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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 II OF X

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1 started is I had counsel and all the parties come to the
2 courthouse before the case started to test all of their
3 equipment. A lot of this is driven by wi-fi and our wi-fi
4 here at the courthouse sometimes is slow. So, there may be
5 a lag when the when the picture is announced and then it
6 comes up. So that's not any party's desire to delay the
7 proceedings. It's just the wi-fi that we have here at the
8 courthouse. So, I wanted to call that to your attention.
9 So, Mr. Imhoff, go ahead.

10 MR. IMHOFF: The gentleman there, Max, and Debbie
11 Simpson are trying their best and believe me, their anxiety
12 is about this high because it's taking a long time. So, I
13 asked the judge for that. I'm sorry about that. It's taking
14 a while to get them up.

15 Q Ms. Zitek, is the other side of the pool, is that a hot
16 tub or a waterfall?

17 A Where the water is going down in the middle?

18 Q Yes, ma'am.

19 A That's a waterfall.

20 Q It's a waterfall. Okay. Did that come in the \$58,000?

21 A Yes, sir. And now, there's the palm trees. Now, at
22 the back of the fence back there, what is that at the ground
23 level? Is that some kind of concrete curbing or edging?

24 A There is edging and there's some stones around the
25 edging.

1 Q And plants and the fence, right?

2 A Correct.

3 Q And you and your husband put all of that in?

4 A Yes, we did.

5 Q When did you put all of that in?

6 A Shortly after the pool was complete. I believe it was
7 around Memorial Day. Actually, I know exactly when we
8 planted those. Those were a Mother's Day gift from my
9 husband. I had gone to work and when I got back he had dug
10 all the holes for all of our plants.

11 Q Okay. That wasn't there when you bought your lot from
12 D.R. Horton; right?

13 A That is correct.

14 Q Did you do a walk through with the builder before you
15 bought the house or the day of the closing?

16 A Yes, sir.

17 Q And did they tell you that they would not warranty
18 grade and landscaping?

19 A Not that I can recall, no.

20 Q You don't remember that?

21 A No.

22 Q Have you seen the walk through and homeowner
23 orientation lists?

24 A I would like for you to show them to me.

25 Q You don't recall?

1 A That's our punch list?

2 Q So did you walk through the house with the builder,
3 Keith Waddell, and point out all of the things that you
4 wanted D.R. Horton to fix before you moved in?

5 A Yes.

6 Q And is that this list?

7 A Yes.

8 Q And was it done before you bought the house?

9 A Yes.

10 Q Did they follow up 30 days later to make sure that
11 everything they promised to do for you was done?

12 A Yes.

13 Q But you don't recall talking to Mr. Waddell and him
14 explaining to you how your electrical works? How your HVAC
15 works. How you could make warranty claims. What's
16 warrantied and what isn't?

17 A Yes, I remember that. But landscaping was not part of
18 that conversation.

19 Q You don't -- it was not, or you do not remember?

20 A It was not part of that conversation.

21 Q Have you personally gone around the neighborhood to see
22 that your neighbors are changing their lots?

23 A Changing the landscape?

24 Q Changing their lots, ma'am.

25 A In what way?

1 Q Have you personally seen your neighbors putting fences
2 up on their lots?

3 A Yes, but I've also seen D.R. Horton put many fences in
4 the new buildings as well.

5 Q Have you seen neighbors putting pools in their
6 backyards?

7 A Yes, sir.

8 Q Do all of your neighbors have pools?

9 A No, sir.

10 Q Have you seen your neighbors putting concrete pads in
11 on the front of their homes for extra parking?

12 A Some have, but D.R. Horton also did some. That picture
13 that you had at the opening, that was Nick Dalton's house.
14 That was part of his contract.

15 Q Okay, you saw that?

16 A The picture from opening?

17 Q You saw the contract between D.R. Horton and Nick
18 Dalton, ma'am?

19 A No, sir. I asked him about it after we left.

20 Q We'll let him talk about that then, okay. Have you
21 seen that people have put hardscape, brick pavers, patios in
22 their backyards?

23 A Yes, and I've also seen D.R. Horton put retaining walls
24 in some of the homes because there was erosion.

25 Q I appreciate you sharing with us other things that I

1 haven't asked you about, but if you would, please just
2 answer my questions. Your attorneys will ask any questions
3 they think are relevant, okay? So, have you seen
4 hardscaping patios pavement put in people's yards?

5 A Yes. But again, it's hard for me to tell if that was
6 original to the home or if that's something that they added
7 later.

8 Q That's what I'm asking you. Have you seen them added
9 after they bought their home?

10 A No, not personally anybody that I've seen in my area.

11 Q But you have seen neighbors put pools in; right?

12 A Yes, I've seen the pools.

13 Q Have you seen people put either concrete or paver
14 patios in their yards?

15 A Again, personally, no. I have not seen that.

16 Q Have you seen a basket ---

17 A I know that they exist in the neighborhood, but again,
18 I don't know if they did that or if that was original to
19 their ---

20 Q Have you seen a basketball court put in someone's
21 backyard?

22 A Yes, well in in their driveway.

23 Q What about the backyard?

24 A Our covenants say that the basketball net has to be in
25 the concrete, so I have not seen them in the backyard.

1 Their driveway concrete.

2 Q Have you seen your neighbors put flower beds around
3 their houses?

4 A Yes.

5 Q Have you seen your neighbors put trees or bushes in
6 their yards?

7 A Yes.

8 Q You talked about Ms. Dimitrova. Has she put a dozen or
9 there were bushes around her yard?

10 A She's tried.

11 Q Ma'am, has she put a dozen or more bushes around her
12 yard?

13 A Yes.

14 Q Has she put any bushes or any vegetation at all on the
15 hill that you discussed with your counsel earlier?

16 A She's tried.

17 Q She has? You've been there and you've watched her try?

18 A I've seen bushes up there.

19 Q On her hill? You've seen bushes on her hill?

20 A I'm not sure how long they last, but I think she has
21 tried to make it pretty.

22 Q I'm just asking you what have you observed. Have you
23 observed Amelia Dimitrova put bushes on her back hill that
24 you referenced earlier?

25 A I have not physically seen her dig the holes and put

1 the plants in, no.

2 Q But you have seen that she's put at least a dozen or
3 more around the rest of her yard, right?

4 A I've seen the bushes there. Again, I don't know who
5 put them there, but I have seen bushes around her property.

6 Q Have you seen that she's put a covered concrete patio
7 in her backyard?

8 A I did not see that.

9 Q Are your neighbors putting sheds in their backyards?

10 A Yes.

11 Q Are they putting raised garden beds in their backyards?

12 A I don't know that for for a fact. I've seen some
13 sheds.

14 Q Ma'am, will you admit to this jury that your neighbors
15 are changing their backyards and the grade of their
16 backyards since they bought their house?

17 A I would not admit that, because I don't believe that's
18 true. I believe they were -- they bought the lot, the house
19 was built. And I believe when you're putting in bushes or
20 plants, you're taking that existing grading and you're
21 digging a hole and you're putting the roots in the hole and
22 that soil is still at the level that it was. So all they
23 did was add bushes, but I do not believe that they changed
24 the grading by digging and putting it level with the ground
25 that was already there.

1 Q Well, that wasn't quite my question for this jury. Let
2 me make sure. All the things we talked about, pool, shed,
3 concrete patios, paver patios, kid's play equipment, a
4 basketball court. You're aware that some of that is out
5 there and was done after they brought homes; right?

6 A That is correct.

7 Q And a paver patio or a concrete patio or a fire pit can
8 change the flow of the water and the grade of the yard;
9 right?

10 A It can, but I don't know that it does.

11 Q So let me ask you again. Will you admit that there are
12 things that your neighbors are doing out there that could
13 impact the grading and drainage in their yards?

14 A Again, I can't be certain of that, because I'm not sure
15 that what they did actually has changed any of the grading.

16 Q Would we have to go to the homes and look at their
17 yards to determine what has been done in their yards?

18 A I don't believe so.

19 Q How else would we know what they have done in their
20 yard if we don't go look at their yard?

21 A There's the interrogatory number 9 that was sent to
22 homeowners that they actually responded. Those that did
23 respond with any of the changes that they've made to their
24 homes.

25 Q Right. And did all of them respond?

1 A Whoever did, yes. A hundred percent, no. But I can't
2 force homeowners to respond.

3 Q So, isn't the best way, if they're not all responding,
4 actually go to their lot to see what they've done?

5 A Yes.

6 Q Isn't another way to ask them under oath what they've
7 done so that we're not confused about who did it or when it
8 was done?

9 A I'm not sure that's necessary, no.

10 Q But would be good information for this jury, wouldn't
11 it? We could have these folks tell us what they've done or
12 haven't done in their backyard, couldn't we?

13 A Yes. But again, I'm not sure that anything that
14 they've done back there planting flowers or or planting a
15 vegetable garden has actually changed the entire grading of
16 their backyard.

17 Q Sure. And I understand your testimony, and I'm sure
18 that the jury does too, ma'am. But I'm asking you, that's
19 information may be relevant to this jury's ultimate task of
20 deciding whether or not it's a D.R. Horton issue or whether
21 it's a homeowner caused issue, correct?

22 A Correct.

23 Q That's information that you do not have; correct?

24 A For some homeowners, correct.

25 Q For many homeowners, correct?

1 A I don't know what the number is percentage wise.

2 Q I took your deposition earlier this year. Is that
3 right?

4 A That is correct, sir.

5 Q All right. During that deposition, at the start of it,
6 did you swear to tell the truth?

7 A I did.

8 Q Were you sworn in?

9 A Yes, sir.

10 Q During that deposition, did you say you were going to
11 ask for \$18,000 from this jury for your yard?

12 MS. LYNN: Objection, Your Honor. This is an improper
13 use of her deposition.

14 THE COURT: Overruled. Ask the question.

15 Q At your deposition, did you testify that you were going
16 to ask for \$18,000 for your yard in response to my question?

17 A I believe my response to that question was that
18 whatever had been estimated for that cost, I would go with
19 the expert.

20 Q Have you seen Dr. Rhett Whitlock's -- I'm sorry, Mr.
21 Andy Sherard's estimate for the neighborhood?

22 A I've glanced at it, yes.

23 Q Has he made a distinction between your yard and the
24 other yards, and how much would be spent on your yard versus
25 the other yard?

1 A I can't be sure of that, sir, but I told you what I was
2 asking for earlier.

3 Q Have you looked at your expert's damages calculations,
4 either Rhett Whitlock or Andy Sherard, to determine if your
5 yard is reduced or different than all of the other
6 homeowner's yards?

7 A No, sir.

8 Q You can't tell the jury that, can you?

9 A I have not studied that. I don't know it like the back
10 of my hand. No, I don't.

11 Q If it is -- I'm sorry if I interrupted you. If it does
12 not distinguish your yard and how much you're asking this
13 jury for from all of the other homeowners, does that need to
14 be changed, ma'am.

15 A Again, I would go with the expert and what they are
16 deciding it's going to cost to regrade.

17 Q Yes, but if your expert says that you should get
18 \$18,000, is that correct?

19 A I don't know, because I don't know how much it would
20 cost for that one third to be regraded plus the \$5,000. I'm
21 not sure where that number will come in. That's why I would
22 rely on my experts.

23 Q Ma'am, at that same deposition that you swore to tell
24 the truth, did I ask you or did another lawyer ask you if
25 water flows downhill?

1 A Yes, sir. I do remember that conversation.

2 Q Did you admit during that deposition that water flows
3 downhill?

4 A During that deposition, during that time of
5 questioning, we were talking about standing water in my
6 backyard, standing water. So ,in the back of my head, when
7 you're asking me about water going downhill or uphill, my
8 thought is on standing water that's sitting there is not
9 going anywhere. It's not going sideways. It's not going
10 up. It's not going down. It's standing water. And that
11 was where my mind was when I answered that question.

12 Q So did you admit or did you deny, I'm sorry, during
13 your deposition, and I can read it to you if you want here,
14 that water doesn't flow -- that you will not admit that
15 water flows downhill?

16 A That was correct. And, like I said, my mindset was at
17 a different point when you were asking that question. So,
18 you're making a distinction whether water flows downhill
19 depending on what, ma'am?

20 Q I'm sorry. I don't understand your question.

21 A And frankly, that is an issue because I don't
22 understand your answer. Does water flow downhill, ma'am?

23 A Yes, sir.

24 Q Did you say that during your deposition?

25 A No, sir, because --

- 1 Q It's called Rose ---
- 2 A --- that is not what I thought we were discussing.
- 3 Q It's called Rose Hill, your neighborhood, right?
- 4 A That is correct.
- 5 Q There's high spots and low spots, right?
- 6 A That's correct.
- 7 Q In fact, at the bottom of Rose Hill, the backside,
- 8 there's actually some wetlands at the bottom; aren't there?
- 9 A Correct.
- 10 Q Nice way to say it's kind of swampy back there, right?
- 11 A However you would like to describe it.
- 12 Q Water flows down there, doesn't it?
- 13 A (NO RESPONSE)
- 14 Q Ma'am?
- 15 A Logic would say, yes.
- 16 Q Does water flow downhill, ma'am?
- 17 A Yes, sir. Okay. And so, does it flow from the top of
- 18 Rose Hill, the highest point, to the lowest points of Rose
- 19 Hill?
- 20 A Yes, sir.
- 21 Q Okay. And so, are the people at the top of Rose Hill
- 22 experiencing the same water issues that the people are at
- 23 the lower elevations of Rose Hill, ma'am?
- 24 A I would have to rely on my experts and what they saw.
- 25 I can't be certain of that, because it may have -- at the

1 top of the hill they may have hill, but there also may be
2 the flat area where they actually build the home. So, it
3 may still collect in an area. So, I cannot be sure of that.

4 Q It may, right?

5 A Yes.

6 Q And we have to go look at the individual lots to
7 determine what they do; right?

8 A Or rely on the interrogatory number 9 answers that have
9 already been provided.

10 Q Well, that's a little different, ma'am. You said that
11 you're going to rely on Andy Sherard. Has Andy Sherard
12 distinguished between the work that needs to be done on each
13 individual lot, including yours?

14 A I don't know. Again, I did not study the report. I've
15 briefly looked at it, but I have not studied it to be able
16 to answer that properly.

17 Q This is Plaintiff's Exhibit Number 55. Is this your
18 home?

19 A Yes, sir.

20 Q And at what point of the repair or your ownership of
21 the house was this picture taken?

22 A That picture was taken when D.R. Horton's engineers
23 came out in July of 2017.

24 Q Let's make sure, because you kept saying four. So, for
25 the jury, let's do our chronology. Okay. You bought the

1 house and moved in July 2013. Is that right?

2 A That's correct.

3 Q When did you have your first brick issue?

4 A Between 2013 and '14. I don't exactly know. I don't
5 remember the date.

6 Q Did you make a warranty request through the D.R. Horton
7 portal or did you talk to Keith?

8 A I talked to to Carl and Keith, so I did not fill out a
9 warranty claim for that.

10 Q And did they come and put more mortar in your cracks?

11 A Yes, they fixed it. At least told me it was fixed,
12 yes.

13 Q Was there any brick cracking at that time?

14 A I can't be certain.

15 Q All right. Did that seemed like a reasonable repair to
16 you at that time?

17 A We knew no better. So, yes, it took care of the mortar
18 that was cracking.

19 Q All right. Great. So, were you satisfied, not knowing
20 what was coming, that that issue had been resolved?

21 A As far as I knew, yes.

22 Q So, that was 2013, 2014, right?

23 A Correct.

24 Q When was the next time you saw cracking in the brick?

25 A 2017.

1 Q 2017, ma'am? Did they just come and put mortar on it
2 one time?

3 A No. There was two times between '13 and '14.

4 Q Two times?

5 A Yes.

6 Q So, they came back and put mortar in once.

7 A Yes.

8 Q Left. There was more cracking in the same place or a
9 different place?

10 A Same place.

11 Q Same place. And they put mortar in it again?

12 A Yes, sir.

13 Q All right. So, from '14 to '17, did that seem to have
14 fixed the issue?

15 A Yes?

16 Q Are you or your friends with warranty tech Carl
17 Ruroede?

18 A Yes. We were very friendly with Carl.

19 Q Has he been to your house, not on business, but for
20 dinner or a BBQ?

21 A Yes.

22 Q Has he played golf with your husband?

23 A I'm not sure. I don't think Carl plays golf, no.

24 Q Did Jim Wilson play golf with him?

25 A Yes.

1 Q Jim Wilson is another warranty tech, for the jury,
2 right?

3 A He was the Superintendent that took over for Keith.

4 Q Are you talking about Jeremy Young or Jim Wilson,
5 ma'am?

6 A Jim Wilson. It was my understanding that Jim had
7 Keith's role.

8 Q So, the people that -- have you ever met D.R. Horton?
9 Donnie Ray Horton?

10 A No, sir.

11 Q And do you know if you've ever met anybody from the
12 home office of D.R. Horton?

13 A I'm not sure.

14 Q Are all the people that you've dealt with local people
15 that work in this area and live in this area with D.R.
16 Horton?

17 A Yes, sir.

18 Q And that includes your friends, Jim Wilson and Carl
19 Ruroede, right.

20 A I wouldn't call them friends.

21 Q Well, you invited Carl to your house for a social
22 event.

23 A He stopped replying to us in January of 2019. I would
24 not call them friends.

25 Q But did you invite him to your house before 2019?

- 1 A Yes.
- 2 Q And did he come to your house?
- 3 A Yes.
- 4 Q And has Jim Wilson come to your house? Not
- 5 professionally.
- 6 A No. We were not social with Jim.
- 7 Q Those are the people that you were dealing with. Local
- 8 D.R. Horton people, right?
- 9 A That is correct.
- 10 Q And you were so happy and friendly with them that you
- 11 invited at least one of them over for dinner, right?
- 12 A Lunch, yes.
- 13 Q Lunch. Okay. So you had the two mortar issues in
- 14 2013, 2014, right?
- 15 A That is correct.
- 16 Q And then in -- well, when did you first notice more
- 17 cracking, ma'am?
- 18 A After the first two repairs?
- 19 Q Yes, ma'am.
- 20 A In 2017.
- 21 Q In 2017. And that's what you went through. You first
- 22 tried to go through the website, is that right?
- 23 A Correct. We emailed the warranty department, D.R.
- 24 Horton's warranty department.
- 25 Q And you also tried to go to the written booklet that

1 you were given for the warranty on your house, right? The
2 RWD warranty, ma'am?

3 A Whatever the contact was that D.R. Horton's warranty
4 office had given to us. I don't know who that was. I just
5 know that we sent a followup e-mail to the contact that they
6 gave us.

7 Q And then you contacted who when you didn't get the
8 response you wanted?

9 A We really didn't get any response other than you're
10 covered if this, this, this, this, this, this this, this,
11 this, this, this, this issue is happening at your home.
12 There is nothing in that e-mail response from the second
13 warranty that said submit some pictures, let us know what's
14 going on. There is nothing. So yes, I reached out to Carl
15 and said, hey, I put the warranty in, but there's no real
16 response. There's no real action as to getting this
17 repaired.

18 Q Right, so you reached out to friend, Carl Ruroede, who
19 had been to your house.

20 A Correct. Warranty man, Carl.

21 Q Right. D.R. Horton warranty technician, right?

22 A That is correct.

23 Q That's who you dealt with at D.R. Horton, right?

24 A That is correct.

25 Q And then he got other people involved in your issue,

1 didn't he?

2 A I don't know what happened. I don't know what Carl said
3 or did or talked to anybody else. All I know is that an
4 engineer came then.

5 Q Two engineers, right?

6 A We had one engineer come out, made some type of
7 estimate. I'm not sure what happened with him. And then
8 another engineer came out. So, I'm not sure what happened
9 with that.

10 Q Two engineers, right?

11 A That is correct.

12 Q So, D.R. Horton paid for two different structural
13 engineers to come and look at your house, is that right?

14 A Yes.

15 Q And those two structural engineers, who testified about
16 it this morning, determined that it was a framing wood beam
17 issue; correct?

18 A It was a structural issue, sir.

19 Q Yes, with the wood framing, right.

20 A No, with the support. The ability to support the
21 brick.

22 Q Put that picture back up if you would please, Max. If
23 we can. We used to have big boards that we would haul in
24 here about that big. Ma'am, do you know if it was the board
25 -- it's called an LBL or some people call it a beam. Let's

1 just call it a beam. A beam behind that metal shelf angle.

2 Do you know?

3 A I'm not understanding what you're what you're asking
4 me, sir.

5 Q Do you know if the failure, the cracking of the brick,
6 was caused by an undersized wooden beam behind the metal
7 lentle?

8 A That was one of the issues. That wasn't all of the
9 issues. Could we bring up the engineer report?

10 Q Well, I'm asking about that part. Was it a beam,
11 ma'am?

12 A Like I said, that was part of the structural issue.
13 There also was not enough concrete supporting footings for
14 the brick.

15 Q Does any other homeowner in Rose Hill have that beam
16 structural issue that you are aware of?

17 A I'm not an engineer. I don't know what is wrong with
18 the people's homes. That's why we're hiring an engineer.

19 Q You were asked earlier about your personal observations
20 and your personal knowledge. Are you aware of -- tell this
21 jury, please. Are you aware of any other homeowner of the
22 219 other houses that had that structural framing issue?

23 A Sir, that was a question that was asked this morning.
24 The question was, was I aware of brick issues and stone
25 issues? There was never any discussion about structural

1 issues.

2 Q Okay, that's fine. Thank you for that clarification.

3 Now, will you please answer my question?

4 A Please ask it again. I'll be happy to.

5 Q Are you aware of another home or homeowner of the other
6 219 houses that have the structural beam issue cited in the
7 structural engineer's report?

8 A I'm not sure that an engineer, a D.R. Horton engineer,
9 has been to those other homes. Again I can't answer that.
10 I don't know.

11 Q Okay, so is the answer, I don't know?

12 A The answer is that two other homeowners that I know of
13 had the same brick cracking and mortar which would lead me
14 to believe that they may have the same structural issues.
15 But I cannot be sure of that because I am not an engineer.

16 Q I hear you, and I understand your answer, but please
17 clarify for the jury. Do you know whether or not other
18 homeowners have that structural beam issue or not?

19 A I do not.

20 Q Thank you, ma'am. So, Carl came out. Do you know who
21 Pam Williamson is?

22 A I believe Pam was his boss. I have never met her.

23 Q Oh, I didn't know that. Okay. All right. So, they
24 said, Mr. and Ms. Zitek, we do have an issue. It looks like
25 it was missed when the garage was turned to the side. Is

1 that your memory?

2 Q No, sir. Pam -- the only the only interaction Pam had,
3 and the only time Pam was at our house, was after the first
4 shoddy repair of brick. She came out to look at that repair
5 to see if they could authorize the brick to be taken off and
6 have a second set of brick put on because it looked so
7 awful. That is the only time we've ever had any interaction
8 with Pam.

9 Q Let me go back, because I don't think we communicated.
10 Did Carl tell you that there was a structural issue with
11 your garage that was caused when the garage was turned from
12 front facing to side facing that D.R. Horton wanted to fix?

13 A It was my understanding that he relayed to us that when
14 the building, when the drawings were there, there were no
15 drawings for a side garage. So, our house was built as if
16 the garage was going to be in the front, which was causing
17 the structural problem on the side.

18 Q So, Carl communicated that to you?

19 A Yes.

20 Q And we've not seen that in the engineering reports
21 also.

22 A Correct.

23 Q And did D.R. Horton say we would like to fix this for
24 you?

25 A Not really, but they came to fix it. It wasn't like a

1 yes, we admit that there's an issue and we're going to come
2 and fix it. The issues were the letter, which we had never
3 seen until this litigation. All I know is that it was going
4 to be taken care of.

5 Q And did you want them to fix it, ma'am?

6 A Yes, sir.

7 Q And did they tell you that they were going to take the
8 brick off? Can you put that picture back back out a little
9 bit. That would be great. So that the jury can see it. If
10 there is one. It's okay if there's not. Did they tell you
11 that they could do that repair by taking the brick out just
12 like this around the head of your garage and not removing
13 all of it on the entire side?

14 A They said they could do that, but it wasn't just this
15 portion. They'd have to go a little bit farther down. But
16 they also said that it may not look exactly right.

17 So, it was our belief that if it was going to look like it
18 was patched and an icky job that they should remove the
19 entire wall and make it all in unison. We didn't want a
20 patch job. We wanted a brick wall that we had paid for.

21 Q Yeah, you got a little ahead of me, but that's good
22 because that's where I was going and you've saved the jury
23 some time. You demanded that they take the entire side of
24 your house, the brick, off.

25 A We did not demand anything. We asked them if it was

1 possible to please have the entire wall because we didn't
2 want a patch job. They couldn't guarantee that they were
3 going to have those exact same color bricks and they would
4 be mismatched and the whole thing would still look like a
5 garage sale house. So, we asked to please take it off and
6 please do the whole wall so it all matched and look the
7 same.

8 Q Right. They told you, as you just said, that if you
9 take the entire wall off it will not match; correct.

10 A They told me that they would do that and then if it
11 didn't match we could have all of the bricks painted so that
12 it would match. We were not really thinking that was a good
13 thing because the paint would eventually wash off, so that
14 was not an option.

15 Yes, we were told that it may not match but give it some
16 time and as the sun exposure on it, it may fade and it may
17 all blend in together.

18 Q So, you and your husband picked the option of taking
19 all of the brick off on that side with full knowledge that
20 it may not match, against D.R. Horton's suggestion; correct?

21 A That was not against their suggestion, sir. I'm not
22 sure where you got that information. It was brought to us
23 that they could piece meal this together and we were not
24 happy with that option, because as you saw the pictures

1 where the bricks did not match those would be over a certain
2 section of the home. So it was for our best interest to
3 have them take the entire wall off and at least have the
4 wall matched. We were already having issues with the
5 structure of the problem. We also didn't want to have the,
6 the, the decor and the way that the home looked look like
7 there was an issue.

8 Q Ma'am, did Carl Ruroede tell you that he thought it was
9 a bad idea to take all of the brick off of the side because
10 of ---

11 A No, he did not, sir.

12 Q --- because it wouldn't match?

13 A No, he did not, sir. I told you. He said if it doesn't
14 match, we'll get someone out here and they can paint brick
15 by brick and we'll get it to match. And if you're not
16 willing to do that, then let's wait and let's see what
17 happens. Let the sun beat down on it and let's see if it
18 changes color to actually merge together.

19 Q Have you ever attempted to have the brick painted to
20 match?

21 A No, sir.

22 Q Have you ever tried to have the mortar tinted to try to
23 match?

24 A No, sir.

25 Q Now, ma'am, someone came out and put brick up that did

1 not look good; is that right?

2 A That is correct.

3 Q And did Pam Williamson come to your house from
4 Charlotte and look at it?

5 A I was not there when she came, but I do believe she was
6 on the premises after the first fix.

7 Q And she, trying to satisfy you, immediately said rip it
8 all off; right?

9 A I'm not sure if she was trying to appease me or try to
10 save D.R. Horton's name because it looked horrible. And if
11 your name was on that home and it looked like that, I think
12 they did that to make sure that there was a quality to it.
13 So, I don't think they were doing me any favors. It looked
14 horrible.

15 Q That's your perspective on it. That's fine. Did they
16 rip it off?

17 A Yes, sir.

18 Q How soon after that communication did they rip it off?

19 A I don't remember that, but I do remember that we were
20 not home. We were not notified they were coming. We were
21 not home when they ripped off the first -- Actually, the
22 third time that they fixed it, but the first time that they
23 replaced all of the brick, we were there. The second time
24 we got no notification. I'm not sure where I was. I could
25 have been working at the time. I came home to the damage

1 that you saw from those pictures with the stone off, all the
2 nails popped. Every picture on my -- on the wall of that
3 area had fallen. I had no time to put anything away.
4 Precious statues from my mother-in-law had hit the floor off
5 of -- So no, I didn't know that they were coming, but did
6 they come? Yes. When they came? I don't remember how long
7 that was.

8 Q Was it within days or weeks?

9 A Sir, I don't remember.

10 Q Did they put new brick up for you, ma'am?

11 A Yes, sir.

12 Q Did it look better than the second job?

13 A It looked better. It still did not match. The mortar
14 color was different. If you're going to have bricks that
15 didn't match to begin with, at least you could have matched
16 the mortar.

17 Q Ma'am, did you or Paul Zitek ever complain about the
18 bricks not matching between the brick being put up and
19 before filing this lawsuit?

20 A Mr. Zitek and I did, yes.

21 Q To who?

22 A To Carl.

23 Q Was that in person?

24 A Yes, sir.

25 Q Was that in writing?

1 A No, sir. Again, that was just give it some time. If
2 the sun doesn't fade it, we'll work on it. We'll make it
3 look better. We'll paint the bricks if we have to.

4 Q Ma'am, you said this morning that the brick on the
5 garage side of your home is cracking again.

6 A That is correct.

7 Q I didn't see of that this morning. Have you taken a
8 picture of that?

9 A That was after discovery, sir. I'm not -- the
10 engineers have been out to our home and I believe they have
11 pictures of it.

12 Q You and Paul have taken hundreds of pictures, have you
13 not?

14 A Correct.

15 Q Have you taken a picture of the brick cracking for this
16 multi million dollar lawsuit and for this jury on your home
17 around or above the garage door?

18 A We didn't have to. The engineers have taken pictures.

19 Q Didn't have to? Did you see a picture of the brick
20 cracking above your garage this morning?

21 A No, sir.

22 Q Did you testify that there's brick cracking around your
23 light by the garage?

24 A Yes, sir.

25 Q But you didn't see a picture of that, right?

1 A Again, that was after discovery.

2 Q Where are the other cracks? Where are the other cracks
3 on the garage side, ma'am?

4 A The ones I've already discussed? There's some brick
5 cracking above it. There's still the step right over it.
6 There's another brick cracking by the coach light.

7 There is some mortar cracking on the front of the house by
8 the coach light, and there's also some step cracking at my
9 daughter's windows up on top.

10 Q Okay, your daughter's windows are on the front of the
11 house, right?

12 A That is correct.

13 Q That brick has been there since 2012, 2013, right?

14 A Correct.

15 Q Let's stick with the side of the house. Can we put the
16 side of the house up, please? There we go. Let's talk
17 about that garage side.

18 MS. LYNN: Your Honor, can we just clarify the exhibit
19 numbers?

20 THE COURT: Give us some reference for the record. Is
21 this demonstrative or an exhibit?

22 MR. IMHOFF: It's demonstrative, Your Honor.

23 THE COURT: Do you have a number?

24 MR. IMHOFF: There's no number that -- I can't see it
25 on. Let's just pull up the pictures of the side of her

1 garage?

2 Q All right. On the garage side of the house, you say
3 there's some cracking by your carriage light; right? Do you
4 know what a soldier course is?

5 A No, sir.

6 Q So bricks that aren't sitting horizontal, but they're
7 actually sitting vertical like this. Do you have those
8 above your garage?

9 A I believe so.

10 Q Is there cracking in that?

11 A Not that I've seen.

12 Q Where is the other cracking? I got the carriage light
13 on the garage side. Where is the other cracking, ma'am?

14 A Where the step cracking is over here in the mortar.
15 There are some bricks above that, or to the side of it, that
16 are actually cracking.

17 Q On the garage side?

18 A Yes, sir.

19 Q Today presently?

20 A Yes, sir.

21 Q But you didn't take pictures of them because discovery
22 in this case had ended?

23 A No, because engineers have already been to my house and
24 have taken multiple pictures.

25 A I'm sorry. I thought that's what you said earlier.

1 You didn't do it because discovery had ended. Did you say
2 that? Did I mishear that?

3 A You didn't mishear that. I thought -- I'm a layperson.
4 I thought that everything that you had for exhibits had to
5 be in by the discovery period. If I'm wrong, then I
6 apologize.

7 Q Did you share the pictures that you took of the brick
8 being replaced with Rhett Whitlock?

9 A They've been submitted for the case. I'm not sure who
10 has privilege to them.

11 Q Do you know what the vertical movement joints are that
12 have been discussed in this case?

13 A No, sir.

14 Q Don't have any idea what they are?

15 A No, sir.

16 Q Do you want them on your house?

17 A I don't have a clue what you're asking me, sir. I'm
18 not an engineer. I don't know what you're talking about.

19 Q Would you like saw cuts from the top sides of your
20 garage all the way up top of your home in the brick on both
21 sides?

22 A Would I like saw cuts?

23 Q Yes, ma'am.

24 A No, sir.

25 Q Have you not heard or talked to or read Dr. Whitlock's

1 reports?

2 A Again, I'm a layperson. I read them. I don't know all
3 the technical terms. I have no idea. I'm not an engineer.
4 But I have looked at them, yes. I have not studied them.
5 And again, I don't know the technical terms.

6 Q Do you know that a huge part of this case is the
7 absence of vertical cuts in your brick and the other brick
8 above the garage door?

9 A No, sir.

10 Q You don't know that?

11 A No, I would leave that to the experts.

12 Q But you don't want ---

13 A I know that there's damage. I'm not exactly sure all
14 the technical reasons that the damage is there.

15 Q You don't want them. You don't want those vertical
16 cuts above your garage; right?

17 MS. LYNN: Objection, Your Honor. Asked and answered.

18 THE COURT: Sustained.

19 Q Now, after the last brick was put up, when did the
20 cracks start to develop around the garage again?

21 A I don't know for certain, but I didn't see that they
22 were there until 2019 when the engineer came out.

23 Q Did you see the cracking by your daughter's window?

24 A When?

25 Q Before 2019.

1 A No, didn't see that until the engineer came out in
2 2019.

3 Q Who hired the engineers?

4 A The law firm.

5 Q So, when you went to the law firm, you are not aware of
6 cracking in your brick on your house, correct?

7 A Correct.

8 Q What were you going to sue for?

9 A Well, this was prior to the lawsuit being there, so the
10 engineer came out so that we knew what the issues were to
11 sue for.

12 Q Ma'am, why did you go to a lawyer to sue D.R. Horton if
13 you didn't know there was any brick cracking in your house
14 when you went to the lawyer?

15 A Because I went to the lawyer for multiple reasons, for
16 all of the homeowners that came to me, my neighbors, and
17 told me that they had similar issues that I did, that I had
18 repaired supposedly or I thought. That is why I went to a
19 lawyer, for myself and for all of my neighbors to protect
20 us.

21 Q But at the time you went to the lawyer, you didn't know
22 of any brick cracking in the house; right?

23 MS. LYNN: Objection. Asked and answered.

24 MR. IMHOFF: She ---

25 THE COURT: Overruled. You can answer the question.

1 A Go ahead and ask again, sir.

2 Q At the time you went to the lawyer to discuss the
3 lawsuit against D.R. Horton, you didn't have any cracking in
4 your brick that you were aware of; right?

5 A That's correct. But that is not the only issue that's
6 in this lawsuit.

7 Q So, did you take it upon yourself to go to a lawyer for
8 all of your neighbors?

9 A Yes, I did.

10 Q For their brick cracking?

11 A Yes, I did.

12 Q Even though you didn't have it at that time.

13 A I am the class representative for 220 homes. All of my
14 neighbors -- I care about all of my neighbors. I care that
15 they may have the same issues that I have, and they deserve
16 to have them taken care of as I did.

17 Q Ma'am, you got very, very mad at your friend Carl,
18 didn't you?

19 A I wouldn't say very, very mad, no.

20 Q There's a spigot on your house that you complained
21 about didn't get put back, right?

22 A That is correct.

23 Q There are some chips in your driveway that you
24 complained about that you wanted fixed, right?

25 A That is correct.

1 Q And you said that there was a bug issue in one of your
2 bathrooms during your deposition, right?

3 A Absolutely, yes.

4 Q You were very, very mad at Carl that he stopped
5 responding to your texts after you texted him and called him
6 again and again about bug issues, and your spigot, and your
7 driveway; right?

8 A I think you're mistaking me for my husband. I did not
9 have those conversations with Carl.

10 Q Was Paul very mad at Carl?

11 A Yes, Paul was quite angry that when we tried to turn
12 our water spigot on, they had mortared the crap out of it
13 and we were scraping our knuckles on the brick to turn the
14 water on. So yeah, that was a little irritating.

15 Q That's why you went to the lawyer, isn't it? Because
16 you were so mad at Carl that he wouldn't respond to you
17 about the bugs and the spigot and the chips in your
18 driveway, right?

19 MS. LYNN: Objection, Your Honor. Compound question.
20 Argumentative. Asked and answered.

21 THE COURT: Ask the question in parts so that she can
22 answer it with each part.

23 Q The reason that you went to the lawyer to start this
24 class action lawsuit was because you were mad that Carl had
25 stopped responding to your requests for the three things

1 that we just discussed.

2 A That is incorrect.

3 Q What other issues did you know of before you went to
4 the lawyer that you wanted remedied by D.R. Horton?

5 A The issues were with my neighbor's, Sharon Galloway's,
6 concrete foundation that was causing tripping. The
7 Jeffersons, who had the same side garage that was not
8 repaired as far as I know, that had the cracking. People
9 were coming to me telling me all of their issues that they
10 had that were similar to the issues that I had gone through.
11 So, I was the class rep. I started the lawsuit to help my
12 neighbors, not because I was mad at anybody, but because
13 other people had similar issues to me that were not getting
14 taken care of.

15 Q Will you explain to the jury why you took it upon
16 yourself to start a lawsuit for your neighbor's issues that
17 you weren't having?

18 A Sir, the lawsuit was filed after the engineer came to
19 our house when we realized we had these issues. And then we
20 realized that it was a common issue with multiple homes is
21 when I filed the lawsuit.

22 Q Ma'am, please can you explain to the jury why you took
23 it upon yourself to go to a lawyer to look into a lawsuit
24 against D.R. Horton for your neighbor's issues that you
25 weren't experiencing at the time?

1 MS. LYNN: Objection, Your Honor. Asked and answered.

2 MR. IMHOFF: She didn't answer it.

3 THE COURT: Overruled.

4 A Could you ask the question again for me, please?

5 Q Yes. Can you please explain to the jury why you went
6 to a lawyer to start a class action lawsuit or at least
7 investigate a class action lawsuit for your neighbor's
8 issues that you weren't experiencing at the time?

9 A As I said, I went to the lawyer to discuss it because
10 people were coming to me. Many people were coming to me
11 telling me that they had the same issues that I had, because
12 they had realized that there was work on my house.
13 I went to the lawyer because I love my community and my
14 neighbors, and to be quite frank, I was pretty -- not sure
15 what the word is, but I was almost embarrassed that I had
16 these issues and they were taking care of for me, but they
17 weren't taking care of for them.

18 Q Have you gone to other neighbors to recruit them to
19 this lawsuit?

20 A No sir, I don't have to. They were coming to me.

21 Q You've never gone to neighbor's houses to talk to them
22 about issues with their houses?

23 A Yes, but not to convince them to join the lawsuit.
24 We've discussed their issues.

25 Q And did you take notes of those issues with those

1 homes?

2 A No, sir. We had conversations.

3 Q After Dr. Whitlock was hired, did you take him to homes
4 where homeowners complained about issues?

5 A Yes, absolutely.

6 Q You took Dr. Whitlock to homes that had window leaks;
7 is that right?

8 A Yes.

9 Q You took Dr. Whitlock to homes that you thought might
10 have brick issues; is that right?

11 A Correct.

12 Q You took Dr. Whitlock to homes that may have flooring
13 issues or slab issues; right?

14 A. That is correct.

15 Q Did you take Dr. Whitlock to any other homes with
16 issues; ma'am?

17 A I had a list of homes for him to go to. \ I can't
18 remember that far back as to what everybody's issues were.

19 Q And you took this all upon yourself to do this and show
20 Dr. Whitlock to other homes, right?

21 A Yes, sir.

22 Q That was before the lawsuit was filed, right?

23 A Yes, sir. Did you hear my my opening information about
24 my volunteering for the community and always wanting to try
25 to do things? That is in my personality. I was there to

1 help my neighbors. Yes, sir, I did that.

2 Q Did you sent all the neighbors a survey, or a document,
3 or a request for information about what ---

4 MS. LYNN: I'm going to object to that line of
5 questioning, Jason. May we approach?

6 THE COURT: Yes, ma'am.

7 (WHEREUPON, a bench conference.)

8 MR. IMHOFF: Your Honor, I will finish this part and is
9 it a good time for all of us to take a lunch?

10 THE COURT: We can. I was going to break at 12:30, but
11 this is a sort of a natural stopping point. Ladies and
12 gentlemen, we'll go ahead and break for lunch.

13 MR. IMHOFF: I wasn't done, Your Honor. I was saying
14 after this section I'll be done. Is that okay?

15 THE COURT: I was going to break at 12:30. So go ahead,
16 go ahead and finish up and then any redirect we'll do after
17 lunch.

18 Q Ma'am, have you done a survey, either mentally, on
19 paper or in a document of what homeowners had what issues in
20 your neighborhood?

21 A No, sir.

22 Q You don't have anything like that?

23 A No, sir.

24 Q So if I was to ask you if a particular address had this
25 issue or that issue or brick or stone or grading, you

1 couldn't tell us?

2 A That information is a client attorney privilege. There
3 is information there.

4 Q All right, the judge has directed me not -- you don't
5 have something yourself in your mind or a document of your
6 own from which to gather that information; is that right?

7 A That is correct.

8 Q Have other homeowners contacted you to tell you they
9 didn't know that they were in this class action?

10 A Just recently, because they got a subpoena from you.
11 Other than that, no. Ms. Kathy Hayes contacted -- she
12 actually contacted my husband and said she was very confused
13 that she got a subpoena, that she was an opt out when she
14 thought she was in the lawsuit.

15 Q She thought she was an opt out or an opt in.

16 A I would have to have you ask that to Paul. I wasn't
17 there for the conversation, but I know that there was
18 conversation with her that there was some confusion.

19 Q So how many homeowners have contacted you to tell you
20 they didn't know about the litigation and they didn't know
21 that they were in the litigation?

22 A Zero.

23 Q Zero. You're aware of them contacting other people
24 about that?

25 A I don't have privilege to that. Like I said, just Ms.

1 Hayes to my husband. Other than that, I'm not aware of
2 anybody.

3 Q Have you talked to every absent class member to
4 determine if they know or want to be in this lawsuit?

5 A No, sir.

6 Q Are the homes still selling in Rose Hill?

7 A I don't keep up with the market. I have no intention
8 of selling my home, so I don't really look at market value
9 or what's going on. In my immediate area I have not seen
10 any. On Sturbridge, I have not seen any homes for sale.

11 Q Ma'am, are you telling this jury you don't know if
12 homes have sold in Rose Hill since you filed this lawsuit in
13 2019?

14 A Sir, I don't keep up with the market. If I was not
15 going to sell my home or buy a home, why would I have any
16 interest as to what is selling?

17 Q So that's a no, you don't know?

18 A I don't know.

19 Q So, does that mean you don't know how much they're
20 selling for?

21 A That would be correct.

22 Q Did you ever tell the homeowners that if they were
23 going to sell their home they needed to disclose this
24 lawsuit and the allegations in it to the potential
25 purchasers?

1 A No, Sir. If anybody had concerns, and there may have
2 been a couple people in the past, I can't give you names. I
3 don't remember who it was. But anybody who would have
4 contacted me about this, I referred to Dabney.

5 Q Who contacted you?

6 A Like I said, I don't remember. I know in the past
7 there's been a couple people that were going to sell.
8 Actually, the one person I can recall was Jason Kittlested.
9 (PHONETIC SPELLING) He was going to sell his home and he
10 wanted information. And I said I am not the person to talk
11 to, but you can talk to Dabney.

12 Q Did he sell his house?

13 A Yes.

14 Q So, you do know, ma'am, that houses are still selling
15 in Rose Hill, correct?

16 A Sir, that was a couple of years ago.

17 Q You do know that houses are still selling in Rose Hill;
18 correct?

19 A A few years ago, yes. I would assume that houses
20 would sell anywhere, but I don't have the knowledge as to
21 who was selling or what they sold for. That's the market.
22 The houses sell. Absolutely.

23 Q Well, ma'am, you filed a \$28 million or \$20 million
24 lawsuit and it's public record. And the houses are still
25 selling in Rose Hill, right? At least a couple that you

1 know of, right?

2 A Right.

3 Q Do you know that they're selling for less?

4 A Sir, like I said, I don't pay attention to the market.
5 I don't have any intention of selling my home, so that's of
6 no value to me.

7 Q You don't know if they're disclosing, the homeowners;
8 is that right?

9 A That's not for me to say. I'm not at the closing.
10 It's not for me to say what information that they're given.

11 Q Have you been on the homeowners association?

12 A Excuse me?

13 Q Have you been a part of the homeowners association
14 board or the architectural review committee?

15 A Yes, years ago.

16 Q You're a helpful person.

17 A I'm not on the architectural committee, no. On the
18 board, yes.

19 Q So, you've been a board member and you testified you're
20 a helpful person, right?

21 A That is correct.

22 Q So, do you want to help these people be able to sell
23 their homes and not have issues with the subsequent
24 homeowners?

25 A Sir, I would have to have knowledge that that's what

1 they were doing. As I said, I don't know who is selling
2 homes in Rose Hill for me to be able to reach out to them.

3 Q Your husband's been the president of the homeowner's
4 association for years, hasn't he?

5 A That's correct.

6 Q Is your husband telling people what's going on with
7 this lawsuit so that they have correct information about
8 their ability to sell their homes?

9 A Sir, you'd have to ask my husband that. That would be
10 hearsay and I have no idea what he tells people.

11 Q Do you know if he's doing that? Because you're a
12 homeowner there also, ma'am.

13 A You would have to ask my husband. I have no idea what
14 his conversations were.

15 Q Has he sent an e-mail out, that you've seen as a
16 homeowner, to the neighborhood to tell them be careful when
17 you sell house because there's this class action litigation
18 going on. That there are millions of dollars of repairs
19 necessary.

20 A I've never seen anything like that. But, in full
21 disclosure, I don't look at the Rose Hill website. I don't,
22 look at any of the Facebook. I just -- I don't want to see
23 any drama and that's normally what happens on that. So, I
24 have avoided it like the plague.

25 Q Are all the houses at Rose Hill the same?

- 1 A In many ways, yes.
- 2 Q Ma'am, are they all in the same size lot?
- 3 A No, sir.
- 4 Q Are they all at the top of the hill?
- 5 A No, sir.
- 6 Q Are they all at the bottom of the hill?
- 7 A No, sir.
- 8 Q Are they all one story?
- 9 A No, sir.
- 10 Q Are they all two story?
- 11 A No, sir.
- 12 Q Do they all have basements?
- 13 A No, sir.
- 14 Q Do they all have brick?
- 15 A No, sir.
- 16 Q Do they all have stone.
- 17 A No, sir, but all houses have some some sort of stone or
- 18 brick on them.
- 19 Q Do they all have stone, ma'am?
- 20 A No. They all have some type of outer cladding on the
- 21 home.
- 22 Q Yes, every house has outer cladding on it, ma'am. Do
- 23 they all have stone?
- 24 A No, sir.
- 25 Q Do they all have Hardy board or vinyl?

1 A No, sir. But they were all built by D.R. Horton.

2 Q Were they -- are the present homeowners -- how many of
3 them bought from D.R. Horton?

4 A I can't answer that.

5 Q You don't know?

6 A No, sir.

7 Q How many of them bought since you filed the lawsuit?

8 A I don't know, sir.

9 Q How many of them bought with full knowledge of the
10 lawsuit, but bought them anyway?

11 A I'm not privy to that information.

12 Q Will they all cost the same amount to repair if it's
13 necessary?

14 A Again, any repair costs I would refer to the experts.
15 That's not for me to say.

16 Q You don't know?

17 A I don't know. I'm not an expert. I don't know what --
18 -

19 Q Well, in fact ---

20 A --- fixes cost.

21 Q I'm sorry. I interrupted you, ma'am. I did not intend
22 to. Have you seen Rhett Whitlock's estimate to repair the
23 homes?

24 A Yes, I have.

25 Q And he actually distinguishes between the homes and

1 he's created three different categories; correct?

2 A That is correct.

3 Q Matter of fact, that was in the opening, wasn't it?

4 A I don't remember that.

5 Q You don't remember seeing that, ma'am?

6 A It was a long opening. You can show me. I'd be happy
7 to look.

8 Q Have you seen his repair document that indicates that
9 there are three different homes; moderate, complex -- I
10 don't remember what the other one is.

11 A Yes, sir, I have seen that.

12 Q Those are three different things, aren't they?

13 A Yes, there are three different sublets of this, but the
14 only reason that there are three different, is because of
15 how many windows are in the home, how much brick is in the
16 home. Each one is proportionated to the size and type of
17 home. That is the only difference. So, the estimate was
18 like, my home has 27 windows and another home in one of the
19 other subcategories has less windows.

20 Q Your house has brick all the way around it, right?

21 A That is correct.

22 Q Do all the houses have bricks all the way around it?

23 A No, sir.

24 Q In fact ---

25 A There's some, not all.

1 Q I'm sorry. Go ahead. Were you finished?

2 A Yes.

3 Q Are there houses out there with no brick?

4 A Yes.

5 Q Those houses aren't like yours, are they?

6 A In the way they look, they're not like mine. With
7 building defects and building code violations and windows
8 that are cracked, yes, they're very similar.

9 Q Ma'am, if houses don't have brick, they don't have a
10 brick issue do they?

11 A That is correct.

12 Q And if they don't have brick, they don't have to have
13 their brick removed and replaced; do they?

14 A That is correct, but they may have stone, and that
15 would need to be removed and replaced.

16 Q But if it's brick and you have a brick issue and a
17 brick estimate to remove it and they don't, your house isn't
18 the same as theirs; is it?

19 A My features aren't the same. That's correct.

20 Q Features, ma'am?

21 A Yes. Stone, brick, Hardy board, correct.

22 Q Well, we want to go to lunch. If they don't have brick
23 on their house like you have on your house, they don't have
24 to have their brick fixed and replaced and won't be awarded
25 damages for that; right?

1 A That is correct.

2 MS. LYNN: Objection, Your Honor.

3 Q Won't ask for damages. I apologize for that. Right?

4 A Correct.

5 Q You're not asking for removable of brick on houses that
6 don't have brick; are you?

7 A That is correct.

8 MR. IMHOFF: Your Honor, is this a good time to break?

9 Thank you.

10 THE COURT: Mr. Imhoff, are you finished, or do you
11 still have more cross examination to go?

12 MR. IMHOFF: I am not finished, Your Honor.

13 THE COURT: We'll just suspend it then. Ladies and
14 gentlemen, we're going to go ahead and take lunch. Be back
15 at 2:00. Leave your pads in the courtroom.

16 (WHEREUPON, jury exited courtroom at 12:27 p.m.)

17 THE COURT: We'll go into recess. We'll start back at
18 2:00.

19 (WHEREUPON, a lunch recess was held until 2:00 p.m.)

20 THE COURT: Anything from anyone before we bring our
21 jury back in?

22 MS. LYNN: No, Your Honor.

23 MR. IMHOFF: No, Your Honor.

24 THE COURT: We can get our jury.

1 (WHEREUPON, jury entered courtroom at 2:02 p.m.)

2 THE COURT: Mr. Foreman, ladies and gentlemen of the
3 jury, I hope everyone had a good lunch. We are ready to
4 proceed. Mr. Imhoff?

5 MR. IMHOFF: Thank you, Your Honor.

6 CROSS EXAMINATION

7 BY MR. IMHOFF:

8 Q All right. I've got a couple more questions for you
9 around the brick. Your husband has a lot of stuff, doesn't
10 he?

11 A I'm sorry?

12 Q Your husband has a lot of stuff?

13 A I'm not understanding what you're asking.

14 Q Has your husband filled your garage with stacks of
15 stuff?

16 A We both have. Yeah.

17 Q You couldn't park in that garage for a long time, could
18 you?

19 A We never intended to park in the garage, which is why
20 we needed a bigger house and a basement. So, that is where
21 the storage went.

22 Q Yeah. So, that garage is full of your boxes and
23 things; is that right?

24 A Yes.

25 Q During the removal of the brick the first time, did you

1 move out?

2 A We moved all of our items out of the garage.

3 Q Did you live in the house?

4 A Yes.

5 Q And was the HVAC condenser damaged on the exterior?

6 A Yes, it was.

7 Q And the second time, you said you were gone. Where
8 were you?

9 A Like I said, we weren't gone for the whole time. We
10 were gone the second time when they tore the brick off. I
11 don't remember. I can only imagine I was at work and came
12 back and that's what I found.

13 Q You didn't have to move out of your house the second
14 time either did you?

15 A We should have. We should have the first time.

16 Q You lived there through two brick removals of your
17 house; is that correct?

18 A That is correct. And again, I would never do that
19 again.

20 Q If this jury awards you damages, you don't have any
21 authority at all to make sure that the homeowners actually
22 use that money to fix the things that are wrong according to
23 you, do you?

24 A As a class representative, that's not my
25 responsibility. These are all adults. I can't tell you

1 what they're going to do with the money.

2 Q And we know at least some people are selling their
3 houses without fixing them, don't we?

4 A Again, I don't know. I am not privy to that
5 information.

6 Q Well, I thought you said this morning, ma'am, that you
7 had at least one call or were aware of one call of a person
8 selling their house during the litigation.

9 A Yes.

10 Q Correct?

11 A Yes.

12 Q Do you have any information to tell this jury that the
13 homeowners who are selling their homes are actually fixing
14 the things that you allege are wrong?

15 A I have no idea.

16 Q Do you ever go on Zillow?

17 A No.

18 Q You've never been on Zillow?

19 A I've been on Zillow, but no, I don't go on Zillow.

20 Q You've been on Zillow, but you don't go on Zillow,
21 ma'am?

22 A In the past. Like I said, I have no intention of
23 selling my home, so I don't have any reason to go on those
24 websites.

25 Q You have been on Zillow in the past.

1 A In the past.

2 Q You've used Zillow in the past; is that right?

3 A I've looked at them. Have I used them? No. I don't
4 believe that their estimates are correct.

5 Q You're aware of what Zillow is?

6 A Yes.

7 Q And Zillow will have and show -- strike that. Are you
8 aware that Zillow will have and show not only houses for
9 sale, but also houses that have been sold?

10 A Yes.

11 Q And you can actually see how much they sold for, can't
12 you?

13 A If I was interested, yes.

14 Q Okay. I'm using this as a demonstrative. But this is
15 the Zillow website from today for your house. It says
16 \$561,600. Do you have any information that your house is
17 now not worth \$561,000.

18 A I have not had a current appraisal on it and, as I
19 said, I don't believe that Zillow is an accurate estimator
20 of home value.

21 Q Your house is all brick with stone of the peak of your
22 garage, right?

23 A Yes.

24 Q And then stone, I call it a knee wall. That's probably
25 not right, but knee level, right?

1 A Yes.

2 Q And that stone at the bottom goes around the front of
3 your house that wraps around to your porch, right?

4 A Yes.

5 Q And isn't it true that in the ten years that you've
6 owned that home, only one stone has fallen off from down
7 there?

8 A It's one too many. Yes.

9 Q And your husband put it back up; right?

10 A No, it's the stone that's in the front of the house.
11 We picked it up off the ground and we put it on, but we did
12 not secure it. It's the top of the rail, that stone fell
13 off, and that was put on.

14 Q That -- okay, so for the jury. So the stone along it
15 is the Anatoliy msv, and then that piece that's right on top
16 that makes the transition from the brick to the stone. I
17 think it's called a water table. Have you ever heard that
18 before?

19 A No, sir.

20 Q We've zoomed in a little bit now. It's a little bit
21 lighter. Is that what fell off, the water table part,
22 between the brick and the stone?

23 A That is correct.

24 Q When did it fall off?

25 A After the lawsuit. I don't have an exact date.

1 Q That stone -- you never had any stones fall off your
2 house before the lawsuit?

3 A No.

4 Q Do you know why the stone fell off?

5 A I'm not an expert at that, but my personal opinion is
6 that there was water behind the wall and it loosened and
7 that's what made it fall.

8 Q Behind what wall?

9 A Between the brick wall and the stone.

10 Q That stone sits on brick, doesn't it?

11 A Yes.

12 Q So, there's a brick. There's stone, and then brick,
13 and then house wrap behind the brick behind the air gap,
14 right?

15 A I would say that's incorrect. There's stone, there's
16 adhesive, then there's brick, and I would imagine more
17 adhesive, and then the the barrier. So, what I would in my
18 opinion think has happened is that the moisture got between
19 the stone and the adhesive.

20 Q Okay, but you're not an expert, right? You're not an
21 engineer, architect, contractor, right?

22 A Correct.

23 Q Never worked in construction?

24 A Correct.

25 Q Why didn't you put the stone back on?

1 A We did. We lifted it from the ground and put it on.

2 Q Why didn't you take something from Home Depot, like
3 Liquid Nails, or mortar, or something else, and put it back
4 on?

5 A Because currently we're in litigation.

6 Q You didn't want to change the evidence?

7 A I'm going to wait to find out what happens to make
8 repairs on my home.

9 Q Ma'am, do you have any photographs at all of water
10 intrusion through the brick or the stone into your home?

11 A Into my home? No, sir.

12 Q Never ever have you seen that; is that correct?

13 A Only through the windows.

14 Q Through the brick and the stone you have never seen
15 water intrusion into your home, correct?

16 A Not with my naked eye. But that doesn't mean that
17 it's not behind the walls.

18 Q Have you ever seen -- have you ever seen anyone do any
19 testing or take any pictures, including the experts that
20 have been hired who have documented water intrusion into
21 your home through brick or stone?

