Zitek,
14 and not the other 220 people in this class. Well, let me go
15 back, because I got a little ahead of myself, okay? This is
16 Natalie Zitek's floor. You didn't hear Mr. Lucey talk about
17 flooring, but it's part of the case. This is what she's
18 suing for. Next, please, Max.

19 There's another picture of the floor. She's also
20 asking for money for that. Next picture. She's also asking
21 money for that. Next picture. That's the Zitek house that
22 Mr. Lucey is gonna spend the next weeks and months trying to
23 convince you is so bad that it's falling down and it needs
24 repair. And here's the most important part. All of the
25 houses are that bad. That's what they look like out there.

1 Mr. Lucey has done this for a while. You heard him. He
2 came up from Charleston for this. He's got an expert
3 sitting out here named Dr. Rhett Whitlock. They've done
4 this for a while. They know what they're doing, but they're
5 only going to show you the parts they want you to see.
6 They've carefully crafted this case, very carefully crafted
7 to only show you what's in one hand and not in the other
8 hand. They know what they're doing. They've been doing it
9 for a long time. The reason they sued D.R. Horton, and you
10 will hear it throughout these weeks, is because D.R. Horton
11 is a big target. You'll hear Mr. Lucey say it again and
12 again. America's number one home builder. America's number
13 one home builder. They are, by some magazine that is
14 subscribed to. Some builder magazine calls them America's
15 number one home builder. So, they put it on their marketing
16 material and it also makes them the number one target for
17 lawsuits like this.

18 Some of the issues that Mr. Lucey showed you are what
19 are minor or technical code violations that can be fixed.
20 They get missed. If you own a business, if you manage
21 people, you know that people are going to make mistakes,
22 Things are going to happen. And that's why D.R. Horton has a
23 dedicated warranty team to fix those things. And we've got
24 our subcontractors here and we'll ask them to fix those
25 things also. But we think the majority of the houses and the

1 majority of the work out there is correct. Can you show me,
2 Max, the stone down to grade, please? Go to the next
3 picture.

4 This is that only Zitek's house, by the way. This is
5 the stone and the brick. This is also Ms. Zitek's house
6 from the back. Go ahead. I put this up, because we're not
7 scared of it. This is wrong. This needs to be fixed.
8 We're going to take responsibility for this, okay? And
9 we'll explain to you how this happened. But it was an
10 architecture detail. You have this stone on the edge sitting
11 on this brick and on wood framing, and as those things
12 shrink and swell, as your house moves, it's going to crack
13 that. We're gonna take responsibility for that, okay? Next
14 slide, please.

15 Here again, you've got some brick to stone connection.
16 It doesn't look great. We're gonna we're going to accept
17 that, okay? And we're going to take responsibility for this
18 and we're going to fix it for the homeowners out there. Go
19 ahead, Max. Same thing. We're not hiding from it. It
20 shouldn't be looking like that, even after 10 years, it
21 shouldn't look like that. Next picture. This is an
22 architectural detail. That's a bad idea. See the stone that
23 fell off. That's a bad idea. We're going to take that off.
24 We're going to pull those stones off. First time I've heard
25 this morning that these have hit somebody. I'm not sure

1 that testimony is actually coming in, but we don't want it
2 to. So, they're easily pulled off. We'll scrape them and
3 clean them off and we'll clean the brick. We'll take
4 responsibility for that. Go ahead, Max.

5 This is called aesthetic manufactured stone. This is
6 not protecting this house. This is not part of the envelope
7 of this house. It's aesthetic only. And here is one of
8 those technical code violations, minor code violations, I
9 was telling you about. What we are being sued for is the
10 stone goes all the way down to grade. See here it touches
11 the mulch there. Now people put up the mulch there, but
12 that actually is causing no damage. It's not hurting
13 anyone, and it is actually now an industry standard. This
14 is how home builders are putting the stone down to grade,
15 because homeowners don't like to see the ugly concrete
16 foundation under it. That's the testimony and evidence
17 you'll hear in this case, is that we're being sued for that,
18 but that's actually become an industry standard. Next
19 picture, please.

20 Same thing. Where the grade is supposed to be four
21 inches on pavement, it's supposed to be two inches above the
22 pavement. Again, it doesn't hurt the house. There's
23 nothing wrong with it. It's a technical code violation some
24 years, but now it's an industry standard. This is how it's
25 done. Next picture. There it is again. So, what

1 plaintiffs are proposing is to go in there and cut that
2 stone out, those bottom two stones, to reveal the concrete
3 foundation behind it. We thought about doing that. We knew
4 the homeowners wouldn't liked it. We're taking
5 responsibility for all of the stone in the entire
6 neighborhood. We're going to take it all off and put it
7 back, all of it. Next picture, please.

8 Mr. Lucey didn't bring it up, but I didn't know what he
9 would say before I got up here. If you don't know, that
10 hole over that window is called a weep hole. Water is
11 actually supposed to get behind the brick and it runs down
12 into what's called an air vent behind the brick, and then it
13 exits through a weep hole, just like that. I believe that's
14 an Natalie Zitek's house. Mr. Whitlock would testify
15 there's no weep holes out there and they all need to be
16 redone. They're out there. All over that neighborhood.
17 Next picture.

18 Here again, some brick. Another picture, please.
19 Another brick facade with weep holes at the top. Next
20 picture, please. We're going to talk about this in just a
21 second. Let me back up just a second to talk about Justin
22 Lucey and Rhett Whitlock, okay? They were given access to
23 221 homes out there. We think. We don't know. We're not
24 allowed to talk to those people necessarily. They went the
25 221 homes and one thing that you didn't see on that screen,

1 one picture they didn't put it up. There's not one picture
2 of rock, or deterioration, water getting into the wood, the
3 wood framing, the wet insulation, moldy insides of the
4 house. Not one in 221 different houses built over the
5 course of six years. That's amazing. And that's why they
6 had the pivot to these things.

7 Every one of those houses were inspected, we're being
8 sued for, by your Anderson County code official. Every one
9 of them. Multiple times. You've got foundation
10 inspections, the frame inspection, plumbing, electrical.
11 They are inspected multiple times by the Anderson County
12 code official. And every single one of those houses has, and
13 every single one of those houses received a certificate.
14 Certificate of occupancy. Max, can you go back?

15 Well, let's talk about, let's talk about this and I'll
16 come back. There was some explanation about what a class
17 action is. Essentially, what you could do is you could file
18 a lawsuit by yourself. And then, if you have a lawyer like
19 Mr. Lucey, you could try to get it certified as a class
20 action. That's, you know, that's not the only way you can
21 do it. There's going to be 220 homeowners suing D.R.
22 Horton. There aren't. There's only one, in South Carolina,
23 the evidence will show, and we're going to bring some of
24 these folks for you, that if you get a letter on a class
25 action, if you don't do anything with it, you're in a

1 lawsuit. You're one of the class members

2 This is an opt out state. That means that if you
3 didn't open your mail, if you threw your mail away, or if
4 you didn't want to be in the class, but you don't write on
5 it and send it back, you are in the class action. And we're
6 going bring some witnesses that are going to talk about
7 that. Who did not think they were in the class.

8 We're also going to show evidence, and we're going to
9 bring somebody -- these houses are still selling. They were
10 sold for the mid two hundreds over the course of a period.
11 If they were -- over the course of that six years. If they
12 were as bad as Mr. Lucey wants to convince you, they
13 wouldn't sell. Here's the kicker. We got to take ten
14 depositions of homeowners out there. One of them bought his
15 house just a couple of years ago. Somebody did the right
16 thing and disclosed the fact that there was a lawsuit, class
17 action lawsuit, in the neighborhood. So we took his
18 deposition. So, why did you do this? Did you pay full
19 price? Yes. Did you know about the lawsuit? Yes. Did you
20 still buy the house? Absolutely. People are still buying
21 these houses for full price despite what Mr. Lucey says.
22 They're still selling out there.

23 Let me talk about the boring stuff. Believe it or not,
24 this is the boring stuff, not the stuff that I was just
25 telling you. Plaintiff the burden the proof. You guys have

1 probably watched a lot of lawyer shows. I haven't watched
2 any of them. The burden of proof in a criminal case, you've
3 probably heard before, is beyond a reasonable doubt. This
4 case is not that. It's preponderance of evidence. You may
5 have seen the statue of Lady Justice. She's holding, right,
6 like this and measuring. So, they have to prove to you that
7 those houses have these issues out there, by the
8 preponderance of the evidence. We don't think they can
9 generally, but one thing we know they can't do, they can't
10 prove that all of those houses have all of those issues and
11 need twenty million dollars for those houses out there.
12 Because, as you saw, they're not all the same. The judge is
13 going to tell you the law. We don't get to tell you the
14 law. The judge gets to tell you the law.

15 But that's it. You heard building code violations. You
16 saw a thing up here about building code violations. He
17 actually -- he put the correct standard on there. Building
18 code violation is only evidence that something is wrong.
19 He's going to talk about building code violations, building
20 code violations, throughout this case. It's only evidence.
21 He still has to prove that it caused some damage. We don't
22 think it did.

23 Again, the judge is going to tell you what the law is.
24 We believe the law is a general contractor, a developer is
25 not automatically liable for the work of its subcontractors.

1 Remember that. We'll tell you that at the end. The judge
2 will tell you that at the end. Just because there's
3 something wrong out there, doesn't mean that the general
4 contractor necessarily did anything wrong. And what lawyers
5 say is not evidence. That's myself included, but certainly
6 Mr. Lucey. Listen to the witnesses. Look at the evidence
7 and judge from that.

8 Let's talk about supervision, quality control. You
9 heard Mr. Lucey talk about that, and my list is too big to
10 go through. But D.R. Horton has a Superintendent on the site
11 every single day. They send architectural plans to their
12 subcontractors before the subcontractor ever gets there.
13 Those architectural plans and engineering plans, if
14 necessary for framing, go to the subcontractor before they
15 get there and are put in a book. They call it "the book"
16 that sits on the site. They then have quality control
17 checklists. Max, will you put that back up?

18 And then they hire contractors that have been vetted,
19 who can do the work, who are licensed, who are insured, and
20 have the sole right and obligation to control the manner,
21 method and performance of the work. The subcontractors are
22 the experts in their trades. The Superintendent that stands
23 out there doesn't know how to do electrical work, doesn't
24 know how to do plumbing work necessarily, unless he's been a
25 plumber before. He doesn't know how to do concrete work or

1 mason work. Here's the independent contractor agreements
2 that these contractors had to sign. They're going to be
3 responsible for the manner, method, and performance of the
4 work. We make them sign a document. Shall perform all work
5 in good and workmanlike manner in accordance with the plans
6 according to industry standard practice and warrants that
7 the work will exceed and meet the building code.

8 So, we vet them. You'll hear that some of our
9 subcontractors have been working in Charlotte. We knew
10 their work and we brought them down. We check their work.
11 If we don't know them, we give them a little bit of work.
12 You'll hear this evidence at trial. We give a little bit of
13 work and if they do a good job, we'll give them a little bit
14 more. We try to hire good contractors. We try to make sure
15 that the contractors have all the information they need. We
16 put a Superintendent on site every day that the
17 subcontractor has a problem. We require them to sign it,
18 that they did it, and they know how to do it, and they have
19 insurance, and they will come back and fix it if it's not
20 done. We have quality control checklists. There's an area
21 construction manager. There's a construction manager. I've
22 said, architectural engineering plans.

23 We also, in this, as you can see, we double up to make
24 sure that it gets done right. Contractors shall be
25 responsible for inspecting any work of another contractor.

1 Do not come and put your work on top of someone else's bad
2 work. If the window doesn't fit because the framer didn't
3 size the window is opening correctly, you signed a contract
4 you're not going to stick that window in there. If the
5 floor is not flat to put flooring on, to put boards on, you
6 better grind it. You better tell us, grind it, fix it.
7 Don't slap your flooring on a floor that isn't flat. These
8 are quality control measures to make sure that it doesn't
9 get done. I'm going to come and hurry up a little bit,
10 okay?

11 We also -- go ahead and stick that one back. Go back
12 one. A couple of things I'm going to hit just quickly. Our
13 Superintendent's bonus is actually partially funded by
14 quality control. D.R. Horton does something that most
15 others don't do. They follow up with the homeowner. They
16 walk them through the house to show them what's there. They
17 have them go through documents to sign off on what is
18 covered under warranty and what isn't covered under
19 warranty. Then they come back to them thirty days after
20 they've moved in and say, what did we do wrong. Tell us
21 what we did wrong. And if things are on that list that
22 thirty days that the Superintendent said were fixed, he gets
23 dinged. He loses bonus.

24 But that's not all. The evidence will also show that
25 we send them surveys at six months and then contact them at

1 eleven months. You've been in your house for 11 months.
2 What did we do wrong? What's wrong with your house? Let us
3 come fix it. Those surveys that folks fill out, they go to
4 the city manager, who you saw this morning, and they go to
5 Dallas corporate headquarters. And if those surveys aren't
6 good, because D.R. Horton takes quality seriously, there's a
7 call immediately back to the city. There's a call to the
8 Superintendent, and there's meetings. Why are we getting
9 bad reviews from these homeowners? N We don't want to build
10 crappy houses. This is all quality control. And then you
11 have panels. If it doesn't get fixed. If it doesn't get
12 resolved, the homeowners have a dedicated warranty and
13 portal they can go to. It goes to Pam Robinson and she's
14 going to come out or she's going to send her staff out to
15 your house to figure out what the problem is with your
16 house, or your house, and they're going to fix it if it's a
17 D.R. Horton issue.

18 And that's what they did with Natalie Zitek. They came
19 back a year later, two years later, and then three years
20 later. And they thought they fixed it, and they thought it
21 was okay. And then a twenty million dollar lawsuit showed
22 up. But Pam is the ultimate end of the day. Why do we have
23 15 of the same issues in this neighborhood? Let's have a
24 meeting with the builder out there, the area construction
25 manager, purchasing, so on. We're going to show you all

1 that evidence also.

2 I want to say something about cracking concrete. You
3 saw some pictures of cracking concrete. If you haven't
4 heard it before, you're not in the industry or you've never
5 been about around it. It's literally called crackcrete.
6 That's the joke. It's crackcrete. Concrete cracks. South
7 Carolina and the entire United States has tolerances of how
8 big the crack can be, how long the crack can be. Everyone
9 in the industry will admit that concrete cracks and it
10 depends on the crack, and that's why Pam's team has to go
11 out and evaluate each house and each crack to see if it's
12 wrong.

13 Some windows that he showed was a bad pictures.
14 There's hundreds, maybe thousands of windows out there that
15 don't have any issues. Is that Ms. Zitek's house?
16 Remember, she brought the class action. She's the one
17 standing in the shoes with all the other homeowners. Those
18 are her windows. There's nothing wrong with Natalie Zitek's
19 windows. Go to the next one. You can see the backyard
20 there back there. Next one. Is there another one? No. We
21 went through half of these houses. They're only going to
22 show you the half so that they can convince you they're all
23 bad out there. They all need to be replaced.

24 And let's talk about the windows a minute. D.R. Horton
25 doesn't provide the products, but as Mr. Lucey said they

1 provide service. They're the general contracts. They bring
2 subcontractors together and product manufacturers together,
3 in order to build a house. It's a service, just like they
4 put toilets in your house, or they put GE appliances in your
5 house. Here's what the evidence is going to show. And my
6 friend Kirby Shealy is back there representing Silverline
7 windows, and he's going to have a witness here named Andrew
8 Carr. Those Silverline windows that are so bad that they're
9 suing D.R. Horton for, are in tens of millions of houses.
10 Tens of millions of houses, but they're suing D.R. Horton
11 for that product. He admitted that he has no installation
12 problems. They weren't installed wrong, but he's suing D.R.
13 Horton. Just like you would sue D.R. Horton for a GE stove
14 or some carpeting that was made by Shaw Carpeting. We think
15 they've sued the wrong people and I think that they knew
16 that they did.

17 The AAMA labels. We're going to show you evidence about
18 that. Those AAMA labels are on the windows from Silverline.
19 They're stuck on the window. Paul Zitek went to the house
20 during construction and he took pictures inside. Guess what
21 you can see from inside the house on the windows before the
22 cleaning people came and took them off? The AAMA, or some
23 similar -- it doesn't have to be a AAMA. Or some similar
24 sticker on the windows. It's just -- it's made-up. When
25 the houses were sold, those stickers were taken off and now

1 they're trying to convince you that they weren't there.

2 Well, let Silverline tell you if they were there or not,

3 okay?

4 Let's talk about Rhett Whitlock a little bit. From our

5 understanding, Rhett Whitlock is going to testify to

6 essentially the plaintiff's case. Mr. Whitlock's testing

7 company has charged about \$400,000 to do his work.

8 He didn't find any rot. He didn't find any deterioration He

9 knows what he's doing. He's been doing it for a very, very,

10 very long time. But here's what he did in this case.

11 Despite no forensic investigating. And the other engineers

12 are going to testify about this. He did all of his

13 inspections and all of his testing in secret during the

14 litigation. He went out and took those pictures that Mr.

15 Lucey put on your screen in secret. He didn't invite the

16 other engineers. He didn't invite the other parties. He

17 didn't let us see his testing. He's going to talk about his

18 window testing. He didn't let us see how he did it.

19 Here's the killer. He cut into the evidence, ladies

20 and gentlemen. You've seen Law and Order I'm sure, right?

21 You can't take the knife and go stick it in the dishwasher

22 that was used in a murder. That's the evidence. You can't

23 spoil the evidence, right? Mr. Whitlock, without telling

24 anybody and all by himself, went out and cut into these

25 buildings all by himself. We couldn't take pictures or

1 videos of what he was doing. We couldn't ask him to move
2 his hand. We couldn't take pictures of the other side of
3 it. We couldn't pull up flaps if he was behind it, if it
4 was rotten or not. All in secret. We even went -- we were
5 allowed to -- the judge allowed us to go walk through a
6 hundred homes in January, February and March of this year.
7 Dr. Whitlock didn't come to one minute those walk throughs
8 in January, February, and March of this year. Not one
9 minute. Why? Because he knows he wouldn't find that all of
10 these buildings are bad. That's what the evidence is going
11 to show.

12 In addition to doing all his work in secret and not
13 inviting us to watch what he was doing to see how he was
14 doing it, he kept no contemporaneous notes. I was there on
15 this day. This is what I observed. No contemporaneous
16 notes of what he did. Instead, what the evidence will show
17 you, is that if a particular homeowner had an issue, they
18 had a brick crack or a crack or water against it, he was
19 taken to that house so that when he was asked how do you
20 know all of these issues exist at Rose Hill? Because one
21 hundred percent of the places I went had that condition.
22 And you know what, that's a true statement, because the only
23 places he went he was taken to.

24 We thought that was a little off, that he would go do
25 all of that inspection and say these things when we were

1 allowed to go out there and look at the houses. And we
2 weren't finding that all the houses had all these pictures
3 Mr. Lucey put up there. So, we hired a firm, and professor,
4 the statistician, and he's going to come here and he's going
5 to testify. Put that up, please. And while he can't say
6 that Mr. Whitlock should have tested or shouldn't have
7 tested, he knows one thing about sampling and statistics.
8 You have to go to houses randomly to see if the issues
9 exist. Randomly to houses. What Dr. Alford (PHONETIC) will
10 say -- he's been doing this for 50 years -- is that Dr.
11 Alford's opinions that all of these issues are out there are
12 statistically invalid. We're going to put them on -- we're
13 going to put them up on the stand. You evaluate what you
14 think about what Dr. Whitlock did and what Dr. Alford has to
15 say about it. But remember, the whole case rests on Dr.
16 Whitlock and what he says and how much it's going to cost.
17 And we think that he has some issues about what he did and
18 what he did.

19 So let me finish. Let me finish. I know that was long.
20 I apologize. It's a big case. It's a lot of stuff. It's
21 twenty million dollars. A little bit of leniency for being
22 long. It's a lot of money at stake here, okay? But what I
23 want you to remember throughout this case, we get to pick
24 what you see, right? We get to put up the witnesses and
25 evidence in front of you. The judge gets to tell you the

1 law, so you've got to follow what the law says. But there's
2 only one group that gets to do one thing, and that is to
3 determine the credibility of the witnesses and the evidence.
4 That's for you. You get to determine credibility. And so
5 we're going to put up evidence that these houses are still
6 selling. They don't all look like those pictures they
7 showed you. And specifically, the one person who's here,
8 suing for twenty one million dollars, lives in that house,
9 has admitted they haven't done maintenance on that house the
10 entire time they've lived there. They're going to try to
11 convince you that it's not habitable and it's falling down,
12 despite the fact that they've lived there for a decade and
13 haven't moved.

14 They had to put some \$50,000 or something into that
15 backyard and pool. Can you get the next one, please?
16 You will see in the evidence -- this is a Facebook page that
17 got cut off. Paul Zitek cut that on. They consider that,
18 on that Facebook page, you'll see in evidence, their resort.
19 That's my resort. I love it. But they're still suing us for
20 that backyard.

21 It's going to be a long trial. We're going to show you
22 a lot of stuff, but I need to hit those things. We're going
23 to ask you to come back knowing that we are taking some
24 responsibility for things. And come back and look at the
25 credibility and tell us what you think about what's wrong

1 out there. And if the Plaintiff's outrageous repairs is one,
2 necessary, and two, reasonable. That's all we ask of you.
3 We're going to ask for you to decide that. Thank you for
4 letting me do that. Again, it's a big case. It's an
5 important case for D.R. Horton. If I do or say anything
6 that makes you upset, please don't take it out on D.R.
7 Horton. You can take it out on me.

8 I appreciate you being here. I'm sorry if you don't
9 want to be here. I'll try to make it easy for you. Try to
10 make it a short for you, and I'll let you go here on Tuesday
11 afternoon. But thank you for your attention. I appreciate
12 it. Thank you.

13 THE COURT: Are there any third party Defendants that
14 wish to make an opening statement?

15 MS. MARTINEAU: Your Honor, may I approach?

16 THE COURT: Yes, ma'am.

17 (WHEREUPON, there was a bench conference.)

18 THE COURT: Ladies and gentlemen of the jury, one thing
19 I want to clarify. There is only one class member here.
20 The Plaintiff, she represents the class, but the Court
21 instructed them not to have everyone here today. We simply
22 didn't have the space in the courtroom, so that's why we
23 don't have two hundred plus people sitting out here today.
24 So, I wanted to clarify that. That was the Court's
25 instructions. Anything from the third party defendants?

1 MS. MARTINEAU: Good afternoon, ladies and gentlemen of
2 the jury. I am Elizabeth Martineau and I represent two of
3 the third party defendants in this case, J.L.S. Masonry and
4 M.J. Cowboys. I have an opportunity to make an opening
5 statement to you now or I could wait until Phase 2, if we
6 get there. On behalf of myself, I'm going to wait until
7 Phase 2 so you can get home a little bit earlier tonight.
8 Thank you.

9 MR. MIMS: Good afternoon. It's not noon at this time.
10 That was the time when I first introduced myself. I just
11 wanted to introduce myself. I'm Kevin Mims for M.L. Reyna.
12 We are also going to save our opening arguments, or opening
13 statements rather, until a later point in time. Thank you
14 very much.

15 MR. BOINEAU: Good afternoon, ladies and gentlemen.
16 Again, Trippett Boineau for BKF Builders. We also reserve
17 until Phase 2 if we get there.

18 MS. CANADAY: Good afternoon, ladies and gentlemen,
19 Stacy Cannady for Jesus Himenez. He is a fourth party
20 defendant. We too also reserve our right to make opening
21 statement to you all should we need to later. Thank you.

22 MR. SHEALY: Ladies and gentlemen. Mr. Imhoff
23 mentioned my name in his opening statement. Kirby Shealy.
24 I represent Silverline Building Products. I would likewise
25 reserve my opportunity to speak to you in an opening

1 statement at a later time if that becomes necessary. Thank
2 you.

3 MR. HUGHES: Ladies and gentlemen, I will also save my
4 opening statement until Phase 2. Thank you.

5 THE COURT: Ladies and gentlemen, that will conclude our
6 activities for today. It's been a long day. We will start
7 in the morning at 9:00. Now, I want you to be there in the
8 morning before you come out I want you to elect a
9 foreperson. This will be the presiding juror over your
10 deliberations in the end. This will also be the juror that
11 communicates with the Court if there are any problems. Any
12 communication between the jury and the Court should be in
13 the form of a written note signed by the foreperson. So,
14 remember your instructions. Don't talk about the case with
15 anyone. Don't do any investigation independently on your
16 own and don't deliberate amongst yourselves. I hope
17 everyone has a good evening, and we will see you in the
18 morning at 9:00.

19 (WHEREUPON, jury exited courtroom at 5:00 p.m.)

20 THE COURT: Okay. Anything from anyone before we go
21 into recess?

22 MR. LUCEY: Yes, sir. The Plaintiff moves for a
23 directed verdict. The Defendant admitted code violations in
24 their opening and the Defendant admitted that they had
25 responsibility for them, they were taking responsibility for

1 them, and the code violations were going to be addressed by
2 repairs. The repairs are, in fact, the damage that result
3 from code violations. The law does not allow Defendants to
4 play fast and loose with liability in opening statements.
5 Defendant can't defend a case saying they didn't do anything
6 wrong and then tell the jury how nice they are in the
7 opening and that they think there might be a couple of
8 problems, but we're going to pay to fix them and get away
9 with it. That's a directed verdict, Your Honor. They
10 admitted to code violations. They admitted responsibility,
11 they admitted the repairs that result from the code
12 violations, and we ask for the court to direct a verdict.
13 They admitted to those, Your Honor, both as to the brick
14 deviations and to the stone veneer deviations, and frankly
15 that's more than half the case.

16 THE COURT: Mr. Imhoff, any response?

17 MR. IMHOFF: We did no such thing, Your Honor. First of
18 all, I don't even remember any brick deviations we talked
19 about. What I said is that there were some issues. I never
20 said there were code violations. I said there are issues
21 out there that are asthetic only and we will take
22 responsibility for them, but part of the case, Your Honor,
23 is damages. And that's a big part of the case. And we did
24 not admit damages regardless of anything else that anybody
25 thinks I said. In fact, we think their demand of

1 \$20,000,000 is outrageous and we'll have evidence of to
2 refute it.

3 MR. LUCEY: Your Honor, the violation stone veneer being
4 within four inches of grade and two inches of hardscape,
5 quote, is a technical code violation. He repeatedly said
6 there were code violations that they were taking
7 responsibility for them and repairing them and we are
8 entitled to a directed verdict, Your Honor.

9 THE COURT: I heard the opening statements. I'm going
10 to deny your motion at this time. However, at the
11 conclusion of the testimony each side may make appropriate
12 motions. I will deny it at this time.

13 MR. LUCEY: Yes, Your Honor. One other matter is that
14 we had stipulated window installation out of the case. He
15 opened that door again in opening. He said they've
16 testified there is no window installation deviations. That
17 is not the case, and if they continue to reopen that door
18 it's going to bring that issue back into the case. I don't
19 want to bring it back in, I'm just mentioning it, that
20 there's a difference between an issue being stipulated out
21 and there being an admission that there was no violation,
22 and if they do that on these other settled issues they're
23 going to open that door. Because it can be unfair to an
24 expert who's trying to be careful about going to that issue
25 to be questioned on that issue by an attorney and he doesn't

1 know whether he's supposed to be following the Court's
2 ruling or the attorney's question, and that's just not fair
3 to the expert.

4 THE COURT: And I would urge the parties to speak to
5 your witnesses. Conform the questions that you ask them by
6 what's been settled and the issues before the Court. Mr.
7 Lucey makes a valid point that the door may be inadvertently
8 opened to something that is already out of the case that
9 would do nothing but confuse the issue. What the attorneys
10 say in opening is not evidence, so that's not before the
11 Court, but be careful with your witnesses. I'm not going to
12 make a ruling on whether a door is open or closed at this
13 point because I haven't heard from any witnesses, but that's
14 out there. You've settled a number of issues, so just keep
15 the case within the parameters of what we're still
16 contesting. Anything else?

17 MR. LUCEY: Not from the Plaintiff, Your Honor.

18 THE COURT: Anything from the Defendant?

19 MR. IMHOFF: Nothing else, Your Honor.

20 THE COURT: We'll be in recess ---

21 MS. MARTINEAU: Your Honor, again, the third party
22 defendants at this time there was at least two mentions
23 during the Defendant's opening of insurance and we would
24 move for a mistrial as to the claims against the third party
25 defendants.

1 MR. IMHOFF: Your Honor, we talked about this. It is in
2 that independent contractor agreement that the
3 subcontractors have to get insurance for D.R. Horton. I
4 think I may have mispoke when I said they have to get
5 insurance, which might have implied that they had to get
6 insurance for themselves. But, we talked about this and you
7 denied their Motion in Limine on that. I will try to work
8 with them to try to figure out how we say that.

9 THE COURT: I remember this issue from Friday. It's a
10 contractual issue, but we risk getting off into the jury
11 making a decision on an improper basis. So, I'm going to
12 deny a motion for mistrial, but this is something that -- I
13 understand the contract. I understand it's in the contract,
14 but -- and certainly this is Phase One of the case anyway.

15 MR. SHEALY: Your Honor, if I may. I understand as to
16 the contract there were some discussion that would be held
17 off until Phase two, but you granted at least two motions in
18 limine as to Phase one regarding admonishing the parties not
19 to mention insurance for any purpose and 411 clearly says
20 that you can't introduce insurance for the purpose of
21 liability, but also for any wrongdoing. Here, what Horton
22 is trying to do, is put the idea of insurance through
23 itself out in front of the jury. They're going to turn
24 around in Phase two and say that the failure to procure
25 insurance is therefore a breach and makes us liable for

1 their damages they've incurred. So, it's a pattern and a
2 trend. This used to be a misunderstanding so the Court
3 clarifies our understandings for the motions in limine there
4 should be no mention of it. I think it poisons the jury
5 against the third parties, and I join in the request with
6 counsel for JLS.

7 MR. SHEALY: Your Honor, I join, as counsel for
8 Silverline.

9 THE COURT: I'll note. All third parties join in it and
10 that motion is denied.

11 MS. MARTINEAU: Thank you, Your Honor.

12 MR. IMHOFF: Your Honor, we will agree to not mention
13 the insurance requirement in the contract in Phase One
14 again. That should get rid of the entire issue.

15 THE COURT: Right now we've just got it in the opening
16 statement. Now, if it inadvertently somebody plows off into
17 that with a witness, then we may have a different issue, so
18 stay away from it.

19 MR. IMHOFF: Will do, Your Honor. It's going to be part
20 of Phase two, is that correct?

21 THE COURT: Yes, sir. Yes, sir. Just stay away from
22 it.

23 MR. HUGHES: Your Honor, am I correct in understanding
24 that you've recognized that all parties are joining in that
25 motion?

1 THE COURT: Yes, sir, Mr. Hughes. All third parties are
2 joining in that motion. Okay, go get some rest.

3

4 TRIAL DAY 2: September 6, 2023

5 (WHEREUPON, the trial resumed at 9:05 a.m.)

6 THE COURT: How is everyone today? Before we get
7 started, I received a note from one of the jurors that he
8 was sitting and saw a individual walk into the courtroom, a
9 Eddie Kenzie. Now, I checked back and that was not listed
10 on the witness list, but he was concerned. He said it was
11 someone that he knew. Is that a party or connected to
12 someone?

13 (WHEREUPON, there was no affirmative response.)

14 THE COURT: Out of an abundance of caution he notified
15 the Court. He was concerned that it might be someone, but I
16 knew this individual wasn't on the witness list. I went and
17 checked again and was not. Make that a Court's exhibit,
18 please.

19 (WHEREUPON, jury note was marked Court's Exhibit Number
20 1 for identification.)

21 THE COURT: Are there any matters we need to take up
22 before we bring our jury in?

23 (WHEREUPON, there were no affirmative responses. The
24 jury entered the courtroom at 9:05 a.m.)

25 THE COURT: Juror number 15 has been elected foreman.

1 Here is another one.

2 (WHEREUPON, jury note was marked Court's Exhibit Number
3 2 for identification.)

4 THE COURT: Mr. Foreman, ladies and gentlemen of the
5 jury, good morning. I hope everyone had a good evening.
6 Mr. Foreman, you'll always sit on that end right there where
7 you are, and the four alternates will always sit on this
8 side. The rest of you are free to move about as you see
9 fit. So, I hope everyone is rested and had a good evening.
10 And we are ready to proceed. So, Plaintiff, call your first
11 witness.

12 MR. LUCEY: Yes, Your Honor. The Plaintiff calls Larry
13 Stephen Moore to the witness stand.

14 LARRY STEPHEN MOORE, having first been
15 duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. LUCEY:

18 Q Good morning, sir.

19 A Fine, thank you.

20 Q You're an engineer by trade, correct?

21 A Yes, sir.

22 Q And your firm name is Applied Building Sciences?

23 A Correct, sure.

24 Q And you have to have at least two offices, one in
25 Charlotte and one down in Charleston near me?

1 A And other offices as well. Yes, sir. That's the two
2 main offices.

3 Q And you're what's called a professional engineer?

4 A Yes, sir.

5 Q And you're licensed by the State of South Carolina,
6 among other states?

7 A That's correct, sir.

8 Q And you were hired by D.R. Horton to investigate Rose
9 Hill; correct?

10 A Yes, sir.

11 Q And that was not a new engagement with D.R. Horton; was
12 it?

13 A No, sir.

14 Q In other words, you've had hundreds of investigations
15 for D.R. Horton prior to Rose Hill; correct?

16 A I've had numerous investigations.

17 Q Hundreds; correct? Hundreds of homes?

18 A Hundreds of homes.

19 Q Before the two hundred some odd homes at Rose Hill;
20 correct?

21 A I don't know if it's hundreds, but we certainly have
22 numerous homes.

23 Q And most of those investigation of D.R. Horton homes by
24 D.R. Horton have been in the state of South Carolina;
25 correct?

1 A Yes, most of them have been.

2 Q And your first call in this matter was approximately
3 January of 2020. Do you recall that, sir?

4 A Yes, sir.

5 Q And you made your first visit to my client's site, my
6 client's neighborhood ---

7 MR. IMHOFF: Your Honor, we object to this line of
8 questioning. Can we approach?

9 THE COURT: Yes, sir.

10 (WHEREUPON, there was an off the record discussion.)

11 THE COURT: Mr. Bailiff, please take the jury to the
12 jury room.

13 (WHEREUPON, the jury exited the courtroom at 9:16.)

14 MR. LUCEY: Your Honor, should we invite the witness to
15 have a seat in the hallway? May we invite the witness to
16 have a seat in the hallway while we argue this matter,
17 please?

18 THE COURT: Mr. Moore, if you would just go out in the
19 lobby. Don't discuss your testimony with anyone.

20 (WHEREUPON, Witness exits the courtroom.)

21 MR. Imhoff, state your objection for the record.

22 MR. IMHOFF: Your Honor, the Notice to cure statute is
23 very very clear. Your Honor, to notice the cure statute is
24 very clear that the notice and opportunity to cure letter is
25 to go before litigation is final. If you look back at the

1 status of this case, Mr. Lucey did not do that. He did not
2 give an opportunity for notice and opportunity to cure, nor
3 inspections, Your Honor. So, when the case was filed and it
4 got to us -- and Mr. Crawford could talk to you more about
5 the chronology -- but we told Mr. Lucey that.

6 MR. CRAWFORD: Yes, we agreed to the notice of right to
7 cure. There was a discussion with the Court related to the
8 extent of the breadth of that inspection that was before the
9 Court on that motion.

10 MR. IMHOFF: And so, even though the case was filed, the
11 reason that we did our inspections and our reports in
12 response to the notice to cure after the case was filed
13 because Mr. Lucey had not done it before. But the Statute
14 on this is very clear, Your Honor, and I could pull up the
15 number. But the notice to cure Statute specifically says
16 that it is not admissible at trial. And again, as I said a
17 moment ago, the reason for that is it will chill settlement
18 negotiations. If builders and defendants are not allowed to
19 put true offers, true analysis of the issues out there or,
20 in this case, accept some things that maybe they're not
21 responsible for, builders defendants aren't going to put
22 anything in writing or offer anything in writing, which is
23 what the statute requires. A letter in response. Some
24 response. And so, all of that, the inspection, the
25 opinions, the report, Mr. Lucey is going to try to use that

1 which is barred -- it is not admissible by statute -- to try
2 to impeach Mr. Moore on his opinions, and potentially his
3 change of opinions. Where he attributed different things to
4 different people and looked at different things. But again,
5 it's all settlement negotiations. That's what the statute
6 is for. None of that should come in. It should have been
7 done before litigation was filed. That's the only reason
8 that it has a 2020 date and not a 2019 date, and we would
9 ask that all of that be kept out.

10 Your Honor, you allowed us to go out there and do
11 inspections. You allowed us to go out there do destructive
12 testing. Mr. Moore has developed opinions on those things
13 and is ready to testify about those things. But the other
14 part is not admissible and I think it's clear that it's not
15 admissible. And I will get the statute number if you'd like
16 it.

17 THE COURT: State the statute number you're using.

18 MR. LUCEY: Your Honor, as I mentioned at the bench when
19 we started arguing this, both reports state expressly that
20 they are in response to class certification materials. They
21 don't mention a right to cure. They were not provided to us
22 as part of the right to cure process. They came in
23 Discovery much later. They were not sent to us. The case
24 of Woodward v Southern Railroad, 88 S.C. 453 70 SE 1060
25 (1911) "Evidence has to be communications between the

1 parties to not be admissible as negotiations for offers or
2 responses." The statute only protects an offer and
3 response, and what you heard about Natalie not doing a right
4 to cure before she filed suit is incorrect. Natalie did
5 five years of right to cure. Natalie showed the Court that
6 she had already satisfied her obligations and given D.R.
7 Horton an opportunity to inspect her house and repair her
8 house many times, which they tried and they failed. What
9 was at issue in this case in the fall of 2019, early 2020,
10 was the right to cure for class members. Because there had
11 not been a class certified yet, there was a right to cure
12 for class members had to be done and the judge decided if
13 it's going to need to be done then might as well get it done
14 now while we're looking at class certification. I think
15 maybe the defendants also said they wanted some evidence
16 regarding classification. But at any rate, Your Honor, we
17 got the right to cure letters in this case for the homes
18 that did get inspected in 2020. Not one of those letters
19 included or referenced a D.R. Horton report. And Exhibit
20 24.4 and 24.6 -- there's actually four of these. These are
21 two exemplars. They expressly -- Exhibited 24.6 says,
22 quote, "This survey was conducted in response to a filed
23 motion for class action certification of approximately 234
24 homes in the Rose Hill Subdivision. Period. An affidavit
25 and reply affidavit alleges there are common and typical

1 defects to the Rose Hill subdivision residences, which
2 include defectively installed exterior building components,
3 fenestration products, cladding, concrete slabs, et cetera."
4 This was done in response to the motion of classification.
5 Not only that, thereafter Mr. Moore, the witness who is on
6 the stand, used these investigations to file an affidavit in
7 opposition to plaintiff's motion for class certification.
8 And I have that affidavit with me. I'd be happy to share it
9 with the Court. We didn't get these in the right to cure
10 process. These are not communications to us. They were
11 never referenced. These are not part of the offers. The
12 offers do not have these documents attached. We got these
13 in discovery and frankly, their attempt to exclude the first
14 two thirds of this witness's investigation -- his three
15 years of investigation. This is the first two thirds of it.
16 Because after they finished this, they sat back for a year
17 and did nothing until their inspections in December of 2022.
18 In fact, we scheduled inspections, additional inspections,
19 and they asked us to wait. Said we're not ready yet. Let's
20 wait. This is over half of this engineer's investigation of
21 this property that they're trying to exclude. I'd be happy
22 to hand up.

23 THE COURT: Let me let me look at it.

24 MR. LUCEY: I'm going to use my copy of 24.6. It has
25 notes on it, but there's a clean copy of 24.4. And the

1 witness also testified in his deposition that the affidavits
2 they referred to were Dr. Whitlock's affidavits in support
3 of classification.

4 THE COURT: Mr. Imhoff?

5 MR. IMHOFF: Can we -- I haven't seen those two exhibits.
6 I may have to get those numbers again, Your Honor.

7 THE COURT: 24.4 and 24.6.

8 MR. IMHOFF: My eyes are -- can I come up there and look
9 at them?

10 MR. LUCEY: They're in the Dropbox about a week ago.

11 MR. IMHOFF: They are. I haven't gotten there.

12 THE COURT: What's that statute you want me to look at?

13 MR. IMHOFF: Your Honor, the statute is 40-59-850, Your
14 Honor.

15 THE COURT: All right. Anything further?

16 MR. IMHOFF: Your Honor, the case law, in addition to
17 the statute, says any offer of settlement, repair, or remedy
18 pursuant to this section are not admissible in the action.
19 We've also filed a Motion in Limine, Your Honor, to keep the
20 reports out. We would ask these reports be kept out. He
21 can certainly ask him what he did investigations. He can
22 ask him what his opinions were and if they've changed. But
23 if this comes in or these come in, it's going to chill
24 settlement negotiations, real settlement negotiations, and
25 the opportunity to cure statute. And the reason the timing

1 is awkward, again, is because Mr. Lucey did not ever send,
2 despite what he just said -- he never sent a notice of
3 opportunity to cure. Ever. For any home, including Natalie
4 Zitek, which he was required to do. And that's why those
5 reports exist, because he didn't do it. And now he's trying
6 to use his error, either intentional or mistaken, to try to
7 get information to use against this witness, against the
8 statute, against the law, and because of how he handled his
9 case, Your Honor.

10 MR. LUCEY: Those reports have absolutely nothing to do
11 with negotiations. Were never provided to us in
12 negotiations. Were never referenced in negotiations. They
13 actually refer to the motion for class certification that
14 they're in opposition to our claims in the motion for class
15 certification. That they are common defects. And this
16 attempt to stretch the statute is just unbelievable. I do
17 not intend to offer the reports into evidence as pieces of
18 evidence, but I do intend to use them in my examination of
19 their expert that's been in this matter for three and a half
20 years, Your Honor.

21 MR. IMHOFF: May I cite the case, Your Honor, just so
22 that that you have it? Your Honor, the case that would
23 exclude this information that Mr. Lucey is trying to get to
24 is Allegro v Scully. It's 733 S.E. 2nd 114. And that's
25 that's the part the expert report is excluded due to

1 hearsay. The admission of the report itself simply because
2 the expert used it in forming his opinion was in error. The
3 report contained many instances of hearsay. It said the
4 homeowner reported this, that, and the other thing, Your
5 Honor. It is, for numerous reasons, it should not be
6 admitted.

7 THE COURT: I have reviewed the proposed exhibits and the
8 applicable law. I will sustain the objection as to the
9 exhibits, the reports themselves. I will allow the plaintiff
10 to question the witness as to what the witness did at the
11 scene, on what date. However, the circumstances are
12 irrelevant for purposes of the trial. They could be
13 construed as -- they don't specifically state that they were
14 as a result of right to cure. The motion to certify the
15 class is mentioned, however, that issue has been decided by
16 the Court and that's not being re-litigated here. So, I
17 don't want the reports in, but you may question the witness
18 as to when he was there and what he did while he was there2.

19 MR. LUCEY: I assume that if he gives an answer that's
20 contradicted by the report then the report can be used for
21 the proper impeachment process.

22 THE COURT: We'll have to wait and see what the
23 witnesses says, but the actual reports themselves I'm going
24 to sustain the objection at this point.

25 MR. IMHOFF: Thank you, Your Honor. How would you like

1 us to handle that? Because that may actually happen and
2 then he's going to bring the report up to him which has
3 hearsay in it, and the offers, and his analysis.

4 THE COURT: Well, he's going to have to ask the witness
5 what he said at a particular time or what his opinion was.
6 And certainly he hasn't been admitted as an expert yet into
7 the case, and once he's admitted as an expert that changes
8 the parameters of the question. I'll just have to hear the
9 question at the time. I'll just have to get context of the
10 question.

11 MS. WOOTEN: Your Honor, one more thing.

12 THE COURT: One of you needs to -- one of you needs to
13 argue the motion. This is the third one. I understand all
14 of you had different roles in it, but Mr. Imhoff is arguing
15 the motion.

16 MR. IMHOFF: I was just wondering if the third parties
17 or fourth parties had anything.

18 THE COURT: All right, let's let's get our witness back
19 in.

20 WHEREUPON, the jury entered the courtroom at 9:37.)

21 THE COURT: Mr. Lucey proceed.

22 DIRECT EXAMINATION

23 BY MR. LUCEY:

24 Q Sir, in the year 2020, your firm had the opportunity to
25 take numerous photographs of forty-five or so houses in the

1 Rose Hill neighborhood; correct?

2 A Yes, sir.

3 Q And then, from time to time thereafter, D.R. Horton has
4 provided you with materials from the build out of this
5 neighborhood for you to review as part of your document
6 review, correct?

7 A Correct.

8 Q And you have had the opportunity to return to Rose Hill
9 with several crews and to observe more houses in late 2022
10 and early 2023, correct?

11 A Yes, sir.

12 Q In fact —

13 THE COURT: Mr. Lucy, let me stop you real quick. Mr.
14 Bailiff, would you give our jury the notepads? Did you give
15 them the note pads? You've given them? Okay. Everyone,
16 write your name on top of your notepads. Go ahead. Mr.
17 Lucey. I'm sorry I interrupted you.

18 MR. LUCEY: No worries, sir.

19 Q And in December or so of 2022, your firm conducted
20 visual inspections of a number of houses on a number of
21 days, correct?

22 A Yes, sir.

23 Q And your firm and you employ lots of qualified
24 attorneys and EIT's and architects that assist you in your
25 work, right?

1 A I don't employee any attorneys. I employee engineers.

2 Q I'm sorry if I said attorneys. Architects and
3 engineers and EIT's. EIT's being engineers in training.

4 A Yes, sir.

5 Q And you sent a bunch of them out to Rose Hill, right?

6 A Yes, sir. And I went with them sometimes as well.

7 Q And then in January you continued some more visual
8 inspections of the class homes, my clients' homes, right?

9 A Yes, sir.

10 Q And then February and March, you had the opportunity to
11 make a lot of what are called test cuts in these houses,
12 right?

13 A Correct, sir.

14 Q And the test cut is where you take a saw and you cut
15 apart the house so you can see something that's hidden
16 right? In any condition.

17 A Correct, sir.

18 Q And you do it strategically. You pick a location where
19 you want to learn something, and that's where you do a test
20 cut, correct?

21 A Correct.

22 Q And of the twenty houses that were eventually selected,
23 you were able to do a test cut anywhere you wanted on the
24 house as long as you told them in advance what you were
25 going to do, correct?

1 A Yes, sir.

2 Q And so sometimes you cut the brick under a window,
3 right?

4 A Yes, sir.

5 Q Sometimes you cut over a window, correct?

6 A Yes, sir.

7 Q And where you wanted to you cut over garages, right?

8 A Yes, sir.

9 Q And you had the opportunity to cut under second floor
10 windows too, correct?

11 A Yes, sir.

12 Q And you've had the continued opportunity to review
13 additional materials supplied to you by D.R. Horton and
14 their counsel in this matter, correct?

15 A Correct.

16 Q Their counsel being Mr. Crawford's law firm, correct?

17 A Yes, sir.

18 Q Who, like D.R. Horton, you've worked with a number of
19 times previously, right?

20 A Yes, sir.

21 Q Not only for D.R. Horton, but in other matters
22 unrelated to D.R. Horton, right?

23 A Yes, sir.

24 Q So, there's a working relationship there with you and
25 the Crawford Law Firm, correct?

1 A Yes, sir.

2 Q Now the destructive tests concluded in about March or
3 so that of this year, right?

4 A That sounds about right, sir.

5 Q And after that, the only other thing that's happened in
6 your investigation was that you were provided with some
7 depositions by some other engineers to review, correct?

8 A Depositions by lots of folks, not only engineers.

9 Q And you've skimmed them, or read them, or whatever as
10 appropriate, correct?

11 A Yes, sir.

12 Q And a number of these people you recognize as qualified
13 engineers, correct?

14 A Yes, sir.

15 Q And by the way, I forgot to mention, you're aware of
16 course that Dr. Whitlock published four or more different
17 reports in the Fall of 2021.

18 MR. IMHOFF: Your Honor. Would you like me to state my
19 objection from jury, Your Honor?

20 THE COURT: Counsel approach.

21 (WHEREUPON, a brief conference at the bench.)

22 Q And, as I was saying, sir, you were provided with
23 copies of the four or more reports that Dr. Whitlock issued
24 in the Fall of 2021, correct?

25 A Yes, sir.

1 Q And whether you agree with them or disagree with them,
2 they were some fairly detailed reports, correct?

3 A They were information.

4 Q Fairly lengthy, correct?

5 A Some of them were short and some were not.

6 Q And you've reviewed them as part of your process of
7 forming your own opinions in this matter, correct?

8 A Yes, sir.

9 Q And what you did in this case for D.R. Horton, is it,
10 is it aptly called forensic engineering?

11 A Yes, sir.

12 Q And you do it regularly, correct?

13 A Yes, sir.

14 Q And you and Dr. Whitlock might apply your engineering
15 principles differently, but in theory you're applying the
16 same engineering principles, correct?

17 A Yes, sir.

18 Q It's the same ones you both learned in school, right?

19 A Correct, sir.

20 Q And then you've refined as you become experienced as a
21 professional, right?

22 A Yes, sir.

23 Q And you've brought all this to bear in this matter,
24 correct?

25 A Brought what to it?

1 Q You brought all those, all that background to bear in
2 this investigation, correct?

3 A Yes.

4 Q And you believe you did a professional investigation in
5 this matter, right?

6 A Yes, sir.

7 Q And you have reached opinions, to a reasonable degree
8 of certainty in your field of expertise in this matter, on
9 behalf of the D.R. Horton, correct?

10 A Yes, sir.

11 MR. LUCEY: The Plaintiff would move to certify Engineer
12 Harry Steven Moore as an expert in Forensic Engineering.

13 THE COURT: Any objection?

14 MR. IMHOFF: No objection, Your Honor.

15 THE COURT: The witness would be admitted as an expert
16 in Forensic Engineering without objection.

17 Q Now, by the end of March or spring of 2023, you had
18 reached your conclusions in this matter, correct?

19 A I had reached most of them, yes.

20 Q In early May of 2023, it was your opinion that there
21 was only one building code violation at Rose Hill, correct?

22 A That was my initial observations.

23 Q That wasn't your initial observation. That was your
24 May, early May 2023 observation after three years, correct?

25 A Yes.

1 Q One.

2 A Yes.

3 Q You've changed your mind, correct?

4 A Yes.

5 Q There's a lot more building code violations at Rose
6 Hill than one, right?

7 A There are some that are building code violations. A
8 lot of them are small, technical issues.

9 Q Do us a favor, please. Let's deal with the technical
10 issue up front here. Tell me where I can find the building
11 code. A provision that says technical violations don't
12 matter.

13 A You won't, sir.

14 Q So, technical or otherwise, you'd agree with me that
15 there's a half dozen or more building code violations in the
16 brick facades at Rose Hill, correct?

17 A There are issues with the bridge facade.

18 Q Construction defects, right?

19 A Yes, sir.

20 Q Building code violations, correct?

21 A Yes, sir.

22 Q And the building code is the minimum standard of care
23 for a builder in the State of South Carolina, correct?

24 A Yes, sir.

25 Q They're not supposed to violate that code, correct?

1 A That's correct.

2 Q You would also agree with me that there is a number of
3 building code violations present at Rose Hill in the stone
4 veneer facades on my clients' properties, correct?

5 A Yes, sir.

6 Q Again, a breach of the minimum standard of care for a
7 builder, right?

8 A Yes, sir.

9 Q Now, you actually don't know whether there are brick
10 defects on Natalie Zitek's house do you?

11 A Correct.

12 Q You don't deny that your firm has had an opportunity to
13 look at her house, do you?

14 A We looked at her house. One of my staff members looked
15 at her house visually.

16 Q You didn't go that day, did you?

17 A No.

18 Q And your staff member missed the cracking on the second
19 floor under her window, correct?

20 A I don't know if they did or did not, sir.

21 Q You don't have it in your materials from your staff, do
22 you?

23 A I haven't looked at that picture to tell you whether or
24 not.

25 Q And your staff member also missed the bowing in the

1 garage opening shelf angle that was present after all the
2 repairs; didn't they?

3 A I would have to see the information, sir.

4 Q You're sitting here today, and you don't know one way
5 or the other whether the brick work above the Zitek garage
6 continues to be defected today, correct?

7 A I don't.

8 Q You have no information that the problems with regards
9 to the foundation supported brick not being separated from
10 the frame supported brick is any different at Natalie's
11 house than any other class member's house, correct?

12 A Not at this time, no.

13 Q You did agree with Natalie and her attorney and the
14 engineer that the building code provision 7.372 expressly
15 prohibits frame supported brick from being in contact with
16 foundation supported brick, correct?

17 A No, I would not agree with that. The reason being that
18 there was an amendment to the South Carolina Building Code
19 in 2006 which eliminated that requirement for all houses
20 built under the 2006 building code, which was the Zitek's
21 house.

22 Q Sir, do you deny telling me previously under oath that
23 the building code requires frame supported brick to be
24 separated from foundation supported brick code section
25 703.702?

1 A I told you that at that time. Since that time, sir,
2 I've learned that there was an amendment to the South
3 Carolina Building Code to the 2006 code deleted those
4 requirements. I now know that.

5 Q Just so the jury is absolutely clear, you don't deny
6 four months ago telling me under oath that the building code
7 required those to be separated, correct?

8 A I told you that at the time, sir. I'm telling you
9 today that the information came forward to me that in 2006,
10 the South Carolina amendment was made to the building code
11 which eliminated the section having to do with the shelf
12 angle.

13 Q Sir, you and I previously looked at some of your
14 photographs together. Do you recall that?

15 A I do, sir.

16 Q Let's look at some more of them. I'm going to refer to
17 what's in evidence as Plaintiff's Exhibit 127.5 which is 4
18 Dartford. You were there on February 6, 2023 inspecting
19 that house with your team, correct?

20 A Yes, sir.

21 Q We'll have Lawton put that up on the screen for us.
22 Would you please go to photo 291 on February 6th, 4
23 Dartford. Sir, this photograph you took is the top left of
24 the garage opening at 4 Dartford, correct?

25 A Yes, sir.

1 Q And just so that we can put that in perspective, I
2 brought with me Plaintiff's Exhibit 127.5a. Which is the
3 front facade on that house. Do you see that?

4 A Yes, sir.

5 Q This is out of your elevation folder for this house.
6 Do you recall being at this house?

7 A Yes, sir.

8 Q And does that look to you like the garage that we're --
9 the corner that we're seeing here in Photo 291?

10 A It does.

11 MR. LUCEY: The Plaintiff moves 127.5.

12 THE COURT: Any objection.

13 MR. IMHOFF: Yes, we would just like the picture
14 identified by who took it, when, and where.

15 THE COURT: Lay some foundation, please, for the
16 picture.

17 Q I'm sorry, sir. Did you -- in your photographs, you
18 occasionally separated out elevations and the brick cuts and
19 the brick fixtures and the pictures of other components. Do
20 you recall doing that?

21 A Yes, sir.

22 Q Do you recall taking a picture of the elevations at 4
23 Dartford when you were there on February 6?

24 A Yes. If there are my initials I took them.

25 Q Yes, sir. And do recognize this as the house where

1 you took your pictures on that day?

2 A Yes, sir.

3 MR. LUCEY: Plaintiff moves Exhibit 127.5a into
4 evidence?

5 THE COURT: Any objection?

6 MR. IMHOFF: No objection.

7 THE COURT: Plaintiff's Exhibit 127.5a is admitted.

8 Q Can you put Exhibit 127.5a on the screen just for a
9 second so the jury can see the front of the house? So,
10 there where the left-hand carriage light is, that's where
11 we're about to go back to, that upper left corner on the
12 garage, correct?

13 A Yes, sir.

14 Q Going back one, please, to photo 291. The brick that's
15 partially under, partially in front of the shelf angle, is
16 fractured, correct?

17 A Yes.

18 Q And you'd agree with me that bricks typically fracture
19 because of stress, correct?

20 A That is one possibility.

21 Q And the stress at this location is more likely than not
22 occurring from a frame supported shelf angle adjoining a
23 foundation supported brick without an isolation joint at
24 that location, correct?

25 A It's a possibility. I'd like to know when this house

1 was permitted to see if that was a requirement for this
2 particular house.

3 Q And sir, just for a moment, regardless of whether
4 you're correct or not about the building code change, let's
5 talk to the jury about the theory behind frame supported
6 brick being separated from foundation supported brick. Are
7 you with me?

8 A Yes, sir.

9 Q Foundation supported brick, in theory, has a great
10 foundation -- pardon the pun -- and it doesn't move a whole
11 lot, right?

12 A Correct.

13 Q And, in fact, if anything, brick comes out of the oven
14 the smallest that ever is and it slightly expands during its
15 first year, correct?

16 A That's correct.

17 Q Now, in contrast, the frame supported brick next to
18 it is actually getting support and strength from wood
19 framing, right?

20 A It is attached to the wood frame.

21 Q That piece of steel that the jury sees in that picture,
22 that shelf angle, is bolted into the framing behind the
23 brick veneer, correct?

24 A Correct. Next to the shelf angle.

25 Q And -- thank you. And for their -- for their

1 terminology for this week, let's take pause there for a
2 second. The same piece of steel is over a window and not
3 attached to framing is called a lentil, but if it's over a
4 garage like this and bolted to the framing it's called a
5 shelf angle, right?

6 A The bolting makes it a shelf angle.

7 Q So, this piece of shelf angle being attached to the
8 wood, the wood on the house is going to dry out and compress
9 during the early years, correct?

10 A Correct.

11 Q And specifically, the wood frame on a house dries out
12 and compresses it shrinks ever so slightly down towards
13 gravity, down towards the ground; right?

14 A Correct.

15 Q So, that brick that's expanding ever so slightly up
16 from the foundation and the shelf angle that is supported by
17 framing that is shrinking ever so slightly down towards the
18 Earth are going two different angles; correct?

19 A Two different ways.

20 Q And it makes their laths go wide. Good workmanship
21 would have an isolation joint between two materials that are
22 moving in two different directions; correct?

23 A Correct.

24 Q So, even if the building code did change, good
25 workmanship would have a home builder recognize two

1 materials going two different directions being attached to
2 each other; correct?

3 A Well, sir, I've never seen one installed in all my
4 years of being around brick homes.

5 Q And you haven't seen it designed by D.R. Horton to be
6 in its houses at Rose Hill, have you?

7 A What, sir?

8 Q You haven't seen the separation of the frame supported
9 brick and the foundation supported brick designed or
10 specified for the homes in Rose Hill; have you?

11 A You're talking about the joints? No.

12 Q Let's go to the bottom picture 292, please. That's
13 just a slightly closer picture of that fracturing,
14 permeating that brick, correct?

15 A Yes, sir.

16 Q And going to 294, please. These are the photo numbers
17 on the contact sheet in evidence, sir, from your file. So,
18 these are your photo numbers I'm using. You're pointing out
19 the mortar in this photograph, sir?

20 A Yes, sir.

21 Q And 290, excuse me, 405. Now, we've moved to the stone
22 veneer that's on this house, correct?

23 A Yes, sir.

24 Q So, this is one of those houses with both stone veneer
25 and brick?

1 A Yes, sir.

2 Q And the stone veneer is on what we call the front
3 elevation of the house?

4 A Yes, sir.

5 Q And we go to image 407, the next image. We see around
6 this corner. That's around the corner from what we just saw
7 in 406, correct?

8 A That's correct, sir.

9 Q The jury is looking at the stone veneer building code
10 defect, correct?

11 A You're looking at stone veneer separating from the
12 brick.

13 Q It's not applied to the building -- to the structure
14 properly, is it, sir?

15 A No.

16 Q It is cantilevered across without a backer; correct?

17 A Correct.

18 Q The stone veneer manufacturer does not provide for its
19 stone to be used in this situation, does it?

20 A It's allowed to be installed on brick with the proper
21 substrate.

22 Q Not as it's shown in this picture, correct?

23 A Not as it's shown in this picture.

24 Q And if the jury could actually stick a pencil through

1 the gap between the stone veneer and the brick on the front
2 corner of 4 Dartmouth, that pencil would eventually hit the
3 framing behind the wood, correct?

4 A Correct.

5 Q Wood framing, right?

6 A Wood framing.

7 Q And the separation is no longer going to keep wind
8 driven rain out of that gap away from the wood framing,
9 correct?

10 A Correct.

11 Q And the failure to have a weather resistant exterior is
12 itself an additional building code violation, correct?

13 A Yes.

14 Q How many are we up to?

15 A I'm not keeping count, sir.

16 Q Let's go to the following photograph, please. That
17 will be 408. This is just slightly further down that same
18 wall showing the gap, correct?

19 A Yes.

20 Q 409, please. This is a slightly wider gap or better
21 photograph, correct?

22 A Yes.

23 Q And we're still at 4 Dartmouth, right?

24 A Yes, sir.

25 Q 412, please. It's just the same gap from a different

1 angle, more from the side of the house, correct?

2 A Correct.

3 Q 419, please. We've now moved around the corner back to
4 the garage where you've performed the test cut; correct?

5 A Correct, sir.

6 Q This test cut is at 4 Dartmouth?

7 A Yes, sir.

8 Q In other words, to be expressed about it you all have
9 actually cut into the mortar and removed the bricks from the
10 structure, correct?

11 A Correct, sir.

12 Q And the jury here can see how that shelf angle is
13 bolted to the structure, that one big bolt we see in this
14 picture; right?

15 A Correct.

16 Q And there's a half dozen or more of those things
17 running down that shelf angle to the other side, right?

18 A That's correct, sir.

19 Q And that's what you and I are saying to the jury when
20 we say that this is wood supported brick above the garage,
21 correct?

22 A Correct.

23 Q Behind that white paper they see, behind the building
24 paper, or some people call it WRB, weather resistant
25 barrier. Behind that is wood framing and sheathing on top

1 of wood framing, right?

2 A Correct, sir.

3 Q And this particular photograph shows the jury another
4 building code violation they haven't heard about before,
5 doesn't it?

6 A Yes.

7 Q The flashing of the shelf angle is not there again, is
8 it?

9 A No, it's not.

10 Q It's cut about a foot and a half short by this picture,
11 correct?

12 A Correct, sir.

13 Q And the failure to properly flash a shelf angle is
14 expressly a building code violation, correct?

15 A Correct.

16 Q Let's pause for a second, sir. Let's talk to the jury
17 about what you and I are talking about when we say building
18 code. After Hurricane Hugo came through about 1989, 25
19 years ago. A couple years after that, the State of South
20 Carolina adopted the International Residential Building
21 Codes in one form or another, correct?

22 A Correct.

23 Q And they have adopted those since that time, correct?

24 A Correct.

25 Q And the State of South Carolina actually has a rule or

1 law that required each municipality to adopt approved
2 building codes, correct?

3 A Correct.

4 Q And one of the approved building codes that the
5 municipality is permitted to adopt, in the requirement that
6 they do adopt one, is the International Residential Building
7 Code, correct?

8 A Correct.

9 Q And some people in the business refer to it as the IRC?

10 A Correct. For houses it would be the IRC.

11 Q And for Rose Hill it would be the IRC, correct?

12 A Correct, sir.

13 Q And from time to time the IRC gets amended and a new
14 version gets published and states look at it and eventually
15 they adopt it in one form or another.

16 A Generally, about every three years.

17 Q And as to Rose Hill, the three IRC's that are
18 applicable are the IRC 2006?

19 A Yes, sir.

20 Q 2012?

21 A Yes, sir.

22 Q And 2015, perhaps, for a couple of houses.

23 A Correct.

24 Q And all three of those codes require that you
25 completely flash the shelf angle that we were seeing that

1 picture back up there, 419, correct?

2 A Yes.

3 Q 420, please. Actually, skip down to 422, please.

4 That's a tie. That's a brick tie, right?

5 A Yes, sir.

6 Q And it only has a little bit of mortar on one edge of
7 it, correct?

8 A Correct.

9 Q And basically, the jury hadn't heard of these before.
10 This is how a mason ties his brick veneer to the wood
11 structure so that, among other things, in an earthquake or a
12 real large storm that the veneer doesn't fail -- doesn't
13 fall away, right?

14 A Correct.

15 Q And the building code has very specific provisions as
16 to where you need to locate these, how often, and how you
17 use them, correct?

18 A Correct.

19 Q And for this brick tie to work, it actually has to be
20 nailed into the frame, right?

21 A Correct.

22 Q And not just any part of the wood structure. The
23 actual framing behind the sheathing; correct?

24 A Correct.

25 Q Because those fasteners that are holding these brick

1 ties in place, they can't get enough strength if they're
2 only nailed in the sheathing, right?

3 A Well, then on the thickness of the sheathing. They
4 might work.

5 Q The building code wants you to get them into the
6 framing to make sure there's adequate support for each and
7 every brick tie fastener, correct?

8 A Correct.

9 Q And that's why, for instance, you'll often see brick
10 ties at every 16 inches, because that's where the frame
11 member is, correct.

12 A Correct.

13 Q Now, just to be clear, you did not try and do a survey
14 as to the fastening of the brick ties into framing members
15 at Rose Hill, correct?

16 A I did not.

17 Q You don't have any data, hard data, to share with us as
18 to the quantity or propensity of the brick ties to be
19 properly fastened into the Rose Hill framing; correct?

20 A There's no reason to be concerned about the bridge.

21 Q But going to the other issue, the use of brick ties, we
22 can tell by this brick tie that it didn't get used; correct?

23 A I would not speculate on that, sir.

24 Q There's not enough mortar on that brick tie for it to
25 have been used in a brick and mortar joint, is there, sir?

1 A I am not going to address that.

2 Q And brick ties that don't actually go into the mortar
3 joint don't count towards code compliance, correct?

4 A Correct.

5 Q Let's go to photograph 429, please. Here's another
6 brick tie with no mortar on it, correct?

7 A Correct, at this moment.

8 Q You see it faster into above the shelf angle, but
9 there's no mortar on the other end, correct?

10 A Well, there would have been mortar there, because that
11 is a brick, it was a standing brick, and you would have
12 mortar there you have brick immediately adjacent to it so it
13 would have had to have had mortar.

14 A And let's go to photo 459, please. We'll skip forward
15 to the subdirectory which will be photo 314 initially,
16 please, sir. Let's go to 315 for better lighting, please.
17 This location we're looking at here is a semi-complicated
18 joiner location on the second floor where a roof is coming
19 into a valley which is adjoining a stone facade wall on the
20 second floor; correct, sir?

21 A As well as a perpendicular wall that might be a
22 different material.

23 Q And if we go to photo 318, please. You can see back
24 behind the trim board the gap between the second wall and
25 the side wall; correct?

1 A Yes.

2 Q Photo 319, please. Thank you. This is a close up of
3 the same gap, correct?

4 A Yes, it is.

5 Q And in this photograph, the jury can actually see the
6 exposed lath on the edge of the back of the stone, correct?

7 A That is a very outside edge of the lath.

8 Q Right. No lath -- no lath is ever supposed to be
9 exposed to the air, correct?

10 A Correct.

11 Q It's supposed to be completely embedded in the first
12 coat of mortar, correct?

13 A Yes.

14 Q It is the first coat of mortar that prevents moisture
15 in the air from rusting the lath, correct?

16 A Yes.

17 Q The jury sees right here on this screen is another
18 building code violation, correct?

19 A Yes. There's no rust on the lath at this point.

20 Q I'm sorry. I didn't hear you.

21 A There's no rust on the lath.

22 Q It's another building code violation, correct?

23 A Yes.

24 Q Would you tell us what provision in the building code
25 we can look at that tells us that if it hasn't rusted yet

1 it's not yet a building code violation?

2 A I was just pointing out. There's not one. I was just
3 pointing out the fact that it's not rusted.

4 Q There is not a provision in the building code excusing
5 defects that have not rusted yet, correct?

6 A No.

7 Q 321, please. In this picture, sir, the jury can see the
8 building paper behind the stone, in the middle stone,
9 correct?

10 A Yes, they see it wrapping around the wall.

11 Q And above the building paper next to the middle stone,
12 the jury can see the sheathing, the wood sheathing, behind
13 the top stone, correct?

14 A I can't tell if that's sheathing or the mortar.

15 Q 343, please. Now, it's kind of hard to see. It's kind
16 of what we call latent, but there is a fracture in the brick
17 in this picture; isn't there, sir?

18 A Yes. There is a fracture of the mortar between the
19 sill and the face clad.

20 Q When I use the word latent, let's put some teeth on
21 that. Somebody on the ground probably could not see that
22 crack that you and I are talking about, right?

23 A Probably would not.

24 Q In fact, somebody inside that bedroom, if that's what
25 it is, probably wouldn't see that crack, correct?

1 A Probably would not.

2 Q In fact, somebody who was not involved in construction
3 probably wouldn't know that there was anything wrong with
4 that, correct?

5 A They may not observe it.

6 Q But that's what we call latent, as opposed to patent,
7 correct?

8 A Okay.

9 Q Because, patent, I'm waiving this. It's like, hey. You
10 can notice it easily, right?

11 A Yes, sir.

12 Q But latent, it's hard to see, right?

13 A Well, it's open and visible. You would just have to
14 look for it.

15 Q You have to know to look for it, correct?

16 A Correct.

17 Q So, somebody like you might recognize right away.

18 Where a homeowner might be five years for them to understand
19 that that's a crack that's not supposed to be there,
20 correct?

21 A I can't speculate on what the homeowner might or might
22 not do.

23 Q You would agree with me that in your three or four
24 decades of engineering experience homeowners typically
25 really don't know much about brick facades, do they?

1 A I wouldn't speculate on what homeowners would know,
2 sir.

3 Q Now, where this crack is, that brick under the window
4 is supported by a frame, correct?

5 A Correct.

6 Q Around the corner on the side of the house, the brick
7 is supported by the foundation; correct?

8 A Well, of course the house on the sides is supported by
9 the frame. I'd have to go back and look at how this was
10 built to determine whether or not it was supported by the
11 frame or the foundation on this particular location. Might
12 be a continuous brick climb from the base up.

13 Q Sir, you cannot identify for this jury a single house,
14 a single brick house at Rose Hill that has side brick that
15 is not foundation supported unless there's a garage in that
16 side of the house.

17 A I will agree with that, yes.

18 Q And if, in fact, that that side of the wall is
19 foundation supported, this area will be seeing a similar
20 stress as we saw at the garages where the foundation
21 supported brick is moving ever so slightly upwards and the
22 wood supported brick above the low roof is moving ever so
23 slightly downwards; correct?

24 A If that's the case.

25 Q And you have no other explanation for that crack at 404

1 Dartmouth on the second floor, that the jury is looking at
2 right now, other than what you and I just discussed,
3 correct?

4 A There could be other reasons. It could be a bad joint.
5 It could be other reasons, but there's been no investigation
6 of that joint or that location to tell exactly what the
7 issue caused it.

8 Q Let's go to 345, please. And that's the same crack we
9 just looked at from a better angle, correct?

10 A Correct.

11 Q And if we go to 353, please. Still at 4 Dartmouth. If
12 I slip up sometime and say the words MSV, or you say the
13 words MSV, we're talking about the same thing as stone
14 veneer; correct?

15 A That's correct, sir.

16 Q And I think it stands for like manufactured stone
17 veneer maybe.

18 A Yes, sir. Masonry Stone Veneer.

19 Q But it is manufactured right?

20 A That's correct, sir.

21 Q It's a synthetic product.

22 A Correct, sir.

23 Q And it's what we call a proprietary product?

24 A Yes.

25 Q And because -- the word proprietary product, that term

1 is a term of art on the building code; right?

2 A Yes.

3 Q Because the building code has very specific
4 requirements for historical products, but not so much for
5 proprietary products, right?

6 A Correct.

7 Q So, if you have a proprietary product, the building
8 code requires you to follow the manufacturer's installation
9 instructions, because it's a proprietary product, correct?

10 A Generally they do.

11 Q And here in photo 353, we have MSV or stone veneer.
12 We're looking at another building code violation that the
13 jury has not heard about; correct?

14 A Which one are you talking about?

15 Q Well, how many do you see in here?

16 A Well, if you're talking about the fact that the stone
17 is sitting on the roof, I would need to know the building
18 code permit for this building, because there's also a
19 revision to the IRC of 2006 which did not require any
20 clearances for MSV on houses.

21 Q Sir, MSV installed -- the manufacturer of the MSV does
22 not permit his product to be installed on roofs like we see
23 in photo 353, correct?

24 A Anatoliy did not have a reference in 2006 to the code
25 that made any difference. The 2006 code did not have

1 clearances required for the MSV on the ground or on a roof.

2 Q Okay. So you're saying that would be legitimate if it
3 was installed under the 2006 code, but it would be
4 illegitimate if it was installed under the 2012 code.

5 A That's what I'm saying.

6 Q And 2012 code got approved in 2013 in the State of
7 South Carolina?

8 A It was effected 2013.

9 Q Did both codes refer to the TMI ACI document that
10 underlies the application of some of their ---

11 A I'm sorry. You were talking and I didn't understand
12 what you were saying. You were pointed in the other
13 direction.

14 Q I'll move on. We'll get back to that. Let's go to
15 photo 359, please. Now, the manufacturer of this stone
16 veneer does not permit his stone to be abutted to windows,
17 does he?

18 A I'm not sure your question. Are you talking about
19 having a joint there?

20 Q Yes, sir.

21 A Yes.

22 Q There's supposed to be a joint there, right?

23 A Yes.

24 Q A joint that's big enough to put sealant in; right?

25 A Yes.

1 Q There's a lot of reasons for that joint, right?

2 A Yes.

3 Q And one of the reasons is so that the stone and the
4 window don't conflict for the same space, right?

5 A Correct.

6 Q I know that's not artfully said, but that's the gist of
7 it, right?

8 A Yes.

9 Q And the other reason is so that you have a big enough
10 joint between the two dissimilar products for a working
11 joint, a joint that actually works. That what some people
12 call an engineered sealing joint, correct?

13 A Yes.

14 Q You don't want to just smear a little sealant over the
15 face of a crack. You want a wide enough joint that you can
16 properly set your sealant in to prevent water intrusion for
17 years to come; correct?

18 A Well, I'm not too worried about water intrusion there,
19 because the fact that if there's at least two layers of
20 protection behind that stone and the water will allow to run
21 in or run out at the way this stone is installed, as well as
22 the base of the product.

23 Q Well, either way it's a violation of the manufacturer's
24 instructions, correct?

25 A Yes.

1 Q Let's go to your next exhibits on the same day,
2 February 6, 2023 at 204 Marshfield and we're going to go to
3 the exhibit 127.7, and because there wasn't a good elevation
4 in that collection, I went ahead and printed the front
5 elevation you to look at at this location from your
6 photographs. I'll hand you 127.7a. That came from the same
7 subdirectory. Do you recognized this 204 Marshfield as
8 being a house that you had the opportunity to visit?

9 A I don't recognize it, but if it's in my photos, I was
10 there.

11 Q And then going to photograph 10 in the garage lentil
12 brick subdirectory at 204 Marshfield, please. Did you all
13 start on another test cut on this garage here?

14 A That's correct.

15 Q And going to photograph number 101, please. This is
16 the test and the test cuts have been pretty well completed
17 here, right?

18 A Correct.

19 Q And going to 103. Can you see that the horizontal lay
20 of the black shelf angle flashing is either short or
21 nonexistent, correct?

22 A It's there. It's short.

23 Q Short. And short itself is also a building code
24 violation, correct?

25 A Yes.

1 Q Flashing is supposed to go to the to the exterior of
2 the wall, correct?

3 A Correct.

4 Q Some people in your business call it "flash to
5 daylight", correct?

6 A Correct.

7 Q That's to make sure that the flashing -- kind of like a
8 shower curtain keeps the water in a tub, the flashing is
9 doing the opposite. It's trying to keep the water on the
10 outside and kick it to the outside of the building; correct?

11 A Correct.

12 Q Going to photo 104, please. Let's skip this to 106,
13 please. Now, presumably the installer of the building code
14 violation flashing cut the building paper to tuck the
15 flashing up, correct?

16 A Right.

17 Q Now, that was the beginning of a good thing, right?

18 A Correct.

19 Q You do want to tuck your flashing into the building
20 paper, right?

21 A Right, to be properly stepped down.

22 Q But, they didn't finish the job. They're supposed --
23 they cut too much, so they're supposed to take that back so
24 that you have a proper air and moisture barrier on the
25 house, correct?

1 A Correct.

2 Q Building code expressly prohibits tears, gaps, and
3 holes in the building paper, correct?

4 A Correct.

5 Q That is an additional different code violation that the
6 jury is seeing, correct?

7 A Correct.

8 Q Go to photo 116, please. And this is just where you
9 lifted up that black flashing to expose the shelf angle bolt
10 behind there; correct?

11 A Yes.

12 Q Let's go to Exhibit 127.9 on February 7, 2023. Now,
13 let's then visit 206 Buxton. Let's go to photo under garage
14 lintel photo 65. There is an initial separation occurring
15 in that mortar joint where we will see continue to the next
16 photo, 66, please, over this garage, correct?

17 A I just -- I see the separation between the trim and the
18 brick, yes.

19 Q Go back one to 65, please. You don't see the separation
20 occurring in the mortar joint itself?

21 A I see a small hairline crack there, right at the weep.

22 Q And go to 154, please. You all did a test cut again at
23 the end of that right-hand corner of the garage at 206
24 Buxton, correct?

25 A Correct.

1 Q Go to 157, please. One additional occurrence of the
2 building code violation that the jury just saw two minutes
3 ago, the shelf angle flashing has no horizontal lath and it
4 does not go to daylight; correct?

5 A Correct.

6 Q Let's go to 160, please. You see that OSB up there on
7 the top right, to the right of the flashing?

8 A Yes.

9 Q There's another gap in the in the building paper,
10 correct?

11 A Correct.

12 Q Another building code violation?

13 A Yes.

14 Q Let's go to February 7 of this year, your visit to 207
15 Buxton, Exhibit 127.10. Let's go to photo 213, please.
16 Remember us, you and me, talking about latent defects,
17 latent construction defects a couple minutes ago?

18 A Yes.

19 Q This is a garage brick hairline crack that is rather
20 latent, correct?

21 A Very visible.

22 Q To you?

23 A Visible to anyone that looks.

24 Q So, you think this is a patent defect?

25 A I think it's a visible defect of a crack.

1 Q Going to the next photo, 214, it appears as though it
2 goes from the soldiers course up above the fascia down
3 1,2,3,4, including the soldier course, it goes 5 --
4 approximately 5 courses?

5 A Yes, sir.

6 Q Other than the failure to separate foundation brick
7 from frame supported brick, you don't have an opinion as to
8 the cause of this; correct?

9 A No. You need to investigate the code to see if it was
10 requirement for the separation for this house.

11 Q 217, please. 207 Buxton has a stone veneer, almost
12 like a chair rail effect -- stone veneer at the lower part
13 of the side garage wall, correct?

14 A Yes, sir.

15 Q And that stone veneer is installed right up on top of
16 the brick; correct?

17 A It is.

18 Q But, as you and I discussed previously, this stone
19 veneer is a proprietary product, right?

20 A Correct.

21 Q And the manufacturer has created what's called a test
22 report that the building code officials rely upon in
23 allowing you to use it for their product, correct?

24 A Correct.

25 Q And that test report does not sanction or authorize the

1 application of stone veneer in the manner we see in this
2 photograph at 207 Buxton, correct?

3 A It -- MSV is allowed to be onto brick surfacing.

4 Q The jury is going to see that chart later. That
5 condition is not in the chart, correct?

6 A It does allow brick onto the -- it does allow MS Von
7 brick.

8 Q So, you're just going to testify to the jury that
9 that's not a building code violation they're looking at in
10 this photograph?

11 A Not at this visual observation, no.

12 Q Well, it is still a building code violation though.
13 Even if what you say is true, correct? Because the code and
14 the manufacturer did not allow that stone veneer to come
15 within two inches of the hard scape or 4 inches of the
16 grade, correct?

17 A It would depend on the time that the project was
18 permitted, sir. There's also a revision of the South
19 Carolina Residential Code which has no requirements for
20 clearance for all houses built MSV in 2006 code.

21 Q Let's go to photo 228, please. These little tubes with
22 the color in the middle above the first floor window at
23 class member 207 Buxton's residence. I'm not sure the jury
24 has seen before today. Those are called weep tubes,
25 correct?

1 A Correct.

2 Q And their presence is required by the building code at
3 that location, correct?

4 A Correct.

5 Q It's called the head of a window, correct?

6 A It is.

7 Q And the head of the windows must be weeped and flashed;
8 right?

9 A Yes.

10 Q But a weep clogged with concrete doesn't qualify as a
11 weep, does it?

12 A No.

13 Q And these weeps are clogged with concrete, correct?

14 A Well, I don't know that they're concrete. They both
15 look red, and that's very possible in mud dauber or an
16 insect that's closed that. Concrete would be grey.

17 Q So would you deny that concrete or mortar filled weeps
18 are widespread at Rose Hill?

19 A I don't deny, but that's not what that photo is.

20 Q You don't deny it that mortar clogged weeps are
21 widespread at Rose Hill; correct?

22 A No.

23 Q And mortar clogged weeps, which you don't deny being
24 widespread, each and every one of them is a building code
25 violation, correct?

1 A Yes.

2 Q Go to photo, please. Another, more clogged weep above
3 the garage, correct?

4 A It is clogged with something.

5 Q And, assuming that's mortar, that's a building code
6 violation; correct?

7 A If it is mortar.

8 Q 234, please. Same thing, right?

9 A Yes.

10 Q 235, please. Clogged again; correct?

11 A With something black.

12 Q 236, please. Let's go on to 256, please. Y'all did
13 another test cut that the top right of this garage, correct?

14 A We did.

15 Q Let's go to 257 the next photo, please. There's either
16 no horizontal lath or an inadequate horizontal lath at this
17 location, correct?

18 A Yes.

19 Q And if we go to 260, we can confirm that, correct.
20 It's not there, right?

21 A No.

22 Q Another building code violation; correct?

23 A Correct. It's not pulled back up. I don't see any, and
24 there was in the earlier photos there was definitely the
25 black poly was there.

1 Q Well, let's go to 268 just to make sure. There's no
2 horizontal lath on this flashing is there?

3 A No. Or it's not turned out very far.

4 Q And to 285, please. That weep is completely clogged
5 mortar; correct?

6 A It's clogged with something.

7 Q 286. The first one we saw was clogged was the left
8 garage weep. This is the center garage weep. It's clogged
9 too, correct?

10 A Correct.

11 Q 287. Tell the jury what's hanging down behind that
12 brick facade.

13 A Well, you're seeing half of the brick tie. The brick
14 ties are typically bent, and half of it you nail into the
15 wall. The other half of it turns into the brick. I don't
16 see a problem with that.

17 Q The half we see is not in the mortar joint is it?

18 A No, you're seeing the bottom half. You don't see the
19 top half which would go into the brick mortar.

20 Q 288, please. Let's go to LSM March 21, 2020, 173
21 Haverhill. This would be Exhibit 127.15 in evidence. Sir,
22 the MSV on this front goes all the way down to grade; does
23 it not?

24 A It does.

25 Q That is a (INAUDIBLE)

1 A That is a what, sir?

2 Q Typical condition at Rose Hill?

3 A It is.

4 Q Let's go to March 21, 506 Carta and 127.1. Photo 303.

5 That MSV is sitting on the asphalt shingles, correct?

6 A Correct. You would need to know what the building code
7 was, whether or not that was a code violation.

8 Q Sir, you can't tell the jury a single building code
9 that permits you to put stone veneer on top of asphalt
10 shingles, correct?

11 A 2006 code does not have clearance requirements, sir.

12 Q You can't remove asphalt shingles when you change your
13 shingles with stones sitting on top of the shingles and you
14 can't get to them; correct?

15 A It'd be just like if you have hardy or other vinyl
16 siding J channel, you'd have to remove it to get to the
17 shingles.

18 Q Having stone veneer sit on top of the shingles is also
19 a violation of the shingles manufacturer's installation
20 instructions and their warning; correct?

21 A Yes.

22 Q Let's go to Exhibit 127.19 which is March 21, 2023, 506
23 Carta stone subdirectory, and we will start at photo 409.

24 MR. LUCEY: Your Honor, I'm actually switching exhibits
25 if you want to take our morning break.

1 THE COURT: Let's let's go ahead and take our morning
2 break. Mr. Bailiff, would you take our jury to the jury
3 room. Don't talk about your testimony. Don't talk about
4 your testimony while you're taking your break.

5 (WHEREUPON, the jury exited the courtroom 10:42.)

6 THE COURT: This is a natural place for a break. We'll
7 take ten or fifteen minutes.

8 (WHEREUPON, Break from 10:42 to 10:58.)

9 THE COURT: Let's have the jury back in, please.

10 (WHEREUPON, the jury entered the courtroom at 10:58.)

11 THE COURT: All right, Mr. Lucey. Proceed.

12 DIRECT EXAMINATION

13 BY MR. LUCEY:

14 Q Sir, the jury has now seen a construction defect and a
15 building code violation as this piece of stone has been
16 pulled away from the wall, correct?

17 A Correct.

18 Q Until the stone was pulled away from the wall, this was
19 in fact a latent defect, correct?

20 A Correct.

21 Q You had to get behind that stone to know existed,
22 correct?

23 A Correct.

24 Q And the defect is that you can tell by the silver on
25 the lath that the lath's never been embedded. Correct?

1 A Correct.

2 Q In other words, this stone veneer at this location was
3 just never properly installed; correct?

4 A Correct. That's at the base of the wall up against the
5 patio.

6 Q There's not, I mean, let's just make sure. There's no
7 building code exceptions for having violations at base of
8 walls, is there?

9 A No. I was just explaining to the jury where it was
10 located at.

11 Q Going please to photo 424. This is a gap between the
12 stone veneer and the trim above it, correct?

13 A The vinyl siding appears to be as I'm picking up on it.

14 Q I'm going to 428. It's the gap at the end, correct?

15 A Correct. I picked up the vinyl siding and picked it up.

16 Q And 453, please.

17 A I think what I'm showing -- what I was trying to show
18 there was the fact that I could see the felt, the double
19 layer of the black felt, behind that wall. Which is
20 required.

21 Q I think we're going to get to the felt in a couple of
22 pictures here. Let's go to 453, please. 453, you with your
23 ruler are showing this jury another different building code
24 violation that they have not heard about this morning,
25 correct?

1 A I am not sure.

2 Q The base coat underneath that stone veneer is supposed
3 to be an inch thick, correct?

4 A I'd have to see what the specs say.

5 Q You don't know?

6 A Not off top of my head, no, sir.

7 Q Well, assuming I'm correct, the reason it's supposed to
8 be a certain thickness is because, as we saw earlier, you're
9 supposed to completely embed the laths so it does not
10 corrode; correct?