22 A No.

23 Q Now, your stone here at the base of the wall is not
24 applied the same way as other houses, is it?

25 A I don't have any idea.

1 Q Well, that stone is applied to brick, isn't it?

2 A That's what appears, yes.

3 Q Is all the stone in the neighborhood put on brick?

4 A I have no idea.

5 Q Are you familiar with the photographs of stone on one
6 side of the house meeting brick on another side of the
7 house?

8 A Can you show me?

9 Q We're trying. Poor Max back there. I think he's going
10 to have an ulcer after this. Are you familiar in general if
11 the stone is coming to the corner of the house and then
12 brick starts from there on the other side of the house?

13 A I think it depends on what home we're talking about.
14 Have I seen it on some homes? Yes.

15 Q I would agree with you. It depends on the house that
16 we're talking about. You don't have that issue on your
17 house, do you?

18 A The issue that the stone is meeting the brick?

19 Q And the mortar is cracking.

20 A Not that I'm aware of.

21 Q Ma'am, over the course of your ownership of the house
22 until I took your deposition -- there's the picture. You do
23 not have that issue.

24 MS. LYNN: Objection, Your Honor. I feel like there
25 needs, again, to be some type of identification.

1 THE COURT: Is this for demonstrative purposes, Mr.
2 Imhoff?

3 MR. IMHOFF: It is. I think the question has been
4 asked. For the purpose of the jury we'll just move on. I
5 think they know what it is.

6 Q In the time you've owned your house, after the water
7 issues at the beginning, you only had one floorboard pop up
8 that your husband, Paul, fixed. Is that right?

9 A A floorboard?

10 Q Yes, ma'am.

11 MS. LYNN: Objection, Your Honor. Can we approach?

12 (WHEREUPON, a bench conference was held.)

13 Q Let's do it this way. You had your floors recently
14 replaced?

15 A Yes, sir.

16 Q On the first floor?

17 A Yes, sir.

18 Q And that's on concrete slab, right?

19 A That is correct.

20 Q And you had to have your floors replaced because you
21 had a water leak, right?

22 A That is correct.

23 Q And you had to make a claim and go through all that and
24 they came in and put new floors in?

25 MS. LYNN: Objection, Your Honor. May we approach?

1 THE COURT: Yes, ma'am.

2 (WHEREUPON, there was a bench conference.)

3 Q Tell the jury what happened that caused the floor to
4 have to be replaced.

5 A The washing machine on the second floor broke. The hot
6 water that was going into the washing machine filled the
7 tank, the tub of the washing machine, so bad that the front
8 loading door opened up and water poured out of the second
9 floor washing machine. At the time, my husband was going
10 shopping, so when he came back he realized that we had a
11 waterfall from the second floor down to the first floor.
12 So, there was water damage.

13 Q That doesn't have anything to do with D.R. Horton, does
14 it?

15 A That is correct.

16 Q That's what I wanted to clarify for the jury. So,
17 because of that laundry room issue, were the floors on the
18 first floor concrete replaced?

19 A Yes.

20 Q So, is it fair to say you no longer have floors on the
21 first floor that were installed by D.R. Horton or its
22 subcontractors?

23 A That is correct.

24 Q Did you put new wood floors in on the first floor?

25 A Yes, we did.

1 Q Did you put any other kind of material on the first
2 floor?

3 A No, sir.

4 Q So, is the entire first floor now wood?

5 A What was replaced was replaced with wood.

6 Q Are there other parts of the floor that weren't
7 replaced?

8 A No, the entire floor was replaced. We have carpet in
9 the living room and we have vinyl tile in the bathroom.

10 Q Was all of that replaced also?

11 A No, sir.

12 Q So, is the carpet original?

13 A To the build?

14 Q Yes.

15 A No, sir.

16 Q When was that carpet put in?

17 A During the first year warranty period.

18 Q All right. So, is the same carpet that was put in
19 during the first year warranty period the carpet that's
20 still there now?

21 A Yes.

22 Q And you said you have linoleum or tile somewhere else?

23 A Vinyl flooring, yes.

24 Q All right. And is that still there from either the
25 original build or the first year period?

1 A Yes, sir.

2 Q So, did you hire a contractor to come in and put that
3 wood floor down?

4 A Yes.

5 Q And they were able to do that, right?

6 A Yes.

7 Q And it's in now and are you happy with it?

8 A Yes.

9 Q You've made claims in this case, if you're aware, that
10 the concrete is cracking so badly that all of the floors
11 need to come up; is that right?

12 A That would be absolutely correct, sir, because when the
13 floor was taken out and put back down, there was a large
14 foundation crack where they originally repaired it in 2013-
15 14, and there was also a new foundation crack in the
16 kitchen. So, that comment would be correct.

17 Q So what did they do?

18 A They sealed the concrete.

19 Q With what?

20 A Then they put the floor.

21 Q With what?

22 A I have no idea. I'm not a contractor, but the concrete
23 has been sealed.

24 Q Do you have an invoice for that?

25 A No, sir.

1 Q Do you have any idea how much that cost to seal the
2 concrete under the floor that was taken up?

3 A No, sir.

4 Q Do you know anything about radon?

5 A Very minimal.

6 Q Are you a radon expert?

7 A No, sir.

8 Q Are you going to rely on Mr. Whitlock to testify? I'm
9 sorry, Dr. Whitlock to testify about that?

10 A Absolutely.

11 Q Let's talk about your windows. You said that you do
12 some maintenance around the house and clean the house; is
13 that right?

14 A That is correct.

15 Q How often you clean your windows?

16 A Once every couple years. Whenever I get an opportunity
17 to.

18 Q Do you ever clean the sills or the interior of the
19 windows?

20 A Yes.

21 Q How often do you clean the sills or the interior of the
22 windows?

23 A Whenever I get a chance. It's not routine.

24 Q Once a month?

25 A Can't tell you.

1 Q Once a year?

2 A More than once a year.

3 Q More than once a year?

4 A Yes.

5 Q And your testimony earlier today to this jury was that
6 you didn't know your windows were leaking until Dr. Whitlock
7 told you, is that right?

8 A That is correct.

9 Q So you've cleaned your window more -- the inside of
10 your windows more than once a year for at least six years
11 and you never had any ideas your windows were leaking until
12 the expert told you that. Is that right?

13 A That is correct. I did not know what I was looking at.

14 Q You don't know what rotten wood looks like or stained
15 wood looks like, ma'am?

16 A I know what water damage looks like, but this was
17 flaking and and taking other appearances, so I would wash
18 wash them and no, it didn't. It didn't dawn on me that that
19 was water damage.

20 Q It didn't dawn on you. Well, what did it look like if
21 it didn't look like water damage?

22 A Paint chipping.

23 Q Do you see any paint chipping in this picture?

24 A Over here to the to the leftn .

25 Q On the left hand side, ma'am?

1 A Yes, sir.

2 Q Have you or your husband or anyone ever painted or
3 caulked the interior windows?

4 A No, sir.

5 Q So, for the entire time that you've lived there, now
6 for 10 years, no one has ever painted or caulked those
7 windows; is that right?

8 A That is correct.

9 Q And it's your testimony to this jury that your windows
10 have been leaking for a decade now?

11 MS. LYNN: Objection. Mischaracterizing the witness's
12 testimony.

13 THE COURT: Rephrase your question.

14 Q Ma'am, are you telling this jury that these windows
15 have been leaking, but you didn't notice them until someone
16 else told you that?

17 A That is correct, because I didn't know what damage I
18 was looking at and what would have caused it.

19 Q So, in this picture, it's down here, flaking, you say.
20 That's the damage?

21 A That is correct.

22 Q Is that right in the middle of the window, not by the
23 corner cracks?

24 A Yes, but there's also a spot where that hand is. If
25 you look down, there's a buckle of paint there.

1 Q A what?

2 A Like, a buckle -- buckled up round circle of paint
3 there.

4 Q Over under that person's hand?

5 A Yes.

6 Q Next picture please. How about this window? Is this
7 one leaking also?

8 A It's -- the picture doesn't go all the way to the end,
9 but, yes.

10 Q I didn't hear you.

11 A In this picture I don't see it, but this is not the
12 full window.

13 Q Is there any leaking window evidence in this picture?

14 A Not from the half window that I'm looking at.

15 Q Does this window leak?

16 A I don't know, but this window is missing components, so
17 it has the potential to. And even if I don't see the leak
18 up here on the sill, that doesn't mean that it's not having
19 moisture behind the wall.

20 Q So, they may be leaking, but behind the wall. Is that
21 right?

22 A I believe that's possible, yes.

23 Q It's possible. Have you seen any evidence of that at
24 all?

25 A No, sir.

1 Q This picture doesn't show a leaking window, right?

2 A As I said, this particular portion of the window is not
3 showing it, but that does not mean there's not damage on the
4 other side.

5 Q Sure. And again, this morning, so the jury remembers
6 you said 26 of your 27 windows are leaking, did you not?

7 A I'm not sure that was the actual question. I think the
8 question was how many of your windows are having issues?

9 Q Okay, ma'am. How many of your windows are leaking?

10 A I haven't counted them. I know that all of them have
11 issues with either cracking on the sides or missing pieces
12 or leaking and water damage.

13 Q You don't know how many of your windows are leaking;
14 right?

15 A That's correct.

16 Q Next picture, please. Have you or -- here's some more
17 pictures. Do these pictures show --

18 MS. LYNN: Objection. For the record, can we get him to
19 verify what house this is?

20 Q Ma'am, is this your house? Go back, please, Max.

21 MS. WOOTEN: It's the ones they just produced.

22 MR. IMHOFF: You literally just handed it to me.

23 THE COURT: Are these are these part of an exhibit or a
24 demonstrative?

25 MR. IMHOFF: These are -- it's Plaintiff's Exhibit,

1 Your Honor. They handed them to us. 25.34a, Your Honor.
2 104 Sturbridge.

3 THE COURT: The court reporter can't put in the record
4 without the number. So, okay, go ahead.

5 Q Is this your house, ma'am?

6 A Yes.h

7 Q Do you believe that these pictures show leaking
8 windows?

9 A Sir, I can't see anything on those pictures. They're
10 very small. I couldn't depict details from them.

11 Q Can you zoom in, Max? You live in this house, right?

12 A Yes, sir.

13 Q And do you think that you would notice if there was
14 water sitting on your sill to the extent that it left stains
15 or started to rot your windows?

16 A All I can say is that moving from Chicago to South
17 Carolina, we don't open our windows very often and the
18 blinds are all the way down to the sill. So, that is not a
19 regular thing that we checked for. We barely open the
20 windows, which is why there may be damage that was
21 undetected, because we just didn't look.

22 Q You haven't seen water damage on your windows despite
23 cleaning them multiple times a year because you didn't look,
24 ma'am?

25 A When I'm cleaning them, I'm looking. I don't believe

1 that was a question that you just asked me.

2 Q When you cleaned them, did you ever notice water
3 sitting on the sill, staining from water or deterioration
4 from water through the window?

5 A Okay, and as I've said, I did see chipped paint and
6 other things that were on the window, but did not understand
7 that that was water damage.

8 Q Let me be very, very specific. In the years before you
9 filed this lawsuit, did you ever see water sitting on the
10 sill on a window?

11 A No, not because it wasn't there, just because I didn't
12 see it and I wasn't looking for it.

13 Q Did you ever see water staining on the sill of a window
14 in the six years before you filed this lawsuit?

15 A Again, I saw damage to the window sills. I did not
16 know if that was water damage, just paint flaking, or even
17 dirt for that matter.

18 Q Ma'am, I don't -- I don't want to keep asking the same
19 question. Do you understand what a water stain is?

20 A Yes.

21 Q Did you see water stains on the sill of your window
22 between 2013 and 2019?

23 MS. LYNN: Objection. Asked and answered.

24 THE COURT: Overruled.

25 A On a few windows, yes, sir.

1 Q Did you take pictures of them?

2 A No, sir.

3 Q Why not?

4 A Because it was before the lawsuit. I would have no
5 reason to take those pictures.

6 Q Did you call D.R. Horton?

7 A No, sir.

8 Q Did you make a warranty claim?

9 A No, sir.

10 Q Was the window closed?

11 A I'm not understanding your question.

12 Q Was the window closed when you saw the water stain on
13 the window sill?

14 A Yes, sir.

15 Q Okay. If there was a water stain on the window sill
16 with the window closed, why didn't you call D.R. Horton or
17 the window manufacturer?

18 A Because again, I didn't realize there was any issue.
19 Sir, I came from Chicago and our home was 60-something years
20 old. We've never had a new construction, so seeing some
21 things is very common and would not alert us or alarm us
22 that there was issues.

23 Q Window staining on the sill of a window in Chicago
24 isn't a big deal?

25 A The homes are 60 to 80 years old. It's not a big deal,

1 no, sir.

2 Q Okay. Have you ever seen damage to the sill, or around
3 the window or under it, in those six years that you were
4 cleaning these windows?

5 A Not that I can recall. I wouldn't be looking for it.

6 Q Well, did you testify earlier today that there is an
7 unlimited warranty on these windows? Lifetime warranty.

8 A I may have read it.

9 Q Sorry?

10 A I may have read it, but I didn't physically say it. If
11 it was in the verbiage that I read, then yes.

12 Q Okay. Do you understand that there is a lifetime
13 warranty on these windows?

14 A Yes.

15 Q Have you ever made a claim to Silverline?

16 A No, sir.

17 Q Have you ever told your neighbors that instead of
18 waiting for four years after you file a class action
19 lawsuit, there's lifetime warranty on these windows?

20 A No, sir. At the time that we found out that there was
21 an issue, litigation had already started.

22 Q Found out what?

23 A That there was issues with our windows. After testing.

24 Q So, you didn't make a warranty claim because you had
25 already started a lawsuit?

1 A That is correct.

2 Q Did you tell all your neighbors that they didn't have
3 to wait for a lawsuit, they could make a warranty claim?

4 A No, sir, I did not.

5 Q Has anyone other than your attorneys ever told you that
6 if you make a warranty claim, your lawsuit goes away?

7 A I had no idea. No, sir.

8 Q Is there any reason not to make a warranty claim while
9 the litigation is going on?

10 A Well, in homeowners' defense, most of this damage is
11 past the one year, and this is not a major structural issue,
12 so we wouldn't think -- I wouldn't think to just contact the
13 window manufacturer to get this repaired. In your mindset,
14 in general, you think of D.R. Horton and the warranty and
15 they're not going to do anything about it. It's past the
16 one year. This is not a major structural issue. We don't
17 have a chance, so don't even bother.

18 Q I was asking you about the warranty through the window
19 manufacturer.

20 A And I'm saying, me personally, I can't speak for the
21 rest of the class, but I would not think of separating that
22 out and calling the manufacturer. Not to mention, I did not
23 know there was damage.

24 Q When your washer flooded your house, did you make a
25 warranty claim to D.R. Horton, ma'am?

1 A No, sir.

2 Q Did you make a claim to the manufacturer of the washer?

3 A Yes, we actually did. It was out of warranty.

4 Q But, you did make a warranty claim to that

5 manufacturer, just not this one; right?

6 A That is correct.

7 Q Ma'am, are you aware that you are suing D.R. Horton for

8 stickers that you allege that don't exist?

9 A Yes, sir.

10 Q Do you know if those stickers were on the windows when

11 the house is inspected?

12 A I do not, sir.

13 Q You don't know one way or the other, do you?

14 A No, sir.

15 Q Do you know what those stickers say?

16 A They have -- I know what color they are, and I know

17 that they're supposed to have some specifications on them.

18 Q Back up a minute, Max. Let's get this. Your husband

19 and your daughter went down during construction to look at

20 the house and the construction, didn't they?

21 A That is correct.

22 Q We saw some pictures of the house with brick on it and

23 the yard. Do you remember talking about that this morning?

24 A Yes, sir.

25 Q This is Exhibit 18.3. Do you recognize this as some of

1 the pictures your husband and daughter were taking at the
2 house during construction?

3 A Again, that's possible. I didn't take the pictures, so
4 if those were submitted that those are his pictures, then
5 yes. It's kind of hard to tell.

6 Q They sent you a bunch of pictures too, because you were
7 still back up in Chicago, weren't you?

8 A That's correct.

9 Q They were taking pictures and they were sending you
10 pictures, right.

11 A He -- when he got home, it was old school. When he got
12 home, we had them downloaded.

13 Q You didn't have to go to a photo mat to get them
14 printed, did you?

15 A That's correct.

16 Q All right. So, have you looked at those pictures to
17 see if that label that you're suing D.R. Horton for was
18 actually on those windows or not?

19 A I've never seen a label on the windows.

20 Q Well, if there were stickers all over your windows when
21 you moved in, would you take them off?

22 A No, sir.

23 Q You'd leave stickers this big on your windows.

24 A Well, I wouldn't leave the silver line sticker up
25 there.

1 Q I'm sorry.

2 A I wouldn't leave whatever this sticker is up there.

3 I'm assuming it's the the manufacturer's, like, name on
4 there.

5 Q Oh, the sticker that says Silverline on it?

6 A I believe that's what it says. Yes.

7 Q You would remove that?

8 A It's impeding the view. I would have to, yes.

9 Q Of course, right? Of course you would, right?

10 A But we didn't take any stickers off, sir.

11 Q I understand that.

12 A There were no stickers on our windows when we purchased
13 the home.

14 Q Ma'am, I understand that. But you wanted them off of
15 your windows, right?

16 MS. LYNN: Objection, Your Honor. Mischaracterizing the
17 witness's testimony.

18 A I'm not understanding what the question is.

19 THE COURT: Ask the question in a different form.

20 Q Ma'am, you wouldn't have left those stickers on your
21 windows, right?

22 A That is correct. Not impeding my vision, correct.

23 Q So if the cleaning crew took them off before you got
24 there, you didn't have to take them off, but if they hadn't
25 taken them off, you would have taken them off, right?

1 A Not if they were important to the window.

2 Q Ma'am?

3 A If there is -- I don't know what this sticker is. I
4 don't know what it says, but if there's information, I may
5 have taken it off because of the view, but I would not have
6 destroyed it. I would have tried to take it off as best I
7 could, and I would have saved it. You'd need to know me.
8 I'm very anal. Very anal that way, when there's stickers
9 and things, I have drawers full of.

10 Q Let me ask again. Have you ever looked at your
11 husband's pictures to see if these stickers were on the
12 windows in his pictures?

13 A I can't tell what stickers are on here. I can't even
14 read it.

15 Q Have you ever attempted to do that?

16 A No, sir. I can't read them, so I wouldn't know what I
17 was seeing anyway.

18 MR. IMHOFF: I don't have anymore questions for you at
19 this point. Thank you, ma'am.

20 THE COURT: Are there any third party defendants that
21 wish to cross examine at this point?

22 (Whereupon, no third party defendant indicates that
23 they wish to cross examine the witness.)

24 THE COURT: Redirect?

25 MS. LYNN: Natalie, I've got two questions, so we can

1 hopefully get out of here and you and the jury both get home
2 at a decent hour.

3 REDIRECT EXAMINATION

4 BY MS. LYNN:

5 Q When Dr. Whitlock came to your house before this
6 lawsuit was filed, what did you learn?

7 A I learned that there was a lot of defects in my house
8 that I was not aware of. I learned a lot. I also learned
9 that there was building code violations on my home. I
10 learned that the home that I loved may not last.

11 Q What existing defects are existing today in your home,
12 because there seems to be some confusion about that, that
13 you're suing about in this lawsuit.

14 A I have cracking and leaking windows. I have
15 foundation cracks in the garage. I have brick cracking.
16 have mortar cracking. I have stones cracking. I had a
17 stone fall off, and I have grading issues in the back on the
18 top one third of the property.

19 Q When was the first time that you noticed an
20 uncorrected problem that is a part of this lawsuit?

21 A Not until 2019.

22 MS. LYNN: Thank you Natalie, and thank you for your
23 time.

24 THE COURT: Anything further for this witness? Thank
25 you, ma'am. You may step down. Plaintiff, call your next

1 witness. Yes, Your Honor. The Plaintiff is going to call
2 Carl Ruroede by publication, and we ask the Court to inform
3 the jury of what we'll be doing, please.

4 MR. IMHOFF, Your Honor, we have some things we would
5 like to take up outside of the jury if you could give us a
6 couple of minutes.

7 THE COURT: Yes, sir. All right. Mr. Bailiff, would
8 you take jury to the jury room, please?

9 (WHEREUPON, jury exited courtroom at 2:41 p.m.)

10 THE COURT: Yes, sir.

11 MR. IMHOFF: Your Honor, the first one is this is the
12 class representative. We've this motion several times, but
13 I'm going to make part of it again now that you've heard the
14 evidence and you see the witness. This Plaintiff is barred
15 on her grading claim. She knew about her grading claim.
16 She admitted it on the stand in the first year that she
17 lived there. She talked to D.R. Horton about it and she has
18 -- nothing has changed in her yard and where that water sits
19 then. This is an affirmative defense, a due process right
20 that this Plaintiff is barred by the statute of limitations.
21 It is clear that she knew about it. She did nothing about
22 it. It is part of her multi-million dollar claim today.
23 She should be barred.

24 That goes into the second part, Your Honor, because
25 that claim and our defense to it, is different than all of

1 the other homeowners, as well as her structural claim is
2 different than all the other homeowners. Her complaints
3 about how the repair was done is different than all the
4 other homeowners. In addition, the brick issues are
5 different on her home, as she admitted. Her flooring issues
6 are different on her home, as she admitted. Your Honor,
7 this has been the basis of our motion to decertify. The
8 statute of limitations gives a due process. It is the right
9 that we have. She clearly testified that she knew about it.
10 She's barred. And that one thing alone, at least as the
11 site, means she cannot be the class representative for that
12 part of the claim. And if she's barred, then that part of
13 the claim is barred. It also highlights, Your Honor, that
14 if we ask all of the other homeowners those same questions,
15 this exact same due process South Carolina constitutional
16 right is effectively being pushed aside and ignored. So, we
17 would ask you to grant us, right now, judgment on the site
18 grading water issue. Not to mention, she's changed her
19 entire backyard. Even her damages are different, Your
20 Honor. She's going -- and there's nothing in Rhett
21 Whitlock's that distinguishes between her \$5,000 plus the
22 back third of her yard from all the other damages, \$18,000 a
23 lot, for every other homeowner. Not to mention she admitted
24 on the stand that every lot is different and every lot needs
25 to be looked at individually and a plan needs to be come up

1 with each lot. She highlighted today the exact issues with
2 this class certification.

3 Your Honor, I could probably go on and on about this,
4 but that testimony today is exactly why she cannot be the
5 class rep. Your Honor, at the beginning of her case -- and
6 we've put this in front of the Court many times. She talked
7 about the reliance on D.R. Horton's representations, on D.R.
8 Horton's websites, on the document that was given to her
9 about the windows and the things in her houses. At least
10 half of those homeowners out there didn't buy their house
11 from D.R. Horton. And so, what you've got today, is this
12 woman talking about things, her relationship with D.R.
13 Horton, and what D.R. Horton told her, and what D.R. Horton
14 did with her that half of the Plaintiffs, the absent class
15 members, don't have. Half of that evidence that is now in
16 front of that jury has absolutely nothing to do with the
17 second class of homeowners that is clearly set out in Judge
18 Maddox's order, which I'd like to point out was likely
19 prepared by Mr. Lucey.

20 This is why we've asked the Court to make two classes,
21 because that evidence is not appropriate for the second
22 class. Her testimony on damages is different than every
23 other class member out there. Her testimony in the statute
24 of limitation could be different than every other class
25 member out there. Certainly ones that bought in '16 and '17

1 that wouldn't have statute of limitation, but the ones that
2 bought in '12, '13, and '14 could, Your Honor. That is the
3 reason that we think one, her grading claim has to be
4 dismissed. And two, we would ask again that this class be
5 decertified.

6 THE COURT: Mr. Lucey?

7 MR. LUCEY: Yes, Your Honor, the motions have already
8 been denied before trial and absolutely nothing just
9 changed. They're re-arguing motions that have not been
10 denied. Excuse me, that have been denied. That's against
11 the court rules and it's against our procedure. If the
12 court would like me to argue this motion again on the merits
13 at an improper time, I'm happy to do so. But the motions
14 have been denied before, and the court didn't hear anything
15 on that witness stand that wasn't in the summary judgment
16 memos and the summary judgment depositions and the de-cert
17 memos and the de-cert evidence that was all considered by
18 this court over the course of a month during the middle of
19 the summer. But I'm happy to re-argue it if the court wants
20 to entertain their untimely motion.

21 MR. IMHOFF: Just to clarify that. So, the law is very
22 clear on this. You, Your Honor, after hearing the evidence
23 are allowed to revisit certification and decertification at
24 any time and that's why we brought it now. It is the
25 appropriate time when the Rep just got off the stand.

1 THE COURT: Mr. Ross wants to say something.

2 MR. ROSS: Yes, your Honor. Thank you. I think there
3 is new information. Obviously, you've got the class Rep
4 testifying and I think this is very important, and I join in
5 Jason's motion. But at approximately 2:32 today, the class
6 representative said, and I quote under -- she said this on
7 the witness stand. "I cannot speak for the rest of the
8 class." She said that verbatim. I think that supports
9 Jason's argument and we reiterate it. And we ask the Court
10 as well to decertify the class.

11 THE COURT: Yes, sir.

12 MR. LUCEY: Would the Court like me to address Mr.
13 Ross's untimely motion on the merits?

14 THE COURT: The general arguments that they made, we
15 don't need to go over that again, because we had a hearing
16 on it. But what has been brought out in trial today, what
17 Mr. Ross just mentioned, please respond to that.

18 MR. LUCEY: Yes, Your Honor. There was a number of
19 issues. And she did say I can't testify for the class,
20 because they tried to take her off onto collateral issues
21 that she doesn't have to be an expert in. She doesn't have
22 to know the modification that's been made to every class
23 member's backyard. That's not part of her general class
24 representative responsibility. Her responsibility is to
25 look out for the class in this litigation on the claims that

1 are being made. She doesn't have to become an engineer.
2 She does not have to become an attorney. She doesn't have
3 to become a Zillow expert. She doesn't have to get an
4 evaluation in every class member's house. Those are the
5 type of questions that she said I can't speak for the
6 classes. For instance, how many are selling. I can't speak
7 to the class as to who's selling. I'm not here for that. I
8 have not looked up if they've made money or lost money on
9 their houses. And, for instance, the value that that Mr.
10 Ross wants to rely on that she can't speak for the class as
11 to the value or how many houses are on Zillow or what have
12 you. What none of these people asked was well hey everybody
13 knows that real estate values have quadrupled during COVID.
14 Did your values only double? That issue has not come up.
15 They just use valuation in the abstract.

16 Your Honor, the class representative has testified on
17 behalf of the class admirably and there was absolutely
18 nothing new in her testimony. In the affidavits in
19 opposition to summary judgment, the issue of the pool was
20 addressed. The issue of her having brought the standing
21 water in the yard to the attention of D.R. Horton and being
22 assured by them that it was natural. It was due to the red
23 clay in this area, and that it's fine, and her reliance on
24 that, that was addressed, Your Honor, during summary
25 judgment.

1 The estoppel and equitable tolling that was created by
2 the situation with D.R. Horton making those representations,
3 and still being in control of the neighborhood, was
4 addressed during summary judgment and decertification. The
5 issue of structural differences in her claim versus the
6 other class members claim. To start with, the structural
7 differences that they think they got out of her, a non-
8 engineer, were already put to rest by the testimony of Larry
9 Stephen Moore yesterday morning. We confirmed that the
10 stone is on these houses in two ways. No, she doesn't know
11 that she has both ways. I think she might think she only
12 has stone on brick. I couldn't hear the testimony clearly.
13 Mr. Imhoff's back was to me. I couldn't hear all of the
14 questions and all of the testimony. But she, in fact, has
15 and I believe we went through this with Mr. Moore. She has
16 brick applied stone under the water table. She has wood
17 framing applied stone in the arch at the top of the front of
18 her house. She has the exact same stone as every other
19 house in this neighborhood. All of them have one of two
20 types. She has both brick applied stone, wood framing
21 applied stone.

22 As to the brick issues, this beam is the biggest red
23 herring anybody's ever seen. Yes, they replaced the beam.
24 The beam is gone. They put the brick back up the same way
25 they put it up the first time. They didn't correct the

1 original code violations. They reinstalled the same code
2 valuations. So, then she has a new brick sidewall missing
3 the same isolation joint that it was missing before they
4 rebuilt the sidewall, which is the same isolation joint
5 that's missing that's causing her second floor window brick
6 to be cracked. Which is the same isolation joint that's
7 missing on every other house in this neighborhood with
8 either second floor brick above first floor roof, or second
9 floor -- excuse me, first floor brick above garage. They're
10 all missing the same isolation joint. She's missing it in
11 her original 2013 front wall, and she's missing it in the
12 rebuilt 2019 sidewall. It's the same joint that everybody
13 else is missing. She also has the other brick defects that
14 everybody else has. She's got step cracking next to the step
15 to the carriage light. There's a step cracking next to the
16 carriage light on the original 2013 front wall, and there's
17 step cracking next to the carriage light on the side wall
18 next to the garage. She has the same -- as to the inside as
19 to the concrete flooring. They took up the flooring five
20 months ago and she has cracks running through the middle of
21 her living room. Unsealed cracks allowing Radon to come
22 through her floor into her house, if it's in the ground
23 below her houses. Same as all the other cracking that's
24 been discussed in this case.

25 So, she's got all the same defects. She has

1 represented the class admirably. She testified that she has
2 reviewed the extra reports, doesn't necessarily understand
3 them, can't interpret them, may not have the language, but
4 she reviewed them and ---

5 THE COURT: Address Mr. Imhoff's argument regarding
6 grading issue.

7 MR. LUCEY: Yes, sir. On the grading, the grading is
8 the exact issue that came up in summary judgment. She
9 brought the standing water to their attention within the
10 first year of warranty. She was assured by Carl Rurode that
11 it was normal for the area. He laughed at them and said,
12 hey, you're from Chicago. You must not know what this hard
13 red clay is. It's normal. It's no problem. You're fine.
14 Based on that assurance, they understood themselves to be
15 fine. It wasn't until an engineer looked at the property
16 and said, well, actually there's a reason you have standing
17 water, because it's not graded properly that she realized.
18 But actually, the assurance given to her by D.R. Horton that
19 it is fine, it is normal, was inaccurate and that should be
20 part of this claim. Yes. Yes, they're trying to penalize
21 her for putting in a pool in a backyard she supposedly
22 owned. The class representative should not be penalized for
23 having put in a pool and trying to enjoy her yard while this
24 litigation played out. She testified that she spent \$5,000
25 extra in the installation of that pool to correct the

1 grading in that main portion of the yard while the pool was
2 being installed. But the degrading from the back third of
3 the yard still had not been corrected. That is the hill
4 that runs from the fence back towards, I believe, back
5 towards the pool. That has still not been touched. She did
6 not say that she's entitled to the exact same. And if the
7 jury thinks that the Defendant is entitled to a reduction on
8 her portion of the grading because she put in a pool and
9 shouldn't get her \$5,000 back, or shouldn't get any money
10 for the last third of her yard, they're entitled to take
11 that deduction. They're entitled to argue that deduction,
12 but that doesn't make her unsuitable as a representative.

13 THE COURT: No, address his argument regarding the
14 statute of limitations.

15 MR. LUCEY: Statute of limitations. She brought the
16 standing water to their attention during the one year
17 warranty period. She testified in her deposition submitted
18 to this court at summary judgment, and on that witness stand
19 this afternoon. She brought it to D.R. Horn's attention.
20 Their representative named Carl Rurode. He and the other
21 representative, I think a guy by the name of Jim Wilson,
22 assured her that this was fine. This was the local hard
23 read clay. There was nothing wrong with their storm
24 drainage. Because of their conduct, she did not believe she
25 had a claim, a warranty claim, or any other kind of claim

1 regarding storm drainage. They had told her it was normal
2 and, in fact, Your Honor, that would have been in the
3 second-half of 2013 or into 2014. During the first year she
4 owned her house. At that time, the developer was still in
5 control of this entire neighborhood. The testimony today
6 was the developer retained control of the neighborhood until
7 July 2017. It was only then they turned the neighborhood
8 over to the homeowners. Because of their control, that
9 gives rise to equitable estoppel also, in addition to the
10 equitable tolling, by them having assured her that it was
11 normal. There was nothing to do about it. Thank you, sir.

12 THE COURT: Yes, sir, Mr. Imhoff.

13 MR IMHOFF: Your Honor, I would ask that we be able to
14 present you with the actual case law on equitable tolling.
15 And it is not "somebody told me, so I closed my eyes and
16 didn't exercise my rights". In fact, what equitable tolling
17 says is that you equitably get to toll your claim if you're
18 told by the contractor that it's fixed and they're coming
19 back to fix it. That's not what was told to Ms. Zitek.
20 This is not equitable tolling. It does not meet the
21 standard for equitable tolling. And I'm not going to tell
22 you what Mr. Lucy wants to testify about. I'm going to tell
23 you about what Ms. Zitek said, and she said that at the back
24 part of her property, the third that she still wants
25 compensation for. Her testimony was that there's no

1 standing water back there. What Mr. Lucy is talking about
2 isn't even the same thing she's asking for damages about.
3 She was talking about where the pool is now, but she's
4 asking the jury to award her damages different from all of
5 the other class members, for the back hill. Equitable
6 tolling is very clear, and this is not it. There's no
7 equitable tolling here. So the statute of limitations in
8 effect, and it should be dismissed, Your Honor.

9 Going back to what the clear law is on class
10 certification, it must be common and typical, commonality
11 and typicality. Her backyard and her damages and defenses
12 to them are not common and typical on her backyard. If they
13 wanted to do a damages model that then said to the jury,
14 everybody gets this amount, except Natalie Zitek gets less
15 amount because she's got a pool in there, then they have to
16 do it for everyone else that put a pool in or put a patio in
17 or changed the grade of their property. And that's the
18 issue with this class certification. Your Honor, I think
19 the case law, Rule 23 on class action, certification,
20 commonality, typicality, the fact that they have one damage
21 for this. But Ms. Zitek admitted her damage is different.
22 And the statute of limitations requires this court to
23 dismiss, at the very least, that part of the claim. Because
24 what we're going to do, all these lawyers in this room,
25 we're going to ask those twelve people who don't -- who

1 aren't lawyers or construction people to figure it out, but
2 they get one damages model. We're going to ask those people
3 to figure out what's commonality, what's typicality, what
4 meets Rule 23, and what damages to award.

5 Your Honor, that's not fair to that jury. It's not
6 fair to D.R. Horton. It's not what the law says. If -- and
7 Mr. Lucey can argue all he wants that this case is
8 decertified, that he gets to bring 200 more cases again, and
9 that's tolled or whatever. But that does not mean that this
10 case should be submitted to that jury with this unclear
11 liability, damages, and experiences, Your Honor.

12 MR. LUCEY: If I may.

13 THE COURT: Yes. Then I'll give you the last, last
14 word, Mr. Lucey.

15 MR. ROSS: Thank you, Your Honor. As to the statute of
16 limitations issue, I just heard the equitable polling
17 argument, which was expected. I have no position on that.
18 But that certainly does not apply to the subcontractors.
19 And there's a case on point on this which is Dean V Ruscott,
20 321, SC 360. It's a 1996 case. It's a construction defect
21 case in Charleston where they're doing pile driving
22 activities. Owner had some suspicions that they might have
23 continuing damages to their house and the Court said the
24 statute starts running when you knew or should have known
25 you had a potential problem.

1 Ms. Zitek just testified that she had her brick
2 replaced or addressed between 2013 and 2014 twice and
3 multiple other times before, at least in this case, my
4 client, JLS, way before they were served which was in 2022.
5 So the equitable tolling argument does not apply to JLS, and
6 frankly I don't think it applies to any of the
7 subcontractors. We would ask to be dismissed on the statute
8 of limitation as well.

9 THE COURT: Yes, ma'am?

10 MS. CANADAY: Thank you. May it please the Court. I
11 would agree with Mr. Ross. I represent Jesus Jimenez who is
12 a fourth party defendant at this point. I would join in his
13 as well.

14 THE COURT: Thank you, ma'am. All right, Mr. Lucey.

15 MR. LUCEY: Yes, Your Honor. Since Mr. Imhoff doesn't
16 recall, let me read it to the Court. "A Defendant will be a
17 estopped to assert the statute of limitations in bar of a
18 Plaintiff's claim when the delay that otherwise would give
19 operation to the statute has been induced by the Defendant's
20 conduct. The doctrine is, of course, most clearly
21 applicable where the aggrieved party's delay in bringing
22 suit was caused by his opponent's intentional
23 misrepresentation. But deceit is not an essential element
24 of estoppel. It is sufficient that the aggrieved party
25 reasonably relied on the words and conduct of the person to

1 be estopped in allowing the limitations period to expire.
2 The conduct may involve either inducing the Plaintiffs to
3 believe that an ample adjustment of the claim will be made
4 without suit, or inducing the Plaintiff in some other way to
5 exercise his right to suit. Some Court's hold that repairs
6 by a defendant may toll the statute. One's assurances to an
7 injured party that defects can be corrected, coupled with
8 attempts to repair them. We're not arguing that second
9 portion. So, clearly Magnolia North applies, and the Court
10 seems to be entertaining two different issues that have been
11 confused together at the same time by the party's argument.

12 There's one issue, which is whether or not the statute of
13 limitations should bar the grading issue. The grading issue
14 is unrelated to the brick defect issue. If, in fact, it
15 were barred, which is not -- we'll talk about just a minute
16 more. If it were barred, that would not affect the rest of
17 the issues in the case, one. Two, class certification law
18 is very clear. The case only needs one dominant common
19 issue to proceed as a class action. Clearly the brick and
20 stone by the same mason crews through the life of this job
21 and the defective windows are the two dominant issues in
22 this case. The Court heard Plaintiff examine the defense
23 expert on the dominant issue several hours yesterday
24 morning.

25 One thing we need to remind the Court of is not only do

1 these third and fourth party defendants have no standing to
2 argue anything regarding the Plaintiff, they're not in my
3 case. But there is not a grading subcontractor over there
4 with subject matter standing because D.R. Horton used
5 plaintiff's grading claim to collect \$1.65 million from all
6 the grading subcontractors. Clearly there was common
7 issues. The Court needs to take judicial notice of that
8 result. For the Defendant who caused all of the bad grading
9 in the subdivision to use Plaintiff's common claim to
10 collect 1.65 million out of the grading subs and then argue
11 that the grading is not a common issue is, Your Honor,
12 certainly arguing out of both sides of the mouth.

13 With regards to returning to the statute of limitations
14 issue for just one moment, Your Honor. We just won, my law
15 firm just won the case known as Walmart, excuse me, Wolbeck
16 v The Iron Company on February 8, 2023. It's a case I
17 filed. I took it in 2009. I filed it in 2010. I tried it
18 in 2014. I won in the Court of Appeals in 2018. The same
19 panel reversed themselves in the Court of Appeals in 2019,
20 and the Supreme Court reinstated my entire verdict on May 8,
21 2023. And the basis, a large portion of the basis of that
22 reinstatement, Your Honor, was that there was enough of a
23 factual issue, that the issue, the statute limitations
24 decided by the jury, was properly submitted to the jury.
25 And here, it's a question of fact. When Natalie and the

1 class knew or should have known they had a class-wide claim
2 for defective grading against D.R. Horton, I was assuring
3 them it was fine. Thank you, Sir.

4 THE COURT: This is a an unusual motion in that it's
5 being made after the plaintiff testified rather than at the
6 conclusion of the plaintiff's case. We have not heard all
7 of the evidence in the in the plaintiff's case. But
8 however, it is a unique situation in that it is a class
9 action and this is the class representative that has
10 testified. And Mr. Imhoff, you are correct in that a
11 decertification motion can be made at that at any time. Now
12 however, in this situation I will note the plaintiff has
13 testified that she was unaware of any defects and the
14 defects that -- some brick cracking and other defects were
15 pointed out to her by the expert. She relies on the expert
16 for damages. Now, whether or not the jury finds that
17 credible, that's a factual question. And Mr. Imhoff, you
18 rigorously cross examined her on that issue and again that's
19 that's up to the jury to determine. At this point I'm not
20 going to dismiss the case or find that the statute of
21 limitations applies. I'm going to let the case go forward.
22 However, you may revisit this in the direct verdict stage at
23 the conclusion of the plaintiff's case. Certainly, I want
24 to hear the rest of what's being presented.

25 The plaintiff did testify that there are some common

1 issues. Again, the weight of that, that's a jury question if
2 it gets to that point, but I'm not going to dismiss the case
3 at this point.

4 MR. IMHOFF: Thank you, Your Honor. The second part was
5 just the second class members all the evidence that was put
6 in about the sale of D.R. and all that. Are we going to
7 have a -- you asked us to bring this up your honor as the
8 facts were developed and here's here's why. This is why the
9 second subclass ---

10 THE COURT: I want to hear the rest of what the
11 plaintiff wants to present in the case and then we'll deal
12 with that. But at this point I'm unclear on how we're going
13 to go forward with that based -- just based on her
14 testimony. So, with that, is there anything else?

15 MS. WOOTEN: Yes, Your Honor. Mr. Lucey has indicated
16 that he's going to attempt to publish the deposition of Carl
17 Rurode. On August 28 of this year we filed our objections
18 to publication of that deposition.

19 THE COURT: Hold on. All right. Go ahead, Ms. Wooten.

20 MS. WOOTEN: Sure. Your Honor, under Rule 32 of the --

21 MR. LUCEY: Can I interrupt? Can we have a copy of the
22 objection. We never got it online.

23 MS. WOOTEN: It's on -- it's on file. He found it.
24 This was E filed.

25 MR. LUCEY: A Carl Rurode objection?

1 MS. WOOTEN: Yes.

2 MR. LUCEY: I got one objection. It wasn't Carl
3 Rurode.

4 MS. WOOTEN: Oh, I have 10, like 10, that were filed
5 August 20.

6 MR. LUCEY: I don't want to hold things up. Go ahead.

7 THE COURT: Have you have you located it, Mr. Lucey?

8 MR. LUCEY: No, we haven't it. Could we do our
9 afternoon break while they try and pull it up?

10 THE COURT: Let's go ahead and do our break and then
11 you can find it.

12 (WHEREUPON, there was a break from 3:20-3:30 p.m.)

13 MS. LYNN: Your Honor, one thing before we call the
14 jury.

15 THE COURT: We've lost Mr. Lucey.

16 MS. LYNN: We can proceed with this one thing while he's
17 in the bathroom. Natalie's daughter is in the hospital, so
18 we want to release her. We just want to let the jury know
19 that's why she's not here.

20 THE COURT: Okay. Well, good luck.

21 PLAINTIFF NATALIE ZITEK: That was perfect timing. Oh
22 my God.

23 THE COURT: Good luck.

24 PLAINTIFF NATALIE ZITEK: Thank you so much.

25 THE COURT: Here he comes. Mr. Lucey, were you able to

1 get a copy of their objection?

2 MR. LUCEY: Yes, Your Honor. And the confusion is
3 this. They filed an objection to a Carl Rurode designation
4 by ML Reyna. That's how it's briefed. In the last
5 sentence, they go on to say, "And we object to any other
6 party publishing too". The Plaintiff would submit to the
7 Court that that's not in compliance this Court's
8 instructions for the deadline for filing objections.
9 Plaintiff did not get an objection to its designation of
10 publication of Carl Rurode. There was one at ML Reyna with
11 the tagline and the last sentence that we don't believe is
12 proper under the Court's scheduling order.

13 MS. WOOTEN: Your Honor, if I may respond briefly.

14 THE COURT: Yes, ma'am.

15 MS. WOOTEN: The motion is entitled Defendant D.R.
16 Horton, Inc's Objections to Publication of Deposition of
17 Carl Rurode, not to MJ's. Now, in the body of the brief, I
18 mentioned MJ because I say -- I mean M&L Reyna, because they
19 did designate portions before I filed this objection. And I
20 went on to say, for these reasons the -- neither ML Reyna
21 nor any other party to this case should be allowed to
22 publish any portion of Mr. Rurode's testimony. I had twenty
23 other people filing deposition excerpts and I filed one
24 objection that was meant to cover everyone and that's why
25 that last sentence was put in there, Your Honor. So, we do

1 object to the publication. It's against the rules. And Mr.
2 Lucey knows it's against the rules. The Rule 32 of the
3 South Carolina Civil Rules of Procedure state that any
4 deposition may be used for the purpose of contradicting or
5 impeaching. So, he can still use the deposition if he wants
6 to impeach, but only the deposition of a party or who anyone
7 at the time had taken the deposition was an officer,
8 director, or managing agent or 30(b)6 designee can be taken.
9 This person, Mr. Rurode, is not a managing agent. There's
10 no contradicting that. He also resides within 100 miles of
11 the courthouse, and thus is subject to subpoena. So, we do
12 object to the publication of his deposition.

13 THE COURT: Do you have him under subpoena?

14 MR. LUCEY: No, because we had no objection to the
15 publication. The objection reads -- it refers to the ML
16 Reyna Construction, LLC has designated portions of the
17 deposition of Carl Rurode, an employee D.R. Horton. Nowhere
18 does it address Plaintiff's designation of the publication
19 of Carl Rurode.

20 MS. WOOTEN: Your Honor, the ---

21 MR. LUCEY: There was no need to send a trial subpoena
22 because there's no objection to the publication, Your Honor.

23 MS. WOOTEN: Your Honor, the title says objections to
24 publication. The real reason is Mr. Lucey's team didn't
25 have copies of it and they didn't get copies.

1 MR. LUCEY: We didn't need to download something that
2 wasn't directed at us. They objected to ML Reyna.

3 MS. WOOTEN: Well, the headline would have told you it
4 pertains to ---

5 THE COURT: Don't argue between yourselves. Do you
6 have another witness you could call this afternoon?

7 MR. LUCEY: Yes, Your Honor, and it was also by
8 designation and it was not objected to by D.R. Horton, and
9 this witness lives in Florida. They objected to Builders
10 First Source designation of Edmond Jeanfreau and not ours.
11 And it's the exact same language as we just heard on ML
12 Reyna, but here's no dispute this witness was in Florida at
13 the time of the deposition. I understand now he may be in
14 Georgia. Wherever he is, he's apparently more than 100
15 miles from here.

16 MS. WOOTEN: That is not true, Your Honor. He lives
17 here. He's within the subpoena of power of the Court. I
18 filed a specific objection for this witness. Edmond
19 Jeanfreau.

20 THE COURT: Is there is there any live witness that we
21 could call this afternoon?

22 MR. LUCEY: Your Honor, I actually have another
23 publication that did not get an objection.

24 THE COURT: Okay. Well, let's do something and then if
25 these witnesses live within 100 miles. I understand how

1 this happened because it is in the body of the document that
2 it's M&L Reyna Construction. Mr. Lucey, I understand why
3 you didn't subpoena these witnesses because you have thought
4 that there was no objection with that the way the thing was
5 filed. But it does say on the caption, just a general
6 objections to publication of deposition of Carl Rurode. But
7 the way the E-filing system files documents, it has a party
8 list and I that's just the world in which we live in now.
9 And I understand, Mr. Lucey, how you would -- what you would
10 have thought. But let's do the one that's unobjected to and
11 then you issue a subpoena and get the other two here since
12 there's an objection. Get the other two here live.

13 MS. WOOTEN: We will get them live here, Your Honor.
14 They're coming, right? Both of them are coming. They're
15 both coming.

16 MR. LUCEY: Sir, my third publication also does not have
17 an objection by the defendant in compliance with the Court's
18 deadline. It's the publication of Pam Williamson, who was a
19 30(b)6 witness. As a 30(b)6 witness, her deposition can be
20 used for any matter Plaintiff chooses. I'm now hearing that
21 there's going to be an objection, because they intend to
22 call her live. That's not a basis for an objection. We're
23 entitled the publish. Thank you, sir.

24 MS. WOOTEN: We would accept whatever the Court rules on
25 that because she will be here to testify.

1 THE COURT: 30(b)6 is specifically outlined in the
2 rule.

3 MS. WOOTEN: I understand, Your Honor.

4 THE COURT: Mr. Lucey is entitled to present that. All
5 right. Well, let's do the two then that you have that we
6 can do right now, and you get the other people here live.
7 Anything else? All right. Let's get our jury.

8 (WHEREUPON, jury entered courtroom at 3:33 p.m.)

9 THE COURT: Mr. Foreman, ladies and gentlemen of the
10 jury, a couple of things. First of all, while we were
11 taking our break, the Plaintiff's daughter went into labor,
12 so she had to leave. They asked the Court to inform the
13 jury that that's why she's not here. So, everyone in the
14 courtroom has wished her luck and that's why she's not here.
15 Second thing is that the next stage of the trial will be
16 deposition testimony. Lawyers are going to present
17 deposition testimony. A deposition is an out-of-court
18 statement by a witness in which it's a procedure where the
19 witness is placed under oath and the lawyers are able to ask
20 the witness questions, and under certain circumstances those
21 depositions can be used in a trial of a case. And so that's
22 what we're going to do now, is have some deposition
23 testimony. Deposition testimony that's admitted in a case
24 should be given the same consideration by you as a jury as
25 if the witness had testified live in the courtroom. Mr.

1 Lucey.

2 MR. LUCEY: Your Honor, our plaintiff's going to call
3 D.R. Horton manager Pam Williamson, and she'll be published
4 by deposition by Mande Finai and Charlotte Winkler.
5 Charlotte will take the stand and read the answers. Mande
6 will be asking the questions. may I begin? Your Honor. Yes,
7 ma'am.

8 (WHEREUPON, deposition transcript published.)

9 MS. WOOTEN: Your Honor, may we approach?

10 THE COURT: Yes, ma'am.

11 (WHEREUPON, bench conference.)

12 MR. LUCEY: We have agreed to insert a paragraph into
13 what you are reading, and since you two don't have the same
14 copy, I'll read that question and answer. May it please the
15 Court. I'm reading from page 247, line 2. Ignore question.
16 Ignore the legalese and the answer to the Second Amendment
17 complaint. There has been a claim asserted, a factual claim
18 asserted by D.R. Horton in this matter, that the plaintiffs
19 didn't bring their claims promptly enough. Are you aware of
20 any facts that support that claim? Answer. I would say
21 that they have a limited warranty from time of closing and
22 that if they have a request or a complaint that exceeds that
23 time frame, then I would attain say yes, they were out of
24 their scope, out of their time frame. Do I know all the
25 legal stuff or all that, all the other ways? No. I deal

1 with the warranty, and for me it's pretty cut and dried." I
2 believe you can now continue at line 16.

3 (WHEREUPON, deposition transcript published.)

4 MR. LUCEY: Your Honor, that concludes the publication
5 of Pamela Williamson. The plaintiff calls witness,
6 Christopher de la Torre, the 30(b)6 witness of JLS Masonry
7 by deposition publication again.

8 (WHEREUPON, deposition transcript published.)

9 MS. WOOTEN: Your Honor, I'm sorry. We have another
10 objection to this.

11 THE COURT: I thought we resolved all that. Come up
12 here.

13 (WHEREUPON, bench conference.)

14 THE COURT: Mr. Bailiff, take the jury to the jury
15 room, please. We will bring them right back.

16 (WHEREUPON, jury exited courtroom at 4:46 p.m.)

17 MS. WOOTEN: Have y'all deleted anything out of this
18 one, like you did the last one?

19 MR. LUCEY: I will check. I don't think anything's
20 been removed. I'm double checking to make sure.

21 MS. MARTINEU: Thank you, Your Honor. Elizabeth
22 Martineau, on behalf of JLS. We wanted to object to reading
23 into the record during the trial of this matter those
24 portions of Christopher dela Torre 30(b)6 witness for JLS
25 regarding the amount of money they've earned working for

1 D.R. Horton. It starts looks like De la Torre transcript
2 19521 through 19923 where he, on page one 196 where it
3 starts. Question. That would be like well over \$1,000,000
4 a year worth of work for D.R. Horton presently? Correct.
5 Through 197 where the answers are about how much money they
6 do a year, possibly three million a year, and then it goes
7 on. Question. So, two, three million a year now with the
8 slow down. Answer. I'll probably say a little bit over a
9 million right now. We would object to that based on 403, as
10 well as relevance.

11 MR. LUCEY: As we discussed at the bar, Your Honor, no
12 objection was filed by this party in compliance with the
13 court's scheduling deadline for publication objections.
14 And secondly, this goes to the witness's bias. He has for
15 twenty years now been doing \$3,000,000 or so a year for D.R.
16 Horton and we believe it's relevant.

17 THE COURT: Well, I find this is relevant evidence, so I
18 would overrule the objection. I also note that objection
19 for the record Ms. Martineau. Mr. Mims, you had one?

20 MR. MIMS: I was going to say, Your Honor, you ruled on
21 ours from the bench. Do we need to put up --

22 THE COURT: Just for the record, put that on the record
23 that was regarding ---

24 MR. MIMS: So, at the bench a few moments ago we raised
25 an objection pursuant to our timely objections filed with

1 the Court as to services to EIFS stucco barrier systems,
2 things of that nature, that are contained within this
3 deposition at page 224 line 4 through 225 line 9. Which
4 talks about EIFS litigation in North Carolina and barrier
5 system, quote/unquote, the EIFS fiasco. I believe Your
6 Honor ruled from the bench in our favor.

7 MR. LUCEY: The Plaintiff removed it pursuant to the
8 court's ruling, Your Honor.

9 THE COURT: Yes, sir. No, we had already dealt with
10 that in the motions the other day, so that we there would be
11 no mention of the EFIS.

12 MR. LUCEY: We're presently on page 22 of 66 in this
13 publication, Your Honor, that's PDF pages, it's 4:50. Do
14 you want us to try and get all 40 pages in, or you want us
15 to stop at few minutes after the hour? What would the Court
16 please?

17 THE COURT: Well, I don't think it'll take that long if
18 we don't have any other object. Are there other objections?

19 MS. WOOTEN: Your Honor, there's some portions of the
20 testimony for right now where he gives -- this witness gives
21 opinions about what may or may not be required of D.R.
22 Horton on the supervision side. We would object.

23 MR. LUCEY: Is there a question, Your Honor, in their
24 deposition and no objections were timely filed pursuant to
25 the court's order or we'd be more prepared to argue these

1 reoccurring objections.

2 THE COURT: I don't see an objection that's filed for
3 those particular.

4 MS. WOOTEN: I think we did file.

5 THE COURT: All right. Well, if no objection was filed,
6 then they come in. Anything else? All right, let's plow
7 ahead and let's get it finished so that we can start with a
8 new witness in the morning. It's EIFS?

9 MR. MIMS: It's synthetic stucco. It stands for
10 Exterior Insulating Finishing Systems.

11 (WHEREUPON, jury entered courtroom at 4:54 p.m. Resumed
12 publishing transcript.)

13 THE COURT: Thank you, ma'am. You can step down.
14 Ladies and gentlemen, that will conclude our day and a long
15 day. Thank you for your patience today. We will start back
16 in the morning at 9:00. I hope everyone has a good evening.
17 Remember your instructions. Leave your notebooks in the
18 courtroom.

19 (WHEREUPON, jury exited courtroom at 5:28 p.m.)

20 THE COURT: Anything from anyone before we adjourn for
21 the day?

22 MS. WOOTEN: Yes, sir.

23 MR. LUCEY: Again?

24 MS. WOOTEN: Again. This is quick, Your Honor. The
25 proffer that we were going to do after lunch today, remember

1 that our witness, John Martin, he had to go back to Memphis.
2 So, he's going to come back for the proffer at a later
3 during our case so that we don't take Mr. Lucey's time with
4 that. Is that suitable for Your Honor?

5 THE COURT: I'll leave that up to y'all.

6 MS. WOOTEN: All right. And then the last thing is the
7 witness order for tomorrow. To avoid these kind of issues,
8 we need to know who Mr. Lucey is going to be calling and in
9 what order?

10 THE COURT: My understanding, Mr. Lucey, is you're
11 going to call Dr. Whitlock?

12 MR. LUCEY: Yes, sir.

13 MS. WOOTEN: And we have some witnesses that are under
14 subpoena from Mr. Lucey that are.

15 MR. LUCEY: I have been emailing you all constantly on
16 those, I believe.

17 MS. WOOTEN: I know. We just want to know if you're
18 not going to get to them tomorrow.

19 MR. LUCEY: I don't think you all will finish with Dr.
20 Whitlock in time for me to get to them tomorrow. If you all
21 plan to be short, I'll be happy to get to them tomorrow.

22 THE COURT: Y'all discuss that.

23 (WHEREUPON, off the record discussion regarding
24 scheduling.)

25 THE COURT: We are adjourned for the evening.

1 TRIAL DAY 4: SEPTEMBER 8, 2023

2 (WHEREUPON, the trial commenced at 9:05 a.m.)

3 THE COURT: When I was downstairs a while ago I
4 received a note from a Juror Number 479. Apparently this
5 juror did not realize one of the witnesses was a co-worker
6 and a friend that he had known in the past and he
7 inadvertently talked to this person. He responded to me
8 that he didn't disclose this in voir dire on Tuesday because
9 he didn't think it was the same person, and he found out
10 that it was. I just talked to this juror and I don't
11 believe he did anything intentionally. But, out of an
12 abundance of caution, I have dismissed this juror from the
13 case since he's had contact with a potential witness in the
14 case. Which that brings us down to two alternates, and I'm
15 going to question the remainder of the panel this morning to
16 make sure no one else has had any conversations with any
17 third parties about the case. But let's make this a Court's
18 exhibit.