11 A Correct.

12 Q 44, please. That moisture meter is in the sidewall or
13 substrate, sir? Can you tell?

14 A Can't tell.

15 Q 484, please. Is this 484? Let me go on to 596,
16 please. Stone on top of asphalt, correct?

17 A On top of shingles.

18 Q And 598, please. More of the same, correct?

19 A Correct.

20 Q 604. Did you remove this stone here? Test cut.

21 A Yes. I had it removed. Yes.

22 Q And you can see the exposed lath on the bottom left
23 hand corner?

24 A I don't know that it was exposed other than the fact
25 that we broke this, the crown off of it. I don't know that

1 it exposed without that. There's pieces of grout there,
2 laying on the ground there on the roof. We had to pry a lot
3 of those off. They were stuck so well.

4 Q And 614, please. That lath's not embedded there, is
5 it?

6 A At that point, we'd beat that lath up and you see that
7 some of it was embedded, some of it is falling out.

8 Q And some of it was not embedded; correct?

9 A I won't be able to tell you that based on the fact we
10 had to tear it up pretty hard to get stuff off.

11 Q And 644, please. Now, you've told the jury that the
12 2006 IRC did not expressly prohibit that stone veneer we're
13 seeing this photograph from being in contact with that
14 concrete, correct?

15 A Correct.

16 Q As opposed to the 2012 IRC; correct?

17 A Correct.

18 Q But that's not the complete story regarding 2006, is
19 it, sir?

20 A I don't know. To me it is.

21 Q Because in 2006, prior to the IRC enacting a specific
22 provision on this it incorporated ASTM 1063, correct?

23 A Correct.

24 Q ASTM is what's called a consensus standard, right?

25 A Okay.

1 Q ASTM standards are generally considered ---

2 A Yes.

3 Q --- and a lot of ASTM standards are actually referenced
4 by the building code, right?

5 MR. IMHOFF: Your Honor, objection. Hearsay.

6 THE COURT: He's been admitted as an expert witness.
7 Overruled.

8 Q A lot of the ASTM standards are referenced by the
9 building code, correct?

10 A Correct.

11 Q And when you're referenced by the building code, that's
12 like incorporating it in, correct? It becomes part of it?

13 A Correct.

14 Q And ASM provides that if you have a plaster based
15 facade, which stone veneer is just like stucco, if you have
16 a plaster based facade it must have clearance from hard
17 scape and gravel, correct?

18 A Correct. But you have a building code. But your
19 building code says otherwise. You have conflicting
20 information of building code and you have a situation that
21 the building code officials are allowing to be installed and
22 continue to be installed.

23 Q ASTM 1063 prohibits the conditions they see on the
24 screen right now, correct?

25 A Yes.

1 Q And ASTM 1063, in 2006, was incorporated into the IRC
2 by reference; correct?

3 A Yes.

4 Q Let's go to March 20, 2023 your LSM photos at 157
5 Haverhill and it is Exhibit 127.13. And we'll just go to
6 the initial photo at one or two just to get an elevation
7 beginning to. If we go to three or four we see the house a
8 little more. Let's go to photo 103, please. Here's a test
9 cut we did at this house on the top left of the garage,
10 correct?

11 A Correct.

12 Q And 105. You'd agree with me that to the right of this
13 test cut that that cavity is rather full of mortar; correct?

14 A It does have some mortar in it.

15 Q In fact, I mean, the jury is looking at the same photo.

16 A Yes.

17 Q The cavity is rather full of mortar in that bottom 6
18 inches or so, correct?

19 A Correct.

20 Q And why do you not care about that? Because the
21 building code requires a one inch air gap behind the brick,
22 correct?

23 A Correct.

24 Q I'm going to 107, please. Flashing no horizontal leg
25 again, correct?

1 A I think you have a small leg, but it doesn't come to
2 the surface.

3 Q Maybe it turns a quarter inch or half inch, but it
4 doesn't come the four or five inches it needs to come for
5 building code; correct?

6 A Correct.

7 Q It would appear as though, from what the jury has seen
8 this morning, that's a common condition that we saw in your
9 photos in your site visits in 2023, right?

10 A Yes.

11 Q Photo 172, please. Here's another test cut you did at
12 the top left of this garage. Go to 176, please. That
13 cavity on the right of this cut appears to be pretty full of
14 mortar; correct?

15 A Is that not the same test cut we were looking at three
16 slides ago? I think it is the same test cut three slides
17 ago.

18 Q Fair enough. 179, please. I'm trying to skip a few
19 here. Let's go to 263. Here is a test cut on the right
20 side of the garage opening, correct?

21 A Correct.

22 Q And in this test cut, the jury can barely see the
23 cavity to the right of the test cut. Do you see that?

24 A Yes.

25 Q It's full of mortar, isn't it?

1 A Well, I see mortar. I'm not saying it's full of mortar
2 on the right.

3 Q And the jury can barely see the cavity above the test
4 cut, correct?

5 A You see mortar and you also see cracking and gaps for
6 the moisture to come down.

7 Q The cavity above the test cut, the one-inch cavity in
8 this photograph is full of mortar; correct?

9 A Correct, but the jury needs to understand that the
10 cavity is to allow the moisture to move down. It may have
11 mortar in it, but the moisture is able to come down the
12 wall.

13 Q Tell me where I can find the building code that the
14 one-inch cavity behind the brick facade is optional.

15 A You're not going to find it, sir.

16 Q Thank you. And the jury can see to the left of this
17 opening that the cavity is full of water, correct?

18 A There's mortar in it.

19 Q All three sides, correct?

20 A I'm not saying three sides. I can only see two. I'm
21 not telling you what the left side is.

22 Q Two sides and a bottom, correct?

23 A Yes. Top side and a little bit on the right.

24 Q Photo 273, please. That building paper is reverse
25 lapped in this test cut; isn't it?

1 A I'm trying to understand what we have there. We have
2 the green guard above, and then you have WRB, and have the
3 poly. I'm not sure exactly what's all going on there.

4 Q The poly, the building paper, is on the outside of the
5 green guard, is it not?

6 A Well, at least a piece of it is.

7 Q And that piece of it is what we call, in this business,
8 reverse weather lap, correct?

9 A Yes.

10 Q It's like that shower curtain hanging on the wall
11 beside the tub. It's going the wrong way, right?

12 A Yes.

13 Q Which is a building code and workmanship violation;
14 correct?

15 A Yes.

16 Q Moving into 179 Haverhill for same exhibit. Let's go
17 to 374. This is a picture you took of the inside of the
18 windows at 179 Haverhill; correct?

19 A Correct.

20 Q Let's go to photo 465, please. Top left of your test
21 cut at 179 Haverhill; correct?

22 A I will take your word for the 179. It is definitely a
23 test cut.

24 Q Do you recall that you put both 157 and 179 in the same
25 subdirectory?

1 A I don't, but I may have.

2 Q Go to 466, please. No horizontal leg. Another
3 building code violation, correct?

4 A Correct.

5 Q 486, please. Did you ever take the opportunity -- you
6 were on Rose Hill's site five times in 2023, five days,
7 right?

8 A That sounds about right, sir.

9 Q Did you ever take the opportunity to take a business
10 card or a credit card and see if you could stick it in the
11 middle of the garage opening between the shelf angle and the
12 brick above it?

13 A I don't remember.

14 Q You don't recall it? I didn't see any pictures of it.

15 A I don't recall it.

16 Q So, did you ever make any effort to, in any way shape
17 or form, no matter how small, did you attempt to measure the
18 gap or the existence of a gap in the middle of the garage
19 opening between the shelf angle and the brick?

20 A I don't recall.

21 Q You would agree with me there shouldn't be a gap.

22 A Sir?

23 Q You would agree with me there not be a gap there,
24 correct?

25 A Well, you've got a small gap shown for the three wall

1 flashing to come through.

2 Q The shelf angle is supposed to be holding the brick up,
3 correct?

4 A Yes.

5 Q And if the shelf angle is holding the brick up, there
6 won't be a gap there, right?

7 A It could be a small gap from the mortar, but the brick
8 is going to be sitting on the shelf angle.

9 Q If there's a gap between the brick and the shelf angle,
10 something has moved; right?

11 A No.

12 Q The brick was built on that shelf angle, was it not?

13 A Yes.

14 Q There shouldn't be a gap there should there?

15 A I'm not saying it should or shouldn't be. In fact, I
16 see a small gap on one brick.

17 Q Let's go to 447, please. 487 I think we have a --
18 there we go. Up at the top a test cut the top right 179
19 Haversham, correct?

20 A Correct.

21 Q Go to 488, please. And again, there's no horizontal
22 leg on the flashing, correct?

23 A Correct. Yes.

24 Q 491, please. We'll just go on to -- I think that's it.
25 506 Carta. Same address vinyl. Same address as two exhibits

1 ago, but the vinyl subdirectory 127.21. And we'll start at
2 photo 386, please. Now, this is the separating wall between
3 two garage doors at 506 Carta, correct?

4 A Correct.

5 Q And it was decorative. It had vinyl up top and it's got
6 stone down below, correct?

7 A Correct.

8 Q And behind the stone down below we can barely over the
9 top we can see the lath, right?

10 A Yes.

11 Q You see the little silver on the top right?

12 A Yes.

13 Q So again, we have unembedded lath, right?

14 A Correct.

15 Q And we also see behind the lower half of the wall
16 behind the stone, we see the building felt that is between
17 the stone veneer and the lath and the plaster and the
18 substrate, correct?

19 A Well, it's between the substrate and the WRB.

20 Q Yes, the substrate being the lath.

21 A Right. There's two layers of protection between the
22 lath and the framing.

23 Q And we see the top of the felt, correct?

24 A Correct.

25 Q And it is not weather lapped with the building paper

1 above it correct?

2 A Correct.

3 Q Another building code violation at a different
4 location, correct?

5 A No.

6 Q The building code requires exterior claddings to shed
7 water to the exterior, correct?

8 A Correct.

9 Q You shed water to the exterior by weather lapping your
10 components.

11 A By the WRB. The felt is considered sacrificial, because
12 you have a wet product installed. You're relying
13 particularly on the WRB to shed the water.

14 Q And if we go down to 434, you're looking at the felt.
15 And we go down to 435. We see that you've pulled the felt
16 back and the WRB is underneath it and the OSB is exposed at
17 the bottom, correct?

18 A Correct. At the base of wall, correct.

19 Q And if we go to 437, we'll see the exposed -- what 5 or
20 6 inches of the OSB at the bottom?

21 A Correct.

22 Q And the building paper should have covered that,
23 correct?

24 A Correct.

25 Q That's another building code violation, correct? @

1 A Yes.

2 Q And going to -- we started this conversation earlier
3 this morning discussing that you were unable to identify any
4 difference between the brick defects or construction at the
5 class representative's home, Natalie Zitek, and any of the
6 other brick homes in Rose Hill. Do you recall the
7 discussion?

8 A Yes.

9 Q Now that you and I have walked through a half dozen or
10 so, maybe a dozen -- I didn't count -- brick homes, does
11 that remain your testimony that you're unable to identify a
12 difference between Natalie's brick construction technique
13 and the rest of the brick construction in the neighborhood?

14 A I have not inspected the plaintiff's home. It would be
15 improper for me to start comparing the issues when I haven't
16 looked at her house.

17 Q Well, you told us earlier that your firm was there,
18 right?

19 A Right. We looked at the exterior photos.

20 Q Your firm has been there since the litigation, right?

21 A Yes.

22 Q And whether you've personally been there or not -- and
23 by the way you used, I don't know, five or six team members
24 for the on site inspections for the last four months from
25 December to March?

1 A Sounds about right.

2 Q Including an architect?

3 A Yes.

4 Q And other engineers, right?

5 A Right.

6 Q And all that said, we've now been through a bunch of
7 brick houses. And as I understand it remains your testimony
8 you're unable to provide the jury with any difference
9 between the brick construction and her house and the brick
10 construction at the other 150 Rose Hill homes that have
11 brick on at least part of the structure, correct?

12 A I haven't seen all 150 homes. We weren't allowed. We
13 weren't able to see all 150 homes.

14 Q That said, you're unable to tell the jury any
15 difference between her brick and their brick, correct?

16 A Correct.

17 Q Let's have 25.1 in evidence on the screen, please? Can
18 you see this fracture coming up through the soldier's course
19 at 6 Duxbury in the first photograph of 25.1?

20 A I do.

21 Q Would you enlarge that step cracking to make sure the
22 jury sees it. Thank you. And now that he's got that
23 enlarged -- And by the way, just to make sure, I mean I'm
24 sure they will probably know. But the bottom course that's
25 perpendicular, the bottom course of brick. That's what you

1 and I are referring to as soldier's course, right?

2 A Right.

3 Q And so this step crack appears to come up through the
4 soldier's course and in this enlargement it runs through
5 three more courses of bricks. So, including soldiers,
6 that's four courses of total brick, correct?

7 A Correct. It runs through the mortar joint.

8 Q And let's come back out. That comment intrigues me.
9 Have you found that homeowners that you've done business
10 with over time -- have you found that they really
11 differentiate between mortar joints fracturing and brick
12 fracturing.

13 A They see a crack.

14 Q They just see a crack, right? And would you agree with
15 me that brick is supposed to be one of the most durable
16 exterior claddings?

17 A It is.

18 Q And would you agree with me that cladding such as brick
19 are expected, when they're installed properly, are expected
20 to last, if done right, the life of the building?

21 A Yes.

22 Q Not five years, right?

23 A You just have a crack. You don't have a failure in the
24 veneer.

25 Q I'm sorry, are you telling the jury that a crack in a

1 brick facade on a new house is not a failure?

2 A How old is this house? You're saying "new house".

3 These houses are 7 to 13 years of age.

4 Q Do you recall you and me discussing that at the time of
5 your visits in 2020 that the average age of all the houses
6 in Rose Hill were four and a half to five years old.

7 A Some of them were. Yes.

8 Q The average age. You were there in 2020; right?

9 A The average age four and a half to five years old.

10 Q Four to five years old, correct.

11 A Yes.

12 Q That's a fair estimate?

13 A Yes.

14 Q At the time that everybody first started looking at
15 these cracks, they were new houses, right?

16 A A four to five year old house is not a new house, sir.

17 Q Are you telling the jury that cracking brick facades
18 within four to five years of construction is not a failure?

19 A I am.

20 Q And what if the cracking brick is resulting from
21 repeated and widespread building code violations. Does that
22 change it? Does that make it a failure?

23 A No. If there was an issue, they have the right to
24 contact and ask for a warranty inspection.

25 Q Just so we're clear, has the jury seen any failures

1 today? We'd like to know your perspective on failures.

2 A I haven't seen any failure yet. They haven't seen any
3 rot. They haven't seen any framing damage.

4 Q And where does the building code say that you have to
5 have rot for there to be a violation of the standard of care
6 by a builder?

7 A No.

8 Q And by the way, in this first picture of Exhibit 25.1,
9 can you give any explanation to the jury as to why the crack
10 is occurring at that location above this garage other than
11 the failure to separate the frame supported brick and the
12 foundation supported brick at this location?

13 A No.

14 Q Next photo in 25.1, please. Fractured brick here at
15 the corner, correct? Two fractured bricks.

16 A It is a fractured bridge. I do not know where it's at.

17 Q Two of them, right? The bottom one is crumbling too,
18 right?

19 A Yes.

20 Q And going to the next photograph, please.

21 THE COURT: What number is this?

22 Q We're in 25.1. This is the third photograph on the
23 screen now, sir. Now, in this photograph, this is a
24 different type of brick cracking that the jury hasn't seen
25 yet today, correct?

1 A It is a crack.

2 Q But it's different than what you and I have shown them
3 so far, right?

4 A Yes.

5 Q And this crack is actually proceeding through the lower
6 brick itself, not the mortar joint, through the lower brick.
7 Up through the next mortar joint and then into the rowlock,
8 correct?

9 A I see a crack through one brick, through one joint and
10 up to the sill.

11 Q And sir, to make sure the jury is on board with us with
12 terminology. The horizontal bricks under the window, are
13 called rowlocks, correct?

14 A Or sill. We typically refer to it as a seal brick.

15 Q And the building code requires that they be sloped at
16 least 5 percent slope away from the building to shed water,
17 correct?

18 A The building code does not require them to be sloped.

19 Q Workmanship requires them to be sloped?

20 A Building code does not require the brick sill to be
21 sloped.

22 Q Workmanship?

23 A What is workmanship?

24 Q Does workmanship require it to be sloped?

25 A No.

1 Q As a matter of industry standard, are you telling the
2 jury that --

3 A I'm saying the building code doesn't require it.

4 Q Does the industry standards require it?

5 A Building -- BIA says it's suggested it is sloped, yes.

6 Q Okay, I'll stop there. You just referred to BIA. Let's
7 tell the jury what BIA is?

8 A Building Industry Association.

9 Q They are the leading manufacturers association in the
10 brick industry, correct?

11 A Correct.

12 Q They issue technical notes about how to do things,
13 right?

14 A Correct.

15 Q They would be considered by most people to be an
16 industry standard, right?

17 A Correct.

18 Q And BIA requires a five percent slope on the rowlocks;
19 correct?

20 A BIA suggests it, but the building code doesn't require
21 it, sir.

22 Q So you would you would agree with me that good
23 workmanship and brick facades would have a five percent
24 slope?

25 A Workmanship, yes, but not a building code requirement.

1 Q And you would further agree with me that you didn't
2 measure the slope on a single one of those when you were on
3 site, did you?

4 A No.

5 Q Next photo in 25.1, please. Here's here's cracking at
6 the base of wall. Again, a type of cracking this jury has
7 not seen before, correct?

8 A Correct.

9 Q And just to be clear, it's running it vertical between
10 two bricks, correct?

11 A Correct.

12 Q Next photo in -- okay, we're at 17 Kettering now.

13 A Back up a minute there, if we could.

14 Q One photo back, please, Mr. Lawton.

15 A We have no idea what caused that brick. It's covered up
16 by the mulch. You have a joint separation. True, but you
17 have no idea, no investigation what caused that crack
18 whatsoever.

19 Q And you also have a mortar filled weep tube at this
20 picture, correct?

21 A And you also have three wall flashing in that picture
22 as well, sir.

23 Q Well, let's go back to my question, sir.

24 A Yes, you have another weep that's clogged.

25 Q That's another building code violation, correct?

1 A But you actually can see the three wall flashing right
2 there at the base of the wall.

3 Q This is the first time you've been able to point that
4 out to the jury, isn't it?

5 A I think the first base of wall we've had, sir.

6 Q Okay. And the weep there, that weep is what we call
7 base of wall weepage, correct?

8 A Correct.

9 Q And they're required, what, every forty-five inches?

10 A Thirty-three to forty-five, give or take.

11 Q And you saw locations at Rose Hill where there is no
12 base of wall weepage, correct?

13 A Correct.

14 Q And those are additional building code violations that
15 you and I haven't shared with the jury yet, right?

16 A Correct.

17 Q Next photo in 25.1. This is the photo with dual
18 cracking in the lowest brick. Do you see that?

19 A I do.

20 Q And one of the cracks actually goes two courses.

21 A Correct.

22 Q That shouldn't be there, right?

23 A Correct. I have no idea what's causing that issue.

24 Q Next photo on 25.1, please. This is cracking through

1 the brick itself in one course and then through the mortar
2 joints in two other courses, correct?

3 A Correct.

4 Q Next photo on 25.1. This fracture is occurring at the
5 corner of a building, correct?

6 A Correct.

7 Q Did you have an opportunity to observe at Rose Hill
8 that some of the base of wall flashing is what's called
9 discontinuous.

10 A Yes, it's my understanding.

11 Q And discontinuous flashing, especially at the base of
12 wall causes its own problems, correct?

13 A No. I would not agree with that. It's a building code
14 but I wouldn't call it. That's not what caused this issue
15 here.

16 Q Next photo, please. This is a cracking at 207 Buxton
17 through 1, 2, 3, 4, 5 courses including the top soldiers
18 course?

19 A Yes.

20 Q All right. Next photo, please. This is hard to see.
21 Are you able to see this one?

22 A Yes.

23 Q And that cracking is going through two soldier courses
24 and two regular courses.

25 A Yes.

1 Q Again, step cracking?

2 A Yes.

3 Q Can you decrease that size back to normal please? This
4 is at 100 Sturbridge. Let's go to the next photo. This
5 one's at 106 Sturbridge, step cracking through four or five
6 courses at the base of wall?

7 A Yes.

8 Q Next photo in 25.1 please is at 4 Dartford. We've
9 already been to 4 Dartford. Let's skip to the next one,
10 please. This is 104 Sturbridge. That's step cracking on the
11 second floor, correct? Natalie's house.

12 A Correct.

13 Q This is the cracks that you all missed when you were
14 there in 2020, correct?

15 A Yes, we did, sir.

16 Q Any explanation for Natalie's second floor brick
17 cracking besides the fact that the front of Natalie's house
18 is frame supported brick and adjacent to this window it
19 adjoins foundation supported brick?

20 A I don't have any idea, sir.

21 Q Next photo, please. Or, am I at the end? Thank you.
22 Feel free to say that. Sorry. You agree that the phenomena
23 we just saw on Natalie's second floor under her window with
24 the stresses created by the frame supported brick and the
25 foundation supported brick are similar to what's occurring

1 above the garage lentils, correct? Garage shelf angles.

2 Excuse me.

3 A Well, the windows are a lentil and they're free
4 floating. It's a different situation altogether, but they
5 bolt to the shelf angle.

6 Q Actually, the photo we just showed the jury, we can put
7 it back up if you want -- the cracking at Natalie's window
8 ---

9 A At the bottom corner.

10 Q --- has nothing to do with the lentil. It's underneath
11 the window, correct?

12 A Right.

13 Q And this is the same phenomena, the interaction between
14 frame supported brick and foundation supported brick
15 occurring at the second floor windows that we looked at
16 above the garage corners, correct?

17 A I don't follow how that could be, sir. This is a front
18 facade. All the brick is foundation supported.

19 Q Do you deny telling me previously under oath that the
20 garage door brick building code violation was similarly
21 missing at other locations where, for example, the second
22 floor roof supported brick met side wall foundation
23 supported brick at corners, causing cracking in the brick
24 facade?

25 A I don't recall that if I said it, but this is not that

1 position, is it? This is the face, the front face of the
2 house.

3 Q It's a second floor supported brick under a window,
4 correct?

5 A Correct, but has nothing do with the intersection of
6 a wall of a roof.

7 Q I'm going to read this one more time so I can get a
8 clear response. Do you deny telling me previously under
9 oath that the garage door brick building violation was
10 similarly missing at other locations, that being the
11 isolation joint. Similarly missing in other locations. For
12 example, where second floor roof supported brick met side
13 wall foundation supported brick at corners, causing cracking
14 in the brick facade?

15 A If I said it, I said it, and I meant it at the time.
16 My question is here though, this is not that application.
17 This is a completely different application. Based on what I
18 recall the Zitek house, this is the front elevation and the
19 second floor the brick is continuous from the foundation all
20 the way up to the roofline.

21 Q Sir, moving on to MSV, moving back MSV for a moment.
22 You agree with me that MSV applied to a brick facade is a
23 construction defect, correct?

24 A Is it what kind of defect?

25 Q Construction defect.

1 A I wouldn't say it's construction defect. The
2 application or the way it was installed may be a problem.

3 Q Do you deny telling me previously under oath, sir, that
4 the MSV, the stone veneer applied to the brick facade was a
5 quote construction defect?

6 A I remember saying that.

7 Q Thank you. And you agree with us that for the MSB for
8 the stone to be properly applied to these walls it must be
9 battered with lots of mortar on the back of the stone,
10 correct?

11 A Correct.

12 Q And the way you know whether or not the stone was
13 properly battered on the back is whether or not you get
14 squeeze out when you push the stone up onto the wall,
15 correct?

16 A Correct.

17 Q So the jury can see in the MSV photos they take back to
18 the jury room with them, they'll be able to see when they
19 can see past the stone if there's squeeze out behind the
20 stone or not, correct?

21 A Correct.

22 Q And you need the squeeze out to achieve the building
23 code required 50 PSI strength, adherence strength, correct?

24 A Correct. Full contact.

25 Q And you're aware that there's a lot of locations at

1 Rose Hill where that did not occur, correct?

2 A I'm aware there are some. I wouldn't use the term a
3 lot. We had a very difficult time getting off the stones.
4 Generally, when we were doing our testing.

5 Q Whether it's some or a lot, each one of those locations
6 is another building code violation, correct?

7 A Correct.

8 Q And the jury hasn't heard about the limitations on
9 brick height on a residential structure under the IRC today,
10 have they?

11 A No.

12 Q They do exist, correct?

13 A No, they don't.

14 Q Do you deny telling me under oath, sir, that the code
15 has brick height limitations?

16 A It does, if you use the prescribed design within the
17 code.

18 Q And the alternative to using the prescribed design
19 within the code is to have an engineer draw and calculate
20 the alternative design, or have a building code official
21 approve of an alternative design, correct?

22 A Correct.

23 Q None of which happened for Natalie Zitek's house,
24 correct?

25 A It did on the second go around when they came back and

1 repaired the wall.

2 Q The second go around?

3 A Yes.

4 Q After it failed?

5 A Right.

6 Q Now, we briefly talked about, as part of your
7 background work in this matter that you reviewed Dr.
8 Whitlock's four PowerPoints, several them being fairly
9 lengthy PowerPoints, correct?

10 A Some of them were, yes.

11 Q Those were his reports on the four or five different
12 issues he was reporting on, correct?

13 A Correct.

14 Q Do me a favor. Would you stand up and show the jury
15 the report you wrote on this?

16 A I don't have the report in front of me.

17 MR. IMHOFF: Your Honor, objection. You've already
18 ruled on this.

19 THE COURT: Counsel approach. I want to make sure I
20 understand the objection.

21 BY MR. LUCEY:

22 Q You didn't write a report in this matter; did you, sir?

23 A I wrote several reports.

24 Q You don't have the report with you today to share your
25 final opinions in this matter with us do you?

1 MR. IMHOFF: Your Honor, he's still doing it.

2 THE COURT: He just asked the question in response to
3 the answer he just gave. Go ahead. You can proceed with
4 that answer.

5 A No.

6 Q In fact, y'all started writing a report, didn't you?

7 A We've written two previous reports.

8 Q You started writing a report after all of the February,
9 January, February, March inspections and testing. After
10 y'all were in my clients' houses, and on my clients' houses,
11 and cutting my clients' houses. Y'all started writing a
12 report, right?

13 (WHEREUPON, Mr. Imhoff stands.)

14 THE COURT: You can answer this question and then we
15 need to move on to something else.

16 A We wrote the report. We wrote in the similar format
17 that we wrote the previous two reports.

18 Q Did you say you didn't finish it?

19 A Oh, we finished it.

20 Q You finished the report?

21 A Uh-huh.

22 Q Not the one I had in your deposition.

23 A No.

24 Q You finished one since?

25 MR. IMHOFF: He won't get off what you've already ruled

1 on.

2 THE COURT: Let's move on something else. Move on to
3 something else. Asked and answered.

4 Q So, you agree with me that there are no exemptions in
5 the building code for building code violations that have not
6 yet resulted in damage, correct?

7 A Correct.

8 Q You further agree with me that D.R. Horton, as the
9 owner and the general contractor, the builder on this job,
10 is the conductor in the construction of the neighborhood and
11 the houses and its superintendents and project managers
12 share in quality control and checking behind the subs,
13 correct?

14 A Correct. They rely on their trade partners, who are
15 licensed competent contractors to perform the work in
16 accordance with the code requirements.

17 Q And it was D.R. Horton's responsibility to make sure
18 that the plans and specifications for the build out of Rose
19 Hill had adequate information and details for proper
20 construction, correct?

21 A Correct. And if there was a question they could go to
22 the Superintendent and get a response.

23 Q And plans are important to make sure that the homes are
24 probably constructed, correct?

25 A Certainly, but a plan doesn't show everything. That's

1 why this. That's why we -- they employed competent
2 subcontractor trade partners who are licensed contractors to
3 perform the work.

4 Q And you've already told the jury this morning that the
5 isolation joint between the frame supported brick and the
6 foundation supported brick cannot be found on Natalie's
7 plans, correct?

8 A Correct.

9 Q Nor any other Rose Hill plans that you've seen?

10 A Correct, or any other house I've found in 15 years.

11 Q And you agree that D.R. Horton, as a general
12 contractor, holds the building license and they're
13 ultimately responsible for the job and in the ideal world
14 it's prudent for a GC to be checking his subs work, correct?

15 A I would agree with that.

16 Q And that the general contractor has an obligation to
17 understand the capabilities and qualifications of their
18 subcontractors and their performance, correct?

19 A I will agree with that. And they did that. These are
20 subs they had used long term and they had multiple jobs with
21 them.

22 Q And as the permit holder, Horton had the inherent
23 responsibility to make sure the construction of these homes
24 met all the requirements, all the requirements, of the
25 building code, correct?

1 A They're the general contractor. They have the
2 responsibility.

3 Q And that includes some duty to inspect the work of
4 subcontractors, correct?

5 A Correct.

6 Q And to provide quality control, correct?

7 A Correct.

8 Q And they had a duty to inform its suppliers of what
9 usage would be made of their windows when relying on
10 suppliers to recommend the product, correct?

11 They provided to their window suppliers the locations with
12 the expectation and the sizes that they needed and the
13 window supplier has the responsibility for providing windows
14 that have met the code in this county.

15 Q And you agree that D.R. Horton shares responsibility
16 for the work performed by subs and that they are the GC and
17 ultimately responsible for the entire job, correct?

18 A But the general contractor is responsible for the
19 project.

20 Q And that the D.R. Horton job descriptions, site
21 Superintendent and the construction manager, those
22 descriptions, those responsibilities include a certain level
23 of quality control, correct?

24 A Certainly.

25 Q While D.R. Horton may have delegated many of its

1 responsibilities to comply with the building code and to
2 build proper houses to its subcontractors, that may give
3 them the right to look to the subcontractors for some
4 redress, but it does not relieve the D.R. Horton of the
5 responsibility, its original responsibility, to comply with
6 the building code, correct?

7 MR. IMHOFF: Your Honor, we object. That's a legal
8 conclusion.

9 THE COURT: I will sustain that objection.

10 Q Now, you've seen the details for the Rose Hill job
11 previously, correct?

12 A I've seen some house plans. Yes, sir.

13 Q And I'm happy to pull them out if you'd like. It's
14 exhibit 15.4 in evidence. And just for the jury's benefit,
15 details are, in essence, supplements to the plan to just
16 have a little more detail to show you how to do what
17 matters, correct?

18 A A particular item or a corner or something, yes.

19 Q Some maybe specialty locations or a little more detail,
20 correct?

21 A Correct.

22 Q And you agree with me that D.R. Horton's details that
23 they provided to the subcontractors for this job have little
24 or no guidance relating to the defects that you and I have
25 talked to this jury about this morning, correct?

1 A That I recall.

2 Q That's correct?

3 A Yes.

4 Q And quality details, that's kind of like saying you've
5 got to provide quality plans, right? It all goes together,
6 right?

7 A To a certain level.

8 Q The plans are more general. Details kind of supplement
9 that.

10 A But typically, details are a different nature.

11 Q And D.R. Horton had a responsibility as the builder to
12 provide its subs with adequate details to construct these
13 resources properly, correct?

14 MR. IMHOFF: Your Honor, once again he's asking for a
15 legal conclusion.

16 THE COURT: Rephrase that question.

17 Q Yes, sir. Sir, in the construction industry, it falls
18 upon the general contractor to provide its subcontractors
19 with adequate details to -- if it's an owner general
20 contractor like D.R. Horton, it falls upon that owner
21 general contractor to provide its subcontractors with
22 adequate details to build the buildings properly, correct?

23 MR. IMHOFF: He's still asking for a legal conclusion,
24 Your Honor.

25 THE COURT: The way it was rephrased I'll overrule the

1 objection. Go ahead.

2 A Could you rephrase the question or restate the
3 question? I'm sorry.

4 A In the construction industry, sir, when you have a
5 owner builder like we have here, D.R. Horton, in your
6 industry, the burden falls - the job falls upon -- the duty
7 falls upon the owner builder to provide the subcontractors
8 with adequate detail for the subcontractors to build the
9 structures properly, correct?

10 MR. IMHOFF: Your Honor, objection again. He inserted
11 the word "duty".

12 THE COURT: Overruled. Go ahead.

13 A It's the general contractor's responsibility to provide
14 adequate plans that are prepared by an architect or an
15 engineer in order in the quality -- capable to build a
16 house.

17 Q Are you telling the jury that you believe that the
18 owner general contractor is not supposed to provide adequate
19 details to build a house?

20 A I said adequate plans. They may include details. They
21 rely on the architect engineer and these houses are
22 replicated many times.

23 Q Before we move on to windows, sir. You would agree
24 with me that you and I have documented hundreds and hundreds
25 of building code violations at Rose Hill; correct?

1 A We have documented building code violations that are
2 repetitive.

3 Q Do you deny telling me previously under oath, sir, that
4 you and I documented hundreds and hundreds of building code
5 violations at Rose Hill?

6 A I haven't counted them, but they are building code
7 violations. I will not deny that.

8 Q You're not denying that statement?

9 A Right.

10 move to the window issues at Rose Hill. You have documented
11 with your photographs and seen other people document with
12 their photographs fractured windows, correct?

13 A Correct.

14 Q And that's where the vinyl -- these are all vinyl
15 windows, right?

16 A Correct.

17 Q So, that's where the vinyl is actually breaking
18 crashing at the lower left or lower right hand corner?

19 A At the jamb seal in the corner. That's correct.

20 Q That relates to the heat weld, correct? In part.

21 A It possibly could.

22 Q And that's something that you've analyzed from the
23 beginning. Is the effect of the heat weld on those windows,
24 correct?

25 A The heat weld, as well as the slot and the gasket or

1 whatever you want to call the filler material.

2 Q And the reason that the welds are present is because
3 the window frame comes in four or more pieces and it has to
4 be put together, right?

5 A It's a manufacturing process, that's correct.

6 Q The heat weld, like it almost as if you could take an
7 iron. You melt the vinyl, and stick the two together,
8 correct?

9 A That's my understanding, sir, yes.

10 Q And that's been a part of your analysis during your
11 three years in this case, three odd years in this case,
12 correct?

13 A Correct.

14 Q But actually you didn't know those heat welds existed
15 when I first took your deposition for the first house at
16 Rose Hill, did you?

17 A That's correct. That was Miss Smith's house.

18 Q You missed it, correct?

19 A Correct.

20 Q You learned from me that there were heat welds there
21 correct?

22 A Yes.

23 Q And now you know the heat welds are part of the
24 manufacturing and design issue with these windows, product
25 issues with these windows, correct?

1 A Correct.

2 Q Because when you melt vinyl and stick it together and
3 it cools, it pulls apart as it cools and creates stresses,
4 correct?

5 A Caliper (as spoken) manufacturing. I'm not a
6 manufacturer of a window.

7 Q You do understand that when vinyl cools it pulls and it
8 creates stresses.

9 A I don't know that.

10 Q Okay. At any rate, it happens to be that all the
11 fractures taking place in the windows at Rose Hill are
12 occurring next to or in that heat weld joint at the bottom
13 left of the bottom right hand corner, correct?

14 A That's what we have noticed.

15 Q And your observations, at least for the five days that
16 you've been there, is that 15 percent or more of the windows
17 at Rose Hill are fracturing, correct?

18 A Have a crack in the corner. That's correct.

19 Q And if an average house in Rose Hill has 20 windows in
20 it that would be an average fracturing in each house of
21 three windows, correct?

22 A Correct.

23 Q An unacceptable rate, correct?

24 A I don't know what the rate is, sir.

25 Q It would be unacceptable if it was your house, correct?

1 A It might be.

2 Q The building code requires that fenestration products
3 such as windows be labeled when they are installed in a
4 residence, correct?

5 A Correct.

6 Q And the labeling is supposed to tell anybody involved
7 what the performance requirements or performance abilities
8 or capabilities are of that window product, right?

9 A Correct.

10 Q And sometimes those labels are referred to as AAMA
11 labels, correct?

12 A Correct.

13 Q But they can they can test with a different agency,
14 correct?

15 A Correct.

16 Q You have not seen a single AAMA label in these
17 fracturing windows or the non-fracturing windows at Rose
18 Hill, have you?

19 A No, sir. They were removed.

20 Q And you have no evidence that in fact they were ever
21 there, correct?

22 A I do have evidence.

23 Q Do you deny telling me under oath, sir, that you do not
24 know whether these windows and doors had labels when
25 delivered?

1 A At that time, that was a correct statement. Obviously
2 I've had opportunity to evaluate other information, other
3 depositions, and see other photographs.

4 Q So, after three years when I got a chance to take your,
5 deposition last May, you had no evidence that there were
6 labels on those windows when they were delivered, correct?.

7 A Correct. But you'll recall at the third day of my
8 deposition, I was actually shown photographs including the
9 Zitek House of when the stickers in the house when they took
10 their in-progress construction photos as well as the second
11 house.

12 Q You were shown the warranty labels and the labels, the
13 NFRC labels, on the glass itself, correct?

14 A Correct.

15 Q And the warranty labels are usually out of sight above
16 the head, correct?

17 A I was shown other labels in addition to the warranty
18 labels on the -- actually on the glass of the windows.

19 Q You are not shown any AAMA labels were you, sir?

20 A Shown WDMA, which is a different testing firm.

21 Q And it had NFRC data on it, not AAMA data as required
22 by the building code, correct?

23 A Well, according to Silver Line, their information was
24 in fact on those windows when those windows were delivered.

25 Q You have no evidence that the remaining 80 or 85

1 percent of windows that have not fractured yet are not in
2 the process of fracturing, correct?

3 A No one has. I do not and no has anyone else have that
4 information.

5 Q And in addition to the fracturing problem with these
6 windows, they have a second problem, correct?

7 A I'm not aware of what you're talking about, sir.

8 Q There is a joint near the fractures which is supposedly
9 plugged by a little pad in the manufacturing process,
10 correct?

11 A Correct.

12 Q And you have seen that pad to be displaced, or out of
13 position, in many, many windows, correct?

14 A I have.

15 Q And when the pad is displaced or out of position a
16 unattractive residue typically appears below that path and
17 travels down the rough well joint to the sill in the house,
18 correct?

19 A It does sometimes.

20 Q Now, you did do some tests, or at least your firm did
21 some testing, to see if water was coming through that slot,
22 where those pads are, correct?

23 A Correct.

24 Q And you're able to turn your little litmus paper from,
25 I guess it's purple, to pink when it touched the water that

1 came through that slot, correct?

2 A We had white and we had to actually to put it into the
3 crack for the few tests that leaked on the dam test. We had
4 no leaks on our spray rack test.

5 Q You were able to show that water was coming through
6 that slot, correct?

7 A There was dampness.

8 Q Y'all didn't prepare a report on those window tests you
9 did, did you?

10 A No, we did not. We had the whole world there watching
11 us at that time.

12 Q The test protocol that you all were trying to follow
13 when you were doing these water tests required that you
14 prepare a report documenting everything when you were
15 concluded with your testing, correct?

16 A It does, but that's the only exception that we have on
17 this whole process. I'll live with it.

18 Q So, it does require it, but y'all didn't do it, right?

19 A No. We performed the test in front of multiple
20 engineers, experts, and WD personnel without an issue.

21 Q And you have had the opportunity to review the WDP
22 window water test reports, correct?

23 A I certainly have. I'm not able to figure out what they
24 did on the spray racks since they don't list which procedure
25 they used on their test report. We're not understanding how

1 he was able to have the windows leak and on the sill dam
2 test he tested a DP 75 whenever the windows are 25, 35, or
3 50s.

4 Q Because you didn't write a test report or gather enough
5 information, you can't even tell the jury which of the two
6 version of vinyl windows present at Rose Hill that you did
7 your water test on, correct?

8 A Generally, they were 2900 Series with a 1.455 rear dam
9 height.

10 Q You've never seen what's referred to in this case as
11 the D.R. Horton quality standards have you?

12 A Do not think so.

13 Q You think you have seen them?

14 A Don't think so.

15 Q Oh, you don't think so? Sir, I'm going to show you
16 what's been marked, for purposes of identification only, as
17 Plaintiff's Exhibit 77. You reviewed this document in your
18 work in this matter, correct?

19 A I have.

20 Q This is typical of information that an engineer such as
21 you would review and in forming your opinions in doing
22 investigation and forming your opinions in a matter like
23 this, correct?

24 A Well, this report was for a developer as they looked at
25 a piece of property whether or not to move forward with the

1 development, purchase and development of it.

2 Q Before we get there, I just want to ask you this, that
3 this is -- you're familiar with this type of information and
4 reviewing it and doing an investigation like you did here,
5 correct?

6 A Yes.

7 Q And you did review this particular report, Exhibit 77,
8 correct?

9 A Yes.

10 Q And some people would refer to it as a soils report or
11 subsurface report.

12 A Correct.

13 Q And, as I understand, you're aware of the soils
14 discussed in that report?

15 A Yes.

16 Q The Louisville soils?

17 A Yes.

18 Q And that report made various recommendations for how
19 the soils at Rose Hill should be addressed, correct?

20 A Yes.

21 Q And, as I understand it, you have no information to
22 share with us that D.R. Horton followed any of the
23 recommendation in the original soils report for Rose Hill.

24 A There is no information that they did not follow the
25 soils recommendations.

1 Q Well, actually the recommendations in that report were
2 for some very, very extensive work to take place at Rose
3 Hill, correct?

4 A There was options provided.

5 Q Three options, right?

6 A Yes.

7 Q And the main option, the principal option, related to
8 the undocumented fills that were present at Rose Hill,
9 correct?

10 A Correct.

11 Q And because they're undocumented, the soils experts, so
12 to speak, said if you want to use these building sites
13 you've got to take all those undocumented fills out,
14 correct?

15 A Correct.

16 Q And if you took out as much fill as that soils report
17 recommended before you started construction, you'd have a
18 lot of invoices for a lot of dump trucks, wouldn't you?

19 A You can move the material around on site, sir.

20 Q You've seen no evidence that any of the work
21 recommended in Exhibit 77 was performed prior to
22 construction, correct?

23 A I haven't looked either way at evidence, sir.

24 Q And it's addressed to Sean Kruglewicz, who is sitting
25 over here at counsel table, correct?

1 A Correct.

2 Q Have you taken an opportunity to ask your client for
3 any evidence that any of that work got performed?

4 A I didn't think it was necessary.

5 Q So, that's a no? You did not ask them?

6 A No, I did not ask him. The house pads had to be tested
7 and inspected not only by the county, but by a soils
8 engineer before the foundations were undertaken. If there
9 were issues, they would have been shown.

10 Q Sir, actually -- you're an engineer. That report is
11 relating to subsurface conditions which are under what the
12 day-to-day lot test is, correct?

13 A But you would find that in your proof rolling
14 operations as you undertook the mass grading operation.

15 Q If proof rolling occurred. Have you looked at the
16 deposition testimony about whether or not it occurred?

17 A No.

18 Q Let me see if we can wrap up. You've not investigated
19 -- well, I'm gonna skip that. So, all the stone, all the
20 manufactured stone utilized at Rose Hill to the best of
21 everybody's knowledge, is all Anatoliy Stone, correct?

22 A Correct.

23 Q So it all should have been put on the same way
24 following the Anatoliy Stone installation instructions,
25 correct?

1 A Correct.

2 Q And we discussed, I think, all the windows there are a
3 similar model of vinyl window from Silverline, correct?

4 A Generally, though, the 2900 series from Silverline.

5 Yes, sir.

6 Q All brick and brick accessories were provided by the
7 same supplier, General Shale, correct?

8 A That's my understanding, sir.

9 Q And your staff confirmed that while there may be more
10 than the six house plans at the neighborhood, that six plans
11 make up 52 percent or more of the house configurations at
12 Rose Hill, correct?

13 A I don't know that I have that exact information. I know
14 there were multiple house plans out at the site. How many
15 or the percentage of each one, I don't know.

16 Q With regards to the risk of radon in Anderson County,
17 you're not familiar with the presence or absence of that
18 risk in Anderson County, correct?