19 (WHEREUPON, jury note marked Court's Exhibit Number 5
20 For identification.)

21 THE COURT: Alternate Number 2 now would become a
22 primary juror. So, we still have we still have two, but it
23 always causes the Court concern when we start losing jurors,
24 and especially with this much time as we have invested in
25 this. But, all right, any matters that we need to take up

1 before we bring our jury in?

2 MR. LUCEY: Noting from the Plaintiff, Your Honor.

3 MS. WOOTEN: Yes, your Honor.

4 THE COURT: Yes, ma'am.

5 MS. WOOTEN: Briefly, we would like Your Honor to
6 admonish the jury about media coverage. It's -- apparently
7 WSPA has chosen to put it on television, Facebook, every
8 media outlet. Apparently, news is slow these days, so if we
9 if the Court would do an admonishment on that. I'm afraid
10 we're going to lose more jurors.

11 THE COURT: Well, I planned to do that anyway.

12 MS. WOOTEN: Thank you, Your Honor.

13 THE COURT: I planned to do it in conjunction with a
14 question about the third parties. That's -- again, we're
15 down to two alternates, and with a lengthy trial, this is
16 not position I want to be in. Yes, sir, Mr. Imhoff?

17 MR. IMHOFF: Your Honor, I believe the Plaintiffs are
18 going to call Dr. Rhett Whitlock this morning. If you will
19 recall, yesterday, Ms. Zitek testified that she had a water
20 claim and had to replace all her floors, wood floors, and
21 that the concrete below was cracked, broken and they had to
22 work on it and all that kind of stuff. If you recall
23 further back, that information was provided to us after
24 discovery closed. We were provided pictures of it, but we
25 were not allowed to go look at it, or inspect it, measure

1 it. Your Honor, we would ask that if Dr. Whitlock has looked
2 at those pictures, or been to that house, or is going to
3 testify about that, that that be excluded as the Defendants
4 have not had an opportunity to look at that. It was
5 disclosed after discovery and it would be unfair to us if
6 they're allowed to use it and we are not.

7 THE COURT: Mr. Lucy?

8 MR. LUCEY: Yes, Your Honor. The Defendant has already
9 opened that door by asking Ms. Zitek about her floors. And
10 they questioned her at length about her flood. They didn't
11 have to go there. It was an insured flood event. She made
12 a claim. They even asked her about, started asking about
13 the insurance claim until Ms. Lynn objected, which of course
14 was improper. They opened that door completely, Your Honor.
15 They took Ms. Zitek's deposition in March of 2023. In that
16 deposition, she told them about the flood that had occurred.
17 They never asked for anything after that. They never
18 subpoenaed the insurance company for insurance claim.
19 Anything like that. Apparently it took two months for
20 Disaster Pro to finish cleaning, and for the insurance
21 company to adjust the claim. They started the repairs,
22 apparently while we were sitting in mediation. As part of
23 the repairs, they ripped out the flooring and they took
24 pictures of all the cracks running through her floors. She
25 immediately emailed them to us on the first day of

1 mediation. We immediately emailed them to the Defendant,
2 Your Honor, so they've had them since then. Your Honor will
3 also recall, please, two things. One, Defendants inspected
4 Ms. Zitek's house in August of 2020. This is besides all
5 the time they spent in her house trying to repair it for
6 five years. They inspected it in this litigation in August
7 of 2020. The Court then gave them an unlimited right to
8 choose 20 houses for destructive testing and detailed
9 investigation. They deliberately omitted Ms. Zitek's house
10 from that opportunity. They then came back to the court in
11 May after they got these pictures. Actually twice. They
12 came back to the court before they got these pictures and
13 said, hey, by the way, we still need to test the class
14 representative's house. And the court said to them, you've
15 had your 20 tests. Did you pick it? No. Okay, game over.
16 They came back after the pictures were provided to them
17 immediately and again asked the court to test, because they
18 said this is all new. And we again pointed out to the court
19 they could have listed her house as one of the 20 houses
20 where they did the destructive testing. All that said, Your
21 Honor, they opened the door on her flooding testimony. It's
22 already in evidence from her that there's a crack running
23 across that living room floor from end to end. That's in
24 evidence and it's in evidence as a result of their
25 questioning. Dr. Whitlock should be allowed to testify

1 about that picture of the crack in the floor.

2 THE COURT: Well, but let me ask you this. The issue
3 with the flooding is not -- is that's not part of the
4 damages in this case, is it?

5 MR. LUCEY: No, sir. No, sir. They did not have to open
6 that door. They did not have to ask her about her flooding
7 or that she lost her floors in an insured claim.

8 THE COURT: But that's not part of what Dr. Whitlock has
9 put in his report.

10 MR. LUCEY: The only relevance is, is that when Disaster
11 Pro came and ripped their thing out to dry things out, there
12 was pictures taken of the concrete slab and there's cracks
13 everywhere. They opened that door by asking her about the
14 flood.

15 THE COURT: So, the issue is you want to admit a picture
16 of the crack in the concrete slab?

17 MR. LUCEY: I'm not seeking to admit the picture, Your
18 Honor.

19 MR. IMHOFF: Your Honor, Mr. Lucey just gave you the
20 timeline and he's mixing a couple of different things. Even
21 if we had gone in March, or April, or May, we couldn't see
22 the floor below it, because he just said it didn't get torn
23 up until June. And that's -- we asked for it multiple
24 times.

25 You remember, you said, Mr. Imhoff, you've already asked me

1 this. What has changed? And I said, Your Honor, the floors
2 have now been taken up and we would like to go look at the
3 floors. So, the first question is, has Dr. Whitlock gone
4 and looked at the floors? If Dr. Whitlock is gone and
5 looked at the floors and we haven't, we think that's unfair.
6 Secondly, we haven't been able to evaluate any of this,
7 despite asking, because there's new evidence the floor came
8 up and exposed the concrete. As you heard, Your Honor, it's
9 very important about what size the crack is, where it runs.
10 And if Dr. Whitlock is the only one that can testify because
11 he's the only one that saw it, then we think that's an
12 unfair advantage. We think it should be kept out. If it's
13 going to be kept out for defendants, it needs to be kept out
14 for plaintiffs. And we didn't open the door to that for Dr.
15 Whitlock to testify about it. What we did is asked her
16 about her floors and the fact that they were able to put
17 them back, Your Honor. So, Your Honor, on the record, we
18 asked to do this. We foresaw this as being a problem at the
19 trial. We haven't been able to investigate it. And we
20 would ask that it be excluded. It was after discovery, Your
21 Honor, and we could not have seen it before June as Mr.
22 Lucey just admitted.

23 THE COURT: Has there been an amendment to Dr.
24 Whitlock's report about the crack?

25 MR. LUCEY: I'm sorry?

1 THE COURT: Has there been an amendment to his report
2 about the crack?

3 MR. LUCEY: No, Your Honor. Dr. Whitlock has not been
4 there. He got the same pictures that the defendant got and
5 the defendants learned about the floor damage during
6 discovery period before it closed.

7 THE COURT: All right. Dr. Whitlock is -- let's -- I
8 will grant the motion. Let's stay away from it. She
9 testified it had nothing to do with the claim. And if Dr.
10 Whitlock hadn't evaluated this and it's not a part of his
11 report, then I'll grant that motion. We'll stay away from
12 this issue.

13 MR. IMHOFF: Thank you.

14 THE COURT: All right. Anything else before we start?

15 MR. LUCEY: I would just mention that the defendants
16 have a habit of reopening doors, and I would think that if
17 they reopen that door, then that would be reconsidered.

18 THE COURT: Well, we'll evaluate that at that time.

19 MR. LUCEY: Yes, sir.

20 THE COURT: All right. Anything else? Let's get our
21 jury, please.

22 (WHEREUPON, the jury entered courtroom at 9:16 a.m.)

23 THE COURT: Good morning. Mr. Foreman, ladies and
24 gentlemen of the jury, before we get started, I want to talk
25 to you a little bit about your your restrictions. And I've

1 had to remove one of your fellow jurors this morning because
2 of inadvertent contact that he had with a witness. I don't
3 believe your fellow juror did anything intentionally wrong.
4 I'll state that at the outset. He's not in trouble, but I
5 had to remove him because he called up a witness that he
6 didn't recognize the name during voir dire on Tuesday. And
7 apparently one of the witnesses was a friend of his that he
8 didn't disclose to the court. Again, I think it was an
9 honest mistake, but it jeopardized the fairness and
10 impartiality of of the jury. So, it's very important that
11 we not have any contact with third parties about the facts
12 of this case. It's very important that we not try to
13 research this case as jurors, and that includes looking at
14 media. You saw yesterday that there was a television camera
15 in the in the courtroom. Do not refer to media to research
16 this case. That's very important.

17 The gravity of this situation is we now have two
18 alternates and if we end up losing people and we end up with
19 not enough jurors that jeopardizes this whole enterprise.
20 We might have to do the entire thing over again. So, it's
21 very important that you abide by those restrictions. And
22 again, nobody's in trouble. I'm not fussing at you about
23 that. I'm just emphasizing how serious this matter is. So,
24 with that said, we will begin today. The alternate Number 2
25 is a now a primary juror. So, Plaintiff call you next

1 witness.

2 MR. LUCEY: The Plaintiff calls Dr. Rhett Whitlock to
3 stand, Your Honor.

4 ALAN RHETT WHITLOCK, having first been duly
5 sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. LUCEY:

8 Q Good morning, Dr. Whitlock.

9 A Good morning.

10 Q Let's cover your personal and educational background
11 for three or four minutes and then we're going to cover your
12 professional background for the jury. Are you with me?

13 A Yes.

14 Q Let's talk about your personal background. Tell us
15 where and when you were born, sir.

16 A I was born in 1957 in Lake City, South Carolina. I
17 grew up there for a few years, then moved to Murrells Inlet
18 where I went to high school, Socastee High School.

19 Q Tell us, if you would please, where you live now.

20 A I live in Murrells Inlet, South Carolina.

21 Q Who do you live there with?

22 A My wife.

23 Q Do you have children?

24 A Yes.

25 Q And are they still in South Carolina.

1 A I have one that's still in South Carolina and the rest
2 are scattered.

3 Q How many?

4 A Between my wife and I, we have seven. Seven boys.

5 Q Murrells Inlet -- the jury probably knows -- what's
6 that, about 20 miles south of Myrtle Beach?

7 A About ten miles south of Myrtle Beach.

8 Q Let's talk about your education, sir. Tell us all
9 where you where you went to high school and what year you
10 graduated.

11 A I went to high school in Socastee, as I mentioned, and
12 when I graduated from Socastee, I went to Florence
13 Darlington Technical College in Florence, South Carolina and
14 I received a degree in Civil Engineering technology, a two
15 year degree. And I liked it. I liked the engineering, so I
16 went on to Clemson and I liked it there a lot too. So, I
17 stayed at Clemson for about six years and received my
18 Bachelor's degree, my Master's degree, and PhD in Civil
19 Engineering.

20 Q So, what was your specialty for your master's degree,
21 sir?

22 A Structural engineering with an emphasis in masonry.

23 Q Masonry being what, sir?

24 A Reinforced brick masonry. Grouted reinforced brick
25 masonry. Research that I was doing for the National Science

1 Foundation.

2 Q So, you're telling the jury your specialty for your
3 Master's degree at Clemson was brick?

4 A Yes.

5 Q All right.

6 Q What did you -- what paper did you write for your
7 Doctorate at Clemson.

8 A My Doctorate was on anchor bolts in masonry. The
9 seismic or earthquake resistance of anchor bolts in concrete
10 and brick masonry.

11 Q Let's come forward from when you got your Doctorate.
12 What year would that be, please?

13 A 1983.

14 Q '83. Let's come forward and give them an overview of
15 your professional background after you got your Doctorate,
16 sir.

17 A When I left Clemson, I went to Northern Virginia, just
18 outside of DC, and worked for a trade association known as
19 the Brick Institute of America, BIA. It's now known as the
20 ---

21 Q Let me stop you there, please. Is that the same
22 organization this jury heard about for the last two or three
23 days this week?

24 A That organization was mentioned several times, yes.

25 Q BIA?

1 A BIA.

2 Q Tell us what you did for the BIA and approximately what
3 year or years you were working there.

4 A Well, I started in 1983 as a research engineer for the
5 Brick Institute, and my job was to work with architects,
6 engineers, builders on the appropriate use of brick masonry.
7 I also did research for the Brick Institute and I worked
8 with universities on research involving brick masonry.

9 Q Roughly how long were you with BIA, please?

10 A Almost four years.

11 Q That would take us up to about '87?

12 A Yes.

13 Q What did you do after that?

14 A I left BIA and went to work for a consulting
15 engineering firm. I stayed on at BIA as a consultant. I
16 did training for them and some teaching for them and some
17 other stuff. But I became full time employed by an
18 engineering firm in Manassas, Virginia.

19 Q Tell us about that firm in Manassas.

20 A At the time, the name of the company was KIDDE, same as
21 the fire extinguisher. You may have seen that. It was a
22 large company. The engineering aspect of that company was
23 about eight or nine hundred people, and I was in charge of
24 an office in Manassas that had about twenty people at that
25 time.

1 Q What were you doing?

2 A I started off running their geotechnical engineering
3 laboratory and assisting in subsurface investigations for
4 buildings and homes, doing inspections of construction, and
5 I expanded that service into what's sometimes called
6 forensic engineering and structural engineering. And I grew
7 that division to about 60 people, from 20 to about 60.

8 Q The jury may have heard that term referenced
9 previously this week. Forensic engineering. Explain to the
10 jury what you mean when you use the term forensic
11 engineering, please.

12 A The study of buildings or other structures such as
13 bridges, parking garages, things that are built that have
14 problems. We would go in and investigate the problems and
15 diagnose the problems, find out why they're occurring and
16 come up with solutions to repair them.

17 Q And you started WDP in what year?

18 A I bought that firm. My division in Manassas was was
19 KIDDE Consultants, which then became KCI Technologies and I
20 bought that division from KCI in 1995 and became WDP,
21 Whitlock, Dalrymple, Poston and Associates.

22 Q So you've been practicing as WDP for roughly how long?

23 A Since 1995.

24 Q That would be roughly 28 odd years?

25 A Something like that.

1 Q Before we go into some of your experience, sir, tell us
2 if you would please do you have any licenses?

3 A I'm a professional engineer in -- I can't remember how
4 many states, probably 15 or so.

5 Q Including South Carolina?

6 A Yes.

7 Q Do you recall roughly what year you got licensed in
8 South Carolina?

9 A 1980 something.

10 Q And have you been a part of or participated in the Code
11 Councils or similar organizations over the years, sir?

12 A Yes, I'm a member of the the Masonry Society and I was
13 on the committee, the ACI 530 Committee, which was mentioned
14 a few times this week. I'm also on ASTM committees,
15 American Society for Testing and Materials.

16 Q Tell us, if you would, please. Let's start in reverse
17 order. Go to ASTM first. Tell us what these committees do
18 and what you would you would do as being part of that
19 committee, sir.

20 A ASTM is a standards writing organization. They write
21 standards for everything you see and use basically. My
22 involvement has been in the construction materials side;
23 masonry, brick and mortar, concrete block, lime, plaster,
24 stucco, plaster. I'm on those committees and I'm involved
25 in helping write the standards that those committees develop

1 for use in the building codes.

2 Q What do you mean by standards, sir?

3 A Rules and regulations for the use of materials and the
4 manufacturing of those materials.

5 Q Why do you need rules and regulations for the use of
6 materials?

7 A For uniformity, and for consistency, and so that people
8 get what they think they're going to get. Get what they pay
9 for.

10 Q Have you participated in writing standards in the
11 masonry industry?

12 A Yes, I have.

13 Q And in the brick industry?

14 A Yes.

15 Q And going back then, you also mentioned that the jury
16 had heard of ACI 530 earlier this week, and you had some
17 involved in that. Tell us about that, please.

18 Q That is a a building code requirement. It's similar to
19 the building code, but it's specific to masonry. It's about
20 this thick, and it covers everything from reinforcement for
21 masonry, the construction of the masonry, the materials that
22 are used, the design and mathematics that go into the design
23 of the masonry. Thank you. So, it's all inclusive for
24 masonry design construction.

25 Q Now, have you published from time to time over the

1 years, sir?

2 A I have.

3 Q Tell us just briefly about that, please.

4 A I published a lot of papers and articles on masonry and
5 and other other issues. I think there's a list somewhere.

6 Maybe it's in evidence, but I can't remember how many
7 publications, maybe 40 or so that I've published. And most
8 deal with construction materials and their use in buildings.

9 Q Tell the jury about a couple of your projects so that
10 they can understand a little better what you do in your
11 industry. Let me ask you first to tell the jury about your
12 work for over the years for UVA and some of the other
13 universities Atlantic Coast in Southeast United States.

14 A We do a lot of work for universities. UVA is a big
15 client of ours. About 20 some years ago, unfortunately
16 there was a commencement ceremony where people were
17 graduating and one of Thomas Jefferson's structures
18 collapsed and killed a lady, and we were hired to come in
19 and investigate why that balcony collapsed. From that
20 point, they had us go through every single building on
21 campus and investigate all the buildings to see what kind of
22 condition they were in. They didn't want that kind of thing
23 to happen anymore. And we're still there today. We have
24 about, I think, 15 people full time in Charlottesville,
25 Virginia, and most of our work out of that office is for the

1 university.

2 Q For UVA?

3 A For UVA.

4 Q So that's several decades of work with UVA?

5 A Yes, we also have a similar contract with Virginia
6 Tech. We have an office there as well in Blacksburg,
7 Virginia. We also work for William and Mary and other
8 universities in Virginia and and in DC.

9 Q Yes, sir, and speaking of universities, I forgot to ask
10 you about that and I apologize. Have you sat on any boards
11 or similar at Clemson?

12 A I was on the Civil Engineering Advisory Board at
13 Clemson, yes.

14 Q And roughly how long were you on that, please?

15 A I think about four or five years.

16 Q And what did you do as part of being on that board at
17 Clemson University?

18 A I met with the university, with the civil engineering
19 department professors, looked at their programs and what
20 they were teaching, met with students. Myself and others
21 gave advice to them on what we felt would be beneficial to
22 add or change in their curriculum.

23 Q Yes, sir. And let's tell the jury about your and your
24 firm's involvement in the United States Capitol
25 investigation.

1 A Several years ago, there was an earthquake in Virginia.
2 It wasn't a huge earthquake, but it was huge enough to where
3 it caused damage in DC and throughout Virginia. And we were
4 hired by the Architect of the Capitol, which is a division
5 of the of the Capitol, to investigate buildings in DC to
6 determine if there were any structural issues that would
7 preclude people from going back in, congressmen and
8 senators.

9 Q Let's talk about some more recent work. Tell us if you
10 would, please, about the work you've been doing for the
11 hotel chain named Marriott.

12 A I'm currently working on a project in Marco Island,
13 Florida on what's called Marco Island Resort, Marriott
14 Resort. It's a very large facility. I think they have
15 8,000 employees, maybe something like that. And it's --
16 they went through a construction phase that didn't go very
17 well and it has a lot of problems, and we've been helping
18 them try to figure out how to get those resolved.

19 Q How about telling us about telling us about your
20 involvement with MARTA down in Atlanta these days.

21 A We just completed a study for MARTA on a bridge
22 structure that had some vibration problems that was
23 frightening some of the passengers. As the rail cars would
24 go over the bridge, they would feel a vibration that made
25 them uneasy. It wasn't the first time that's happened. It

1 was other bridge structure in in the city that did the same
2 thing a few years ago that they had us study and help them
3 come up with solutions.

4 Q Let's move to a couple of your brick projects, sir,
5 your brick forensic projects. Do you recall a project named
6 Tennyson Row.

7 A I do.

8 Q Tell the jury briefly what you did in Tennyson Row.

9 A Tennyson Row is a condominium development in Mount
10 Pleasant, South Carolina and it consists of -- I don't
11 remember exactly how many, but 60 or so units that were
12 constructed of brick masonry and had windows that had some
13 issues. So, I was hired by Mr. Lucey to go investigate
14 those those structures and basically what I did investigate
15 the masonry and the window systems.

16 Q Did you actually end up testifying at trial in that
17 case?

18 A I did.

19 Q And did Judge Stephanie McDonald of the South Carolina
20 Circuit Court certify you as an expert?

21 A Yes.

22 Q And let's talk about another one of your brick
23 investigations. Tell us about the work you did for the
24 State of South Carolina at the Thurman Gazes Research Center
25 at MUSC in Charleston, South Carolina, please.

1 A That's a a brick building in downtown Charleston, and
2 it had a number of issues. One was comfort. The occupants
3 got cold when they sat at their desks because the windows in
4 the exterior walls had so much air drafts and leakage, air
5 leakage. There was also some issues with the supporting
6 steel shelf angles that supported the brick on the exterior
7 of the building and there was some corrosion problems that
8 was hidden. You could find it if you removed ceiling tiles
9 and looked at out toward the exterior walls at the columns.
10 You could see a lot of corrosion that was occurring due to
11 humidity coming in because of that air infiltration problem
12 and that warm humid air would hit the cold air conditioned
13 air and cause condensation on the columns, leading to
14 corrosion.

15 Q And were you able to help the state of South Carolina
16 bring that investigation to a successful conclusion?

17 A Yes.

18 Q And from time to time in your investigations, sir, have
19 you investigated windows?

20 A I have.

21 Q Tell us about that a little bit.

22 A I've been doing that for 20 some years. There are
23 windows throughout the United States, both in commercial
24 buildings and in residences, that have issues. One I just
25 mentioned was air infiltration. That's a comfort problem

1 and a heating and cooling problem with windows. There's
2 also windows that just leak and I've been hired to
3 investigate both of those types of issues with windows in
4 all types of buildings.

5 Q Tell us briefly about your involvement as a
6 professional investigative engineer, window investigative
7 engineer, in the national class action known as MI Windows.

8 A MI windows happened to be the windows that were in the
9 project that I spoke about, Tennyson Row. Those were vinyl
10 windows. They were not well made. They were flimsy and
11 they leaked, and I was retained to investigate those
12 windows, perform numerous tests, dissect the windows, look
13 at their testing performance, and then render my opinions.

14 Q Yes, sir. Now, also with regards to class actions --
15 let me back up first. As part of your services to your
16 clients over the last three or four decades, have you
17 participated or studied and provided advice on the probable
18 cost of the repair of the problems you document in your
19 forensic engineering?

20 A Yes.

21 Q Tell the jury, if you would, give them a little bit
22 background on that from some original estimating you did
23 back in the day in the early days and then we'll come
24 forward with forensic testimony.

25 A Well, as an engineer, we do engineering estimates as

1 part of what we learn in college and I actually taught that
2 class in at the college level.

3 Q What class did you teach regarding that, sir?

4 A Quantity estimating and cost estimating.

5 Q At Clemson or where?

6 A Not at Clemson. At a Community College in Virginia.

7 Q Do you recall that college?

8 A Northern Virginia Community College.

9 Q Thank you. Go on, please.

10 A So, the basic principle is you determine what quantity
11 you need, the quantities of two by fours to build something,
12 the quantities of plywood, quantities of whatever it takes
13 to complete a construction, and then get the prices for
14 those items and the cost of labor to put the materials
15 together. That's quantity estimating and cost estimating
16 combined. That's the types of things we do for our clients,
17 to give them an idea of what a construction project or
18 repair project will cost, both for projects that are like
19 this one that are in litigation and in many cases projects
20 that are just old buildings or bridges or parking structures
21 that have deteriorated and need to be fixed.

22 Q Let's take it full circle. Take it back to the
23 universities. Do you provide probable costs to your
24 university clients?

25 A Yes.

1 Q Tell us briefly about that.

2 A When we investigate the problem for the universities,
3 we write a report. They receive the report. We meet with
4 them. We come to an agreement on what the solution is and
5 then we do the plans and specifications for the repairs, and
6 at the same time develop a budget, a probable budget for
7 cost.

8 Q Let's tell the jury about the class action known as
9 Napier v Adiz. Are you with me?

10 A Yes.

11 Q Tell them what you recall about the final subject
12 matter of your investigation in Napier, with regards to the
13 foundation the site preparation.

14 A That went to trial. It was a case involving duplex
15 buildings in Aiken, South Carolina that were built over soil
16 that was not very suitable for construction, and there was
17 settlement and cracking of the buildings. And I was hired
18 to investigate these problems and then to provide a solution
19 for the repair and this was the basis of my testimony at
20 trial.

21 Q With regards to the solution for the repair, were you
22 also asked to estimate or forecast the probable cost of
23 repair for the class wide membership?

24 A Yes.

25 Q Did you do that?

1 A Yes.

2 Q Did you testify at trial?

3 A Yes.

4 Q Were you certified by the Honorable Judge Cordell
5 Maddox of the South Carolina Circuit Court with regards to
6 being an expert in forensic engineering and in estimating
7 damages in that class action?

8 A Yes.

9 Q Sir, let's leave your experience for a few minutes and
10 just cover the background of the work you performed in this
11 matter, without getting into any opinions yet. Are you with
12 me?

13 A Yes.

14 Q All right. Tell us if you would, please, when -- if you
15 recall, when you began investigating the alleged
16 construction defects at Rose Hill.

17 A In June of 2019 was my first site visit to the project.

18 Q And was that a one day visit?

19 A Yes.

20 Q Did you visit more than one house?

21 A I did.

22 Q Did you walk the neighborhood?

23 A Generally walked the neighborhood. Maybe not the
24 entire neighborhood, but a good part of it.

25 Q Did you return to Rose Hill in 2019?

1 A I did.

2 Q Tell us briefly when and what you did there.

3 A In September and October, September 30th, I think. And
4 then October 1 and 2, I returned. I did more visual
5 inspections throughout the neighborhood. I went into many
6 of the homes, also removed some brick and performed some
7 water tests.

8 Q Let's go forward to the 2020. Did you return to Rose
9 Hill and do more work?

10 A I did.

11 Q Tell us briefly, give us a brief overview of the
12 additional work.

13 A I think it was June of 2020. I returned and performed
14 more visual inspections throughout the neighborhood and
15 within the homes, and performed some additional testing.

16 Q And during 2021 and 2022 were you provided documents
17 relating to the construction of Rose Hill?

18 A Some, yes.

19 Q And did you review those?

20 A I did.

21 Q And did you consult with various building codes or
22 learned treatises in forming your opinions during that time
23 period?

24 A Yes.

25 Q In late 2023 -- excuse me, late 2022 and late early

1 2023 did your firm return to Rose Hill?

2 A We did.

3 Q Give us a brief overview of why your firm returned to
4 Rose Hill and what you did while you were there, again
5 without reaching your opinion.

6 A The defendants were doing inspections and my staff was
7 there to assist -- not assist, but to follow them and watch
8 what they did when they did their work.

9 Q ABS?

10 A Yes.

11 Q In case all of their initials are blending together for
12 the jury, that would be Mr. Steven Moore's firm that they
13 heard from on, I believe, Wednesday morning?

14 A Correct.

15 Q Roughly, how many staff did you have visit the ABS
16 testing?

17 A It depends on the day, but I think three to five, on
18 and off.

19 Q As part of your work in this matter, have you taken an
20 effort to document everything that you've seen and done?

21 A Yes.

22 Q Tell us about that.

23 A Well, my staff and I have documented everything that we
24 see with photographs and videos. We performed tests, and
25 we've documented the test results of each of those tests in

1 the same fashion. And we produced reports of every test
2 that we performed. And I've produced reports for each
3 aspect of the construction that I found to have issues.

4 Q These were printed reports?

5 A Yes.

6 Q And did they contain photographs and diagrams
7 illustrating your opinions?

8 A They did.

9 Q Did you issue most of those in 2021?

10 A I believe that's correct.

11 Q Have you had an opportunity to update one or more of
12 them over the years?

13 A I'm sure I did.

14 Q Have you reviewed depositions in this matter?

15 A I have.

16 Q Give us an example of a deposition you reviewed.

17 A I reviewed my own deposition and ---

18 Q Stop right there, please. Please tell the jury how
19 many days you sat for a deposition by the defendants in this
20 lawsuit.

21 A I think I was questioned --I may be wrong with this.
22 Maybe eight days.

23 Q Eight days?

24 A I think so.

25 Q Over how many months?

1 A Several months. I can't remember how many.

2 Q Prior to those depositions did you repeatedly produce
3 all of your materials to the defendants?

4 A I have.

5 Q I was asking you to give us an exemplar of some of the
6 other materials or depositions that you've reviewed in this
7 matter, please.

8 A Reviewed depositions of the defense's people, their
9 experts, and D.R. Horton personnel. Specific names. I
10 remember viewing Skip Lewis's deposition and Mr. Morris and
11 others.

12 Q Your Honor, at this time the plaintiff would tender
13 D.R. Rhett Whitlock to the court as an expert in forensic
14 engineering and in forecasting and estimating the probable
15 cost of repair.

16 THE COURT: Any objection?

17 MR. IMHOFF: No, Your Honor.

18 THE COURT: So, the the witness would be admitted as an
19 expert in forensic engineering and forecasting cost of
20 repair without objection. Mr. Lucey, proceed. T

21 THE COURT: Thank you, Sir.

22 Q Dr. Whitlock, let me start with some housekeeping.
23 Initially, I'm going to hand you what's been marked for
24 purposes of identification only as Plaintiff's exhibit

25 25.34, which is a hard drive, computer hard drive. Have you

1 had an opportunity to review the contents of that hard drive
2 before today, sir?

3 A Yes.

4 Q What does it contain?

5 A It contains a lot of photographs, my photographs and
6 others.

7 Q That being WDP photographs?

8 A Correct.

9 Q And are the photographs somehow identified so people
10 can know which photograph they're looking at?

11 A Yes, there's photograph numbers. There's dates of the
12 photographs and a log of the photographs stating where the
13 photograph was taken.

14 Q And sir, that doesn't have all of your staff
15 photographs on it, does it?

16 A I'm not sure I have to look at it again. It probably
17 doesn't.

18 Q And any staff that did take photos at Rose Hill were
19 they taking them at your direction?

20 A Yes.

21 Q And we've printed off some of those sub directories so
22 that we'd have some exemplars with photo numbers available
23 to us, so that we could refer to photographs by numbers for
24 the jury when we put them up on the screen for everybody.

25 So, I'm going to hand you what's been marked as 25.34a,

1 contact sheets, photo contact sheets, through 25.34q. If
2 you would just briefly look at these and confirm that these
3 are, in fact, true inaccurate printouts of contact sheets,
4 thumbnails, of photos from your sub directories. Not all of
5 them, but an exemplar. I think there's sixteen of them.

6 A Yes, sir. That's what they are. These are my
7 photographs.

8 MR. LUCEY: At this time, my client would move the hard
9 drive with photographs, exhibit 25.34, and the printouts of
10 a number of the directories on a hard drive exhibits 25.34 A
11 through Q into evidence.

12 THE COURT: Any objection?

13 MR. IMHOFF: Your Honor, may we may we approach?

14 THE COURT: Yes, sir.

15 (WHEREUPON, bench conference.)

16 Q Sir, I want to go first to the photographs of Natalie's
17 house, and we're going to start from exhibit 2534a, the 104
18 Sturbridge pictures from June 28, 2019. I'd ask that --
19 Lawton, could you put picture 2229 on the screen, please.
20 While he's getting that picture, let's just go ahead and
21 start talking about it. When we see the picture come up,
22 we'll change back to the picture. Tell us, if you would
23 please, what you recall observing at Natalie's house when
24 you were there to inspect it for the first time on June 28,
25 2019. I see the picture is up. Is that her house, sir?

1 A Yes.

2 Q And just briefly tell us what you recall noticing and
3 then we'll run through some pictures.

4 A I recall seeing brick that didn't match, brick that had
5 cracks in a number of different places, or the entire wall
6 had cracks, not the brick on the exterior. I recall seeing
7 windows on the interior that appeared to have had signs of
8 prior leakage.

9 Q Let's go to photo 2231. What can the jury see of
10 interest in this photograph, sir?

11 A What you see in the photograph, just to the right of
12 that light, is a stair step crack near the corner of the
13 home, probably about 6 feet above ground level. And that is
14 a crack within the brick that had been replaced on the
15 garage side.

16 Q Let's go back two photographs so we can put this in
17 perspective. Photo 2229, please. All right. This is a
18 photograph of the front again and I see a downspout on the
19 left side of the front that would be next to the garage on
20 the side. Do you see that, sir?

21 A I see the downspout just behind that bush. Looks like
22 a crepe myrtle maybe.

23 Q And is there a carriage lights on both sides of the
24 downspout?

25 A Yeah, there's one that you can't see that's just beyond

1 the downspout.

2 Q That would be next to the garage?

3 A Yes.

4 Q So, now let's go back to the step cracking you just
5 showed to the jury. Let's go to -- yes, there it is in
6 photo 2231. It's between a downspout and a carriage light.
7 Tell us, tell the jury where they're looking.

8 A The downspout is the white object on the right hand
9 side of the photograph, and then just behind that those
10 berries on the tree branch is a cracking and then to the
11 left is the light. Further to the left would be the garage
12 door opening.

13 Q So, this is the side wall?

14 A Yes.

15 Q The one that D.R. Horton says they replaced?

16 A They did, yes.

17 Q And is that step cracking that the jury sees in this
18 second photo on Natalie's house, is that is that
19 significant? Is it material? Does it matter?

20 A Yeah, it matters.

21 Q Why?

22 A It allows more water through. Cracks will allow a
23 tremendous amount of water through. And that's not good.

24 Q Let's go on to photo 2232, please. Anything
25 significant in this photo, sir?

1 A That's just to the right of the garage door at the top
2 corner. If you look closely at that red rusty object,
3 that's what's called -- some people have referred to it as a
4 lentil and maybe referred to as a shelf angle, but it's also
5 referred to by some people as angle iron. It is what the
6 brick sits on over top of that opening, and you can see that
7 the mortar below the brick has separated from that angle.

8 There's movement that's occurred since this brick was
9 reinstalled, and it has started cracking or has cracked.

10 Q Let's go to the other side of that garage opening in
11 photo 2237. Enlarge that corner there of the garage,
12 Lawton. Is something going on there, sir?

13 A Yeah, that's the opposite side, and if you look closely
14 at the location where that angle goes into the masonry, you
15 can see that it's starting to crush at that location or has
16 crushed. The brick is spalled off.

17 Q Photo 2245, please. What does the jury see in this
18 picture, sir?

19 A That's a weep hole. That is a plastic weep that was
20 pushed into that joint. In the process of pushing it into
21 the joint it became filled with -- partially filled with
22 mortar.

23 Q Mortar?

24 A Yes.

25 Q Is that what the orange color is?

1 A The orange color is probably from the yellowing of the
2 plastic, but the stuff inside the plastic tube is mortar.

3 Q And let's go to photo 2252, please. Are you able to
4 see any in this picture, sir?

5 A That's near the ground level, and what you see that
6 white material is efflorescence. That's where water has
7 drained out of the wall from that weep.

8 Q And 2255, please.

9 A That's another location. This is not the garage door.
10 This is a window lentil and -- I'd like to explain the
11 difference between a lentil and a shelf angle.

12 Q Would you, please?

13 A A lentil is an angle iron that spans across the
14 opening. It goes from one side of a window to the opposite
15 side. So, when the masons lay their brick, they lay the
16 brick up on each side of the window until they get to the
17 top. And then, in order to lay the brick across the top of
18 the opening, they put the angle in, and then they can lay
19 brick on that angle, and that is called a lentil. It is
20 like a little beam that goes across the opening to support
21 the brick. A shelf angle, which is what was on these garage
22 doors, is a little different. It is not supposed to bear on
23 each side. It is bolted to the beam above the opening and
24 it's supposed to be cut short on each end so that it doesn't
25 bind up and cause that cracking that you saw. This is a

1 lentil. It's rusty, but it's a lentil. It's not well
2 protected by any type of coating, and what is sticking out
3 is another weep with some mortar in it.

4 Q Is that lentil supposed to be rusting?

5 A It shouldn't be, no.

6 Q Why not?

7 A It's supposed to be protected by flashing and by
8 corrosion protection, coating.

9 Q Next photo 2256, please. Anything notable in this
10 photo, sir?

11 A There is some cracking to the left. It doesn't show up
12 well in this photograph. I think maybe the next photograph
13 will show it.

14 Q Let's go to the next one at 2257, please.

15 A What's notable in this photograph is a stonework. The
16 stone should not be in contact with the concrete at the
17 bottom. There's supposed to be clearance so that the
18 concrete can move relative to the buildings slightly without
19 causing damage to the stone, because it's not bearing stone.
20 That stone is attached by adhesion to the walls.

21 Q This stone is what the jury referred to as "at at the
22 water table" earlier this week?

23 A I've heard that term used for this for this area, yes.

24 Q What does this stone adhere to?

25 A In this case, it's adhered directly to the brick

1 masonry.

2 Q And does brick expand or contract after it's
3 manufactured?

4 A After brick is installed, it begins to expand. It has
5 moisture expansion is what it's called. It comes out of a
6 kiln, when it's made, it's bone dry, and as it absorbs
7 atmospheric moisture over time it grows slightly. Not much,
8 but just a little bit.

9 Q How, at all, does that contrast with manufactured
10 stone?

11 A Manufactured stone is cement based, and cement based
12 products shrink over time. So, they fight each other. The
13 stone wants to shrink and the brick masonry wants to grow
14 and that can cause some bonding problems.

15 Q Let's explain that cement shrinking to the jury a
16 little bit. Let's give them an example, a real life example
17 of something they've probably seen many many times.

18 A Sidewalks.

19 Q Sidewalks. How about expansion joints and brick? Tell
20 us about those at bridges. Tell us about those.

21 A Expansion joints and bridges?

22 Q Yes, sir.

23 A Well, those are necessary for mostly for thermal
24 expansion because of long spans. When you have structures
25 that undergo huge temperature swings over long distances

1 there's movement, and that thermal expansion needs to be
2 accommodated by joints, and expansion joints are what are
3 required.

4 Q Going back to the moisture expansion you were talking
5 about on the stone on Natalie's wall. How, if it all --
6 what is the issue, if any, of having brick expanding and
7 stone -- excuse me, stone that's contracting adhere to brick
8 that's expanding?

9 A It can lead to stresses at the bond interface that --
10 they can cause it to delaminate.

11 Q What do you mean by stresses?

12 A Resistance to movement. Like, if you take a string and
13 pull it, you put it in tension. If you put it in too much
14 tension, it's going to snap. If you have two objects
15 connected together and one wants to grow and the other wants
16 to shrink, sheer stresses that develop.

17 Q What's the ultimate result of those stresses, sir?

18 A Failure.

19 Q What does that mean as an engineering term? Failure.
20 What does that mean to the jury?

21 A That the stone can fall off.

22 Q Fall off the wall?

23 A Yes.

24 Q What they heard about earlier this week?

25 A Yes.

1 Q And you said that the stone is not supposed to go to
2 the ground like they see it in the picture that's on the
3 screen. What do you mean by it's not supposed to? Is that
4 some opinion you came up with?

5 A That's the building code requirement. It's in the
6 building code and in the manufacturer's instructions.

7 Q Anatoliy manufacturers?

8 A Yes, the manufacturer of the stone.

9 Q Which building code are you referring to, sir?

10 A The International Residential Code.

11 Q Let's keep going through a couple of photos here at her
12 house. Let's go to photo 2259.

13 A That's the front of her home.

14 Q Right. Let's go to that stone above the first floor on
15 the left hand side. Is that stone installed in the same
16 fashion as the stone that the jury just looked at the water
17 table on front walkway?

18 A No, that stone is not applied to brick. Behind that
19 stone is wood framing, so that stone is applied to what's
20 called lath. You may have heard that term earlier this week
21 and some of you may know what that is. So maybe not. But
22 it's wire or expanded metal sheets. Looks like a diamond
23 pattern. It's called metal lath, and that material is
24 affixed to the walls and then plaster is placed over that
25 like, cement mortar plaster is placed over that wire lath.

1 And once it sets, the stone are then embedded into that by
2 applying mortar to the surface of the walls and to the back
3 of the stone and the stone are to be pushed into that, so
4 that the mortar bonds it to the walls. And that's how that
5 should have been installed.

6 Q Now, are you telling the jury that there's stone
7 installed in two different manners on Natalie's house. Is
8 that correct?

9 A Yes

10 Q Is there any other manner that stone is installed on
11 any class home in Rose Hill, besides the two manners you
12 told the jury about for Natalie's house.

13 A Not that I'm aware of.

14 Q And let's go to photo ---

15 A There's one other thing I should probably point out
16 here, is that the brick that you see on each side of that
17 roof. And you can see that the brick on the right side is
18 not really level. It's kind of running downhill. The brick
19 on the left side looks to be more level, but that brick is
20 sitting on the roofs. It's not supported by foundation.
21 It's sitting on the roof structure, as is the brick to the
22 right over that shallow, that low pitched roof.

23 Q How do you know that, sir?

24 A I got into the space up above the garage and I cut a
25 hole in the ceiling to look up into the area below the brick

1 to the right hand side.

2 Q Are you telling the jury you double checked visually?

3 A Yes.

4 Q Why do we care that the brick that you're telling us
5 about on the second floor of Natalie's house is sitting on a
6 roof?

7 A It's a -- the code doesn't allow you to support brick
8 directly on wood like that. It's not permitted, and it
9 results in things that we see here, cracking of the brick
10 due to movement of the wood framing relative to the brick
11 supported elsewhere, like on the foundation.

12 Q You just said the word "code". Are you referring to
13 the IRC that you told the jury about a few minutes ago?

14 A Yes. The International Residential Code.

15 Q The Building Code?

16 A Yes.

17 Q And let's go to photo 2282 at Natalie's house, please.
18 Anything notable in this brick picture, sir?

19 A This is the end that was replaced.

20 Q The side?

21 A Yeah, side. If you're standing at the front of the
22 home, it's the left side of the home and that's the garage
23 door. And above the garage door is the masonry that was
24 replaced. In fact, all of it was replaced.

25 Q Photo 2283, please. This is -- we're focusing on a

1 different carriage light than earlier, correct?

2 A Yes, it's just to the right, on the corner to the
3 right.

4 Q Is there anything notable on this photograph?

5 A I'd like to look at that screen to see. Is it okay if
6 I look at their screen?

7 THE COURT: You can step down.

8 MR. LUCEY: Do you need any of it enlarged by Lawton?

9 WITNESS: Lawton, can you zoom in right here. My vision
10 -- it's my vision.

11 THE COURT: Mr. Whitlock, you can stand down there, but
12 make sure you speak up so the court reporter can hear you.

13 WITNESS: I'll just go back. I think my screen is
14 about the same as theirs.

15 Q Let's try the next photo, which is a little closer up.
16 2284, please.

17 A I was getting ready to put a laser pointer on my
18 screen. Yeah, I can see it in my screen. I don't know if
19 you can see it in yours, but there's a horizontal crack.
20 Just below that band on the gutter downspout and it goes to
21 the right and it steps down through that first head joint
22 and then goes to right again. It's just a continuation of
23 the crack that's right around the corner near the light.

24 Q And just to help us locate the crack on this
25 photograph, sir, is there a single brick in this photograph

1 that has different colored mortar all around it?

2 A Yeah, there's a replaced mortar around this.

3 Q Replaced from what, please?

4 A It looks like it was pointed up. I'm not sure, but
5 it's a different color, as you mentioned, and then you can
6 see the crack is developing in these joints.

7 Q And the middle picture. Now, that's enlarged to the
8 right of the band on the downspout around the corner to the
9 right. Is there a fracture in the brick?

10 A These are not fractures. That's a texture that are
11 manufactured in the brick.

12 Q And before you sit down, if you would show us with the
13 pointer exactly where the crack is near the new mortar.

14 A Starting here, and then it goes down through this joint
15 and continues horizontally to the right.

16 Q Is -- is -- that's a pretty distinct crack, is it not?

17 MR. IMHOFF: Your Honor, objection. Leading.

18 WITNESS: It's a crack.

19 THE COURT: Don't -- rephrase your question. Don't
20 lead the witness.

21 Q Would you consider that crack a patent defect or latent
22 defect, sir?

23 A I think that crack to me is obvious, but to a lay
24 person it may not be so obvious.

25 Q Got you. While he's standing there, could you please

1 show him 2285, Lawton? Anything further here above the
2 window, sir?

3 A Lawton, can you zoom in on that? There may be a
4 cracking of the lentil. It's starting to show a crack, a
5 vertical crack, where this -- this is called a soldier
6 course. The vertical brick. And it's cracked up through
7 that location. That's all from the movement that's
8 generated around the corner.

9 Q Let's talk about that, sir. What do you mean by
10 movement generated around the corner? What do you mean by
11 that or explain that to them?

12 A As I mentioned earlier, that lentil or shelf angle
13 above that garage door opening is bolted to the wood
14 framing. But just adjacent to the garage door, the brick
15 goes down to the concrete foundation. So, there's a rigid
16 support for the brick at the concrete foundation that goes
17 up to where that lentil is. That lentil spans across the
18 opening and there's deflection and movement of the wood
19 framing. It's causing binding, brick binding, and pressure
20 to be developed where everything comes together at the end
21 where the steel meets the brick and due to that bolting, all
22 that weight and force is being transferred to the brick
23 causing it to fracture. The brick joints, they fracture
24 more easily than the bricks, and most of the cracks are in
25 the mortar joints.

1 Q Sir, we're going to describe that in more detail later
2 when we are going to show the jury a picture of the shelf
3 angle. But, until then, let me just ask you before we leave
4 the answer you just gave the jury. Is what you just
5 described to the jury that you say is present on the side
6 wall, the rebuilt wall, is that a building code violation?

7 MR. IMHOFF: Your Honor, leading.

8 THE COURT: Overruled.

9 A It is.

10 Q Let's remember that answer when I can show them the
11 shelf angle so you can explain further to them what's going
12 on there, please. Until then, let's go to photo 2287 in
13 your June visit to see Natalie's house. Anything notable in
14 this picture of the brick wall on his house, sir?

15 A What's notable is that is the one area of the masonry
16 that is supported by the roof sheathing. The brick is just
17 laid right on the wood roof.

18 Q What's the issue with that?

19 A That's not a -- that's not code compliant.

20 Q Let's go to some of the windows photos you took this
21 day in June, sir. 2287. There's about ten of them. We'll
22 just move through them until you tell us something that you
23 can show us that is notable, just to save time. 2267. This
24 is a photo of a window corner in her house?

25 A Yes, that's one corner. It shows a little bit of

1 separation between the left jam in the window of some
2 movement relative, the window relative to the wall, some
3 type of movement going on there. Not sure if there's a leak
4 there. You might see some other photographs as we go
5 forward where I saw what I thought may be leakage.

6 Q 2268, please. The other corner. Anything notable
7 here, sir?

8 A That one looks like it may have had some leakage. It
9 looks like there's some leakage staining in that corner,
10 which made me think that perhaps the windows had some issues
11 with leakage.

12 Q Photo 2276, please.

13 A Well, that was pretty well out of focus, but I believe
14 what it shows is definite staining at the miter, which
15 indicates that some water was coming through.

16 Q Let's get a clearer picture to explain that. So, let's
17 go to your next visit to Natalie's house in late September
18 of 2019. Plaintiff's Exhibit 2534b and go to photo 97.
19 Tell us what we see here, sir.

20 A I think that's the same window we looked at a little
21 while ago. Maybe a better picture, but again, it shows
22 signs of water intrusion and staining at that corner.

23 Q And if you would, please, with the Court's permission,
24 step down and show the jury where the water staining is on
25 Natalie's window sill.

1 A It's emanating out of this gap right here, causing that
2 red stain and this stain pattern.

3 Q Thank you, sir. And let's go to the other side of that
4 window at -- well, actually, let's go to photo 98, please.

5 A That one I would say I would be a little inconclusive
6 on whether that's a leak or not. There are others that show
7 it more clearly.

8 Q Let's go to photo 100, please.

9 A This shows signs of water penetration. This is a fixed
10 window in the bathroom and there's some staining and crud
11 along the horizontal joints within the window itself.

12 Q Tell the jury what you mean by a fixed window, please.

13 A It's a window that doesn't open or close. It's just
14 some people call it a picture window.

15 Q Let's go to photo 104, please.

16 A This is another example of a corner that's leaking and
17 that may be cracked. That may be a corner crack in that
18 that location.

19 Q He's enlarged it now. Can you see it better?

20 A Yes. This area has moisture staining and there is a
21 crack in the joint, in the vinyl right there. And you may
22 have heard somebody talk about a pad. That grey material is
23 a gasket. This joint is not sealed, or not welded. It's
24 not a welded connection like this diagonal is miterd was
25 heat welded. That's not. There's a pad that's placed in

1 that. Some were missing and some were misplaced. That one
2 is there and has a little gap at the bottom. That window
3 was leaking. It appeared to have been leaking.

4 MR. IMHOFF: Your Honor, may we approach?

5 THE COURT: Yes, sir.

6 (WHEREUPON, bench conference.)

7 THE COURT: Mr. Bailiff, would you take our jury to the
8 jury room, please?

9 (WHEREUPON, jury exited the courtroom at 10:20 a.m.)

10 THE COURT: Mr. Imhoff, You have an objection?

11 MR. IMHOFF: Yes, Your honor. As I said prior to
12 trial, we moved to exclude Dr. Whitlock on multiple grounds,
13 but including, Your Honor, can we excuse the witness? May I
14 ask to excuse the witness?

15 THE COURT: Yes, Sir. Dr. Whitlock, would you please
16 step out into the lobby?

17 (WHEREUPON, witness exited the courtroom.)

18 THE COURT: Mr. Imhoff?

19 MR. IMHOFF: Yes, Your Honor. As I said, the Court and
20 Mr. Lucey are well aware that we have moved to exclude this
21 expert. We have moved to exclude parts of his testimony and
22 we have moved that he is not an expert or has not -- doesn't
23 have the qualifications or done the testing on certain
24 aspects of his testimony. Mr. Lucey is aware of that. As I
25 said at bar, he played a little fast and loose earlier this

1 morning and only offered him as a forensic engineer.

2 Clearly Dr. Whitlock is a forensic engineer. That's not the
3 question. The question is can he testify to a window
4 manufacturing defect, or a window design defect, as is
5 required.

6 We have additional objections to his testimony as a
7 general contractor, as to the standard of care, and many
8 other concrete issues, Your Honor. But as to that
9 particular -- and I want those preserved as you ruled
10 earlier at the bench and as those questions are asked we
11 could object to those. But Your Honor, forensic engineer is
12 a very general thing, but within that -- and everyone in
13 this room is clear that we've objected to certain things.
14 We do not believe he is qualified, nor has he done any work
15 to determine what a the window defect this manufacturer has
16 done. And so, we would ask to voir dire him outside of the
17 jury, Your Honor, on his qualifications and on his work as
18 to those things.

19 And I asked you earlier, just in the interest of time
20 since we're taking a break here for the jury, we can go
21 through the other questions on the other issues as the
22 general contractor, and standard of care, and those types of
23 things if the Court would like us to.

24 THE COURT: Mr. Lucey?

25 MR. LUCEY: Yes, Your Honor. Dr. Whitlock has been

1 certified by this Court as an expert in forensic engineering
2 without objection. His window background was covered prior
3 to that certification. His brick background was covered.
4 His masonry background was covered. His forensic
5 engineering background was covered. Some design work and
6 the estimating work. It happens to be that, I believe,
7 Larry Moore was certified yesterday as an expert in forensic
8 engineering, or two days ago, with no objection from the
9 defendant. And, Your Honor, if they thought that forensic
10 engineering was too broad of a category or a bad
11 description, they had a duty to object at the time that he
12 was certified as an expert in forensic engineering.

13 They can't look behind the Court's certification afterwards.

14 Your Honor, they keep trying to convince this Court --
15 on a separate issue. They keep trying to convince this
16 Court that the plaintiff must prove a product liability
17 claim against Silverline? We do not. We're not suing
18 Silverline, we're suing D.R. Horton. All we have to show is
19 either negligence or breach of implied warranty. We don't
20 have to show a product defect. We have to show either
21 breach of industry standards or we have to show a breach of
22 the building code, which we are in the process of doing, but
23 for these constant interruptions by the defendant.

24 He's certified. There was no objection to the manner
25 in which he was certified, and as and there was no objection

1 to the area he was certified in. They constantly, all week,
2 have been rearguing motions that have already been decided
3 by the court. And Your Honor, it's unfair for them to have
4 two shots at Dr. Whitlock if they really think that he has a
5 lot of qualifications. The jury needs to hear the voir
6 dire.

7 THE COURT: Mr. Imhoff, I want to make sure I understand
8 your objection. You're objecting that this witness is not
9 an expert in determining what the defect in the window is or
10 the manufacturing of the window.

11 MR. IMHOFF: Yes. One of them, Your Honor. Yes.

12 THE COURT: And what is your objection regarding the
13 the other issues that -- what is? Well, let me rephrase
14 that question. What do you allege that the category
15 forensic engineer does not cover regarding the other issues,
16 the brick and the code violations, and everything else that
17 he's testifying to?

18 MR. IMHOFF: It is not brick, Your Honor. It is that
19 he is not a concrete expert and has done no concrete
20 testing, Your Honor. He has done no soil testing at all,
21 Your Honor, and he intends to testify about that. He is not
22 a general contractor, as you heard Mr. Lucey just admit,
23 he's trying to bootstrap a products liability into a general
24 contractor issue. We put in front of this court already
25 when we asked Dr. Whitlock what the standard of care was for

1 a general contractor. He said he did not know. Mr. Lucey
2 just admitted that his own expert has to testify to the
3 standard of care of a general contractor in selecting the
4 products. We agree with that. But before you can even get
5 there to that part, which he isn't qualified to do, Your
6 Honor, in our opinion, he has to prove a defect with the
7 window. You can't say you were negligent in selecting a
8 product without proving that the product is defective. And
9 in this state, to prove a product is defective, there are
10 very defined rules, what an expert has to do in both his
11 investigation and, for instance, if it's a design defect, he
12 has to provide an alternate design. Which is why I asked
13 him to step out. So, I'm sure he knows that, but he doesn't
14 have to. And so, this is just an attempt to go around the
15 product's liability, prove a product's liability case and
16 then try to stick it to D.R. Horton by saying it's not a
17 product's liability case. But it is, Your Honor. And so we
18 have to ask him what the issue is with the window. He's
19 going to testify what the issue is with the window
20 inappropriately and not qualified for it. And then he's
21 going to say it's D.R. Horton's fault for selecting it,
22 which he also doesn't know the standard of care. And all of
23 this has been in front of the Court before. Mr. Lucey knows
24 it. And he knew this was coming. And so he intentionally
25 tried to avoid qualifying him as a window expert, or as a

1 concrete expert, or as a soil expert. It was done
2 intentionally to avoid exactly this, Your Honor. But
3 there's no question he's a forensic engineer. He just
4 hasn't done the work, or the specific expert work, and
5 that's why we would ask that he be voir dired outside the
6 jury, so that we could put it on the record, Your Honor.

7 THE COURT: All right. I will allow you to voir dire
8 the witness on the window issue and go ahead and ask him
9 about concrete and then I'll make a ruling. We're going to
10 take a short break before we do that.

11 (WHEREUPON, break in trial 10:29-10:41 a.m.)

12 THE COURT: Dr. Whitlock, would you retake the witness
13 stand, please? We have had objections to the record by Mr.
14 Imhoff regarding the scope of this witness's expertise. He
15 has been admitted, without objection, as a forensic
16 engineer. The objections, as the Court understands them,
17 are specifically any testimony regarding the manufacturer or
18 potential manufacturing defects in the windows, the duties
19 of a general contractor in selecting the windows, and
20 concrete work. And the Court has -- Mr. Imhoff?

21 MR. IMHOFF: Within the concrete is the soil, Your
22 Honor.

23 THE COURT: And soil, concrete soil work. The Court is
24 going to allow the attorneys to voir dire the witness
25 outside the presence of the jury regarding these three

1 issues so that the Court can determine whether his
2 designation as an expert covers testimony in these matters.
3 So, Mr. Lucey, it's your witness. Any questions you'd like
4 to ask this witness to further his qualifications?

5 MR. LUCEY: He's been certified, Your Honor.

6 THE COURT: All right. Mr. Imhoff, any questions you'd
7 like to ask him?

8 MR. IMHOFF: Yes, Your Honor. Thank you.

9 EXAMINATION (IN CAMERA)

10 BY MR. IMHOFF:

11 Q Dr. Whitlock, have you done any analysis to the
12 performance of the window design?

13 A I have not looked at anything regarding the design of
14 the windows, other than my observations of the failure
15 mechanisms of the windows at their miters where they're
16 welded together. And I have done research on welded miters
17 and found that there are test methods for welded miters, but
18 did not find such testing in the documents provided by you
19 for this, for these windows.

20 Q Can you provide an opinion that the design of these
21 windows is defective, to a reasonable degree of engineering
22 certainty?

23 A Not the design, no.

24 Q Have you produced or done an alternate window design?

25 A I have not.

1 Q If you are going to criticize the design of a product
2 or a window, are you required to provide an alternate
3 design?

4 MR. LUCEY: Objection, Your Honor. Calls for a legal
5 conclusion.

6 THE COURT: It's outside the presence of the jury. Go
7 ahead.

8 WITNESS: Could you ask me that question again? I'm
9 not sure I followed it.

10 MR. IMHOFF: Sure.

11 Q Have you ever done -- have you ever developed an
12 opinion in your career and experience that a window design
13 was incorrect or defective?

14 A I might have. I don't remember. I'm trying to think
15 back on some cases. If they involve the design of the
16 window. I think I did in the case of MI windows. If you
17 would like me explain that, I will.