19 A Yes, you discussed it as an elevated condition in our
20 deposition. I've since looked up on DHEC and Anderson
21 County has a two to four rating, with the average test at
22 1.7. 2 to 4 does not require a radon system. However, D.R.
23 Horton, in talking with Sean and some others, did put in a
24 passive system that it just collects gas under all
25 foundations within this area just to be -- just to do it.

1 Q Because Anderson adjoins Greenville, which is has the
2 higher risk, correct?

3 A It has a higher, but I'm going by DHEC's rules, DHEC's
4 information.

5 Q Apparently it's still seen prudent to put them in
6 Anderson County, correct?

7 A Yes.

8 Q And for those radon capture systems to work they have
9 to have the slab, the concrete slab, capture the gas before
10 it pipes it up through the roof, correct?

11 A No, it's not the concrete slab. It's the plastic poly
12 vinyl liner that they put below that which captures it and
13 keeps it within the pipe system.

14 Q The concrete slab above the poly vinyl provides the
15 reinforcement for the poly vinyl to capture the gases and
16 put them into the passive system, correct?

17 A Not the concrete slab. The poly system.

18 MR. LUCEY: Nothing further. Thank you, sir.

19 THE COURT: Ladies and gentlemen, we're going to break
20 for lunch at this point. We will start back at 1:45. Just
21 be back in the jury room by 1:45. Thank you. Same
22 instructions. Don't talk about your testimony.

23 WITNESS: I understand, sir.

24 (WHEREUPON, lunch recess 12:30-1:45.)

25 THE COURT: I had a note from one of the jurors. One of

1 the jurors has had an emergency arise with one of his
2 business -- the person running the business while he's on
3 jury duty has had a heart issue and is -- the way I read the
4 note is going to have to have a procedure done on Friday and
5 he just found out about this during the break. We've got
6 four alternates, so I'm going to let him go. It's Juror
7 153. So, take a minute and I'm going to go inform this
8 juror he's released.

9 (WHEREUPON, Jury note was marked Court's Exhibit Number
10 3 for identification.)

11 THE COURT: Are we ready?

12 MR. IMHOFF: Just with one clarification. Just to make
13 sure. We're going to ask Mr. Moore questions today in
14 response to Mr. Lucey's questions. We just want to make
15 sure we're not precluded from calling him back in our case.

16 THE COURT: You don't want to examine him in full at this
17 point?

18 MR. IMHOFF: Correct, Your Honor. We have not heard the
19 Plaintiff's whole case. Matter of fact, we haven't heard
20 any of the Plaintiff's case yet.

21 THE COURT: We are in a position where we have a number
22 of third parties who may want to cross examine your witness
23 as well. Logistically, I'm trying to figure out how.

24 MR. MIMS: Your Honor, on behalf of the third parties, I
25 think most of us want to wait until phase two. If that

1 helps.

2 THE COURT: Is there any third party or fourth party
3 defendant who wants to question him now?

4 MR. MIMS: Speaking for myself, we will wait until Phase
5 two, Your Honor. I think that is the consensus.

6 THE COURT: Mr. Imhoff, how are you going to separate
7 what you bring out in here and in your direct examination?

8 MR. IMHOFF: How am I going to separate the issues that
9 I ---

10 THE COURT: It sounds like he went through the entire
11 case.

12 MR. IMHOFF: He actually didn't, Your Honor. There was
13 no site stuff in there. I assume he's got lot more evidence
14 on windows. I assume he has a lot more evidence on the
15 concrete cracking and the grade stuff, the slabs. So, he
16 did -- and we think we have to ask the questions today for
17 the jury, but we don't want to be precluded from coming back
18 and presenting a full case when we get a chance to come back
19 and call our witnesses. Now, we're not going to retread the
20 same ground, as much as possible.

21 THE COURT: All right. I will let you do that, but you
22 need to question in full about anything that was brought in
23 today and you can recall the things that are not covered by
24 Mr. Lucey. He's not going to testify twice about the exact
25 same thing.

1 MR. IMHOFF: Can we have just a moment, Your Honor?

2 That complicates things for us.

3 THE COURT: Yes. Thank you, Your Honor. We are going
4 to respond to Mr. Lucey's questions today. I think he has a
5 lot more than that. He hasn't called one witness yet. Your
6 Honor, we can proffer the testimony later, if you want to,
7 but we intend to call Mr. Moore back to address all of the
8 plaintiff's claims. We're not going to retread all of the
9 ground with him, but certainly we have the right to call our
10 witnesses and have them testify, Your Honor. We would ask
11 the Court consider that, and I'm going to do what I can
12 today to cover as much ground as I can today.

13 THE COURT: And, Mr. Imhoff, the Court is going to give
14 you every opportunity to present what you feel like you need
15 to present, but time is of the essence in this case and we
16 certainly cannot have exact same question twice from the
17 same witness. If you want to do it that way, that's fine.
18 But let's examine in full these issues today. If you choose
19 to do that, I'll let you recall him on anything else. Is
20 there anything else before we bring our jury out?

21 MS. WOOTEN: Yes, Your Honor.

22 THE COURT: Yes, ma'am.

23 MS. WOOTEN: We understand Your Honor's ruling on the
24 hearsay exception, but Mr. Lucey can't -- Mr. Lucey is
25 looking at me quizically. We're talking about when we

1 objected that Mr. Lucey couldn't just talk about ASTM and
2 ask an expert on the stand. And I understand Your Honor's
3 ruling that learned treatise are something that you can
4 question an expert about, but they're predicates that have
5 to be laid under 803-18 under the South Carolina rules. And
6 we think some testimony has already come in that wasn't done
7 this way, but we want to make sure that going forward that
8 that rule is completely followed. And the rule says to the
9 extent called to the attention of an expert witness upon
10 cross or relied upon by the expert witness in direct,
11 statements contained in published treatises, periodicals, or
12 pamphlets on a subject Of history, medicine, or other
13 science or art established as a reliable authority by the
14 testimony or admission of the witness or by other expert
15 testimony, or by judicial notice. That's fine. There
16 wasn't any such predicate laid here, although ASTM is a
17 reliable authority. But the next part is, if admitted, the
18 statements may be read into evidence, but may not be
19 received as exhibits.

20 That being, in my interpretation, Your Honor, that
21 Mister Lucey can't simply say well, doesn't ASTM say this?
22 Rather, he has to read that into evidence so that the rule
23 is followed on any type of learned treatises that he's
24 asking an expert witness about. He can't just make up
25 something. You know, that's why this rule is here that says

1 may be read into evidence. He can't just say, well, isn't
2 it true that you know, the ASPCA says X. He's got to read
3 what he's talking about into evidence, not make it up, and
4 not paraphrase it.

5 MR. LUCEY: Your Honor, I conformed with the rules of
6 evidence in my examination. That was not being referred to
7 as learned treatise. But, before I even get into that, the
8 Court has already issued a one attorney argument rule.
9 We're on a witness, Mr. Imhoff's witness, and I'm now facing
10 second attorney arguing against me. But, Your Honor, the
11 witness specifically testified -- can we excuse the witness
12 if we're going to talk more about this?

13 THE COURT: Mr. Moore, can you step out into the lobby,
14 please?

15 (WHEREUPON, the witness exited the courtroom.)

16 MR. LUCEY: The witness specifically testified that the
17 building could, and in fact in the state of South Carolina,
18 references ASTM 1063, which in our industry means that it
19 becomes part of the building code for that subject matter.
20 It's not like we're talking about some academic treaties
21 from college. We're talking about a an express document
22 that's referenced and listed in our building code. In my
23 examination of the witness if I proffered him, if he wanted
24 to say in front of the jury that he doesn't know what's in
25 that ASTM, that's in effect here in South Carolina, that was

1 his choice. I mean, he knew enough about to respond to the
2 questions.

3 THE COURT: The witness in this case testified he is
4 familiar with ASTM. I think the words used were a standard
5 and the witness testified he's familiar with it and then
6 questioned. And to answer you, Mr. Lucey, I allowed Ms.
7 Wooten to argue this because this is different from the
8 examination of this witness. I believe her issue is more
9 general, as I understand it.

10 MS. WOOTEN: It is, Your Honor. It's a general motion.

11 THE COURT: It would be improper for her to argue about
12 this particular witness. But, in the event we have any of
13 this other, a learned treatise, in the future for an
14 examination of a witness, we'll certainly follow all the
15 rules. In this case, the witness testified that he was
16 familiar with that and he answered affirmatively when Mr.
17 Lucey asked.

18 MS. WOOTEN: And they will be read into evidence?

19 THE COURT: Well, let's see what the question is. It's
20 a learned treatise and there's a lot of testimony about
21 building codes and what was including in the building code.
22 Mr. Moore testified he was familiar with that. And he was
23 qualified as an expert. But if we have that issue come up,
24 then certainly Mr. Lucey can confirm about what will be read
25 into the record.

1 MS. WOOTEN: Thank you, Your Honor.

2 THE COURT: Are we ready?

3 MR. IMHOFF: Yes, Your Honor.

4 THE COURT: Get Mr. Moore back in. Let's have our jury.

5 (WHEREUPON, the jury entered the courtroom at 2:02.)

6 THE COURT: Mr. Imhoff.

7 CROSS EXAMINATION

8 BY MR. IMHOFF:

9 Q Mr. Moore, you were asked some questions this morning,
10 but you weren't asked about who you are, where you came
11 from, and what your qualifications are. Are you a licensed
12 engineer?

13 A I am, sir.

14 Q And in how many states?

15 A Eight, at the moment.

16 Q Eight states?

17 A Yes, sir.

18 Q Are you a general contractor?

19 A I am, sir. I'm a -- in North Carolina I'm an unlimited,
20 unclassified, limited contractor. In South Carolina I'm a
21 building contractor and a water sewer contractor.

22 Q Is there a difference between a residential contractor
23 and a general contractor?

24 A Actually there is, but I'm a general contractor.

25 Q Residential, I assume, builds residential. General can

1 do whatever?

2 A Anything. Whatever.

3 Q So, you're an engineer and general contractor. Did you
4 say where you're a general contractor? Both North and
5 South Carolina?

6 A North and South Carolina.

7 Q Let's talk about your work experience. Did you ever do
8 any site engineering?

9 A Correct. I have worked for about ten years for Centex
10 homes as director of land development. I was possible for
11 all the development of all the land co-entitlement, all
12 amenities, twenty plus thousand lots that I did. I worked
13 for Crowder Construction Company, which is a heavy highway
14 contractor. We also did thousands of residential lots for
15 builders like Pulte, Horton, Centex. I ran an engineering
16 office for a short time. We designed subdivisions as one of
17 our key elements. I worked for the city of Charlotte for
18 about 11 years, eight of them as the construction engineer,
19 where I built -- I was responsible for all the horizontal
20 work. The roadways and parts that the city undertook and
21 actually we had our full laboratory and we had a full soils
22 lab. We did asphalt work, concrete work, soils work,
23 nuclear gauges, et cetera. And for the past 15 years, I've
24 been working in this field of forensic engineering.

25 Q And I don't want to take anything away from forensic

1 engineering, but you in your career have actually done the
2 design, oversight, supervision of developments such as Rose
3 Hill. Is that right?

4 A Directly. In the early years of Centex, we literally
5 hired each one of the functions individually. We'd hire a
6 grading guy. We would hire a pipe guy, a paving guy. In
7 the latter years, we were so large, we would hire general
8 contractor. Centex Homes, who I worked for, is a lot like
9 the D.L. Horton in that they have a general contractors
10 license for buildings, but they don't have one for site
11 development. They are required by law to hire a site
12 development or general contractor to do all that work and we
13 did the same thing.

14 MR. IMHOFF: Your Honor, at this time, I would like to
15 move to qualify Mr. Moore as not only a forensic engineer,
16 but also a site design engineer and a general contractor.

17 THE COURT: Any objections?

18 MR. LUCEY: No questions, Your Honor.

19 THE COURT: The witness would be admitted as a site
20 design, professional engineer and also a general contractor
21 without objection.

22 Q Mr. Moore, what is Centex Homes?

23 A Centex Homes was a national home builder back in the --
24 when I started to work for them the first time was 1988
25 through '91 and I went back in 2000 and 2007. Some of the

1 juries may remember 2007. I call it the world ending when
2 home building basically quit. It went under because of the
3 high interest rates. And Centex homes was basically
4 absorbed and bought by Pulte Homes. We were doing some, as
5 a national company, 50,000 homes a year in Charlotte. We
6 were closing on a typical year about 1,250 to 1,300 homes in
7 the Charlotte region, which included the upper state of
8 South Carolina, Fort Mill, Rock Hill, Clover area.

9 Q So let's talk about your site design experience a
10 little bit. Okay? You said a moment ago that D.R. Horton,
11 Centex Homes does not hold a license to develop land. Is
12 that right?

13 A That's correct, sir.

14 Q So, if you're a home builder such as D.R. Horton, what
15 do you have to do to get that process started?

16 A You have to hire typically an architect and/or
17 engineer, and the first thing you do is start getting the
18 site plan developed and see how many lots you can put on the
19 ground, whether it requires a razoring or not. The razoring
20 is the order to able to get the lot size that you want. Once
21 you get through the razoring or the entitlement phase, then
22 the engineer starts developing the plan, the grading plans,
23 the water plans, the sewer plans, storm drain, the lot sizes
24 and that goes through a permitting process. In this
25 particular case, they went through Anderson County who would

1 review and approve the plans, at least for the storm drain
2 side grading lots, et cetera. And then you would go out and
3 get quotes or bids for the work and then the general site
4 development contractor would undertake the work and you
5 would have inspections by the governmental agencies. That
6 will probably involve the South Carolina DOT for the
7 roadways, as well as Anderson County, and the Water Sewer
8 Authority.

9 Q That's a lot.

10 A Yes.

11 Q Let's do it -- let's break it down a little bit. Does
12 that mean that the home builder developing subdivision is
13 only acting as the owner at that stage and actually doing no
14 work?

15 A Correct. They're not allowed by law to do any work
16 other than manage the process.

17 Q Not allowed by law. They have to hire a professional
18 engineer and a licensed mass grading company to do that.

19 A A licensed highway contractor. Yes, sir.

20 Q The highway?

21 A Someone that can do grading, storm drains, piping,
22 water, sewer, paving. Whether you hire one, or four, or
23 five they still have to be licensed entities that do the
24 work. Licensed under the State of South Carolina.

25 Q So, D.R. Horton not only can't do it, they have to hire

1 other third parties and rely on them. Is that right?

2 A That is correct.

3 Q And, in this case, have you reviewed materials that
4 they hired a site engineering company?

5 A Yes.

6 Q Do you remember the name of it?

7 A No, I don't remember the name of the firm. I do
8 remember the name of the contractor.

9 Q And then depending on how it works out, then that
10 engineer hires a licensed mass site grader.

11 A Well, the owner hires the -- not the engineer. The
12 owner hires the mass grading contractor.

13 Q All right. And does D.R. Horton necessarily have to
14 rely on them to both get their work right and do their work
15 correctly?

16 A Yes, they do.

17 Q Because D.R. Horton can't do it, can they?

18 A That's correct.

19 Q They have to rely on other people to do it.

20 A That's correct.

21 Q All right. Did any of those people work for D.R.
22 Horton?

23 A No, they're third-party hired engineering or
24 contracting firm.

25 Q And then they get those big site plans, right? They're

1 about that big and they show all the contours of the
2 streams. Well, hopefully not streams, because then the EPA
3 comes, but it shows the property and what needs to be done
4 to cut lots.

5 A It shows the existing conditions and the proposed
6 conditions.

7 Q And then that has to go to the county, and the county
8 has to approve it, is that right?

9 A That's correct. The county would have to approve the
10 plans. Ultimately, the roads are generally going to be
11 accepted by some entity in South Carolina. It's either the
12 state, county, or town. So, they're going to approve the
13 road profiles. They're going to approve the lot sizes. The
14 water sewer authority has got to review and approve the fact
15 that you can tie on the water and have capacity as well as
16 tie onto the sanitary sewer. All that has to be approved
17 and you have to get permits, written permits, issued before
18 you can go to work.

19 Q Does the county inspect the work?

20 A Yes.

21 Q And it's inspecting the work of the engineering company
22 and it's inspecting the work of the licensed third-party
23 grading contractor. Is that right?

24 A That's correct, sir.

25 Q And as that work goes on, they clear the brush, clear

1 the trees, cut in the lots. That type of stuff.

2 A That's correct, sir.

3 Q Contour the property. And that's all done by the county
4 and by the engineer. And by the site director.

5 A That's correct.

6 Q Mr. Lucey presented to you a document, a letter from
7 2011 from an engineer about soil. Do you remember that?

8 A That was a subsurface investigation I believe ECS.

9 Q Is that part of that process while D.R. Horton is
10 acting as an owner?

11 A Yes, that was part of the preliminary process where
12 it's called a due diligence process. It's where you look at
13 the property, there's been a price named for the dirt and
14 you look at what it's going to cost you to develop the land.
15 And then that's figured into the cost of the home to see
16 whether it's feasible or not. And one of the very first
17 things you do is have a soils investigation done to see what
18 has to be done to the land. You have to grade it and cut it
19 clear, move it, dig it, rock, whatever necessary, unsuitable
20 soils, all that figures into your cost when you run your
21 performer.

22 Q Right. So, that letter that was presented to you isn't
23 unusual, is it?

24 A No, it's pretty standard.

25 Q And then after that, when D.R. Horton has their lots,

1 plats. What are they called?

2 A Record plat.

3 Q When D.R. Horton has that, do they have to hire a
4 foundation contractor?

5 A They do. Once the lots are developed, the pads are out
6 there and the plats recorded. At some point you can start
7 building a house. And you have to have someone come out and
8 lay out the foundation of the house. That's usually a
9 surveyor.

10 Q And then does a concrete truck show up and a crew show
11 up with rebar and they start pouring the foundation and then
12 the slab?

13 A Well, it's a little more complicated than that. You
14 have to dig the footing, dig out the dirt, and it's got to
15 be tested. And typically you have a third party independent
16 testing firm that's going to run test in the footings and
17 then part of most municipalities I've ever been involved in,
18 the Code Enforcement Office has to come out and look at the
19 footing as well. He makes sure the rebar is there. He makes
20 sure that the depth is correct, and only at that time will
21 he approve the footing, then the concrete trucks show up and
22 pour the footing and the slab.

23 Q So is the dirt checked?

24 A Yes. Two times.

25 Q By who?

1 A Checked by a third-party engineering firm, a soils firm
2 like ECS, and it's checked by the Code Enforcement officer
3 and a footing or a foundation inspection before you pour the
4 concrete.

5 Q All right. And then the concrete is poured for the
6 foundation and the slab. Is that right?

7 A That's correct.

8 Q I don't want to bore the jury, but I think they need to
9 know. The slab on a slab on grade construction is a
10 concrete base, right? Flat concrete base, essentially with
11 turned up concrete on the sides, right?

12 A Yes, sir.

13 Q And then you build your framing up from that, right?

14 A That's right.

15 Q And the house, the framing, the wood and everything
16 else sits on that concrete pad, is that right?

17 A That's correct. It's on the foundation and you
18 typically have grade beams or turn down footings for the
19 loads. As an engineer, you figure out where your load
20 points are coming down through your house and they start at
21 the roof, come through the second floor to the second floor,
22 first floor to the foundation so that you can support the
23 house.

24 Q We got a little preview of what the allegation is.

25 Let's talk about it anyway now. Do you understand that, Dr.

1 Rhett Whitlock may have the opinion -- we haven't heard his
2 testimony yet -- but may have the opinion that those slabs
3 are sitting on bad soil?

4 A That's what he has in one of his reports. He states
5 that there may be problems with the way the concrete was
6 poured or subsurface of the soil underneath the slab, but
7 he's done no work or investigation at all. There was no
8 floors taken up to determine what the problem, what they
9 were problems with slab. He's not taken any cores of the
10 concrete foundation. He's not taken any soil samples or
11 investigation the soils at all around the slab or even
12 through the slab to know if there's a problem. So, he did
13 no work whatsoever to determine whether it was a concrete
14 slab or a subsurface problem at all.

15 Q Well, let's tell the jury. Let's start right at the
16 beginning. Have you ever seen a house that was built on bad
17 soil on slab?

18 A Once.

19 Q What's it look like, Mr. Moore?

20 A The foundation starts breaking up, cracking, and you
21 get major displacement between the slab that -- you know. If
22 you can imagine this surface of this table here is the slab
23 all of a sudden have big ups and downs in the slab because
24 of this weight of the house is greater than the capacity of
25 the soil to support it so you start getting sheer failures

1 in your slab.

2 Q Do you get a slab? Do you get actual vertical
3 differences that you can see?

4 A If -- in this -- if it's a bad soil you would, yes.

5 Q Yeah. So, as you're walking through your living room,
6 all of a sudden you have to step up to the other part of the
7 house.

8 A You'd catch your foot and you trip.

9 Q Or step down to the other part of your house, right?

10 A Yes.

11 Q Or if it's a corner, that starts coming down.

12 A Yeah. And there are problems. We've had a few
13 locations where you may have a small foundation issue and
14 you put some helical piers in or something to address it,
15 but that's after we have done investigation of the soil and
16 et cetera to determine what the problem was and what the
17 appropriate solution was.

18 Q Well, let's get to it for the jury. Is there any
19 evidence at the 220 homes at Rose Hill that they are
20 settling differentially and causing cracks and issues with
21 these houses?

22 A No, there's no evidence been presented whatsoever to
23 substantiate that.

24 Q How many houses have you looked at?

25 A Roughly 110, 120, give or take.

1 Q And again, what would you expect to see if a house was
2 settling on bad soil? Would you see it in this lab and
3 potentially up the side of the house?

4 A Yes. You would see significant faulting of the
5 concrete if part of the slab is setting.

6 Q This isn't something a homeowner would miss, is that
7 fair?

8 A That's fair.

9 Q And you alluded to it a moment ago. Are there tests
10 you can do to determine why it's failing and settling
11 differentially?

12 A Absolutely. It involves going through the slab, going
13 outside the slab, taking sole tests, and ---

14 Q Let me stop you right there. Let me stop you if I may.
15 What's a soil test? I don't think any of these folks have
16 ever seen it.

17 A A soil test is when you take and examine the strength
18 and capacity of the in place soils. You usually take off
19 the top 6 inches or foot to get below the top soil and then
20 soil tests would be run. They would called the DCP's where
21 they drop a hammer and they see how many drops of the hammer
22 it takes to get a certain step and those relate based on the
23 material to the strength of the material.

24 Q I've also seen them take two. A core sample or boring.
25 Is that another way that you can stick that tube down into

1 the earth and pull it up and then you can see what's there.

2 A Right. You take a soil sample and from that you can
3 take and determine what the materials are and if there's any
4 improper materials within the field. The only problem with
5 that is you're outside the slab, but generally you're close
6 enough it will be representative of the slab. Most
7 appropriate test is to go through the slab.

8 Q So there's two tests we know of that could have been
9 done. Did Dr. Whitlock do either one of those tests?

10 A He did not.

11 Q If it's a rebar issue or a concrete issue, are there
12 tests to check that?

13 A Yes, we actually have equipment that can do an X-ray of
14 the slab and determine if there's rebar and or wire fabric
15 in the slab.

16 Q Did Dr. Whitlock do that?

17 A He did not.

18 Q Did Dr. Whitlock do any test to determine whether or
19 not the slab, concrete, rebar, or soil was inappropriate?

20 A He did no test.

21 Q Did you see any measurements that you took which would
22 show differential settlement, or part of the house settling
23 at a different rate than anything else?

24 A The only thing he showed was some photos of some
25 cracking or cracked tile. And he never didn't investigate

1 that. It was just a crack in the joint of the tile.

2 Q I can't remember if you were here or not, but I
3 referred to concrete as crackcrete. Is that normal in the
4 industry to refer to it as crackcrete?

5 A Concrete is going to crack. That's just the bottom
6 line. It has to do with the curing of the concrete and that
7 the surface cures quicker than the middle. So, as it cures,
8 it tends to concave up and cause the stresses in the
9 concrete. It will crack. Within the house you saw the
10 joint. So this is just smooth as you can be. Still put the
11 joint there and in the driveways you tool the joint and the
12 reason is you're trying to induce the concrete to crack
13 there. Sometimes it does, and sometimes it doesn't. That's
14 just the real world.

15 Q It's just the way of the world, and in fact the code
16 officials know that.

17 A Yes.

18 Q The South Carolina residential construction standards
19 talk about that.

20 A The South Carolina Residential Performance Standards,
21 which are usually in effect in the first year after a home
22 is built, gives tolerances to whether the width of the crack
23 or the vertical displacement of the crack.

24 Q Let me go back a second, because we tried to get an
25 average in earlier. If the last house was built in 2017,

1 how old is it today?

2 A Six plus years.

3 Q If the first house was built in 2012, how old is it?

4 A 11 to 12 plus years.

5 Q When is the majority of settling in a house?

6 A The first year.

7 Q Is it essentially done settling by the third year?

8 A Yes.

9 Q So if you had a soil problem or a structural problem,
10 would you expect the homeowner to see it within the first
11 one to three years?

12 A Yes.

13 Q Is that a structural problem?

14 A Yes, that is a structural problem.

15 Q Have you reviewed D.R. Horton's warranty on structural
16 problems?

17 A I'm aware that they have a ten year structural warranty
18 on their houses.

19 Q So, if in fact the houses were settling, would a
20 homeowner notice it? Settling differentially. I apologize.
21 Would a homeowner notice it?

22 A Oh yes.

23 Q And how soon would you expect, in your opinion and
24 based on your experience, a homeowner to notice that their
25 house was settling and cracking and falling apart?

1 A They would know it in the first three years, surely.

2 Q And the youngest house is now six years old; is that
3 right?

4 A Six plus.

5 Q Six plus. Fair enough.

6 A Well, that was 2011, 2012.

7 Q Is there any evidence, any evidence, that those houses
8 are still settling or settling out of what is acceptable and
9 allowed by the code or the residential standards?

10 A No evidence whatsoever.

11 Q And has Dr. Whitlock, in your opinion, developed his
12 investigation and done his inspection to validate that
13 issue?

14 A He did not validate that issue.

15 Q Go back to cracks a little bit. So we're talking about
16 the residential standards in the code. What does the code
17 say about cracking? No cracking?

18 A No, the code says you're going to have cracking. It's
19 inevitable. But, the standards is what gives you the width
20 and the height to give you the deviations that are
21 acceptable.

22 Q Can you give us some examples, if you know off the top
23 of your head, what's an allowable crack and what's not?

24 A I don't remember. You know, I know that when I was
25 checking cracks along the side of the foundations of all of

1 them, I checked, I found one that I think exceeded the LLR
2 performance standards.

3 Q And would you need to go to each house and each crack
4 and measure it to determine if it's outside of those
5 standards?

6 A Yes, you would.

7 Q Can you take one crack and say that that crack is in
8 220 other homes in your opinion?

9 A No.

10 Q Is that an acceptable or reasonable way to do an
11 investigation into a construction defect?

12 A No. Should have looked at every house, determine if
13 there was cracks in the foundation as you could observe from
14 the side elevation.

15 Q And are there potentially different reasons why there
16 would be cracks in a foundation?

17 A Sure.

18 Q Could be soil. Could be rebar. Could be concrete.
19 Could be something else, right?

20 A Could be a design issue with all of these that been
21 shown, but a number of issues could show up. You have
22 different houses out there. You have ranches. You have two
23 stories and you have two stories with basements.

24 Q That's right. I forgot there were houses out there
25 with basements aren't there, Mr. Moore?

1 A Yes, sir.

2 Q So, you need to go look at each one of them to
3 determine what's wrong, if it's outside of the standards,
4 and why it happened. Is that fair?

5 A That's correct. You have different cladding. For
6 example, if you have the brick cladding, it's going to cover
7 the brick, cover the slab. You're not be able to see it.
8 If you have a basement, you'll have interior cast walls. You
9 could see cracking. You'd have to look at every one to see
10 what the issue is and if you have a problem or not. A
11 hairline crack is not a problem.

12 Q And if Mr. Lucey puts up a bunch of cracks in concrete,
13 pictures of that, is that sufficient in your mind to do a
14 reasonable, acceptable investigation of that issue by
15 engineering standards?

16 A No, you'd have to measure every crack and see where it'
17 it's at.

18 Q I just want to hit it very, very briefly, okay. Very
19 plainly for the jury. Very simple, okay. Is the radon
20 system required in Anderson County when these homes were
21 built?

22 A No, it's not.

23 Q If it wasn't there at all, would it be a code
24 violation?

25 A It would not.

1 Q Do you know what the name of the radon system is that
2 is installed even though it's not required?

3 A It's called a passive system.

4 Q And what is a passive system versus another kind of
5 radon system?

6 A Well, this passive system is a series of pipes under
7 the slab. You have the stone and the pipe, and then you
8 have a plastic poly and then you have the concrete slab on
9 top of that and you have one simple pipe that comes out of
10 the ground connected to those pipes and goes up through the
11 roof so that any gases -- it's just a natural free flow of
12 the air up. There's no pump. There's no system forcing air
13 in or pulling air out of this passive system.

14 Q Do the cracks have anything to do with that radon
15 passive system?

16 A No. As we talked about earlier, you intentionally saw
17 or tool concrete to get it to crack. So, the poly is the
18 layer that's between the pipes and between the concrete and
19 that keeps any radon below. Horton advised me that they put
20 them throughout the county because of the proximity to
21 Greenville. But it is, if you look at the DHEC information,
22 we are two to four. We're media 2 here, which requires no
23 equipment, no testing. Like I said, the DHEC published data
24 is that they've got a 1.7. The average test here, and
25 you've got to get above a four to even start worrying about

1 having a collection or a more complicated system.

2 Q Does putting a radon, even a passive system, cost
3 money?

4 A Yes.

5 Q Is that an extra cost to D.R. Horton?

6 A Yes.

7 Q Was it necessary?

8 A It wasn't necessary. It was something they did for
9 their clients, customers.

10 Q Was there anything related to the radon or the concrete
11 related to the radon that you could find?

12 A No, sir.

13 Q I'm going to switch subjects on you.

14 A Yes, sir.

15 Q Mr. Moore, will you explain the difference between a
16 prescriptive requirement in the international code and a
17 performance requirement in the international code.

18 A The prescript requirement tells you the minimum you can
19 do by. It may spell out the size of a 2 by 4 or size of a
20 beam. The performance tells you what you're trying to get
21 to, what the end result is.

22 Q So, as a performance standard evaluated by whether it's
23 performing or not?

24 A Yes.

25 Q Are you familiar with the IRC Section 7?

1 A Yes.

2 Q This isn't the page guys. Let's go to 703, please,
3 gentlemen. One page back, gentlemen. Nope, I'm sorry 7-13.
4 If you -- Section 703. Exterior covering. Is this talking
5 about everything you put on the exterior of a house?

6 A Yes.

7 Q Does this section say the exterior walls -- does that
8 include vinyl?

9 A Yes.

10 Q Hardy?

11 A Yes.

12 Q Brick?

13 A Yes.

14 Q Stone?

15 A Yes.

16 Q "Shall provide the building with a weather resistant
17 exterior wall envelope". Did I read that right?

18 A Yes, you did.

19 Q Let's skip a line and go down to the next part here.

20 "The exterior wall envelope shall be designed and
21 constructed in a manner that prevents the accumulation of
22 water within the wall assembly by providing a water
23 resistant barrier behind the exterior veneer, as required by
24 703.2 and a means of draining water that enters the assembly
25 to the exterior". Does it say that?

1 A Yes, it does.

2 Q Was that code section in effect at the time that Rose
3 Hill was constructed?

4 A It was.

5 Q What does that mean? Tell the jury what -- well, let
6 me ask you this. Is this a performance standard?

7 A Yes.

8 Q Okay, tell the jury what that means.

9 A It means that you're provide a system to keep the water
10 out of the walls, and if it gets in, a way to get it out.
11 Protect the interior of the house.

12 Q I know you engineers argue about this a little bit.
13 Where does the interior of the house start? Does it start
14 at the wall, the exterior wall sheathing, or the interior
15 wall gypsum board, or the framing or do you know?

16 A As far as we're concerned -- I'm concerned -- it starts
17 at the sheathing. If the sheathing starts becoming damaged
18 by water intrusion, then you have an issue.

19 Q Do you remember the 1995 CABO code?

20 A Yes.

21 Q I'm almost that old. We heard about WRB earlier,
22 weather resistant barrier.

23 A Yes.

24 Q Do you remember if in the 1995 CABO, the weather
25 resistant barrier was even necessary?

1 A There was a time frame in there that they considered
2 sheathing OSB and plywood as water resistant and you didn't
3 have to put WRB on.

4 Q So you just put your vinyl right over the wood. People
5 called the plywood forever, but plywood or big sheets, it's
6 called strand board now, right?

7 A Yes, OSB, oriented strand board.

8 Q And that that would protect your house from getting
9 water inside, right?

10 A Right.

11 Q We didn't just start building houses a couple years
12 ago, did we?

13 A No.

14 Q Have we built houses with wood for a very, very long
15 time?

16 A Yes.

17 Q And brick?

18 A Yes.

19 Q And masonry?

20 A Yes.

21 Q And is the point of building the house to keep the
22 weather and water out?

23 A And has that evolved over the years?

24 Q Yes, they realized that, for example, the plywood and
25 OSB wasn't very water resistant. That's why they came back

1 with the WRB which was to prevent the water damage to the
2 wall.

3 Q So, then they developed the product, a lot of folks
4 will see, Tyvek T-y-v-e-k white to put on the exterior of
5 the house, right?

6 A Correct.

7 Q That's weather resistant barrier; is that right?

8 A That is correct, sir.

9 Q And that protects the wood sheathing from water, right?

10 A Yes.

11 Q I'm not sure if it's required. Is it required in every
12 house now?

13 A There is some means -- I mean, for example there are
14 newer systems called the ZIP system. But it's some kind of
15 water resistant barrier is required on all houses, unless
16 it's a mass wall. So for a house, yeah, it's not
17 complicated.

18 Q We're going to talk about this at length, but let's
19 just give the jury sort of an idea of what we're talking
20 about. Does brick veneer keep water off houses?

21 A No.

22 Q Is brick veneer, in fact, designed to let water behind
23 it?

24 A It's not designed to let water in, but it's designed to
25 get the water out that does come in because it's absorbent.

1 Brick and mortar joints will absorb moisture.

2 Q You were asked about an air gap earlier.

3 A Yes.

4 Q And I want to make sure that the jury understands this,
5 okay? So, you have your row of bricks that you see outside,
6 right?

7 A Correct.

8 Q What's behind that, Steve, if you were to kick it open
9 and peek in that hole?

10 A The intent is to have a gap there of one inch plus so
11 that as the water does absorb into the brick absorb into the
12 mortar joints it would then fall down based on gravity to
13 the flashing and then be carried back out of the wall.

14 Q Let me make sure that the jury understands that. I
15 mean no disrespect to them. I just want to make sure they
16 understand, because I've been doing it a while and you've
17 been doing it longer. That was a shot at you.

18 A That's okay.

19 Q The water is actually assumed to get behind the brick
20 on a brick veneer, house. Is that right?

21 A Yes.

22 Q And the code says once that water gets through it it is
23 to hit that WRB, that Tyvek, use gravity to go downhill, and
24 then either exit the wall at the bottom or exit the wall
25 some other way. Is that right?

1 A That's right. It would go down to the flashing and the
2 flashing and the weep would carry it out to the face of the
3 brick. It's logical to think that if water gets into a
4 masonry joint, it will come out of a masonry joint as well.

5 Q All right. So, what's the water protection on a house,
6 Steve?

7 A Protecting the wood framing.

8 Q What's the product that does it?

9 A You get rot. You get rot.

10 Q No, no, no. Is the WRV, the white Tyvek, actually what
11 is waterproofing the framing and the interior of the house?

12 A Yes, it provides the water resistance to the house.

13 Q You were asked a little bit earlier about mortar slop
14 in that one inch area. Do you remember that?

15 A Yes.

16 Q What's mortar slop?

17 A Mortar is the excess material that comes off the brick
18 laying operation. The code allows you to actually fill the
19 space up. If you want to fill it completely up, you're
20 allowed to. But as bricks are laid you, they'll lay them
21 mortar on the back and the edge of the brick and they'll
22 push it down and they'll cut off the edge, but there's
23 there's bricks slop on the back. There's mortar that
24 overhangs the backside of the brick and it will drop off.
25 And that's the -- that becomes the slop that you get into

1 cavities. Still got gaps. It's still got a way that the
2 water will drain through that cavity to the base.

3 Q Is mortar porous?

4 A Is what important?

5 Q Is mortar porous?

6 A Yes.

7 Q Can water get through it?

8 A Yes.

9 Q Is brick porous and can water get through it?

10 A Yes.

11 Q If water gets in through brick or mortar, can it come
12 back out through brick or mortar?

13 A It does. It can and it does.

14 Q If it's in the wall and it's doing exactly as it's
15 designed, which is following that white Tyvek WRV down, is
16 the mortar in that cavity going to prevent the water from
17 going down?

18 A No. If it was and there was and there was an issue,
19 then it would show up on the inside of the wall. And I'm
20 talking about inside the house.

21 Q Let's talk about that. How many houses did you go in?

22 A One hundred something.

23 Q Actually, let me back up a little bit, Mr. Moore. Have
24 you ever done work for a plaintiff's construction attorney
25 or plaintiff's case in construction?

1 A Yes, sir.

2 Q So, you're hired to go out and look at somebody's house
3 or building to find what's wrong with it?

4 A Yes.

5 Q And when you're sent out there to look at that house,
6 what is one of the first things that you're looking for?

7 A Damage caused by water.

8 Q By water.

9 A Water causes rot. In this area, within 4,5,6 years,
10 water will rot. You'll see black rot. The wood will turn
11 black, the sheathing, the framing will rot, and you can get
12 biological growth from it. It's a pretty natural process if
13 you're not keeping the water out.

14 Q Is that a standard operating procedure for a forensic
15 engineer who is asked to evaluate a house or a structure?

16 A Yes. That's normally one of the first things the
17 homeowner sees. He observes water or water stains on his
18 walls, or some issues, and therefore we start with -- they
19 asked for someone to come in and start investigating it.

20 Q Is it number one?

21 A Pretty much.

22 Q So you go, and you look for water damage, right? Water
23 gets all over, doesn't it? It's amazing, isn't it?

24 A Yes.

25 Q And you follow the water and you follow the rot to

1 determine how or why it got there, right?

2 A You determine where that water is coming in and to what
3 extent it's caused the damage.

4 Q Do you remember when Dr. Rhett Whitlock started
5 investigating in this neighborhood?

6 A Yes.

7 Q What year?

8 A '20 I think. '19. Early.

9 Q '19 or '20?

10 A Yes.

11 Q So we're talking for three to four years, then, right?

12 A Yes.

13 Q Do you expect him to do his standard operating
14 procedure any different than any other forensic engineer?

15 A No. I would expect him to do the same.

16 Q Mr. Moore, I think this is important point. So I'm
17 just stressing to the jury. How many houses are out there?

18 A 220 are in this lawsuit.

19 Q Have you seen one photograph of 220 houses over four
20 years with water damage, rotten sheathing, framing, or wet
21 insulation?

22 A Not one. Not a single photograph has been produced
23 that shows that damage.

24 Q And under the code section, the performance code
25 section, are the exteriors of the houses working?

1 A Yes.

2 Q Mr. Lucey asked you about a crack here and a gap there
3 when you took brick off these houses -- and we'll go through
4 the pictures -- did you find any damaged, water rotted,
5 deteriorated sheathing?

6 A No, we found that one piece of sheathing that counselor
7 showed us at the bottom of the trim between the two garage
8 doors. That didn't have the WRB, and it wasn't even damaged,
9 but we didn't find any rot anywhere in our investigation
10 whatsoever.

11 Q Do you have an opinion as to how likely it is to
12 investigate 220 residential houses that are somewhere
13 between six and eleven years old and not find anywhere
14 that's rotten?

15 A It was amazing. You usually don't find it. With all
16 the allegations of the issues I would expected to have seen
17 it, but there wasn't any. Shows that the houses, the
18 systems, are carrying the water away from the inside of the
19 house and not causing any damage whatsoever.

20 Q Let's turn that around. Have you seen any photographs
21 of any water damage from the exterior sheathing on the
22 interior of these houses?

23 A No.

24 Q Did you find any when you inspected?

25 A No.

1 Q When you look at the thousands and thousands of
2 pictures that have been taken and produced in this case,
3 have you found any pictures of water damage caused by the
4 exterior sheathing?

5 A No.

6 Q Exterior sheeting. I'm sorry. The stone, vinyl,
7 whatever the exterior.

8 A Exterior cladding.

9 Q Exterior cladding. Sorry about that. I got a little
10 ahead of myself. Now, there are -- we're going to talk
11 about them a little. Some of these windows are cracked and
12 the jury is seeing that. We'll talk about that in a little
13 while. And there is some water staining and even some water
14 damage on some of the sills out there, right?

15 A Right.

16 Q Can you distinguish that from water getting in through
17 brick or stone?

18 A Yes.

19 Q So again, did you find any water getting in and rotting
20 anything in 221 houses from brick or stone?

21 A Well, we didn't get to go into 220 homes, but the homes
22 we went in and the photos we've observed, ours and Dr.
23 Whitlock's, we didn't see any water damage.

24 Q If, in your opinion, Dr. Whitlock or the homeowners or
25 Natalie Zitek had water damage from the brick or the stone

1 in their houses, would you expect that to be front and
2 center?

3 A Yes, sir. Very quickly.

4 Q That's the contact list. This is what Mr. Lucey put up
5 earlier. And I can't see it, frankly. Were you showing all
6 the pictures, Mr. Moore?

7 A No. We took some 50,000 photos.

8 Q And Mr. Lucey kept asking you. Let's talk about the
9 lentil issue. He kept asking about the lentil and cracks.
10 How many houses did you see?

11 A One hundred and something. We did destructive testing,
12 I think, on some 29 maybe.

13 Q Did all of the brick houses have cracks above the
14 garage door?

15 A They did not.

16 Q Did you do notes or analysis of how many houses had
17 cracks above the garage door?

18 A We noted if there was cracks, yes. We took photos of
19 everything, of the exterior, as best we could.

20 Q Does every house have those cracks?

21 A No.

22 Q If they are six to eleven years old, in your
23 professional opinion and your experience, will they develop
24 cracks in the future?

25 A No.

1 Q Is it unusual, Mr. Moore, to have cracks in brick
2 during that first year or first three years of settling?

3 A No, it's not unusual.

4 Q Even more importantly, is it normal and even expected
5 to have cracks in the mortar?

6 A Yes, and you've got cracks the mortar. You come back
7 and repoint it.

8 Q Go back and what?

9 A Repoint the joint.

10 Q Will you pull that microphone over just a little bit?
11 Thank you.

12 A Repoint the joint.

13 Q What does that mean that mean?

14 A Just a repair.

15 Q I mean no disrespect to the jury.

16 A You take the you take a saw and saw out the joint and
17 put mortar back in and you can dye it to match the existing
18 joints.

19 Q Is that normal maintenance?

20 A Yes.

21 Q Is it hard to do?

22 A No. You have a mason come out and do it, so a few hour
23 operation.

24 Q Does it affect the structure integrity of the house?

25 A None at all.

1 Q Does it affect the water resistance of the house?

2 A No.

3 Q So, if you see a crack in mortar, does that tell you
4 anything more than there's a crack in mortar.

5 A No, nothing more.

6 Q Only certain pictures were shown to you. Are there
7 pictures of houses that don't have cracking above the
8 garage?

9 A Yes, there are.

10 Q Can you make a blanket analysis in your experience and
11 opinion based on a reasonable degree of engineering
12 certainty that if you find at three or five or ten places on
13 homes that all of the other homes have those same issues?

14 A No. This whole neighborhood is individual. There are
15 220 different lots. Some of them are slab ranches. Some of
16 them are two stories, some of them walk out. They're
17 different configurations. A few are side load, front load,
18 some have bricks, some don't have bricks, some have vinyl,
19 don't have vinyl, some have stone, don't have stone.
20 Everything is unique. You've got to be able to evaluate
21 each house for each unique problem.

22 Q It could be a number of different things, right?

23 A Correct.

24 Q It could be the brick ledge wasn't poured correctly,
25 and the brick isn't supported by the brick ledge, correct?

1 A Correct.

2 Q It could be that the concrete didn't cure correctly,
3 and the house is settling on that uncured concrete, couldn't
4 it?

5 A Could be a bad corner in the concrete. Could be a
6 framing issue.

7 Q Mr. Lucey showed you a picture of where brick was
8 actually cracked right at the bottom corner of a brick
9 house.

10 A Front right corner.

11 Q Just for the jury, what could be the possible causes
12 for that?

13 A Somebody bumped it with something.

14 Q Well, that's one.

15 A Small tractor, lawn mower. It could be a lot of issues
16 there.

17 Q It could be underground water, right?

18 A Yes. You have the drainage of the downspout coming out
19 right there next to it. Could soften up the ground.

20 Q Somebody could have hit it?

21 A Somebody could've hit it. It could be just could be a
22 soil issue. It could be a structural thing, but no one
23 knows. The thought that the through wall flashing was
24 discontinuous there caused that issue is ludicrous.

25 Q Again, has there been investigation and -- let's just

1 talk about that one issue. Investigation and inspection and
2 analysis and testing to determine why that one area is
3 cracking?

4 MR. LUCEY: Objection, Your Honor. May we approach?

5 THE COURT: Yes, sir.

6 (WHEREUPON, bench conference.)

7 Q In your experience and based on your education, have
8 you seen adequate investigation, testing, and analysis to
9 arrive at an opinion to a reasonable degree of engineering
10 certainty, which is your standard, why that brick is
11 cracking there?

12 A No.

13 Q You haven't seen that testing or that investigation?

14 A No.

15 Q Mr. Moore, if you were allowed to, would you ask the
16 homeowner what happened?

17 A Yes.

18 MR. LUCEY: Objection, Your Honor. May we approach?

19 (WHEREUPON, bench conference)

20 Q I'll rephrase the question. What would you have done?
21 I'm just talking about this one issue. What would you have
22 done to investigate that issue?

23 A Certainly would have talked to the homeowner, if
24 they've noticed that particular problem. Looked on the
25 inside of the house. Would asked if they knew what it was.

1 Otherwise, we'd have gone out and try to take some testing.
2 Look at the subsurface, see if the soil is wet there, if
3 it's soft.

4 Q Let's talk about the lentil issue. You haven't yelled
5 at me Steve. I call it a lentil.

6 A It's a shelf angle.

7 Q It's a shelf angle. I apologize. Tell the jury,
8 please, what's the difference between a lintel and a shelf
9 angle?

10 A They're both pieces of steel, generally. Typically
11 you'll have a lintel over a window, a door that will not be
12 bolted to the framing. It's sits on the masonry. And it's
13 supported by the masonry, and it also supports the masonry
14 above it. A shelf angle is a same piece of steel, typically
15 over a garage, and is bolted to a framing and supported
16 differently.

17 Q So the lintel has to go way out, right? And sit on the
18 brick, is that right?

19 A The lintel has to sit on brick. That's correct.
20 Typically it's shorter.

21 Q Shorter. And it has to sit on the brick, so it's got
22 to be potentially thicker and longer.

23 A Right. If you have -- you could use a lintel on a
24 garage. This has to be much longer, because it has to be
25 supported on its minimum width length of the brick. Have to

1 be a lot thicker. The design requirements for a garage is
2 "L" over sixteen. "L" over sixteen is a or "L" over 480 is
3 how engineers determine what the sag of a beam would be. So,
4 the greater the distance, the bottom number is going to be
5 more. A bigger number to reduce the sag. So you have to go
6 to a much thicker and longer beam, longer angle rather, if
7 you use a lintel as opposed to if you use a shelf angle
8 which is bolted to what we call LVL which is a engineered
9 piece of wood.

10 Q So, if you use a lintel, it's longer and kind of ugly,
11 and it breaks up the brick.

12 A And it's thicker and bigger, and you'll see it. It
13 extends way out into the brick wall.

14 Q So, how were these shelf angles designed for the houses
15 at Rose Hill?

16 A The shelf angles were designed. If you look at the code
17 that we had earlier, the 703, if you go by prescribed by
18 the right and you have a house that has one story above it,
19 I think the shelf angle only goes -- that only goes about 8
20 or 9 or 10, 12 feet. You would not be able to have a two
21 car garage. That's why there's have to be designed when you
22 have two-car garages that are one door.

23 Q And have you looked at the plans for these houses out
24 there?

25 A I have.

1 Q And do they have a lintel or shelf angle table?

2 A They do.

3 Q That tells you what to put and how to put it there?

4 A Yes, they break it up into three segments. I think one
5 is probably for windows. One is for the doors and then the
6 third one is for the shelf angle and it tells you the size,
7 tells you the spacing of the bolts, and the size of the
8 bolts to go into it to hold it into the structural framing.

9 Q Well, that's the important part right, right?

10 A Yes.

11 Q You're going to put bolts through it into the frame,
12 right?

13 A Right. It's designed by a structural engineer.

14 Q And once it's put -- once you put those bolts through
15 it and put it onto the framing, it changes from a lintel to
16 a shelf angle. Is that right?

17 A That's correct.

18 Q And that's on the plans that were provided to D.R.
19 Horton for the construction of these houses, is that right?

20 A Some of them, yes.

21 Q Did it require vertical movement joints?

22 A I'm sorry. Do what?

23 Q When you put it -- when you change it from a lintel to
24 a shelf angle, as Mr. Lucey alluded to earlier, did those
25 plans require vertical movement joints?

1 A They did not.

2 Q Let's talk about Ms. Zitek's house specifically. Do
3 you -- where is Ms. Zitek's -- do you remember where her
4 garage faces?

5 A It's on the left side of her house. It's a side load
6 garage, is what we would call it.

7 Q Is the original plan with a front facing garage?

8 A That's correct.

9 Q And when she came with her husband down here to pick
10 their house, could you see that they made changes to change
11 it from a front-facing garage to a side-facing garage?

12 A To a side-load garage, yes.

13 Q And then the house was built and sold to the Zitek's,
14 and they had cracks in their brick. Is that how you
15 understand it?

16 A As I understand it.

17 Q And you understand that they asked warranty to come
18 back out, tuckpointing the brick. You called it something
19 else, not tuckpointing, but putting mortar on it, right?

20 A Tuckpoint, yeah.

21 Q Did you tell this jury earlier that putting new mortar
22 in mortar cracks is normal?

23 A Yes.

24 Q It's an expected issue?

25 A You'll have it. You'll just tuckpoint it.

1 Q So, if you go out there as a warranty tech and you see
2 mortar cracking, it's not unusual. It's just the mortar and
3 you put more mortar in?

4 A That's right. You just do a simple repair.

5 Q Didn't fix it, did it?

6 A Didn't fix this one.

7 Q So after a couple of years, did D.R. Horton get another
8 warranty claim?

9 A Yes.

10 Q Do you know if they went out, from your review of the
11 materials to look at the Zitek house?

12 A They went out and hired a structural engineer to do an
13 evaluation of the garage and the lumber or the framing, the
14 angles, above the garage door.

15 Q I have in front of you Exhibit 214, Southern Dynamic
16 Engineers. Have you seen that before?

17 A I have, sir.

18 Q And what did Southern Dynamic diagnose the brick
19 cracking issue at?

20 A The framing was two areas of framing that was
21 inadequate. One was a below the second floor and one was
22 above the garage. So, at that point, they did an analysis,
23 the structural engineer, of the loads, and they came back
24 and identified the issues and then identified what the new
25 framing should be, including some of the base columns.

1 Q Let's make sure the jury understands that. Was it a
2 brick issue?

3 A It was not a brick issue.

4 Q It was a wood framing issue.

5 A It was a framing issue of the lintel and of the LDL
6 that held up the garage door, above the garage, and held up
7 the second floor.

8 Q And do you understand what that engineer told D.R.
9 Horton to do to fix that issue?

10 A Yes.

11 Q What was that?

12 A They tore it out and rebuilt it up.

13 Q The framing, the wood part?

14 A Yes, they did.

15 Q And then you understand that the mason came and put
16 brick on again?

17 A That's correct.

18 Q What do you know about, in your investigation for this
19 case, that second set of brick?

20 A That it was a very, very bad job. It was so bad, in
21 fact, that as soon as the D.R. Horton personnel saw it, they
22 had it taken back down. Had the brick taken back down and
23 redone again. They were so upset with it, they rejected the
24 work and redid it.

25 Q Have you had a chance to see the photographs of the

1 Zitek house after the brick was taken off?

2 A Yes.

3 Q Is the weather resistant barrier on the house?

4 A It was.

5 Q The white wrap?

6 A Yes.

7 Q Are there weep holes in the new brick.

8 A Yes.

9 Q Is there base of wall flashing in the brick?

10 A Yes.

11 Q Does it come to or very near daylight?

12 A It does.

13 Q Are the windows taped.

14 A Yes.

15 Q Are there brick ties ---

16 A Yes.

17 Q --- on the side of the house?

18 A Yes.

19 Q Did you, in your investigation and looking at those
20 pictures, see anything wrong with the reinstallation of the
21 brick on Natalie Zitek's house?

22 A No.

23 Q Have you seen any photographs, or seen for yourself,
24 any cracking above the garage of the Natalie Zitek's house?

25 A I think about the second floor there's a crack at the

1 window.

2 Q Is that on the front elevation or is that on the side
3 of the garage?

4 A It's on the side elevation, and I think there's one on
5 the front now.

6 Q Do you know what's the cause of that?

7 A No.

8 Q So the Southern Dynamic letter, are you aware of any
9 other house in the neighborhood that had a wrong-sized
10 framing or LVL issue that caused issues with the brick?

11 A Not been aware of any other issues whatsoever.

12 Q Is Natalie Zitek's issue with her brick different than
13 every other house out there, in your opinion?

14 A From that standpoint, yes. It was originally a design
15 issue that was addressed and corrected by D.R. Horton.

16 Q When you saw the brick removed, was there any evidence
17 of water intrusion, or water rot, or anything else?

18 A No. All the that were done taken during the repairs
19 didn't show any water damage at all.

20 Q When you have to replace the LVL, do you have to take
21 all the brick off the entire side of the house?

22 A Didn't take it all off. They took a substantial
23 amount, but you didn't have to take it all off.

24 Q Would you take it out the head of the garage and pull
25 the LVL out, put a new one in?

1 A Yes.

2 Q Do you know why all the brick was taken off?

3 A No.

4 Q All right. Mr. Moore, you looked at another hundred
5 houses out there, some of which had brick on them, is that
6 right?

7 A Yes.

8 Q Did you see base of wall flashing?

9 A Yes, in a lot of locations.

10 Q Did you see weep holes?

11 A Yes.

12 Q What are the weep holes in the base of wall flashing to
13 do? What's that for?

14 A To allow water out.

15 Q So again, it gets behind the brick, comes down that
16 gap, and then it hits that flashing and exits out, hopefully
17 through the weep holes and or that flashing?

18 A Correct.

19 Q Did you see any evidence that that flashing isn't
20 working out there?

21 A None whatsoever.

22 Q Do you see any evidence that those weep holes aren't
23 working out there?

24 A Well, they were clogged. It wouldn't work, but the
25 water was getting out around them or through the -- through

1 all flashing.

2 Q Are all of the weep holes clogged with the exact same
3 materials?

4 A No.

5 Q You said mud daubers earlier.

6 A Yes.

7 Q Is it unusual for mud daubers to get into weep holes?

8 A I see it all the time.

9 Q Is that a maintenance issue for the homeowner?

10 A Yes.

11 Q Now the homeowners not having any issues that you
12 observed with water getting out of that brick, is that
13 right?

14 A That's correct.

15 Q But the homeowner should still go check and clean those
16 out, right?

17 A Correct.

18 Q If the weep holes are missing, they're not there at
19 all, or they're not spaced correctly, what is the repair for
20 that?

21 A It's very simple. Take a drill, drill a hole in the
22 masonry. Stick in the weep hole.

23 Q Is it really that easy?

24 A That's it.

25 Q Is it really that easy?

1 A Yes. As long as you don't drill through the PVC
2 through wall flashing that comes off the back wall, it's
3 that easy.

4 Q And how do you determine whether or not the base of
5 wall flashing is out there without taking all the brick off
6 the bottoms of everywhere on every one of those brick
7 houses?

8 A You'll either see the thin edge of the black poly or
9 you'll see the joint. If you look around the base of brick
10 houses, you would see a thin line along the weeps and that
11 is the three wall flashing. That's the break that's caused
12 by the three wall flashing between the mortar on the top and
13 the mortar below three wall flashing.

14 Q There was a photograph shown to you earlier, where the
15 flashing -- this is the black -- is it PVC?

16 A Black poly.

17 Q Explain what poly is.

18 A Plastic. It's a sheet of plastic.

19 Q So plastic is the flashing?

20 A That's correct.

21 Q And it comes down vertically and it turns out between
22 two bricks?

23 A That's correct.

24 Q And then that gap is filled with mortar?

25 A Yes.

1 Q I've never done this. So, you take a brick and you take
2 your mortar and you slap it on there.

3 A And you lay the brick on top of it. You've still got
4 that break, still that plastic. The mortar will come across
5 the top of that plastic below that mortar.

6 Q So, if -- I'm confused by this. So you've got a piece
7 of rubber membrane, right?

8 A Plastic membrane.

9 Q It's a plastic membrane and it's encased in mortar,
10 because if you put mortar in that joint where that is, how
11 does the water get through that?

12 A Well, we're not talking tons of water. We're talking
13 about a minor amount. It just slides along on that plastic
14 poly and comes through the weep.

15 Q So, it just kind of migrates through the mortar?

16 A Yes.

17 Q So, if flashing comes down and it doesn't come all the
18 way out to daylight, it stops here halfway through the
19 brick, does the water still migrate out of the brick?

20 A Yes. In fact, there was a study done, a paper was done
21 in 2003 by a structural engineer through Clemson University
22 and the original intent of that study was to.

23 MR. LUCEY: Objection, Your Honor. Improper use of the
24 treatise.

25 THE COURT: Do we have the treatise you're addressing?

1 MR. IMHOFF: I actually do have it, but I didn't ask
2 that question. Would you like me to get it and hand it to
3 him?

4 THE COURT: If you would like to ask about the treatise
5 to be consistent.

6 MR. IMHOFF: Your Honor, may we take a break while we
7 pull that up?

8 THE COURT: I think it's a good time to take a break.
9 Mr. Bailiff, would you take our jury to the jury room?

10 (WHEREUPON, the jury exited the courtroom and a break
11 was held from 3:08-3:28 pm.)

12 THE COURT: I have received a request from the jury that
13 the attorneys speak louder or speak into a microphone so
14 they can be able to hear. Ladies and gentlemen, if at any
15 point you have trouble hearing, please raise your hand and
16 let us know.

17 (WHEREUPON, jury note was marked Court's exhibit 4.)

18 Mr. Imhoff, proceed.

19 CROSS EXAMINATION

20 BY MR. IMHOFF:

21 Q Mr. Moore, you referenced before the break, a study
22 that talked about whether or not flashing has to go all the
23 way out to daylight, is that right?

24 A Correct.

25 Q I put what I think you're referring to on the screen

1 now.

2 A This is it.

3 Q What does that top say?

4 Q Alternative Flashing Applications to Metal Grip Edges
5 and Brick Veneer, Paul Perlman, which is a structural
6 engineer. The original intent of the study, as I understand
7 it, was to come up with how much -- what different types of
8 flashing would leak, more or less, but a byproduct of the
9 study was determined that if the three wall flashing was
10 actually a quarter or a half inch short of the face of the
11 brick, it made no difference in the effectiveness of it.

12 Q Who did that? Who authored that study or what school
13 or where?

14 A It was Paul Perlman who was a structural engineer with
15 Richtex brick. Hanson America, Columbia. But it was through
16 Clemson University.

17 Q We've tossed some words around. They're not technical
18 words. Is it a technical code violation not to bring it to
19 daylight?

20 MR. LUCEY: Your Honor, the treatise that is not in
21 evidence is still on the screen. We'd ask that it be taken
22 down.

23 THE COURT: All right. Take it off the screen. He's
24 answered the question. If you want to ask him more
25 questions, let the witness see it.

1 MR. IMHOFF: Yes, sir. I'm fine. Thank you.

2 Q Does cutting the flashing short and not bringing it all
3 the way out to the exterior affect the performance of the
4 exterior brick veneer?

5 A No, it does not. If it did, you would know it by water
6 intrusion at the house at the base of the walls.

7 Q In your opinion and experience and investigation, are
8 the brick exterior walls functioning to keep the house
9 weather resistant?

10 A Yes, they are.

11 Q Is it is the exterior brick veneer performing up to the
12 code requirements for performance?

13 A Yes. It's doing its intended purpose, which you showed
14 earlier, was to provide weatherproof cladding to a house.

15 Q I think it's important for the jury to know how it gets
16 cut short? Being a general contractor, being an engineer,
17 being around it for a while, why does it get cut short, Mr.
18 Moore?

19 A All kinds of reasons. Sometimes they'll just cut it
20 short. Sometimes they'll take a torch and burn it, and when
21 they burn it, it pulls back in a little bit.

22 Q If it comes out of the house, does it look like the
23 brick house is wearing like a little mini skirt or a little
24 flower hat or something like that?

25 A It's a little black miniskirt hanging down around the

1 brick, if you will. It's not very attractive. Homeowners
2 typically don't like it, so it gets cut or burned back off
3 and it's just take the torch and burn along the edges of
4 brick it will recess back.

5 Q It's actually in that report that says the homeowners
6 don't like it. It's ugly, isn't it?

7 A Yeah.

8 Q They don't like it?

9 A No.

10 Q They don't want to see it.

11 A They want to see the brick wall.

12 Q It breaks up the brick, doesn't it?

13 A Yes, sir.

14 Q Does it affect the performance of the wall?

15 A No, it doesn't.

16 Q Let's talk about the vertical joints. So, what Mr.
17 Lucey was talking to you about this morning is -- well, you
18 tell me. What does th is vertical joint look like in these
19 people's houses that they're proposing?

20 A It's going to look like a big wide joint going from the
21 end of the steel all the way to the roof line.

22 Q So, above your garage.

23 A On both sides of the garage opening.

24 Q On both sides of the garage opening, somebody is going
25 to take a saw and saw above this side of the garage door

1 opening, and this side of the garage door opening all the
2 way to the wood soffit or the roof line? Is that right?

3 A That's right. One side might be five feet high and one
4 side might be ten feet or fifteen feet high.

5 Q Can you remember, in your entire career, seeing that
6 vertical joint installed on a residential house?

7 A I never have. I went looking for it the other week. I
8 can't find one anywhere in new houses in South Carolina. I
9 was in a neighborhood in Fort Mill looking and they're just
10 not there. They haven't been there ever.

11 Q Is the industry standard to not put that ugly vertical
12 joint in residential houses?

13 MR. LUCEY: Objection, Your Honor. It can't possibly be
14 industry standard if it's against the building code.

15 THE COURT: Overruled.

16 Q Is it done in both South Carolina and North Carolina on
17 every brick house that you have ever looked at that you
18 remember?

19 A It has never been done on any house in North or South
20 Carolina that I've worked on or seen.

21 Q What do you fill that with?

22 A You would put a backer rod and then sealant. And then
23 it would have to be a maintenance issue for the homeowner.
24 They would have to maintain that sealant as it aged over the
25 years.

1 Q Let's talk about the MSV. Sorry, the stone. What's a
2 dry stack?

3 A Dry stack is where you don't fill the joints in around
4 the stone. The stone is pressed onto the wall and then the
5 adjacent stone is pressed into the wall and there's a space
6 between them.

7 Q So, if it's not a dry stack, you actually take mortar
8 and you fill in all the areas around each stone, right?

9 A That's correct.

10 Q And in this application you don't put any mortar in the
11 joints; is that right?

12 A Right. After the base coats down, you take and put
13 mortar on the back of the stone and you push it on there.
14 Push the next stone and you're done.

15 Q Let's let's walk the jury on how you do this. Let's
16 walk them through this. So, you've got your -- you have your
17 --

18 MR. IMHOFF: I hope -- is there a microphone I can talk
19 into, Your Honor?

20 THE COURT: There's one there.

21 MR. IMHOFF: Over here? I'll just ---

22 THE COURT: Stand close to the jury. I want to make
23 sure they hear you.

24 Q So here we have a picture image 0387. This is a
25 picture of the stone. In between the stones is there

1 mortar.

2 A Between the stones? No.

3 Q And if water gets in between the stones, how does it
4 get out?

5 A It's going to drain right back out between the stones.

6 Q Goes right back out.

7 A Right back out.

8 Q What is waterproofing these houses.

9 A The WRB which you see in the white -- in the top right
10 area, that's the original weather resistant barrier that's
11 on all the houses.

12 Q It's required to be on all the houses?

13 A It's required to be all the houses. All the ---

14 Q It's required to be all the houses. I'm sorry, I
15 didn't mean to interrupt you.

16 A Required to be on all the houses.

17 Q But when the stone mason comes and he puts his stone
18 on, does he waterproof it further?

19 A Yes.

20 Q How?

21 A He puts this black felt, typical felt, typically
22 fifteen pound felt, and the reason he does that is because
23 it's considered a wet process. In that the mortar that you
24 put on to the lap is wet. So, it's considered a sacrificial
25 piece of underlayment. Kind of like the stucco process, but

1 here it's the stone process so that if the water is going to
2 deteriorate something, it's going to be that felt and your
3 original WRB is going to remain intact.

4 Q So the house is waterproofed by the white weather
5 resistant barrier or house wrap, right?

6 A Correct.

7 Q Same weatherproofing waterproofing, that's behind the
8 stone, right.

9 A Correct.

10 Q But then the stone mason comes and puts a whole 'nother
11 piece of black -- is it tar felt or --

12 A It's just black felt.

13 Q Is that what you put under shingles on your roof?

14 A It could be, yes.

15 Q Is that what they used to put under there?

16 A A long time ago they did.

17 Q So behind the manufactured stone veneer there's
18 actually two waterproofing agents, right?

19 A That's correct.

20 Q And then the mason doesn't fill in the gaps between the
21 stones, so water can get right back out if it even gets that
22 far.

23 A Puts the lap down, put the bed coat, and then he comes
24 back and you put the stone embedded onto that and it has all
25 the gaps and openings to allow the water to flow in or flow

1 back out.

2 Q So water gets in, gets out. If it gets further in, it
3 gets to the tar paper, right?

4 A Gets to the felt paper.

5 Q If somehow it gets beyond that, then the weather
6 resistant barrier is there.

7 A Carries it right down to the ground.

8 Q Have you found any damage to the houses from the
9 installation of the manufactured stone veneer?

10 A No, and everywhere we opened up, we always found two
11 layers of felt, two layers of material.

12 Q Is the installation of the manufactured stone veneer
13 complying with the performance requirement that the house be
14 weather resistant?

15 A Yes.

16 Q And what would be evidence that it's not?

17 A You would have water intrusion and damage.

18 Q Have you found or seen anything like that?

19 A No.

20 Q Let's talk about the code violation of this stone. Let
21 me ask you this. Is the stone just been purely decorative?

22 A It's a cladding. That's all it is.

23 Q But it's not weather proofing the house?

24 A No. The weather resistance is provided by the WRB?

25 Q It protects the house from neighbor kids' frisbees and

1 bikes and that type of thing?

2 A Yes.

3 Q Let's talk about the base of the wall clearance
4 requirement. Actually probably going to go back a little
5 bit to the brick. What was the code in place in Anderson
6 County between 2006 and July 2013.

7 A The 2006 IRC with South Carolina modifications.

8 Q Did that code require that the stone not be taken all
9 the way down to a sidewalk, or all the way down to grade?

10 A It did not have the language in the specific code that
11 required the spacing of two, four, or half inch.

12 Q So up until July 2013, is it correct that South
13 Carolina let you bring your stone all the way down to grade?

14 A Correct.

15 Q And in your experience, is that how you've seen it
16 done?

17 A That's how I've seen it done. That's how it's continued
18 to be done today. It's still being done that way.

19 Q In your work, you said you work always at the Rose Hill
20 inspections. Is that right?

21 A Yes.

22 Q Do you work -- in your work, do you regularly rely on
23 photographs taken by other people, measurements taken by
24 other people, tests done by other people?

25 A Absolutely. You have a team that you work with and you

1 rely on them. And you look at the other experts'
2 information as an engineer. You want to see all the
3 information to be able to formulate your opinions on.

4 Q What are the names of the gentlemen that came down and
5 we're taking pictures of some of the inspections?

6 A Gabriel Molina was one of them.

7 Q What is -- and who is Gabriel Molina?

8 A Gabriel Molina is one of my project managers. He's a
9 professional engineer in multiple states. He has worked for
10 me for several years.

11 Q Are you aware that Gabriel Marino took some photographs
12 when he was down here?

13 A I'm aware he took some photographs on site as well as
14 he took some photographs off site.

15 Q When you say he took photographs off site, Mr. Moore,
16 where?

17 A There are several subdivisions within the immediate
18 area of Rose Hill. Caledonia, and something plantation which
19 within a mile. Caledonia subdivision is literally across
20 the street and up the hill from Rose Hill and the other
21 plantation subdivision is right down the road. They're
22 within a mile of both of them.

23 Q I represent to you that this is one of Gabriel's
24 photographs taken in one of those neighborhoods.

25 A And I can confirm that that is. I have seen that on

1 his photo list.

2 Q Have you seen this photo before?

3 A I have, sir. Yes, sir.

4 Q What does this show, Mr. Moore?

5 A It's showing they are in the process of installing the
6 MSV on the front elevation of a house, and it's hard to
7 tell, but if you look to the left, the left of the garage
8 opening and to the double window to the left of the opening
9 you can see that MSV appears to go all the way to the
10 ground.

11 THE COURT: What exhibit number is this?

12 MR. IMHOFF: 127.26, Your Honor.

13 Q Was this photograph taken while we were doing
14 investigations at Rose Hill?

15 A Yes.

16 Q Were these gentlemen installing the stone in a very
17 similar or the same way as the stone is installed at Rose
18 Hill?

19 A Yes.

20 Q Does every house in Anderson County have to get a
21 permit from the Anderson County building official?

22 A Yes.

23 Q Before people can move into a house, does every house
24 have to be inspected and get a certificate of occupancy by
25 the Anderson County building officials?

1 A Yes.

2 Q Is this the same way it's done in Rose Hill?

3 A Yes.

4 Q Is this the same way that you see it done in your
5 experience around the southeast?

6 A Yes.

7 Q And it had to pass inspection, didn't it?

8 A Yes, it did.

9 Q How about that, Mr. Moore? Is that the same dry stack
10 stone application that we have in Rose Hill?

11 A Yes. You see it goes all the way into the ground.

12 Q Next photograph, please. And this was occurring in
13 Anderson County within a mile of Rose Hill. Is that right?

14 A Right. In 2023.

15 THE COURT: What number is this?

16 MR. IMHOFF: It's the same exhibit, Your Honor. We
17 marked all these photographs the same folder.

18 MR. LUCEY: They're not in the 127.26 that we were
19 provided.

20 MR. IMHOFF: I don't know how to prove a negative, Your
21 Honor. Do we need to take a break? I'm told they're in the
22 folder 127.26.

23 THE COURT: Mr. Bailiff, take our jury to the jury room.

24 (WHEREUPON, the jury exited the courtroom 3:45.)

25 MR. LUCEY: We've been through every Dropbox they give

1 us, and this is not in the most recent Dropbox we have.
2 We've got a list of all Rose Hill addresses with photos and
3 nothing outside of Rose Hill is in 127.26. We've actually
4 never been provided a final detailed defendant's exhibit
5 list.

6 MR. IMHOFF: Your Honor, I believe that Mr. Lucey
7 subpoenaed all of ABS photos. We had a conference, where he
8 stipulated to all of ADS's photos. Every single one of
9 them. He didn't object to one. He hasn't objected to these
10 that I've heard today. This is a photo that was taken
11 contemporaneous with the --

12 MR. LUCEY: Rose Hill photos.

13 MR. IMHOFF: You said ABS photos, Justin.

14 MR. LUCEY: In the Rose Hill case.

15 MR. IMHOFF: This is part of the Rose Hill
16 investigation.

17 MR. LUCEY: Apparently this is a neighborhood next
18 door.

19 MR. IMHOFF: These are ABS photos from all of the site
20 inspections, Your Honor. Mr. Lucey subpoenaed his file as
21 well.

22 THE COURT: What pages is on?

23 MR. LUCEY: Page 22 of 35 is what we have. And while
24 the jury is out, Your Honor, do you want to address that
25 we're going to object, even if he does, this is a

1 neighborhood next door. To the extent they want to be
2 demonstrative and say other people are violating the
3 building code too, that might be fine. We know the Courts
4 been lenient with the admission notice. We don't think it
5 would be proper to admit a photograph of unidentified
6 subcontractor work, unidentified contractor work at a
7 different neighborhood, and apparently under a different
8 building code if it's under construction when they drove by
9 in 2023 as opposed to the 2006, 2012 IRC. The Rule 403
10 violation is significant, not only do we object to the
11 admissibility.

12 MR. IMHOFF: May I, Your Honor?

13 THE COURT: Yes, sir.

14 MR. IMHOFF: All of ABS's photos were stipulated to by
15 Mr. Lucey. These are ABS photos. I can set a further
16 foundation. I will not move this into evidence. It is
17 demonstrative only for this expert to testify that these
18 types of installations, just like the brick, are not only
19 common, they're normal and they're accepted by the Anderson
20 County. Mr. Lucey has built his entire case on little code
21 violations and the truth is that this jury needs to hear is
22 that these code violations are very minor. They're not being
23 -- they're not being followed. And I'll even lay a further
24 basis, Your Honor, the Anderson County Building inspector is
25 the only person who can interpret and enforce the code in

1 Anderson County. And I can say that to him. I can ask him
2 who it is. I can ask him if this is being built in Anderson
3 County. I can ask him if this is how he is seeing it's
4 done. All of those things, because as I just did with the
5 brick, this is in fact the industry standard and the case
6 law is clear, Your Honor, that for a construction defect
7 case you can prove it four ways. You can prove a violation
8 of the code. You could, as Mr. Lucey has pointed out, you
9 could prove a violation of installation instructions. You
10 could prove that someone didn't follow the plans. Or you
11 could prove that they violated industry standard. And Mr.
12 Lucey has brought up industry standard multiple times during
13 this case. We should be able to dispute that the industry
14 standard is what Mr. Lucey says and put evidence in that the
15 industry standard is in fact every stone clad house in
16 Anderson County. That's it. We should be able to argue in
17 response to the industry standard.

18 THE COURT: Mr. Imhoff, the witness has already
19 testified that it's still being done today. The witness
20 identified this photograph, because Mr. Lucey didn't object
21 when you showed the photograph. The witness has already
22 testified that every home has to be approved by Anderson
23 County, that this is the way it's done and that this would
24 pass inspection. So what else are you seeking to?

25 MR. IMHOFF: Ultimately, I'm going to I'm going to ask

1 him just that. I'm going to ask him Anderson County is the
2 only person that enforces the code, and then I'm going to
3 ask him if this is the industry standard.

4 THE COURT: There's no need to put the pictures into
5 evidence. You've already elicited the testimony. Mr. Lucey
6 didn't object to the testimony. Let's move on.

7 MR. IMHOFF: Can I use other pictures in another
8 neighborhood?

9 THE COURT: I still have not located the pictures in
10 the exhibit list.

11 MR. LUCEY: They're stipulated to, Your Honor. So we
12 stipulated to Rose Hill. We would not -- we said we would
13 not object to any ABS photographs in this case. This case is
14 Rose Hill. This case is not three neighborhoods over done by
15 Stanley Martin.

16 MR. IMHOFF: Your Honor, that is a misrepresentation. Can
17 I read you the stipulation?

18 THE COURT: Show me the stipulation.

19 MR. IMHOFF: May I approach?

20 THE COURT: Yes, sir. Mr. Lucey, you may as well.

21 MR. IMHOFF: I'm not seeking to admit them.

22 THE COURT: Then that's a non-issue. It's not been
23 sought to be admitted into evidence it won't be, but you can
24 ask the question that you mentioned earlier. We just need
25 to move on.

1 MR. IMHOFF: I've got one other neighborhood. Can I
2 show the other neighborhood?

3 THE COURT: But this is not a D.R. Horton neighborhood?

4 MR. IMHOFF: It's directly across the street from Rose
5 Hill.

6 THE COURT: Same -- you've already shown one. I'm
7 going to sustain the objection. That's not clear what's
8 stipulated to and I don't see the --

9 MR. IMHOFF: If I'm not moving it in, can I put it on
10 the screen, Your Honor?

11 THE COURT: If it's not in evidence don't put it on the
12 screen. But you can ask the witness that question. You've
13 already asked him that question.

14 Let's get our jury.

15 (WHEREUPON, the jury entered the courtroom 3:53.)

16 REDIRECT EXAMINATION

17 BY MR. LUCEY:

18 Q Mr. Moore, are you aware that Gabriel took pictures of
19 stone going all the way down to grade in another neighbor?

20 A I am, sir.

21 Q Where's that?

22 A It's within a mile of the Rose Hill site.

23 Q Who is the only person in Anderson County who can
24 interpret the International Residential Code?

25 A The code enforcement officer. Chief code enforcement

1 officer for Anderson County.

2 Q Anderson County's own building official, right?

3 A Correct, sir.

4 Q And is that true in every county?

5 A Correct, sir.

6 Q Is there anybody else that can interpret the code?

7 A No. When it comes down to interpretation of the code,
8 is what the code official says goes.

9 Q Is there anyone else? Is there anyone else that can
10 enforce the code in Anderson County other than that same
11 building official?

12 A No, the building officials have the responsibility to
13 enforce the code. Period.

14 Q The head building official in each county is the only
15 person that can interpret and enforce the code in that
16 county. Is that right?

17 A That's correct.

18 Q Do you have any information that all of those houses
19 that have stone down to grade, including the ones in Rose
20 Hill, were not, did not pass final inspection and get a
21 certificate of occupancy issued by the Anderson County
22 Building official?

23 A No, the opposite. Every one of them passed, issued a
24 CO. Every one of them has been lived in, which could not
25 happen without a certificate of occupancy.

1 Q Is bringing that stone down to grade aesthetically more
2 appealing?

3 A Certainly. No one wants to see three or four inches of
4 flashing or wall exposure.

5 Q Concrete slab, that type of thing?

6 A Exactly.

7 Q Is bringing the stone down, knowing that you're putting
8 two layers of waterproofing behind them, damaging these
9 homes at all?

10 A No. On the front where it comes up to the patio,
11 you're only required to have half inch to start with. The
12 quote unquote.

13 Q Let's go back a minute, Steve. Let's go back. We
14 started talking about it. Did the code in 2006 require that
15 that stone be off grade?

16 A No.

17 Q When did it change?

18 A July 1, 2013.

19 Q When was Natalie Zitek's house permitted?

20 A Under the 2006 code.

21 Q Before July 2013?

22 A Yes, sir.

23 Q Is it a code violation if Natalie Zitek's stone comes
24 all the way down to grade?

25 A No, it's not.

1 Q Same thing for the brick lintel issue in this vertical
2 saw cut.

3 A When the house was originally built, it was not
4 required for her house.

5 Q When Natalie Zitek's house was permitted was a vertical
6 saw cut required?

7 A It was not.

8 Q You're a general contractor, right?

9 A Yes, sir.

10 Q Have you developed a scope of repair at Rose Hill?

11 A I did.

12 Q Tell the jury what a scope of repair is.

13 A A scope of repair are the items that I believed should
14 be repaired at Rose Hill.

15 Q And have you done a couple of different ideas about
16 what to do and how to do that?

17 A Yes.

18 Q Was one of the first ideas you had to go out to these
19 homeowners' houses and do what Mr. Lucey is asking to be
20 done which is cut the stone four inches from grade?

21 A You mean the MSV?

22 Q Yes, I'm sorry.

23 A Yes.

24 Q And what would that look like.

25 A It would look a little ragged. We were going to take a

1 saw and rip the bottom of the MSV to gain that height.

2 Q They were literally proposing originally to go out
3 there with a saw and cut the stone off the bottom of these
4 people's houses and expose that cement foundation, right?

5 A Cement concrete foundation, yes.

6 Q Do you think that they would find that aesthetically
7 pleasing?

8 A No.

9 Q Have you revised your scope of repair, Mr. Moore?

10 A I have for the MSV.

11 Q There's some other issues that Mr. Lucey pointed out
12 with the MSV, some of it depending on what code right?

13 A Yes.

14 Q May be sitting on asphalt shingles. There are a couple
15 of places where he pointed out that some of the metal lap
16 didn't have --

17 A Was exposed.

18 Q So what have you ultimately decided that you'll go
19 ahead and recommend if the homeowners want it?

20 A To take all the MSV off. Take it off the lap walls.
21 Take it off the brick. And then reinstall it on the lap
22 walls.

23 Q So you have actually prepared a scope to take it all
24 off. Is that right?

25 A That's correct, sir.

1 Q You think it needs to come off?

2 A I think that some of it needs to come off, but the
3 problem is when you start taking some of it off and trying
4 to match the stone, some of the stone is 12 or 13 years old.
5 It will not match well. You may tear up more than you are
6 just trying to take it off. So, I thought that in the best
7 interest of the homeowners to go ahead and take it all off
8 and put it back on the lap covered walls, the heated walls.

9 Q Did you also in your scope put in a scope to go ahead
10 and cut these vertical joints above people's garages?

11 A We put the funding in there if the homeowner wants it.
12 It would be their decision, but we put funding in there to
13 do that.

14 Q And did you also put in your scope to walk around each
15 one of these homes and figure out if there are weep holes
16 there and maybe even base of wall flashing?

17 A We did. Our approach would be that if you didn't have
18 a weep hole at 33 or so inches, we would add one. If you'll
19 recall, I talked about the drilling through the masonry
20 joint and inserting the weep hole or removing and replacing
21 the one that was missing. The other thing is to come in and
22 if there was not three wall flashing, to put it in. You may
23 recall that some of the photos we had taken in our test cuts
24 and you would see the top of the brick above the lintel had
25 been cut and just see them suspended there. We would take

1 short segments, typically 10 feet, if the three wall
2 flashing was not there, we could take out a couple of brick
3 courses for a 10 foot section and put the three wall
4 flashing in and then put the brick back and you alternate so
5 that you never have more than 10 feet. You let that brick
6 mortar cure out while you're working on another section. But
7 we had put money in there to undertake enough of that that
8 we felt like to add any three wall flashing that was
9 missing.

10 Q And have you sent that scope of repair to a licensed
11 working general contractor.

12 A I did.

13 Q Why didn't you put in there to take all the bricks off
14 of all these homes, Mr. Moore?

15 A There's no issues and there's no information been
16 provided that would justify removing and replacing all the
17 brick. The brick cladding is working. We need to add the
18 three wall flashing a few places and the weeps if we need to
19 have the joints but the brick veneer is working as it
20 should.

21 Q Is it reasonable, based on the investigation that
22 you've done, and the inspection that you've done, to take
23 all the brick off?

24 A No.

25 Q You were asked about the Brick Institute of America.

1 You remember that?

2 A Yes.

3 Q Does the Brick Institute of America, in fact, require
4 maintenance for brick?

5 A Yes.

6 Q Does it also -- it requires you clean out your weep
7 holes, right?

8 A Yes.

9 Q It also requires that you tuck point. I mean, I'm
10 sorry. You mortar the joints occasionally, right?

11 A You repair the joints, yes.

12 Q That's part of maintenance for bricks, right?

13 A That's right. It's homeowner maintenance.

14 Q Does it also make recommendations for missing weep
15 holes and potentially missing base of wall flashing?

16 A Yes, it does.

17 Q And what does it say about taking all of the brick off?

18 A It says you just surgically repair what's necessary.

19 Q I put a picture up there. What is that?

20 A The head of a window.

21 Q So did you go look at every single window, or have your
22 engineers go look at every single window in every house that
23 you inspected?

24 A Yes, the ones we were allowed into.

25 Q And did they take pictures of every single window?

1 A They did.

2 Q Can you do another picture, please? Were there any
3 windows that were found that had cracks at the head, at the
4 top?

5 A No, there were no cracks located at the head of
6 windows.

7 Q Did they find windows out there that were in perfect
8 operating condition?

9 A Yes, like this one.

10 Q Let's just keep going through these. Were the vast
11 majority of the windows and good working order without
12 cracks, leaks, or issues?

13 A Yes, sir.

14 Q There has been kicked around 15 percent or so have some
15 issue. Have you heard that?

16 A Yes, that number was generated by one of the other
17 experts, Mr. Randy Seals. And it's a reasonable number based
18 on his evaluation and it seemed to be fair, based on what we
19 saw.

20 Q I don't see him in here right now, but let's talk about
21 what the issues are in the windows. Max, is there any way
22 that you could zoom in on that? Let's talk about how the
23 window is manufactured. Okay? Have you read the deposition
24 testimony of Andrew Carr with Silverline windows?

25 A I have, sir.

1 Q Have you read the deposition testimony of Skip Lewis,
2 who is the forensic engineer for Silverline windows?

3 A I have, sir.

4 Q And do you regularly rely on other people's testimony,
5 especially when it's their product?

6 A Certainly, sir.

7 Q To help develop your opinions.

8 A Yes.

9 Q So let's talk about the vertical crack that goes from --
10 the moving part is called the sash, is that right?

11 A Yes.

12 Q So what is this part? What is this part? What is this
13 part right here above the sill called?

14 A It's called the back dam.

15 Q Back dam. What is what is the job of the back dam?

16 A To keep the water out of the inside of the house.

17 Q Is that when the sill, I'm sorry. When the sash is
18 open?

19 A Yes.

20 Q When the sash is open, that's when water comes in?

21 A Or when it's closed, either way it will keep the water
22 out.

23 Q On the sash at the bottom is there any waterproofing?
24 Do you remember that?

25 A You mean on the inside or outside?

1 Q When you close the window down and it hits the sill,
2 what's that smooshing sound?

3 A Well, there's a weather strip there. The weather strip
4 there.

5 Q It might be called a bulb or something like that,
6 right?

7 A There's a weather strip that keeps the seal between the
8 window and the frame.

9 Q Right. So and it runs across the entire bottom of the
10 sash that moves up and down, right?

11 A Yes.

12 Q And so when you click that thing closed, you could
13 actually feel it push down on that thing and you lock it,
14 right.

15 A That's right.

16 Q That weather stripping supposed to keep water out of
17 the house, right.

18 A Yes.

19 Q If water gets by that weather stripping, is it supposed
20 to be stopped by that back dam?

21 A Yes.

22 Q Or if the window is open it's supposed to be stopped by
23 that back dam, right?

24 A That's correct.

25 Q Now, the vertical point right there, the felt part on

1 the vertical part, what is that?

2 A Well, you're talking about the filler or the slot.

3 Q The filler in the slot.

4 A The filler in the slot is a foam or a gasket is another
5 term. We can use gasket here.

6 Q Gasket. It literally is the water protectant in
7 between the plastic or the final parts right?

8 A It's between the two and when they manufacture and
9 assemble the window, it leaves that gap there, that slot,
10 and then they put this gasket in it to water proof that
11 opening.