18 Q Was that a design issue?

19 A In my opinion it was.

20 Q Did you provide an alternate design, sir?

21 A No.

22 Q Based on the standards by which you are to do your
23 investigations and conduct your work, whichever standards
24 that help you understand what you're supposed to do, are you
25 required to provide an alternate window design with a

1 criticism of a window design by a manufacturer?

2 MR. LUCEY: Objection, Your Honor. This is not a product
3 liability case. This is a construction defect case against
4 the home builder, and it's being judged by the building code
5 and it's under negligence and implied warranty. He does not
6 have to provide an alternative design in the context of this
7 case and this question is not relevant.

8 THE COURT: I'll let him answer the question, Mr.
9 Lucey. This is this is outside the presence of the jury.
10 BGo ahead.

11 A I have not provided an alternative design and I don't
12 know that I'm required to in this case.

13 Q You don't know if you're required to in this case. I'm
14 asking you by engineering standards, whatever the standards
15 are that help you understand how you're to investigate, and
16 develop your opinions. Are you required, if you are going
17 to develop opinion that there is a design defect in a
18 window, to provide an alternate design?

19 A No.

20 Q Other than the MI Window, have you ever investigated a
21 window design issue?

22 A Yes.

23 Q What ones?

24 A Presently, I'm involved in a case in Florida for a
25 casement type window that is a aluminum clad window that is

1 failing. Type of window that are failing.

2 Q Have you produced an alternative design in that case?

3 A No.

4 Q Do you know if you've ever produced an alternative
5 design in a window design product defect case?

6 A I don't recall if I've produced a design, no.

7 Q Have you done any evaluation as to any design criteria
8 specific to Anderson County, South Carolina?

9 A This case has a lot of design criteria in Anderson
10 County for many things, including windows.

11 Q What specific design criteria, the design of the
12 window, have you evaluated specific to Anderson County,
13 South Carolina? The design, sir.

14 A I don't know if there's anything specific to Anderson
15 County that differs from anywhere else, other than wind
16 speed.

17 Q Have you performed any research on the placement of the
18 gasket in these windows or the design of the gasket?

19 A As I mentioned earlier, I did some research on the heat
20 welding of the window parts. I found nothing with regard to
21 the gasket in these sills of these windows.

22 Q I want to clarify that. You have done no research on
23 the placement of the gasket or the design of the gasket; is
24 that correct?

25 A Not other than what I've seen in these windows

1 themselves, No.

2 Q Just looking at them?

3 A Yes.

4 Q You haven't compared them to other designs of gaskets
5 or other placement of gaskets, or anything like that, right?

6 A I have not.

7 Q What research have you performed on the design of the
8 corner weld?

9 A As I mentioned earlier, I did research on the testing
10 of the miters, the welded miters. I found the test methods
11 that AMMA publishes on those those items. I looked through
12 the literature that was provided to me by you, by the
13 defense, for these windows, for Silverline windows, to see
14 if research or testing had been performed and was furnished
15 to me on those welded miters and found none.

16 Q Well, let me clarify that. You said it was provided by
17 us. Have you looked at Silverline's design documents?

18 A I do not have their design documents. All I have are a
19 series of test reports and drawings.

20 Q Have you ever asked for the design documents for the
21 Silverline windows?

22 A Through the Lucey law firm I believe they asked for all
23 relevant information regarding these windows.

24 Q You have not been provided the design documents for
25 these windows, sir?

1 A Just drawings.

2 Q I'm sorry?

3 A Drawings. The drawings that were associated with the
4 test reports is what I have.

5 Q I'm going to ask you about manufacturing defects. What
6 investigation have you done into the specific process that
7 Silverline used to manufacture the windows installed in Rose
8 Hill?

9 A None.

10 Q What have you done to evaluate where the manufacturer
11 deviated in the manufacturing process?

12 A I've noted missing gaskets, and I've noted misplaced
13 gaskets and leaking gaskets in my inspections of these
14 buildings and homes.

15 Q You've seen the gaskets in your opinion are misplaced
16 or missing; is that right?

17 A Yes.

18 Q I'm not asking you about in the field. I'm asking you
19 about during the manufacturing process. Do you understand
20 what a manufacturing defect is, sir?

21 A I do.

22 Q Where does the manufacturing defect occur?

23 A At the manufacturer's facility.

24 Q So, my question is, what have you done to evaluate
25 where the manufacturer deviated from the manufacturing

1 process?

2 A Yes, I just answered that question. I can tell you
3 what the end result is as the windows sit there today. I
4 don't know that the gaskets got removed or were never placed
5 there, but the gaskets were missing in some places. It'd be
6 hard to remove, because they're compressed fairly tightly
7 where they exist. So, it's highly unlikely that somebody
8 removed those gaskets. I think they were missed placed, not
9 placed in the manufacturing. That's why they're missing.

10 MR. IMHOFF: May I ask, respectfully, Your Honor. May I
11 ask you to pull the microphone over just a little bit.

12 MR. LUCEY: We can't hear counsel. Can he speak up,
13 please?

14 MR. IMHOFF: That was exactly what I was asking Dr.
15 Whitlock.

16 THE COURT: Make sure everyone speaks up. The court
17 reporter has to get down what what you're saying.

18 MR. IMHOFF: I asked him to move the microphone.

19 Q So, you have done -- other than looking at the windows
20 out in the field, you have done no analysis of the
21 manufacturing process or a deviation from the manufacturing
22 process, correct?

23 A That's correct.

24 Q All right. Have you looked at the deposition of Andrew
25 Carr, sir?

1 A I don't recall that name.

2 Q Have you looked at the deposition of representative of
3 Silverline windows?

4 A I don't remember. I might have. Is that Andrew Carr?

5 Q Yes.

6 A I don't remember.

7 Q Do you know if Silverline windows applies their design
8 ratings and WDMA label on the windows based upon information
9 based upon information from Silverline, Builders First
10 Source, and other information in this case?

11 A They didn't on these windows. The labels did not
12 exist.

13 Q What did you look at, if anything, to determine whether
14 or not Silverline was putting the label on the windows
15 during the manufacturing process?

16 A Well, I wasn't at the manufacturer when the windows
17 were manufactured. I saw the windows as they were
18 installed. Hundreds and hundreds of them. And not one
19 single window had the appropriate label affixed.

20 Q Let me make sure I understand that. You saw the
21 windows in this case installed?

22 A As installed. As they sit there today.

23 Q You saw them years and even a decade later, correct?

24 A Years and maybe a decade later. Yes.

25 Q Did you see the windows when they left the factory?

1 A I did not.

2 Q Did you do any investigation, read a deposition, look
3 at manufacturing documents to determine if the labels had
4 been placed on the window or if the manufacturer had a
5 process in place to put the labels on the windows?

6 A I'm not aware of any process that they had in place.
7 I'm only aware that the labels do not exist today.

8 MR. IMHOFF: Your Honor, I'm sorry.

9 Q Dr. Whitlock, I understand that you're not aware. My
10 question isn't if you're aware. My question is, did you go
11 look at anything to determine if the manufacturer has a
12 manufacturing process that puts the appropriate labels on
13 the windows.

14 MR. LUCEY: Objection, Your Honor. Asked and answered
15 multiple times. He's testifying. He knows it doesn't exist
16 because the labels aren't on any of the thousands of windows
17 at Rose Hill.

18 THE COURT: He's already testified he wasn't there.
19 So, let's let's move on to something else.

20 Q Have you ever been to the manufacturing facility?

21 A I've never been to Silverline's facility, no.

22 Q Do you know how they manufacture the windows?

23 A With vinyl parts and glass.

24 Q Specifically, how are they manufactured? What machines
25 are used? What human labor is used? How do they bend them?

1 With what tools? Have you investigated any of those things?

2 Q I have not seen any of their machinery. I've not seen
3 them manufacture the windows. I know that the corners of
4 the windows are heat welded and they're made out of vinyl.

5 Q Have you done anything to establish whether these
6 windows were manufactured outside of the manufacturer's
7 intended process?

8 A No.

9 Q What information do you have about the industry
10 standard threshold for manufacturing defects?

11 A The only one I'm aware of is through the glazing
12 industry. The glazing industry has a accepted failure rate
13 for glazing. And I think in my deposition I testified to
14 this and I may have misstated it, but the glazing industry
15 has a standard of acceptance of failure of eight lights or
16 eight pieces of glass out of 1,000. That's a one in 125
17 failure rate, which the glazing industry thinks is
18 acceptable. I know of no other standard for any other
19 aspect of windows, but if you apply that to this case, these
20 windows fail miserably. They don't even come close to
21 meeting that standard.

22 Q Well, thank you for that information, but that's not
23 the question I asked. I asked very specifically about the
24 industry standard threshold for a manufacturing defect
25 during the manufacturing process that you are deviating from

1 an industry standard in the way you put these products
2 together.

3 A I don't know of one.

4 Q You don't know of one? Sir, is there a manufacturing
5 defect in these windows?

6 A There are defects in the windows as they sit there
7 today, and that defect is failed and cracked vinyl. I don't
8 know if that is from design of the windows or manufacturing
9 of the windows, but according to deposition testimony, the
10 windows were not cracked when they were installed. They
11 cracked after they were installed.

12 MR. IMHOFF: Your Honor, I am finished with that part.
13 I can make my motion now or make my arguments now.

14 THE COURT: Go ahead and finish questioning him and then
15 I'll hear from you on all the issues.

16 Q Sir, you are not a general contractor; is that correct?

17 A I am not.

18 Q You've never worked for a general contractor?

19 A I have.

20 Q Have you worked for the general contractor as a third
21 party or actually for the general contractor.

22 A My dad was a general contractor and I drove nails for
23 him.

24 Q Okay, how long? Have you ever worked as a residential
25 builder?

1 A I have.

2 Q Do you have a residential builder's license.

3 A No.

4 Q Have you ever worked as a superintendent for a builder?

5 A No.

6 Q Did you testify in your deposition that you did not
7 know what the standard of care was for a general contractor
8 supervising its subcontractors?

9 A I'd like to read that testimony if I could.

10 Q Here's the first page. Would you go back one page,
11 please? This is volume eight of your deposition, sir.

12 A Okay.

13 Q Do you remember being under oath and giving deposition
14 testimony that day?

15 A Yes.

16 Q Next page. I asked you, sir, is there 2168, guys? I'm
17 just going to read -- we'll skip it. I asked you, "Where is
18 the standard that a general contractor has to exercise to
19 supervise its subcontractor between solely relying on them
20 and generally seeing everything and knowing everything."
21 What was your answer, sir?

22 A Let me let me digest that question a little bit, if you
23 don't mind.

24 Q Well, if we could, let's go ahead and read what you
25 said and then you can explain it. Can we do that?

1 A No.

2 Q No?

3 A If you don't mind, I'd just like to read it.

4 Q Do you want to change your explanation?

5 A I just want to read it.

6 Q Read it.

7 A Okay, I read it.

8 Q Did I ask you, "Where is the standard that a general
9 contractor has to exercise to supervise its subcontractor
10 between solely relying on them and generally knowing
11 everything and seeing everything." Did I ask you that
12 question?

13 A That's what it says, yes.

14 Q Was your answer, "Somewhere in between"?

15 A Yes.

16 Q And then I asked you, "Where?", correct?

17 A Yes.

18 Q And was your answer, "I can't tell you"?

19 A That's correct.

20 Q You do not know what the standard of care is for a
21 general contractor supervising its subcontractor according
22 to your testimony under oath; correct, sir.

23 A Well, you can see what my answer was. It's kind of a
24 confusing question and it wasn't specifically what is the
25 standard of care of a general contractor. But I agree I

1 said what I said.

2 Q Thank you, sir. Have you ever worked in a building
3 supply house?

4 A No.

5 Q Do you know what the standard of care is for a supply
6 house to evaluate a manufacturer's claims about the design
7 pressure, or pressure rating, or other ratings of a window
8 are?

9 A No.

10 Q Sir, did you do any bore samplings in Rose Hill?

11 A You talking about soil borings?

12 Q Yes, sir.

13 A No, we did not.

14 Q Did you do any borings at all?

15 A No, soil borings. No.

16 Q Did you do any concrete borings?

17 A No.

18 Q Did you do a dynamic penetration test?

19 A No.

20 Q Did you do a hammer strength test?

21 A There's no such thing.

22 Q You've never heard of a hammer strength test, sir.

23 A Hammer strength test? No.

24 Q Okay, so, I assume if you don't know what it is, you
25 haven't done it?

- 1 A There is no such thing.
- 2 Q I'm sorry.
- 3 A There is no such thing.
- 4 Q Did you do any soil sampling?
- 5 A No.
- 6 Q Did you x-ray the slab?
- 7 A No.
- 8 Q Did you test the concrete?
- 9 A Did not.
- 10 Q Sir, did you do any testing of the soils in Rose Hill?
- 11 A Did not.
- 12 Q Did you do any testing of the concrete itself?
- 13 A I did not.
- 14 Q You did not?
- 15 A No concrete testing. No.
- 16 Q Do you know why the cracking is occurring between
- 17 natural settling, bad soils, bad concrete, earth movement,
- 18 or anything else?
- 19 A There is movement that's caused the cracks, and that
- 20 movement is a combination of natural shrinkage of the
- 21 concrete and foundation movement, soil movement.
- 22 Q Which is it?
- 23 A A combination of both.
- 24 Q Which is the defect, construction defect?
- 25 A Concrete shrinkage is normal. So, that's -- I wouldn't

1 say it's a construction defect. I saw no indication that
2 there was excessive shrinkage. I did see some cracks, not
3 in every home, but in some homes there were some extremely
4 large cracks. And, in my opinion, those were due to soil
5 subsidence.

6 Q So, it's not the concrete, sir? It's soil subsidence?

7 A In those particular cases I just mentioned. Yes.

8 Q In all of the houses or in those particular cases?

9 A I just said in some homes.

10 Q Which homes?

11 A You mean to tell you each one?

12 Q Yes, sir.

13 A I can't tell you sitting here which ones. There are
14 some that have significant settlement issues.

15 Q How many?

16 A I don't know.

17 Q Which ones?

18 A You just asked me. I told you, I don't know which
19 ones.

20 Q Is it all of them?

21 A No, it's not all of them.

22 Q Is it less than ten percent?

23 A I think it's in that order of magnitude. Ten percent
24 to maybe twenty percent. I didn't do a detailed study.

25 Q Have you set out for this court or for this jury, which

1 houses, anywhere in your estimate and scope of repair, which
2 houses have the issue that you believe is a soil sediment
3 issue?

4 A I haven't made any claim or any any criticism in any of
5 my work about soil settlement problems. That's not part of
6 what I've done.

7 Q Is fixing the concrete part of your estimate?

8 A Fixing cracks in concrete. Yes.

9 Q And is fixing concrete for every single house?

10 A It is.

11 Q And have you determined that every single house has a
12 soil subsistence defect, sir?

13 A No.

14 Q But, if you have -- if it's ten percent, you still call
15 for repair of 90 percent of the concrete.

16 A Well, every every home I inspected has cracking. It's
17 either shrinkage and or settlement cracking in the concrete.
18 And because D.R. Horton designed and sold a radon system for
19 these homes which relies on crack repair -- in their specs
20 they say that cracks have to be sealed. I'm just following
21 through with their own specifications. They didn't seal the
22 cracks.

23 Q For the 90 percent of homes that you have not
24 determined is a soil defect issue, is there a defect in
25 those 90 percent of concrete slabs?

1 A There is a defect in the sense that there are shrinkage
2 cracks and or settlement cracks that were not filled with a
3 sealant as specified by D.R. Horton's own plans.

4 Q What is the specification that you were relying on?

5 A It's in their detail sheets to seal all cracks.

6 Q Which one, sir?

7 A Well, you'll have to show me the ---

8 Q Is it a 2018 radon sheet?

9 A It might be. It might be an earlier one. I don't
10 remember.

11 Q Any chance we have that radon sheet? What was the last
12 -- when was the last Co issue? When was the last permit
13 issue?

14 A I don't know.

15 Q It was before 2018, wasn't it, Dr. Whitlock?

16 A It could have been. I'm not sure.

17 Q So, the 2018 wouldn't have been in place while these
18 homes were built. If it's 2018, correct?

19 A I don't know what the date is. You'd have to show me.

20 Q I want to clarify this for the judge. I want to make
21 sure that we have this nailed down. You do not have an
22 opinion that 90 percent of the concrete slabs are a
23 construction defect. Instead, you are relying on a D.R.
24 Horton specification, is that right?

25 A That's in combination with the observed cracks and D.R.

1 Horton's specification for the radon system is why I said
2 that the cracks should be filled.

3 Q Sir, in your engineering, both ethics and
4 investigations requirements, are you required to follow
5 certain protocols in doing sill dam testing in windows?

6 A I am ---

7 MR. LUCEY: Objection, Your Honor. We covered windows.
8 Once he said he was done, we moved on to, I think GC and he
9 said he's done and we've been on soil cracking. If there's
10 a conclusion to this motion, I believe it might be time --
11 windows are done.

12 THE COURT: How does this how does this apply to your
13 issue, Mr. Imhoff?

14 MR. IMHOFF: Your Honor, again, it was in our brief.
15 Mr. Whitlock has done all of his testing in secret with no
16 one there. We think both his ethics and the investigation
17 required him to have people there who could both document it
18 and do their own testing at the same time. He also filled
19 the sill dam. I'm going to do this for Dr. Whitlock. He
20 also filled the sill way beyond the design pressure rating,
21 so that it would leak, Your Honor. He did not follow the
22 required investigation guidelines in his industry.

23 THE COURT: The witness has been admitted as a forensic
24 engineer expert. The methodology, the sufficiency of his
25 investigation in the conclusion, certainly I understand that

1 the defense disagrees with that. Your expert disagrees with
2 that. That's a factual question for the jury to determine.
3 He's been admitted as an expert on that. I'm not going to
4 allow this questioning. Move on to -- we've covered
5 windows. We've covered soil samples. We've covered
6 concrete. Is there anything else?

7 MR. IMHOFF: Your Honor, to that point, I think part of
8 this voir dire and what I was trying to show is that his
9 testimony is unreliable. You've heard about Dr. Alford, who
10 has talked about that. But also this goes to, if he has not
11 conducted his inspections and investigation, including sill
12 dam spray rack tests, which we were talking about windows,
13 Your Honor. If he has not conducted them. I just want to
14 put this in the record. I've heard you, okay?

15 MR. LUCEY: Can we asked counsel to step back so we can
16 hear what he's saying. His back is to us. We don't hear
17 anything.

18 MR. IMHOFF: Anyway, it was part of him being
19 unreliable testing, Your Honor, and I understand your
20 ruling, but I just want that for the record. I wanted to
21 ask.

22 THE COURT: This -- reliability goes toward the
23 qualification of an expert in the first place, and this
24 witness was qualified as a forensic engineering expert
25 without objection. So, I'm finding that -- this is what I'm

1 going to rule. I've heard this and and I will note that in
2 Mr. Lucey's questions the witness testified that he has
3 participated in investigations of public and private
4 buildings. The witness has testified that windows were a
5 part of that investigation. There's been the significant
6 testimony already with photographs of failing windows.

7 I will find after Mr. Imhoff's questioning that this
8 witness is not qualified as a witness who can be a
9 testifying expert as to the the actual design defect or
10 manufacturing process in the factory that would have caused
11 it. The witness, however, will be able as a forensic
12 engineer to testify that, in his opinion, the windows are
13 failing. The witness also is qualified based on the the
14 expert status as a forensic engineer to testify about
15 because there was testimony that he taught a class on that.
16 So again, Mr. Imhoff, I understand your profound
17 disagreement with the opinions that he gives and certainly
18 you will be able to argue that throughout the case and
19 that's an openly question of fact for the jury. So, with
20 that ruling, is there anything else?

21 MR. IMHOFF: Your Honor, you didn't address the
22 concrete. Ninety percent of his estimate is based on -- is
23 based on no defect, Your Honor. And so he's got, I mean, 90
24 percent of it is concrete and flooring estimate and he just
25 testified that he doesn't have opinions on that except for

1 some D.R. Horton.

2 THE COURT: Mr. Lucey, I want to make sure I understand.
3 What I heard the witness say is he's not issuing an opinion
4 as to the way the concrete was poured or provided to the
5 project. His criticism was the failure to seal the cracks
6 in accordance with D.R. Horton's protocol. Is that ---

7 MR. LUCEY: His opinion was the failure to seal cracks
8 in conjunction with the radon system. He's not calling for
9 any replacement of foundations. It's the failure to seal
10 cracks, Your Honor.

11 MR. IMHOFF: Your Honor, we would ask if that is in fact
12 what he's relying on a 2018 document that we talk about this
13 before it comes up in front of the jury because that is not
14 evidence that Rose Hill was using. It's a reliability
15 issue also, Your Honor. But if it is that 2018 document, we
16 sure would like to hear about it now before we have to send
17 the jury out again so we can address it.

18 MR. LUCEY: Your Honor, the EPA has required those
19 cracks be sealed and a radon system forever. It happens to
20 be the 2018 drawing as an admission by a party opponent that
21 they know those cracks need to be sealed for an effective
22 radon system. If they try and tell this court in 2023 that
23 it's something different their own design says it should be.
24 But the EPA standards are are fairly standard or fairly
25 accepted in the industry.

1 THE COURT: We've already had testimony in the case
2 about radon.

3 MR. IMHOFF: I'm sorry, Your Honor?

4 THE COURT: We've already had testimony about radon.

5 MR. IMHOFF: It was -- yes, Your Honor, by our expert
6 that it's not required in Anderson County. We would just --
7 I would ask for the court to rule on may Dr. Whitlock rely
8 on a 2018 document when the last houses in this neighborhood
9 were built in 2017.

10 MR. LUCEY: Your Honor, I think that's context specific.
11 If they cross them in the wrong way, they open that door.
12 He may rely on a submission by our party opponent. I
13 believe it's context specific.

14 THE COURT: I want to hear the question. I want to
15 hear the question. But I will -- I understand.
16 I'm not going to even have to rule on the defects in
17 concrete as what I thought I was going to before this
18 started because of what he testified to. He's not
19 criticizing the way the concrete was laid. So, just proceed
20 with caution on that issue.

21 MR. LUCEY: Yes, sir.

22 THE COURT: Mr. Bailiff, get our jury.

23 (WHEREUPON, jury entered at)

24 THE COURT: Mr. Lucey, proceed.

25 MR. LUCEY: Thank you, sir.

1 RESUME DIRECT EXAMINATION

2 BY MR. LUCEY:

3 Q Let's go to -- we're going to return where we broke off
4 at 104 Sturbridge, your September 2019 visit. I'm showing
5 132 just so we can go forward from there. Let's go to 134
6 please. Explain to the jury what's going on here, sir in
7 photo 134 at Natalie's house.

8 A This is a window in the Zitek home that appeared to
9 have had some water leakage, at least on one side of the
10 right side of the window. So, I constructed a sill dam test
11 and placed water into the sill to see if that, in fact, is
12 what the source of the observed leakage was.

13 Q Before we go into what happened here, tell the jury
14 first, please, what is a sill dam test? What's it used for?
15 How does it work?

16 A You can see on the outboard side of the window is some
17 tape that I placed there to create a dam, and the purpose of
18 that dam is to hold water onto the horizontal or nearly
19 horizontal surface of the sill. If you don't mind, we'll
20 come over there, because I think your screen might be
21 better.

22 Q Speak up when you're not in your seat.

23 A Yes. So this is this is the tape, the dam. You can
24 see the water line right here and water penetration has
25 occurred here. There might be a close up in the next photo.

1 Q Okay, we'll go to photo 135, please.

2 A Similar to that one. This is the point of water
3 intrusion at this point and you can see that the water line
4 is right there.

5 Q Alright, let's add some language to this so we can talk
6 about this without tripping over each other. Tell the jury,
7 if you would please, what that biggest piece of vinyl is in
8 the lower center part of the picture.

9 A That is what's referred to as the back dam.

10 Q Back dam? Why is it a dam? What's that terminology?

11 A It keeps water from just flowing right straight in. It
12 stops the water at this point. I believe this window, that
13 dam extends up vertically from the bottom of the sill about
14 an inch, maybe an inch and a quarter.

15 Q And just to give us perspective as we as we transit the
16 window sill of the vinyl towards the duct tape you applied
17 there's a vertical piece of vinyl sticking up in the middle.
18 What can we call that just so we can just refer to it.

19 A That's just the fin that projects upward that the sash.
20 The sash is the part that goes up and down. The sash goes
21 down to that and sits within that portion of the sill in the
22 back dam.

23 Q And then, tell the jury where -- show the jury where
24 the duct tape is that you've applied for this test.

25 A On this outboard edge here.

1 Q And of those three vertical components, the first one
2 nearest being the back dam then and then the fin and then
3 the duct tape. Which of those three is the highest and
4 which one is the lowest?

5 A The back dam is the highest. The middle fin here is
6 about a half inch high, and then the duct tape is probably
7 about an inch in this phtograph.

8 Q And then show the jury where the pad filler or the
9 gasket is in this photograph.

10 A This green material is the pad sticking up. This is
11 the vertical portion where the pad exists, and then you can
12 barely see, but this is the diagonal or the welded miter
13 location right there.

14 Q And how would you describe that that pad's current
15 position in that photograph, sir. That gasket.

16 A Pardon?

17 Q How would you describe its current position in this?

18 A It's protruding out at the top somewhat. I can't tell
19 you how much. Maybe an eighth or a quarter of an inch.

20 Q And let's go to photo 136, please. Tell the jury what
21 you're doing here, please.

22 A This is a moisture meter, and I placed the pins from
23 the moisture meter into the corner of the window sill on the
24 inside portion of the window sill inside of the window. And
25 you can see that the needle is pointing all the way to the

1 right, which indicates that it is wet.

2 Q Tell the jury, just very briefly, how does the moisture
3 meter use those two metal pins to make that needle move back
4 and forth?

5 A If it's wet, there is an electrical current that passes
6 through that go into the material. Depending on how much
7 moisture is in the material, you'll get a deflection of this
8 needle.

9 Q And with the needle being all the way to the right, is
10 there a particular descriptor that we use for that location?

11 A It's maxed out. It's saturated.

12 Q And what is that -- what is the net effect? What's
13 what's this telling us, this prong on this moisture meter at
14 this location where you just water tested the sill?

15 A An indication that it's leaking.

16 Q And when the moisture needle is maxed out on a moisture
17 detector, what does that tell you?

18 A It's wet.

19 Q What is wet?

20 A The window sill on the inside portion. Not inside the
21 window, but the window has leaked to the interior of the
22 home and cause the window sill to become wet.

23 Q And then going to photograph 147, please. Tell the
24 jury what they see in this photograph.

25 A I removed the drywall. It was saturated and mucky, and

1 that is the condition of the wood, the dark areas of the
2 wood below, this area that was leaking.

3 Q And go to the photograph 149, please. 148 and then
4 149.

5 A That's another moisture test.

6 Q 149.

7 COURT REPORTER: Pause for just a second, gentlemen.

8 See that microphone? If you will stand there, that will
9 help me. Thank you.

10 Q This photo, please.

11 A That's just another test in the center location.

12 Q Sir, that's -- we're going to finish the brick
13 photographs in this exhibit now. You can probably have a
14 seat unless there is a lack of clarity with the jury. Let's
15 go to photo of 81 from September 30, 104 Sturbridge, please.
16 Can you blow up the -- where the shelf angle enters the
17 brick in this photograph, Lawton? What do we see here, sir?

18 A Where the brick is -- where the brick is fractured.
19 Where the it's in contact with that lentil, or that shelf
20 angle.

21 Q And you've previously before our mid-morning break, you
22 previously described the stress that's going on on the right
23 hand corner or the right hand side of this garage. We're
24 now on the left. How could all these stresses differ from
25 what you previously described to the jury?

1 A It's the same condition. This steel angle protrudes
2 into the brick a certain distance. I can't tell here how
3 far it is. This brick is actually notched, so that the
4 angle can go through, and then the angle is then also bolted
5 to the wood beam above the door and it's binding up and
6 causing the cracking and fracturing.

7 Q Is there any cracking occurring above the shelf angle?

8 A Separation. Where the brick on the left is, is lifting
9 relative to the angle and the beam is attached to. They're
10 going in opposite directions and you can see that the brick
11 in the mortar joint is lifting up off of the angle. That's
12 why you see a horizontal separation along that length.

13 Q Should either of those cracks be there?

14 A No.

15 Q Let's go to photo 105, please. Can you enlarge the
16 left corner of the sill, please? Just slightly. Is there
17 anything going on here, sir?

18 A Well, I don't see anything, other than that sliver of
19 brick that's kind of sloppy workmanship to use a little tiny
20 section of brick to finish out the wall.

21 Q Photo 106, please. What do we see here, sir?

22 A That's the lentil over a window and a weep hole
23 sticking out of it.

24 Q What's the condition of the weep hole, please?

25 A That one probably has a bug in it. I don't see any

1 mortar sticking out and it looks like it may have a some
2 type of insect, possibly.

3 Q 107?

4 A That's the sealant, partial sealant joint where the
5 brick meets the the window. There should be a space there,
6 a little bit larger, so that the sealant joint could be
7 formed better.

8 Q They heard a little bit about that on Tuesday or
9 Wednesday. Were you here for that?

10 A I think so.

11 Q So, tell the jury what should be present in this joint
12 between the brick and the window on Natalie's house.

13 A There should be a gap that's large enough to put what's
14 called a backer rod that goes in first and then sealant goes
15 over that. It's really important to keep the brick when the
16 brick expands to keep it from damaging the window.

17 Q Go to 113 please. Anything here, or should I move to
18 the next photo?

19 A You can move. It's similar.

20 Q 114, please? Can you -- there's a little closer on
21 115, please. Anything here, sir, or should I go to 116?

22 A Go ahead to the next one.

23 Q 116, please.

24 A This area is where there's a crack below that window.

25 Q Can you enlarge below the right hand corner of the twin

1 window, please, Lawton?

2 A You can see a step crack emanating from the bottom
3 right corner of the window going toward to the right. There
4 may be a better photograph upcoming, but that's generally
5 what the condition is at that location of a step crack. And
6 that's, again, a result of the brick being supported by the
7 wood roof, which isn't compatible with the brick further to
8 the right that's supported by the foundation.

9 Q So, is this what Natalie referred to as her daughter's
10 bedroom window?

11 A I believe that's correct, yes.

12 Q Back all the way out of this picture so we can see what
13 it looks like from the ground. Now, would you consider --
14 would you describe this defect, this cracking up here, as a
15 latent defect or a patent defect, sir?

16 A From this distance, it's hard to see. I could see it
17 particularly when I zoomed in. So, for a normal passerby,
18 I'd say it was a latent defect.

19 Q Let's go to 117, please.

20 A Same area, that's just a better photograph.

21 Q And what insight can you give us as to why this is
22 cracking?

23 A Because the brick to the right is supported by the
24 foundation and it's firmly affixed. The brick, more toward
25 the left, is sitting on the roof, which is wooden, and it's

1 moved downward and it's caused the stresses that resulted in
2 the brick cracking.

3 Q Let's go to photo 121, please. Tell the jury what you
4 did in this picture.

5 A Well, there's two holes you see in this photograph. I
6 drilled those holes in so I could look inside the wall with
7 a fiber scope, a bore scope, but that wasn't successful
8 because the space was filled with mortar. I couldn't see
9 anything but mortar, so I removed that one brick to see what
10 the conditions were.

11 Q What are the conditions that were reflected in TC
12 Number 1, test cut number 1 at Natalie's house?

13 A There is a steel lentil that supports the brick above
14 the window, and then there's flashing that comes down from
15 the top down to that lentil, but it doesn't turn
16 horizontally, it just stops at the angle. So, the angle's
17 horizontal surface is not protected from moisture. There's
18 also a lot of mortar that's accumulated and built up and
19 filled that airspace up.

20 Q The cavity?

21 A Yes.

22 Q And is that what some people might have heard earlier
23 this week, mortar slop?

24 A I heard that, yes.

25 Q And is the mortar slop in this photograph at Natalie's

1 house, is it a violation of the building code in effect?

2 A Yes.

3 Q And you referenced the flashing being shorter, not
4 having a horizontal leg. Is that a violation of the
5 building code?

6 A It is.

7 Q Let's go to the next photo, 122, so you can show them
8 that flashing.

9 A This shows the the black material in the back is the
10 flashing, then there's some mortar, and then the horizontal
11 leg which looks like it has these channels in it is the
12 steel angle. The flashing stops inside that mortar. I
13 think there's another photograph that shows the mortar
14 removed.

15 Q Let's go to 123, please.

16 A Maybe the next one?

17 Q 124.

18 A Yes, I can stand up and show you with my pointer.

19 This is a PVC flashing and it stops right here. You can see
20 this edge where it stops. Then this is the bare steel
21 angle, and this is a weep hole and this is the mortar
22 material.

23 Q And then photo 126. Anything additional in this photo,
24 please, sir.

25 A No, that's just a different perspective, but similar

1 conditions.

2 Q 127, please.

3 A That's the weep that I pulled out of that area. I
4 believe it was filled with mortar.

5 Q 128, please.

6 A That's the end view of the weep.

7 Q Is it filled with mortar?

8 A Yes.

9 Q Is that a building code violation?

10 A Well, it's basically a non-weep. Makes the weep
11 ineffective.

12 Q Is a non-weep -- does the building code require weeps?

13 A The building code requires weeps, and that's
14 effectively not a weep.

15 Q Photo 130. Tell us if there's any brick issue in this
16 photo, please?

17 A We talked about the the joints, the sealant joint
18 around the windows that are missing. There's one at the --
19 where the bricks sill meets the window that's hard to see
20 here, because the duct tape is in the way. And below this
21 sill is supposed to be flashing and weep holes and that does
22 not exist.

23 Q Below the window sill?

24 A Yes, below that brick sill.

25 Q Tell the jury, is that a building code violation?

1 A That is. The code requires flashing there.

2 Q This is the side wall?

3 A This is the rear of the home.

4 Q Sir, these brick and stone issues that we've reviewed
5 at Natalie's house so far from 2019, were they similar to or
6 different from what you ended up documenting on the other
7 homes in Rose Hill?

8 A Very similar to all other homes.

9 Q I want to move to your other photographs from your
10 first visit on June 28, 2019 and the other homes. Exhibit
11 25.34-Q. Actually, sir, I want to start at 2534-C, please.
12 Go to photo at 200 Buxton. Go to image 5, please, on
13 September 30. Sir, tell the jury what they're seeing at
14 this image.

15 A Are we in June of 2019?

16 Q September 30, 2019, 2534-C.

17 A This is a window that I saw. I didn't test it. It was
18 as is as I saw it. It looked like it might be wet, so I put
19 the moisture meter in there to check it, but it wasn't.

20 Q Let's go to photo 10, please.

21 A That's the corner of a home with a crack at the corner.

22 Q Let's go to photo 11 and tell us about that crack.

23 A That's a crack right at the flashing line where the
24 flashing stopped short. And because of brick expansion, as
25 I've mentioned earlier, brick expands over time, and as it

1 expands over the flashing, the flashing provides us somewhat
2 of a slip plane. But near the corner, the stresses between
3 the brick above them below the flashing can develop such
4 that you develop cracks. And that's what's happened in a
5 lot of corners like this around Rose Hill.

6 Q Let's break that down a little bit, please. Is this
7 what's referred to as the base of wall flashing?

8 A Yes, this is near the bottom of the wall and the joint
9 that is the first joint from the top is where the flashing
10 was placed. It doesn't come all the way out. You can't see
11 it. It's buried back into the wall.

12 Q And you spoke of that, I believe, as being a bond
13 breaker. Tell us about that, and how did that stop? How
14 did that result in the fracture?

15 A Well, at the corner, the flashing is not complete. And
16 somewhat even if it is complete, but more so if it's not
17 complete, you'll get bond from the brick above the flashing
18 and the brick below the flashing. And as the brick above
19 the flashing tries to expand, that bond will create stress
20 in the brick and lead to cracking.

21 Q Let's go to photo 38 at 200 Buxton. What are we
22 looking at here, sir?

23 A That's the garage door and stone around the garage
24 door, and stone above the garage roof, and it shows the
25 stone in contact with the roof. And beyond that, you can

1 see another example of where brick was laid on top of the
2 roof.

3 Q Should the stone be in contact with the asphalt
4 shingles?

5 A No.

6 Q Is that a building code violation?

7 A Yes.

8 Q Six pictures later, you took a picture at number 44.
9 I want to show you that and then come back to this location.
10 What are you showing the jury in this photograph?

11 A That's a leak in the garage ceiling that coincides with
12 the stone wall that we were just looking at above it.

13 Q Let's go back then to photo 38. Tell the jury --
14 explain this to the jury. What's going on with this stone
15 and the asphalt shingles?

16 A The stone turns the corner and is on this face. It
17 comes down to the roof here, and there's obviously an issue
18 with the flashing in this case, because right below that is
19 where you saw the leakage in the garage.

20 Q Let's go back to that leakage, 44.

21 A Below that area, above.

22 Q Let's go, please, to photo 52.

23 A That's a stone that's broken out, falling off.

24 Q Any other code violations in this photograph?

25 A The stone goes down below the grade.

1 Q Pull the photograph back out, please. Any other
2 violations in this photograph?

3 A And it's in contact with the concrete.

4 Q And is that a building code violation?

5 A It is. It should be held up off of the concrete and
6 above the grade.

7 Q All right, staying at 200 Buxton for a moment, let's go
8 to Image 64. What is occurring, if anything, with the brick
9 in this picture, sir?

10 A This is an example of a window that was not caulked at
11 all, wasn't sealed at all, and there's no expansion space
12 between the brick sill and the window. There should be
13 sealant there according to the code and expansion room.

14 Q Go back to photo 46, please. That's the same house,
15 200 Buxton. What's the jury see in this photograph, sir?

16 A Separation of the stone at the corner of the building.

17 Q Why is that occurring?

18 A Differential movement. There's relative movement
19 between the stone facade and the brick and it's caused the
20 intersection to crack.

21 Q Let's look at that more closely in photograph 74,
22 please.

23 A That's just more of the same. It's down lower and it
24 shows the crack continuing down the wall.

25 Q Photo 75, please.

1 A And that shows it from the top down to about the light
2 level and below.

3 Q The condition that we're seeing here at this
4 intersection of stone and brick at 200 Buxton, is that
5 similar to or different from the conditions you saw at other
6 similar intersections at Rose Hill?

7 A It's identical to every other location like this at at
8 Rose Hill. Some are worse than others.

9 Q Let's go to 106 Burwick on September 30. Photo 157,
10 and then 158 front elevation. Then photo 159, please. Can
11 you enlarge the area underneath the right window including
12 the bottom of that window, please. What's that, sir?

13 A That shows the window corner and the baseboard below
14 the window and the baseboard is stained along the carpet
15 area.

16 Q Photo 160, please.

17 A That's a close up of the stained area of baseboard.

18 Q Photo 161, please.

19 A That's the window corner, and if you look closely,
20 there appears to be a gap in the gasket and a crack in the
21 miter, or near the miter.

22 Q Photo 162, and then slowly proceed on 164, please.

23 A This is looking out the window and down to the roof
24 below and you can see the top edge of the stone.

25 Q 164.

1 A This is during a water test.

2 Q Is this the same location you just showed the jury?

3 A Yes.

4 Q Do you recall doing this water test?

5 A Yes, I do.

6 Q Let's go to the photo ---

7 A One thing I should point out though is it appears
8 somebody had put sealant at the end. Excuse me.

9 Q What's -- you're talking about inside the window
10 itself?

11 A Yes, at the end of the sill, but it wasn't effective.
12 It still leaked.

13 Q And 165, please. Do you need more water, sir.

14 A Thank you. This just shows the opposite side of the
15 window that was being tested.

16 Q Next photograph please.

17 A Again, that's just the top edge of the stone below the
18 window sill and the roof below that.

19 Q 167, please.

20 A It shows the test and process.

21 Q Sill dam test?

22 A Yes, the water level is about maybe 3/8 of an inch from
23 the bottom of the windowsill. It's not to the top. We did
24 it progressively by adding water and slowly filling it up.
25 Leaks often occurred when the water level was very low.

1 Q You just said the water level was approximately 3/8 of
2 an inch, sir?

3 A Guessing at it. You can see it in the corner.

4 Q All right. Well, let's take a break. Let's back up.
5 Let's go ahead and explain to the jury the significance of
6 the term you taught them, the back dam, a few minutes ago.
7 Tell the jury more about how the back dam works.

8 A Well, it's -- the purpose of the back dam is to keep
9 water from flowing into the home. It has a certain height
10 just in case there's a hard driving rain with wind that it
11 doesn't come over top.

12 Q So, what is the significance of your statement to the
13 jury two minutes ago that the water level that you used to
14 test this window was approximately 3/8 of an inch?

15 A Because I did not have to fill the window sill
16 completely up to produce leakage. The leakage occurred when
17 water was barely in the sill in some cases, and in other
18 cases it may be only 1/4 to 1/2 an inch. However, I did
19 continue to fill the sills up as much as I could to see what
20 the severity of leakage would be, but leakage did occur in
21 many cases with little water in the sills.

22 Q In these photos, if you look close, and can you actually
23 see the height of the water in these photos?

24 A Yes, and many others as well.

25 Q Going on to photo 168 and then 169, please. This is

1 still testing process?

2 A And it shows a puddle of water sitting on the sill.

3 Q How did that get in?

4 A It came in through the vertical and diagonal miter.

5 Q And your very next photo is photo 170. What's the
6 significance of that, sir?

7 A Water was dripping from the ceiling in the dining room
8 below the window.

9 Q Where did the water come from?

10 A From that cracked miter flowing down through the wall.

11 Q Go back one photo, please. That's the source in photo
12 169?

13 A That little puddle is sitting on top of the window
14 sill, but water was coming through this joint and going down
15 under this gap below this trim and draining down into the
16 wall. As you saw, the baseboard is wet. That's how it got
17 wet, water flowing down through the hall, but also continued
18 flowing into the dining room ceiling below it.

19 Q Are you telling the jury that what you're showing them
20 there in this photo is the same thing that caused baseboard
21 brown that we saw five minutes ago?

22 A Yes.

23 Q Let's go back to the next photo. What is this, a
24 dining room or sunroom of some kind?

25 A That's the bay window in the dining room area.

1 Q Next photo 171, please. Next photo, let's go to 173.

2 What's going on in this photograph, sir?

3 A That's a photograph I took after sill dam test was
4 completed and just shows the outside condition of the window
5 and the wall and that that bay window roof area.

6 Q Photo 174.

7 A It's just test water that drained down the surface.

8 Q Drained down the surface of the stone?

9 A Yes.

10 Q 176.

11 A That's a close up of the ceiling and you can see
12 there's some prior damage, rippling of the drywall.

13 Q Can you point that out to the jury? It's hard to see.

14 A It's here, and here. You see a nail pop. That's
15 moisture damage.

16 Q From the window above?

17 A Yes.

18 Q In this picture, in the very lower right, is that the
19 bay windows I see?

20 A Yes.

21 Q And photo 178, please.

22 A That's just sliding glass door to the rear.

23 Q Photo 190.

24 A This is another test.

25 Q Let me jump down to 202.

1 THE COURT: Hold on, Mr. Lucey. I believe we have an
2 objection.

3 (WHEREUPON, bench conference.)

4 Q Sir, I believe you suggested that we move further on to
5 finish the water testing from the second floor at 106
6 Burwick, and we are going to photo 202. What's going on
7 here?

8 A That's the area of the ceiling that was wet and I had
9 some of the drywall removed.

10 Q Photo 204, please.

11 A That's the condition of the insulation and the drywall
12 after it was pulled, or partially pulled down.

13 Q So, the jury is looking upwards?

14 A Yes, I took this photograph standing on the floor
15 looking up at the ceiling where the drywall was removed.

16 Q The source of the water that the jury sees in the
17 insulation and the drywall is what, please?

18 A Coming through the crack in the window corner.

19 Q Part of your water test?

20 A Yes.

21 Q Let's go to photo 205, please.

22 A That's the same piece of drywall after it was removed
23 and it's laying down on the patio slab.

24 Q Photo 207, please.

25 A That's the opening after the drywall and insulation was

1 removed and that is the beam that spans across the ceiling
2 at the bay window.

3 Q Let's go to 101 Burwick at photo 213 to see the front
4 elevation, please. There's a better elevation at 215,
5 please. Going to inside the house, sir, please to 218.
6 Tell the jury what you're doing here, please.

7 A This is the window that you could see from the street
8 on the second level. I am performing a sill dam test here.

9 Q Photo 220, please.

10 A That's the opposite end. It doesn't appear to be
11 leaking on the right hand side, but on the left hand side I
12 believe that it did leak.

13 Q Go back then to 219, please. Tell us what we're seeing
14 in 219 at 106 Burwick.

15 A That's water running out of the joint, the window
16 joint, at the corner.

17 Q From your test?

18 A Yes.

19 Q And let's go to 16 Kettering, photo 222. Let's go
20 inside the house to photo 224. Where are you in this photo,
21 sir?

22 A In the upstairs master bedroom.

23 Q 275, please. What do we see in the right corner of the
24 twin window in the upstairs master bedroom at 16 Kettering?

25 A What appears to be water damage in the corner of the

1 window and a crack in the window frame.

2 Q And tell the jury what you mean by a crack in the
3 window frame.

4 A This vertical piece right here is cracked. That's the
5 miter, a diagonal thing, but right there is a crack that
6 goes down through the frame.

7 Q And what's causing the flaking of the finishes that the
8 jury sees between the sill in the crack in the jam?

9 A Moisture damage.

10 Q Make sure we're all on the same page, sir. Show the
11 jury what the jam or the jam extension part is.

12 A The vertical part is the jam. This is the sill.
13 That's the gasketed joint, and this welded miter. One or
14 more of those aspects, either the crack and or the gaskets
15 has leaked, causing that damage.

16 Q And the damage that's vertical, would you call it a jam
17 extension?

18 A This damage?

19 Q Yes, the component that it's on. What's that component
20 called?

21 A That is the trim jam extension. Sometimes that's made
22 out of wood in some homes, but in these homes it is made out
23 of drywall.

24 Q And photo 226, please. This is the same?

25 A Yes.

1 Q Let's go to photo 227, 228.

2 A This is the condition during the test.

3 Q What test?

4 A The sill dam test.

5 Q Is that what happened during the sill dam test that you
6 performed that we're looking at, similar to Kettering, sir?

7 A Similar to the previous home, water came through those
8 joints and caused the sill to be wet on the interior.

9 Q What, if anything, did your test results indicate to
10 you regarding the cause of the water damage to the joint and
11 finishes at the window?

12 A That the damage that I observed was, in fact, due to
13 window leakage.

14 Q Go to a different window at 116 Kettering at photo 233,
15 please. What do we see in this photograph, sir?

16 A That's a window as it appeared. No testing was done.
17 That was just the condition that it appeared and you can see
18 the stain on the sill and some staining at the joint.

19 Q What do you believe to be the cause of the staining on
20 the sill in photo 233 at 16 Kettering?

21 A Similar to the windows that I'd previously tested. I
22 believe that that was due to water leakage of the window.

23 Q Let's go to 102 Amsbury at photo 244. Then on to 246.
24 Close up. Let's look at the stone at the apex in photo 248.
25 Then 249. Oh, let me stop here. Go back one. What's in

1 the top center of the stone in the apex, please, or what's
2 not in there?

3 A The top center of the apex is a vent.

4 Q Oh, below that, please.

5 A Stone and missing stone.

6 Q What was the second thing?

7 A Stone and missing stone.

8 Q Show the jury where missing stone is.

9 A Here. Here. Here. Here. These are places where the
10 stone was falling out.

11 Q Let's go to 8 Duxbury at photo 257. 258 for the
12 elevation. Let's go to 272, and then photo 275. Tell the
13 jury please what you're documenting in photo 275 at 8
14 Duxbury.

15 A That's cracked stone at the corner of the home. If you
16 were standing at the street looking at the home, it would be
17 the far left corner and it's cracked and separated from the
18 home.

19 Q And what is the risk of those gaps that we see between
20 the stone and the brick?

21 A There's several risks. One risk is that water can
22 freely get into those large gaps. So can other things.
23 Birds maybe, but also stone could fall.

24 Q Is this an appropriate condition that the jury sees in
25 photo 275 at 8 Duxbury?

1 A No.

2 Q Going to the very next photo 276 tell us what's going
3 on here.

4 A That was a loose stone that I pulled off with my hand.

5 Q Should you be able to do that?

6 A No.

7 Q Is a stone that can be pulled off by a human hand in
8 compliance with the code or is it a deviation from the code?

9 A It's a deviation from the code. Stone should be
10 securely affixed such such that you could not simply pull it
11 off with finger pressure.

12 Q The jury might have heard a term 50 PSI sometime this
13 week. Is that a term that relates to the stone pressures?

14 A There is a standard for installation of stone by the
15 American Concrete Institute and it provides two options for
16 adhering stone, and one option is that it be adhered to a
17 decree that it has 50 pounds per square inch of adhesion,
18 and this definitely doesn't have that type of adhesion.

19 Q Going to photo 277, was this the same or different
20 stone?

21 A That's a similar stone adjacent to the one I pulled
22 off. This one also came off with finger pressure.

23 Q Am I correct that it's below the one that you pulled
24 off?

25 A Yes.

1 Q Photo 278, please.

2 A That's a distant photo showing both of the stones
3 removed.

4 Q And is the stone at this location applied to brick or
5 is it applied to lath on top of a framed wall?

6 A That's over lath. You can see kind of see it right
7 there. There's lath exposed in that corner. You might see
8 it in the photograph.

9 Q Photo 279, while you're standing up there.

10 A You can see the lath better in this photograph.

11 Q Let's move on to October 1. Exhibit 25.34D. Let's go
12 to 508 Cardiff, photo 283 for elevation first, and then
13 photo 285. And then to the next one, which is closer, 286.
14 Tell the jury what's going on this 285, 286, pair of photos.

15 A Similar to 104 Sturbridge, this is a lentil slash shelf
16 angle over a garage door that has started cracking and
17 displacing.

18 Q Is there both a horizontal and a vertical crack here?

19 A There's a horizontal crack where the brick meets the
20 shelf angle, and then the vertical one at the where the
21 brick meets the jam of the door.

22 Q Going to photo 290, please. What does the jury see
23 here at 508 Carta on the second floor?

24 A A crack in the wall just above the roof and a window
25 sill that should be flashed and weeped, but isn't.

1 Q And, sir, the window sill that should be flashed and
2 weeped, you're talking about masonry?

3 A Masonry should be -- that brick should have flashing
4 and weep holes beneath it.

5 Q Underneath the rollap? (AS SPOKEN)

6 A Yes, underneath the brick.

7 Q Is that a building code requirement?

8 A Yes, it is.

9 Q Are there any weeps under any windows in the roughly
10 150 houses in Rose Hill that are at least partially clad in
11 brick?

12 A I never saw one on any house.

13 Q Does the absence of each one of those weeps below each
14 window in each brick house a code violation?

15 A Yes.³³

16 Q Go to photo 300, please. Still at 508 Carta.
17 What's the jury see in this photo?

18 A That's a close up of the photo we saw a couple slides
19 back.

20 Q Photo 306, please.

21 A That's a window with a crack that blends generally
22 horizontal at the near the miter, and missing the pad or the
23 gasket in the vertical part.

24 Q Sir, is there -- are you perceiving any water standing
25 on sill of the window?

1 A Possibly. I can't tell for certain.

2 Q Do you want to step down and look at this screen down
3 here?

4 A There's staining in the crack, and part of another
5 crack. This could be more staining, but really can't say
6 for sure.

7 Q Thank you. Let's go to 206 Buxton and go to photo 315
8 and then to 318. Tell us what, if anything, this photo at
9 206 Buxton shows us about the brickwork there.

10 A I don't see anything specific here, unless I'm missing
11 something. Except that it's another example of a sill.
12 It's kind of a distant photograph, but I'm confident that
13 sill also does not contain flashing and weeps.

14 Q Photo 321, please.

15 A That's a crack above the garage door.

16 Q And what's the condition of the weep in this photo?

17 A It's clogged with something. That could be insect.
18 Appears like it could be an insect issue.

19 Q Photo 350.

20 A That shows that the angle above the door extends over
21 about three and a half inches and then is exposed on the
22 outboard surface.

23 Q What's the significance of the first half of that
24 answer?

25 A It just confirms that the angle does in fact, go into

1 the masonry. And again, as I said earlier, if those angles
2 are bolted to the beam above, they should not also bear on
3 the masonry adjacent to it.

4 Q Going to 109 Amherst. Photo 406. And then to photo
5 410, please. What are you documenting here, sir?

6 A Just a considerably large crack in the concrete floor,
7 slab.

8 Q Photo 418, please. And then 419. What are you doing
9 at this window, please?

10 A That's a sill dam test, that window.

11 Q 109 Amherst. Let's go to 420. What do we see on the
12 sill of this photograph?

13 A That's the left hand corner, and there appears to be a
14 crack near the miter.

15 Q 421.

16 A That's the opposite side, and that also shows a nearly
17 horizontal crack.

18 Q Above the miter joint?

19 A Yes.

20 Q 422. Is this the same ---

21 A --- same location, yes.

22 Q 423. Testing process?

23 A Yes, opposite side.

24 Q Let's go to 425. 426.

25 A Just a moisture test showing that there was moisture in

1 the sill inside the home.

2 Q What's the need of doing this moisture test?

3 A It's showing that it's saturated.

4 Q 429.

5 A That's the same area the moisture test was showing --
6 shown in the previous slide. This shows that the sill is
7 wet and dark and no -- definitely no sill flashing
8 underneath the window, which should be there.

9 Q What is the -- what have you done to this -- in this
10 photograph to expose the components?

11 A Just remove the drywall from the inside.

12 Q What do they see? What's the yellow orange color
13 below?

14 A There is some air barrier material there that's kind of
15 torn and partially missing. The yellow staining, I'm not
16 sure what that is. The darker area is just dark wet wood.

17 Q Photo 433 and then 434, please.

18 A And just confirmation of moisture.

19 Q After the test?

20 A Yes.

21 Q Going to 201 Buxton, let's go to the elevation at 443.
22 And then photo 445, please. What do we see here, please?

23 A That's the front right corner of the home and it's
24 another condition where the stone is separating from the
25 brick.

1 Q Photo 478, please.

2 A That's a window sill on the left side of the home and
3 I've marked the location for the brick to be removed.

4 Q Photo 480, please.

5 A And this is back toward the front at the stone to brick
6 intersection and I pulled the stone away a little bit.

7 Q Did you pull that away with tools or manually?

8 A I believe we've pried that off.

9 Q 481, please. 483.

10 A That's that same area with the stone removed, and you
11 can see the the plaster over the lath in that area.

12 Q So, with this location, between this photo and the next
13 photo, would this be a good location to explain the dynamics
14 of where the stone cantilevers over onto the edge of the
15 brick on the front of the house?

16 A You can see it at that top stone.

17 Q Let me flip up this next photo and then come back to
18 this for you. The next one is 44. Then back ---

19 A --- lath.

20 Q --- to ---

21 A --- metal material. So that the plaster kind of bonds
22 into it. That stone is affixed to lath and plaster and it
23 extends past and over top of the brick with some amount of
24 mortar bonding material.

25 Q Back to the next photograph.

1 A And again, that is the lath that is there to secure the
2 plaster.

3 Q Explain to the jury if you would, please, why the Rose
4 Hill homeowners are experiencing so much separation at this
5 stone brick corner intersection of the facades.

6 A Because you have two different materials of wood frame
7 assembly and then a brick assembly, and the brick expands
8 and contracts, particularly expands at different rates, than
9 this stone surface and it causes some fatigue and cracks.

10 Q If we go to 485, just for perspective, we see that this
11 is at the top of a ladder, right?

12 A Yes.

13 Q So, I'm going to go to 486 which is not at the top of a
14 ladder. Is this different?

15 A That's a different location.

16 Q Same condition?

17 A Yes.

18 Q 487, please.

19 A Just a close up showing the plaster and the lath not
20 well bonded together.

21 Q Tell the jury why you say it's not well bonded. What,
22 in that picture, indicates that to you, please?

23 A The lath, the plaster plate flaked out of the -- flaked
24 out easily.

25 Q And 488, please.

1 A That's a piece of stone with some mortar attached to
2 the back of it.

3 Q And how, if at all, does the mortar pattern on the back
4 of that stone indicate? What does it indicate?

5 A It's not a complete bond. It should be completely
6 filled with mortar so that when the stone and the plaster is
7 put together it's all one uniform piece with no voids.

8 Q So what's the term called when the mason puts that
9 mortar on the back of that stone before pushing it up the
10 wall?

11 A Fully buttered.

12 Q Buttered. Is this stone fully buttered?

13 A No.

14 Q Does it need to be to achieve the 50 PSI?

15 A At least. Yes, it does.

16 Q Then there's a term called wet out or squeezed out that
17 the jury heard earlier this week. Is there any evidence of
18 wet out or squeezed out on the back of this stone?

19 A Well, just just the opposite.

20 Q First, tell them -- make sure they ---

21 A Yeah, that's when the plaster is placed over the
22 surface of the lath. It allowed to harden somewhat,
23 completely or somewhat, and then plaster is placed over --
24 or mortar is placed over the stone and it's pushed into that
25 and you're supposed to have the mortar extrude out around

1 the sides. That gives you a visual indication that you're
2 filling it up sufficiently.