12 Q That opening, because when they -- well, strike that.
13 So, if that gasket isn't seated properly all the way down,
14 right, can water -- a little bit of water get through the
15 bottom?

16 A Absolutely. If it leaves an opening that water will
17 penetrate through. If the water builds up in front of the
18 back dam.

19 Q Did D.R. Horton design that?

20 A They did not.

21 Q Did D.R. Horton manufacture these window?

22 A They did not.

23 Q Did D.R. Horton have these windows delivered to their
24 site?

25 A They did not.

1 Q Do you know how the windows got into these houses,
2 specifically through what companies and what process?

3 A Pro Build was hired by D.R. Horton to provide windows
4 that would meet the pressure and the sizes in this area.
5 I'm talking about the design pressure for the window within
6 the code requirements in Anderson County.

7 Q Let me back up a minute. What is turnkey?

8 A Turnkey means they handled the entire process from
9 start to end.

10 Q In reviewing D.R. Horton's records and purchase orders,
11 how were the windows purchased and installed?

12 A It was a turnkey operation from Pro Build who bought
13 the windows from Silverline, and then Silverline would
14 deliver them either to Pro Build's offices or warehouses or
15 to the job site where Pro Build then had a company or
16 someone install the windows in the house.

17 Q So D.R. Horton hired Pro Build to get the windows and
18 install them turnkey, is that right?

19 A That's correct, sir.

20 Q D.R. Horton didn't design them, is that right?

21 A That's correct.

22 Q And D.R. Horton didn't manufacture them, is that right?

23 A That's correct.

24 Q Similar to a GE oven?

25 A Right.

1 Q Same thing. D.R. Horton didn't design, manufacture, or
2 ship that oven either, did they?

3 A They did not.

4 Q Now, we've talked about the gasket part. You were
5 talking about a heat weld earlier. Now, let's talk about the
6 diagonal here. OK, this diagonal.

7 A That is the heat weld where the two pieces come
8 together.

9 Q And literally they take some machine and they heat it.
10 So those things press together and create a joint. That's
11 diagonal, right?

12 A Correct, sir.

13 Q Did D.R. Horton design that design?

14 A They did not.

15 Q Did they operate the machinery?

16 A No, sir.

17 Q Did they manufacture it?

18 A No, sir.

19 Q Now, there's a third issue on these windows, isn't
20 there? Some of them are actually cracked through the vinyl
21 or plastic, aren't they?

22 A That's correct.

23 Q All right. Do you have any idea how many are cracked
24 through the vinyl or plastic?

25 A Well, the crack that we felt was about 15 percent of

1 the windows and the example this morning that Counselor
2 Lucey used was if you've got 20 windows, 15 percent be 3
3 windows in the house.

4 Q I'm asking you specifically, not if the gasket is
5 missing or if the heat weld came open. I'm asking you how
6 many are actually cracked.

7 A Well, fifteen percent is a guess because I haven't been
8 in every house, but 15 percent is a guess that we're using
9 to working from today.

10 Q Do you know if there's a warranty on those windows?

11 A I do. There's a lifetime warranty on those windows.

12 Q You read the deposition of Andrew Carr with Silverline,
13 is that correct?

14 A That's correct.

15 Q Has a warranty claim ever been made to Silverline for
16 these windows?

17 A According to Mr. Carr there has never been a warranty
18 claim for the window from Pro Build, from Rose Hill, or from
19 the Zitek's. Ever.

20 Q Let's ask the big question. How many homes are these
21 windows in, according to Mr. Carr?

22 A Well, according Mr. Carr -- I can't tell you how many
23 homes, but there are ten to fifteen million units of these
24 windows in the United States from the Rockies eastward.

25 Q So D.R. Horton selected a window, or depending on the

1 testimony, Pro Build selected a window, either way, that's
2 in ten to fifteen million houses?

3 A Ten to fifteen million units, and Pro Build selected
4 the windows. D.R. Horton asked for a window that would meet
5 the code and gave them the sizes needed and Pro Build then
6 worked with Silver Line to get those windows designed,
7 ordered, and installed.

8 Q I guess what I'm asking you is that a commercially
9 available window?

10 A Yes.

11 Q Is it a popular window?

12 A Absolutely.

13 Q Was Mr. Carr asked how many builders buy those windows?

14 A He did. He said all of them. Many of them.

15 Q In fact, what he said is he couldn't think of one
16 builder who didn't buy those windows.

17 A Correct. He listed numerous national builders like
18 Horton, Centex, Pulte.

19 Q Is it fair to say that D.R. Horton, through Pro Build,
20 picked one of the most widely used and popular windows on
21 the east side of the United States?

22 A Absolutely correct.

23 Q Did they buy an off brand window?

24 A They did not.

25 Q Some random window that nobody else would use because

1 it's so bad.

2 A No, not ten to fifteen million units. Absolutely not.

3 Q In your opinion, did D.R. Horton do anything wrong by
4 purchasing a widely available, extremely popular window?

5 A Absolutely did not. They relied on a national window
6 manufacturer and a very large supplier, and that's what
7 you're right to rely on that to give a reasonable window
8 that was designed and installed. It's what GC's do.

9 Q Do builders have to rely on product manufacturers and
10 sellers about their products?

11 A Not only do they have to, they have the right to.

12 Q Let's talk about this AAMA sticker issue. Can we?

13 A Yes, sir.

14 Q While he's doing that, do the windows leak anywhere
15 other than those bottom issues?

16 A No, they do not.

17 Q So, they either leak one of three ways, right? The
18 gasket isn't right, is that right?

19 A The gasket is either dislodged or up.

20 Q Or the weld has popped open, the heat weld.

21 A Right.

22 Q Or the windows crack right?

23 A Or there's a crack at the corner.

24 Q There's a crack at the corner. Is that the only way
25 these windows leak?

1 A That's all we've been able to find.

2 Q Let's talk about before I move on, while Max is getting
3 this next exhibit up. Did you do window testing out there?

4 A Yes, I did. Well, my company did. Some guys at my
5 direction did.

6 Q You actually brought a guy that is an expert in window
7 water testing, isn't he?

8 A I brought up Eddie Polk from our Charleston office.

9 Q What's his name?

10 A Eddie Polk, P-o-l-k.

11 Q What makes Eddie Polk better than anybody else?

12 A He does it all the time. He's up to date on all the
13 standards. He takes care of all the equipment.

14 Q So, Eddie Polk came to test the windows out there,
15 right?

16 A Correct, sir.

17 Q Did you invite anybody else?

18 A Well, I have a young man in my team to assist him, but
19 then we had every expert and most of the attorneys and four
20 or five of WDP people -- Mr. Whitlock's, Dr. Whitlock's
21 people there as well during the entire time that we were
22 testing windows for two days.

23 Q Did Dr. Whitlock come?

24 A He did not come.

25 Q Did Dr. Whitlock do window testing?

1 A He did.

2 Q Were you there?

3 A Was not invited for that. None of us were invited for
4 that.

5 Q When you say "none of us" who are you talking about?

6 A I'm talking about everyone that is on a defendant side
7 was not invited to the testing.

8 Q Did Dr. Whitlock do his window testing in secret?

9 A He did.

10 Q In your experience. Is that normal?

11 A No, it's not. It's very unethical.

12 Q Why?

13 A We're not allowed as the defendants to see what the
14 original conditions were. We're not allowed to see how he
15 performed his testing and how the things came out. There's
16 questions about his testing.

17 Q There are questions?

18 A Yes, sir.

19 Q Could you have answered them if you were there?

20 A I could have seen what he did. Everybody saw what ABS
21 did.

22 Q Could you evaluate how he was putting the water in?

23 A Could have if I'd been there.

24 Q Could you evaluate what pressure you did?

25 A I could have been there if I was invited.

1 Q Could you evaluate how high he was putting the water
2 up?

3 A I could have if I'd been there.

4 Q Could you evaluate what water was put in that window
5 sill?

6 A If I had been there.

7 Q You're an engineer. Do you know what the scientific
8 method is?

9 A Certainly.

10 Q Scientific review. How about that? Have you heard of
11 that before?

12 Q So what do you do? You put it, you put a hypothesis
13 out there, you send it out to the other side to the other
14 engineers, and everybody looks at it and tries to see if
15 it's right. Is that right?

16 A That's correct.

17 Q Is that the same idea when you're doing window testing,
18 let's figure out what's going on with these?

19 A Yes.

20 Q And everybody comes and everybody participates and they
21 do their own photographs, videos, tests, protocols, all of
22 that, right?

23 A That's the way.

24 Q Isn't it in fact true that most testing product
25 testing, there's a protocol developed before the test is

1 done?

2 A Correct.

3 Q And that protocol goes to everyone who's involved in
4 that product so that everyone has a chance to decide what's
5 going to be done and how it's going to be done. So everybody
6 can either validate or invalidate opinions.

7 A That's right.

8 Q Was that done in this case?

9 A No. What ABS did was we provided a list of everywhere
10 we were going to do it and what we were going to do and for
11 distributed that to everybody, so they all knew what we
12 planned to perform.

13 Q Mr. Lucey said earlier that your testing wasn't valid
14 because there's not a report.

15 A I didn't write a report.

16 Q But everybody was there, including members of WDP,
17 right?

18 A That's correct.

19 Q Did WDP ask you to do anything.

20 A No.

21 Q Did they ask -- did they take pictures?

22 A They were in the middle of it the whole time.

23 Q Did they take videos?

24 A They were taking and photos.

25 Q They're there the entire time, taking videos and

1 pictures, but not Dr. Whitlock?

2 A That's correct.

3 Q Were you allowed to do that when Dr. Whitlock tested?

4 A I was not.

5 Q What were the results of your tests, Mr. Moore? I'll
6 put anything up on the screen that you want me to put up.

7 A We ran a series of what's called a spray rack test,
8 where you put a rack up that sprays water on the windows.
9 There it is there. We sprayed a series of windows and we
10 were careful to make sure that we didn't have any cracks. We
11 weren't testing the cracks. We were testing the windows, we
12 didn't have -- We did not have a single window fail in our
13 spray rack test.

14 Q Well, that's not what Dr. Whitlock's testing revealed,
15 is that right?

16 A Dr. Whitlock did a series of tests, probably 10 or 12.
17 One passed. Everything else failed.

18 Q What was different when he tested than when everyone
19 else tested?

20 A I don't have any idea. We weren't there to observe it.

21 Q Who is this gentleman in this picture?

22 A That would be Mr. Skip Lewis, who's obviously local,
23 and he is the representative for Silverline. He's a
24 professional engineer.

25 Q I don't want to bore the jury with all this technical

1 stuff, but I think they need to understand a little bit. How
2 do you do a spray rack test? Just kind of briefly for them.

3 A You set up the nozzle. It just went away, but you set
4 up the spray rack and the nozzles spray water onto the
5 window. There's two ways of doing it. You can do it in five
6 minute increments. You spray it five. Then you let it rest
7 for a minute or two, and you spray it five and let it rest
8 for a minute and you spray it for 5 minutes. Or, you can
9 spray it for a constant 15. We sprayed for a constant 15
10 minutes and never got a leak. Dr. Whitlock says that he was
11 getting puddles of water inside the window within one to two
12 minutes on most of his spray tests.

13 Q Is this supposed to simulate a rain storm.

14 A Yes, a rain event.

15 Q So, do you have to set those nozzles to get like a
16 hundred year storm or a fifty year storm?

17 A There's a pressure. You maintain a pressure on the
18 spray rack for the water pressure as you spray it.

19 Q How?

20 A It's got a gauge.

21 Q How do you find out what pressure you're supposed to
22 put it at?

23 A Well, this is just the standard and I'm not going to
24 tell you exactly, I don't remember what that pressure is,
25 but is the standard, so I have Eddie there to spray the

1 water here.

2 Q Anderson County has one of the lowest wind zones in the
3 country. Is that right?

4 A That's right. It's a 90 or 95 pressure.

5 Q Is there anyone lower than that?

6 A No. There's not.

7 Q So, is Charleston different?

8 A Oh, yes. Charleston is a much higher. They're 130,
9 140, and 150 miles an hour wind zone.

10 Q So in Anderson County, do you have to put windows in
11 like you have to put in Charleston County?

12 A You could not put the same one as in Charleston County
13 as you could put in Anderson County.

14 Q These windows wouldn't meet the code down there?

15 A They would not meet the code down there.

16 Q These are not hurricane proof windows.

17 A That's right.

18 Q But these windows do meet the code for Anderson County.
19 Is that right?

20 A They do.

21 Q Should a general contractor have any concern at all
22 that a window manufacturer is designing and selling windows
23 that don't meet the minimum design pressure in the country?
24 Anderson County?

25 A Should not have any concern whatsoever. It's

1 expectation that Pro Build is not going to provide you a
2 window. They're local. They know what the codes are.
3 They're going to provide a window that meets the
4 requirements.

5 Q Well, they're going to, but the requirement here in
6 Anderson County is the lowest in the country, right?

7 A Yes.

8 Q Manufacturers shouldn't be building a window that has a
9 design pressure less than this required in Anderson County,
10 right?

11 A That's right.

12 Q So it isn't even -- I mean you don't even need to go
13 pay attention to all that because it has to at least meet
14 the minimum of the entire United States to be commercially
15 available. Is that fair?

16 A Correct.

17 Q So you spray the window and it doesn't leak.

18 A That's right.

19 Q Now, is that true in windows that have these crack or
20 other issues?

21 A No.

22 Q Has anyone been able to make any of the windows leak
23 that don't have one of those three problems; the gasket, the
24 well joint, or cracking?

25 A We didn't make them leak. We tried windows that did not

1 have the crack, did not have the issue. They did not leak.

2 Q All right, let's talk about a sill dam test because I
3 certainly don't know what that is. Just briefly, I think
4 it's getting late here. I don't mean to cut you short, but
5 just briefly tell me.

6 A One of the common tests is to put water in the base of
7 the window. Do you remember I was talking about the sill
8 dam earlier, the photo, and you determine the height of the
9 water is a way of determining the pressure. If the window
10 is over six months old, then you do $2/3$ of the pressure
11 rating and times 15 percent divided by 5.2 which is the
12 weight of water. So, let me make it easy. If you've got a
13 window that's DP30, two thirds of that is 20 times .15 is 3,
14 and you divide that by the 5.2. It gives you about half
15 inch. So you would put a half inch of water in the window.
16 And you literally put tape across the front of the window
17 and hold it to half inch and you let it sit there for 15
18 minutes to see if you leak. We ran 15 sill dam tests. And
19 eight of them did not leak. The only ones that leaked there
20 were a tiny crack in the window and the only reason we could
21 see water was we took white litmus paper and literally
22 touched the crack and it would turn pink. We never had free
23 standing water inside the window whatsoever. What you're
24 going to see is, if they show that document back up. We can
25 put that page back up. The previous photo. The previous

1 drawing.

2 Q The drawing? I told you not to bore the jury, Steve.

3 Well, what we did was we tested it at three ratings. We

4 tested it at a 25 or 30 or 35 and this one here. And what I

5 want to point out was -- and this is Mr. Lewis's drawing,

6 Skip Lewis did this as part of the design. But you see--

7 MR. LUCEY: Objection, Your Honor. I don't believe this

8 exhibit is in evidence.

9 MR. IMHOFF: It's a Demonstrative exhibit, Your Honor. We
10 won't move it in. Skip Lewis.

11 MR. LUCEY: It's hearsay.

12 THE COURT: Mr. Lewis is listed as a witness, so that may
13 be admitted later.

14 Q Go ahead and tell them and then we'll put that up for
15 Mr. Lewis.

16 A Our tests -- we ran the test at a $\frac{1}{2}$ inch or nine
17 sixteenths to replicate that DP rating. Dr. Whitlock ran it
18 at a 75 DP. His report states that he tested to the top of
19 the sill dam, which is 1.455 inches high. And all but one
20 of his tests failed. Well, if you're testing a window 3that
21 is rated at DP25 and you're testing it at DP75, what, three
22 times as likely to fail.

23 Q Trying not to bore the jury. Do the windows meet the
24 design pressure based on your testing and evaluation and
25 inspection for Anderson County?

1 A They do.

2 Q Are there some problems with some of them where they're
3 cracked or split or the gasket isn't there?

4 A Yes. And that's repairable without removal and
5 replacing the window.

6 Q How do you repair it?

7 A Well, you can -- if it's a crack, you can do a liquid
8 vinyl repair. If it's the slot there is material you could
9 put in, like a sealant, or put it in, that would be a
10 permanent repair. You don't have to replace the window.

11 Q So, we determined earlier these houses are somewhere
12 between 6 and 11 years old. Is that right?

13 A That's right.

14 Q Do you have any idea how long a window is supposed to
15 last?

16 A These are have a lifetime guarantee to the owner.

17 Q Good. So, if they can be repaired, do they need to be
18 pulled out and replaced those ones that have that issue?

19 A No, they could be repaired in place.

20 Q The ones that don't have that issue, in your opinion,
21 are they performing adequately?

22 A Absolutely.

23 Q Do they need to be pulled out?

24 A No. Why would you pull out a working window that has
25 no issues?

1 Q Is there any evidence or indication that the windows,
2 85 percent of whatever it is, will fail in the future?

3 A No. No one's done any kind of inventory. So, based on
4 the available information, they should be, if they haven't
5 cracked by now they're probably not going to crack.

6 Q Those 15 percent of the windows, did D.R. Horton do
7 anything at all that would have caused those issues?

8 A No. There was a turnkey operation by Pro Build. D.R.
9 Horton was an owner -- a builder, excuse me. They didn't do
10 anything wrong but rely on Pro Build to take care of the
11 process.

12 Q And in your opinion as both a general contractor, an
13 employee of another builder, and an engineer, did D.R.
14 Horton do anything wrong in selecting one of the most
15 popular windows east of the Mississippi?

16 A No, sir. It did not.

17 Q I don't have any more questions for you, Mr. Moore.
18 Thank you.

19 THE COURT: Any redirect?

20 MR. LUCEY: Yes, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. LUCEY:

23 Q Sir, you and I discussed the building code violations
24 at length this morning, correct?

25 A We did, sir.

1 Q You're not walking back any of that testimony in front
2 of this jury, are you?

3 A No.

4 Q You, as a practicing engineer in South Carolina, would
5 never advise a client to violate the building code, would
6 you?

7 A Would not.

8 Q In fact, you wouldn't assist them in violating the
9 building code, would you?

10 A No, not knowingly violate the building code, no.

11 Q Now, you talked to the jury about part of the building
12 code being a performance base.

13 A Yes.

14 Q And the part that you pointed out to the jury that was
15 performance based was the part that says you should have
16 weatherproof building envelope, correct?

17 A Correct.

18 Q When the building code says something like you must
19 meet your base of wall flashing every 33 inches at the base
20 of wall. That's what we call descriptor, right?

21 A Yes.

22 Q That is you, shall, and must do that; correct?

23 A Correct.

24 Q Now, you've repeatedly pointed out to the jury that the
25 building code as to some masonry issues became more specific

1 in the year 2012, correct.

2 A Effective July 1, 2013.

3 Q 2012 code. 2013 effective. Correct?

4 A Correct, sir.

5 Q But you and I talked about that with regards to the
6 clearance at the base of the MSB wall because the 2006 code
7 still incorporated ASTM 1063, which requires clearance for
8 plaster based masonry veneers such as this OSV; correct?

9 A So you have a conflict in the code.

10 Q No, you have the building code that's not specific as
11 to it. As to the requirement and incorporation document ASTM
12 1063 which is very specific as the requirement and all
13 building codes in the world and in South Carolina provide
14 that were two requirements govern a situation the more
15 stringent requirement governs, correct?

16 A I think that's correct, yes.

17 Q Now, the other change was whether or not the 2006
18 building code required that foundation supported brick be
19 separated from frame supported brick. Do you recall that
20 discussion?

21 A Yes.

22 Q Well, again, the building code got more specific in
23 2012, but in 2006 the leading brick association in the
24 United States, BIA, Brick Institute of America, in their
25 technical bulletins require that isolation joint between

1 frame supported brick and foundation supported brick in
2 2006, correct?

3 A I would have to look that up.

4 Q You don't know.

5 A I don't know.

6 Q So, you're not prepared to tell the jury that it was
7 not industry standard in brick installation to isolate
8 those two different types of brick in 2006, correct?

9 A Correct.

10 Q You told the jury about Plaintiff's Exhibit 77, marked
11 for identification, the subsurface soil investigation was
12 very -- I believe your words were either standard, or
13 typical, or both. Correct?

14 A Pretty typical. It's a standard report that's done
15 early on in a project.

16 Q That report that's in front of you, Exhibit 77 is the
17 least standard subsurface investigation you have probably
18 ever seen in your career, correct?

19 MR. IMHOFF: Objection, Your Honor. That's
20 argumentative. He's putting his own facts in. That question
21 is improper. The least he's ever seen in his career.

22 THE COURT: Rephrase the question, Mr. Lucey.

23 Q Sir, the subsurface investigation that's in front of
24 you as Plaintiff's Exhibit 77 is not very typical or common
25 with what you typically see at the commencement of a

1 residential subdivision development, is it?

2 A I think it's pretty typical. I see all types of reports
3 with all types of subsurface materials.

4 Q That report requires D.R. Horton to remove ten feet of
5 undocumented fill on half the lots in the neighborhood
6 before they build the houses, correct?

7 A Correct.

8 Q That's not very typical, is it?

9 A I've got one right now. We're moving 25 feet of
10 material before we put the buildings on top of it.

11 Q And you have absolutely no evidence that D.R. Horton
12 removed the first dump truck of dirt out of that
13 subdivision, correct?

14 A Can I answer that question? We have no evidence they
15 did not. You have a subdivision that's been built and
16 performing.

17 Q And you wouldn't deny to this jury that the subsurface
18 is typically considered roughly 5 feet and below, correct?

19 A Would you repeat the question?

20 Q The sub service investigation would typically focus on
21 the area 5 to 6 feet under the surface and below, correct?

22 A No, it begins at the surface and goes down to you feel
23 - until the engineer feels like the material is consistent
24 at that point.

25 Q It's different than the lot testing, correct?

1 A It's different than the what?

2 Q It's different than the lot testing.

3 A This is a preliminary subsurface before the lots are
4 even identified.

5 Q And if, in fact, D.R. Horton did not remove the
6 unsuitable fill as recommended by the subsurface engineers
7 in Plaintiff's Exhibit 77, there's more of a chance of earth
8 movement in this subdivision than if they had followed the
9 recommendation of the subsurface engineers, correct?

10 A That's purely speculation. It's possible.

11 Q Well, let's put it this way. The subsurface engineers
12 were recommending the undocumented fill be removed so that
13 unexpected earth movement would not occur; correct?

14 A Correct.

15 Q Now, when the Anderson County building inspector comes
16 to check the site before the slab and footers are poured,
17 the site is covered with plastic and rebar, correct?

18 A The foundation has been excavated and the rebar is in
19 the footings or in the slab and then it's typically covered
20 with plastic.

21 Q And he's coming to inspect. He can't -- at that point,
22 the plastics down and he's not running a probe down into the
23 dirt, is he?

24 A I'm not sure how they do it. Many of them do run a
25 probe down. They look ---

1 Q They don't --

2 A They look at the test results.

3 MR. IMHOFF: Your Honor --

4 THE COURT: Ask the question, and then let the witness
5 answer it.

6 Q I apologize, sir.

7 A That's okay, sir.

8 Q I started talking and I realize you hadn't stopped and
9 I apologize for that.

10 A No problem. Some of them run test probes. Some of them
11 look at their test results from previous. The private
12 firms, they do it different ways. They are responsible to
13 ensure they are the ones that sign off on allowing that
14 foundation slab to move forward and being cast.

15 Q And you're aware, of course, of the civil work that
16 Anderson County does in new subdivision. The civil checking
17 of the work is often focused more on the streets and the
18 storm sewer under the streets that it's going to accept
19 ownership of than on the private lots, correct?

20 A The water from the private lots eventually ends up into
21 the storm drain system, so they're in the streets, so we'll
22 have to check it out to ensure that it works.

23 Q I beg your pardon, sir, for just a moment. I'm just
24 checking my notes from your conversation with Mr. Imhoff.

25 A Yes, sir.

1 Q You testified that there was potentially different
2 reasons for concrete slab cracking, correct?

3 A Yes.

4 Q And one potential reason is earth movement correct?

5 A That is a potential reason.

6 Q And that was what the subsurface engineers'
7 investigation and recommendation was supposed to prevent.
8 Earth movement, correct?

9 A Correct. It's a potential reason. There's no evidence
10 there that it is happening.

11 Q Y'all talked about CABO for a little while. CABO is no
12 longer applicable, correct?

13 A That's right. It's been gone many years.

14 Q And you have to have weather resistant barriers or
15 building paper now. You can't rely on USB anymore, correct?

16 A Correct, sir.

17 Q And by the way, what insight can you give us as to why
18 in 2010, 2015, D.R. Horton was still specifying to its
19 subcontractors in the subcontracts that they should file
20 CABO when it was 20 years gone?

21 A I have no idea.

22 Q You saw that, right?

23 A I don't remember that, but I'll take your word for it.

24 Q You don't remember that being in there? You talked
25 about mortar slop with Mr. Imhoff. I appreciate you telling

1 the jury that word because I didn't tell them that. That has
2 to do with that one inch cavity, correct?

3 A Correct, sir.

4 Q And you're aware that, unlike the stone, the brick was
5 not turnkey. The brick mason supplied labor only to the
6 site, and D.R. Horton supplied all the materials, correct?

7 A I believe that's correct, sir.

8 Q And in the mason industry, it's very typical that the
9 masons get their instructions, in part, from what components
10 they find on the job site when they arrive to do their work,
11 correct?

12 A Correct.

13 Q And when these masons arrived on this job site to do
14 their work and picked up the D.R. Horton components from the
15 brick supplier to put these brick walls up, D.R. Horton
16 hadn't provided them with any mortar nets to keep the mortar
17 slop out of the code required one inch cavity behind the
18 brick walls, correct?

19 A Correct.

20 Q And if D.R. Horton wanted to comply with the building
21 code and keep that slop out it would've been very
22 inexpensive to provide those mortar nets to the brick
23 masons, correct?

24 A It could have been. Mortar nets aren't typically
25 provided in residential building.

1 Q You talked about your apparent focus as a Plaintiff's
2 engineer in looking for moisture damage in your
3 investigation. Do you recall the conversation?

4 A I do.

5 Q Have you ever seen a D.R. Horton neighborhood with so
6 much brick cracking and stone problems?

7 A I've never investigated a 220 home subdivision for
8 Horton.

9 Q You've investigated at least 200 other of their houses
10 prior to Rose Hill. Have you ever seen so many brick veneer
11 cracking and stone veneer problems?

12 A No, not that I'm aware of.

13 Q Now you've been involved in real estate transactions in
14 the state of South Carolina, correct?

15 A I have one time.

16 Q And you advise clients on what to buy, what to sell,
17 what not to buy, and what not to sell or what might need to
18 be fixed from time to time. I think they're called property
19 valuation reports or something like that.

20 A Back up. I don't -- I don't think I follow your
21 question. Your line. I've been part of the team that has
22 been recommended to Centex homes, whether to purchase land
23 or not in South Carolina through property evaluation.

24 Q Okay. Have you ever been consulted on any other
25 property sales in South Carolina either personally yourself,

1 for family, or for clients?

2 A I personally owned one small house in South Carolina.

3 Q Were you aware in South Carolina that you either need
4 to fix defects in your house or you need to disclose them
5 when you try and sell your house?

6 MR. IMHOFF: Objection, Your Honor. He wasn't qualified
7 for this.

8 THE COURT: Counsel approach.

9 (WHEREUPON, bench conference.)

10 Q Sir, have you learned in your engineering practice in
11 the state of South Carolina where you are I understand
12 licensed that a homeowner selling a house either has to fix
13 defects or disclose them to the buyer?

14 A Only peripherally as having bought or sold a home in a
15 lifetime.

16 Q So and I'm not really -- I apologize. I'm not really
17 catching that. Are you aware that that is the situation
18 here in South Carolina that you either have to fix the
19 defect or you need to disclose it to the buyers?

20 A Generally aware, but I'm not a real estate agent.

21 Q Repointing mortar joints brick facade is appropriate
22 for cosmetic defects, but if there's a structural defect,
23 you need to solve the cause of the problem, not just cover
24 up the problem with the cosmetic repointing; correct?

25 A Correct. Homeowners should make a claim against their

1 structural warranty to make an investigation of what the
2 issue is.

3 Q Have you ever seen a warranty claim like that? Those
4 homeowner warranties some people get at closing? Have you
5 ever seen a claim on one of those warranties be worth the
6 paper you write it on?

7 MR. IMHOFF: Your Honor, I don't know where he's going
8 with that, but he's asking him if he knows about other
9 warranty claims?

10 THE COURT: I sustain the objection.

11 Q Now you opined that the defect of discontinuous
12 flashing in the base of wall is, I think I heard your word,
13 ludicrous.

14 A To think that that one corner cracked because of the
15 discontinuous flashing.

16 Q But cracking can occur with discontinuous flashing,
17 correct?

18 A Never heard of that in my life, sir.

19 Q Well, let's just talk about the engineering of it. The
20 flashing at the base of the wall is a bond breaker between
21 two courses of bricks, correct?

22 A And so if you have a bond breaker running between two
23 courses of brick for 20 feet, and you all of a sudden stop
24 it before it gets to the end of those two courses of brick,
25 you transfer all the stress to the point where the bond

1 breaker stops, correct?

2 A Possibly.

3 Q And if, in fact, that occurs the result in brittle
4 brick would be a fracture, correct?

5 A If you show that the fracture was along the mortar
6 line, I might be more inclined to agree to it, but you had a
7 triangular piece of brick broke out. I don't see that the
8 stress has caused that to happen. There's been no
9 information provided other than Dr. Whitlock's opinion that
10 that's what caused it. Never had that provided further.

11 Q Even if the Brick Institute of America did not provide
12 for the isolation joint between the frame supported brick
13 and the foundation supported brick when Natalie's house was
14 built, the lack of that joint there today is still a code
15 violation, correct?

16 A Correct.

17 Q Because that wall got rebuilt after the code got
18 changed, correct?

19 A Correct, sir.

20 Q And all this stuff about a table in one of the D.R.
21 Horton plans that shows you what shelf angles to use.
22 That's got nothing to do with Natalie Zitek's claim in this
23 case, does it? She hasn't complained about the size or
24 length of the shelf angles, has she?

25 A I don't think that was the reference to it. We were

1 talking about what the plans provided.

2 Q The only issue with the shelf angles is that they
3 extend from frame supported brick into foundation supported
4 brick, correct?

5 A Correct.

6 Q Now, one of Natalie's problems apparently may have
7 started with a framing issue. An LVL and inappropriately
8 sized framing piece supplied and installed by D.R. Horton,
9 correct?

10 A Correct.

11 Q But once that framing piece got fixed and the brick
12 still broke, still fractured, still cracked, it no longer
13 has anything to do with that unique framing piece she had,
14 correct?

15 A Speculation.

16 Q You have no evidence to share with the jury that it had
17 anything to do with the earlier defective framing piece
18 being longer; correct?

19 A No.

20 Q And by the way, with regards to the masons, while the
21 mason companies changed through the build out of Rose Hill
22 from 2011 through 2017 twice, the people, the crews did not
23 change, correct?

24 A I believe that's correct.

25 Q They were still run by the same person and they were

1 still staffed by the same crews, correct?

2 A That's my understanding.

3 Q And that's both as to the brick crews and as to the
4 stone crews, correct

5 A Correct.

6 Q In fact, when the brick company came down out of
7 Charlotte, they hired D.R. Horton's existing stone masons to
8 keep doing the stone the way D.R. Horton had always had them
9 do the stone, correct?

10 A Correct.

11 Q And I didn't hear you address the lack of a weep screed
12 in the stone veneer, the MSV, in your repair protocol, did
13 I?

14 A It would be installed in accordance with all the
15 requirements, flashing, weeps.

16 Q There is no weep screed at the base of any of the MSV
17 at Rose Hill today, correct?

18 A Correct.

19 Q The weep screed is required by the manufacturer at the
20 base of every stone veneer wall, correct.

21 A No.

22 Q It's required at the base of wall where there is a
23 drainage plane and framing behind it, correct?

24 A If there's a concrete curb or a concrete, it's not
25 required.

1 Q So, in other words, if the stone has been mounted on
2 the brick, it doesn't need that weep screed, in your
3 opinion, correct?

4 A Right.

5 Q But if it's mounted on the wood framing, it does,
6 correct?

7 A Correct.

8 Q And you're proposing to install it as part of the
9 repair?

10 A It would be part of the repair for our protocol.

11 Q And there's roughly 69 houses at Rose Hill with a stone
12 clad wood wall of some sort, a front area. Does that sound
13 about right?

14 A I don't know the exact number, but it's in that
15 ballpark.

16 Q So until you replace that weep screed, that's 69 more
17 building code violations that the jury didn't discuss,
18 didn't hear this morning, correct?

19 A Fine, sir.

20 Q Correct?

21 A Fine, sir.

22 Q You mentioned about the cladding being inspected by the
23 Anderson County building inspector. Do you recall that?

24 A No, but they don't.

25 Q Well, just in case there was any ambiguity about it,

1 there is not a county building inspection of the exterior
2 cladding is there?

3 A Not that I'm aware of.

4 Q There are four or five scheduled inspections by the
5 inspector, and they do not include the cladding, correct?

6 A I think there's a file inspection, but I'm not sure
7 there's one that just does cladding inspection. No, sir.

8 Q And I heard a mention of certificates of occupancies or
9 what we sometimes refer to in abbreviated fashion as a CO.
10 You're aware, are you not sir, of chapter one of all of the
11 versions of the International Residential Code applicable to
12 Rose Hill expressly provides that the issuance of a
13 certificate of occupancy is not an approval by the building
14 official of any code deviations within the structure,
15 correct?

16 A I think that's correct. I'd have to go back and look at
17 it.

18 Q In fact, no inspection by the building inspector,
19 pursuant to the code, is ever considered an approval of a
20 deviation, unless the deviation is expressly called out to
21 the inspector by the builder, correct?

22 MR. IMHOFF: Your Honor, objection. That's a ---

23 MR. LUCEY: It's a code provision.

24 THE COURT: Overruled.

25 Q Correct?

1 A Correct.

2 Q Did you happen to bring the BIA article that you
3 mentioned in your testimony with you to court today?

4 A I didn't bring anything with me, sir.

5 Q You don't know why the windows are failing, correct?

6 A Correct.

7 Q You don't know when they failed after installation,
8 correct?

9 A Correct.

10 Q You don't know the mechanics, the science of the
11 failure taking place in those windows, correct?

12 A Correct.

13 Q And without you knowing any of that, your prediction
14 that the other 85 percent or more of the windows are not
15 failing as we sit here and talk, is purely speculation,
16 correct?

17 A I wouldn't say that. The windows been in place some
18 seven to twelve years. We've only found roughly 15 percent.

19 Q Now, you testified about what you believe took place
20 between D.R. Horton and ProBuild in the purchase of the
21 windows. Do you recall that testimony?

22 A I do, sir.

23 Q Have you reviewed D.R. Horton's purchasing manager's
24 deposition relating to his purchase conversation with
25 ProBuild for these windows?

1 A I likely have. I'm not sure who that person would have
2 been.

3 Q Mr. Gene Pro (PHONETIC) Does that ring a bell?

4 A No, it does not.

5 Q And you were you were asking -- you were discussing
6 what information they would have procured -- D.R. Horton
7 would have procured from ProBuild in selecting its windows,
8 correct?

9 A Correct.

10 Q And when we talk about windows, the kind of information
11 we talked about is performance information, correct? DP
12 ratings, performance ratings, wherever you want to call
13 them, correct?

14 A Correct.

15 Q Some people call them design pressure ratings?

16 A Yes.

17 Q And you're unaware that the D.R. Horton window
18 purchasing manager testified that he didn't know what one
19 was until I asked him about it in his deposition.

20 MR. IMHOFF: Your Honor, he just said he's not familiar
21 with him. He doesn't know what he said. Mr. Lucey said ---

22 THE COURT: I sustain the objection. The witness
23 testified he didn't know.

24 Q As I understand it, your testimony to the jury was that
25 the windows only leak in three ways, the fractured heat

1 weld, the cracks near the heat weld, and the displaced pads
2 in the slot. Is that correct?

3 A That's correct.

4 Q Are you used to windows that leak in more than three
5 ways? I'm just curious why you think three is acceptable.

6 A That was what we observed in our testing. The leaks we
7 saw were in one of those three locations. Generally they
8 were either in the slot where the pad didn't go all the way
9 down or in a crack.

10 Q Now, there's two types of water testing of windows;
11 performance testing and diagnostic testing, correct?

12 A Correct.

13 Q Did you do some of both?

14 A I'm not sure which is which. I didn't do the testing.
15 Eddie did the testing for the confirmation.

16 Q Your firm. You're not sure if your firm did
17 performance, or diagnostic, or both. Is that correct?

18 A Well, the performance testing would have probably been
19 the spray rack. The diagnostic would have probably been the
20 seal dam, if I had to think about it.

21 Q So you think you did both?

22 A Yes.

23 Q And do you believe Dr. Whitlock did both?

24 A Did the thing we did, or we did the same thing he did.

1 Q So you think he did performance testing and diagnostic
2 testing?

3 A I think.

4 Q And in your testing, I heard that you did 15 tests and
5 eight did not leak. The rest had tiny cracks, and you would
6 use litmus paper to be able to visually see the moisture?

7 A Yes. On the dam test.

8 Q And you, as an engineer, I guess, could appreciate that
9 tiny cracks that seep moisture could cause a problem if
10 they're there and the homeowner can't see them and they're
11 leaking through that slot into the sill; correct?

12 A It could. Generally, water leakage is considered when
13 water beyond the face of the window plane.

14 Q You testified you didn't see any pictures of water
15 damage at Rose Hill on the one hand, but on the other hand,
16 I thought you testified that you reviewed Dr. Whitlock's
17 reports, which would have included his pictures.

18 A We were talking about the base of the wall behind the
19 brick or the cladding.

20 Q So, at the base of wall you didn't see water damage.

21 A Correct. Or behind the wall. Behind the brick or the
22 MSV.

23 Q Sir, in your experience as a forensic engineer, does it
24 typically take from 8 to 12 years for latent defects behind
25 cladding to manifest themselves by rotting from the inside

1 out to the point which a homeowner can see them?

2 A Usually much quicker than that.

3 Q What is your experience?

4 A Three to five. I've seen some as quick as two.

5 Q You talked about repairing the windows in place. Did I
6 hear that correctly?

7 A Yes, sir.

8 Q Do you deny telling me, under oath, four months ago
9 that you do not have an idea at this point and how to repair
10 it? That you asked somebody else to come up with that.

11 A Correct.

12 Q In fact, you don't deny telling me that you had no idea
13 what repairing those windows would entail, correct?

14 A At that time that was correct. I have the right to
15 continue to investigate and determine options, sir.

16 Q And that you have never been a part of such a repair
17 program previously, where vinyl windows, on a widespread
18 basis, were repaired in place, correct?

19 A Correct.

20 MR. LUCEY: Thank you, Sir.

21 THE COURT: Anything further from this witness at this
22 time?

23 MR. IMHOFF: I'm sorry?

24 THE COURT: Anything further from this witness at this
25 time?

1 MR. IMHOFF: Just a little bit. I want to let this jury
2 go, so I can keep it to 10 minutes, Judge.

3 THE COURT: I'll allow any response to any redirect
4 questions that have brought up.

5 RECROSS EXAMINATION

6 BY MR. IMHOFF:

7 Q I'm trying to be real quick to respect the jury.

8 A That's fine with me.

9 Q You were asked a bunch of questions --

10 (WHEREUPON, there were audio issues in the courtroom
11 causing loud static.)

12 A I hope that wasn't me.

13 Q I think she turned it off. Let's be loud so the jury
14 can hear us. You were asked a bunch of questions implying
15 that you have not developed opinions why these windows are
16 failing or leaking. Is that right?

17 A That's right.

18 Q Were you asked to do that?

19 A No.

20 Q Is it your burden to prove his case?

21 A No, it is not.

22 Q You were asked that all day today. Did you do this? Do
23 you do that as a forensic engineer, try to prove the
24 Plaintiffs case for them?

25 A No, the burden of proof is on the plaintiff.

1 Q Is there any reason that you would go determine why the
2 Silverline windows were either manufactured or designed
3 incorrectly?

4 A No, not at all.

5 Q In fact, there's a protocol and a requirement to do
6 window design or manufacturing work, correct?

7 A Correct.

8 Q What do you need to do for a design?

9 A You've got to know what you're designing, which is way
10 beyond me.

11 Q Right. You need to present an alternative design,
12 don't you, Steve?

13 A Correct.

14 Q Why would you do that for their windows in his case?

15 A I would not.

16 Q You wouldn't? Of course you wouldn't. You were also
17 asked some implication that the Anderson County building
18 official doesn't care about any of the exterior of the
19 buildings in Anderson County. Is that your experience?

20 A No.

21 Q Of course not, right? Is the Anderson County building.
22 Official going to look at the entire house?

23 A Yes. He's going to walk around and look at the house.
24 He may not be doing an inspection, but he's looking at it.

25 Q Absolutely. And he comes multiple times right?

1 A Correct.

2 Q Now, Mr. Lucey did point out that there are scheduled
3 inspections for particular things, right?

4 A Foundation, plumbing, rough in, electrical rough ins,
5 mechanical, HVAC, insulation, structural.

6 Q Sure. That doesn't mean that he's not looking at other
7 things, does it?

8 A Correct.

9 Q In fact, that's not true at all, is it?

10 A No.

11 Q If there were code violations, an Anderson County
12 official can stop the construction. He can stop
13 construction and make them take it down, right?

14 A Absolutely.

15 Q I forgot to do this ---

16 MR. LUCEY: Judge, exceeds the scope of redirect, Your
17 Honor.

18 MR. IMHOFF: It's the window questionnaire, Your Honor.

19 MR. LUCEY: It's window labeling and I did not cross on
20 window labeling.

21 THE COURT: That's correct, right?

22 MR. IMHOFF: We'll save it for next time, Your Honor.
23 Thank you, Steve. May we let him go, Your Honor?

24 THE COURT: We're going to shut it down for the day.

25 WITNESS: Will I be allowed to speak to the attorneys

1 tonight?

2 THE COURT: You are not -- your testimony is suspended,
3 as I understand it. Mr. Imhoff, you're going to recall this
4 witness?

5 MR. IMHOFF: In our case, Your Honor.

6 THE COURT: So, you may not discuss the testimony that
7 you are appearing for now that Mr. Imhoff -- the Court's
8 previous ruling. You can bring up other matters with this
9 witness. So, your testimony is suspended, but I'm going to
10 have you go under oath again when they recall you. You're
11 excused right now.

12 MR. IMHOFF: Can we talk to him about the issues that
13 didn't come up today?

14 THE COURT: Yes, sir. All right, ladies and gentlemen,
15 Mr. Foreman, it's been a long day and we're going to go home
16 now. Remember your instructions. Don't talk to third
17 parties about the case. Don't do any independent research.
18 That includes getting on the Internet, reading media,
19 attempting to research anything about the facts of the case
20 or the law, and don't deliberate amongst yourselves. We
21 will commence again in the morning at 9:00. See you then.
22 Have a good evening.

23 (WHEREUPON, the jury was excused at 5:09.)

24 MR. LUCEY: Your Honor, while we're here and it's fresh
25 in our minds, I thought it would be prudent, given the

1 courts ruling on the limitations on the continued
2 examination, to review what was covered in cross today with
3 this witness so we don't do it twice. They covered site
4 development, grading, concrete, brick issues, MSV issues,
5 scope repair and repair methodology.

6 THE COURT: Mr. Imhoff?

7 MR. IMHOFF: Your Honor, I think, with all due respect,
8 our witnesses were the first ones called. We have not even
9 heard the plaintiff's case yet. If we are limited to
10 guessing what plaintiff is going to put up in a case where
11 their burden to prove with twenty plus million dollar demand
12 that we cannot adequately defend this case. We have to hear
13 what Andy Sherard is going to say. We have to hear what
14 Rhett Whitlock's going to say. We have to hear what Natalie
15 Zitek is going to say.

16 Your Honor, I understand the Court's ruling and I
17 understand that we're limited by time. Fortunately, many
18 people have settled out, but we have to be able to have our
19 experts come back and testify to whatever we determine is
20 relevant and appropriate in response to plaintiff's case.
21 We haven't heard one witness from them yet. We are
22 speculating.

23 THE COURT: I will make that decision, Mr. Lucey, after
24 I've heard the rest of the testimony, because they're not
25 going to recall this witness until their case and I'm giving

1 them the right to respond to new matters and other things
2 that have not been covered. So, I'm not going to designate
3 what they can they can present with this witness at this
4 time.

5 MR. IMHOFF: I have one other issue, your Honor. We
6 said that we would accept subpoena for out of town employees
7 of D.R. Horton. We did that. Mr. Martin's was scheduled
8 too. He lives in Memphis, TN. He was scheduled to testify
9 today. I just heard that he's not going to be called
10 tomorrow. May I allow him to go back to Memphis, TN.

11 MR. LUCEY: No, I'll call him tomorrow. I will e-mail
12 you by 7:00.

13 THE COURT: Well, does anyone else have anything other?

14 MR. ROSS: Judge, I'm sorry to bother everybody in the
15 room. I'm being blown up by people back in Charleston about
16 an issue that's not in the case anymore. And they're trying
17 to submit that stipulation of dismissals to horizontal
18 defendants. And they're having a hard time. And they're
19 basically saying, hey, while I'm in front of you can I get
20 some guidance from you. I can't talk to you without
21 everybody else here, which is the reason I'm doing it now.

22 THE COURT: Has an order been circulated?

23 MR. ROSS: It's a stipulation of dismissal that you
24 actually signed here in court on Friday. They tried to
25 submit it. It was rejected, so the blank one has been

1 submitted.

2 THE COURT: The systems kicking it back? What's the
3 problem?

4 CLERK OF COURT: I'll be happy to talk to them.

5 THE COURT: Talk to the Clerk.

6 (WHEREUPON, adjourned for the day at 5:15 p.m.)

7

8 TRIAL DAY 3: September 7, 2023

9 THE COURT: Anything before we bring the jury in?

10 MS. WOOTEN: Yes, Your Honor. Just a couple of
11 housekeeping things. One of our witnesses, one of our D.R.
12 Horton employees, was subpoenaed to be here in person by Mr.
13 Lucey a couple of weeks ago. We agreed to accept that
14 subpoena for him. Last night, Mr. Lucey told us that he
15 intended to only use his deposition. However, he's here.
16 He drove all the way from Memphis, Tennessee, and we would
17 respectfully ask, Your Honor, if we could take him out of
18 order and go ahead and let him testify.

19 THE COURT: Mr. Lucey?

20 MR. LUCEY: Yes, Your Honor. The Court may recall
21 yesterday at 5:00 PM, D.R. Horton requested that the Court
22 excuse the witness from his subpoena. I then proffered to
23 the Court that I would decide by 7:00 PM whether I would ask
24 him to remain under the subpoena or release him and use the
25 publication that we served last week. At about 6:00 or 6:15

1 last night, I emailed, or I had my team email, in compliance
2 with what I said I would do, and let them know that he was
3 released from the subpoena. The reason we did that, Your
4 Honor, is we estimate the publication is approximately 50
5 minutes, and we were worried if we call him in person, the
6 testimony could last two or three hours and we all know that
7 time is an issue here.

8 As we adjourned yesterday, Your Honor, it was learned
9 that that witness was in the courtroom in violation of this
10 Court's rule on witnesses. So, the witness should be
11 disqualified in person regardless. There's no precedent for
12 what they're asking. It's not appropriate. I complied with
13 what I said I would do with the court. We did notice the
14 publication. They always had the notice of publication.
15 Mr. Imhoff and I have actually emailed several times every
16 day on the scheduling of witnesses and every time we have
17 promptly responded as to whether or not we're going to get
18 to somebody or not. And you so, Your Honor, the motion had
19 no merit if the witness had not been in the courtroom
20 yesterday afternoon, in violation of this court's order. He
21 was in the courtroom, so that should be the end of the
22 discussion. Thank you, sir.

23 THE COURT: Was he in the courtroom?

24 MS. WOOTEN: Your Honor, he came in the courtroom in
25 the afternoon at the subpoena time. We did not know he was

1 here. As soon as we found out he was here, we let him know
2 to leave.

3 THE COURT: But he was in the courtroom for a period of
4 time?

5 MS. WOOTEN: I believe he was.

6 THE COURT: I don't think Mr. Lucey is accusing you of
7 doing any wrongdoing, but the witnesses was in the
8 courtroom?

9 MS. WOOTEN: He was.

10 THE COURT: You can use the deposition. I'm not going to
11 let him testify. All right. Next matter.

12 MS. WOOTEN: Your Honor, can we at least have the chance
13 to counter designate? Because, I mean, this is not what we
14 expected. We expected the witness to be live. That's what
15 Mr. Lucey had represented all along, so can we at least
16 counter designate the rest of his deposition? So the jury
17 can ---

18 THE COURT: Well, how long is the deposition? Mr.
19 Lucey, how much of the deposition are you putting in?

20 MR. LUCEY: Your honor, it totals when it's printed out,
21 condensed or excuse me, when it's printed out as an extract,
22 it's about 65 pages. I would estimate that's about one
23 quarter or one fifth of the total deposition. I estimate
24 that it's probably about 45, 50 minutes of publication time.
25 And we did designate that publication. I believe the

1 Court's deadline for us was August 25, and that's when we
2 designated it.

3 THE COURT: Have you thought about how what you want to
4 counter designate?

5 MS. WOOTEN: Your Honor, this completely caught us by
6 surprise.

7 THE COURT: I understand.

8 MS. WOOTEN: And we would need to -- if he's going to be
9 excluded from testifying live in this case. He came here in
10 response to a subpoena that Mr. Lucey issued.

11 THE COURT: I understand what happened. Again, I'm not
12 hearing any allegation that y'all did anything wrong by
13 bringing him into the courtroom, but I've had the witnesses
14 sequestered and the Court has a very clear order on that.

15 MS. WOOTEN: We'll need to proffer his testimony if the
16 Court is going to exclude him as a live witness in our case.

17 THE COURT: Yes, ma'am. I'll allow you to do that.
18 Due to the circumstances, he was listed as a live witness. I
19 will let you. Mr. Lucey, are you going to put the -- since
20 it's being done by deposition, are you are you planning on
21 doing that today?

22 MR. LUCEY: I don't think we'll get to it today, Your
23 Honor. And we can avoid it, if it helps the Court.

24 THE COURT: That what -- I'll allow you to prepare some
25 counter designations. Get those to Mr. Lucey and then we

1 can go from there.

2 MS. WOOTEN: All right. At what point do we need to
3 proffer? He's here from Memphis, Tennessee, and has to go
4 home. So we will need to proffer his testimony for the
5 record, since it's been excluded.

6 THE COURT: This is the plaintiff's case. What I'm
7 hearing is you wanted the right to call him in your case.

8 MS. WOOTEN: Yes. Do we still have the right to call
9 him in our case?

10 THE COURT: Well ---

11 MR. LUCEY: Your Honor, he violated the rule.

12 THE COURT: Yes, ma'am. I'm not going to allow live
13 testimony. But now the question is when would you you
14 proffer it? Who are you calling in yours today, Mr. Lucey?

15 MR. LUCEY: Your Honor, we're starting with Natalie
16 Zitek and if we get to it, we're going to do Rhett Whitlock
17 and we have one publication in between. We have the
18 publication of Edmond Jeanfreau in between.

19 THE COURT: All right. How long will the proffer take?

20 MS. WOOTEN: An hour? Maybe an hour, Your Honor.

21 THE COURT: Maybe an hour? Okay. All right, let's --
22 You can do that today. We'll -- let's get into the
23 plaintiff's case and we may do that right after lunch.

24 MS. WOOTEN: All right. Thank you, Your Honor.

25 THE COURT: I'll let you since he's here. I'll let you

1 proffer that, but I'm not going to have the jury sitting
2 back there for an hour when they have shown up.

3 MS. WOOTEN: We understand. The second -- I'm sorry.

4 MR. MIMS: Thank you, Your Honor. Kevin Mims for M&L
5 Reyna. I just want to, while were talking about Mr.
6 Martin's destination, I have one objection that's dealt with
7 the topic that you rolled on in your motions in limine.
8 It's just one question, one answer we took exception to. I
9 can give it to the court. I can give it to the 4th. The
10 timely we filed this objection. It's pages 48. Actually, I
11 think it's page 48, page 49, line three question, one answer
12 you've already covered under rule. We would like to note
13 our objection. I don't know if there's a defense to that.

14 MR. LUCEY: We're not publishing today, so we were not
15 prepared -- we didn't bring it to argue an objection.

16 THE COURT: Ms. Wooten is going -- she's going to get her
17 counter designations to him. And Mr. Mims, take a look at
18 her counter designations and I'll give you the opportunity.
19 If you have an objection to any of that as well. Mr. Ross?

20 MR. ROSS: Thank you, Your Honor. For JLS, I was going to
21 ask the court if the court will allow the third party
22 defendants to provide counter designations as well?

23 THE COURT: As to this witness, yes. Yes. Since it's
24 not being published today and I recognize this is a special
25 circumstance, so ---

1 MR. ROSS: Thank you, Your Honor.

2 MR. LUCEY: Your Honor, the court had indicated it would
3 inform the jury as to why class members were not in the
4 courtroom for the trial. The Court already did that for
5 opening, but it limited that instruction to the opening
6 context. We would ask that the Court give an information
7 instruction to the jury that the class members have been
8 sequestered as potential witnesses and that's why they're
9 not in the courtroom. Thank you.

10 THE COURT: All right. Anything else?

11 MS. WOOTEN: We object to that. There's an order that
12 they're sequestered. That's why they're not here. That's
13 not why they're not here. That's going to mislead the jury.
14 It's going to be more prejudicial than probative. We
15 absolutely object to something like that. That's not why
16 they're not here.

17 MR. LUCEY: Two defendants moved to exclude all my class
18 members from the courtroom. They're not here as a result of
19 their motions. The jury is entitled to know the class
20 members have been excluded from the courtroom for this
21 trial.

22 MS. WOOTEN: You know, we didn't even get to take these
23 people's depositions. I mean, to have this sort of order
24 out there that says, you know, that's not necessary and it
25 certainly is prejudicial to us to have the Court say, well,

1 they're not here.

2 MR. LUCEY: The movants should have contemplated that
3 before they moved to exclude my class members from the
4 courtroom.

5 THE COURT: How is that prejudicial, Miss Wooten?

6 MS. WOOTEN: Because it's not true.

7 THE COURT: They have been sequestered. So, how is how
8 is that prejudicial to your client?

9 MR. IMHOFF: May I, Your Honor?

10 THE COURT: No, sir. Ms. Wooten is arguing this
11 motion.

12 MS. WOOTEN: Your Honor. We just don't think it's fair
13 to have that out there. I mean, we could, you know, we could
14 think of one that an order that you could say for our
15 people, you know, why aren't all the D.R. Horton people
16 here? Because they've been sequestered.

17 THE COURT: Well, this is what I will do. I will tell
18 the jury, that -- I will explain that all the witnesses in
19 the case have been sequestered and that if a person is a
20 witness, they cannot come in the courtroom until such time
21 as their testimony is completed and they're no longer a
22 witness.

23 MS. WOOTEN: I think that's fair, Your Honor.

24 THE COURT: I will do that, and Mr. Lucey, I think that
25 that will cover that concern. And certainly after your

1 people testify, they can stay in the courtroom. Anything
2 else?

3 MS. WOOTEN: Yes, Your Honor.

4 MR. LUCEY: Mr. Mims did show me his objection. It was a
5 reference to insurance, and we had already redacted it to
6 avoid bringing that. We agree with that.

7 THE COURT: Does that answer all your concerns on that,
8 Mr. Mims?

9 MR. MIMS: Thank you, Your Honor. Yes, it does.

10 THE COURT: All right. So noted.

11 MS. WOOTEN: Your Honor, we do have one more issue, and
12 that is just a clarification on a ruling that Your Honor
13 made yesterday. We were attempting to put up demonstrative
14 exhibits with our expert from another neighborhood, if you
15 recall and the Court ordered that we couldn't put anything
16 up on the screen unless it was in evidence. That's the way
17 I understood, Your Honor. But are you saying that we can't
18 put up any more demonstrative exhibits if they're not in
19 evidence? We have lots of demonstrative exhibits like Mr.
20 Lucey had his posters and things like that that we plan to
21 use during this case.

22 And there's case law in South Carolina that there's
23 four things that have to be met in order for demonstrative
24 exhibits to be used. One is that we have to show they're
25 authentic. Two is that we have to show they're relevant.

1 Three is that we have to show they're a fair and accurate
2 representation of what they are. And four, we just have to
3 show that they have probative value that's more than their
4 prejudicial effect. So, are we going to be able to
5 introduce our demonstrative evidence under those standards,
6 Your Honor?

7 THE COURT: The argument that I heard yesterday was
8 that it was in evidence, that it was part of the exhibits
9 that had been submitted, and Mr. Imhoff showed me his
10 exhibit list. Then Mr. Lucey said that it wasn't in
11 evidence, so that was what I was hearing from the parties,
12 that there was a dispute over whether or not the exhibit had
13 been admitted.

14 MS. WOOTEN: Right, Your Honor, and then Mr. Imhoff
15 said I have two more to put up from another neighborhood.
16 And I understood -- maybe I misunderstood your ruling. I
17 heard you say if it's not in evidence, you can't put a
18 picture up there.

19 THE COURT: Well, the witness was being asked questions
20 about a -- well, let's back up the objection I heard also
21 Mr. Lucey objected on the issue of relevancy of another
22 neighborhood. And Mr. Lucey, what is your position on
23 purely demonstrative evidence?

24 MR. LUCEY: As long as it's identified as a
25 demonstrative evidence so that it's not used as a back door

1 to admit evidence that shouldn't be admitted. We believe
2 that demonstrative evidence with a proper foundation may be
3 temporarily shared with the jury.

4 THE COURT: That fine, then. But it needs to be
5 clearly designated what it is to begin with. Again,
6 yesterday, that was being presented to the Court as an
7 exhibit.

8 MS. WOOTEN: Sure, sure. I understand, Your Honor. I
9 thank you for your clarification.

10 THE COURT: All right. Are we ready? Anybody else?
11 Let's get our jury. Let's make sure all witnesses are out
12 of the courtroom that haven't testified. All attorneys,
13 make sure your witnesses are out.

14 (WHEREUPON, jury entered courtroom at 9:24 a.m.)

15 THE COURT: Mr. Foreman, ladies and gentlemen of the
16 jury, good morning. Hope everyone had a good evening. We
17 are ready to proceed. I appreciate your patience. We had
18 some issues that we had to take up outside of your presence,
19 but we are now ready to move forward. Plaintiff, call you
20 next witness.

21 MR. LUCEY: The Plaintiff calls Plaintiff and class
22 representative, Natalie Zitek.

23 WHEREUPON, Natalie Zitek, having first
24 been duly sworn, testified as follows:

25 DIRECT EXAMINATION

1 BY MS. LYNN:

2 Q Natalie, good morning. Please introduce yourself to
3 the jury.

4 A As I just said, my name is Natalie Zitek. I am the
5 plaintiff in this case. I have brought the lawsuit against
6 D.R. Horton for myself, as well as 219 other homeowners in
7 my subdivision.

8 MR. LUCEY: She needs to move closer to the microphone.
9 I don't think the jury can hear her.

10 A Sorry, maybe that's better. I'm trying to address
11 you. There we go. Okay, can you hear me? All right. So,
12 my name is Natalie Zitek. I am the plaintiff in this case.
13 I own a home in Rose Hill, and I'm representing myself, as
14 well as 219 other homeowners that also have D.R. Horton
15 homes. And I just wanted to address you a little bit. I am
16 a little nervous, as you can tell. I got news last night
17 that my daughter may be delivering my grandson tomorrow, so
18 that's why we're trying to get this done today. So, I do
19 apologize in advance if I have some brain farts, because
20 that's going to happen. I have a lot on my mind, and I do
21 want to thank you for your time and giving up what's going
22 on in your lives to be here, because I know that this is not
23 fun. So, thank you.

24 Q All right. Natalie, let's talk about your background.
25 Can you tell the jury a little bit more about yourself, such

1 as your family or professional experience, your education?

2 A I was going to try and keep everything pretty short,
3 but I know I have to elaborate on this one. Okay. So, I
4 was born in Chicago, Illinois in 1967, and I started my
5 first job when I was 11. I was a paper girl for the Chicago
6 Tribune and sometimes that led me to meeting many of my
7 neighbors, and it led to babysitting jobs, and it also led
8 to my first real job in a medical office. I started that
9 when I was 14. For the next 10 years I worked in the
10 medical field. Through a co-worker of mine, I met my
11 husband. We were married in 1989. We're going on our 35th
12 wedding anniversary. He is a Chicago police officer, and
13 after five years of marriage, we decided to start our
14 family. We have three children. My youngest is still at
15 home. My oldest is getting ready to have my grandson.

16 And so, at the time that we had our children, it was a
17 mutual decision that I would stay home and be a stay at home
18 mom. So, I was able to stay home for 14 years. I
19 understood the privilege that that brought me. Not
20 everybody gets to stay home. So, I tried to use my time
21 wisely and I volunteered in my community. I volunteered in
22 my church. I was on advisory board meetings and in councils
23 for both of those. When my girls went to elementary school
24 and they wanted to be in Girl Scouts, Girl Scouts did not
25 exist in the public school system. So, I pioneered a

1 program at our school and I was a Girl Scout leader for six
2 years.

3 When it was time for me to go back to work, and my kids
4 were all into school, I was very fortunate to get a job with
5 the National Insurance Crime Bureau. I started as an
6 investigative assistant, which was the lowest level at the
7 time. When I started, I had my associate's degree in
8 business. Again. I was incredibly fortunate, and then ICB
9 paid for me to have a bachelor's degree. I earned a
10 bachelor's of business, business management, and then from
11 there they also paid for my master's degree. So, I have a
12 master's in non-profit administration and I chose that
13 master, that major, because I love to help communities. I
14 wanted to learn how to how to do it more professionally and
15 do a better job.

16 So, I stayed with NICB for six years, and at that time
17 my husband had been in the Chicago Police Department for 26
18 years and he was ready for retirement. So, I left my job
19 there and we moved to South Carolina. I took off a couple
20 years just to get familiar with our new surroundings, being
21 800 miles away. It was a little different in South
22 Carolina, and one of my first jobs here was working as the
23 Volunteer Development Director for the Girl Scouts of South
24 Carolina. So, I was in charge of different counties and
25 about 5,000 volunteers, which is where my masters came in

1 and did help me do some good.

2 I stayed with the Girl Scouts for about a year because
3 the insurance that they had offered was not suitable for my
4 family. So, I then applied for the Department of Homeland
5 Security, which is a government job for government benefits.
6 Once you apply for that, it does take some time to be called
7 like your number to get called. So, in that time period for
8 brief, about 6 months, I worked for a NAG, which was a
9 property management company, so I could learn more about
10 HOA's and how that kind of worked. Never had a new home in
11 Chicago. Everything is pretty much older. You buy an
12 existing home. So, it was very interesting for me to learn
13 a little bit more about that process.

14 I was eventually called up to the Department of
15 Homeland Security. I currently am a Transportation Security
16 officer. I work at Greenville Spartanburg International
17 Airport. I am, like I said, a certified TSO, but I'm on a
18 detail for the last two years where I do do payroll and
19 uniforms for the entire state. So I plan on staying at the
20 Department of Homeland Security until I retire, and I'm
21 hoping it's six more years.

22 Q All right, Natalie. Let's talk about your move from
23 Chicago to Easley. Where do you currently live in Easley?

24 A I live in the Rose Hill Subdivision and my address is
25 104 Sturbridge Court in Easley. That's off of Exit 40 on

1 85, if you take that. And I am between 153 and 123.

2 Q Let's talk about when you purchased your home at 104
3 Sturbridge in 2013. What attracted you to the neighborhood?

4 A Well, I still had school age children. I had one going
5 into her second year of high school and one going into
6 middle school, so the school district was pretty much the
7 key for us for location, and we were looking for something
8 in Anderson One. So, when we were looking at this location
9 and then, of course, price range because there was only so
10 much that we could afford. We were looking for a good home
11 design for our family to make sure that bedrooms were
12 upstairs and we could all be together. We had a family of
13 five and then the builder was very important to us. We've
14 never built a home before. Like I said, everything in
15 Chicago was a pre-existing home that you just purchased.
16 So, it was very important with such a big investment to make
17 sure that I chose the right builder.

18 Q What efforts did you take to look further into the Rose
19 Hill neighborhood?

20 A Well, like I said, I was looking for a location and
21 Rose Hill came up in the area that we were looking for, so
22 we clicked on the link. I reviewed the website. I did some
23 research on the builder. In fact, I checked the Better
24 Business Bureau. I checked reviews. I found nothing that
25 brought any alarm to me. I didn't see really anything

1 negative. And so, then we clicked the link on the Rose Hill
2 website, which brought us to one of those, you know, would
3 you like more information? And that led to conversations
4 with Angie Moss via e-mail.

5 Q Who is Angie Moss? What is your understanding of what
6 her role was at D.R. Horton?

7 A Angie Moss was a sales representative for D.R. Horton.
8 She was stationed at the model home within Rose Hill. She
9 was our primary contact. She was there when we went down to
10 make the sales contract. She drove us around, so that we
11 could see the area, and she was there from the beginning to
12 the end, to close.

13 Q What materials did you review or see in connection with
14 purchase of your home?

15 A Oh, we had lots of brochures. I remember getting floor
16 plans and options lists, features of what you could expect.
17 Again, the price point. We had a -- we were given a map of
18 the entire community so we could see what lots were
19 available. Where we might want to put that house. Just
20 anything you can think of in purchasing the house. The
21 options, the layouts, pictures. When I got the layout, you
22 know, you see here's what's going to be on the top floor,
23 here's what's going to be on the second floor. But, I'm a
24 visual person, and I could not gather what it was going to
25 look like. So, I had reached out to Angie and asked her to

1 send me some pictures of some existing homes that had that
2 floor plan, so I could kind of see what it was going to look
3 like.

4 Q Let's turn to some of these marketing materials.
5 Natalie, we're going to show you what's been marked as
6 Plaintiff's Exhibit 213, which has been stipulated into
7 evidence. We're going to look at page 1 of Plaintiff's 213.
8 What is this document?

9 A This is an e-mail that went that came to me from Angie.
10 Along with it were the pictures that I had spoken about
11 earlier that these were two of the plans that we were
12 possibly thinking about and I wanted to see them visually.
13 So this was just her following up and she sent me the actual
14 images of those models.

15 Q What happened regarding the model that you ultimately
16 for 104 Sturbridge?

17 A Ultimately, once we went down there, we decided that we
18 were going to go with a different plan. And the reason for
19 that was when the materials were sent to me to like look at
20 the homes and see what they had available, there was the
21 option list that went with it. And we knew that we always
22 wanted to have a side garage with a driveway. So when we
23 looked at those options, the Fieldstone said if you're going
24 to have a turn driveway that there be some consideration for
25 basement. So, the entire time we were thinking, we were

1 thinking we were going to get a basement with this home and
2 that had a lot to play with, how much space would be in that
3 house.

4 So, when we came down and we met with Angie, we found
5 out that the lots in the area that was opening for that
6 phase, that none of them would have any basements. So, we
7 had to kind of regroup and figure out, well, if we're not
8 going to have the extra space in the basement, then maybe I
9 need to have the extra space in the house, more closets,
10 more whatever. So, we changed and we went with the Westerly
11 which was a bigger floor plan and a bigger model.

12 Q Looking at page 73 in Plaintiff's Exhibit 213. What is
13 this document?

14 A This is an e-mail to us from Kerry Hills. She worked
15 with D.R. Horton and the communication here was that when we
16 left the sales office, and this is when we were making the
17 purchase contract, there is a portion of the contract where
18 you had to pick an elevation, which is what is the house
19 going to look like? Is it going to have Hardy board, is it
20 going to have stone? What is it going to look like? And
21 there is pictures of everything in the front, but we knew
22 that we had changed the home to have a side garage and there
23 was no elevations that depicted what that was going to look
24 like. So, I had sent an e-mail to her to ask her, do you
25 have any renditions of what the site is going to look like?

1 Because nothing that I was shown is actually going to be our
2 elevation. So again, I'm visual and I needed to see it.

3 Q And looking at page 79 of Plaintiff's Exhibit 213, what
4 is this document showing?

5 A So, one of the options that we had chosen when we made
6 the sales contract was an additional patio area in the
7 backyard. I think it originally came with 12 feet, a 12 by
8 12, or 10 by 12. It was very small, so we wanted to have an
9 additional patio space back there. So, we did ask for an
10 additional 680 square feet and Angie wanted us to draw on
11 the model exactly where we wanted that pad. So, that's what
12 we did.

13 Q You referenced a brochure, Natalie. I'm going to show
14 you Plaintiff's Exhibit 267. Scroll through all four pages.
15 What is this document?

16 A This is one of the advertising -- these are all
17 advertising materials that were emailed to us when I was
18 inquiring about the Rose Hill subdivision. This one right
19 here is, of course, just the map of where it's going to be.
20 But I think that the key points were the lots and that's
21 what we were interested in. And this also was very, very
22 important because again, when I was doing research on D.R.
23 Horton as a builder, this type of advertisement was all over
24 all of their brochures that they were America's number one
25 home builder, that they built quality homes. So, that -- I

1 took good consideration into these advertising materials.

2 MS. LYNN: Your Honor, Plaintiff moves Plaintiff's
3 Exhibit 267 into evidence.

4 THE COURT: Any objection?

5 MR. IMHOFF: No objection, Your Honor.

6 THE COURT: Plaintiff's Exhibit 267 would be admitted
7 without objection.

8 Q All right, Natalie, let's talk about your purchase
9 contract. We're going to show you a copy of your purchase
10 contract which is a part of Plaintiff's Exhibit 7.1 which
11 has already been stipulated into evidence. Do you recognize
12 this is as your purchase contract?

13 A Yes.

14 Q As we scroll through the purchase contract being shown
15 in separate pieces, does it appear to be a complete copy?

16 A I think this was everything that was given to us at
17 closing.

18 Q When did you sign your contract?

19 A We signed our contract on February 17, 2013, the day
20 before our anniversary. It was our gift to each other.

21 Q And why did you decide to purchase your specific lot?

22 A The lot had a big, a big deal with our decisions. So
23 again, I hate to keep making the reference, but in Chicago,
24 everything is very different. To get a corner lot in
25 Chicago was like gold. So, when we had the opportunity to

1 get a corner lot, that's where our focus was, because it
2 meant that you didn't have neighbors on one side. You had a
3 little bit more space. So, the particular lot that we chose
4 was 266 and we did it for a reason, because only certain
5 lots in the area that we were choosing in that phase could
6 accommodate for a side garage and a long driveway. At the
7 time, we had four drivers in the family. I knew that my son
8 would be driving, so I would have to accommodate for five
9 vehicles on a pad. So, that part was very important. Being
10 able to turn the house so that there was a side garage was
11 very important. The lot had to be wide enough. It had to
12 be long enough, and we also wanted a very large backyard,
13 because we have kids and they were going to play and
14 eventually we were going to put a pool in and wanted to have
15 enough space around the pool for the kids to be able to play
16 and do whatever they wanted to do.

17 Q What type of input did you have as to the makeup of
18 your home?

19 A Only being able to pick various options like colors,
20 the color of the walls, the color of the brick. We were
21 able to choose if we wanted more outlets or more canned
22 lighting. I would say the biggest option that we had to
23 choose from was our master bedroom could either be a full
24 master bedroom with the whole section to the side that would
25 have a fireplace and the sitting room. And if you didn't

1 want that, you could choose the option to make that a
2 bedroom. With a family of five we chose that to be the
3 bedroom for my son.

4 Q Who do you understand would design your home?

5 A D.R. Horton.

6 Q Who do you understand would ultimately select the
7 products that were going to be put in your home?

8 A D.R. Horton.

9 Q And who did you understand would build your home?

10 A D.R. Horton.

11 Q How much did you agree to pay for your home?

12 A About \$288,000.

13 Q After you signed this purchase contract and agreed to
14 pay that amount, what happened next?

15 A They started building. It was about six months from
16 start to end. During that time we got a lot of pictures
17 from Angie. Not sure if you've seen the map of the
18 neighborhood, but the lot that we chose, 266, was directly
19 adjacent to the model home. So, from her window of her
20 office window she could see our lot and she could see the
21 building going up. So, she did take periodic pictures and
22 send them to us. I would e-mail her and ask her how it was
23 going. As it got closer to us selling our home in Chicago,
24 I was getting nervous because, you know, I'm only going to
25 have so much time. I have to get moved into this new house.

1 So, I would ask her, are we on track. Are we going to close
2 on time, and everything seemed to be good. Prior to the
3 drywall going up, one of the requirements for the new build
4 was that the homeowner go down and check everything before
5 they put the drywall, because once the drywall goes up,
6 you're kind of out of luck. So, that was to check outlets
7 and lights and things like that. So, my husband did that
8 and brought my daughter. At the time, I still had to work
9 in Chicago, so I couldn't come down.

10 Q Let's now turn to closing. What was the closing
11 process like?

12 A The closing process was a couple steps. So, the first
13 part of the process was the home orientation. That was done
14 on July 22, 2013. That was done with the superintendent of
15 the build of my home, and that was Keith Waddell. So, he
16 walked us through the house and we went through every room.
17 He had like a little pole stick that if there was nail pops,
18 he'd go around and he'd circle all the nail pops so that
19 they would know to come back. So, first we just looked at
20 the home and make sure everything was what we had ordered,
21 what we had looked at. And what we had agreed upon. And
22 then after that, he took us for a walk around the entire lot
23 and the home. He showed us maintenance, like where you
24 would winterize with the water and things that we would be
25 familiar with the home. And then he gave us a warranty

1 manual. The warranty manual had contacts for any of the
2 contractors that had worked on our home. So, if we had an
3 issue with plumbing call this person. If we had an issue
4 with the cabinets, and then also it had samples of the paint
5 that was used in our home in case we needed to make any
6 adjustments.

7 Q What materials, in addition to the warranty did you
8 receive with closing?

9 A With closing, of course, the financials. We received
10 the option sheet that you had seen. We received the feature
11 sheet again with all of the amenities and things through the
12 through Rose Hill. So, just basic documents. Your deed.
13 Like I said, the warranty manual, all the financials, the
14 disclosures.

15 Q And Natalie, we're going to stick with Plaintiff's
16 Exhibit 7.1. We're going to look at pages 34 to 36 of this
17 exhibit. Page 34 is in front of you now. What is this
18 showing?

19 A I have the Westerly model. Is that the page? Oh, okay.
20 This is showing us the model that we chose. That's all.
21 It's got our initials on it and this was the Westerly plan.
22 But again, this is not a rendition of anything that we had,
23 because our house is going to be turned with the garage to
24 the side.

25 Q Now, we'll turn to page 35. What is this part of the

1 model selection showing?

2 A This is the part that I needed to be visualized,
3 because here was the floor plan and I couldn't see that.
4 So, on here, these were options that we had chosen. You'll
5 see that there is some circles there. We added some more
6 can lighting. We added some more electric outlets. I think
7 we had another switch for some ceiling fans. So, these are
8 just additional options that we could choose.

9 Q And looking at the third, what is that showing?

10 A This is showing, again, the floor plan, but it's
11 showing that I chose to have the bedroom versus the sitting
12 room for the master.

13 Q If we move to page 37 of Plaintiff's Exhibit 7.1. What
14 is this document?

15 A This is the features list and this is what gave us an
16 idea of what we were going to expect for the build. Which
17 we believed was going to be a quality built home. And we
18 believed it was going to be good quality, based on some of
19 the options that we had here. So we had designer fixtures
20 and we had exquisitely crafted this, and, you know, so all
21 of that was in our head that this is going to be a really
22 beautiful home. It's going to be a very good quality home.
23 Also, looking at the windows. I'm trying to find the
24 windows here. Oh, there we go. So, easy maintenance
25 windows, which was really important for us. Easy to clean,

1 easy to take care of.

2 Q Scrolling through the remainder of the documents in
3 Plaintiff's exhibit 7.1, where do you see any pre-closing
4 quality control checklists completed for your home that are
5 included as a part of this closing document?

6 A I don't see any checklist.

7 Q What quality control checklist relating to your home do
8 you recall ever being provided to you?

9 A I never received anything.

10 Q When did you ultimately move in to 104 Sturbridge?

11 A The day we closed, July 25, 2013. We went to closing.
12 We got the keys, we came back, and looked around, and we
13 were going to have to go back to our travel trailer, which
14 is what we brought from Chicago with a lot of things that we
15 needed. Most of our items were on a moving truck. They
16 were going to take three weeks to get down to South
17 Carolina. So, all of our necessities we really pretty much
18 had in the travel trailer and that's where we were staying
19 until the house was ready. So, when we walked in with our
20 keys, the kids were just so excited. We were all excited
21 and they wanted to stay there that night. Like, there's no
22 beds, there's no nothing. So, they convinced us to go back
23 to the travel trailer. We pulled all of the mats and
24 mattresses off of everything in the camper and brought
25 whatever we could to the home. And that night, as a family

1 up in the loft, we put all the beds there and we all stayed.
2 We were just all just amazed. This was our house. We were
3 so excited it finally happened. The move came and everybody
4 was good.

5 Q And what was your impression of the home at that time?

6 A At that time? I mean, it was just a dream. We just
7 absolutely loved it. This was everything that we chose. I
8 mean, this was the house that we chose every option that was
9 in it was exactly what we wanted. It was a perfect lot. It
10 was a perfect house and at the time it looked beautiful.

11 Q What happened after you moved in?

12 A After we moved in, it was pretty much normal stuff.
13 The first year warranty. There was a couple items that we
14 had brought up to Carl and Keith. Everything was taken care
15 of. If we did bring up an issue, they either took care of
16 it or we were told that it wasn't an issue. The only
17 concern that we had was within that one year period the
18 mortar on the brick over the garage had been repaired twice.
19 So, we were just a little concerned, you know, would this
20 happen in the future.

21 Q What ultimately happened?

22 A Well, after the one year warranty and two fixes in '13
23 and '14, it wasn't until 2017 that we realized that the
24 cracks were coming back. So, we had step cracks above the
25 garage and it was even worse because we were having an issue

1 with our garage. The door was binding and wouldn't go up
2 because the garage header seemed to be sagging. So, it was
3 causing a problem with the garage door going up and down.
4 So, we were very concerned, especially that the garage
5 wasn't going down and we were getting a little concerned
6 that there was a bow in the header. So, we contacted Carl
7 and we asked him to come out and take a look at it.
8 Carl advised us that we should probably file a warranty, a
9 warranty claim.

10 Q Natalie, I'm going to show you Plaintiff's Exhibits 51
11 and 52. Starting with Plaintiff's Exhibit 51 first, which
12 has also been stipulated into evidence. What is this
13 document?

14 A Can I read the first paragraph there?

15 Q Sure.

16 A I think I can read it. I'm getting old. Oh, there we
17 go. So, this was in response to the first warranty claim
18 that my husband had put in for the Brick issue. "Your
19 warranty request has been submitted. Your satisfaction is
20 our priority, and we will work to resolve your warranty
21 request in a timely manner. When you purchased your home
22 from America's Builder, you'll get more than just a house.
23 You get D.R. Horton's commitment to years to come. We will
24 be in touch with you as soon as possible to discuss the next
25 steps towards a resolution."

1 Q Let's look next at Plaintiff's Exhibit 52, which has
2 also been stipulated into evidence. Natalie, what is this
3 document?

4 A This document -- So, this was a response to the
5 warranty request. So, the first warranty request that we
6 put in, they said it wasn't their issue. So, they told us
7 to send the warranty claim to another company. So, this was
8 the e-mail that my husband sent to the other warranty
9 company. I can read it if you'd like to exactly my
10 husband's words as to what the issue was. "The exterior
11 brick above the right hand side of the overhead garage door
12 is cracking. The entire right hand side of the upper
13 support metal bar is bending due to brick sagging and
14 cracking. My overhead door binds severely as it opens and
15 closes. There are several cracks above the overhead door
16 leading straight up the exterior brick wall to the second
17 floor window. The brick area in question has been replaced
18 twice during the first year of ownership due to cracking and
19 bricks sagging. It has once again cracked and this time the
20 bricks are compressing and crumbling, causing a severe bend
21 to the right hand side of the support metal brace. At the
22 upper hand corner, the bricks are cracking and falling apart
23 from the weight of being compressed. We are afraid that the
24 entire side leading up to the second floor window will
25 collapse, causing the right side of the house to fall."

1 Q What happened after you made this warrant submission?

2 A Nothing, so we then reached out again to Carl and said,
3 you know, what's going on. And at that point, I believe
4 Carl -- I'm not sure what happened, but it started to get
5 fixed. Carl also worked with Jim who is the current
6 superintendent, took over Keith's position, and I believe
7 they arranged for an engineer to come to our house to see
8 the damage.

9 Q What happened as a result of the engineer visit?

10 A Well, the engineer came out and they took probably 5-6
11 feet of brick off and probably five or six rows up so they
12 could see behind. The engineers came out, they took
13 pictures, they took the information back. So we originally
14 called June of 2017. That's when we contacted Carl and
15 started sending out the warranty requests. It was about
16 July, mid-July, when the engineer came out and again the
17 whole upper part of the garage was taken apart. The bricks
18 were off and we didn't really hear anything for a couple
19 months. And then we did get a message that it was, kind of,
20 it was the holidays. I think we got a call from Jim. It
21 was the holidays. Give him a little grace. We're going to
22 get through the holidays and then we'll get started on your
23 in your house at the beginning of the year. The repairs
24 started in March of 2018, so that was months and months and
25 months after the engineer came in. For months the entire

1 top of the garage was open. The bricks were taken off.

2 Q Natalie, I'm going to show you Plaintiff's Exhibit
3 32.14, which has also been stipulated into evidence. What
4 is this document?

5 A This is a letter that was given to Jim, it looks like.
6 After the engineer came to our house and took his pictures
7 and took his notes, we never heard anything. I was never
8 privy to this letter until this litigation, and so
9 apparently from this letter the design of our home, they had
10 one design for the Westerly. They did not have a plan that
11 turned the home. So, the structure of our home was
12 incorrect and I can read this section to you, which is
13 exactly what the engineer said was wrong. It says,
14 "Attached is a revised layout with my notes for 266 Rose
15 Hill." That's our home. "Per our conversation, the Westerly
16 plan has been updated and renamed The Woodrow. The original
17 plan called for Lot 266 to be a front entry garage and there
18 was no mention of brick. This created a couple of problems.
19 As a precaution I recommend adding additional front wall."
20 And this is very technical. I'm not sure if you want me to
21 read that. The bottom line is that the support system that
22 they put above the garage and the support system that they
23 had for that entire wall was not enough to support the brick
24 that was on there. So, the brick was failing.

25 Q Natalie, next I'm going to show you Defendant's Exhibit

1 215 that Horton's counsel showed the jury yesterday. What
2 is this document?

3 A Yesterday was the first time I ever saw this letter.
4 But apparently there were two engineers that came to the
5 house, or at least two engineers that had looked into fixing
6 our home and they had the same conclusion that there was not
7 enough support of our home and that the beams needed to be
8 wider. The beams needed to be -- let me read it. "Based on
9 our findings, it would appear that these garage beams were
10 not designed to support brick veneer. In order to properly
11 support the front brick climb and the brick over the garage
12 door header, the properly sized structural beams and columns
13 will need to be installed and adequate footing sizes will
14 need to be verified. Once all the structure elements are
15 installed, then all the brick veneer cracks shall be tuck
16 pointed by a professional masonry contractor and the
17 required area shall be monitored over the following months
18 to a year." So, I had not seen this until yesterday, but
19 that's two engineers saying the same thing, is that the
20 structure of my house was not correct.

21 Q And how long did Horton's repair of those problems
22 last?

23 A They're still lasting, because there are still lasting
24 issues that have not been taken care of. But primarily this
25 fix went on for about 20 months. Again, we started in March

1 and in March the brick layers came and took all the bricks
2 off that side of the wall. Then they came and did the
3 support. Then they came and they put concrete footers in
4 front of the garage to support. Once that was done, then
5 they re put the brick up. They reinstalled the brick. And
6 once they had done that, my husband and I had gone out there
7 when they were finished and we were horrified, absolutely
8 horrified. So, the brick was not straight. Some bricks
9 were like this. Some bricks were like that. The whole line
10 of bricks was uneven. And then when you look at the mortar
11 that they did to those bricks, it looked like a wave. It
12 looked horrible. So, we called Carl and we complained and
13 said, you know, this is just not acceptable. My house can't
14 look like this. You did a repair and now you've left it
15 looking worse than what it was originally. So, it's my
16 understanding that Carl had called Pam, who was his boss,
17 and she came out to take a look at the brick and everybody
18 agreed that it was a very poor job and that it should be
19 torn down and and re redone, which is what they did.

20 Q And how was that repair process for you, personally?

21 A That was hell. That was absolutely hell. The side of
22 the home that was being repaired is our bedroom, so our
23 windows are right there. Everybody could see in for months,
24 five months. Everything that was in our garage was in the
25 the pods that sit on the concrete. The pods were taking our

1 entire driveway that I said that, you know, we had four or
2 five drivers. I need space on a driveway to park. We
3 couldn't use our driveway. We couldn't use our garage
4 entrance to get into the house, because we had to take so
5 much out of the garage and put it in storage. We couldn't
6 get to any of the items that we needed. You know, you think
7 I'm going to go to the garage and get get this? Oh, I
8 can't. It's in the pod. And so our whole life was like that
9 for months.

10 On top of that we were we were pretty worried for our
11 safety, to be honest, because when they were doing the
12 garage repair they blocked off -- So, we have a three car
13 garage and what it is, is two cars in the front and then the
14 third garage is behind, more like storage, and it goes this
15 way where the garage goes this way and the storage goes this
16 way. So, D.R. Horton had built a plywood wall where the two
17 car garage separated from the storage and right where that
18 ended was our side entry from the garage. That was not a
19 steel door, that was an interior door that we were scared
20 that people could just come in and get into our house in the
21 middle of the night. So, it was not a good time to be at my
22 home.

23 Q Natalie, I'm going to show you Plaintiff's Exhibit 55,
24 which is 155 photos of your home prior to and during the
25 first 2017 repair, which has already been stipulated into

1 evidence. Turning to photo one. What is this photo
2 showing?

3 A So, in this photo I told you that the engineers came
4 out in July. This was all of the bricks that they took off
5 that sat there like that from July until March when they
6 ripped the rest of the bricks off. What you're seeing all
7 the way to the right, you'll see the mortar area. That is
8 the step crack that was originally over the garage. You're
9 also seeing some of the support above this garage and you're
10 seeing that there's a bolt missing right there. So, this
11 was the damage. This was the garage where they had to do
12 the repairs.

13 Q Turning to photo four, what is this photo showing?

14 A This is a better view of what we had there and what you
15 can see past here. What we currently have, is more cracking
16 down here. So, this is just a view, but currently that
17 whole area still has some mortar cracking.