3 Q Let's go to photo 506 at 201 Buxton. Tell us what's
4 going on here.

5 A This is that brick area that's in the process of being
6 removed. The person is chiseling out a piece of the brick
7 sill and that's where there should be some metal or should
8 be some flashing that extends from beneath the window and
9 then down and out below the sill with weep holes.

10 Q Below the row lock sill?

11 A Yes.

12 Q And tell the jury which are the components of the row
13 lock, please.

14 A Above the chisel is the row lock sill, the brick, the
15 masonry sill.

16 Q And 507, please.

17 A That's a close up of that same area. Notably, is a
18 fastener, a nail in the bottom corner of the window that's
19 about rusted out. It's very corroded, because it's extended
20 contact with moisture. Moisture that seeps through the
21 joints in the sill.

22 Q And 510, please. And then 512.

23 A That's the same area, different angle. That's with
24 more brick removed and a lot of mortar debris in that
25 airspace.

1 Q Going to photo 514, please.

2 A That's a wall tie. It had about a one inch of
3 engagement into the bed joint.

4 Q And photo 519, please.

5 A That is mortar congestion. Clogged up mortar in the
6 airspace behind the brick.

7 Q Where on there is the brick clogged, please?

8 A This big hunk of mortar. Then again, this is not good
9 workmanship, having some of these slivers of brick
10 terminating at this jam. They could have coursed it out to
11 have a half a brick or whole brick at the end.

12 Q And 524, please. On to 526, please.

13 A That shows one of the wall ties and you can see the
14 corrosion on the tie. It's -- all of the galvanizing
15 protection has been eaten off of it. It's corroded away.

16 Q 528, please.

17 A That's a close up of a wall tie. You can see the nail
18 head that secures the tie to the wall. It's highly corroded
19 also.

20 Q Those nails, those wall tie nails, how are they
21 supposed to be installed, sir?

22 A They're supposed to be installed -- they're supposed to
23 be corrosion resistant nails installed in the studs.

24 Q Explain to the jury what you mean by the studs. Where
25 and how the mason finds those?

1 A Well, there's a number of ways to find them, but
2 they're supposed to find the studs and put the nails into
3 the studs to secure those wall ties to the building.

4 Q Is that a building code requirement?

5 A Yes.

6 Q Did you observe the extent to which the mason had
7 installed the wall ties in the studs?

8 A I observed that about half of them were not in the
9 studs.

10 Q Half?

11 A Basically half.

12 Q As in 50 percent?

13 A Yes.

14 Q What's the significance of not having a wall tie
15 fastened into a stud, sir?

16 A It doesn't have sufficient pull out resistance.

17 Q Is it a building code violation?

18 A The code requires it to be in -- the nails to be in the
19 studs.

20 MR. LUCEY: Thank you, sir. Sir, I'm going to switch
21 exhibits. It's a good time for the morning break.

22 THE COURT: We'll go ahead. It's 12:30. We'll go
23 ahead and break for lunch. We'll start back at 1:45. Mr.
24 Foreman, ladies and gentlemen of the jury, I hope you have a
25 good lunch. We'll see you at 1:45.

1 (WHEREUPON, the jury exited the courtroom at 12:30 p.m.
2 Trial was in recess for lunch until 1:45 p.m.)

3 THE COURT: Anything from anybody before we bring our
4 jury back in?

5 MR. LUCEY: Yes, Sir. I have some photographs exhibit
6 2534. I just wanted to confirm that the procedure we're
7 following is that I'll be removing the patio doors
8 overnight, supply Mr. Imhoff with either a redacted copy or
9 a removed copy for his approval and then those photographs
10 will come into evidence.

11 THE COURT: Yes, sir.

12 MR. LUCEY: The other thing I wanted to confirm, Your
13 Honor. I had a meeting with Kim, Ms. Wooten, a couple days
14 ago about the damages to review how to handle the credits
15 for settlements. What we've agreed is that when we publish
16 our damage, we'll publish a net amount we will not reveal to
17 the jury that has been reduced for whatever reason or
18 whatever amount. We will use a net amount.

19 THE COURT: Is that correct?

20 MR. IMHOFF: Yes, Your Honor.

21 THE COURT: Let's get our jury. Dr. Whitlock, you can
22 come on up to the retake the stand.

23 (WHEREUPON, the jury entered the courtroom.)

24 THE COURT: All right, Mr. Foreman, ladies and
25 gentlemen of the jury, I hope everyone had a good lunch. We

1 are ready to proceed. Mr. Lucey, you may resume your
2 questioning of your witness.

3 DIRECT EXAMINATION

4 BY MR. LUCEY:

5 Q Dr. Whitlock, I want to pause on the photographs and
6 use a demonstrative exhibit to organize the brick issues.
7 Do you see the exhibit I'm holding up to you?

8 A Yes.

9 Q Is that an adaptation that you did out of building
10 code?

11 A Yes.

12 Q Let me get demonstrative slide 2 up on the screen.
13 Sir, let's address the top half of this demonstrative
14 exhibit. If you would please, explain to the jury what it's
15 it's showing.

16 A This drawing depicts aspects of the construction that
17 are required by the code. For example, sealant at the
18 intersection of the brick, row lock sill, and the window
19 sill. It's important to have a sealant there for two
20 purposes. One, to keep water out and one to apply a soft
21 joint to keep movement from causing this sill to be damaged.
22 And that's typically missing. It doesn't exist at Rose
23 Hill. Also what is required by the code is flashing that
24 comes down and out through the masonry below the sill with
25 weep holes. That is also not present at Rose Hill. At Rose

1 Hill, some of the sills are sloped, some are not. They
2 should be sloped. Further down, is that a full screen? Is
3 it showing? There are things like the wall ties. The wall
4 ties are required to secure the brick veneer to the wood
5 framing, and then there's also weather resistant barrier
6 that's required. That is present at Rose Hill, but it is
7 missing in some places torn and incomplete. The one inch
8 airspace or the one inch grouted space. It has to be one or
9 the other. And what's happening at Rose Hill is there's
10 frequent clogged areas of mortar bridging, and that is when
11 mortar extends from the brick veneer over to the sheathing
12 area and lays against the sheathing, keeping moisture in
13 contact with that sheathing. Flashing weep holes in the
14 base were inadequate. The flashing frequently stopped
15 inside the wall and the weep holes were hit and miss.

16 Q Thank you, sir. Are each of those seven conditions on
17 that chart a code violation that is deviated from?

18 A That is correct.

19 Q You may have a seat. We're going to run through a
20 couple more brick issues. Everything you just told the jury
21 about on that brick diagram was, as I understand it,
22 separate and apart from the issue of isolation joint
23 required to separate the foundation supported brick and
24 frame supported brick?

25 A That's in addition to, yes.

1 Q So, that would be an eighth and separate building code
2 violation?

3 A Correct.

4 Q And number 9. Describe, in the simplest fashion you
5 can, why discontinuous flashing is a code violation.

6 A Well, flashing needs to be continuous so that it
7 gathers water and takes it out to the exterior. Secondly,
8 if it's discontinuous, you get that bond across the joint
9 that's, in most places, precluded by the presence of the
10 flashing, but in places where flashing is missing the bond
11 then transfers through. The brick expands and causes cracks
12 like we saw at the corners of many of the homes. And I
13 showed you in some of these slides this morning.

14 Q May I have 25.3 in evidence on the screen, please.
15 Sir, is this an example of a discontinuous flashing that you
16 previously testified about?

17 A Yes, it is.

18 Q In this photograph here, sir, what is the condition
19 being demonstrated here?

20 A That shows the flashing stopping about a little over an
21 inch from the surface of the brick from the face. It is
22 supposed to come to the surface of the brick so that the
23 water gets completely out.

24 Q Is this second photograph, 25.3, a code violation?

25 A Yes.

1 Q Is it different from the first nine that we just
2 itemized to the jury?

3 A It is one of those that I showed in the graphic.

4 Q It's one of those nine. Next photo in this group,
5 please. What is being demonstrated here at the corner, sir?

6 A If you saw this, you can see the cracking at the top
7 just above that wall tie. This is where the expansion --
8 the long wall expanded and cracked at the corner.

9 Q Next photo, please. Go ahead and take that down. We
10 haven't discussed excessive brick height over the garage
11 openings. Talk to us about that, please.

12 A There are some areas where the walls are two stories
13 tall, and at the bottom of the walls is a garage door, and
14 there's a lot of brick masonry above the garage door putting
15 a lot of weight on that brick causing additional cracking.
16 That height of masonry above the garage door is an excess of
17 what the code permits in addition to the defects of the
18 shelf angle slash lentil being installed wrong at those
19 areas.

20 Q Would that be a tenth building code violation?

21 A It would be, yes.

22 Q Sir, what is the net effect of these ten building code
23 violations on the homes at Rose Hill?

24 A That the brick is defective in a widespread manner.
25 It's not functional. The wall ties are not adequate.

1 They're not long term and durable. They're not attached
2 well. The walls are going to hold water. You can already
3 see where moisture was absorbed below the windows. There
4 was elevated moisture there. It's makings for rapid
5 deterioration of the overall building walls.

6 Q What is the remedy for that condition at Rose Hill,
7 sir?

8 A To replace the brick.

9 Q Why don't you just piecemeal cut some pieces out and
10 put some pieces back in?

11 A You could cut flashing out and put it back in different
12 places, add wall ties, but the piecemeal effect would look
13 bad, wouldn't be as effective as you would want it to be for
14 the homeowners. Plus you would leave the air and weather
15 barrier in a defective state, in addition to flashing around
16 the windows that needs to be fixed.

17 Q Let's talk about the stone before we return to a few
18 more pictures. I will show you some of your stone
19 demonstrative exhibits as to the instillation of stone
20 veneer. Are these reasonably accurate depictions of the
21 installation?

22 A Yes. Those are the manufacturer's instruction
23 installation details.

24 Q Let me have the first slide up on that group so I can
25 review it with Dr. Whitlock. Sir, on the screen is base of

1 wall for the stone veneer. Tell the jury if you would
2 please, what the diagram demonstrates should be there and
3 and what is not done and missing.

4 A This shows the exterior stone veneer, adhered stone
5 veneer on a wood framed structure and the different
6 components. This WRV is weather barrier that's shown back
7 against the sheathing. Below that is the metal lath that
8 the plaster is imbedded into. Then there's a mortar setting
9 bed. That was what we talked about before, setting stone
10 onto the plaster and lath followed by what's called a weep
11 screed or flashing at the base, and clearance. The walls
12 don't contain any clearance. The stone doesn't contain the
13 clearance that is required. At Rose Hill the stone goes
14 down to or below grade, and down to the concrete. This weep
15 screed though, waterproofing feature, was not used at Rose
16 Hill. Above the roofs it was left out and at the bottoms of
17 the walls near the ground it was left out. It wasn't used.
18 The mortar ---

19 Q Could you pause there? Could you pause there one
20 second, sir. Just take a moment to elaborate a little bit
21 on the source of the weep screed requirement and what the
22 function of the weep screed is at the base of the wall.

23 A Well, the source of it is the manufacturer's
24 instructions. That says to do it. There's also historical
25 precedent for using it and the building code says to do it,

1 and so do ASTM standards. ASTM standards 1063. All three
2 of those are consistent in their requirements that that
3 device be used. Its purpose is to get the water out of the
4 wall without it seeping back into other areas.

5 Q And then you were elaborating on the ---

6 A Okay, going back up. One of the biggest issues with
7 the separation and failure of the stone is the mortar
8 setting bed. It was done very poorly throughout and the
9 stones don't stick well and many have fallen off and many
10 come off easily with light hand pressure. Those are the big
11 items that are required by both code and manufacturer's
12 instructions that weren't done or weren't done well at Rose
13 Hill.

14 Q And the six deficiencies called out on the slide. Are
15 they all violations of manufacturer's installation
16 instructions?

17 A They are. These are the instructions, yes.

18 Q Let me have slide three, please. This is apparently
19 the stone condition at the base of windows. In other words,
20 a couple of feet up from the ground. Tell us, if you would
21 please, what the diagram shows and what the deviations are.

22 A Again, this is from the manufacturer's instructions,
23 which the code requires you to follow. These require that
24 there be a joint, a sealant joint, a backer rod, at these
25 locations. That was not used at Rose Hill, and therefore

1 water can enter these areas unimpeded. This says the casing
2 bead is optional. It was not used. I can't say that that's
3 a code violation because in the manufacturer's instructions
4 it says it's optional. I personally think it would have
5 been a good idea to use it, but it wasn't. The sill
6 flashing over the window fin. That flashing has problems.
7 That flashing is supposed to go up and turn in and cover
8 this sill pan. It needs something that would catch the
9 water should the window leak, like we showed you that the
10 windows leak. If there had been a sill or a sill pan
11 flashing it could have collected that water and deposited it
12 back to the exterior. That doesn't exist at Rose Hill. The
13 mortar setting bed. We talked about that. It's the same
14 issue here. It didn't bond well. The mortar joints weren't
15 used. They're not required, but they weren't used. There
16 were two layers of weather resistant barrier, but installed
17 well.

18 Q Are each of the red deviations itemized by you on the
19 sheet, seven of them, are each of those violations of the
20 manufacturer's instructions?

21 A Yes. Well, with this section of the optional casing,
22 the others are a violation of instructions.

23 Q The last stone diagram, please.

24 A This is a similar detail at the roof where the stone
25 comes down from a upper wall down towards the roof. This

1 shows a two inch gap with the similar foundation type detail
2 of weep screed and other important items just like the
3 foundation detail showed. This was not done at Rose Hill.
4 The stone was taken down and placed on top of shingles. In
5 fact, there's mortar and stone. Is frequently shown smeared
6 all over the shingles at these locations.

7 Q Are each of the red callout deviations in this exhibit
8 violations of manufacturer's installation instructions?

9 A They are.

10 Q So, that's in excess of a dozen between the three
11 slides, a dozen deviations?

12 A Correct.

13 Q You can have a seat, Dr. Whitlock. I want to hand you
14 B to your affidavit from the spring of 2020, excuse me.
15 Exhibit 2420B, which is in evidence. Is that a collection
16 of window photographs from your materials?

17 A These certainly aren't all of my photographs, but this
18 looks to be a fair sampling of window photographs that show
19 problems.

20 Q And they relate to the windows at Rose Hill, sir?

21 A Yes.

22 Q And they all have a blue stamp on the right from where
23 they were filed in court on November 23, 2020?

24 A Blue stamp? I don't see a blue stamp.

25 Q Yours don't. Do they all have a address at the bottom

1 right hand corner?

2 A Yes.

3 Q All the addresses are different?

4 A Yes.

5 Q Let's go ahead and put the first one up on the screen.

6 What are we seeing here on the screen, please, sir?

7 A That's a leak at the corner of a window. And that is 1

8 Chatham Court. The location of that home is 1 Chatham.

9 Q Next photograph, please.

10 A That's a similar condition. That happens to be a fixed

11 window at 2 Kettering.

12 Q Next photograph, please.

13 A That's another similar condition and that is 4 Duxbury,

14 Q Next, Lawton.

15 A That is a leaking condition at -- I believe that is 3

16 Kettering.

17 Q Is there any standing on the actual wood or drywall

18 wall component itself in 16 Kettering?

19 A 16 Kettering shows a stain on the window at the miter

20 intersection with the vertical joint and then a dried up

21 water stain on the sill.

22 Q Next one, please.

23 A Rotate that. That is 16 Kettering and that -- I think

24 we saw that one earlier today and it shows deterioration of

25 the jam and sill.

1 Q Next one, please. 17 Kettering.

2 A 17 Kettering that is had water damage completely.

3 Q 106 Barrett, please.

4 A Another condition where water stains exist, dried up
5 water.

6 Q Is there water staining on the wood or drywall finish
7 itself inside of the window component?

8 A I see on the sill. I can't tell for sure if it's on
9 the drywall. It could be. I mean on the side, on the
10 vertical portion.

11 Q 109 Amherst, please.

12 A There's a stain in the bottom corner on the window and
13 on the window sill.

14 Q 151 Haverhill.

15 A Same thing. Damage at the corner of the window.

16 Q 314 Amesbury.

17 A Yeah, water leakage and damage in the corner.

18 Q 8 Dartford.

19 A Same thing.

20 Q 10 Hardwick.

21 A Another example. Yes.

22 Q 100 Sturbridge.

23 A That's another one with a horizontal oriented crack.

24 And rotate the photograph so the crack is horizontal instead
25 of vertical. But yeah, that's another leak.

1 Q 101 Sturbridge.

2 A Another horizontal crack and leakage at the crack and
3 below it.

4 Q 102 Yonce.

5 A Again, leakage in the corner. That's 101 Sturbridge.
6 102 Yonce is the next photograph if you want to switch it,
7 There we go. That's 102 Yonce with some damage in the
8 corner.

9 Q Is that water damage?

10 A Yes.

11 Q What is the black substance we see there?

12 A It's some type of biological growth. There's obviously
13 more water below this that we don't see.

14 Q Why do you say -- why do you say that? Why do you say
15 to the jury, there's obviously more water below that than we
16 can see?

17 A Water goes downhill. It flows by gravity to areas below
18 where it's deposited, similar to what we saw in the
19 photographs of the ceiling leak that came through.

20 Q The ceiling leak you showed the jury this morning?

21 A Yes, we saw that because there's a wall above it that
22 water drained through and drained into the ceiling. Most
23 conditions like this is a wall that just goes down to the
24 slab or ground and there's no ceiling or something beneath
25 it where you can see water trickle out.

1 Q And 104 Amherst.

2 A That's a failed miter with staining.

3 Q 159 Haverville.

4 A Another failed miter with water stains emanating from
5 the miter.

6 Q When you say a failed miter, tell us what you mean by a
7 failed miter.

8 A That the heat welded miter has a crack within it. In
9 this case, it is within the miter and then it kind of,
10 toward the bottom, comes out of the miter and into the
11 bottom frame.

12 Q And how does that differ from some of the fractures
13 that we see that are horizontal or vertical?

14 A Just different orientation, but stress related.

15 Q 177 Haverhill, please.

16 A Another example of a leaking miter. I can't see a
17 crack in that one, but obviously there is.

18 Q And 233 Marshfield.

19 A That's the right hand side with a crack that starts in
20 the top portion of the miter and kind of curves to the left
21 to right.

22 Q 207 Buxton.

23 A That's another crack starting in the miter and then
24 migrates into the jam.

25 Q 211 Buxton.

1 A That is a crack and leak and that's a fairly large
2 horizontal crack at the top of the miter.

3 Q And what causes those gaps like we're seeing in the
4 joint between the house sill and the window product?

5 A Wood is behind all of this material. When it gets wet
6 it swells and causes the parts to move apart.

7 Q And 303 Reading, please.

8 A That's another cracked miter with stains.

9 Q 404 Rowley.

10 A That is a crack at the right hand side above the heat
11 weld.

12 Q How would you describe the positioning of the gasket in
13 this particular photo, in 404 Rowley?

14 A It looks like it's not completely filling the gap. It
15 fills the bottom two thirds, maybe three fourths, and just
16 not complete.

17 Q And why -- we touched on it, I think, in different
18 context. Tell the jury why that gasket -- if you're going to
19 use a gasket, why does it have to seal that gap?

20 A To prevent water from flowing into the home.

21 Q Sir, what's the problem with the windows at Rose Hill?

22 A The problem is -- the biggest problem is they have
23 frequent leaks and frequent cracks and they're not
24 performing as they should, to be weather tight.

25 Q Sir, you just showed the jury a dozen or two failed

1 windows from a dozen or two houses at Rose Hill. Describe
2 for the jury, if you would please, what you believe to be
3 the propensity for those failures throughout Rose Hill,
4 throughout the 220 odd class members.

5 MR. IMHOFF: Your Honor, may we approach?

6 THE COURT: Yes, Sir.

7 (WHEREUPON, bench conference.)

8 Q Sir, how widespread are the window failures? Before I
9 even ask you that, let me back up one second. I'm going to
10 show you another demonstrative exhibit. A color coding of
11 the Rose Hill neighborhood with all the lot lines and a
12 color coding of the homes inspected by WDP coded in red. Do
13 you believe that to be a reasonably accurate graphical
14 depiction of where your firm has been?

15 A Yes.

16 Q That would include, I can tell you, both 2019 and 2020
17 stuff that you and I were at before lunch and your business
18 with the defendant's engineers later in the case?

19 A Yes.

20 Q And note that on here there's a circle, a yellow
21 circle, for houses where your firm did destructive tests.
22 In other words, took a brick out, a stone out, things like
23 that. Do you believe that to be a reasonably accurate
24 depiction of where you all tested in the neighborhood?

25 A I think so.

1 Q Do you happen to recall the approximate number of homes
2 that you all have inspected from the exterior?

3 A Almost all of them from the exterior.

4 Q So, that would be almost 220?

5 A Yes.

6 Q Do you recall the approximate number of homes that you
7 all have inspected, you all being WDP, that you all have
8 inspected on the inside too or done testing?

9 A I've personally been in about 90, and my staff have
10 been in more, somewhere around 140 or so.

11 Q 140 out of the roughly 220?

12 A Yes.

13 Q Based upon your personal inspection -- let me ask
14 first, did you take the opportunity over the course of this
15 case to review your staff photographs too?

16 A Yes.

17 Q And debrief with your staff as to their observations?

18 A I did.

19 Q And review the work with them?

20 A I did.

21 Q Based upon both your 80 or 90 odd interior inspections,
22 your test cuts, your water tests, and your staff's
23 additional observations, do you have an opinion as to how
24 widespread the window failures are at Rose Hill?

25 A I do.

1 Q Tell us about that.

2 A They are throughout. Every single house I went into, I
3 saw crack miters. Some a lot, some a few. But everyone I
4 looked at had a crack miter somewhere in the home. And my
5 staff confirmed that in their inspections as well.

6 Q Sir, I want to just talk to the jury for a moment about
7 some of the the water testing you did. They heard you
8 talking about sill dam testing. I'm going to hand you
9 what's been marked for purposes of identification only
10 exhibit 2724.28. Are those your firm's water testing
11 reports?

12 A Yes.

13 Q And tell us which is which. Which report 24.28 or
14 24.27. Which report is ---

15 A The 24.28 are reports from the windows that were tested
16 using the sill dam procedure.

17 Q Let's stay with that for a second. We'll come back
18 Tell us, if you would, please, how and what you reported in
19 these sill dam reports relating to the pictures that you
20 already showed the jury this morning with the duct tape.

21 A Basically the location of leakage if it occurred by a
22 red dot at the location. Sometimes it's on both sides,
23 sometimes on one. There may have been a case or two where
24 there wasn't a leak.

25 Q And what is the information that you catalogue at the

1 top of this first page of these window test reports?

2 A The location, date of the testing, the window
3 manufacturer, and the type of window.

4 Q What do you append to these reports?

5 A Photographs.

6 Q And why is it you take the effort to do this when you
7 already poured the water, you just saw the moisture beading,
8 you took photographs. What is the point in writing up this
9 report?

10 A To transmit the results to whoever is interested in
11 seeing them.

12 Q And to anybody who's interested in replicating your
13 efforts?

14 A That -- it could be used for that purpose.

15 Q Or refuting your efforts?

16 A That too.

17 Q Have you received any information refuting your
18 efforts?

19 A I've received no reports from anyone.

20 Q Roughly how many sill dam test reports are in here? A
21 dozen? A half dozen?

22 A I think nine, maybe.

23 Q And can you summarize for us the results of your
24 overall sill dam testing? We might not get to every one of
25 those photos today.

1 A That there was leakage in all of those tests, I
2 believe. I can go back through it real quick and see, but I
3 believe there was, in the sill dam tests, I think there was
4 leakage in each one. Yes.

5 Q Leakage in every one?

6 A Yes.

7 Q Now, let's turn to 24.27, your other window test
8 reports. I haven't had the opportunity to show the jury a
9 picture about this other type of window testing. Would you
10 give them a brief overview of this other water testing you
11 did?

12 A Yes. That is commonly referred to as a spray rack
13 test. Instead of flooding the dam sill, the dam, nozzles
14 are set up over the window and water is sprayed. Sometimes
15 a vaccume is pulled on the interior to simulate a wind
16 driven rain like a storm. In all of these tests I performed
17 the spray without any type of simulated wind. It was just
18 spray against the window. Except for one test. There was
19 one test that results were a little bit odd. I saw at the
20 bottom of the window what I thought appeared to be a prior
21 leak, a historic leak, and when I did the test the opposite
22 side leaked. Which surprised me. So, that one test I did
23 add a vaccumme to see if that would cause the opposite side
24 to leak, and it did.

25 Q Let's break that down and let's ignore the one higher

1 test for a moment. What ASTM standard is the spray rack
2 conducted in accordance with, generally?

3 A That spray rack is from the ASTM E1105.

4 Q And you initially told the jury that most of your 1105
5 tests were at zero pressure, or some people say zero
6 differential pressure. Tell the jury what that means and
7 maybe perhaps start with what an 1105 would usually
8 replicate if you use pressure but what it means if you don't
9 use pressure.

10 A Well, for new windows or newly installed windows it is
11 common to perform that test with pressure applied to it to
12 simulate the wind driven rain. I chose not to do that.
13 Except for that one test. I chose not to do that. I wanted
14 to see if just a very light rain would create leakage. I
15 think some of the windows it did. Maybe one or two it
16 didn't. I'd have to go back and look at the results. I
17 don't remember exactly, but it was confirmation. I was
18 doing diagnostic testing. I had the impression from looking
19 at so many windows that the windows have a leakage problem.
20 I wanted to differentiate the leaks I saw from being from
21 another source. I wanted to know if it was from the window
22 or from the missing sealants, or whatever. That's why I did
23 the sill dam. The sill dam told me yes, the windows have a
24 leakage problem at the bottom corners. My next concept was,
25 well, will those windows leak if there's a rain. So, I did

1 the spray test without pressure and created leakage in those
2 windows.

3 Q If you don't mind, would you take a quick look through
4 these? First, tell me is the test information that you put
5 in the E1105 report the same as the sill dam report,
6 generally?

7 A There are photographs and there's indication of whether
8 there was leakage during the test.

9 Q Can you skim your results and talk to us about it.

10 A I can tell you the first test I did was at 404 Rowley.
11 It was on a window that has a stain, but the spray test did
12 not produce a leak. It did not leak. No, it did not leak.
13 The next test was at 106 Berwick Court. It did leak.
14 Again, it was zero test pressure. It leaked two minutes
15 after we started spraying. The third test was at 106
16 Berwick. It did not leak. The fourth test was at 17
17 Kettering and it did leak with the screen on and with the
18 screen off. The next test was 206 Buxton. It leaked. I
19 skipped that one. The next window test was 207 Buxton and
20 it leaked three minutes after spraying began. The next test
21 was 314 Amesbury. It also leaked after 11 minutes of
22 testing. Eleven and a half minutes. The next test was 5
23 Berwick. It leaked 11 minutes into the test.

24 Q Can I stop you there for a second?

25 A Sure.

1 Q You said 11 minutes into the test. What is the
2 standard length of time?

3 A Fifteen minutes.

4 Q Keep going.

5 A The next test was 5 Berwick. It also leaked. That's
6 the one where I did a second test with air pressure applied
7 and, of course, it leaked with air pressure applied.

8 Q You can skip 8 Duxbury and go to the next one.

9 A 203 Buxton Court. It leaked. That was somewhat of a
10 different test. That home had a history of leakage from
11 above the window, moreso than at the sill. Water was
12 observed by the homeowner to drip from the top. I recreated
13 that leak by putting the spray rack above their window and
14 it also leaked.

15 Q What was your take away from this window testing, sir?

16 A That the flashing above that window was bad.

17 Q Not just the one test, but your entire set of window
18 testing.

19 A The take away from all of the window testing is that
20 the windows are leaking. They're not water resistant.

21 MR. IMHOFF: Your Honor, can we approach?

22 (WHEREUPON, bench conference.)

23 Q Sir, I want to clarify, with regards to the flashing
24 and weeps at the head of a window in a brick wall and the
25 flashing and weeps in the sill of a window in a brick wall,

1 we're talking about a masonry function; correct?

2 A Masonry flashing is what I was talking about just a few
3 minutes ago.

4 Q Sir, do you consider these windows to be fit for their
5 intended purpose?

6 A They are not.

7 Q Are the brick walls fit for their intended purpose?

8 A They are not.

9 Q Are the stone walls fit for their intended purpose?

10 A No.

11 Q Let's talk about what the building code requires for
12 the use of windows in the jurisdiction where it's in effect.
13 What requirements does the building code have for windows to
14 be used in residential structures?

15 A Windows in buildings have to be tested and rated and
16 certified for their intended use. Building code specifies
17 the procedures for doing that, and those procedures are
18 those that are produced by an organization known as AAMA.
19 The standard is AAMA 101 and it outlines testing procedures
20 for windows and the labeling requirements for those windows.

21 Q Just without diving too deep, give the jury an overview
22 of the testing procedures for windows to get the
23 certification that's needed to make them able to used in the
24 building code jurisdiction.

25 A Generally there's testing. The three general tests

1 that the windows must pass. Structural testing, wind
2 pressure testing for structural purposes. Water resistance
3 testing. And air infiltration testing. Those are the major
4 tests. There are some other tests that are required, but
5 those are the performance grade tests for windows that they
6 must pass. There are procedures for doing those tests
7 specified by AAMA, and once those tests are performed by an
8 independent laboratory, the laboratories then produce a
9 report that is checked by a validator which is another
10 organization that checks to make sure the testing was done
11 right. They say everything is okay and then they can get
12 the certification label to put on their windows.

13 Q Some of the terminology, sir. When you get this
14 performance rating, is it sometimes referred to as a DP
15 rating?

16 A Performance grade is the appropriate terminology.
17 Performance grade. And performance grade of a window
18 carries with it a design pressure rating, DP rating.

19 Q And some people call that DP?

20 A Yes.

21 Q And some people shortcut DP for performance grade, but
22 they're not quite the same thing?

23 A Not really, no.

24 Q And so you get a testing issued performance grade, a
25 third party test, that gives you a theoretical grade. What

1 were you telling the jury about a validator?

2 A That's another review, another level of review, to make
3 sure that the testing was done properly and appropriate, and
4 that the windows met the requirement.

5 Q And then what does the building code provide so that
6 people who use these windows in the jurisdiction will
7 actually know that they've been tested, and validated, and
8 certified, and that they're acceptable for use?

9 A The code states that the windows are to be labeled in
10 accordance with AAMA's certification procedures.

11 Q This labeling, sir. Is this something that you've seen
12 in other investigations in prior cases?

13 A Yes.

14 Q Where do you typically see the validation label on a
15 window?

16 A At the head of the window at the top. It's a label
17 that is usually made of foil with a heavy adhesive. It's
18 difficult to remove and it's in a place where a homeowner
19 wouldn't see it and wouldn't want to remove it or wouldn't
20 need to remove it. It's basically hidden. It's not on the
21 window and it's not stuck to the face of the frame. It's up
22 in the window head out of normal line of view.

23 Q Now, I'm going to show you a demonstrative exhibit with
24 some window labels on it. Are you talking about either of
25 the labels on this exhibit?

1 A The label I was speaking about is similar to what's on
2 the left, the AAMA certification label.

3 Q And did you find any of those in Rose Hill?

4 A Not one.

5 Q Were those windows permitted to be used in South
6 Carolina under the IRC in effect at the time if they didn't
7 have the appropriate labels on them?

8 A No.

9 Q You mentioned that they're hidden. Are they hidden
10 from homeowners or are they hidden from builders?

11 A Well, they're not hidden. They're just out of the line
12 of sight. You can see them if you look up at the top of the
13 window.

14 Q Are you familiar with some of the stickers that come on
15 the face of a new window if you're driving down the street
16 in a new neighborhood you might see a bunch of stickers with
17 a lot of window manufacture names on them.

18 A Yeah, those usually have the manufacturer's name and
19 sometimes the instructions for installation.

20 Q Do you ever see AAMA 101 information on those big
21 manufacture labels that are stuck to the glass that
22 everybody knows is going to be removed because you can't see
23 through the glass?

24 A No.

25 Q That's not typically where you find them?

1 A That's not where you find them.

2 Q Do you ever see NFRC data on the big manufacturing
3 stickers?

4 A That is fairly common. You'll see energy information
5 on a sticker, a removable sticker, on windows. That's
6 placed there so the buyer knows it has a certain R value or
7 insulation value. But those are not required labels.

8 Q What does NFRC stand for, please?

9 A National Fenestration Rating Council.

10 Q Is there any relationship between the information that
11 is found on the NFRC label and the information that is
12 required by the building code for the validator for them to
13 be used in this jurisdiction?

14 A No.

15 Q Sir, tell the jury if you would, please, what a safety
16 letter is.

17 A It's a -- I've written those before. I saw a concern
18 on a project I would issue a letter saying I think there's a
19 problem that needs to be addressed for safety purposes.

20 Q Does your engineering standards give you certain
21 criterion or conditions in which you need to issue such a
22 letter?

23 A If I feel professionally that there is a danger that
24 someone could be hurt by any type of condition, then I feel
25 obligated to do so.

1 Q Are you required to issue one?

2 A Yes.

3 Q Have you issued any for Rose Hill?

4 A I think I have.

5 Q Tell us, if you would, please, the first one you recall
6 issuing for Rose Hill.

7 A Stone, falling stone.

8 Q What was the issue with the safety letter, please.

9 A That I was concerned that stone could fall off and hit
10 a person or a child in a driveway, for example.

11 Q Are you aware of whether or not falling stone has
12 presented a risk at Rose Hill?

13 A It hit one of my employees. My son, in fact. He
14 stopped to touch a stone to see if it was loose and it fell
15 and hit him. He's okay, but if it was a child sitting there
16 may have been hurt.

17 Q And what was the second safety letter you issued in
18 Rose Hill, please?

19 A I don't recall a second one.

20 Q Did you issue one relating to radon?

21 A I did.

22 Q Tell us about that.

23 A The plans for these homes and the homes actually
24 contain a system, a radon ---

25 MR. IMHOFF: Your Honor, objection. May we approach?

1 THE COURT: Yes.

2 (WHEREUPON, bench conference.)

3 THE COURT: Mr. Bailiff, would you take the jury out,
4 please.

5 (WHEREUPON, jury exited courtroom.)

6 THE COURT: Mr. Imhoff, first of all, state your
7 objection on the record.

8 WITNESS: Do you want me to leave?

9 THE COURT: Yes. Step out in the lobby, please.

10 (WHEREUPON, witness exits courtroom.)

11 MR. IMHOFF: Your Honor, as we argued this morning, the
12 basis of Dr. Whitlock's opinion on concrete cracking and
13 radon is based solely on 2018 plans. The houses are all
14 completed by 2017. We addressed it this morning and I
15 thought it was made clear. He just testified, and I don't
16 know if the court reporter can read it back or not, but he
17 just testified the detailed plans show -- and that's when I
18 objected, Your Honor. Mr. Lucey, at bar, just said we don't
19 have them, but we know it exists, therefore we should be
20 able to testify about it. That is not a valid basis for
21 this expert to have an opinion that the 2018 detail should
22 be used in absence of a detail. He has no other basis, as
23 you've heard, for the cracks being sealed in Anderson
24 County, because you don't have to put the radon system. The
25 only thing he can use is the detail and the only detail he

1 has is a 2018 detail which was done after these houses were
2 built.

3 THE COURT: Mr. Lucey?

4 MR. LUCEY: Your Honor, Dr. Whitlock has produced to
5 these defendants his pictures of the radon system in these
6 houses. A radon system could not have gone in these houses
7 without a set of plans. So, we know the plans exist. They
8 haven't been produced to us. The Court may recall yesterday
9 JLS testified in their deposition that Exhibit 15.4 what
10 D.R. Horton has represented are the plans for Rose Hill are,
11 in fact, not the plans for Rose Hill. JLS has testified
12 yesterday that the detail for Rose Hill would've had
13 Greenville on them, not Atlanta. That was published to the
14 jury. We know that the radon systems exist in plans when
15 Rose Hill was built out, because there are systems in the
16 house and you can't put a radon system in a house without a
17 set of plans. It's above the knowledge of your average
18 mason.

19 Your Honor, your typical radon capture system in this
20 area is simply gravel below your foundation, vapor barrier
21 above the gravel, a sealed foundation, you seal any cracks,
22 and then you pipe the gasses that gather in the gravel up
23 through just like a bathroom toilet pipe. Up and you vent
24 it out the roof passively, just like you vent bathroom
25 gasses out passively. But, the point is, it starts down

1 under the foundation with the gravel and the certain kind of
2 pipe to capture the gasses, and then hook that pipe through
3 the foundation. That's beyond the knowledge of your average
4 mason.

5 So, we know that there are plans for those. It doesn't
6 even matter, because we know the radon systems are in the
7 house. We've photographed them and this -- the thing about
8 -- I'll be honest with Your Honor. I forgot what question I
9 had asked that led to the objection. But, the -- the plans
10 that they have are 2018 plans are the same as the EPA's
11 plans. The five basis I just explained to the court you're
12 going to find them in any plans. Gravel, vapor barrier,
13 seal concrete foundations so gasses can't get into the
14 building, run a pipe through your gravel area to collect the
15 gasses, and pipe it up through the roof. You're going to
16 find that anywhere.

17 The relevance of the 2018 plans will only be relevant
18 if they somehow deny in this courtroom that you have to seal
19 your concrete for a vapor return system. Because their 2018
20 plans show that they know you have to seal your concrete in
21 this vapor capture system. But, other than that, he has
22 personally seen the systems. He doesn't need to rely on
23 their plans. We don't disagree with him that those were
24 optional, but once Horton assumed the duty to put them in
25 they assumed the duty to put them in properly. Homeowners

1 shouldn't be relying on them having radon equipped houses
2 if, in fact, the radon systems aren't working because they
3 weren't put in right.

4 THE COURT: Well, now my recollection is both of you
5 questioned Mr. Moore about this issue.

6 MR. LUCEY: Yes, sir.

7 THE COURT: And Mr. Moore, if my memory is correct,
8 testified that the systems were not there when the houses
9 were built. Is that -- am I understanding that testimony?

10 MR. LUCEY: I don't recall, Your Honor, but I can show
11 the Court the pipe that runs through the house and they do
12 install it from the very first day.

13 THE COURT: There was some testimony about him looking
14 up the DHEC regulations. Each of you questioned him about
15 that.

16 MR. LUCEY: He disputed that the cracks needed to be
17 sealed.

18 THE COURT: He testified the cracks had nothing to do
19 with it. Why don't we do this. Let's take just a short
20 break. Mr. Lucey, you proffer the questions that you want
21 to ask.

22 MR. LUCEY: Or, if the Court would like me to lead, I'll
23 make sure he doesn't refer to the plans.

24 MR. IMHOFF: No, thank you.

25 MS. WOOTEN: We've had enough of that.

1 THE COURT: Let me hear the question, but let's take a
2 short break.

3 (WHEREUPON, RECESS HELD.)

4 THE COURT: Let's go on the record. Mr. Lucey, why
5 don't you proffer that question.

6 DIRECT EXAMINATION (IN CAMERA)

7 Q Sir, have you seen evidence that radon collection
8 systems exist in the Rose Hill houses in the houses
9 themselves?

10 A Yes.

11 Q Was that during your inspections?

12 A Yes.

13 Q Tell us what evidence you saw regarding the existence
14 of radon collection systems in the houses themselves.

15 A I saw pipes in the basements leading down to sump
16 crocks labeled radon, and I also saw pipes in attics going
17 up through the roof labeled radon.

18 Q Then with regards to radon -- or let's just talk about
19 engineering generally, in your practice, Your Honor --
20 excuse me. Not Your Honor, Dr. Whitlock. I apologize. Dr.
21 Whitlock, in your practice is it typical to rely on
22 standards issued by reliable agencies such as the government
23 of the United States?

24 A Yes.

25 Q And from time to time do you rely on standards issued

1 by entities such as like the EPA?

2 A Yes.

3 Q And does the EPA issue standard radon requirements?

4 A Guidelines, yes.

5 Q On radon collection systems?

6 A Yes.

7 Q And on how much radon you can be exposed to?

8 A Yes.

9 Q Stuff like that?

10 A Yes.

11 Q And sir, are these guides from the EPA publicly

12 available to everybody on the Internet?

13 A Yes.

14 Q And have they been for some time?

15 A They have.

16 Q Sir, the safety letter that you already told the jury

17 about, tell us if you would, please, what gave rise to you

18 writing that letter?

19 A Well, I noticed that the homes had systems in them. I

20 noticed that the plans that I had had information about the

21 radon systems on the plans. I did some research on radon

22 systems, and I read where the EPA says that radon is number

23 two to cigarettes in killing people from cancer. And that

24 made me feel like I should let you know and others as well.

25 Q And you didn't reference any plans in your letters to

1 the homeowners, did you?

2 A I don't remember.

3 Q Did you form an opinion about the cracking concrete and
4 whether or not that was suitable for radon collection
5 systems in these homes?

6 A I knew that the concrete was cracked and I knew that
7 the plans that I reviewed said that the cracks need to be
8 sealed.

9 Q Besides plans, does the EPA have any guidance about
10 cracking concrete?

11 A It says that the cracks should be sealed.

12 Q And is there guidance any different than what you might
13 have seen in any other plans?

14 A I don't think so.

15 Q Are you able to testify regarding your radon
16 observations without referring to what D.R. Horton says are
17 post dated plans, the 2018 Emerald Plans?

18 MR. IMHOFF: Your honor, he just led the witness and
19 told him exactly what to say. I thought we were proffering
20 this man's testimony to find out what he relied on. He just
21 told his expert what to say so that he could avoid your
22 ruling that he can't rely on the plans. Your Honor, that
23 was -- that was -- he was leading him. He was coaching him.
24 That's exactly why you asked to proffer this witness.

25 THE COURT: That was a leading question. Don't answer

1 that question. All right, move on to the next one.

2 MR. LUCEY: Yes, sir.

3 Q Sir, did you form an opinion, to a reasonable degree of
4 certainty and your expertise, as to whether or not the
5 cracks at Rose Hill needed to be sealed to comply with the
6 EPA guidelines?

7 A Yes.

8 Q And do they?

9 A Yes.

10 Q From a layperson's point of view, just so the jury will
11 understand, do you understand the science of why you would
12 want to seal the cracks in a radon collection system?

13 A Because it's a fine gas that can seep up through those
14 cracks.

15 Q What -- so the purpose of the sealing is what?

16 A To prevent the infiltration of the gas into the homes.

17 Q And, in theory, if you prevent -- further prevent gases
18 from coming into the concrete, where are they going to go?

19 MR. IMHOFF: Your Honor ---

20 A Into the collection system.

21 MR. IMHOFF: He's leading him again. Continuing to lead
22 him.

23 THE COURT: You can answer that question.

24 A It will help force the gas to go into the collection
25 system and out the roof.

1 Q Some of the principles of a gas collection system that
2 you understand, would any of those be based upon engineering
3 principals that you would be aware of anyway?

4 A On those that are promulgated by EPA and similar
5 agencies.

6 Q And did you learn about gases in engineering?

7 A I learned about radon in my experience at the Brick
8 Institute. There was a claim at one time that brick had too
9 much radon in them, so I became aware of it at that time.

10 MR. LUCEY: Thank you.

11 THE COURT: Mr. Imhoff, did you have any questions
12 you'd like to ask him regarding that issue?

13 MR. IMHOFF: Yeah, just briefly, Your Honor.

14 CROSS EXAMINATION (IN CAMERA)

15 BY MR. IMHOFF:

16 Q Dr. Whitlock, did you rely in arriving at your opinion
17 that the cracks in the concrete need to be sealed based upon
18 a plan or a detail by D.R. Horton?

19 A That was part of my reasoning for that, yes.

20 Q Without that plan, can you tell us what plan or detail
21 you relied on, please?

22 A If I had them available to me, I could go through them
23 and show you to you. But I can't recite the page number or
24 the date or anything as I sit here.

25 Q We talked about it this morning.

1 A You did.

2 Q Was it 2018, sir?

3 A You said that. I don't remember. There may have been
4 one that predated 2018.

5 Q Have you seen one that predated 2018?

6 A Again, I'm not sure without looking.

7 Q Can you testify that you have seen a radon concrete
8 plan that would have been contemporaneous with or before the
9 build out of Rose Hill?

10 A I cannot tell you, because I don't remember the date of
11 the plans I looked at.

12 Q Without that plan, does the EPA require the cracks to
13 be -- strike that. Without that plan, what is the basis for
14 your opinion that the concrete needs to be sealed?

15 A What I've read in EPA's literature that concrete should
16 -- concrete cracks and penetration should be sealed.

17 Q What literature, sir?

18 A That what you can get from the EPA.

19 Q What literature, specifically, that you can get from
20 the EPA?

21 A It deals with radon in homes. I can't remember the
22 title of it. I have a copy of it. I could go get it.

23 Q Is it in your file?

24 A It is in my file.

25 Q Is it in the file that you produced to us?

1 A Probably. I'm not sure if it is, but it could be.

2 Q When did you look at it?

3 A I've looked at it several times over the past few
4 years.

5 Q Did you look at it and then rely on it, put it in your
6 file and produce it to us?

7 A I don't remember.

8 Q What specific part of the EPA are you referring to,
9 sir?

10 A There is a document, maybe more than one, on radon in
11 homes, or in buildings, and in there it's has guidelines
12 that suggest that cracks and penetrations be sealed.

13 Q They suggest it or they're in there.

14 A They recommend it.

15 Q Did you get it off of the EPA website?

16 A Yes.

17 Q Is it required in South Carolina?

18 A I don't know.

19 Q Is it required in Anderson County, South Carolina.

20 A I don't know if it's required anywhere. It's
21 guidelines promulgated by the EPA.

22 MR. IMHOFF: Your Honor, I don't have any further
23 questions for him, but I certainly would like to discuss
24 this with him out of the room here.

25 THE COURT: Say that again.

1 MR. IMHOFF: I would like to discuss this with the
2 witness excused and out of the courtroom if we could.

3 THE COURT: Okay. Doctor, please go in the lobby.

4 (WHEREUPON, the witness exited the courtroom.)

5 THE COURT: All right. Mr. Imhoff?

6 MR. IMHOFF: Your Honor, they're tiptoeing around it.
7 But the truth is that Mr. -- Dr. Whitlock, excuse me, began
8 to testify that the basis of his opinion was a D.R. Horton
9 detail. We know that that detail was a 2008, and Mr.
10 Lucey admitted that. Eighteen. I apologize, 2018. And Mr.
11 Lucey admitted that and said we know they exist, but we
12 don't have them. So, he can't possibly be relying on any
13 detail of D.R Horton. They're contemporaneous with the
14 build out of this. And if he doesn't have one, then he
15 can't refer to it. He can't rely on it, he can't testify
16 about it, Your honor. His opinion has no basis.

17 The second part that I asked him about is hearsay.
18 It's guidelines. He doesn't know where it is, if he
19 produced it, Your Honor. But the first part about D.R.
20 Horton's detail is should be we would object to any of that
21 testimony coming in, Your Honor.

22 THE COURT: All right. Mr. Lucey, your response.

23 MR. LUCEY: 1Yes, Your Honor. The witness testified
24 that government entities such as this are reliable places to
25 get standards to apply in engineering analysis. He got

1 standards from the EPA and frankly the EPA standards were
2 originally researched. But also from a question from me.
3 If you can't rely on the plan they produce, what else would
4 you rely upon to -- or besides your own engineering, besides
5 your own analysis, where else could you point us as there's
6 a resource that says you have to seal these cracks. And the
7 EPA resource is out there and it's been there forever and
8 it's just part of a standard collection system. And, Your
9 Honor, they should not be rewarded for hiding the radon
10 collection system plans from us. We all know they exist
11 because the radon systems are in these houses. You can't
12 put stuff in houses that don't have plans. So, we know D.R.
13 Horton had a radon collection system plan and they just
14 haven't given it to us. We also know the masons aren't
15 capable of putting these in without guidance, without plans.

16 So one, he has an adequate engineering basis, EPA is
17 reliable, and he's testified he can rely on it. And third,
18 they shouldn't be rewarded for not producing to us the
19 plants. Frankly, the reason he looked at the 2018 plans is
20 because in this litigation D.R. Horton produced what they
21 told us were the plans, the details, for our neighborhood.
22 It was only after we were two years in the litigation that
23 we found out that hey, D.R. Horton, one of the details you
24 gave to us actually post dates our neighborhood. That
25 didn't happen -- actually, I don't believe we even learned

1 that until after -- might not have learned that till after
2 the life safety letter was issued. But Your Honor, he has
3 adequate engineering foundation and he's entitled to rely on
4 the EPA.

5 THE COURT: All right, well, I will rule after hearing
6 the testimony, I will allow the questioning. However, he
7 should not refer to 2018 plans.

8 MR. LUCEY: Yes, sir.

9 THE COURT: Since that's post construction. But again,
10 Mr. Imhoff, your objection toward the EPA, that's a matter
11 of the weight of the testimony rather than admissibility and
12 is certainly subject to your cross examination on that
13 issue. So that will be the ruling on that issue. Is there
14 anything else before we proceed?

15 MR. LUCEY: May I tell him in the Court's presence that
16 he's prohibited from referring to those plans when he gets
17 back, as the jury -- before the jury comes back?

18 THE COURT: Yes, sir.

19 MR. IMHOFF: Your Honor, just one other thing I want to
20 put on the record. I think it's a good time, efficiently.
21 Mr. Lucey -- I want to put this on the record, Your Honor.
22 Mr. Lucey continuously puts in things that are settled in
23 this case, photographs, testimony we've talked about. He's
24 put in doors. He's put in installation issue. I would just
25 -- I think the jury is getting annoyed with all the

1 objections, but I think you're sustain sustaining the
2 objections. We would ask that either you inform the jury
3 what is going on somehow with a curative instruction or tell
4 Mr. Lucey to knock it off. As I said, we were up to 11:30
5 last night, making sure that there are no pictures or no
6 documents for things that are settled out in the case. Mr.
7 Lucey didn't do it and I don't know if he's doing it
8 intentionally or not, but he keeps putting it back into
9 evidence and I keep having to get up and take time, one,
10 Your Honor. But also, I assume I'm annoying the jury.
11 Probably you also, Your Honor, but I would ask that he stop
12 doing that and I want that on the record. Thank you.

13 THE COURT: Well, Mr. Lucey's indicated that he's going
14 to go back and clean up these pictures so that there's no
15 more settled matters in it. And he's outlined what he's
16 going to do this evening. And Mr. Imhoff, you look at them
17 closely and then we'll just make sure Monday morning before
18 we go any further that all those settled matters are taken
19 out.

20 MR. LUCEY: Yes, sir. And as long as he's bringing that
21 up, we're a week into trial and we don't still do not have a
22 proper defense exhibit list or properly labeled defense
23 exhibits. And they have not recorded our stipulations and
24 not recorded our objections on the publicly circulated list
25 like we did for everybody a week ago. We, at this point in

1 time, Plaintiff doesn't know what defense exhibits are in
2 evidence, have been admitted in here, or stipulated in or
3 not. So, they come up to the bench and say, well, this is
4 stipulated in evidence. Well, how do we know? You've never
5 given us back a stipulation saying it's stipulated evidence.
6 It's -- Your Honor, we need the Court to order defendant to
7 comply with the Court's requirements on exhibit list and
8 exhibits by say halfway through the weekend so we can have
9 24 hours to get caught up on this.

10 MR. IMHOFF: We have, Your Honor. I think the issue is
11 that Mr. Lucey didn't ever see our supplemental exhibit
12 list. As a matter of fact, I got an e-mail from I believe
13 Charlotte the other night and she said you talked about and
14 showed the judge a 55 page exhibit. And it wasn't. It
15 wasn't. It was the 35 page supplemental exhibit list that
16 was filed ---

17 THE COURT: Make sure he has the appropriate copy of
18 what you've prepared, because if you're looking at the wrong
19 exhibit list then we're going to have problems throughout.
20 So, if it's ready to where you can transmit it to him now,
21 do it now.

22 MR. IMHOFF: It's filed, Your Honor. It was filed per
23 your order.

24 MR. LUCEY: It does not reflect whether or not our
25 stipulations were accepted or rejected. We don't know what

1 defense exhibits are in or not at this point in the trial,
2 Your Honor.

3 MS. WOOTEN: That's not our job.

4 THE COURT: All right, after we're finished today,
5 y'all confer and if there's any problems, I'll take that up.
6 But before you leave today is what I'm hearing from two
7 sides is something completely different. So, all right,
8 let's get our jury back in again. Get Dr. Whitlock back in.

9 MR. LUCEY: Dr. Whitlock, the court has permitted me to
10 inform you that you were prohibited from referring to the
11 2018 plans in your responses to my radon questions. And I'll
12 inform you that it's our belief that the plans you're
13 referring to are probably the 2018 plans. You weren't sure
14 of the date. But we will not be referring to plans, D.R.
15 Horton plans, during our radon testimony, sir.

16 WITNESS: Okay.

17 MR. LUCEY: Am I clear?

18 WITNESS: Yes.

19 MR. LUCEY: Thank you.

20 (WHEREUPON, the jury entered the courtroom 3:30 p.m.)

21 THE COURT: Here are two things, ladies and gentlemen.
22 Were any of you able to hear any of the discussions that
23 were taking place in the courtroom while you were out of the
24 courtroom?

25 (WHEREUPON, no jury member responded.)

1 THE COURT: Mr. Foreman, ladies and gentlemen, the
2 jury, I know this is frustrating for you at times to have to
3 get up and go back and forth to the jury room. The reason
4 that I have the bailiff take you is like I instructed you on
5 the first day. Sometimes there's an objection over a
6 question or piece of evidence, and I have to make a ruling
7 on that. And sometimes these are involved questions where
8 there are a lot of issues of law that we have to consider.
9 And unfortunately it means you have to sit in the jury room,
10 sometimes for longer periods than than I would intend. But
11 we appreciate your patience and I'm doing my best to
12 minimize that. But there are some times that that's going
13 to be unavoidable, that you're going to have to go back and
14 forth to the jury room. But it's just to ensure that all
15 the parties in this case have a fair trial in accordance
16 with the rules of evidence. So again, I appreciate your
17 patience in this matter. So, Mr. Lucey, would you proceed
18 please.

19 MR. LUCEY: Thank you, sir.

20 REDIRECT EXAMINATION

21 BY MR. LUCEY:

22 Q I apologize. I actually forgot exactly where we are.
23 I think we were discussing the life safety letter you issued
24 regarding the radon warning and I just want to cover quickly
25 your reason for doing that and then show a couple of

1 concrete cracking pictures. Tell us, if you would please,
2 why you issued the life safety letter on the radon for the
3 Rose Hill residents.

4 A Because it was my understanding that that area is close
5 to an area in the Upstate that has the potential for
6 elevated radon levels, and that could be affecting the homes
7 at Rose Hill and the people at Rose Hill, and that the
8 cracks in the slabs should be filled to help mitigate the
9 radon issue.

10 Q And have you personally observed the existence of radon
11 collection systems in these houses?

12 A I have.

13 Q Without digging into any detail, in a very superficial
14 way, just explain to the jury what a radon collection system
15 is, or what the four components are, or something like that.

16 A There's -- under the ground slab, there's a system of
17 a collection system of gravel that the radon collects in and
18 it goes into a pipe, and that pipe then goes up through the
19 home and through the attic and out the roof.

20 Q Why is it that you recommended that the concrete
21 cracking be sealed?

22 A It's my understanding that that was part of the system,
23 that the cracks needed to be filled.

24 Q And what else? By filling cracks, what do you prevent
25 the radon from doing, sir?

1 A Coming up through the cracks.

2 Q Let's show some of the concrete cracks to the jury.

3 Tell the jury what this first picture is, please.

4 A That's a crack in the concrete slab.

5 Q Next please, Lawton.

6 A That's the crack in the side of a concrete slab as
7 viewed from the exterior.

8 Q And the jury obviously can only see the very edge of
9 that slab. Help us understand what you expect to be beyond
10 what we can see.

11 A That crack extends into the home across the width of
12 the home to the other side. It may go at a diagonal and
13 come out the around the corner, but usually they extend
14 through.

15 Q Did you take any opportunity at Rose Hill to chase the
16 cracks, so to speak?

17 A Not when they're covered with carpet or other flooring
18 materials. I didn't take it up to map out the cracks.

19 Q Were you able to do any without taking out flooring
20 materials.

21 A Where I can photograph cracks, like in basements. I
22 did garage slabs, in those types of areas.

23 Q Next photo, please. What are we looking at, please?

24 Q That's a crack in a basement wall.

25 Q Next photo, please.

1 A That's a crack in a basement wall as viewed from the
2 exterior.

3 Q Next photo, please.

4 A Another crack that extends down from the top to the
5 bottom of the basement wall.

6 Q Next photo, please.

7 A Basement floor slab crack right beside a control joint.
8 This saw cut joint is what you see in the bottom corner.

9 Q Next photo.

10 A That's a crack on the exterior edge of the slab.

11 Q Next photo, please.

12 A Another exterior slab crack.

13 Q Next photo, please.

14 A Same thing. Slab crack or -- excuse me, wall crack.
15 That's a basement -- I mean, a garage slab crack.\

16 Q Next?

17 A Same thing.

18 Q Next?

19 A It's a crack that extends into the curb at the edge of
20 the garage. It's another slab crack. All of these are so
21 far basement or garage slab cracks, as is that. This is a
22 crack in someone's home under their carpet. That is a
23 basement wall crack.

24 Q Next?

25 A That is a slab crack on the outside edge.

1 Q Next.

2 A Another example of a slab crack.

3 Q Now, this crack is a little bit different. Go back,
4 please. This crack now on the screen is a little different.
5 Tell us about that.

6 A It's larger. It is tapered. It indicates that there
7 may be some differential movement, like one end of the slab
8 dropped more so than the other causing it to taper, have a
9 tapered shaped like that.

10 Q Explain to the jury, please the meaning and
11 significance of your usage of the word differential
12 movement.

13 A That one portion of a structure moves more than the
14 other, and that is termed differential movement or
15 differential settlement.

16 Q What do we see on the screen now, please?

17 A That's a crack on the slab edge behind some straw or
18 grass. That's a slab crack. Can't tell if that's a
19 basement slab or where it is, but that's -- I think that's
20 in the garage.

21 Q Next.

22 A That's the cracks that have been sealed by someone,
23 several cracks in several different directions, and some
24 control joints as well.

25 Q Sir, I see this particular -- that particular crack the

1 the part at the bottom was larger, 167 Haverhill. You seem
2 to be wearing glasses. I can't see that far. Do the rest
3 of the pictures have addresses on them?

4 A I don't -- I don't know. I'd have to go back to see. I
5 don't remember seeing that.

6 Q Next.

7 A That one does. That's 173 Haverhill.

8 Q Next. That's a different crack. Tell the jury what
9 this is, please.

10 A That appears to be the curb that transitions from the
11 garage slab to the home and is a -- that's an odd looking
12 crack. That's not normal to see cracks oriented in that
13 direction, but that is definitely a crack.

14 Q Next.

15 A Garage crack. It's right beside a control joint. It
16 should be cracking in the control joint. That's the purpose
17 of the control joint. But for some reason, this has this
18 multiple crack pattern just adjacent to it.

19 Q We'll move on, sir. Let me show you what's been marked
20 for purposes of identification only as Plaintiff's Exhibit
21 243. Are these your measurements and photographs, sir?

22 A Yes.

23 Q I have on the cover of a thumbnail of each and then
24 attached to the large photograph.

25 A Yes.

1 Q Did you take these at Rose Hill, sir?

2 A I did.

3 Q They're being taken on top of the concrete?

4 A Yes, the first four are.

5 Q And tell us, well -- actually before I get into that,
6 Plaintiff moves 243 into evidence.

7 THE COURT: Any objection?

8 MR. IMHOFF: No objection, Your Honor.

9 THE COURT: Plaintiffs Exhibit 243 will be admitted
10 without objection.

11 Q Tell us if you would, please, sir, what you are
12 measuring in these photographs. What's going on?

13 A Are you projecting them or just --

14 Q No. I'm sorry, I don't think I have them on the
15 projector.

16 A Should I show?

17 Q Just from there would be fine.

18 A This is a six foot level that I placed on the concrete
19 slab. It's touching at each end and there's a hollow spot
20 underneath it showing us there's a dip in the concrete.
21 The next one is the same level.

22 THE COURT: Mr. Lucey, let me stop you. If you need to
23 use the overhead projector, there's one right here that may
24 make it simpler for everyone to see.

25 Q Let's go to that first photograph now that the jury can

1 see it, sir.

2 A Yeah, that's photograph 28. And I was just
3 illustrating that the slab had a dip in it. The level is in
4 contact with the concrete at each end, but in the central
5 portion there's a hollow spot where the concrete is low.

6 Q Why were you out there measuring the levelness of the
7 concrete?

8 A I was looking at the cracking of the concrete in the
9 garages and looking at some flooring issues at that time.

10 Q Was the -- were there any flooring issues on the first
11 level only, ground level, that you related to these concrete
12 measurements?

13 A There were in some areas where homeowners were
14 complaining about feeling a hollow spot where they walk
15 across the floor and feel a drop in the floor that disturbed
16 them.

17 MR. IMHOFF: Your Honor, objection. Hearsay.

18 THE COURT: Well, he's been qualified as an expert.

19 Q You didn't take their word at it. You investigated
20 it?

21 A I felt what they were talking about and I measured it.
22 This is one ---

23 Q Wait one second. What do you mean you felt what they
24 were talking about?

25 A I could feel the low spot in the floor as I walked

1 across it. I could also see it in some cases.

2 Q What type of flooring was it that was allowing you to
3 see or feel low spots?

4 A One example is this bare concrete. Another example
5 would be a linoleum or vinyl floor.

6 Q How about hardwood?

7 A Hardwood also, and there were other issues with the
8 hardwood and with cracking. There were some separations in
9 the hardwood that correlated with cracks in the concrete
10 beneath the hardwood.

11 Q Well, if you're interested in the floor covering, why
12 are you out in the garage?

13 A Because there were dips in the floors inside the home
14 and noticed there were dips in the floors in the garage as
15 well.

16 Q Going to your next photo, Number 182. Tell us what
17 you're doing, please.

18 A This is an area where the the dip was a little bit
19 larger. It extended from the far right to the center of the
20 garage, and as you can see from this level, the right end is
21 in contact with the concrete. The left end is sitting up
22 upon shims. I put shims in there until the level was
23 actually level, and you can see that it's about three
24 quarters of an inch.

25 Q And the next photo please, photo 183. We're still in

1 Plaintiff's Exhibit 243.

2 A That's just showing that the level was, in fact, placed
3 to level with the bubble centered.

4 Q And the next photo is what?

5 A That's the shim end, the shimmed end.

6 Q And roughly, what -- how high was that, sir?

7 A Between one half and three quarters of an inch.

8 Q And the final photograph in Plaintiff's Exhibit 243,
9 please.

10 A That was on the floor above the basement and on the
11 right end. The level is in contact with the hardwood on the
12 left end and it's elevated quite a bit. The thickness of my
13 ruler plus some shims.

14 Q Is this -- is the elevation in the hardwood flooring
15 room in the fifth photograph more or less than what you
16 showed in the garage?

17 A More.

18 Q And was the -- is the dips and the undulations in the
19 concrete having any effect on the flooring other than simply
20 you could notice it?

21 A You could, yeah, it's perceptible and it would be -- if
22 it was -- it would be reflected in the floors above. That
23 is, if you build walls on top of a basement slab that has a
24 dip in it, you're going to have a dip in the floor above it.

25 Q In the floor covering?Ye

1 A Yes.

2 Q I want to move on to a collection of your photos purely
3 relating to brick, 25.27 in evidence. On the screen,
4 please. We're going to work through these as quickly as we
5 can and if we get the one that we've seen before, just say
6 skip and we'll move on. Enlarge the very center of that,
7 please. There you go.

8 A That's a crack above the garage door at 305 Amesbury.

9 Q That's three courses long.

10 A More than that, like six maybe seven.

11 Q And part of that is actually splitting a brick?

12 A It goes through brick and mortar, yes, vertically.

13 Q Next, please.

14 A That's a close up of the upper portion of the crack.

15 Q Next.

16 A And more of the same.

17 Q Next.

18 A That's a crack at the top of a wall where it intersects
19 a roof at a gutter. That is 305 Amesbury as well.

20 Q Is that a patent or ---

21 A That's latent. That would be -- I noticed it. I don't
22 know if the homeowners did.

23 Q Next.

24 A That's a crack at the corner of a of a home at the
25 flashing level.

1 Q Next. 102 Burwick.

2 A That is 102 Burwick, and another crack. Can't tell
3 exactly where that is. Maybe you can back out and I can
4 tell you, but it's like near the top of the wall at the
5 soffit.

6 Q Next, please.

7 A I don't see the crack in that one.

8 Q Next.

9 A That's a brick crack. That is - the brick was made
10 that way.

11 Q Next.

12 A That's a stair step crack. It extends from the left
13 end of that sill and steps downward to the right.

14 Q Can you read the address of that one, please?

15 A 200 Buxton.

16 Q Next.

17 A 200 Buxton as well. And that's a crack at the bottom
18 of the wall.

19 Q Next.

20 A That is 201 Buxton and that's a crack near the corner.
21 Behind that fence post, I believe, is close to the corner of
22 that that area.

23 Q Next.

24 A That is another corner crack at the bottom of a wall
25 just below the flashing.

1 Q Next.

2 A That is a removed sill from 207 Buxton with corroded
3 fasteners at the window nailing in.

4 Q Next.

5 A That is the moisture condition in that area when the
6 brick was removed.

7 Q 23.8 percent?

8 A Yes.

9 Q Next.

10 A That is a brick defect. The brick was made that way.

11 Q Next.

12 A Corner crack at the flashing level near a corner.

13 Q Next.

14 A Same thing. Corner crack at the bottom.

15 Q Let's skip the rest and let's go to 25.31, please.

16 We've seen that. Next. We didn't look at this part when we
17 looked at the top part. Tell the jury what's going on.

18 A That's the stone that has fallen off.

19 Q Next.

20 A That's the stone that's loose and about to fall off.

21 Q Next. Stop right there a second. Go back one, please.
22 Tell the jury why the stone looks like it does up there so
23 that they'll be able to recognize that.

24 A That's aggregate you see where the the mason broke the
25 stone to make it the right size to get it into the space and

1 you can see some little black exposed aggregate on the end
2 of the stone.

3 Q They're actually seeing inside of the manufactured
4 stone, so to speak?

5 A Yes.

6 Q Next.

7 A That is 307 Amesbury and that is the stone at -- I
8 can't tell exactly where that is.

9 Q Next.

10 A That's the stone at a deck to door intersection.

11 Q Next.

12 A Cracked stone near the corner of a wall base at 307
13 Amesbury.

14 Q Let me have exhibit 15.4 on the screen, please. WE're
15 going to skip the rest of those, Dr. Whitlock. I'm showing
16 the jury exhibit 15.4. It's about 90 pages. I'm going to
17 ask Lawton to page through.

18 A So, you want me to describe what I see?

19 Q I want you, as we go through it, I want you to just
20 have another look at it and tell us whether any of the
21 details in here apply to the construction defect issues that
22 we've presented to the jury.

23 A On this sheet are details that do not apply to any
24 issues that I've discussed with you today. These are
25 details for interior conditions, some columns, and other

1 other things on the interior of the homes. So no
2 applicability so far. You can go to the next page. This is
3 D2 and there is a detail that may be applicable. If you
4 could zoom into that "10" on the bottom, the second one from
5 the left bottom, there we go. I don't know if that
6 condition exists. It says detail at garage canopy roof. I
7 don't recall that being existing at Rose Hill, so I don't
8 think that is applicable. You can zoom out and then there's
9 another one I want you to zoom in on. Be the bottom right
10 on the far right bottom. I don't recall if that's
11 applicable. It could be. There may be that condition at
12 Rose Hill that shows brick and stone veneer. Doesn't show
13 any flashing there except for flashing for the siding above
14 the band board. That is a condition that should be flashed.

15 Q Next page, please.

16 A I don't see anything on this page that's applicable.

17 Q Next page.

18 A That cornice return, number 2, the one in the center
19 top. That may be a condition that exists there and that
20 shows the brick wall with -- can you zoom in a little more?
21 Maybe the resolution will get better. Nope, that's -- I
22 don't think there's anything there to discuss.

23 Q Next.

24 A Nothing.

25 Q Next sheet.

1 A No.

2 Q Next sheet.

3 A This one shows a brick condition on the top far right
4 brick ledge section. Number 4 of D5. That is roughly what
5 the condition is at Rose Hill. There's a concrete slab and
6 then there's a brick ledge and brick goes up from there. It
7 shows the brick stopping, but I think that's just a graphic
8 depiction of how the brick is supposed to be supported at
9 the ledge.

10 Q Can you step down with your light. Show the jury what
11 we went over this week regarding foundation supported brick.

12 A This is the brick that's supported by the foundation
13 and this should show flashing somewhere in this location.
14 It doesn't show it, but this is where the flashing should
15 have shown installed.

16 Q And while that's a condition at Rose Hill, you don't
17 have any criticism of that condition at Rose Hill, do you?

18 A Not the condition of the brick ledge supporting the
19 brick. I think they should have shown flashing there.

20 Q Zoom back out please, please. D6, please.

21 A None of that is applicable.

22 Q None of that applicable to the issues in this case?

23 A This one is. Can you come in on this area?

24 Q Top right?

25 A Yes. It's similar to the area where you saw me

1 performing a test that leaked down through to the ceiling
2 into the dining room, except instead of there being brick
3 here there was actually stone and the water dripped down in
4 here by coming through the window. This shows brick and
5 there are conditions like this, but -- and this shows
6 flashing comes out the wall and down, but I never saw that
7 in existence in Rose Hill anywhere. The conditions I saw at
8 Rose Hill was the brick sitting on the roof with no through
9 wall flashing at all.

10 Q Zoom out, please. Sheet D8.

11 A Nothing.

12 Q Sheet D9?

13 A No.

14 Q So, the conditions that are at issue in this case
15 except for the benign condition of adding a footing, did you
16 see anything ---

17 THE COURT: Hold on. Do we have an objection?

18 MR. IMHOFF: I'm going to eject. He's leading him, Your
19 honor.

20 THE COURT: Don't lead the witness.

21 MR. LUCEY: Thank you, sir.

22 Q Did you see any details that prohibited the conditions
23 that we have in this case?

24 A I didn't see any details of the conditions we've
25 discussed in this case. Stone details are absent. Brick

1 flashing details are absent. Window installation details
2 are absent. These details don't really cover the critical
3 areas that we've been talking about.

4 Q Let's back up for a second. Tell the jury, if you
5 would please, the interplay between details and plans on a
6 construction job such as this.

7 A Well, in a set of plans, usually there's a floor plan
8 and elevations to show what the home looks like. And then
9 there are sections that are cut in reference to the details.
10 And these plans and details should cover all aspects of the
11 construction so that the guys building the building will
12 know how it should be put together, and that it's drawn in
13 accordance with the building code requirements.

14 Q Let's put on the screen 5.25 in evidence the Westerly
15 model plans related to Natalie's Westerly model. Have you
16 had the opportunity to look at these documents?

17 A I believe so, yes.

18 Q Did you see any details on these documents that would
19 have instructed the subcontractors on how to avoid the
20 mistakes they made at Rose Hill?

21 A Well, let's step through them quickly and let me see if
22 I pick up anything. I don't recall seeing anything.

23 Q Next sheet, please.

24 A This is the front elevation. It depicts how the home
25 looks graphically from the street and the section -- If you

1 back up, the sections such as this -- seven, that would take
2 you to a detail that shows how that is to be constructed.
3 You'll see those kinds of call outs in different places.
4 And those details should exist.

5 Q Next sheet.

6 A That's the left side, an option for a garage in the
7 right side elevation with similar details called out.

8 Q Next.

9 A Rear elevation.

10 Q Next.

11 A That is the basement plan and the grading plan, or a
12 garage if it has a basement.

13 Q Is there a basement at Natalie's?

14 A No, there's not.

15 Q Next.

16 A This is a slab plan. This is what would have been used
17 to formulate the slab on grade for the construction.

18 Q Next.

19 A This is first floor framing.

20 Q Next.

21 A Second floor.

22 Q Next.

23 A The roof plan.

24 Q Next.

25 A And then there are some outlet plans, electrical plans.

1 Q Have we seen anything so far that would provide any
2 guidance to the subcontractors on how to avoid the mistakes
3 made at Rose Hill?

4 A There's been no details so far.

5 Q Keep going, please.

6 A That's a modified front elevation.

7 Q Next.

8 A Left and right side.

9 Q We already saw that one, right?

10 A Yeah, these are just slightly modified. Slight
11 modifications to the ---

12 Q Options?

13 A Yes.

14 Q Next.

15 A Same thing.

16 Q What do you mean? Options?

17 A Well, different options. That's an optional front
18 porch is what this shows.

19 Q Next.

20 A And optional garages, garage types, and then back to
21 another basement and plan.

22 Q Why are there two different basement plans?

23 A Slight differences in the configuration of the home.

24 Q Next.

25 A Slab plan, again.

1 Q Next.

2 A And first floor framing.

3 Q I'm going to ask him just to page through and to pause
4 only for one second on each page unless you tell him to
5 stop. If you see any detail that affects this litigation, I
6 want to stop and talk about it. Just start paging through,
7 please.

8 A Go ahead. Go ahead. Keep going.

9 Q It's a big .pdf. It might be pausing a second.

10 A Continue. Continue. You can keep going if possible.
11 I think that's the same one. Keep going. No difference.
12 Continue.

13 Q See if this will work faster, sir, I'm going to give
14 you the paper copy and if you find something that we need to
15 talk to the jury about, we can then get him to jump forward
16 on his screen. Should be about a dozen pages in.

17 A So far, I just think these are just variations in the
18 elevations and floor plans. None. No details, just
19 variations and elevations and floor plans.

20 Q So, lots of options?

21 A Yes.

22 Q That's what you mean by variations?

23 A Yeah, options for different appearances. Basically,
24 the same plan with some variations.

25 Q So, are these both interior and exterior options?

1 A All kinds of options.

2 Q Layouts?

3 A Yes.

4 Q Different garages?

5 A Yes.

6 Q Different roof configurations?

7 A Different roof configurations, different entrances,
8 side load garages, front garages.

9 Q Any details about how to avoid the mistakes we see in
10 Natalie's house?

11 A There are no -- there's details referenced on the
12 drawings. Call outs for details, but they're not contained
13 with these drawings.

14 Q Is there any isolation joints in here between
15 foundation supported brick and frame supported brick that
16 you saw?

17 A No.

18 Q Any instructions about how to install the shelf angles?

19 A No.

20 Q Sir, in your industry, who's responsibility is it to
21 provide the subcontractors with an adequate set of plans and
22 and details.

23 A The general contractor.

24 Q I'm sorry?

25 A The general contractor supplies his subs with contract

1 documents.

2 Q Sir, were you asked to compile an estimate of the
3 probable cost of repair of the class houses, the 220 odd
4 class houses?

5 A Yes.

6 Q And we discussed when we were introducing you to the
7 jury earlier that you have some experience with that. Give
8 them a one minute background of that experience to remind
9 them, please.

10 A That I have, myself and my company, have been in
11 practice for 20 some years and doing analysis of buildings
12 and other structures and designing repairs, doing the
13 estimates for those repairs, and actually bidding those
14 repairs and seeing them through completion.

15 Q I want to hand you an exhibit that's marked for
16 identification purposes only, which is 2416 and also 2430.
17 We'll get to in a few minutes, again, only for
18 identification purposes. Are those documents that you
19 prepared?

20 A Yes.

21 Q And what were you doing -- without getting into too
22 much detail, what were you doing in preparing these
23 documents?

24 A These documents are estimates of cost for repairs to
25 the homes throughout Rose Hill.

1 Q You mentioned to the jury this morning that it all -- I
2 think you mentioned it -- that it all starts with what some
3 people in the industry call a take off, quantity estimate.

4 A Quantity estimate.

5 Q Tell the jury how you got your quantities.

6 A We began by actually measuring the buildings through
7 photography. We had no plans, so we used photographs we
8 took of the homes.

9 Q Let me stop you right there. I'm sorry. We just saw
10 you look through a 75 page set of plans for Natalie's house.
11 Why do you say you have no plans?

12 A At that time, I had no plans.

13 Q Do you actually have -- besides the the Westerly -- the
14 75 page Westerly model, have you ever seen a set of exact or
15 custom plans regarding Natalie's house?

16 A No.

17 Q Have you seen exact or custom plans regarding any class
18 member's house?

19 A I think one person had a set of plans for his house.
20 An architect, I can't remember his name. I believe he had a
21 set of plans or close to what his house was.

22 Q So, without plans specific to Natalie's house, walk us
23 through how you did your take off.

24 A As I was mentioning, we calibrated photographs of the
25 homes so that we could then use CAD programs to trace the

1 drawings, or the photographs, and use the CAD programs to
2 compute links and and areas of walls and roofs and windows
3 and all those things.

4 Q Tell them briefly what a CAD program is.

5 A Computer Automated Design, drafting and design, is how
6 our guys do our drawings.

7 Q Tell us about the exercise of doing a CAD takeoff for
8 this many houses.

9 A It's done to determine the square foot of all the
10 materials. Square footage of brick. Square footage of
11 stone. The number of windows, or a simple count, and the
12 areas and sizes of the windows, and lengths of flashing.
13 Lengths of trim, gutters, and anything else that's involved
14 with the demolition and rebuild attempt.

15 Q Did you tend to facilitate or make your job easier by
16 using different categories of houses, sir?

17 A Yes. We couldn't do every single house. That would be
18 extremely time consuming. So, in looking at the homes, I I
19 realized that the homes fell into basically three
20 categories. Not small, medium, large, but like a basic
21 house, a moderately ornate house, and then a more complex
22 style house. That's usually related to how much masonry,
23 stone and brick, there was. A little bit of stone, a little
24 bit of brick, it falls into what's called the basic
25 category. And then if it had more stone and brick on the

1 front, it would be moderate. And then if it had stone and
2 brick on the front and maybe the sides, then that was
3 considered a complex type house.

4 Q Did you actually, by address, add each house into one
5 of these groups?

6 A Yes.

7 Q I'm showing you demonstrative exhibit as to the
8 allocation of the lots in Rose Hill to the three groups. Is
9 this is a reasonably accurate depiction, color depiction, of
10 what you all did?

11 A That is how it turned out from our surveys.

12 Q When you say your surveys, what do you mean by our
13 surveys, please?

14 A The photographic survey of the entire neighborhood.

15 Q Who did that?

16 A My staff.

17 Q What was the purpose?

18 A To categorize the homes into those categories.

19 Q Talk -- take us through the next step.

20 A So, then I took 12 homes, and from this 12 homes I did
21 a detailed estimate. And four of the homes were basic, four
22 were moderate, and four were complex type. Went through a
23 detailed analysis of those and then kind of stood back and
24 looked at it and said well maybe we should do some more.
25 So, we took the results of those 12, expanded that with 20

1 more, or 22 more. I think had a total of 34 homes, and that
2 gave us a good database of what the cost would be for a
3 large sampling of the moderate, basic, and complex homes.
4 From that, we projected what the cost of the entire
5 neighborhood would be.

6 Q Before we leave the 34 home group that you just told
7 them about, tell us if you would, please, the source of your
8 pricing for the quantities.

9 A From published data from R.S. Means Company. It's a
10 construction cost publication company that is used by many
11 people for cost estimating in construction.

12 Q Give us an idea, an exemplar if you would please, how
13 do you get cost? What cost you get out of R.S. Means.

14 A For example, if you want to know what it costs to dig a
15 trench, there is numbers in the book on the cost for digging
16 a trench. If you want to know the cost for laying brick,
17 there are categories then for types of brick, the quantity,
18 the size of the brick, those types of things. You can look
19 up what the cost for labor and materials is. That's what we
20 did for the different work items that had to be done.

21 Q Were the quantities -- and cost too. Were the costs
22 adjusted for the fact that this project will be located near
23 Greenville?

24 A Yes.

25 Q How so?

1 A There's cost adjustment factors for different
2 geographical areas. That's published in Means also. But
3 when we did this, COVID was an issue. So, it was a
4 consideration also. Also construction materials went
5 through the roof during COVID and they haven't come back
6 down very well. So, that was also a factor we considered.

7 Q I had sidetracked you for more information when you got
8 to your group of 34 houses. You told them you increased
9 your pool of houses from 12 to 34. What did you do with
10 your information after that?

11 A Then took that information and projected those cost for
12 the 220 on a stratified -- what's called a stratified basis.
13 So, if we have -- you saw the color-coded chart. We knew
14 how many of each category we had. We knew what the average
15 cost in each category was and extrapolated that over the
16 entire neighborhood to get a total cost.

17 Q And sir, let's look at a section of your work just
18 orally to get an exemplar of how you did your work. Let's
19 look at what's been marked for identification purposes only
20 as 24.30. Let's go to 177 Haverhill and use the brick demo
21 section as an exemplar of how you costed this work.

22 A You said one 157?

23 Q 177, sir. It should be about the sixth page.

24 A I need a magnifying glass. Here we go. 177 Haverhill.

25 Q Yes, sir.

1 A And you asked me to for brick demo?

2 Q Let's illustrate for the jury how you did your costing
3 using first the brick demo section at 177 Haverhill and then
4 using the brick reinstall section.

5 A Brick Demo has a number of line items including removal
6 of trim, brick removal, flashing and lintel removal,
7 removing the weather barrier and damaged sheathing, wall
8 insulation, structural framing. There's some roof shingles
9 that may have to be removed, only six square feet in this
10 case. Some metal roof panels, zero square feet in this
11 case, some soffit panels, 34 square feet, and I should have
12 given you all the quantities. But all that adds up, if you
13 take the quantities times the unit costs that are published.
14 It came up to \$1,290.00 for the brick demo.

15 Q At 177 Haverhill?

16 A Yes.

17 Q Let's go to the brick reinstall section and the brick
18 replacement section on the next page I think, and illustrate
19 how you computed that half of the repair.

20 A Well, basically the same quantities that we took off
21 had to go back on, but the cost for taking it off is
22 different than the cost of putting it back. Going down
23 through the quantities times the unit cost for each of those
24 items. The repair cost for the brick, or replacement cost
25 for the brick, was \$6,800.

1 Q And at the bottom of the estimate of the house you
2 estimate general conditions and general contractor markups
3 and overhead and what have you?

4 A Yes.

5 Q And you get a total price for each house?

6 A That is correct.

7 Q And going to exhibit -- this time, actually 24.30.
8 Have you had a chance to update your costs from time to
9 time?

10 A I have.

11 Q Before we go further on that, let me show you what's
12 been marked for purposes of identification only as
13 Plaintiff's exhibit 233a. I know there's a pile. Let me
14 get rid of the window reports. Get rid of the pictures.
15 There's 233a for identification purposes only, and 233b for
16 identification purposes only. Sir, without getting into the
17 thought of your work in 233a or b, tell the jury first, do
18 you expect that the homeowners to need to move out during
19 any of these repairs?

20 A That was our criteria, that the homeowners would be out
21 of the way so that workers could get into the homes and do
22 the work they need to do unencumbered, and then put
23 everything back together and people move back in.

24 Q If they don't move out will affect the length of time
25 of reconstruction.

1 A It would, yes.

2 Q How?

3 A Because they would have to work around people, move the
4 furniture around, work around their schedules, and it would
5 be really a nightmare for the homeowners and for the
6 contractor.

7 Q Did you hear Natalie's testimony two days ago regarding
8 her experience when they did one of her walls?

9 A I did hear her testimony, yes.

10 Q And so again, without getting into the result of 233 a
11 or b, tell us if you would please the exercises performed in
12 estimating the cost of the loss of use for the residents
13 during repairs.

14 A The loss of use, we computed two ways. I first had my
15 staff used government rates, published rates by the U.S.
16 government for per diem, for living expenses for personnel.
17 That is their lodging and meals. We used those numbers
18 times the numbers of homes and families that live there and
19 came up with a cost to house those families and provide them
20 food while the homes were being repaired for all 220 homes.
21 And that came out to be a number that was fairly high and we
22 then recomputed it by assuming that the families could kind
23 of huddle up and you share hotel rooms and tighten up, and
24 maybe not eat as well as the government would pay them to.
25 And the cost about came in half. Do you want me to give the

1 numbers?

2 Q Sir, before we get there, have you been asked to make
3 other adjustments to your estimate from time to time by the
4 plaintiff?

5 A I have.

6 Q And have you made handwritten adjustments to your prior
7 work?

8 A I have.

9 Q What is the adjusted bottom line net figure only as to
10 your firm's estimate of plaintiffs repair cost and loss of
11 use? The very net number.

12 A \$28,525,942.00.

13 Q For the class damages?

14 A That's -- yes, that's what it costs.

15 Q How much is that 28.5 million, sir, is the loss of use?
16 The adjusted loss of use.

17 A Relocation, loss of use, people having to move out.

18 Q One million dollars? Is that what you wrote?

19 A No, about --

20 Q Not the original one, but the adjusted.

21 A About 1.5 million.

22 Q 1.5 included in the 28.5, right?

23 A Yes.

24 Q Sir, just to recap. That 28.5 million, includes what
25 replacement, please?

1 A Brick, stone, windows, fixing cracks. Just the major
2 issues.

3 Q And does it also include an allowance that the grading
4 expert asked to be included?

5 A Yes, I've got numbers from the grading expert for doing
6 the grading repairs and that's included also.

7 Q Did you do that actual calculation or did another
8 engineer supply that to you?

9 A Another engineer gave me those numbers.

10 Q So, that 28.5 million includes correcting the grading
11 issues at Rose Hill?

12 A That's correct.

13 Q Just so we're clear, a re-clad of the brick and stone,
14 and window exteriors, fixing the cracking in the concrete
15 for the radon system, and correcting any grading issues?

16 A That's correct.

17 Q Sir, do you work with general contractors on a regular
18 basis in your profession?

19 A I have clients who are general contractors, yes.

20 Q In your industry, are general contractors bound by the
21 building code?

22 A Yes.

23 Q The IRC, the residential building code?

24 A Yes.

25 Q Is there any exclusion in the building code for

1 compliance by multi state, regional or national builders?

2 A The building code is to be followed by anybody who
3 builds anything anywhere. No exclusions for anyone.

4 Q And is each contractor and subcontractor on the
5 property obligated under the building code to comply with
6 the building?

7 A Yes, they are.

8 Q Is the general contractor able to delegate some of his
9 work or obligations to a subcontractor?

10 A They do. They do delegate.

11 Q Does the building code provide any provision to relieve
12 the general contractor of responsibility if he delegates it
13 to the subcontractor?

14 A Not that I'm aware of.

15 Q What responsibility does the general contractor have
16 with regards to the selection of products to be used in the
17 construction of these homes, these residences?

18 A They are to select products that meet the requirements
19 of the building code.

20 MR. IMHOFF: Your Honor, may we approach?

21 THE COURT: Yes, sir.

22 (WHEREUPON, bench conference.)

23 THE COURT: Mr. Lucey.

24 Q Sir, you and I talked about the requirement that the
25 windows be properly labeled with the performance rating and

1 certification stuff this afternoon.

2 A Yes.

3 Q But the one thing we didn't finish is who should be
4 able to -- who on the job site is expected to be able to
5 recognize whether or not the fenestration products, the
6 windows, have the code required certification somewhere on
7 them. Somewhere, anywhere, before they're sold.

8 A Any contractor involved with those windows should see
9 that. They should to assure that those windows are
10 appropriate and meet the building code requirements.
11 That would be the installer and the general contractor.

12 Q Well, now the general contractor, so to speak, is
13 either in an office building in Greenville or an office
14 building down in Texas. The only person on site ---

15 MR. IMHOFF: Your Honor, he's leading and he's
16 testifying.

17 THE COURT: Don't lead the witness.

18 Q If the only general contractor representative on site
19 is the site superintendent that they call the builder, would
20 you expect that person to be knowledgeable enough about the
21 recognize whether or not the windows are properly labeled?

22 MR. IMHOFF: Your Honor, objection. Calls for
23 speculation. He's asking what some ---

24 THE COURT: Overrule the objection.

25 Q In your industry, would that fall within the realm of

1 responsibility for the typical site superintendent?

2 A Yes.

3 Q In your opinion, did D.R. Horton provide subcontractors
4 with adequate plans, details, and or specifications to
5 properly build these houses?

6 A Not based on what I've seen.

7 Q In your opinion, did D.R. Horton provide adequate
8 quality control and supervision in the construction of these
9 houses?

10 A No.

11 Q In your opinion, did D.R. Horton build these homes in a
12 fit and workmanlike manner?

13 A No.

14 Q In your opinion, do these homes contain conditions that
15 present a threat of harm to these homeowners and or their
16 property?

17 A They do.

18 Q Sir, there's just one exhibit we missed along the way,
19 778. May I have 27.78 on the screen in evidence? Sir, this
20 letter is in evidence. Can you enlarge the -- let's get the
21 date first before we enlarge it. Let's back it off.

22 Friday, March 11, 2016. Do you see that?

23 A Yes.

24 Q Do you recognize the name of M&L Renya at the top?

25 A Yes.

1 Q And it's to a homeowner in Rose Hill at 14 Harwick?

2 A Yes.

3 Q Now, let's go to the body of the letter and enlarge it.

4 Now, the letter says that we at M&L Renya and Carl Rurode
5 have gone to look at the stone veneer at 14 Harwick Court,
6 Easley. Did you hear Carl Rurode's name earlier this week
7 in court?

8 A Yes.

9 Q Have you seen his deposition or portions of it?

10 A Yes.

11 Q Do you know who he worked for back in the day?

12 A Renya?

13 Q No. Carl Rurode.

14 A The GC.

15 Q General contractor as in D.R. Horton?

16 A D.R. Horton.

17 Q It goes on to say we are doing the stone veneer as per
18 D.R. Horton's specifications for the stone. Did I read that
19 correctly?

20 A Yes.

21 Q So, as I'm -- it appears somebody's made a site visit.

22 A They both did, yes.

23 Q Both being which side and which general contractor?

24 A Renya and Horton.

25 Q Can you read the next sentence to the jury please, sir?

1 A There is no gap between the exterior wall and the
2 stone for us to put weeples (AS SPOKEN) in it, as we do with
3 brick, paren, has space between the wall and brick, close
4 paren, which we do have the weeples (AS SPOKEN) in.

5 Q One second. Let's do this. Let's read the next
6 sentence and then let's come back to the sentence you just
7 read. Read the next sentence to the jury, please.

8 A This is how all the houses have been done, even before
9 we started working here, and we have just kept doing it like
10 the previous vendor. We have not had a problem with any
11 leaks from the stone veneer. There's nothing we can do to
12 put the weep holes in.

13 Q Let's go back to that prior sentence. What do you
14 understand weeples (AS SPOKEN) to be?

15 A Weep holes, I believe, is what he means.

16 Q Well, do you use weep holes in stone veneer?

17 A No.

18 Q What's the significance of the comment that there's not
19 a gap to put a weep hole in behind the stone veneer?

20 A I don't believe he understands, or I don't understand
21 what he's saying. I can only assume that he's talking about
22 there should have been a weep screed and flashing at the
23 base of the stone veneer.

24 Q Weep screed and flashing?

25 A Yes.

1 Q Not weeples (AS SPOKEN)?

2 A Not weep holes.

3 Q And going down further in the letter, please. May I
4 have the bottom of the letter? Can you back out, please.
5 It's from the subcontractor?

6 A Mauricio Renya.

7 Q Back out, please. Now, is this the location that you
8 told the jury earlier today there are no weep screeds?

9 A Correct. There's no weep screeds at the base of the
10 walls.

11 Q So, in 2016 does this letter inform D.R. Horton that
12 there's no weeps screeds in the stone veneer?

13 A It says there is none and they can't put any there is
14 what he's saying.

15 Q Have you ever heard of weeples (AS SPOKEN) before?

16 A No.

17 Q Dr. Whitlock, have the opinions you've given to the
18 jury today been to a reasonable degree of certainty?

19 A Yes.

20 Q In your field of expertise.

21 A Yes, they have.

22 MR. LUCEY: Thank you, sir.

23 THE COURT: All right. Ladies and gentlemen of the
24 jury, that concludes direct examination of this witness, so
25 we are going to conclude today. Remember your instructions

1 over the weekend. Don't talk to third parties about the
2 case. Don't attempt to research the law or the facts of the
3 case. Don't deliberate amongst yourselves. I hope everyone
4 has a good weekend. We will resume at 9:00 Monday morning.

5 (WHEREUPON, the jury exited courtroom at 4:40 p.m.
6 The trial was in recess for the weekend.)

7 *** END OF REQUESTED TRANSCRIPT OF RECORD ***
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CERTIFICATE OF REPORTER

I, the undersigned, Tara T. Scott, CVR, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial/hearing of the captioned case, relative to appeal, in the Circuit Court for Anderson County, South Carolina, on the 5th, 6th, 7th, and 8th day of September, 2023.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

A handwritten signature in black ink, appearing to read "Tara T. Scott", is written over a horizontal line.

Tara T. Scott, CVR

Official Court Reporter

November 11, 2023

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-

TRANSCRIPT OF RECORD

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

DEFENDANTS

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

September 11-
September 15, 2023
ANDERSON, SC

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

B E F O R E:

THE HONORABLE R. SCOTT SPROUSE

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Dabny Lynn, Esquire
Attorney for Natalie Zitek

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Attorney for M & M Foundations

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PROCEEDINGS

THE COURT: Is there anything we need to take up before we bring our jury in?

MR. LUCEY: Judge, Plaintiffs are still looking for a defendant answer as to whether or not any defense exhibits that we --- are, in fact, in evidence or not.

THE COURT: Okay.

MR. IMHOFF: Your Honor, we need to review and look at that. I understand Mr. Lucey and Mr. Crawford were talking about that overnight. I'm not sure exactly where that stands. That wasn't my focus, Your Honor. So, I think that they're working on it.

THE COURT: Let me hear -- Mr. Crawford, what's remaining to be ---

MR. CRAWFORD: Your Honor, what we realized is that the exhibit list has some modifications on there that there are some issues with, and so we -- I talked to Dabny and Mr. Lucey this morning and told them that we would get an updated list to them in the morning and would be able to explain -- and that will have the updated stipulations, and all the information that they're looking for at that time.

THE COURT: Okay, well ---

MRS. WOOTEN: They redacted some this morning, too, so.

THE COURT: Okay. All right, well, I will expect this to be resolved by commencement of court tomorrow, okay?

1 MR. CRAWFORD: Yes, Your Honor.

2 THE COURT: All right. Anything else? All right, let's
3 get our jury.

4 MRS. WOOTEN: Your Honor, can we wait just one second?

5 THE COURT: All right, hold on. Hold on, hold on.

6 MRS. WOOTEN: This is just a minor thing, but we didn't
7 talk about witness order when we left on Friday, and it's
8 possible that we might get through with that witness today,
9 and we have people who are -- who have been subpoenaed that
10 are waiting to know what that order is so if we could just get
11 that ---

12 MR. LUCEY: Well, actually, we did communicate, and I
13 sent you an email saying I'm --- witnesses unless you thought
14 you'd be short with Dr. Whitlock, so that's kind of in your
15 control. If you're going to be short, then we'll get to that
16 one. And then one other thing -- thank you for reminding me,
17 Mrs. Wooten. One other thing -- we had a witness under
18 subpoena for this morning, a gentleman named Brian Waddell.
19 I'm not sure that's his first name. His last name's Waddell.
20 He was under subpoena for 10:00 am. We were able to reach him
21 and tell him that he would not be needed here this morning if
22 he agreed to show up when requested. He's a former employee.
23 He agreed to that. He's on standby for a text or a call for
24 when he's supposed to be here. I only mention it because I
25 wouldn't know him from Adam if he walked into this courtroom,

1 and I wouldn't want to be accused of violating the witness
2 rule. He says -- and my understanding is he's not coming now
3 until we text him.

4 THE COURT: Okay. Mr. Bailiff, hold on a second. Hold
5 on one second.

6 BAILIFF: Okay.

7 THE COURT: Shut the door. So, you need to know if Mr.
8 Waddell is here?

9 MR. LUCEY: It doesn't appear he is. If he walks in when
10 nobody's looking, I wouldn't know what he looks like.

11 THE COURT: Okay.

12 MR. LUCEY: But he tells us he's not coming.

13 THE COURT: Be on the lookout for a Mr. Waddell, if you
14 -- and don't let him come into the courtroom until such time
15 as he's called.

16 MR. LUCEY: Thank you, sir.

17 THE COURT: Okay.

18 MRS. WOOTEN: Your Honor, the information we need is what
19 witnesses are going to be called as you ask every day. What
20 witnesses are going to be called today if we get through?

21 MR. LUCEY: It will -- depends on how long you take with
22 Dr. Whitlock. Do you know how long you're going to be?

23 MRS. WOOTEN: Maybe half a day, maybe a whole day.

24 MR. LUCEY: That's what I suspect. I would not be
25 surprised if it's less than three-quarters of a day, so ---

1 MRS. WOOTEN: Still ---

2 MR. LUCEY: --- that dictates what witnesses I call.

3 THE COURT: Who would be the next witness if they finish
4 with Mr. -- Dr. Whitlock?

5 MR. LUCEY: Your Honor, if they finish mid-afternoon,
6 depending on how much time is left, we have two publications
7 to do, we have two homeowners to do, and one more expert to
8 do. We also have two of their witnesses under subpoena,
9 which, because of time constraints, we will make a decision on
10 dropping at least one witness.

11 THE COURT: Okay.

12 MRS. WOOTEN: Your Honor, we need to know who the
13 publications are, who the next witnesses are, so that we can
14 properly plan and get our people here, and make sure that we
15 don't run into another snafu like we did the other day. Who
16 are the witnesses, Justin, please?

17 MR. LUCEY: They're not entitled to my witness. They've
18 got a witness list. I've published my -- I designated my
19 publications on August 25, 2023 in accordance with the Court's
20 order.

21 THE COURT: I'm not going to require the Plaintiffs to
22 call their witnesses at a specific order. That's a tactical
23 decision made by the attorney, but as long as they're on the
24 witness list, and you have them subpoenaed, and -- what did
25 you put in your email, Mr. Lucey? Did you ---

CROSS EXAMINATION OF RHETT WHITLOCK

1 MR. LUCEY: We have two of their employees -- former or
2 current employees under subpoena, and I put in my email, I
3 think it was Friday, I would not get to them unless they
4 thought they would be short today. So, we can confer at lunch
5 and they can update me on their progress.

6 THE COURT: I'm not going to require you to tell us what
7 order the witnesses will be called. I'm -- I think defense
8 counsel's correct in needing some idea, and the Court wants an
9 idea, but ultimately, the tactical decisions of each attorney
10 in calling their case, I'm not going to interfere with that.
11 Okay. All right, let's go ahead.

12 [Whereupon, the jury enters the courtroom.]

13 THE COURT: All right, Mr. Foreman, ladies and gentlemen
14 of the jury, good morning. I hope everyone had a good
15 weekend, and we are ready to resume. Dr. Whitlock, you may
16 retake the witness stand. Dr. Whitlock, you are still under
17 oath.

18 DR. WHITLOCK: Yes, sir.

19 THE COURT: Mr. Imhoff, your witness.

20 MR. IMHOFF: Thank you, Your Honor.

21 CROSS EXAMINATION

22 BY MR. IMHOFF

23 Q Good morning, Dr. Whitlock.

24 A Good morning.

25 Q Let's set a baseline for this jury, if we can. When were

1 you hired to work on this case?

2 A Approximately the summer of 2019, June-ish, in that
3 timeframe.

4 Q And you went to Mrs. Zitek's in June of 2019, is that
5 right?

6 A That's correct.

7 Q Did she take you to other homes at that time?

8 A Someone did escort us around, but -- I think it might
9 have been her, but I'm not sure.

10 Q Escorted you around to other homes, is that right?

11 A Yes. That's correct.

12 Q And she escorted you around, along with Plaintiff's
13 counsel to other homes where those homeowners had complaints,
14 correct?

15 A I'm not sure that they all had complaints. I'm sure some
16 of them did, but I don't know if they all did.

17 Q Okay. There was some type of a document, or a survey, so
18 you knew which houses to go to, and what to look at, correct?

19 A I don't remember a survey.

20 Q You don't remember that?

21 A No.

22 Q Okay. All right, so you went on June 28th, 2019. When
23 was the next time you went to Rose Hill?

24 A October 30th -- no, August 30th, then September 1st and 2nd.

25 Q In August, sir?

- 1 A I think so.
- 2 Q Did you take photographs?
- 3 A Yes.
- 4 Q Did you do a photo blog for August, sir?
- 5 A Yes.
- 6 Q Are you sure it was August 2019?
- 7 A I'm not positive. It might have been October. I'm not
- 8 for sure. I'd have to look back in my notes.
- 9 Q All right, my records show that you were there on June
- 10 28th.
- 11 A Correct.
- 12 Q And the next time that you came was September 22nd through
- 13 24th, does that sound right?
- 14 A It might be, I just can't remember the dates.
- 15 Q All right. Sir, do you know when the lawsuit was filed?
- 16 A No, I don't.
- 17 Q You don't know that it was filed before and while you
- 18 were still looking on September 25th, 2019?
- 19 A I had no idea when the lawsuit was filed.
- 20 Q Were you done with your investigation on September 25th,
- 21 2019?
- 22 A No.
- 23 Q So, the lawsuit was already filed, and you weren't done
- 24 yet, is that right?
- 25 A I'm not aware of when lawsuits are filed. That's not my

- 1 job. I'm an engineer, not an attorney.
- 2 Q Who hired you?
- 3 A The Lucey Law Firm.
- 4 Q The Lucey Law Firm?
- 5 A Yes.
- 6 Q Not Natalie Zitek and not the homeowners, correct?
- 7 A On behalf of the homeowners.
- 8 Q Who's paying you?
- 9 A I get paid through the Lucey Law Firm.
- 10 Q How much have you charged so far?
- 11 A I'm not sure.
- 12 Q Okay. I've heard it's over \$400,000. Is that correct?
- 13 A That might be -- that's probably correct.
- 14 Q Has it gotten to half a million yet?
- 15 A I doubt it. I'm not sure.
- 16 Q How much had you charged by September 25th, 2019, when the
- 17 lawsuit was filed?
- 18 A I don't know.
- 19 Q When you were allowed to look at the houses out there,
- 20 were you looking for any issue, top to bottom?
- 21 A I was looking at the homes throughout -- walk through the
- 22 interior and the exterior and look at the exterior walls, the
- 23 windows, from the exterior. I looked at the roofs. I looked
- 24 at the foundations, the driveways, the garages.
- 25 Q Now, we know ---

1 A I wasn't finished.

2 Q Go ahead.

3 A Still on the interior -- I was talking about what I did
4 on the exterior. Now, on the interior, I do the same thing.
5 Walk through the homes. There were homeowners that had
6 complaints about noisy floors, so I walked through the homes
7 to experience that, and I looked at the exterior windows and
8 the doors and saw what I saw, and photographed all of that.

9 Q Okay. And we know, don't we, that as Plaintiff's expert,
10 one of the main things you're looking for is water intrusion,
11 rot, and deterioration from water intrusion, correct, Dr.
12 Whitlock?

13 A I'm looking for signs of issues, evidence. Symptoms is
14 what I look for. I can't see through building materials to
15 see what's going on inside them, but I can see what they
16 display on the exterior, and the exterior features of a home
17 will display certain characteristics if there's a problem.
18 Cracks, for example, stains, another example, and those are
19 types of things I look for on my initial inspection.

20 Q Sir, you were looking for damage from water intrusion in
21 your investigation, correct?

22 A If it was obvious, yes.

23 Q If it was obvious. Okay, you would have documented that
24 in your pictures, correct?

25 A I did.

1 Q Okay. Water intrusion to the exterior cladding not
2 including the windows, you would have documented that,
3 correct?

4 A Why does it have to be not including the windows?

5 Q Sir, were you looking for water intrusion or evidence of
6 water intrusion through the brick?

7 A I was looking for anything that I could see. I had no
8 idea what I was going to see before I got there. I was just
9 there to make an overall inspection of the homes.

10 Q Right. So, if you saw water intrusion through brick, you
11 would have documented it, correct?

12 A I would have, and I did.

13 Q Okay, and if you saw water intrusion through stone
14 veneer, you would have documented that also, correct?

15 A And they saw that last week, yes.

16 Q I'm sorry?

17 A They saw that last week. I did document that, yes.

18 Q All right. So, that's what you were out there doing.
19 You were looking at everything, but you were looking for water
20 intrusion through that brick and stone to support your
21 opinions, right?

22 A I was looking for anything that I could see that was not
23 right.

24 Q All right. And you say you documented that while the
25 lawsuit was being filed, is that right?

1 A I told you I didn't know when the lawsuit was filed. I
2 documented it when I was there, so I'm sure my records show
3 when I was there.

4 Q Well, it's especially important in this case because
5 there's 220 homes to make sure that you do a thorough
6 investigation, correct?

7 A I think that I do.

8 Q It's important, correct?

9 A Yes.

10 Q And that you do your investigation correctly, right?

11 A Yes.

12 Q Okay. And that's true because not all the homes out
13 there are the same, are they sir?

14 A They're all very similar.

15 Q Okay.

16 A Some are construction, some are materials -- they have
17 some different features, but they're all very similar.

18 Q They're all very similar, except, Dr. Whitlock, Natalie
19 Zitek's home is all brick, isn't it?

20 A Some are all brick. Hers is.

21 Q Hers is all brick, sir, correct?

22 A The exterior is coated with brick. In most places,
23 there's some siding and some stone, but most of it is brick,
24 yes.

25 Q Right. And there are houses out there that don't have

1 any brick, correct?

2 A I think there are two or three.

3 Q Two or three, sir?

4 A There's more than two or three, excuse me. I misspoke.

5 There are some houses that have some brick and some stone and
6 some both.

7 Q Right. I just -- the jury just needs to know. There are
8 houses out there with brick, aren't there, Dr. Whitlock?

9 A Yes, there are.

10 Q Okay. And there are houses that have vinyl on four
11 sides, and just a little bit of stone on the front, right?

12 A Correct.

13 Q And there are houses out there that are three stories
14 with a basement, correct?

15 A Two stories with a basement.

16 Q Okay. And there are houses out there that are one story,
17 correct?

18 A That's correct.

19 Q And there are houses out there that have stone and vinyl?

20 A Yes.

21 Q And there are houses out there that have brick and vinyl?

22 A Correct.

23 Q And there are houses out there that have hardie board and
24 stone, correct?

25 A Yes.

1 Q Okay. And there are houses out there that are at the top
2 of Rose Hill and the bottom of Rose Hill, correct?

3 A They're throughout the entire neighborhood.

4 Q And there are houses out there that were built in 2012,
5 and houses that were built in 2017, correct?

6 A I believe so.

7 Q And there was a code in place from 2006 to July of 2013,
8 correct?

9 A Yes, the 2006 International Residential Code.

10 Q And then in July of 2013, it changed to the 2012
11 International Residential Code, correct?

12 A Yes.

13 Q There are houses out there that were built under
14 different codes, correct?

15 A Those two codes were applied to the various homes.

16 Q And there are houses out there where the owners bought
17 from DR Horton, like Mrs. Zitek, correct?

18 A I believe that is correct, yeah.

19 Q And there are houses out there that were not built by DR
20 Horton, correct?

21 A I believe all of them were built by DR Horton. There may
22 be second buyers.

23 Q I'm sorry, I said built. And I meant sold. So, there
24 are homeowners that live there who did not buy from DR Horton,
25 correct?

1 A I believe that is correct.

2 Q There are second and third owners of these houses out
3 there, aren't there?

4 A Probably.

5 Q And people have changed their houses, haven't they, Dr.
6 Whitlock?

7 A I don't know that they've made major changes to the
8 homes. If you're talking about driveways, yes, there's some
9 been some driveway changes. And I believe some people may
10 have added some screen porches on the back. But I'm not aware
11 of any major reconstruction of the home itself.

12 Q You haven't seen any homes where the homes have finished
13 out their basement, sir?

14 A The basements I recall, I believe one was partially
15 finished, and the others may not have been finished.

16 Q Okay. You didn't go to our inspections of 100 homes in
17 January or February or March of this year, did you, sir?

18 A My staff did. I didn't go.

19 Q Okay. You did not go to one minute of those inspections
20 this year, correct?

21 A I did not.

22 Q Okay. Did you look at all the pictures to see the
23 finished basements and the dance studio that one father built
24 for his daughter?

25 A I don't remember a dance studio, but I went through a lot

1 of photographs, yes.

2 Q Well, that's a lot of I don't knows for \$400,000 -
3 \$500,000, isn't it?

4 A I don't think so.

5 Q Okay. All right. Did you see people getting new roofs
6 out there while you were out there?

7 A I did.

8 Q Okay. Did you see people with new floors out there, sir?

9 A I saw a van replacing a hardwood floor -- in the process
10 of replacing a hardwood floor. I saw some ---

11 Q Did you document it?

12 A I think I took a photograph of the van.

13 Q Okay. Did you document that that house has a new floor
14 in it?

15 A I don't know if I went in that house. If I did, I would
16 have taken photographs of it.

17 Q You don't know?

18 A I don't remember.

19 Q Did you take it out of your damages?

20 A Did I take what out of my damages?

21 Q Did you take that new floor out of your damages
22 calculation because there's already a new floor in that house?

23 A No.

24 Q No. Okay. And the Zitek house doesn't have some of the
25 conditions that you put in front of this jury, does it? It

1 doesn't have that brick to stone corridor where the mortar is
2 cracking behind the stone, does it?

3 A It doesn't have that condition, no.

4 Q No. And it doesn't have -- and the stone on the Zitek
5 house -- on the base of the wall, is actually on brick,
6 correct?

7 A It's adhered to the brick with mortar.

8 Q Right. And other houses it's not. It's adhered to lath
9 or sheathing, correct?

10 A Well, Zitek has that, also, above the gable at the roof
11 of the garage.

12 Q Yeah.

13 A It has that type of construction as well.

14 Q At the base of the wall, sir, it's adhered to brick,
15 correct?

16 A That is correct.

17 Q Okay. And other homes, at the base of the wall, are
18 adhered to lath and wood framing, correct?

19 A Yes. There are other homes that are also adhered -- has
20 stone adhered to brick as well.

21 Q And you're not aware of one other house in Rose Hill that
22 had the structural wood framing issue that Zitek's garage has
23 suffered, are you, sir?

24 A Yes, I am. A lot of them do.

25 Q The wood beam being undersized, sir?

1 A The wood beam was not undersized. That's not the problem.
2 That's why it's failed several times. The engineer that
3 redesigned it screwed up. It's not fixed today as we sit
4 here. And other homes have the same problem.

5 Q Ah, so the engineer who wrote a letter in 2017 screwed
6 up?

7 A Yes.

8 Q Okay. And so, you don't think that his analysis that it
9 was a missing or undersized wood beam was correct, is that
10 right?

11 A That is absolutely incorrect.

12 Q Absolutely, okay. But, sir, because there are 220 homes
13 in this class action -- as I was saying, it is very important
14 for you to be very thorough in your investigation, isn't it?

15 A I was thorough.

16 Q You were thorough, sir, but you took no contemporaneous
17 notes during your inspections, correct?

18 A I took thousands of photographs. When I see things with
19 my eyes, it registers in my brain what I've seen. I record
20 that with photographs. Sometimes videos, but mostly
21 photographs.

22 Q Well, let's talk ---

23 A If I see a crack, I don't have to write down I see a
24 crack.

25 Q Let's tell the jury, you took no contemporaneous notes

1 during your inspections, correct?

2 A I did not.

3 Q Okay. And you took no survey or notes of the discussions
4 that you had with homeowners, correct?

5 A That's correct.

6 Q Okay. So, we don't know who you talked to, when you
7 talked to them, or what they said, correct?

8 A That's correct.

9 Q All right. And you didn't take any maintenance history
10 from any of those homeowners, correct?

11 A No.

12 Q And you didn't take any notes or do any documentation to
13 try to find out what maintenance, repairs, or renovations were
14 done out there, despite seeing roofing trucks, and flooring
15 trucks out there, correct?

16 A Well, regarding the roofing, there had been a hail storm
17 that had caused hail damage to the roofs, and I was informed
18 that that was why those roofers were on the site, that many of
19 the homes had experienced a damaged roof from hail.

20 Q Sir ---

21 A That happens.

22 Q Sir, you didn't take any notes for modifications or
23 repairs to these houses even though you saw a flooring van, as
24 you said, and roofing vans out there, correct?

25 A I documented both of those. I took photographs of the

1 roofing vans and of the flooring vans.

2 Q Okay. Sir, I asked you if you took notes.

3 A I did not.

4 Q Okay. So, you didn't take notes even though you knew
5 when you were out there that people were changing their
6 houses, correct?

7 A I wouldn't characterize it as changing your house. I
8 think fixing your roof is maintenance. If a roof is damaged
9 from hail, they should fix it, and they were doing that. If
10 someone's hardwood floor is destroyed for some reason that I'm
11 not aware of, that needs to be replaced, they replaced it.
12 That's their choice. They own the house. They have a
13 problem, they fixed it. I did see some sealants around
14 windows that did not appear to be placed by a professional.
15 They were sloppy, they were ineffective, and that may have
16 been done by homeowners, but I didn't ask them if they put the
17 sloppy sealants in. It might have been DR Horton's people
18 that did that. But it was there. The problems I saw weren't
19 caused by a homeowner's lack of maintenance. The problems
20 were caused because they were built badly.

21 Q Right. But if you don't know that the conditions that
22 you're looking at were done by DR Horton or a maintenance man,
23 or the homeowner, you can't say that it was DR Horton or their
24 subcontractor's fault, correct?

25 A I can't say that the sloppy maintenance was their fault,

1 if it in fact was maintenance. If it was from original
2 construction, it was sloppy then, as well.

3 Q Well, let's just get to it, sir. You're a committee
4 member of the American Society of Testing and Materials,
5 right?

6 A The America Society for Testing and Materials, yes.

7 Q Yeah. You're a committee member of that, right?

8 A I am.

9 Q And that's ASTM, that you keep telling this jury, ASTM is
10 sort of the gold standard bible that everybody has to follow,
11 correct?

12 A I haven't used those words. You did. But it is a well-
13 respected organization.

14 Q Right. And they publish guidelines, right?

15 A And standards.

16 Q And you have used those standards here to tell this jury
17 that DR Horton has violated something and should be -- and
18 should pay these homeowners, correct?

19 A Well, I have testified about defects I found at the
20 homes, and those defects were violations of the building code,
21 and ASTM standards, and other industry standards.