18 Q Which whole area?

19 A It's above the lantern here, the light.

20 Q And turning to photo nine. What is this photo showing?

21 A Again, that's just the overall view of what the house
22 looked like from July until March. Everything open through
23 Christmas through everything. I had a hole in the side of
24 my wall.

25 Q Where is the brick cracking now at your home?

1 A Well, the brick is still cracking right in the same
2 area. I have the same step crack right there and currently
3 I have some cracked bricks above it as well now.

4 Q And what is the condition of that wood beam in your
5 garage now?

6 A Unfortunately, that piece of the garage is now bowing
7 down again.

8 Q Turning to photo 67. What is this photo showing?

9 A When the engineers came out and they did the test cut
10 in the front, they also cut up the drywall in the inside.
11 So, this was them trying to see the support of the garage
12 from the inside. So again, that was all broken up for
13 months and months and months.

14 Q Turning to photo 90. What is this photo showing?

15 A This is showing that once they took the brick off of
16 the house, they breached the moisture barrier there. So,
17 that should be all covered so that no moisture can get
18 behind.

19 Q Turning to photo 97. What is this photo showing?

20 A This is showing our life. This was our life throughout
21 this process. So, we could not enter to the garage.
22 Everything was blocked off the entire driveway because this
23 is a driveway past the garage. The garage was full of all
24 of the materials. It was full of all of the ladders. I'm
25 not sure -- the scaffolding. So, that's it. That was a

1 picture of our life.

2 Q Turning to photo 134. What is this photo showing?

3 A More of our life. The entire side. You couldn't get
4 into that. It's also showing you the bedroom windows up
5 there where, you know, people are on scaffolding looking
6 into my house. Yeah, it was very, very uncomfortable. The
7 dumpster was right there. It was leaving garbage all over
8 the driveway.

9 Q Turning to photo 142. What is this photo showing?

10 A This is showing not only the scaffolding, but it's
11 showing one of the pods. There was two. So, those pods sat
12 on that driveway until from March when they were dropped
13 off, until September when they picked them up.

14 Q Natalie, we're gonna move to Plaintiff's Exhibit 56,
15 which is 208 photos of your home during the first 2018
16 repair. They're also stipulated into evidence. We're going
17 to turn to photo 21 of Plaintiff's Exhibit 56. What is this
18 photo showing?

19 A This is during the structural repair. This beam right
20 here that is supporting the second floor.

21 Q Turning to photo 81. What is this photo showing?

22 A This photo is showing the brick after the first repair
23 and if you can look up at the windows there, there's some
24 gapping between the window and the window sill with the
25 brick and I'm not sure if you can get a closer up view for

1 for the jury, but this is where the bricks were like this
2 and the mortar was...

3 Q Turning to photo 190. What is this picture showing?

4 A There again, it's showing the bad work. Again, unless
5 you're looking at it very closely, you're going to have a
6 hard time seeing what we saw. But in person, when you
7 looked at it, those bricks were not equal. They were not
8 straight, and those mortar lines were just a a complete
9 wave. It'd give you a headache.

10 Q Natalie, we're going to next look at Plaintiff's
11 Exhibit 57 which are 93 photos of your home during the
12 second 2018 ---

13 A Oh, if I can go -- if I can go back to this before you,
14 you move it. So, if you see the window on my right hand
15 side, you'll see that there's a little black hole underneath
16 there. That is a hole where birds and mice were able to get
17 in because that home was open for so long.

18 Q We're going to move to Plaintiff's Exhibit 57, which
19 are 93 photos of your home during the second 2018 repair.
20 This has also been stipulated into evidence. Looking at
21 photos 24 to 29. What are these photos showing?

22 A These photos are showing the dramatic, dramatic
23 difference between the back of the house, which is the
24 original brick, and the second repair. So, the color is
25 incorrect. The spacing of the bricks is incorrect. The

1 mortar is a different color. It just does not match.

2 Q If you'll move to photo 29.

3 A Again, this is just another angle. This is the back,
4 which is the original brick. You'll see it is way darker
5 red brown. The brown bricks are very, very dark brown. The
6 mortar color here is a little bit cream. Here it's a little
7 beige. Those brown bricks don't match the same color and
8 certainly the red bricks are a very light colored red brick
9 compared to the very dark red brown over here.

10 Q We're going to turn to photos 38 through 44 in
11 Plaintiff's Exhibit 57, starting first with photo 38. What
12 is this photo showing?

13 A Unfortunately this photo is showing my garage sale
14 house, which is how I felt after I looked at it. So, on the
15 left you're seeing the new wall after the fourth fix. So,
16 here we have the light, kind of like, orangish kind of brick
17 instead of red brown, and it's meeting up to the front of my
18 house at the bottom here by the carriage light. That is the
19 original brick which is the red, brown and a different color
20 of mortar. And then you look up to the top, because they
21 had to repair that from the side as well. So, now I have
22 the mismatched color brick from the side at the front and
23 now I have a view, a corner view, of mismatched, miscolored,
24 as I say, garage sale home.

25 Q Turning to photo 39, what is this photo showing?

1 A This photo is showing the same thing, only a different
2 -- this is just showing that no matter what the light is,
3 those bricks do not match.

4 Q Moving to photo ---

5 A Can you go back to that one?

6 Q Sure. Going back to photo 39 of Plaintiff's Exhibit
7 57.

8 A This picture is a really good depiction of the stone
9 that we have in the front. We have like 3 and a half feet
10 of stone from the ground up to the window sill there and
11 that is depicting that it is -- the stone is installed
12 directly on top of the brick.

13 Q And going to Photo 40. What is this photo showing?

14 A This photo is showing the brickwork that doesn't match
15 currently from the carriage light from the garage all the
16 way to the left. We started to have some step cracking now
17 in the front by the carriage light.

18 Q Beside that first window on the first floor?

19 A If you go to that one, what that's going to show, the
20 next picture. This picture is showing -- so, when I talk
21 about my daughter's bedroom upstairs, her bedroom is this
22 top triangle here and these two windows are her bedroom.
23 So, what this picture is showing is at the time after the
24 repairs were done on the fourth repair, there is no
25 cracking. There is nothing underneath my daughter's bedroom

1 window. After those repairs were made, and currently, I
2 have a step crack that leads from the corner here of that
3 window all the way down.

4 Q Natalie, we're going to move to the next photo, Photo
5 43. Where is that cracking happening on the front
6 elevation?

7 A On the front elvation, again, these two windows, which
8 is a bedroom, my daughter's bedroom. If you go to the very
9 corner edge of the window sill or the brick that features
10 the window there, there is a step crack at the corner, at
11 least down. I think it's three bricks.

12 Q We can actually compare it if we can pull 25.27, photo
13 63, Dr. Rhett Whitlock, whicy has already been stipulated
14 into evidence. I can just show it to you, Natalie. This is
15 your second window now?

16 A Yes, and there is a step crack from the corner of the
17 window. So there it is.

18 Q When did you first notice any brick cracking, such as
19 this, at your home after the final repair?

20 A After the final repair? I didn't see this until 2019.

21 Q Natalie, we're going to go to Plaintiff's Exhibit 58
22 which are 26 photos of your home after the fourth repair.
23 These have also been stipulated into evidence. Looking at
24 Photo 3 of Plaintiff's Exhibit 58. What is this showing?

25 A This is showing the interior damage of my house

1 compared to the exterior damage. So, after the fourth
2 repair was done, the stones on my fireplace fell off.

3 Q Turning to Photo 8, what is this photo showing?

4 A That is showing all the nail pups that was left in my
5 house after they did the fourth repair.

6 Q Turning to Photos 15 to 16. What are these photos
7 showing?

8 A I'm sorry. This is showing the nail pops that were in
9 my daughter's bedroom and this bedroom is directly above the
10 garage where they did all of the structural repair. They
11 came back because I complained about the nail pops. So D.R.
12 Horton came and they put spackle on the holes and they did
13 two flybys with paint and left this for us to to manage for
14 ourselves. So, we had to repaint what they left.

15 Q What steps did you take regarding the cleanup still
16 needed at your home and these issues left behind by Horton?

17 A Well, we continuously tried to reach out to Carl and
18 Jim, texted them. If we saw them in the neighborhood, we'd
19 flag them down and ask what's going on. And each and every
20 time it was like, yeah, we're going to handle it. Yeah,
21 we're going to take care of it. Someone's going to be on
22 their way. They'd make plans for people to get there, and
23 then they never showed up. So, that's why I'm saying after
24 20 months there's still multiple things from this repair
25 that are still existing. And eventually, in January of

1 2019, we had no communication at all anymore from Carl and
2 Jim.

3 Q Natalie, I'm going to show you Plaintiff's Exhibit 97.
4 What is this document?

5 A This document where all of the text messages off of my
6 phone and my husband's phone. They detail all of the
7 conversations that we had with Jim and Carl. You'll see
8 that there's two sections here. One is who the message was
9 from and the second column is who the message was to.

10 Q Why did you prepare this document?

11 A At the time, we were going to be losing our cell phone
12 carrier and I didn't want to lose the history of what was
13 going on. And again, we lost communication with Carl and
14 Jim, and to have reference so I go back and say, you know,
15 hey you said that somebody was going to come. I wanted to
16 keep track of it so that I could get my house fixed.

17 Q How did you prepare this document?

18 A I was able to copy and paste all the text messages from
19 both of our phones, my husband and I. I put them in a note
20 section on my phone, and then I took that note section,
21 copied and pasted it to an e-mail, and then took all of the
22 information from the e-mail and put it into a spreadsheet.
23 It was not an easy feat, but I was able to get everything
24 there. And these are all original from the phone.

25 MS. LYNN: Plaintiff would move Plaintiff's Exhibit 97

1 into evidence.

2 THE COURT: Any objection?

3 MS. WOOTEN: Objection, Your Honor. These are texts
4 from other people that haven't been verified. They haven't
5 been authenticated, haven't been timed, and we don't have
6 the underlying documents.

7 THE COURT: Mr. Bailiff, could you take our jury out,
8 please?

9 (WHEREUPON, the jury exited the courtroom at 10:18 a.m.)

10 THE COURT: We have an objection. Ms. Lynn?

11 MS. LYNN: Your Honor, this is the best evidence. Ms.
12 Zitek just testified that she was about to lose her phone.
13 Also, the communications are between her and Jim Wilson and
14 Carl Ruroede, both of which are D.R. Horton employees and,
15 therefore, all of those would qualify as admissions by a
16 party opponant. Your Honor, may I approach with Ms. Wooten?
17 I want to explain one thing about the document.

18 THE COURT: Sure.

19 MS. WOOTEN: I made that objection out of turn. I'm
20 sorry, Your Honor.

21 MR. IMHOFF: I'm happy to let Ms. Wooten do it.

22 (WHEREUPON, off the record conference.)

23 THE COURT: As I understand it, Mr. Imhoff you've dealt
24 with the issue of the text messages and so I'm going to
25 allow you to argue, even though Ms. Wooten made the

1 objection. I'm going to allow you to argue this. So, tell
2 me tell me what your objection is.

3 MR. IMHOFF: Yes, Your Honor. Well, there's multiple,
4 besides the foundation and improper evidence. It actually is
5 a summary of communications that Ms. Zitek wasn't involved
6 in. It's between Paul and Carl. She has communications on
7 here with her husband and other parties that she wasn't part
8 of. So, at the very least, those need to come out of this.
9 I intend to ask her about what she texted, but I don't think
10 she's the proper witness to just talk about other people's
11 communications. That's literally hearsay. This is a table
12 and a summary. We could do them one by one, and evaluate
13 them one by one, if Ms. Zitek received the text or sent the
14 text. But again, that's not what this is.

15 MS. LYNN: Your Honor, if I may?

16 THE COURT: Yes, ma'am.

17 MS. LYNN: She literally just testified that she took
18 off all verbatim. And that she was copied on those texts or
19 had access to her husband's phone with those texts. She
20 properly authenticated it, so there is no foundation issue.
21 As to, the hearsay these are all officials of D.R. Horton.
22 We can take it line by line, but I believe it is admissible.

23 MR. IMHOFF: Is this every text that was communicated
24 between these parties, or is this just portions?

25 MS. LYNN: Every text that was in her phone or Paul's

1 phone is what she specified to.

2 MR. IMHOFF: It wasn't picked and chosen?

3 THE COURT: Hold on. Hold on.

4 MR. IMHOFF: Our objection being if it's not every
5 single one, Your Honor. And, I'm sorry. You said hold on.

6 THE COURT: Were these provided in discovery?

7 MS. LYNN: Yes, Your Honor.

8 THE COURT: Okay. At the bench, each of you said there
9 were some issues that you have redacted from these texts
10 that that would be inadmissible. And so has a defense had
11 an ample opportunity to redact the texts?

12 MR. IMHOFF: Your Honor, no. We've never seen this
13 document before with these redactions. I assume these
14 redactions have been done as parts of this case have been
15 settled out.

16 MS. LYNN: That's incorrect, Your Honor. This document
17 was produced in discovery a very long time prior to
18 Natalie's three-day deposition.

19 MR. IMHOFF: Not with the redactions.

20 MS. LYNN: Well, the redactions ---

21 THE COURT: Hold on, hold on, hold on.

22 MR. IMHOFF: The point is, we haven't seen -- That's
23 what I said. We haven't seen it with the redactions.

24 THE COURT: So, you have a redacted document that
25 contains Ms. Zitek's phone and her husband's texts as well,

1 both phones. Is that is that correct?

2 MS. LYNN: Correct.

3 THE COURT: All right. Well, you can get her to
4 identify the document. Her husband is listed as a witness.
5 I'll give you the opportunity to lay foundation with him as
6 well with the text messages, but I'm not going to allow the
7 exhibit in at this point. But I'll reserve judgment on it
8 after you've questioned your husband about it at that point.
9 So, that will be the ruling of the court. Let's get our
10 jury back. Well, let's just go ahead and convert this into
11 our morning break. I was going to take it about 10:45in.
12 Since they're already down there, we'll just take it early.
13 So, Ms. Zitek, while you're under oath, don't discuss your
14 testimony with anyone during the break. We'll take a short
15 break.

16 (WHEREUPON, there was a break from 10:25-10:39 a.m.)

17 THE COURT: Let's have the jury.

18 (WHEREUPON, jury entered the courtroom at 10:39 a.m.)

19 THE COURT: Ms. Lynn, resume.

20 DIRECT EXAMINATION

21 BY MS. LYNN:

22 Q Natalie, when did communications stop with D.R. Horton?

23 A They stopped in January 2019. That was the last
24 communication with Carl and Jim.

25 Q What actions did you take next?

1 A Well, after there was no communications and later in
2 2018, 2019, even during the repairs on my house, I had
3 multiple neighbors come and ask me what was going on. Was
4 there something wrong with the house.

5 MR. IMHOFF: Your Honor, objection.

6 THE COURT: Sustained. Sustained.

7 MR. IMHOFF: Thank you, Your Honor.

8 Q Which neighbors came to your house?

9 A The Jeffersons had come to my house. Sharon Galloway
10 came to my house. These were all homeowners that had
11 similar issues. So, when I realized that it wasn't just my
12 house and there was other people involved, I reached out to
13 you.

14 Q Can please explain to the jury why you filed this
15 lawsuit yourself as well as 219 Rose Hill homeowners?

16 A Because we have many defects in our homes and they need
17 to be repaired.

18 Q Why do you think Horton is responsible for those
19 things?

20 A Well, D.R. Horton was the developer, and the designer,
21 the subcontractor, the seller, and the repairer of all these
22 homes. So, that being said, they left us with leaky
23 windows, and cracking windows, and flooding yards and
24 cracked foundation.

1 Q What claims are you bringing against D.R. Horton?

2 A Our claims are negligence, gross negligence, and a
3 breach of implied warranty. And the reason for that is
4 because they chose all of the supplies for my house. They
5 chose the bricks, they chose the stone. They designed the
6 home. In my case, there was not a design for my side
7 garage. They were responsible for the build of my home.

8 Q What will you do if you are awarded monetary
9 compensation from this jury?

10 A I'll research contractors in the area. I'll make sure
11 that they have a quality control of their product. I'll
12 make sure that we have appropriate, like, windows and just
13 we'll make sure that we have the appropriate non-defective
14 repairs, so that our homes no longer are subject to code
15 violations.

16 Q Let's now turn to the defects in more detail. What
17 window problems have you experienced?

18 A My windows are leaky. I have cracks in the seams of
19 the windows. My window sills are separating from the
20 window. I can see water damage on some of my walls. I can
21 actually see water damage on some of my curtains next to the
22 windows.

23 Q How many windows do you have in your home?

24 A I have 27 windows in my home.

1 Q How many of those 27 have the cracking and leaking that
2 you just described?

3 A 26 out of 27. I'm not sure about the 27th, because
4 that's on my second floor foyer where I need to have, like,
5 a 20-foot ladder to get up there, and I'm too afraid to go
6 and look. But all of the windows that I have taken a look
7 at all have some type of damage.

8 Q Natalie, I'm going to show you some photos from Dr.
9 Whitlock of your windows, all of which have been stipulated
10 into evidence. First, we're going to look at image 96.
11 What is this photo showing?

12 A This photo is upstairs in the loft. This is one of the
13 windows that is on the wall where the garage was repaired,
14 that whole side of brick. So, that's where this window
15 sits. What I'm looking at is the sill separating from the
16 window. I'm looking that there's some white kind of
17 cracking there in the frame, and what you can't see is a
18 piece that's supposed to be here. I'm not sure what it's
19 called, but I know that there's a, like, a felt piece that's
20 supposed to be in this corner there and that is missing.

21 Q That corner that we're seeing in this photo?

22 A Correct in the frame here.

23 Q Next, we're going to move to image 97. What is this
24 photo showing?

25 A This is downstairs. This is right outside the

1 backyard. Here on the side of this red curtain is the patio
2 door. So, this is the main floor, the first window in the
3 living room. And you're seeing some water damage here and
4 you're seeing again the missing piece that belongs in this
5 corner here. And you're seeing a little bit of separation
6 from the window and the sill.

7 Q Next, we're going to look at image 104. What is this
8 photo showing?

9 A So, looking here, there is a lot of water damage here
10 on the sill. There's a cracking of this frame right here
11 where there's an opening at the corner at the bottom, and
12 that piece that I said that was missing from the other
13 windows is right up here, but it's not in the proper spot.
14 There's also some separation, again, between the window and
15 the wall and the sill.

16 Q Where is this window in your home?

17 A This is also in the living room, the family room, which
18 is on the main floor just outside the kitchen and the
19 backyard is just past this window.

20 Q Next, we're going to look at image 135. What is that
21 photo showing?

22 A This is another window in the living room, and this
23 again is the patio. So, what you're seeing here is this
24 lifted up piece of paint because moisture has gotten
25 underneath here. You're going to see the, again, the piece

1 that was missing from the other ones. But again, this is
2 not in the correct position either. It's not doing its job.

3 Q When did you first observe this cracking and leakage at
4 your windows?

5 A I didn't know that there was any damage like that until
6 2019, when an engineer had come out to my house and did some
7 testing.

8 Q And what windows at your neighbors' homes have you
9 personally observed that are also cracking?

10 A I have many neighbors. Denise Larson is one of them.
11 She has a tremendous water damage on her windows, window
12 sills. Lisa Butler lives on Berwick. She has a large
13 amount of water coming into her home. Her walls are damaged
14 and her windows are all cracking.

15 Q What labels, if any have you seen on your windows?

16 A I've not seen any labels on my windows. I've not seen
17 any labels on any windows.

18 Q And what are you seeking to remedy these window
19 problems?

20 A Money in order to replace and put new windows in that
21 aren't damaged, that aren't defective, so that I don't have
22 moisture coming into my home or between my walls.

23 Q Let's now turn to the brick. What brick problems have
24 you experienced since D.R. Horton's fourth and last attempt
25 to repair your brick in 2018?

1 A Well, I think we've seen some of the other pictures,
2 but since they left I have, above the garage, I have some
3 more bricks cracking in half. The same area where the step
4 cracking was over the garage has now come back. As I said,
5 if you go -- here's the garage and you go to the front where
6 that carriage light was, there's some cracking right in that
7 area and then I have the step cracking at my daughter's two
8 bedroom windows in that corner.

9 Q What brick problems have you personally at your
10 neighbor's home?

11 A There is other bricks cracking. Rob Knorr, he's on 8
12 Kettering Court. He's had similar cracks in his brick. He
13 also has a side garage. The same as the Jeffersons. They
14 also have a side garage and they have cracking above their
15 garage and their bricks.

16 Q And what are you seeking to remedy the brick problems?

17 A The money to repair and replace the brick to make sure
18 that the brick is properly installed and to make sure that
19 any code violations are corrected with the installation of
20 that brick so that my house does not fall down.

21 Q Let's now move to drainage and grading. What grading
22 or drainage problems have you experienced?

23 A We had some standing water in the backyard during the
24 one year warranty period, and it's currently where the pool

1 was installed. And in the Rose Hill subdivision, you have
2 the model home that's right at the corner, and then you have
3 my home that's at the opposite corner. So, it's very
4 visible. And every time Carl and Keith was in the
5 neighborhood, they would stop by and just say, hey. So, we
6 were in the backyard. They stopped by and my husband and I
7 showed them the standing water and we told them that there
8 may be a little bit of concern, you know, is is this okay?
9 And it was kind of laughed off. You know, you're from the
10 Midwest, You have black dirt. You don't have red clay.
11 This is normal. Don't worry about it unless that water is
12 standing for more than 24 hours. So we had the assurance
13 that that that was normal, nothing to be concerned about.
14 So I had no idea that there was anything wrong with the
15 grading of my backyard until we were having the pool
16 installed and the installers came through and they're like,
17 you know, this grading ---

18 MR. IMHOFF: Your Honor, objection. Hearsay.

19 THE COURT: Sustained.

20 Q Natalie, what happened during the install of your pool?

21 A We had to pay extra money to have the grading done
22 properly so that they could actually install the pool, and
23 we paid an extra \$5,000 for that.

24 Q How much of your backyard does the pool cover?

25 A It's about 2/3 of the backyard, but the top 1/3 is the

1 original grading of what D.R. Horton left.

2 Q What process did you follow to submit your pool for
3 approval?

4 A Any changes need to be submitted to the ARC committee.
5 So, we had the pool, the design, and all of the information
6 about the pool, and we submitted the Anderson County permit
7 for that pool to be built.

8 Q What is the art committee?

9 A The ARC committee is a committee of homeowners in Rose
10 Hill. They're anonymous, because they're making decisions
11 on whether you can have, you know, a shed, or a pool or
12 change the color of things. So, it's an anonymous group of
13 people that are volunteers that their main job is to keep
14 uniformity in the community and make sure that any changes
15 to your property or your home fit within the standards of
16 our covenants.

17 Q How long did D.R. Horton make up the architectural
18 review committee themselves?

19 A Until the HOA was actually provided the takeover of the
20 community, and that was, I believe, in July of 2017. So all
21 homes built by them from '12 to '17 were under their ARC
22 rules.

23 Q What grading and drainage issues have you personally
24 observed at your neighbors' homes?

25 A The one that stands out the most is Amelia Dimatrova.

1 She lives on Haverhill Lane and her yard is incredibly hilly
2 and I believe D.R. Horton tried to correct that by putting
3 like a drainage pipe in her area, and the slope is so severe
4 that the water, when it drains, stays away from that drain
5 and drains into her yards. So, she has terrible vegetation
6 dying because it's just creating like a river down the sides
7 of her home. So that's the most severe I've seen.

8 Q And what are you seeking to remedy these grading and
9 drainage problems?

10 Q I, personally, am looking to hopefully get the \$5,000
11 back that I had to spend in my own grading plus the top 1/3
12 of my property that still has the original grading from D.R.
13 Horton. Whatever the experts have decided it's going to
14 cost to fix that and put that to proper use.

15 Q Let's now turn to the stone. What stone problems have
16 you experienced?

17 A Well, like I said, my stone is in the front of the
18 house. It goes up about three and a half feet from the
19 ground. The problem is that the stone was installed
20 directly down to the floor, directly down to the dirt, so
21 moisture is getting behind there. I have some cracks in the
22 stone that are lower to the ground. A couple of stones have
23 cracks right through the middle, and I actually have a stone
24 that fell off right at my front door. The front door has a
25 we have like a porch. So the door -- you, well, you saw my

1 house. We have the door there and there's a tiny little
2 covered kind of porch and then you have the front of the
3 house. So, when you come out the door, there's a ledge and
4 the stone had fallen off and was on the ground.

5 Q When did you first observe this cracking and separation
6 at your stone walls?

7 A That didn't happen until 2019 as well. When the
8 engineer came out. I honestly didn't know what to look for.
9 And now that I know what to look for. And of course I
10 didn't have to look for anything when the stone was on the
11 ground that fell off.

12 Q What stone problems have you personally observed at
13 your neighbor's home?

14 A Multiple stones falling off. The one that was the most
15 alarming was my neighbor Courtney, who had stones above her
16 garage. One fell off and actually hit her.

17 MR. IMHOFF: Your Honor, we object to hearsay. That's
18 hearsay. I suspect she's going to tell what somebody said.

19 THE COURT: I think you asked this, but ask the
20 question if she has any personal knowledge that she has.

21 MS. LYNN: I did, Your Honor. I don't think that she
22 ever testified as to what anyone said.

23 THE COURT: Ask the question again.

24 Q Natalie, what stone problems have you personally
25 observed at your neighbors' homes?

1 A I've personally observed that stones have fallen off
2 the wall. Stones are on the ground.

3 Q What are you seeking to remedy these stone problems?

4 A The money to be able to replace and reinstall the stone
5 properly without any code violations, so that the home is
6 secure.

7 Q Let's now turn to the concrete. What concrete problems
8 have you experienced?

9 A Well, again, within the first year of our home
10 ownership under the warranty, we had noticed in the garage
11 that there was a hairline fracture going up the driveway, or
12 going up the garage where the two car part is. So again,
13 Keith and Carl, again we were on the corner and for a very
14 long time we were the only home on that on that area. So
15 they would stop by and say hey, so we flagged him down. It
16 was like hey, you know look at the look at the concrete.
17 Looks like there's a a crack going through it. So they
18 looked and again, kind of, I'm not going to say laughed off,
19 but it was like, yeah, that's that's a hairline crack that's
20 just cosmetic, nothing really to worry about. That happens
21 within construction. So again, we were appeased that okay,
22 this just happens. This is normal. And then after they did
23 the construction of the fourth repair on the brick, that
24 hairline crack started to get a little bit longer and a
25 little bit deeper. So, it did raise a little bit of a

1 concern.

2 Q What year was that?

3 A That was 2019 actually. The repair was finished at the
4 at the -- still not finished, but mid 2018.

5 Q What concrete problems have you personally observed at
6 your neighbors' homes?

7 A I've observed many, but again, the one that sticks out
8 the most in my mind is Sharon Galloway. She lives in Buxton
9 court. She invited me to her house to show me her
10 foundation in her guest bedroom. So she had had a a
11 relative come and stay with her, and the relative actually
12 fell.

13 MR. IMHOFF: Your Honor, objection. Hearsay again.

14 THE COURT: Sustained.

15 Q Natalie, what are you seeking to remedy the concrete
16 cracks?

17 A The money to be able to seal the concrete cracks,
18 because not only are the foundation cracks dangerous because
19 you could fall, but they're also dangerous because there's a
20 potential risk of radon being emitted from the ground. So
21 we would like to seal all of that concrete to eliminate any
22 of those exposure issues.

23 Q Natalie, what do you do to maintain your home?

24 A I get the easy stuff. I get to clean inside my house
25 and dust and clean. Our whole marriage, my husband, we have

1 pretty much divided the duties. He's outside. I'm the
2 inside. So, wash walls, wash windows. My husband mows the
3 lawn, cuts the grass. He winterizes the entire home. We
4 know the importance of that living in Chicago and things
5 freezing. So absolutely all about winterizing.

6 Q What do you do to maintain your exterior walls?

7 A There isn't much I really can do to maintain them. I
8 make sure that the landscaping is cut down so nothing is
9 against the brick. But, in my opinion, there isn't any
10 maintenance that's going to help the building code
11 violations and the issues behind the walls that exist, so
12 the exterior maintenance of it isn't going to help anything
13 that's behind the walls.

14 Q What maintenance do you do for your windows?

15 A The same. Just be able to clean them. There's no
16 maintenance in the world I can do to help the cracking
17 windows and the moisture that gets in.

18 Q Natalie, I'm going to show you page 9 of Plaintiff's
19 Exhibit 9, which is the Horton warranty binder that has been
20 stipulated into evidence.

21 A Am I able to read a couple sentences off of there?

22 Q Sure, if you'd like to.

23 A So, this was our belief the entire time that we had
24 bought this home. That the home was going to have minimal
25 maintenance. "Your home requires minimal maintenance to

1 preserve its appearance and value for years to come.

2 However, homeowners maintenance is required to preserve the
3 life of your home." And we understood that. Whatever we
4 could do, we did.

5 Q Natalie, how would your decision to purchase your home
6 change, knowing what you know now?

7 A Knowing what I know now, there is no way I would have
8 ever had D.R. Horton build a home. My dream home that we
9 loved so much on June 25, 2013 and were so excited to stay
10 in that night, that dream became a complete nightmare. I
11 would never hire D.R. Horton ever again to build a home.

12 Q How do you feel like you and the class have been hurt
13 by Horton?

14 A In many and in multiple ways. Number one is safety.
15 First, when stones and bricks are falling off homes, they're
16 a safety risk for people to get hurt. I think of my own
17 family. I also have two grandchildren from my middle child.
18 And if my grandchildren came and something fell off the top,
19 something that heavy of a stone or brick, fell off and hit
20 them, that could be deadly. We have safety concerns. We
21 have financial concerns. From what I understand, there's
22 millions and millions of dollars of damage in all of these
23 homes. The average homeowner like myself, we don't have
24 that kind of money in the bank to be able to make these
25 repairs. The repairs that are necessary, because of a

1 failed building from D.R. Horton, because it's riddled with
2 building code violations and building that they didn't
3 follow proper procedures on.

4 MS. LYNN: Thank you. No further questions.

5 THE COURT: Defendant cross examination?

6 CROSS EXAMINATION

7 BY MR. IMHOFF:

8 Q Good morning, Ms. Zitek.

9 A Good morning.

10 Q It's Zitek. Is that right?

11 A It is Zitek.

12 Q It is Zitek and not Zitek.

13 A It is Zitek.

14 Q I apologize if I misstate it.

15 A It's very good to see you again too.

16 MR. IMHOFF: Your Honor, we got a note that the jury
17 can't necessarily hear us. I'm getting some nods from the
18 back.

19 THE COURT: Can everyone hear? Again, if you have a
20 problem hearing, raise your hand.

21 MR. IMHOFF: Are these the microphones, Your Honor?

22 CLERK OF COURT: They are.

23 MR. IMHOFF: Thank you. I'm not trying to crowd your
24 space, but I do want you to be able to hear me, okay? So,
25 if I come over here, I'm not trying to crowd you.

1 Q Ms. Zitek, you bought your home originally the contract
2 was in 2012, is that right?

3 A Correct.

4 Q And you did that from Chicago.

5 A No ---

6 Q With Angie Moss?

7 A No. I take that back. We did the contract in February
8 of 2013. The home was done in June of 2013. So it was not
9 '12.

10 Q And you were communicating with Angie Moss, the sales
11 agent from Chicago at that time; is that right?

12 A That is correct. That was the time frame of 2012.

13 Q I think you told me that you and Paul, and maybe your
14 daughter, came down one time to look at the lot or not?

15 A No. The first time that we saw the lot was in February
16 of 2013 when we came to do the sales contract.

17 Q Sure. Okay, great. So February '13 you picked a lot
18 and signed the contract, is that right?

19 A Yes, sir.

20 Q And ultimately, after the changes, the things that you
21 were allowed to do and put in your house, you paid \$288,000
22 for that house. Is that right?

23 A At the very end it was 290 some thousand.

24 Q 290,000. Do you know what it's worth today?

1 A I do not.

2 Q Did you meet with Keith Waddell at your first meeting?

3 A With Angie?

4 Q Yeah, when you came down in February 2012, did you meet
5 Keith Waddell?

6 A At that time we were in the sales office. We didn't
7 really know who he was. He came in to use the bathroom and
8 said hello. She introduced us and he left.

9 Q Did Angie say this will be your builder or might be
10 your builder?

11 A Yes. Yes.

12 Q You talked about -- let's start with -- well, let's
13 start with your history that you gave to the jury. You left
14 part of your history out, didn't you?

15 A Yes. I didn't feel it was relevant.

16 Q You did you leave it out, right?

17 A (NO VERBAL RESPONSE)

18 Q Did you leave it out, ma'am?

19 A I worked for school district for two days.

20 Q You took ---

21 A I realized that this teaching was not in my bucket.

22 Q You took a job at the school district down here. Which
23 one?

24 A Carolina High School in Greenville.

25 Q And when you went, after two days, you quit, leaving

1 them without a teacher. Is that right?

2 MS. LYNN: Objection, Your Honor. Argumentative.

3 Q Did you quit after two days?

4 THE COURT: Overruled. Answer the question.

5 A Yes. I had gone through a two week PACE program, which
6 was an accelerated teacher education program, and I had
7 basically 20 minutes of various learning exercises, because
8 I had come down with a master's degree and I had always
9 wanted to work and help people, so I wanted to be a teacher.
10 I went through the PACE program. I got a limited
11 certificate to teach. You had to get your own position.
12 So, I went to the Greenville Fair to find a school that I
13 could work at. They hired me, and when I got to the class,
14 there was multiple students that didn't speak English. I
15 was not a English as a second language teacher. I would say
16 more than half of my class had special plans that needed to
17 be followed. This was way above anything that I learned in
18 two weeks. So, I went to the principal after two days and I
19 said I don't think I can do this. I don't think this is
20 something that I will be of benefit to these children
21 because I don't know how to handle children that speak
22 another language and children with behavioral issues and
23 children with learning disabilities. That was beyond my
24 purview of learning to get the PACE. So, yes, after two
25 days, which on a resume two days doesn't count anything. So

1 yes, I left that part out.

2 Q And there was actually a complaint against you, wasn't
3 there?

4 A No, that was standard procedure because I breached my
5 contract.

6 Q So, there was a complaint against you and you are
7 barred from teaching in the State of South Carolina.

8 A I am not barred from teaching, sir.

9 Q You're not barred from teaching?

10 A I am not barred from teaching. If I wanted to, I would
11 have to go back into the PACE program. I would have to go
12 through that two weeks again, find employment. But no, I am
13 not barred from teaching, sir. I don't want to teach so I
14 won't go that route.

15 Q But when your counsel asked you to give this jury a
16 history of what you've done and where you've worked, you
17 left that out; right?

18 MS. LYNN: Objection, Your Honor, asked and answered.

19 THE COURT: Sustained.

20 Q Let's talk about your complaint about your yard. Let's
21 go ahead and put that out. You went and picked this lot in
22 February of 2013, correct?

23 A Correct.

24 Q And then your husband and daughter came down the house
25 as it was under construction, correct?

1 A That is correct.

2 Q And these are your husband's pictures of your house and
3 that lot during construction, are they not?

4 A That is correct.

5 THE COURT: What exhibit is this?

6 MR. IMHOFF: This is a demonstrative exhibit, Your
7 Honor, that we're going to show her, but this is -- this is
8 her exhibit. These are her pictures. This picture is 104
9 Sturbridge 78. And, Your Honor, there's hundreds of these
10 pictures that are labeled as one by both Plaintiff and
11 Defendant and stipulated to.

12 Q This is what your lot looked like as the construction
13 was ongoing; is that right?

14 A As far as I know from the pictures, yes. I was not
15 there.

16 Q There's the hill in the backyard, correct?

17 A That is correct.

18 Q It's a little hill, but it's back there, right?

19 A That's correct.

20 Q It's not hidden from you, is it?

21 A No, sir.

22 Q Let's go to the next picture, please. Sorry, I'm
23 facing away. Did you take this picture, ma'am?

24 A Yes, I did.

25 Q Why did you take that picture?

1 A At the time, I was worried about the standing water.
2 It has been -- it has happened to us twice in Chicago where
3 we had sewer backup when it was raining. Very difficult,
4 very, very hard. So, this was a concern of mine that the
5 water may get into the house or there may be sewer back up,
6 because there was so much water going into the sewer at the
7 front of the the home that the sewer could actually start to
8 overflow.

9 Q You took this picture of that water the back of your
10 property near the hill because you thought it was going to
11 get in the house?

12 A No, sir. Because this water was meeting to where on
13 the right hand side this was almost a stream, and that
14 stream of heavy water was shooting right out to the sewer in
15 front of my house. And as I said, in Chicago there was a
16 lot of sewer backup and it was a real fear in the back of my
17 mind, not knowing how the sewer is in this small subdivision
18 could handle that much water, that it could be a potential
19 danger. So, I took a picture in case there was any
20 aftermath of the sewers overflowing.

21 Q There's no pool in that picture, right?

22 A That's where the pool is now.

23 Q It's not there yet in this picture, correct?

24 A Correct.

25 Q And there's no fence in that picture either, is there?

1 A My neighbor's fence up on top. Yes.

2 Q I apologize. Your fence has not yet been installed.

3 Is that right?

4 A That is correct.

5 Q So, this was very early after you bought the house; was
6 it not?

7 A I don't know when that picture was taken. We had the
8 the fence put in in 2018. I think in the fall. And the
9 pool didn't get installed until 2019. So, I have no idea
10 when I took that picture.

11 Q You testified earlier that Carl and Keith would stop
12 by, correct?

13 A That is correct.

14 Q And you discussed he water in your yard with them; is
15 that correct?

16 A Correct. Not -- not that.

17 Q Not what?

18 A Not this picture, no.

19 Q Okay. What water did you discuss with them, ma'am?

20 A During that one year warranty period, there was
21 standing water in the backyard. That is what we discussed
22 with Keith and Carl.

23 Q So, from -- when did you close on your house?

24 A July 25, 2013.

1 Q So, between July 25, 2013 and July 2014, you saw
2 standing water in your yard and discussed it with D.R.
3 Horton?

4 A Yes, and they told us it wasn't an issue.

5 Q Okay, but it's not this water in this picture.

6 A That is correct.

7 Q This isn't standing water. This is moving water during
8 a rainstorm, right?

9 A Yes, as it was moving between my home and my neighbor's
10 home. Like I said, that was a stream going into the sewer.

11 Q Ma'am, have you ever produced a picture in this case of
12 water standing in your yard?

13 A No.

14 Q So, from 2013 through 2023 you have not produced one
15 photograph of water standing in your yard. Is that right?

16 MS. LYNN: Objection, asked and answered.

17 THE COURT: Overruled.

18 A That is correct, because I was unaware of any type of
19 grading issues until they built the pool in 2019. At that
20 point, they did the grading and there was no more issue in
21 that area. There would be no reason for me to take a
22 picture.

23 Q No reason?

24 A No.

1 Q Do you still have standing water in your yard?

2 A In one area we have two double gates that you can't
3 see. It's past this concrete slab. There are two double
4 gates and there is some standing water sometimes in that
5 area.

6 Q Okay. Have you ever taken a picture of it?

7 A No, sir.

8 Q Do you have any idea how much money you're asking this
9 jury for for standing water in yards in this case, ma'am?

10 A I know what I'm asking for. I was asking for the
11 \$5,000 to be able to repay what I've already been out of
12 pocket to have the grading fixed, and the top one third
13 where it is still hilly up there. Whatever the experts have
14 decided it will cost to bring that to where it needs to be.

15 Q How much is it?

16 A I don't know. I would have to rely on an expert for
17 that.

18 Q Is it millions of dollars for all the houses?

19 A Again, I would rely on the estimates that the experts
20 have.

21 Q Is it \$18,000 just for your house?

22 A No, sir. As I stated, it was going to be the \$5,000
23 that I have already expended and whatever it's going to cost
24 for the top one third to be regraded properly.

25 Q So the top one third of your property, plus the \$5,000

1 you've already spent, right?

2 A Correct.

3 Q Is that the same amount that all of the other
4 homeowners are asking for?

5 A I don't know, sir.

6 Q You don't know what the other homeowners are asking for
7 to regrade their lots?

8 MS. LYNN: Objection, asked and answered.

9 Q Ma'am?

10 THE COURT: Go ahead.

11 Q Ma'am.

12 A There's various lots in the neighborhood. I don't know
13 what was estimated by the experts, what it would cost for
14 individual lots causing an overall amount

15 Q Right. Your lot and what you're asking for may be
16 different from someone else's lot and what they need,
17 correct?

18 A Correct.

19 Q Because not everybody put this big pool in and regraded
20 two thirds of their property, right?

21 A That is correct.

22 Q Have you produced the invoice for the \$5,000 that you
23 say that you spent to fix the issue in your yard?

24 A Yes. I had submitted the receipt for the pool and on
25 there it was stipulated for grading.

1 Q Was it specifically to regrade issues in your yard, set
2 out in a document?

3 A I don't remember, sir.

4 Q You don't?

5 A No.

6 Q Now, why was it too much trouble for you in this
7 multimillion dollar lawsuit to walk into your backyard over
8 the last four years and take a picture of water standing in
9 your yard so this jury can see as it?

10 A As it rains -- I mean, that's not my first thought is
11 to run outside and take a picture.

12 Q Have you been in other multimillion dollar class
13 actions before, ma'am?

14 A No, sir. But the the water that was -- that stands --
15 D.R. Horton has already been to my home to look at my home.
16 Carl, and Jim, multiple people have seen my home. I did not
17 feel that I would have to take a picture when it's already
18 been viewed.

19 Q Do you understand that you have the burden to prove
20 your case, ma'am?

21 MS. LYNN: Objection. Calls for a legal conclusion.

22 THE COURT: Overruled.

23 A I'm sorry, could you repeat the question again?

24 Q Do you understand that you have the burden of proof to
25 prove your case in this case today?

1 A Yes, sir.

2 Q And you do not have a picture of standing water in your
3 yard at any time over the last 10 years. Is that right?

4 A Not that I can remember taking, no.

5 Q How much you pay for that pool.

6 A I think about \$58,000.

7 Q Does that include all of the landscaping, and
8 gardening, and palm trees that this jury has seen?

9 A My husband and I put those in, so that was not part of
10 the invoice.

11 Q So, in addition to the \$58,000 you also bought palm
12 trees and put in a fence, is that right?

13 A Yes, sir.

14 Q And you put in gardens along the back fence, is that
15 right?

16 A Yes, sir.

17 Q And did you take any consideration about how the yard
18 was graded when you were doing that work?

19 A We worked with what we had. Again, at that time, we
20 were not aware of the issue until 2019.

21 Q Next picture, please. You weren't aware of what issue
22 until 2019?

23 A That that one third of the property was improperly
24 graded.

25 Q Which one third, ma'am?

1 A Well, you're not showing it, but past the pool where
2 the landscape is.

3 Q The back part of your property?

4 A Yes, sir.

5 Q But that's not where you said the standing water is, is
6 it?

7 A The standing water is in the front.

8 Q It's up near the house by the fence, right?

9 A Correct.

10 Q So, you said you didn't find that until 2019 that the
11 back third of your property was not graded correctly. Did I
12 hear that correctly?

13 A Yes, sir.

14 Q But there's no standing water back there, right?

15 A I don't understand what you're asking, sir.

16 Q Is there standing water on the hill at the back of your
17 property?

18 A No, sir.

19 Q Next picture, please.

20 MR. IMHOFF: Your Honor, may we approach a moment?

21 THE COURT: Yes, sir.

22 (WHEREUPON, there was a bench conference.)

23 THE COURT: Ladies and gentlemen, I just want to inform
24 you. Counsel is concerned about some lag times and delays
25 as the pictures come up. One thing I did before this case