22 Q There we go.

23 A I have to tell you that I cannot read it. The quality of
24 the print is so bad, it's unreadable.

25 MR. IMHOFF: Okay.

1 THE COURT: Could we enlarge that? I can't see it,
2 either.

3 BY MR. IMHOFF:

4 Q I will -- well, let me ask you. Are you familiar with
5 ASTM 2128-12?

6 A Yes.

7 Q All right. And this is the standard guide for evaluating
8 water leakage of building walls, correct?

9 A It is a guide, yes. It has procedures in there that
10 people can use to help them in evaluating leaks.

11 Q So, this is a group you're a committee member of,
12 correct?

13 A I'm not on this specific committee, but some of my staff
14 are.

15 Q Sir, are you a committee member of the American Society
16 for Testing and Materials?

17 A Well, they have thousands of committees. This is one
18 specific committee. I'm not on this one, but yes, I am a
19 committee member.

20 Q Yes.

21 A Yes.

22 Q Okay. And you've seen this before, correct?

23 A Yes, I have.

24 Q Okay. And it's the standard guide for -- correct?

25 A It's a guide, yes.

1 Q Okay. Let's go to the next page, please. 5.4, Dr.
2 Whitlock, sampling. The recommended sampling method for the
3 applications guide is considered the spectrum of wall
4 conditions from apparently performing to apparently non-
5 performing, from undeteriorated or undamaged areas to
6 deteriorated or damaged areas. You didn't keep any notes of
7 all the places that you saw at Rose Hill that had
8 undeteriorated walls, correct?

9 A There's a lot of photographs I've taken that show
10 undeteriorated walls.

11 Q None of them that you showed this jury, though, correct?

12 A There were a lot of photographs of homes that I'm sure
13 they could see walls that weren't deteriorated.

14 Q And then ---

15 A That's all last week.

16 Q And in this standard guide, it says, it is also important
17 to distinguish between varying conditions, which may result
18 from prior modifications or attempted repairs, correct?

19 A Yes.

20 Q It says right in that ASTM that you're to go find out the
21 history of that structure, in this case, these residential
22 houses, to see what's been modified or repaired, correct?

23 A It's -- for purposes of doing the testing they're talking
24 about, yes.

25 Q That's right. And you don't have any notes, as you just

1 said, of what has been modified or repaired out there,
2 correct?

3 A I have evidence of what's been modified and repaired,
4 photographic evidence, which is very good.

5 Q Let's go to the next one, please. Again, when you talked
6 to these homeowners, did you ask them about maintenance?

7 A I did not.

8 Q Next, please. Okay. Did you go look around and talk to
9 -- look at other neighborhoods, and talk to the Anderson
10 County building official about local and historical practices,
11 because the actual construction may be influenced in an
12 undocumented manner by local practices?

13 A I did not talk to the building official, no. And I did
14 not talk to any other local builders.

15 Q Did you go to any neighborhoods around Rose Hill, sir?

16 A No.

17 Q Let's go to the next one. So, if you weren't talking to
18 the homeowners and taking notes, I guess you didn't take any
19 history related to any leakage problems from brick or stone on
20 these houses, correct?

21 A Well, I asked the homeowners if they were present, if
22 they had any knowledge of leakage.

23 Q Great. Great. Where are those notes, sir?

24 A In photographs. If they had a leak, they would tell me
25 where it was, and I'd photograph it.

1 Q So, it's not written down, we just have to look through
2 your thousands of photographs, right?

3 A That's correct.

4 Q Which is why it took eight days for your deposition,
5 correct, sir?

6 A You were taking my deposition, asking the questions.

7 Q Right. And you have no notes, right? And all you have
8 is photographs, so if we wanted to talk about any particular
9 house, what you found there, and what the homeowner said
10 there, and what the maintenance history is there, you had to
11 look at your photographs, correct?

12 A I have a log that says where the photographs were taken,
13 so that will help you find the home, if you want to do that.

14 Q Right. Because there's no notes, so we don't know what
15 those homeowners said, correct?

16 A No. Only what I've told you.

17 Q Only what you tell us, right?

18 A Yes.

19 Q And you don't remember a lot of that stuff, right?

20 A I remember what's important.

21 Q Okay.

22 A I photographed what was important.

23 Q Okay. Next one, please. Maintenance and repair records,
24 sir. Again, this is from an organization that you're a
25 committee member of that tells you specifically you have to

1 distinguish between original construction and attempted
2 repairs, right?

3 A Which part of the sentence, or this paragraph do you want
4 me to read?

5 Q It will be necessary to distinguish between original
6 construction and attempted repairs during the inspection and
7 testing phase of a systematic evaluation. Is that what it
8 says, sir?

9 A That's what it says, yes.

10 Q Okay.

11 A And that's what I did.

12 Q You did? With pictures, but no notes, right?

13 A That's right.

14 Q Okay. Next. Okay. From the extent of the leakage and
15 attempt to correlate historical leak occurrences with
16 particular building features and details. You didn't do that,
17 either, did you?

18 A That's exactly what I did.

19 Q That is?

20 A Yes.

21 Q In your pictures?

22 A Yes.

23 Q But no notes of the historical leak occurrences, correct?

24 A Only through observation of staining and leak evidence.

25 Q Right.

1 A I saw that. I assumed that's what it was. I tested it
2 and proved that it did leak. And that was the operations that
3 I went through and documented. And I have reports that I
4 furnished to you, reports of that testing, that go beyond just
5 note-taking, and photographs of those leaks.

6 Q Sir, you don't have one document where a homeowner said
7 this window has been leaking since 2011, or this wall has been
8 leaking since 2016. Not one, correct?

9 A I have no evidence in documentation from the homeowners,
10 only the photographs I took from their homes that showed leaks
11 that leaked during tests and showed the damage that existed.

12 Q Sir, you just said you have no evidence of historical
13 leaks. But you just testified to this jury that you, in fact,
14 did talk to those homeowners, and you did ask them those
15 things, and you documented it with a picture. Correct?

16 A If they knew that they had a leak, they would tell me.
17 They would say, yes, I have a leak in a certain place, and I
18 would go document it.

19 Q How does a picture taken -- well, strike that. A picture
20 taken in 2020 doesn't tell us when the homeowner started to
21 see any particular leak, does it?

22 A No.

23 Q No. And you don't have those notes, correct?

24 A No.

25 Q Even though it says they do, correct?

1 A It says attempt to correlate historical leak occurrences
2 with particular building features and details.

3 Q Right.

4 A That's what I did.

5 Q Right. Well, sir -- okay, let's go to the next one.

6 This is inspection. Let's go to the next one. Did you
7 determine the current conditions of the placement condition
8 and resilience of sealants and gaskets?

9 A I photographed a lot of missing sealants, sealants that
10 should have been there that never were installed. So, how can
11 you photograph something that doesn't exist? I ---

12 Q Okay.

13 A --- proved that it didn't exist. And we can go through
14 those photographs again if you'd like.

15 Q We will.

16 A Let's do it.

17 Q Let's go to the next one. Again, indications of wear and
18 tear, maintenance, attempted repairs. The damage from non-
19 weather-related causes, such as impacts from unaccommodated
20 volume changes or structural ---

21 A Well, that's a good one. Yes, that's exactly what I
22 documented.

23 Q You did?

24 A The Zitek residence is failing again from unaccommodated
25 differential movement -- stresses related to unaccommodated

1 volume changes, that's differential movement. Volume change
2 is what happens with brick expands and wood expands or
3 shrinks, and that's what I documented, that's what has
4 happened, and that's why that house is failing, and that's why
5 others throughout the neighborhood are failing, for the same
6 reason.

7 Q Sir, you showed this jury pictures of broken, cracked
8 brick at the bottom of a corner of a brick home.

9 A And broken, cracked brick under a window on the second
10 floor as well.

11 Q Did you ask the homeowner, sir, if they hit the corner
12 with their car or some other thing that broke it?

13 A I don't think the homeowners would drive their car in the
14 backyard and drive into their house. If they did, I think
15 they'd tell me.

16 Q You don't know, because despite what this tells you to
17 do, you didn't ask, and you didn't take notes, right?

18 A I did ask. I did not take notes of anybody driving their
19 car into their house.

20 Q And again, you kept no notes of maintenance, or no notes
21 of attempted repairs, or timing of any of these things, even
22 though it says to do it, correct?

23 A I took photographs of what I thought might have been
24 repairs. For example, there were -- there was one particular
25 window leak I found that I could tell had been repaired, and

1 the homeowner did tell me they repaired it. But it wasn't
2 repaired very well.

3 Q I hear you, sir. You keep saying, I took photographs.
4 But my question is repeatedly, and the jury is hearing it, is
5 did you take notes. You didn't, sir.

6 A You've asked me that about 15 times, and I said no.

7 Q Right. Let's go to the next one. Sir, 9.7 of the ASTM,
8 which you are a committee member of, sir, requires you to
9 document in writing inspection findings. And it actually
10 says, sir, the documentation should be supplemented
11 graphically with photographs, video, or dictated notes, but
12 these should not normally be relied on. Correct?

13 A That's correct.

14 Q So, all of those answers that you gave to this jury that
15 you didn't document these things, except for photographs, is
16 directly contrary to the American Society for Testing and
17 Design, which you are a committee member of, and which you
18 have used in this case to support your opinions, right?

19 A Incorrect. You didn't read the whole thing. And it's
20 the American Society for Testing and Materials, not design.

21 Q Oh, I'm sorry. Sir, that committee, that society, tells
22 you not to do exactly what you did, which is take photographs,
23 rely on them exclusively, and keep no notes, correct?

24 A I photographed it. I did not lose any photographs. I
25 did not lose any videos. Everything is maintained well.

1 Q Is that a yes, sir, that the American Society that you're
2 a committee member of, requires you to take notes, and not
3 rely on photographs, and you did anyway?

4 A This -- these aren't requirements. These are guidelines.
5 And it says what it says.

6 Q Next one. 9.7.1, the written documentation should be
7 complete enough for the evaluation process to be repeated. Is
8 that what it says, sir?

9 A Yes.

10 Q Okay, well, nobody can take your photographs and repeat
11 your analysis of maintenance records, repairs, causes, or
12 timing. Correct?

13 A Incorrect.

14 Q It is. Okay. So, I can take a picture, and I can find
15 out how the homeowner has maintained their home, correct?

16 A No.

17 Q I can take one of your pictures, and I can find out when
18 the homeowner began having issues, right?

19 A I don't think that could be determined unless you were
20 there from the very first day the home was completed, with an
21 expert eye, because damage, deterioration, and failure is a
22 slow process. No one knows exactly when it starts, and many
23 of these homes have had basically zero maintenance to them,
24 except for the back doors that have fallen apart. In many
25 cases, there's been no maintenance because there's nothing

1 they can maintain. They can't maintain a window that's
2 cracking and falling apart.

3 Q No engineer can take your pictures and determine what
4 maintenance has been done, what repairs have been done, when
5 it started, or how it started. Correct, sir?

6 A I think a knowledgeable engineer could take my
7 photographs and interpret them and know what the damage is
8 that's being photographed, and maybe what potential causes are
9 of the damage. Maintenance -- I don't think many --- did
10 maintenance, because there was no maintenance to be had.
11 There's nothing to do to the brick to maintain it, nothing to
12 do to the stone to maintain it. Nothing to do to the cracked
13 concrete in the homes to maintain it. The yards, that's not
14 my gig, but I don't know if there's much to do with the
15 drainage problem that the homes have that they could have
16 maintained, although some of them did try to keep water out.
17 Q All right, so this doesn't apply to you, right?

18 A In its entirety, it does apply. I think the guidelines
19 in this are good, and it has many other sections that are
20 applicable.

21 Q They're good, but you didn't follow them, right?

22 A I did.

23 Q Well, sir -- okay. Let's go to the next. More notes.
24 Go to the next one, please. So, if you don't have notes, you
25 can't tell us the sequence of the inspection process, can you?

1 A You can see a time-by-time, step-through of every home I
2 went in, looking at my photographs. They're date-stamped, and
3 there's a GPS location embedded into them. You know where I
4 am, what time I took the photograph, and what it is.

5 Q Sir, the date, time, and name of the person making the
6 observation should be recorded, correct?

7 A And it was.

8 Q It was. Okay. We'll go through them. That's a
9 requirement, or, in your opinion, a guide, correct?

10 A Yes.

11 Q Okay. Let's go to the next one. Next. Under
12 investigative testing, sir, you actually cut into these
13 houses, didn't you?

14 A In some places, yes, I did.

15 Q The houses are the evidence in this case, aren't they,
16 sir?

17 A Yes.

18 Q Just like a knife in a murder trial, you're not supposed
19 to change the evidence, correct?

20 A It's not a murder trial, and I didn't have a knife. I
21 did remove some materials to do inspections.

22 Q Okay. And again, this ASTM, the guide, sir, the standard
23 guide, that you're a member and a committee member, says there
24 should be an agreement on testing methods and that should be
25 reached between the interested parties before testing begins.

1 And it has a list of items that should be addressed by
2 interested parties. Does it say that, sir?

3 A I see that.

4 Q And every test you did, spray rack, seal dam, cut into
5 these houses, was done in absolute secrecy, wasn't it, sir?

6 A No, it was wide open. I'm there doing my testing,
7 there's no secrecy.

8 Q Really. Did you ever contact any of the people involved
9 in this case to tell them that you would be cutting into and
10 changing the evidence in this case, sir?

11 A Two things. It's not my role to go behind my client's
12 back and try to find somebody to come look at what I'm doing.
13 I had no idea who's involved in this case except for my client
14 and the homeowners, and DR Horton.

15 Q Okay, so you knew that DR Horton was in the case at
16 least, right?

17 A What was I do to, call 1-800-DR Horton?

18 Q Sure. There actually is a DR Horton website and phone
19 number, sir.

20 A So I should go on their website and call them and tell
21 them I'm going to test their homes?

22 Q Did you tell anyone that you were going to be cutting
23 into these buildings and doing testing on these buildings so
24 that you could invite them so that they could see what you're
25 doing and develop the protocol that your society recommends?

1 A There was no one I knew of that would be involved with
2 this work. I had no idea of any other entity to invite.

3 Q Did you turn around and look at the lawyers who hired
4 you, while you're cutting into these buildings and say, why
5 isn't anyone else here? The protocols clearly state that the
6 other party should be here to see what I'm doing. Did you do
7 that, sir?

8 A No, I didn't turn around and ask them that question when
9 I was doing my work. I did not.

10 Q Did you ever say that in my industry, the standard guide
11 requires me to invite interested parties to see the changes
12 I'm making to these buildings?

13 A No.

14 Q Why not, sir?

15 A Because there were no other interested parties that I was
16 aware of.

17 Q Sir, you just said you knew about DR Horton. The lawsuit
18 was filed before you were even done with your testing.

19 A It was.

20 Q Sir, are you telling this jury that you didn't know DR
21 Horton was the defendant in your case when you cut into these
22 buildings?

23 A I knew DR Horton was, but I had no idea who was in the
24 other -- engineers involved or any other testing companies,
25 but ---

1 Q You never said to anyone, DR Horton and their experts and
2 engineers should be here to see what I'm doing, how I'm doing
3 it, and what the evidence looks like before I change it.

4 A I don't ever recall saying those specific words, no.

5 Q That's right. So, DR Horton and all these other
6 engineers, experts, defendants, didn't get to see one second
7 of what you did out there, correct?

8 A They got to see the homes before I tested them, during
9 the test, and afterwards. I documented everything, and I
10 wrote reports, and I furnished those reports. And I didn't
11 destroy the homes. Very small areas of certain homes were
12 dissected. There are many other areas out there to test, and
13 they went out there and did it.

14 Q None of these people can see exactly what you did or how
15 you did it, or what it looked like before, correct?

16 A They can see my reports, and that's sufficient.

17 Q It is. Not according to this standard guide, is it?
18 It's not sufficient, sir, is it?

19 A I believe that it is, yes.

20 Q Okay. So again, certain of these things don't apply to
21 you and your investigation, correct?

22 A In this situation, I did what needed to be done in the
23 manner that it needed to be done.

24 Q Let's go to the next thing, please. You remember, sir,
25 that I took your deposition. We took a long deposition. Do

1 you remember that, sir?

2 A Yes.

3 Q And in that deposition, we had to go through your photo
4 log and through your photos, because you didn't have any
5 contemporaneous notes, correct?

6 A Well, we went through my photographs for other reasons.

7 Q We had to use your photo log and your photograph to
8 determine what was done at each house and what you found,
9 correct?

10 A We went through a lot of photographs, yes.

11 MR. LUCEY: May we approach, Your Honor?

12 THE COURT: Yes, sir.

13 [Whereupon, a bench conference was held off the record.]

14 BY MR. IMHOFF:

15 Q Sir, during your deposition, we came upon a series of
16 photographs that did not match the house you said they were
17 from, correct? Correct?

18 A I don't remember that question.

19 Q All right.

20 A Would you repeat what you just said, that we looked at
21 some photographs that I said what?

22 Q During your deposition, as I was trying to determine what
23 you did out there, we came upon a set of photographs that were
24 labeled as a particular house, and you admitted it was not
25 that house, correct?

1 A I don't remember that.

2 Q All right.

3 A It could be correct, I just don't remember that.

4 Q I asked you, now photograph 759, which is indicated to be
5 8 Duxbury Lane, on June 3rd, 2020, has a left-handed garage.
6 What was your answer, sir?

7 A Can I read the whole thing into the record?

8 Q Sure.

9 A You asked me, question, bay window, I will never get
10 those right, okay. Now, photograph 759, which is indicated to
11 be 8 Duxbury ---

12 Q Sir, are you reading -- go ahead.

13 A I was reading it. I'm just -- I'll start over. Bay
14 window, I'll never get those right. Okay. Now, photograph
15 759, which is indicated to be 8 Duxbury Lane, again on June
16 3rd, 2020, has a left-hand garage. Answer, yeah. Question, it
17 does not have a bay window. Answer, that's correct.
18 Question, is this 8 Duxbury? Answer, no, it's not. Question,
19 is that a mistake in your file? A, that is not 8 Duxbury, I
20 may have been at 8 Duxbury when I took the photograph. That's
21 why I wanted to look at adjacent homes. That is likely I was
22 standing in the yard of 8 Duxbury and took the photograph of
23 an adjacent home.

24 Q Are you telling this jury it's one picture, sir?

25 A We're talking about one photograph in this questioning.

1 Q Are you telling this jury that it's only one picture that
2 was mistaken?

3 A I'm not saying it was mistaken. I'm saying that I was
4 standing in the yard of 8 Duxbury, apparently, when I took a
5 photograph of an adjacent home. What do you want me to read
6 now?

7 Q Okay. 759 is not 8 Duxbury, right? What was your
8 answer, sir?

9 A You said, okay, 759 is not 8 Duxbury, right? And I said,
10 no, it's not.

11 Q I asked you, can you say whether the photographs between
12 759 and 779 are 8 Duxbury. What was your answer, sir?

13 A That those weren't.

14 Q I'm sorry?

15 A That they were not 8 Duxbury.

16 Q That's right. So, we're not talking about one
17 photograph. We're actually talking about 20 photographs that
18 you indicated were from 8 Duxbury, and they're not, correct?

19 A That's what I told you.

20 Q Yes.

21 A I was telling you that the photograph was taken of a
22 different home.

23 Q You also told us that you documented this thoroughly, and
24 we could rely on your photographs, correct?

25 A Correct.

1 Q But we can't rely on your photographs, can we, Dr.

2 Whitlock, because we know at least 20 of them aren't even the
3 right house, right?

4 A I think you're taking it out of context.

5 Q I -- okay. We cannot rely on your photographs and
6 absence of notes for those 20 photographs, correct?

7 A I believe you're incorrect.

8 Q You are. We can still rely on them even if we don't know
9 where it is.

10 A I believe we do know where it is.

11 Q You do?

12 A You can -- if you look at the photographs, you can tell
13 that I took photographs of the neighborhood. Sometimes I took
14 photographs looking down the street where there's multiple
15 homes showing in the photographs.

16 MR. IMHOFF: I asked you, which home is shown in these
17 pictures, 759 through 779, what address?

18 MR. LUCEY: May we have the page and line number that
19 you're quoting?

20 MR. IMHOFF: Sure, it's page 1029, that was line 24. Can
21 you blow that up?

22 BY MR. IMHOFF:

23 Q What did you say, sir?

24 A Can you go back to the previous one? I was right in the
25 middle of reading it. So, it says question, so 777 is the

1 last photograph that you designate? No, I'm wrong, 779 is the
2 last photograph that you designate as 8 Duxbury. Answer, I
3 think those are just neighboring homes that I took pictures of
4 when I was leaving 8 Duxbury. Question, which home? Answer,
5 all of them. Question, no, which home is shown in these
6 pictures, 759 through 779, what address? Go to the next page,
7 please. I don't know the address. I was taking photographs
8 down the street.

9 Q Sir, you don't know the address for those 20 pictures, do
10 you, sir?

11 A It wasn't necessary. It was just a -- reference
12 photographs of the neighborhood.

13 Q It's not necessary, sir?

14 A No. Not for those photographs. They didn't show
15 anything in particular. They were showing neighborhood
16 photographs.

17 Q It's not necessary to know where you took your
18 photographs of what home, so we could determine what code
19 applies, who owns it, what repairs have been done, what
20 maintenance has been done, or frankly, who built it? It's not
21 important, sir?

22 A You're wrong. I was standing in the yard of 8 Duxbury
23 taking pictures down the street of other homes.

24 Q Of which home?

25 A The neighboring homes.

1 Q Which one?

2 A All of them. That's what I answered in the ---

3 Q So those 20 pictures are of all the homes?

4 A Just neighborhood homes. Just general reference
5 photographs of where I was.

6 Q Can you blow this up a little bit? So, that's not the
7 only place where you don't know where you're taking pictures,
8 and we don't know where you're taking pictures. Correct?

9 A That's correct in this, based on what I'm looking at.

10 Q Someone took a bunch of pictures on June 1st of 2020, and
11 you don't know what address it was, correct?

12 A Which -- do you know which photographs those were? What
13 -- who took -- was it mine?

14 Q I'm uncertain.

15 A I'd like to see the rest of this document, but I don't
16 recall that.

17 Q Is this your document, sir?

18 A It could be. I don't know if it's my photographs or
19 someone that was with me, but probably from my company.

20 Q Sir, do you see the stone on the top of this house in the
21 middle?

22 A Yes.

23 Q Okay. Did you use pictures of that stone yesterday --
24 I'm sorry, Friday, to convince this jury that DR Horton had
25 put stone on incorrectly on this house?

- 1 A I didn't use the pictures. I was answering questions.
- 2 Q You didn't use the pictures, sir?
- 3 A I answered questions about pictures I was shown.
- 4 Q Okay. If you were shown a picture of this house with
- 5 this stone and those two white rocking chairs, you don't
- 6 remember talking about that on Friday?
- 7 A I remember talking about a lot of stuff on Friday, but
- 8 you asked me if I used pictures. I didn't use them. I was
- 9 answering questions about pictures.
- 10 Q Did you answer questions about this stone installation on
- 11 this house with these white rocking chairs?
- 12 A I was asked what was -- I think I was asked, what is
- 13 going on in this location. And I said the stone fell off.
- 14 Q Okay. Did DR Horton put that stone on that house, sir?
- 15 A I don't know.
- 16 Q All right. Sir, why was it -- why did you answer
- 17 affirmatively that that is evidence of errors in stone
- 18 installation if you don't know?
- 19 A Well, I don't know who put the stone on there, but I know
- 20 that it fell off. And I don't think I was asked about errors
- 21 in the stone. I don't recall being asked specific questions
- 22 about the installation. What had happened, I think I was
- 23 asked.
- 24 Q You don't remember seeing this picture, sir?
- 25 A I do remember seeing that picture.

1 Q Do you remember testifying about it?

2 A I remember testifying.

3 Q Do you know what the address is?

4 A I do not.

5 Q Sir, do you know what property record detail is in
6 Anderson County?

7 A I've never looked at Anderson County's property record
8 details, but I've seen them for other counties.

9 Q Did you ever actually go look to see which homes were
10 built by DR Horton and which homes were not?

11 A No.

12 Q Well, the home that you used or talked about as a
13 construction defect on Friday, sir, who sold that home?

14 A John W. Merritt, III purchased it in 2004. 2005, the
15 purchaser was Poinsett Development. 2006, Poinsett Homes.
16 2007, Graham Danny -- Danny Graham and Elizabeth Graham. And
17 then in 2022, Isaiah Dunlap and Nina J. Dunlap.

18 Q Right. This home was sold in 2006 by Poinsett Homes,
19 LLC, wasn't it?

20 A That's what it says, yes.

21 Q Did you know that when you put it up on the screen for
22 this jury?

23 A Well, I didn't put it up on the screen. And I didn't
24 know who built it.

25 Q Did it come from your photographs, Dr. Whitlock?

1 A Yes.

2 Q And if you had taken notes and gone and looked, you would
3 have found out that not only did you have it labeled as a
4 house that doesn't exist, but it was actually a house that
5 wasn't built by DR Horton, correct?

6 A I believe it's in my photographs, and I believe I
7 identified it in my photographs, the address.

8 Q That's right, sir, and if I could get the picture of it,
9 I believe the address you put on it was on 102 Amesbury, which
10 doesn't even exist, correct?

11 A I don't know if it exists or not, but according to this
12 it's 102 Birch.

13 Q Sir, you've told us that you haven't followed the
14 guidelines in the ASTM, in documenting your notes and inviting
15 people to do your inspections ---

16 A I did document it.

17 Q Okay. But we should ---

18 A And there was no one for me to invite.

19 Q But we should rely on your investigation, even though it
20 didn't follow the standard guidelines, correct?

21 A It followed the guide. I did my work in accordance with
22 the guide, the scientific aspects of my work were true and
23 correct, and I reported them as such.

24 Q But you took pictures of a house and included it in your
25 photographs with the wrong address, for a home that DR Horton

1 didn't even build, correct?

2 A If it's included in my photographs, and I have the wrong
3 address, then you're correct. And apparently DR Horton did
4 not build that, Poinsett did.

5 Q So your file isn't accurate, is it, sir?

6 A I believe that it is generally accurate, yes.

7 Q Generally accurate. Is generally accurate somewhere in
8 the ASTM for documenting and investigating?

9 A For every home I tested and every home I reported on, I
10 believe that it's accurate. I took photographs of the entire
11 neighborhood, including other homes -- many other homes, that
12 were built by other people. They are included in my
13 photographs as well. But I did not test them. And I got my
14 report on those homes in my reports.

15 Q Well, sir, we won't know when we're looking at
16 photographs or you're testing about an error whether or not
17 you have the right home, or even a home built by DR Horton,
18 now, will we?

19 A Every home I tested was built by DR Horton.

20 Q What about that one?

21 A I didn't test that home.

22 Q Does concrete crack?

23 A It can.

24 Q Does it regularly crack, sir?

25 A Concrete has an issue with shrinkage and cracking.

1 Q Shrinkage crack, right?

2 A Yes.

3 Q Not only does it crack, it's actually expected to crack,
4 isn't it?

5 A To some degree, yes.

6 Q It's called crack-crete, isn't it, sir?

7 A That's a cute term, crack-crete. I've never heard that
8 made by somebody in this court, but it's concrete. It's made
9 out of cement, sand, and other add mixtures, and cement, as it
10 dehydrates, shrinks. And so, concrete does have a shrinkage
11 issue.

12 Q All right.

13 A And that's why they put control joints in concrete.

14 Q Concrete has shrinkage issues which are well-known and
15 well-documented, aren't they, sir?

16 A Yes.

17 Q And just because you have cracks in your slab or in your
18 garage doesn't mean there's any issue or any structural issue,
19 does it?

20 A Not in and of itself. A crack doesn't necessarily mean
21 there's a structural issue.

22 Q Right. You're familiar with the South Carolina
23 Residential Construction Standards?

24 A Various issues of it. This is a pretty old one, but
25 there are different issues of this standard, yes.

1 Q You're familiar with these, sir?

2 A Yes.

3 Q Okay. Let's go to the next page. Now, it says right in
4 it, concrete is subject to several natural changes. The first
5 is shrinkage, which creates shrinkage cracks, the type most
6 common in concrete work, especially flat slabs. Did I read
7 that correctly?

8 A Yes.

9 Q Shrinkage cracks themselves do not affect the integrity
10 of the surface. Did I read that one correctly?

11 A Yes, you did.

12 Q Are those South Carolina residential standards?

13 A That's what it says, yes.

14 Q Were you aware of those when you were doing your
15 investigation?

16 A Yes.

17 Q And you know that shrinkage cracks are not only common,
18 but they actually assume you will get them, right in our
19 residential construction standards, right?

20 A That's why they put control joints in concrete ---

21 Q Right.

22 A --- just like in sidewalks, they have control joints.

23 Q And to determine if the crack is outside of the
24 tolerances, let's say, it's more than just a shrinkage crack,
25 you have to do more investigation than just take a picture,

1 right?

2 A Well, if it's a large crack, you can photograph it and
3 document it, that it's a large crack, yes.

4 Q Let's go to the next page, please. These cracks --
5 cracking is a characteristic of concrete, does it say that?

6 A That's the first few words -- cracking is characteristic
7 of concrete.

8 Q Okay. Let's tell the jury, okay. Just because you see a
9 crack in concrete doesn't mean it's necessarily wrong,
10 correct?

11 A I think I've already said that, yes.

12 Q Okay. Cracks are caused by settling of the house,
13 shrinkage of the concrete, expansion and contraction, and may
14 occur continually throughout the life of the house, correct?

15 A Well, hopefully it won't continue too much throughout the
16 life but it can.

17 Q Right. That's what it says in our South Carolina
18 residential standards, right?

19 A Yes.

20 Q Okay. Next page, please. Can you blow that up, please?

21 And to determine in the garage if it actually needs to be
22 fixed, you have to measure it to see if it's greater than
23 five-sixteenths, or if the concrete on one side is higher than
24 the other side by five-sixteenths, right?

25 A That's what the standard says, that cracks in garage

1 slabs in excess of five-sixteenths of an inch in width or
2 five-sixteenths of an inch in vertical displacement shall be
3 repaired.

4 Q Right.

5 A That's what it says.

6 Q You need to measure it, sir, don't you?

7 A Yes.

8 Q Yeah. You can't just say, here, jury, here's some
9 pictures of cracks, award \$28 million, right?

10 A I don't think I did that.

11 Q Did you measure all the cracks out there, sir, that you
12 showed this jury?

13 A I did not measure all the cracks. You can see in the
14 photographs there's a crack comparator and rulers applied to
15 the cracks that you can see the dimensions of the cracks.

16 Q And when we're talking about the interior, you have to
17 measure them to see if it's three-sixteenths separation or
18 three-sixteenths difference between the ---

19 A Did you mean to change the screen?

20 Q Is three-sixteenths the standard on interior slabs, sir?

21 A It might be. Did you have a screen you wanted to show me
22 that said that?

23 Q Sir, you don't know?

24 A I don't recall, but I think you might be right. I just
25 would like to see it, if that's what you wanted to show me. I

1 don't think your graphic is working if that's what you wanted
2 to show.

3 Q When you did your investigation of all of these homes
4 over the course of the last four years, for somewhere between
5 \$400,000 and \$500,000, were you aware of the standard of
6 cracking in interior slabs?

7 A I'm aware of this document, yes.

8 Q Okay. And it's three-sixteenths, isn't it, sir?

9 A I believe that might be correct. I just thought you
10 wanted to show it.

11 Q So, did you measure all the cracks in the interior?

12 A I did not measure all the cracks.

13 Q So, can you tell this jury that all of the cracks that
14 you took pictures of that were on the screen in front of them
15 need to be repaired, sir?

16 A I did recommend that these cracks be repaired for a
17 specific reason, and it was because of DR Horton's design of
18 the radon system.

19 Q Ah. Is this three-sixteenths? Can you blow it up?

20 A Yes, that's what it says. Three-sixteenths.

21 Q So, are you telling ---

22 A That much.

23 Q --- the jury that you didn't measure them because it
24 didn't matter?

25 A I didn't measure all of them. There were some that I

1 measured. You can see it in my photographs.

2 Q Okay. But how is the jury supposed to know if you didn't
3 do your investigation, which cracks are outside the tolerances
4 and which side are in the tolerances, sir?

5 A They all exceed the specification by DR Horton's plans to
6 fill cracks in the slabs.

7 MR. IMHOFF: May we approach, Your Honor?

8 THE COURT: Yes, sir.

9 [Whereupon, a bench conference was held off the record.]

10 THE COURT: Mr. Bailiff, would you take the jury to the
11 jury room, please?

12 DR. WHITLOCK: Do I stay here, Your Honor?

13 THE COURT: Yeah, you stay right there.

14 [Whereupon, the jury exits the courtroom.]

15 THE COURT: Now, I told Dr. Whitlock to stay. Do you
16 need Dr. Whitlock?

17 MR. IMHOFF: No, he can stay right there.

18 THE COURT: Okay, all right.

19 MR. IMHOFF: If that was your question.

20 THE COURT: Yes, sir.

21 MR. IMHOFF: Your Honor, as I said at -- a moment ago,
22 Dr. Whitlock has now multiple times put things into his
23 testimony which I didn't ask him about, that are specifically
24 excluded by your ruling and/or our --- case. The first time
25 he did it, he started talking about rotten back doors. I know

1 he said rotten back doors. They settled, it's out of this
2 case. The second time he's now done it and the third time
3 he's now done it, is I was asking him if he measured the
4 cracks in regard to the South Carolina Residential Standards.
5 Now, Mr. -- Dr. Whitlock took it upon himself to begin talking
6 about the 2018 radon standard from DR Horton, which this Court
7 has specifically excluded. Dr. Whitlock knew it, you voir
8 dired him about it during the day. There were arguments about
9 it the other day. He was told he couldn't rely on that, and
10 he just did.

11 It appears that the Plaintiffs are trying for a mistrial,
12 which I think is probably where we are right now, but the
13 second thing is, Your Honor, he's doing it intentionally and
14 with knowledge. So, at the very least, we'd ask for a jury
15 instruction to the jury, and what that is, I'd have to think
16 about, but it's already out there now, but Your Honor, this is
17 clearly intentional by Dr. Whitlock. And clearly in
18 contradiction of your order. We had to send John Martin home
19 because he was subpoenaed to be here at 3:00 pm.

20 While I was up here cross examining, he sat in the back
21 of the court. He's our main construction expert, and you said
22 he violated the court's order, we can't use him, and he had to
23 drive back to Memphis. You now have a witness, the main
24 witness in this case, who has directly violated an order that
25 you gave and told directly to him not to bring up, and he

1 brought it up in response to a question about measuring cracks
2 in the South Carolina Residential Standards, Your Honor. We
3 think absolutely a curative instruction --- but we'd also ask
4 for a mistrial, Your Honor. That was intentional by him.

5 THE COURT: Mr. Lucey?

6 MR. LUCEY: Yes, Your Honor. Much of what the Court just
7 heard is a figment of Mr. Imhoff's imagination. But the ruled
8 on -- what the Court ruled upon a day ago was that Dr.
9 Whitlock did not rely upon the 2018 drawings to establish the
10 standard of care, and he did not yesterday. Counsel opened
11 the door with his question to Dr. Whitlock as to why the
12 cracks need to be fixed. And he answered the question. He
13 had not been instructed by the Court not to refer to the 2018
14 plans, and it happens to be that DR Horton produced those
15 plans in this litigation, which falls to our request with
16 details that apply to this subdivision. They produced them,
17 not us.

18 So, Your Honor, he drew that -- just like on the patio
19 doors that he's complaining about now, Your Honor. For him to
20 say to Dr. Whitlock, he couldn't find any rotten behind brick
21 or stone would be one thing. He went to Dr. Whitlock in front
22 of the jury and said you can't find any rot in Rose Hill,
23 could you? He opened the door. There was rot in the back of
24 these houses next to the patio doors. It was natural for Dr.
25 Whitlock to respond, yes, I saw it at such and such.

1 He just -- he asked the broad question instead of asking
2 a narrow question that would be tailored to eliminate any
3 information from settled matters. The counselor is the one
4 that keeps opening doors, Your Honor. We oppose his request
5 for a mistrial.

6 MR. IMHOFF: Your Honor, I cannot try this case if I
7 can't ask him about the South Carolina Residential Standards
8 and the fact that he didn't measure those cracks and that
9 those cracks don't fall within the tolerances. I have to ask
10 that. He knows that that's what I'm asking him, and he went
11 to the radon, which you specifically directed him not to.
12 What Mr. Lucey said is not accurate. I did not open the door
13 for him to start talking about DR Horton standards and radon.
14 I was asking about the South Carolina Residential Standards,
15 which was what was on the screen. That word was not ---.

16 MR. LUCEY: He used inapplicable standards that go in the
17 barn doors. There's nothing in the South Carolina Residential
18 Standards regarding what you have to do to correct radon.
19 It's irrelevant as to radon. This crack measurement and these
20 standards is for the defective installation of a foundation or
21 a floor. We don't allege that the floors were defectively
22 installed. We're not saying they violated these standards.
23 We're simply saying that if you install a radon protection
24 system, you have to seal the cracks to keep the radon from
25 coming up through the floors into the house. It's everywhere.

1 It's in their plans, it's on the EPA website, and everywhere
2 else. He opened the door by using completely inapplicable
3 standards to examine this witness.

4 THE COURT: Well, I've heard the questions, and as was
5 mentioned at the bench, the questions I don't find open the
6 door, but it did get close. Dr. Whitlock, I'm going to
7 instruct you to answer the question that is asked. Do not
8 volunteer information that is not asked. We are in the second
9 week of this trial, and if something comes up in this case
10 that would require -- and I'll find that this does not require
11 a mistrial. I am going to order the jury to disregard the
12 last answer and have that stricken from the record, but we are
13 well into this trial, and a mistrial would be very bad for all
14 the parties concerned. So, I will order that that last answer
15 be stricken and disregarded and that will be the curative
16 instruction. And let's move on.

17 MR. LUCEY: Yes, Your Honor. Can we go to a bathroom
18 break while the jury's out?

19 THE COURT: Yeah, just go ahead while we've got them back
20 there. Let's just take a short break.

21 MR. IMHOFF: Your Honor, I have one other point. We can
22 take it up now, we can take it up later.

23 THE COURT: Yeah, go ahead, while we're ---

24 MR. IMHOFF: When I'm -- could we ask Dr. Whitlock to
25 step out?

1 THE COURT: That's fine.

2 [Whereupon, the witness exits the courtroom.]

3 THE COURT: Okay.

4 MR. IMHOFF: So, we have to ask Dr. Whitlock about radon,
5 Your Honor, and it is not required in Anderson County. And I
6 can ask him that, that it is not required by Anderson County,
7 and the answer can be whatever it can be, but that was not
8 opening the door to the 2018 DR Horton standard. And so,
9 perilously close, you're right. It's getting -- but I am very
10 well aware of the question I'm asking, and it ain't, do we
11 have to fix the cracks because of a 2018 standard of detail
12 that's been kept out of this trial. The question can be very
13 specific, but that radon system is not required in Anderson
14 County, so I would ask you to instruct Dr. Whitlock to never
15 bring up that 2008 standard, unless I ask him about it.

16 THE COURT: Well, that's ruled in the Court, and I will
17 reiterate that.

18 MR. IMHOFF: All right. And we'll do that when we get
19 back, Your Honor?

20 THE COURT: Yes, sir.

21 MR. IMHOFF: Thank you.

22 THE COURT: Let's take a short break.

23 MR. IMHOFF: How long do you want to do?

24 THE COURT: About ten minutes.

25 [Brief recess.]

1 MR. LUCEY: May I provide Dr. Whitlock the Court's
2 request?

3 THE COURT: Yes, sir.

4 MR. LUCEY: Dr. Whitlock, the Court has requested, to be
5 polite about it, or ordered, if you want to be frank about it,
6 that you not refer to the 2018 DR Horton details, the 2018 ---
7 details, one. Two, that you avoid referring to the settled
8 issue regarding the rotten patio doors.

9 DR. WHITLOCK: Okay.

10 MR. LUCEY: Thank you, sir.

11 THE COURT: All right. Let's get our jury, please.

12 [Whereupon, the jury enters the courtroom.]

13 THE COURT: Mr. Foreman, ladies and gentlemen of the
14 jury, you are to disregard the last answer given by the
15 witness prior to our break. You are to give it no
16 consideration whatsoever. So, with that, Mr. Imhoff, please
17 proceed with your cross examination.

18 MR. IMHOFF: Thank you, Your Honor.

19 BY MR. IMHOFF:

20 Q Dr. Whitlock, Anderson County, South Carolina, does not
21 require a radon system to be installed, correct?

22 A I believe that's correct.

23 Q You haven't done one test in Rose Hill for radon,
24 correct?

25 A I have not.

1 Q I wanted to clarify something earlier, because we
2 couldn't get it up. This is Plaintiff's Exhibit 25.31 --- go
3 back and fix this. Can you see the label on that, sir? What
4 house did you say that was?

5 A I read the address of the home. It says 102 Amesbury.

6 Q Go back, please, Max. And that was put into evidence, or
7 shown to the jury on Friday as an example of bad stone work by
8 DR Horton, correct?

9 A It was shown on Friday, and I answered questions about
10 that, yes.

11 Q And sir, there isn't even a 102 Amesbury in this
12 neighborhood, is there?

13 A I don't know. I don't -- I'm not sure. Apparently not.

14 Q Take that down, Max. Sir, you can't say if cracks are
15 present in all homes in this --- can you?

16 A Well, every home I inspected I saw cracks on the
17 foundation walls or basement walls or slabs.

18 Q Sir, you cannot tell this jury that every home out there
19 has cracks in the slab of the interior of their homes, can
20 you?

21 A I have not seen the slab on every home, therefore, I
22 can't say with certainty that every home has cracks. But
23 every one that I did look at, did have cracks.

24 Q Dr. Whitlock, all of the slabs are covered by flooring
25 materials, such as wood flooring or carpet or tile, correct?

1 A Except on the outside edges where the cracks come through
2 below the siding. You can see the cracks there.

3 Q So looking through your photographs, there was only one
4 home that you saw where someone had pulled up the flooring
5 material other than Natalie Zitek's home, correct?

6 A And some basement slabs and garage slabs. And again, as
7 I said, the edges of the slabs.

8 Q So, you're saying the ones that I investigated -- but
9 sir, that's 218 homes that have flooring covering the slab
10 that you cannot see, correct?

11 A That's correct.

12 Q And you have proposed to this jury to pull up all of the
13 floors in all of the homes, check to see if they're there, and
14 then pay the homeowners for all new floors on the first floor,
15 correct?

16 A There's a cost estimate for doing that, yes.

17 Q Yeah. But you don't even know that they're there,
18 correct?

19 A I'm confident that there are cracks in the slabs. I
20 haven't documented cracks in all the slabs, but I have
21 documented cracks on the edges of the slabs, and in other
22 places throughout the neighborhood, yes.

23 Q You don't know they're in every home, correct?

24 A I suspect that they are.

25 Q Okay. You don't know how big they are, correct?

1 A Correct.

2 Q You don't know what caused them, correct?

3 A I know the typical causes of shrinkage and foundation
4 settlement are typical causes for the cracks.

5 Q You don't know what has caused any particular crack in
6 any particular home, correct, Dr. Whitlock?

7 A There's two things that caused the cracks. Shrinkage and
8 movement.

9 Q So, even though you haven't seen 218 of these floors,
10 you're testifying to this jury that there's only two possible
11 things that could have caused it, correct?

12 A Concrete cracks when it moves, and it moves from
13 shrinkage and foundation settlement.

14 Q You don't know if it's due to the concrete itself,
15 correct?

16 A Well, that would go towards shrinkage cracking. The
17 quality of the concrete would drive the shrinkage
18 characteristics.

19 Q Let's put up the thing. Sir, you have not done a rebound
20 hammer or Schmidt hammer test on the concrete, correct?

21 A That test would not be applicable for doing anything
22 specific.

23 Q You have not done that test, correct?

24 A It's not necessary.

25 Q You have not done that test, correct?

- 1 A No.
- 2 Q That's another ASTM, correct?
- 3 A For measuring relative strength of concrete.
- 4 Q For strength of concrete, that's right. You have not
- 5 done the penetration resistance test either, sir, have you?
- 6 A No.
- 7 Q That's another ASTM, isn't it?
- 8 A If you want to know what the relative compressive
- 9 strength is, you would.
- 10 Q You haven't done an ultra-pulse velocity test, correct?
- 11 A Nope.
- 12 Q Another ASTM, correct?
- 13 A That's correct.
- 14 Q And you haven't done a drill core test, correct?
- 15 A Did not.
- 16 Q Another ASTM, correct?
- 17 A Correct.
- 18 Q And you didn't x-ray the concrete, either, to see if the
- 19 rebar is in it correctly, or anything else, correct?
- 20 A I doubt there's any rebar in the concrete slab. There's
- 21 no need for rebar in the concrete slabs. There may be wire
- 22 reinforcement, but I did not do anything to confirm it,
- 23 whether it's there or not.
- 24 Q You didn't?
- 25 A No.

- 1 Q You didn't do that test, either, right?
- 2 A No.
- 3 Q And you said that those cracks could also come from
- 4 settlement, correct?
- 5 A It could.
- 6 Q And you have done no soil borings at all, correct?
- 7 A No, I have not.
- 8 Q You've done no soil sampling at all, correct?
- 9 A Nope.
- 10 Q You've done no analysis of the soils under these 220
- 11 houses, correct?
- 12 A I have not done any testing of the soil, no.
- 13 Q And you haven't even done any crack monitoring over the
- 14 last four years, have you, Dr. Whitlock?
- 15 A No, I have not.
- 16 Q And crack monitoring is where you actually go out there
- 17 and you put devices on the cracks, or on the houses that will
- 18 tell you if, over time, they're moving, correct?
- 19 A That's the purpose, yes.
- 20 Q Yeah. So, in 2019, you could have put these crack
- 21 monitoring devices out there and by 2023, today, you could
- 22 have told this jury if, in fact, your hypothesis is correct,
- 23 that these houses are settling, correct?
- 24 A I don't know if I've testified to that.
- 25 Q You don't have that opinion, sir?

1 A I don't think I've said that there's a significant issue
2 with settlement. I know that there has been some movement, in
3 terms of shrinkage and some settlement that has caused cracks,
4 but I haven't stated that that has risen to a level of great
5 concern.

6 Q Okay. Fair. Let's tell the jury that. You can't
7 testify that settlement is causing the cracks in these houses,
8 correct?

9 A I believe that it is, but I have not done any specific
10 testing to prove that.

11 Q You believe that it is, but you've done no testing after
12 \$400,000-\$500,000 to determine that, correct?

13 A That's correct.

14 Q Similarly, can you say it's the concrete itself -- any
15 one of those tests -- that the concrete itself was a poor
16 product or poorly poured?

17 A No.

18 Q So you can't say it's soil settling and you can't say
19 it's concrete, correct?

20 A I can say it's one of the two or a combination of both.
21 Concrete cracks when it moves. That's what causes the crack.

22 Q Sir, can you say, to a reasonable degree of engineering
23 certainty that it is poor concrete or bad soils causing these
24 cracks?

25 A I can say that the concrete shrank, because it does.

1 That's how we started off this questioning. Shrinkage causes
2 cracks. Foundation settlement also causes cracks. And given
3 the size of the cracks, particularly where you can see them in
4 the garages, they have cracked outside of the control joints.
5 Some of the cracks are many and large. I believe that that's
6 due to some foundation settlement. Not large settlement, but
7 enough to cause cracking.

8 Q Sir, have you made a table of all of the cracks in all of
9 the homes that you've investigated, with measurements to
10 determine if they're inside or outside tolerances, sir?

11 A No.

12 Q No. So, you don't know, so they can't know, correct?

13 A I haven't stated that they are.

14 Q Sir, it's pure speculation that the cracks are there,
15 that the cracks are outside of tolerances, that the cracks are
16 caused by concrete or caused by settlement, correct?

17 A No, it's not pure speculation. I have stated, and it's
18 true, that there are cracks in the slabs. You can see the
19 cracks in the slab edges on the backs and fronts and sides of
20 the homes. You can see the cracks in the garages. You can
21 see the cracks, and there is where some homeowners have
22 removed their carpet or their flooring. You can see some
23 flooring that is gapped wide open at the joints because of
24 cracks beneath the slabs. But I haven't stated that it is so
25 bad and so widespread that the houses need to be torn down to

1 fix it. I've just said that those cracks should be filled,
2 sealed.

3 Q But it's not required -- they're not required to be
4 filled if they are lower than either five-sixteenths or three-
5 sixteenths, according to the South Carolina Residential
6 Standards, correct?

7 A According to that 1998 standard -- South Carolina
8 standard ---

9 Q Right.

10 A --- you are correct.

11 Q And you haven't done measurements or a table or notes to
12 tell this jury how many cracks are outside the tolerances and
13 where, correct?

14 A That's correct.

15 Q Okay. But there's a lot of money in your damages for
16 that, isn't there?

17 A There's money in the damages for removing materials to
18 seal the cracks, yes.

19 Q Millions of dollars, isn't it, Dr. Whitlock?

20 A I can't remember the exact number, but yes, there's
21 several million.

22 Q All right. Now, we talked a little bit earlier about
23 Mrs. Zitek's house and the structural beam issue. You have
24 told the jury now that you don't think it's a structural beam
25 issue, correct?

1 A It's not a problem with the beam that's behind the brick
2 no.

3 Q No. Even though an engineer investigated it and sent a
4 letter that it is a beam issue, correct?

5 A That's correct.

6 Q Okay. And you think the issue is the shelf angles, sir?

7 A The issue is the construction operation of putting the
8 shelf angle in that is bolted to a beam, but also extends into
9 the adjacent masonry area.

10 MR. LUCEY: Can we approach, Your Honor?

11 THE COURT: Yes, sir.

12 [Whereupon, a bench conference was held off the record.]

13 BY MR. IMHOFF:

14 Q Dr. Whitlock, mortar cracking doesn't always indicate
15 structural problem, correct?

16 A I'm sorry, I didn't hear you -- the question.

17 Q Mortar cracking by itself does not always indicate a
18 structural problem, correct?

19 A It means there's been movement. It doesn't necessarily
20 mean there's going to be a collapse, which I would consider
21 the structural problem. But it does mean that something has
22 moved, causing stress, resulting in cracks.

23 Q Right. But mortar cracks on their own don't necessarily
24 signify a problem or even a difficult problem, correct?

25 A They can. They can indicate that there's unacceptable

1 movement causing stresses leading to cracking.

2 Q They can. The question, sir, was do they always -- just
3 mortar cracking -- always indicate a deeper issue?

4 A Not always.

5 Q No.

6 A Mortar can also shrink and crack.

7 Q Right. Like concrete, mortar cracks, shrinks, breaks,
8 deteriorates, correct?

9 A It can.

10 Q It's made out of sand, isn't it, sir?

11 A Cement-based material. It has sand in it.

12 Q Right. So, it deteriorates and cracks over time, doesn't
13 it, sir?

14 A Over long-term, more can deteriorate. Good mortar lasts
15 100 years without deterioration.

16 Q So just because you see a mortar crack, does not signify
17 a deeper structural issue without more investigation, correct?

18 A Yes, it can indicate a deeper issue that needs to be
19 investigated.

20 Q Yes, it can, sir, but again, that is not the question I
21 asked you, Dr. Whitlock. The question I asked you is it
22 doesn't necessarily signify a deeper structural issue,
23 correct?

24 A A crack doesn't in and of itself necessarily indicate
25 that, correct.

1 Q And you have to do more investigation, correct?

2 A Yes.

3 Q All right. In 2019, you went to Natalie Zitek's house in
4 Rose Hill in June, and maybe September and October, correct?

5 A Yes, that's correct.

6 Q Dr. Whitlock, you didn't find any cracks in Natalie
7 Zitek's brick in 2019 in June and September, correct?

8 A Yes, I found cracks.

9 Q Did you document them with your pictures?

10 A Yes.

11 Q Did you write notes on them?

12 A No, I photographed them. You can see them in my
13 photographs.

14 MR. IMHOFF: Next picture, please. These are your
15 pictures, Dr. Whitlock, from that time period, so -- next
16 picture, please.

17 MR. LUCEY: May we have the exhibit number, please?

18 MR. IMHOFF: We'll use this as the demonstrative at this
19 time.

20 MR. LUCEY: I still need to know what document's being
21 used a demonstrative so we know what it dates from.

22 MR. IMHOFF: Sure. These are his photographs.

23 MR. LUCEY: But we need the source, the date.

24 THE COURT: Yeah, indicate what date this was taken.

25 BY MR. IMHOFF:

1 Q Dr. Whitlock, just so that the jury understands, the
2 notes you kept for your photographs are kept in a WDP photo
3 log, correct?

4 A I have a photo log and it shows the date and location of
5 the photos.

6 Q Is that what your photo log looks like?

7 A Yes.

8 Q We saw another one up on the screen earlier, just ---,
9 right?

10 A I don't know if that was mine or someone else's, but I
11 did see one.

12 Q It was a WDP photo log, though, correct?

13 A Yes.

14 Q Okay. All right, so the way that you documented your
15 inspections out there is you just listed an address, a date,
16 and then either exterior or interior. That's it, right?

17 A Well, I can't read it from here, but I believe you're
18 correct.

19 Q But that's what it did. There's three columns, right?
20 Address, interior/exterior, and date, right?

21 A Yes.

22 Q And no notes, right?

23 A Right.

24 Q And so, if I want to see, as Mr. Lucey just did -- if I
25 want to see what picture that is, where it came from, and when

1 you did it, I have to go find the image number, if I can, on
2 this, and then look at the date that the folder it's in,
3 right?

4 A Right.

5 Q And then, hopefully, it's right, so that I know that that
6 picture that you said at that address on that day is right,
7 right?

8 A Correct.

9 Q That's the only way to do this, right?

10 A I think that's true for anybody's photographs.

11 Q There's no notes, so we can't go look at the notes or
12 what you found or when. We have to go look at this photo log,
13 right?

14 A Those are notes that share the location and date.

15 Q So the photo that was just put up was 9/30/2019 -- what
16 number, Max? Sorry? 115. Did you document them in any other
17 way so that I could not take this jury's time so that we could
18 try to figure it out without going through that exercise?

19 A The photo has a number. It's in the log of -- in the
20 photo file. The file has a file number, which is a photo
21 number ---

22 Q Right.

23 A And that photo number is on that sheet in your hand, and
24 it says the date and location.

25 Q But it doesn't have a photo number on it, so this jury

1 could see it, right?

2 A No, there's no embedded photo number on the photo.

3 Q All right. So, you took these pictures on September 30th,
4 2019, correct?

5 A Assuming you're doing your stuff right, yes, that's
6 correct.

7 Q Well, assuming the pictures are labeled right, right?

8 A They are.

9 Q Next one, Max. This mortar crack, sir?

10 A You know, there's a crack in the previous photograph, but
11 from a distance that photograph was taken, it's hard to see,
12 but it's in there.

13 Q Let's go back to the previous photograph. There's a
14 crack in this photograph, sir?

15 A Yeah, under the window where the right-hand shutter is,
16 is a stairstep crack that goes down from the brick sill over
17 toward the corner.

18 Q Sure. And we'll get to that picture in a minute, but you
19 can't see it in this picture, can you?

20 A No.

21 Q No.

22 A It's too far away, and too low.

23 Q Let's go to the next picture. And let's remember, this
24 is September 30th, 2019. The lawsuit's already been filed,
25 right?

1 A I don't know. I'll take your word for it.

2 Q This is a mortar crack, is it not, sir?

3 A That's a stairstep crack through mortar, yes.

4 Q Okay. And without investigating it, as you testified to
5 earlier, you don't know that just because there's a mortar
6 crack, there's a structural issue, correct?

7 A I know that there's significant movement in this wall to
8 have caused that crack.

9 Q How? Well, strike that. You didn't pull that wall
10 apart, did you?

11 A No, but I saw a lot of photographs of the wall that had
12 been pulled apart ---

13 Q Right.

14 A --- several times.

15 Q And you didn't pull out the base of the wall to see what
16 the brick ledge looked like, correct?

17 A No.

18 Q Okay. Let's go to the next picture. So, this is
19 actually the area that was repaired several years prior to
20 this, above the garage door, correct?

21 A It is cracked through the brick and mortar.

22 Q Where do you see that crack, sir?

23 A If you look at the shelf angle of the red rusty object,
24 to the left side of the photograph, it extends into the brick
25 that is basically in the center of the photograph, and there

1 is a crack in the mortar just below that brick that extends up
2 into the brick and then down through that small shard of a
3 brick just below the shelf angle.

4 Q Sir, are you talking about the mortar that's sitting on
5 top of the shelf angle?

6 A Could I use the pointer?

7 Q Well, let me ask the questions if you don't mind. I'll
8 lead.

9 A No, I was answering your question.

10 Q Sir, is it the crack above the shelf angle ---

11 A No.

12 Q --- that you're referring to?

13 A No. If you'll allow me, I'll show you.

14 Q Let's go on to the next picture. This is efflorescence,
15 correct?

16 A Efflorescence.

17 Q Efflorescence.

18 A Yes.

19 Q Efflorescence is the minerals or the minerals in the
20 water that are running down the brick, is that right?

21 A It's minerals that come from mortar that's brought to the
22 surface by rainwater.

23 Q And that's a weep hole, correct?

24 A Yes.

25 Q And that weep hole is draining water out of the Zitek

1 house, correct?

2 A It is.

3 Q It's doing its job, isn't it, sir?

4 A It is draining water at that point, yes.

5 Q Next picture, please. This is another picture you took,
6 sir?

7 A Yes.

8 Q Of all of the brick that you say needs to come off of
9 Natalie Zitek's home, correct?

10 A Yes.

11 Q Okay. Next picture, please. And this is another picture
12 of brick. Are you saying there's a crack in this picture
13 also, sir?

14 A Yeah, it's -- there's a small crack. It's around the
15 corner from the previous photograph you showed. There's a
16 horizontal crack above the center brick. There's a vertical
17 crack just below it in the head joint. And then to the right,
18 there's a crack through the mortar joint that runs vertically
19 and horizontally.

20 Q Is that mortar cracking, sir?

21 A It is.

22 Q So this is mortar cracking, again, which is to be
23 expected in mortar on a brick house?

24 A Not this kind of cracking, coupled with the additional
25 cracking around the corner, it should not be happening.

1 Q Now, I asked ---

2 A Particularly if it's been replaced twice.

3 Q Now, I haven't seen you put one measuring tool on any of
4 these cracks, not even a measuring tape, is that correct?

5 A That's correct.

6 Q You didn't even measure the size of the cracks, did you,
7 sir?

8 A I did not.

9 Q This another picture you took of Natalie Zitek's home?

10 A Yes.

11 Q And that shows the weep at the top of the window,
12 correct?

13 A It shows two weeps above that lintel, and then the crack
14 I was photographing is at the end of the lintel, just above
15 the shutter, right in the corner of the shutter.

16 Q There's a crack there, sir?

17 A Yes.

18 Q Is it in the mortar?

19 A Vertically up to the mortar, yes.

20 Q I can't see it, can you?

21 A I can.

22 Q You can? Okay. Let's go to the next picture. And this
23 is the brick on the side of the house above the garage,
24 correct?

25 A Yes, that's the brick that's laying on top of the garage

1 roof.

2 Q Okay. Are you proposing to take all this brick off, too,
3 sir?

4 A Yeah, that needs to come off. That's not good.

5 Q That's not?

6 A No, that's a steep roof. If cracks propagate up through
7 that brick, it could slide off.

8 Q If?

9 A Yeah.

10 Q Have you seen cracks there?

11 A There's cracks below it and likely will continue to
12 crack.

13 Q There's cracks below it, sir? Where?

14 A Yes.

15 Q Where?

16 A You just showed them.

17 Q Are you talking about around the garage?

18 A Yes.

19 Q Those hairline cracks in the mortar, sir?

20 A There's more than just hairline -- there's fractured
21 brick and crushed brick in that same area.

22 Q Sir, how long ---

23 A You can show those photographs if you want.

24 Q How long has that brick been on that house?

25 A A few years. I don't know exactly how many. Three,

1 maybe.

2 Q Three, sir?

3 A That brick was replaced twice.

4 Q Okay. You don't know what year it was replaced?

5 A I can't remember.

6 Q You don't know when the brick was replaced on Natalie

7 Zitek's home, sir?

8 A It may have been 2017 or '18, but I don't remember the
9 exact date.

10 Q Can you pick a year?

11 A If I go through my file, I can tell you exact date. I
12 just don't remember.

13 Q Sir, isn't it important to know how long the exterior
14 structure has been on a house, so you can evaluate if it's
15 performing correctly?

16 A It's not performing correctly.

17 Q Sir, isn't it important to know how long exterior
18 components are on a house so you can evaluate how it's
19 performing?

20 A Yes.

21 Q In fact, sir, under your code and under ASTM, service
22 history is a huge part of your evaluation, isn't it?

23 A And this has a lot of service history, non-service
24 history, basically, of cracking and failing and being
25 replaced.

1 Q The best evidence of the performance of an exterior of a
2 home is in-service performance, correct?

3 A The -- yes.

4 Q Yes. And that's another ASTM, isn't it, sir?

5 A I don't know if ASTM specifically says that. Maybe
6 there's something in the standard that talks about performance
7 history, but, of course, if a house is performing without any
8 cracks, then that's good. This house doesn't have that
9 history. It has bad performance history.

10 Q Sir, it's not only -- as you just testified, it's the
11 number one criteria. How is the exterior performing in
12 service, correct?

13 A Correct. If it's performing well, then I would not be
14 concerned.

15 Q That's right. That's right. You just testified you
16 weren't sure how long that brick on that house has been in
17 service.

18 A I can't remember the date that they replaced it the third
19 time.

20 Q Okay.

21 A Or fourth time, whatever it was.

22 Q So, there's three other sides that weren't touched, are
23 you aware of that?

24 A No, the rear of the home was replaced as well.

25 Q Sir ---

CROSS EXAMINATION OF RHETT WHITLOCK

- 1 A Yeah, the rear of the home ---
- 2 Q The rear of the home? The brick ---
- 3 A A lot of the brick on the rear of the home was replaced.
- 4 Q Did you say a lot?
- 5 A Yes.
- 6 Q Was the exterior brick on the back of the Zitek home
- 7 replaced, sir?
- 8 A I believe that it was.
- 9 Q Where did you learn that?
- 10 A Photographs from the repairs.
- 11 Q Did you make any notes of that?
- 12 A I remember seeing it.
- 13 Q You remember seeing what, sir?
- 14 A Photographs of brick removal on the rear of the home.
- 15 Q How far did it go, sir?
- 16 A Can't tell you. You'd have to pull the photographs. I'm
- 17 sure they're in the records.
- 18 Q Well, when did you take those photographs?
- 19 A I didn't take them. The homeowners took them.
- 20 Q Oh, these are homeowner photographs?
- 21 A Yes.
- 22 Q So, have you reviewed all homeowner photographs during
- 23 construction?
- 24 A All that I was given.
- 25 Q I'm sorry?

- 1 A All that I was given.
- 2 Q How many are there?
- 3 A I can't tell you exactly. I would say probably 100 or
- 4 so.
- 5 Q You think they have 100 photographs of their home ---
- 6 A I think so.
- 7 Q --- during construction?
- 8 A During construction, they had photographs, and during the
- 9 multiple repairs.
- 10 Q Okay. All right, so let's say you're correct. Are the
- 11 other two sides -- how long have the other two sides of brick
- 12 been there?
- 13 A Since the home was built.
- 14 Q When was it built, sir?
- 15 A I don't remember exactly.
- 16 Q You don't know when the home was built?
- 17 A I don't remember the date, no.
- 18 Q All right. So, if it's been a decade, does that go into
- 19 your analysis of in-service performance on those two sides of
- 20 the home?
- 21 A Sure.
- 22 Q Okay. And did you document brick cracking or issues on
- 23 the two sides of the home that have been there for a decade?
- 24 A Yes.
- 25 Q You did?

1 A Yes.

2 Q All right, well, let's put those pictures back up if we
3 can, Max. Let's find out where you documented that. So, this
4 is the brick that's been replaced, right, on the garage side?

5 A This might be the rear. I think this might be the rear
6 of the home.

7 Q You get -- sir, can you look at your notes that tell us
8 where this is?

9 A I don't have anything with me except my glasses, and your
10 screen.

11 Q You don't have any notes that tell us where this is, and
12 you just testified that you can't tell us where this is,
13 correct?

14 A It looks like the rear of the home. You said it was the
15 garage.

16 Q Okay. You think that the Zitek's built a fence that goes
17 into the middle of the rear of their house?

18 A Can you show me the next photograph?

19 Q Sir, do you think the Zitek's built a fence that goes
20 into the rear of the middle of their house?

21 A I'm not sure. I don't remember what's back there.

22 Q Well, sir, these are your photographs that you say are
23 all we need to evaluate this neighborhood. But you can't tell
24 us even which side of the home this is, correct?

25 A Well, I could if I had my photographs and my notes, my

1 photo log.

2 Q But you don't have it?

3 A But you didn't provide that to me.

4 Q You don't have any notes -- contemporaneous notes for
5 this.

6 A I have the photo log and the photographs. And I can tell
7 you the location of the photos and photo logs if I had that
8 with me.

9 Q Okay. Go to the next picture. This photograph doesn't
10 document any cracks, does it, Dr. Whitlock?

11 A There's a crack below that right-hand shutter, where the
12 brick is resting on the roof.

13 Q All right, so ---

14 A It's a large stair-step crack below that gutter -- I
15 mean, below that shutter.

16 Q So, there's one on the front of the house, correct?

17 A One that I photographed. There could be more.

18 Q There could be more, sir?

19 A Yes.

20 Q When's the last time you were at Mrs. Zitek's house?

21 A I haven't been there in probably a year or so.

22 Q It's been three years, hasn't it, sir?

23 A It could be.

24 Q It was February, 2020, correct?

25 A If you say so. I mean, I was out at Rose Hill a lot of

1 times. I probably was in 2020 was the last time I was there.

2 Q Okay. So, you haven't been back to Mrs. Zitek's house
3 that you're aware of, in the last three and half years,
4 correct?

5 A Probably not.

6 Q So you can't tell this jury that the cracks have gotten
7 any worse or not, correct?

8 A I can tell you they were there the last time I was there.
9 I photographed them.

10 Q You can't tell this jury if those cracks have gotten any
11 worse in the last three and a half years, correct?

12 A I can't say that, no.

13 Q Okay. But that would be part of a reasonable
14 investigation to see in-service performance over the last
15 three and a half years, wouldn't it, Dr. Whitlock?

16 A Well, I did it -- the time I was there, I documented the
17 non-performance of the home when I was there, and the cracks
18 that existed when I was there. I did enough to show that the
19 house had cracks. Even where it had been fixed still had
20 cracks.

21 Q Sir, you can't tell the jury if the cracks have gotten
22 any worse or not, correct?

23 A I can't say that they've changed since I was there last.

24 Q Right. And that would be important to share with the
25 jury, if the bricks -- or the cracks are actually getting any

1 worse over time, correct?

2 A I can only tell you what was there -- how it existed the
3 last time I was there.

4 Q I'm asking you if it would be an important or valuable
5 piece of information for both you and this jury, to evaluate
6 the in-service performance of the bricks on the Natalie Zitek
7 house?

8 A No. The brick on Natalie Zitek's house failed. It was
9 failed the last time I was there, and it remains failed.

10 Q Would you like to answer my question?

11 A It may have gotten worse, I don't know.

12 Q You don't know.

13 A Because I haven't been back.

14 Q Right. But it would be an important piece of information
15 that we could share with this jury if you don't ---

16 A If I had been there.

17 Q Okay. And you didn't do it?

18 A I didn't go back.

19 Q Okay. Next. Next. It looks like we're repeating, Max.
20 9/30/2019, that was all of them.

21 A That's not all of my photographs, sir. That's all you
22 chose to show.

23 MR. IMHOFF: No, that was all of the pictures of brick
24 cracking on 9/30/2019 ---

25 MR. LUCEY: Objection, Your Honor.

1 MR. IMHOFF: Do you ---

2 THE COURT: Hold on.

3 MR. LUCEY: Counselor is testifying, and his testimony is
4 contrary to the evidence in the record.

5 THE COURT: All right. Rephrase your question.

6 BY MR. IMHOFF:

7 Q At that time, had you developed an opinion that all of
8 the brick needs to come up from all of the houses in Rose
9 Hill, sir?

10 A At the time I took that photograph?

11 Q 9/30/2019.

12 A I can't say for certain if that was the time when I came
13 to that conclusion or not, but I have come to the conclusion
14 that there was significant cracking problems in the homes, not
15 just Natalie Zitek's, but other ones as well.

16 Q You went into Natalie Zitek's house, correct?

17 A I did.

18 Q Okay. Did you ever find water intrusion to the interior
19 of her home from the brick?

20 A I can't say that I did.

21 Q You didn't find any water intrusion in Natalie Zitek's
22 home through the stone, either, did you?

23 A I did not go to where the stone is located in the gable
24 over the roof -- I did not go there to see, but no, I did not.

25 Q Apart from the window that you tested, you didn't find

1 any water intrusion through the exterior brick or stone
2 exterior claddings at all on Natalie Zitek's house, correct?

3 A I didn't see any evidence on the interior of her home of
4 leakage, except at windows.

5 Q Right. Sir, do you believe the brick ties are
6 inappropriate in this neighborhood?

7 A Yes.

8 Q Where did the brick ties come from?

9 A I don't know.

10 Q You don't know, sir?

11 A I don't know who manufactured them. I think they were
12 delivered -- or purchased through the brick distributor, or
13 brick manufacturer.

14 Q And you're critical of the brick ties because you say
15 they're undersize, is that correct?

16 A The tie is supposed to be seven-eighths of an inch wide.
17 These ties are what are called corrugated ties, but they're
18 not a uniform width. They are scalloped like this along the
19 edges, like an S-shape on both edges. The critical width is
20 the most narrow width of any structural member. And in this
21 case, the wall tie is much less than seven-eighths of an inch
22 wide at that point.

23 Q Okay. You don't know who manufactured it, correct?

24 A I don't.

25 Q But you know that they were delivered by the brick

1 supplier, General Shale, correct?

2 A That's my understanding.

3 Q Okay. And if General Shale provides them, is there any
4 reason for any reasonable person to assume that a brick
5 supplier would be supplying brick ties that don't meet the
6 minimum requirements?

7 A Well, they should meet the minimum requirements. They
8 don't. That's not the homeowners' problem. They're looking
9 to DR Horton to solve their problems.

10 Q Sir, would any reasonable contractor measure brick ties
11 supplied by a supply house of brick materials?

12 A I think they should just ask for compliant materials, and
13 check to see that they got what they asked for.

14 Q Do you know that they didn't, sir?

15 A I don't know.

16 Q You don't know. And you actually found other brick ties
17 out there that you said were fine, correct?

18 A I did find a few, yes.

19 Q A few. And you don't propose taking the brick off
20 because of the brick tie issues, correct?

21 A Not for that alone, no.

22 Q Not for that, sir, correct?

23 A If that was the only reason, there's ways to re-anchor
24 the brick with retrofit ties, but that's not the only problem.

25 Q And there's no evidence at all that the brick ties are

1 failing and you are seeing bowing brick walls or falling brick
2 walls, correct?

3 A I haven't seen any falling brick walls or bowing, but I
4 have seen brick ties that are corroded badly, and the
5 fasteners are corroded.

6 Q But sir, again, I asked you a different question. I
7 asked you -- you have found no evidence that the walls are
8 bowing or falling due to a brick tie issue, correct?

9 A I have not seen a falling brick wall.

10 Q Okay. Now, you talk about corrosion. You're not saying
11 that if there's a nail or a brick tie or lath that's
12 corrosion-resistant, it can never have evidence of water leak,
13 are you?

14 A Well, water is supposed to get in, but drain out and dry
15 out rapidly. These walls are so full of mortar that water
16 gets in there and kind of sits around and stays damp, which
17 contributes to -- corrosion is caused by moisture in the air.

18 Q Sir, I'm asking you about corrosion-resistant metals.
19 Nails, brick ties, lath. Do you understand what corrosion-
20 resistant metals are?

21 A Yeah, they should last a while.

22 Q Right. But they also show evidence of water on them,
23 even though they're corrosion-resistant, correct?

24 A You can see water stains, but they shouldn't be corroding
25 where bare rusty metal is exposed already with the early age

1 of these homes.

2 Q Have you gone to determine whether the brick ties, nails,
3 and lath were manufactured to be corrosion-resistant?

4 A No.

5 Q Do you even know who manufactured the nails, brick ties,
6 and lath, sir?

7 A I do not.

8 Q Do you know if it was sold as corrosion-resistant?

9 A I do not.

10 Q As an engineer, are you allowed to evaluate as-built
11 buildings, structures, homes?

12 A Yes.

13 Q And you've been an engineer -- matter of fact, you have
14 your doctorate in engineering, correct?

15 A Yes.

16 Q And you're able to do that analysis in that manner,
17 correct?

18 A Yes.

19 Q All right. And as an engineer, you can actually look to
20 see if the as-built conditions are performing both water-
21 resistance and in this case, the brick ties, correct?

22 A Correct.

23 Q And you've done that analysis, sir?

24 A I have.

25 Q And these walls are not failing due to a brick tie issue,

1 are they?

2 A The brick ties are failing, but the walls are still
3 intact. They haven't collapsed as you've asked me a few
4 minutes ago.

5 Q Well, sir, as an engineer, you need to know what the
6 brick tie is nailed into, correct?

7 A Yes.

8 Q You need to know what size nail is used, correct?

9 A Yes.

10 Q You need to know what type of nail is used, correct?

11 A Yes.

12 Q And you need to know the sheathing width, the OSB or
13 plywood width, because if it's this thick, it's different than
14 this thick, right?

15 A The sheathing doesn't matter.

16 Q Sir, you wouldn't do an engineering mathematical equation
17 to determine if the friction-resistance of the fasteners was
18 high enough to hold that wall up?

19 A You asked about the sheathing. The sheathing is a
20 factor. The sheathing is not to be relied on to resist pull-
21 out of the nails. In fact, the nails are supposed to go into
22 stud framing and not just sheathing. The sheathing is there
23 for other purposes.

24 Q Sir, to determine the as-built condition, you need to
25 know what friction is in that wall, keeping the wall from

1 pulling off, correct?

2 A Not friction, no. That's not the appropriate term or
3 concept. You want to rephrase your question?

4 Q Yes. You need to know how much pressure it takes to pull
5 the nail out of the wall, correct?

6 A If you were to do some types of analysis. The code
7 doesn't require that. The code says it's okay to build brick
8 walls as long as you put proper wall ties, the right kind of
9 wall ties, in a certain spacing, and the wall ties are
10 connected to the stud framing. That's what the code requires.
11 But that's not what they got.

12 MR. IMHOFF: Sir, again, you're answering a question I
13 didn't ask you. We are talking about your ability as an
14 engineer to do ---

15 MR. LUCEY: I object, Your Honor. May we approach?

16 THE COURT: Yes, sir.

17 [Whereupon, a bench conference was held off the record.]

18 BY MR. IMHOFF:

19 Q Sir, I'm going to ask you a yes or no question. Are you
20 allowed, as an engineer, to do an engineering analysis of the
21 in-service performance of a brick wall? Yes or no.

22 A You can do an analysis. Anybody can do an analysis on
23 anything for any reason. You can do that analysis.

24 Q And yes or no, do you need to know such things as the
25 fastener type, the size of the fastener, and what the fastener

1 is put into to do that evaluation, sir? Yes or no?

2 A Among other things, yes.

3 Q And you have not done that analysis to determine the
4 thickness of the sheathing, the size of the nail, the type of
5 the nail, correct?

6 A I have pulled nails out. They're eight-penny nails. The
7 sheathing is nominally a half-inch OSB sheathing and two-by-
8 four studs, with an air space that's variable, and a wall-tie
9 with the nail eccentricity -- that's where the nail is placed
10 in the wall tie -- that's excessive. Those wall ties are
11 junk. They will straighten out under finger pressure. They
12 are flexible and not very substantial, and if you do that
13 analysis and you do it right, you will come to the conclusion
14 that those wall ties are not suitable for attaching the brick
15 to these buildings.

16 Q Sir.

17 A I just had to answer your question, sir.

18 Q The walls aren't failing because of it, correct? Yes or
19 no.

20 A The walls have not collapsed.

21 Q They're not failing, sir, yes or no?

22 A The wall ties are failing.

23 Q Sir, I'm going to ask you again, are the brick walls
24 failing because of the brick ties? Yes or no.

25 A I've already -- no, they have not failed.

1 Q Thank you, sir. You testified to this jury on Friday,
2 sir, that there is no flashing under the brick, under the
3 brick sill, correct?

4 A Under the window sill. The brick sills under the
5 windows.

6 Q Under the windows.

7 A Right.

8 Q But, the IRC -- the International Residential Code
9 actually allows you to flash the windows at the head of the
10 window, correct?

11 A It requires the flashing to be in both places. Those are
12 two completely different places, and you can't omit one due to
13 the presence of the other.

14 Q Sir, the International Residential Code allows you to
15 flash the windows at the head of the window where you see the
16 lintel and where you see the weeps, correct?

17 A It does not allow you to, it requires you to.

18 Q Yes. And it also, at International Residential Code
19 703.81, allows you to drain water onto the weather-resistant
20 barrier and down the inside of the air cap, correct?

21 A For windows. For window flashing.

22 Q Yes.

23 A Not for the brick sill. The brick sill is required to be
24 flashed independently of the window.

25 Q Right. And this theory is not hurt that behind brick

1 there is an air gap.

2 A There's supposed to be.

3 Q Right.

4 A There's supposed to be an air gap.

5 Q And behind that is the weather-resistant barrier, the
6 white sheet paper sometimes called Tyvek. Right?

7 A That's right.

8 Q And the brick wall, or the brick veneer, is actually
9 expected to gather water into that air gap and run it down to
10 the base of the wall, correct?

11 A Or to whatever it hits first -- whatever flashing is
12 present first, it's supposed to gathered water and drain it
13 back to the exterior.

14 Q Right. Down inside that air gap, correct?

15 A Yes.

16 Q And so, if you install a window in brick that then drains
17 into the air gap and down, that is compliant with the
18 International Residential Code 703.81, correct?

19 A For the window. Not for the brick sill. For the window
20 itself -- but see, that doesn't happen at Rose Hill, because
21 they didn't install the sill flashing under the windows. It's
22 missing. That's another code violation. The windows did not
23 have flashing over the wood beneath the windows, and that is
24 to protect the wood, should the window leak, as they do at
25 Rose Hill.

1 Q Sir ---

2 A They do leak to that location. There is no flashing
3 there, and it's causing wood damage.

4 Q Sir. The flashing at the sill that you're talking about
5 is not required if you flash it at the head of the window,
6 correct?

7 A Wrong.

8 Q If you put PVC flashing underneath the sill -- the bricks
9 in the sill, they cannot attach to the mortar, correct?

10 A They are there by gravity, and that is what is required
11 by the code and the Brick Institute of America, and everybody
12 that's knowledgeable about brick will agree that what you're
13 saying is wrong.

14 Q Everyone, sir?

15 A Everyone that knows what they're talking about, yes.

16 Q So, if you've got that piece of flashing under your sill
17 on that row of bricks there, they can't connect to the mortar,
18 and maybe just fall right off, right?

19 A They won't fall right off.

20 Q No.

21 A No.

22 Q Okay. The brick does not have to be taken off because of
23 the lack of weeps, correct?

24 A No.

25 Q In fact, weeps need to be maintained, don't they, sir?

1 A I've never in my career seen anyone in any building
2 situation maintain weeps.

3 Q Sir, you just ---

4 A Never.

5 Q --- talked about -- you just talked about the Brick
6 Institute of America. The Brick Institute of America actually
7 tells homeowners to maintain their weeps, don't they, sir?

8 A I don't know, they might. But I've never seen anybody do
9 that.

10 Q You didn't read that part, sir?

11 A I don't recall seeing it ---

12 Q And you found ---

13 A --- tell homeowners to maintain weeps. I've never seen
14 that. I've seen maintenance projections for mortar and brick
15 and the amount of time required, 25 to 50 years for that kind
16 of thing, in similar literature. And you might be right, I
17 just don't recall ever seeing that in their literature about
18 weeps being maintained.

19 Q Well, you found many with mud daubers in them, correct?

20 A Yes.

21 Q Okay. And the mud daubers need to be cleaned out of
22 there, correct?

23 A It would be nice, but I think water will flow through mud
24 and wash it out if water got into it.

25 Q Well, we know if there are weeps that have mortar in

1 them, then no homeowner has ever tried to maintain their weeps
2 if it's still there a decade later, correct?

3 A I think the average homeowner doesn't even know what a
4 weep is.

5 Q Now, Mrs. Zitek's house that was repaired, that entire
6 side of brick didn't need to come off to repair that, correct?

7 A I wasn't there, so I don't know what the condition was
8 adjacent to the garage door. I do know that the brick doesn't
9 match the rest of the house. It's a really bad mismatch.

10 Q The Brick Institute of America also says that brick
11 issues may be surgically repaired, correct?

12 A Yes.

13 Q You don't need to take all of the brick off, correct?

14 A Well, depends. If the only problem is just flashing, for
15 example, then you can just replace the flashing, if that's the
16 only problem.

17 Q And if it's just weeps, you can just put in weeps,
18 correct?

19 A If that was the only problem.

20 Q Right. And the header that was replaced, and the work
21 that was done on Mrs. Zitek's house could have been done
22 without taking all of the brick off, correct?

23 A To replace the brick over the garage door could have been
24 done just by replacing the brick over the garage door.

25 Q Right. So, when you talk about lintel issues to this

1 jury, if, in fact, you are correct, and we're going to believe
2 you, you could actually fix any issues over the garage door
3 without taking all of the brick off, correct?

4 A If the problem was just the garage door and the brick
5 above it, you could do that by removing just that brick, yes.

6 Q Sir, did you intentionally not take photographs of all of
7 the good brick in Rose Hill?

8 A I took photographs of every home that I looked at.

9 Q Okay. Have you done an evaluation of how many homes do
10 not have brick issues?

11 A Every brick home I've looked at has had brick issues.

12 Q Do you have notes that will tell this jury which brick
13 homes you looked at that had brick issues?

14 A They're in my photographs and in my logs, yes.

15 Q So we'll have to go through your photographs, 6,000 -- or
16 16,000 photographs to determine if, in our opinion, your
17 photographs show brick issues, correct?

18 A I can just tell you. I've been through all the
19 photographs, and I've seen -- and I've seen them in person --
20 the homes -- and I've seen brick issues on every single home
21 that I visited and looked at. Every single photographic
22 representation of the homes that I've looked through have
23 brick issues.

24 Q Does every brick have -- every brick house have brick
25 cracking?

1 A At Rose Hill, yes.

2 Q Every single one, sir?

3 A Yes.

4 MR. IMHOFF: Okay. Let's go through some photographs
5 here. This is image 488 for 201 Buxton.

6 MR. LUCEY: The exhibit number, please.

7 MR. IMHOFF: This is a demonstrative exhibit.

8 MR. LUCEY: I still need an exhibit number so I can
9 locate it.

10 MR. IMHOFF: It's in his photo log.

11 THE COURT: State the date. State the date.

12 MR. IMHOFF: Date. All right, let's move on. We'll come
13 back. We'll show you all those pictures after lunch.

14 BY MR. IMHOFF:

15 Q You understand that many of these homes were built --
16 excuse me. Do you understand that many of those homes were
17 permitted before July 2013, correct?

18 A I don't know how many, but I understand that some were,
19 yes.

20 Q Well, sir, you have not documented how many homes were
21 built before the code change in July of 2013?

22 A I believe that there is a spreadsheet that shows that. I
23 can't tell you how many sitting here.

24 Q Okay. Well, in 2006 code, there was no prohibition on
25 bringing the stone down to grade, correct?

1 A There was.

2 Q In the 2006 IRC, your testimony to this jury is that
3 there was a prohibition for bringing stone down to grade, sir?

4 A Yes, by reference to ASTM standards and the ACI 530 code.

5 Q Okay, so it's not in the code, it's a reference, sir?

6 A It's a reference standard, which is part of the code.

7 Q All right. And the reference standard, according to you
8 earlier when I was asking you about your investigation of the
9 -- using ASTM. Those are just guidelines, according to your
10 testimony.

11 A Some of ASTM's standards are guidelines. Some are
12 standards, requirements for construction that are adopted by
13 the code and they become part of the code.

14 Q So, for your inspection for this \$28 million case, it's
15 guidelines, sir?

16 A That's the title of the document.

17 Q But for ---

18 A Don't interrupt me, please. I'm answering your question.

19 MR. IMHOFF: May I finish my question, sir?

20 THE COURT: Let him finish the question.

21 DR. WHITLOCK: Sorry.

22 THE COURT: And let him answer the question.

23 BY MR. IMHOFF:

24 Q For your investigation, the ASTMs are guidelines, but for
25 purposes of suing DR Horton, they're required, sir, correct?

1 A No. You're mischaracterizing the documents. The ASTM
2 produces manuals. They produce standards for materials,
3 standards for manufacturing things, and guides, handbooks -- a
4 lot of different things. The document you were talking about
5 before, ASTM E2128, is a standard guide for doing certain
6 things. And it says within that guide that people can alter
7 how they do things. There's a lot of different guidance-type
8 items in there. Then there are standards, which have the word
9 shall in it. You shall do X, Y, and Z. Those are standards
10 that require things to be done precisely. What I just
11 mentioned for this stucco or stucco-clad material, the adhered
12 stone veneer, are standard specifications, requirements. Not
13 guides.

14 Q Sir, is the Anderson County code official the only person
15 who can interpret and enforce the code in Anderson County?

16 A That's whose job it is to enforce the code, yes.

17 Q That's right. He's the only person who that do it,
18 correct?

19 A That's the only person that can make a decision that's
20 enforceable.

21 Q Right. And we saw the ASTM earlier, where it instructs
22 you, or guides you to check with the local municipality to
23 determine if they have undocumented exceptions to the code,
24 correct?

25 A That's the guidance of it, yes.

1 Q And you haven't done that, have you, sir?

2 A No.

3 Q You haven't gone to see what in Anderson County is
4 actually acceptable, allowed, and habitable, correct?

5 A I have not talked to Anderson County building code
6 officials, no.

7 Q Have you gone in Caledonia, the neighborhood directly
8 across the street from Rose Hill, where construction is still
9 occurring, sir?

10 A No, that's not part of Rose Hill, so I wouldn't have gone
11 there.

12 Q Okay. Are builders in Anderson County getting permits
13 for, building houses with stone all the way down to grade, and
14 getting approval by the Anderson County building officials,
15 sir?

16 A I don't know, but they shouldn't be.

17 Q You don't know?

18 A No.

19 Q Well, let me show you, sir. Sir, is that stone
20 installation across the street from Rose Hill all the way down
21 to grade?

22 A It looks like it is.

23 Q Okay. Next picture. Next picture. Is this a different
24 house with stone -- and I can't tell if that's stone or brick,
25 but all the way down to grade, sir?

1 A That's what it looks like from that distance, yes.

2 Q Next picture, please. Next picture, please. Okay. And
3 is this another house with stone all the way down to grade,
4 sir?

5 A It looks like stone, yes. And it looks like it's to
6 grade, but I can't say for certain in this photo.

7 Q Okay. Next. Next, please. Again, another house with
8 stone all the way down to grade, sir?

9 A Well, you really can't see it because of the bushes, but
10 I'll take your word for it.

11 Q Okay, next picture. Next house. Is this another house,
12 sir, with stone all the way down to grade?

13 A Yes.

14 Q Next picture, please. Is this another house across the
15 street with stone all the way down to grade?

16 A It appears to be.

17 Q Do you know who this builder is, sir?

18 A No.

19 Q Next picture, please. Next picture. Another house with
20 stone all the way down to grade?

21 A I see that.

22 Q Next picture. Flip through the rest of these pictures,
23 if you will ---. Will you zoom in on that, Max? So, this
24 appears to be a construction entrance for Stanley Martin
25 Builders, do you see that?

- 1 A I do.
- 2 Q Are you familiar with that builder?
- 3 A I've heard of them.
- 4 Q You have. But have you ever worked for or against them,
- 5 sir?
- 6 A I don't ever recall being involved in any of their
- 7 construction.
- 8 Q Next picture, please. Is this a house with stone all the
- 9 way down to grade, sir?
- 10 A Well, you can't really see it, but -- no, I can't tell.
- 11 Q You can't tell?
- 12 A Well, there's a garbage can in front of one part and a
- 13 bush in front of the other. I can't really tell for sure if
- 14 it goes to grade, but it might.
- 15 Q Is the stone all the way down to grade, Dr. Whitlock?
- 16 A On the right-hand side it appears to be, yes.
- 17 Q Okay, and is this now a second neighborhood, Dr.
- 18 Whitlock, of stone all the way down to grade?
- 19 A I didn't know it was a different neighborhood. You're
- 20 saying that it is.
- 21 Q Next picture, please. Next picture, please. Is this
- 22 another house with stone all the way down to grade, Dr.
- 23 Whitlock?
- 24 A Looks like it.
- 25 Q Next picture, please. Another house with stone all the

1 way down to grade, Dr. Whitlock?

2 A I can see that it looks like it is, it's on the right-
3 hand side. There could be a gap underneath the stone, but it's
4 hard to tell.

5 Q Okay. Next picture. Can you tell now, Dr. Whitlock,
6 it's all the way down to grade?

7 A I can't.

8 Q Flipped by it too fast? Would you like to go back?

9 A If you want me to look at it, I think you should. It
10 looks like it goes down to grade or close to it.

11 Q Next picture, please. It looks like here, this is stone
12 all the way down to grade, under construction. Do you agree
13 with that, sir?

14 A That's what it looks like, yes.

15 Q Okay. And these were taken during the -- strike that.
16 Next picture. Next picture. Again, sir, another home with
17 stone all the way down to grade?

18 A It looks like it.

19 Q Next picture. And here, you can see the masons actually
20 putting the stone on the house, under construction, all the
21 way down to grade, correct, Dr. Whitlock?

22 A I can see they're in the process of putting stone up,
23 yes.

24 Q All the way down to grade, Dr. Whitlock.

25 A That's what it looks like on the left side. On the right

1 side, I don't think they've started.

2 Q And the Anderson County building inspector comes to these
3 houses multiple times to inspect them over the course of
4 construction, correct?

5 A That's correct.

6 Q Next picture, please. Sir, you have not done any
7 investigation into whether or not Anderson County and the
8 Anderson County building office and Anderson County inspector
9 has allowed or encouraged the use of stone all the way down to
10 grade, have you, sir?

11 A I have no idea whether the county inspector has been
12 asked if that's acceptable or not.

13 Q And you have done no investigation into whether or not in
14 Anderson County, South Carolina, it has now become the
15 standard in the construction industry to bring the stone all
16 the way down to grade, correct?

17 A I have not done investigations to see what all other
18 neighborhoods are doing. If they are doing it, they are in
19 violation of the code.

20 Q You, sir, do not get to make that determination if the
21 Anderson County building inspector has made a different
22 decision, correct?

23 A If Anderson County has made an official decision that
24 it's acceptable, I would have the opinion that they made an
25 error, but I doubt that has happened.

1 Q And this is exactly what ASTM 2128-12 envisioned when it
2 guided you to check into the local customs and changes,
3 correct?

4 A I don't know if that's what that ASTM standard meant or
5 not, if this was the exact condition. There are other
6 conditions that can vary from state to state that may cause
7 construction to be vastly different from one state to another.

8 Q Actually, construction can be vastly different from one
9 county to another, correct?

10 A Potentially it could be. I don't know that I've ever
11 seen vast differences in similar areas.

12 Q Well, sir, does Greenville County have some mountainous
13 areas up at the north side of Greenville County?

14 A Yes.

15 Q Caesar's Head is one of them, is it not?

16 A Probably.

17 Q And Caesar's Head has very, very, very different
18 environmental conditions than say, Simpsonville, or Gray
19 Court, correct?

20 A I'm not very familiar with Caesar's Head.

21 Q So you have to do an analysis, if you're doing it
22 appropriately, to determine where in the county you are, what
23 the building official is doing, what the construction industry
24 is doing in that particular part of the county, according to
25 ASTM, the American Society for Testing and Materials that

1 you're a committee member of, correct?

2 A And the building codes.

3 Q I'm sorry?

4 A You've got to analyze the building code as well in every
5 location where you're working.

6 Q You have to do a lot of analysis and investigation for a
7 220-home neighborhood, correct?

8 A They should have, yes.

9 Q You should have, correct?

10 A No, the builders should have. They should have done an
11 analysis and investigation of building code requirements as
12 well.

13 Q You should have also, correct?

14 A And I did.

15 Q Now, we talked about some stone that is mortared above
16 the garage doors. Do you remember that?

17 A Yes.

18 Q It's sitting above a garage door, correct?

19 A Correct.

20 Q Now, the International Residential Code doesn't actually
21 prohibit that, correct?

22 A I don't think it addresses it specifically.

23 Q And you can actually mortar stone on to brick and
24 concrete, correct?

25 A I think the manufacturer's instructions cover conditions

1 where the stone is adhered to concrete block or concrete, but
2 doesn't address adhering it to brick.

3 Q Well, it doesn't prohibit it, sir, does it?

4 A It doesn't address it. It just addressed adhering it to
5 concrete.

6 Q Sir, I'm going to ask you a yes or no question again.

7 The International Residential Code, whichever one was in
8 effect at the time that these houses were built, does not
9 prohibit adhering stone to brick, correct?

10 A It does not.

11 Q It is not a code violation, correct?

12 A I wouldn't say it's a code violation, no.

13 Q No. And it actually could stay up on the brick if it was
14 adhered with liquid nails or a stronger mortar, correct?

15 A Are you kidding me? Liquid nails? Like you buy at Home
16 Depot?

17 Q Sir ---

18 A No.

19 Q No.

20 A That would be very inappropriate to use -- to put stone
21 masonry on a building with liquid nails.

22 Q It could ---

23 A No.

24 Q It could be adhered to the brick with a different
25 material, correct?

1 A If you wanted to adhere it masonry to masonry, it should
2 be adhered the way the code says to do it, ACI 530, and that
3 is to plaster the wall with a coat of well-bonded mortar to
4 start with and then bond that stone to that mortar bed with
5 additional mortar. That could work. But what they did didn't
6 work, it doesn't work, and liquid nails certainly will not
7 work.

8 Q Now, what we were talking about earlier is the brick on
9 Natalie Zitek's house is adhered -- I'm sorry, the stone is
10 adhered to brick, correct?

11 A At the bottom. At the base.

12 Q At the bottom. And the brick, and the weather barrier
13 are protecting the interior space from the weather, correct?

14 A That's the purpose of the weather barrier.

15 Q Right. So, the stone along the bottom of the wall on
16 Natalie Zitek's house is purely decorative, isn't it?

17 A I would say it is decorative.

18 Q And it has been, as we talked about earlier, in service
19 for over a decade, correct?

20 A I think so.

21 Q And have you read the testimony of Natalie Zitek or Paul
22 Zitek, sir?

23 A I don't think so.

24 Q You haven't read the testimony ---

25 A I think I read Paul Zitek ---

1 Q --- of the class action representative in this case?

2 A I don't recall if I read both of their testimonies or
3 not, no.

4 Q Do you know, sir, that the only thing that has occurred
5 with their stone on that house is one water table has come
6 loose?

7 A I was in here when she testified and said that, and her
8 interior stone fell off the mantle.

9 Q Okay. Do you know that the interior stone was applied in
10 the same manner or by the same people as the exterior stone?

11 A I don't.

12 Q Do you have any opinions regarding the interior stone and
13 its application or its construction, sir?

14 A No.

15 Q Okay. Let's talk about the exterior stone, then, that's
16 in this case. Are you aware that in over ten years of service
17 the only thing, the only stone that has come off of Natalie
18 Zitek's house is, in fact, a water retainer?

19 A The stone at the top of the wall -- the capstone at the
20 top of the wall she said ---

21 Q Right.

22 A --- fell off.

23 Q That's it, right?

24 A That's as far as I know, yes.

25 Q All right. And to repair that, you'd put mortar on it

1 and put it back up, correct?

2 A If you wanted to repair that one stone, yes.

3 Q Right. And they haven't done that, they just set it back
4 up there, correct?

5 A I think that's what she said.

6 Q Okay. Are you telling this jury that all of that stone
7 at the base of the wall of Natalie Zitek's house has to come
8 off?

9 A Yes.

10 Q Okay. It is not a code violation, is it, sir?

11 A The presence of the stone at that location is not a code
12 violation.

13 Q It is not a life safety issue, is it, sir?

14 A No.

15 Q Okay. It is not affecting the water protection of that
16 house in any way, is it, sir?

17 A It's not making it adverse, no.

18 Q No. Are you also proposing to this jury to take all of
19 the stone off all of the other houses where it's applied below
20 waist-level to brick, sir?

21 A Yes. Even ---

22 Q All of it?

23 A --- your own expert said he's recommending it all come
24 off.

25 Q Sir ---

1 A And I agree.

2 Q You did. You want to take it all off, although it's not
3 a code violation and it's only aesthetic, correct?

4 A Well, it's attached to brick that's defective that needs
5 to be fixed.

6 Q It is not damaging anything, is it, sir?

7 A The stone in and of itself is not damaging anything.

8 Q Now, have you made notations in your notes or in your
9 damages where stone would be removed from brick below your
10 waist versus stone being removed that was installed on lath?

11 A I don't think that's been separated out.

12 Q Okay. Next picture, please. Sir, you do not have any
13 evidence that DR Horton knew or was aware of any problem with
14 Silver Line windows, is that correct?

15 A I don't have any evidence that they knew it.

16 Q In fact, Natalie Zitek didn't know that she had any
17 problems with her windows until you told her, correct?

18 A I don't recall her telling me that she had window issues.

19 Q You sat there with her testimony, correct?

20 A Yes.

21 Q Natalie Zitek testified that she did not know that she
22 had any window issues until you told her in 2019 or 2020,
23 correct?

24 A I think that's what she said, yes.

25 Q DR Horton didn't design those windows, correct?

- 1 A No.
- 2 Q DR Horton didn't manufacture those windows, correct?
- 3 A Correct.
- 4 Q There is no evidence that they were cracked at the time
- 5 they were installed, correct?
- 6 A There's testimony that says that they were not cracked.
- 7 Q Exactly. There's testimony that they were not cracked at
- 8 the time they were installed, correct?
- 9 A Correct.
- 10 Q Well, that necessarily means that any issues that have
- 11 developed with those windows have developed since they were
- 12 installed, correct?
- 13 A I believe that's correct.
- 14 Q You know those windows have a lifetime warranty, don't
- 15 you?
- 16 A I heard that.
- 17 Q Have you investigated it yourself?
- 18 A No.
- 19 Q Why not, sir?
- 20 A Because I don't investigate warranties. I investigate
- 21 problems.
- 22 Q Okay. Did you ever counsel the homeowners to make
- 23 warranty claims on those windows?
- 24 A I'm not a counselor of homeowner warranty claims. I
- 25 think that's out of my area of expertise.

1 Q Did you ever suggest that they make a warranty claim,
2 sir?

3 A No.

4 Q You never did? Okay. Let's go ahead and put some
5 pictures of the windows up. Let's do 24.28. This is a sill
6 dam test report by WDP, correct?

7 A Yes.

8 Q Okay. We're going to go through these, but is this first
9 one at Natalie Zitek's house at 104 Sturbridge Court?

10 A Yes.

11 Q Isn't it true, sir, that every single window you tested
12 had some crack or issue in that window?

13 A Every window -- well, with a couple of exceptions, almost
14 every window I tested I thought had some signs of leakage at
15 the corners. And my purpose was to see if it was the window
16 causing that leak or not.

17 Q Right. Every window you tested, sir, had that corner
18 issue, correct?

19 A All but maybe one or two, yes.

20 Q Okay. You didn't test any windows that don't have that
21 corner issue, correct?

22 A That's correct. Well, again, I think there were a couple
23 windows I tested that didn't, and you'll see the results.

24 Q Right. And we're going to go through those results.

25 Sir, you intentionally did not test the windows with no issues

1 because you didn't want the results that they didn't leak,
2 correct?

3 A Incorrect.

4 Q You didn't test any windows with no issues, correct?

5 A Incorrect.

6 Q Let's go through them, sir. Let me ask this first. Is
7 this ASTM E2128 the same ASTM that we were referring to
8 earlier about your investigation this morning?

9 A Yes.

10 Q Yes. And this is the ASTM that requires you to invite
11 other interested parties to observe your testing, correct?

12 A We went through that this morning.

13 Q Correct, sir?

14 A Correct. You asked me that this morning.

15 Q And you did all of these sill dam tests and spray rack
16 tests without any other parties there to see, correct?

17 A There was no one there except for myself. My staff.

18 Q You did not invite any of the other interested parties to
19 see your tests, photograph your tests, participate in your
20 tests, suggest changes to the way you did your tests, correct?

21 A Well, you asked me this this morning, and I told you,
22 it's not my place to invite other people in a matter like
23 this. I know of ---

24 Q But you knew ---

25 A --- knew of no other engineering firms involved in this

1 case when I did my tests.

2 Q Sir, you knew DR Horton was a defendant in this lawsuit,
3 correct?

4 A I didn't even know if there was a lawsuit when I did my
5 tests. I suspected there might be a lawsuit, but I don't get
6 into the legal aspects of these cases.

7 Q Sir, you knew when you were doing your tests, there was
8 nobody there watching you do it, correct?

9 A The homeowners were there, and my staff, but no outsiders
10 were there, no.

11 Q And you knew that?

12 A Yeah, I knew that.

13 Q And you knew that was unusual, correct?

14 A No, it's not unusual.

15 Q Okay. You knew that the ASTM suggests that you invite
16 other parties, correct, sir?

17 A It suggests that, and the standard is written for many
18 other reasons, not just cases such as this.

19 Q Now, this window test says that you failed the top of the
20 sill back dam, is that correct?

21 A Eventually, yes, that was the terminating height of the
22 water level ---

23 Q Okay.

24 A --- if we got there.

25 Q The appropriate and correct way to test these windows is

1 to determine the design pressure and only put enough water in
2 that is consistent with the design pressure, correct?

3 A That's not necessarily so, no. And that is what I did.

4 You can't immediately fill these sills up. It was filled
5 slowly up and I monitored for leakage as it was being filled.
6 And if you look at the photographs, the leaks occur way before
7 the fill -- the sill was filled.

8 Q What is the design pressure radiant for a window that
9 would have filled to the top of the sill back dam, sir?

10 A Well, these windows had no design pressure radiant.

11 Q Sir, is there any window manufacturer that you would fill
12 it to the top of the back dam?

13 A There have been, yes.

14 Q There have been?

15 A Oh, hell yeah. Yes.

16 Q Are they hurricane windows?

17 A They could be, yeah. Some manufacturers don't make the
18 back dam high enough, and the back dam does not equal what it
19 should as far as that's concerned. So yeah, there are
20 manufacturers that make the back dam too short, and it's --
21 you're unable to test it with this test method because of
22 that.

23 Q Right.

24 A And those back dams can fill up without air pressure. If
25 the water flow to that point flows in faster than it flows

1 out, it'll fill up without air pressure, so it's a
2 misconception that people have that it's only air pressure
3 that fills the sill dam up. That's incorrect.

4 Q Let's make sure that the jury understands what we're
5 talking about. To do an appropriate and correct sill dam
6 test, you only put enough water in to a certain level in the
7 sill dam, correct?

8 A You fill it to whatever level is necessary in your
9 opinion to recreate what has happened by nature, and that's
10 the premise behind 2128, is to identify leakage and then to
11 identify the sources of the leakage, and that's what I did.
12 And I found that these windows did, in fact, leak at those
13 cracks and at those gaskets before the dam had to be filled to
14 the top. They leaked when the water level was low.

15 Q Sir.

16 A And you can see that in the photographs very clearly if
17 you choose to look.

18 Q Let's explain to the jury how you do a sill dam test
19 correctly.

20 A I did already.

21 Q You fill the sill dam up to a certain level depending on
22 the design pressure for the window, correct?

23 A You can do that. But there is no design pressure for
24 these windows. These windows were not rated.

25 Q We'll get to that, sir. But to do a correct sill dam

1 test, to determine if the window is performing consistent with
2 the manufacturer's design pressure rating, you only fill it to
3 a certain level, correct?

4 A You can fill it just to the level of the design pressure
5 rating, that's correct.

6 Q And then if it fails when you put that little bit of
7 water in it that corresponds to the design pressure rating,
8 then you know the window has failed its design pressure,
9 correct?

10 A You know it failed that test.

11 Q Right.

12 A This test doesn't really test the window for design
13 pressure. This is a quick test, a check of the sill to see if
14 the sill can hold water.

15 Q If ---

16 A The appropriate test is the ASTM 1105 test where you
17 spray the water with a sprayer and also pull a vacuum at the
18 same time.

19 Q If you fill the window with more water than is allowed
20 over the design pressure, you are trying to make the window
21 perform higher than it's rated, correct?

22 A But, I told you we didn't do that. We filled it from the
23 bottom up and monitored for leakage.

24 Q Sir, I just want a -- I just want you to -- I'm going to
25 ask you a yes or no question so this jury understands what

1 this test does. You determine the design pressure rating,
2 then you do math to determine how much water should go in the
3 sill to correspond to the design pressure, and if it doesn't
4 leak, then it has complied with that design pressure, correct?
5 Yes or no?

6 A Yes.

7 Q Okay. And if you fill it higher than the design pressure
8 on the window, you have gone beyond what the window even said
9 it was rated for, correct?

10 A That is correct.

11 Q And if you fill it to the top of the sill back dam, that
12 is not an appropriate test because you've exceeded the design
13 pressure rating for that window to make it leak, correct?

14 A If that's the only point at which it leaks, that's
15 correct.

16 Q All right. This is Natalie Zitek's house. Let's see the
17 pictures. Max, could you show a picture closer up to that
18 bottom window, please? You picked this window because it has
19 a missing gasket or other issue there, maybe a well joint
20 that's opened, and some cracked mortar, correct?

21 A Why don't you ask me why I picked the picture?

22 Q Correct?

23 A No. I picked it because it showed signs of prior damage
24 in the sill. You can see the damage in the photograph.

25 That's the reason I picked it. The reason I tested it to see

1 was is that, in fact, a leak coming in at that location. And
2 yes, it was, and you can see the water level is well below the
3 top of the back dam. It's about a quarter of an inch deep in
4 that picture. And it's leaking.

5 Q The reason that you picked the windows that have a crack
6 or water damage is so that you could testify at this trial
7 that all of the windows you tested failed, correct?

8 A That's not why I picked it. I picked it to do what I
9 said, and it's perfectly in line with the guide that you
10 quizzed me about this morning.

11 Q All right. Now, caulk is ---

12 A You didn't show that part of the standard.

13 Q Caulk is a maintenance issue, is it not?

14 A Interior caulk is not intended to keep water out of a
15 building. If you think that caulking that's failing should
16 have been replaced to stop the leak ---

17 Q All right, sir, I'm going to ask you ---

18 A --- the water will continue into the wall below it.

19 Q I'm going to ask you a yes or no question again. Is
20 caulk a maintenance issue, yes or no?

21 A Caulking should be replaced by the owners of a building.

22 Q Next picture, please. So, when you filled this sill and
23 overfilled this sill, it leaked, right?

24 A It leaked before I overfilled it. It leaked very low,
25 and it was in the previous photograph, and I've already

1 testified to that.

2 Q Okay. Now, did you videotape this test?

3 A I don't remember if I did or not.

4 Q Okay. Was anybody from DR Horton there or invited to see
5 that what you're testifying to on the stand is, in fact, what
6 happened, sir?

7 A Nobody was there.

8 Q Nobody was there to verify it, right?

9 A DR Horton was not there.

10 Q When you do a scientific test to check a hypothesis, you
11 want as many people to see it and either verify it or disprove
12 it, correct?

13 A No.

14 Q You do not want your testing to stand up to exterior
15 third-party analysis, sir?

16 A You didn't ask me that.

17 Q Do you want your ---

18 A I documented my testing.

19 Q Do you want you testing to stand up to other parties'
20 analysis, sir?

21 A Yes.

22 Q And to do that, you have to document everything that you
23 did during that testing per ASTM 2128, correct?

24 A I documented this testing.

25 Q And you need to invite other parties who can both see

1 what you're doing and also conduct their own tests, correct,
2 sir?

3 A No.

4 Q Okay. All right. And of course, when you made it leak,
5 you put the moisture meter on it, which was going to show that
6 there was water there, because there's water there, correct?

7 A Correct.

8 Q All right, next picture. Next picture. This is another
9 one you did on 106 Berwick. Again, sir, did you fill this to
10 the top of the sill back dam?

11 A I may have gotten to the top of the sill back dam, but I
12 guarantee you it leaked before I got there. You see it
13 leaking.

14 Q Sir, why are you filling it all the way to the top of the
15 back sill dam if it had already leaked?

16 A Severity. To be complete. To see if the opposite end
17 would leak as well.

18 Q You want it to leak more?

19 A Just to document what happens when it gets to what the
20 designer of the window anticipated.

21 Q Well, in fact, if the design pressure is 35, and you fill
22 it to the back of the sill dam, it is, in fact, going to leak,
23 isn't it, sir?

24 A These windows weren't rated. I saw no rating for these
25 windows, and what they should be -- should withstand.

- 1 Q I'm going to ask you a yes or no question again, Dr.
2 Whitlock. If the windows are rated at a random number -- I'll
3 pick 35 -- and you filled the sill dam to the top of the back
4 dam, they are almost certain to leak, aren't they, sir?
- 5 A Not certain, but the probability of leakage would be much
6 higher, yes.
- 7 Q Much, much higher.
- 8 A Yes.
- 9 Q There is no scientific reason or validity to fill these
10 windows to the top of the sill back dam, is there, sir?
- 11 A Just to check the sill completely. That's the only
12 reason.
- 13 Q Or to make it leak, correct?
- 14 A Well, they didn't all leak.
- 15 Q Next picture, please. That's a picture of the window you
16 were testing on the second floor, is that correct?
- 17 A Yes.
- 18 Q Okay. All of those dark stains, is that where you were
19 dumping water into that window?
- 20 A That's where I pulled the tape off and the water ran down
21 the surface.
- 22 Q That's a lot of water, isn't it?
- 23 A Looks like it but it was whatever is contained within the
24 sill.
- 25 Q Way more than these windows are rated for, correct?

1 A No. If there was a rainstorm, all that stone would be
2 wet. Saturated.

3 Q Sir, the amount of water that you put into the sill is
4 way more than the windows are rated for, correct?

5 A I wouldn't say that, no.

6 Q Next picture, please. Inside, Max. Was that window
7 cracked or missing a gasket or have an open heat weld, sir?

8 A I don't remember if it had all of that. It could have
9 had one or more of those conditions, but that window did leak
10 down inside the wall below the window into the ---

11 Q There it is. There it is.

12 A --- ceiling below.

13 Q Can you zoom in on that bottom picture, Max? That is
14 missing a gasket or it's misplaced, correct?

15 A I believe there's a gasket protruding out of the top, and
16 there may be some sealant on the back. But also, you can
17 notice that the water level within the window is about a
18 quarter of an inch from the bottom of the sill, and it's
19 leaking.

20 Q That window has an expanded or open heat weld, does it
21 not, Dr. Whitlock?

22 A Well, I can't tell if it's -- if the heat weld is open.
23 It might be. I can't tell.

24 Q Okay. And the gasket is not seated all the way down to
25 the bottom, correct, Dr. Whitlock?

1 A I can't tell if it's seated or not. It looks like it's
2 displaced somewhat at the top.

3 Q Well, can we look at your notes, sir, to see ---

4 A We can look at the rest of the photographs.

5 Q Can we look at your notes, sir, to see if you indicated
6 that there was a heat weld opening or a mis-seated gasket?

7 A That would be in the photographs.

8 Q Just the photographs, right?

9 A Yes.

10 Q And again, yes or no question, sir the caulk is a
11 homeowner maintenance issue, correct?

12 A Caulking is, but there's no caulking to be maintained
13 with this window.

14 Q Sir, do you see caulk on the interior of that window
15 where it meets the window?

16 A I see a gap where the wood has swollen beneath this
17 window and pushed the window out, leaving a gap around the
18 perimeter that lets water down into the wall.

19 Q Yes or no, is there caulk in that picture, sir?

20 A There is.

21 MR. IMHOFF: Thank you. Next picture, please. Next
22 picture. Let's go back, Max, to 106 ---

23 DR. WHITLOCK: Can we take a bathroom break?

24 MR. IMHOFF: This is ---

25 DR. WHITLOCK: Bathroom break?

1 THE COURT: All right. Mr. Bailiff, would you take our
2 jury to the jury room? We're going to take just a short
3 break.

4 [Whereupon, the jury exits the courtroom.]

5 THE COURT: The witness indicated he needed to go to the
6 restroom. It's ten after 12:00. Let's just -- we'll just
7 take an early lunch and we'll start back at 1:30. So, we'll
8 just let them go ahead -- tell the jury they can go on to
9 lunch and be back and 1:30.

10 BAILIFF: 1:30?

11 THE COURT: 1:30.

12 [Recess for lunch.]

13 THE COURT: Anything before we bring our jury back in?

14 MR. LUCEY: No, sir.

15 MR. IMHOFF: No, Your Honor.

16 THE COURT: All right, Dr. Whitlock, you can come back
17 around to the witness chair. I hope everyone had a good
18 lunch.

19 MR. LUCEY: Yes, sir.

20 THE COURT: All right, let's get our jury.

21 [Whereupon, the jury enters the courtroom.]

22 THE COURT: Mr. Foreman, ladies and gentlemen of the
23 jury, I hope everyone had a good lunch. We are ready to
24 proceed. Mr. Imhoff, you can continue.

25 MR. IMHOFF: Thank you, Your Honor. Max, could you put

1 those window tests back up for 106 Berwick, please?

2 BY MR. IMHOFF:

3 Q Dr. Whitlock, we were talking about your sill dam tests
4 at 106 Berwick, and it dawned on me over lunch that the jury
5 may not know what a sill dam test is. So, let's do that next.
6 Is the back dam visual -- can you see it in the bottom picture
7 there?

8 A Yes, that is the vertical piece of vinyl that goes from
9 left to right.

10 Q There it is. Okay. So, that whole piece that's towards
11 the inner side of the window is called the back sill dam, is
12 that right?

13 A Yes. It's a ---

14 Q Okay. And when the sash comes down and closes, it closes
15 adjacent to, next to that sill dam, correct?

16 A Yes.

17 Q All right, and on the bottom of the sash, there are bold
18 gaskets, correct?

19 A Yes.

20 Q In other words, weather stripping, so that when you push
21 it down, it seals against the bottom of it, right?

22 A That's the intent, yes.

23 Q That's the intent, sure. All right, and then the sill
24 dam is to prevent any water that could either blow in or gets
25 in that window that could then well up in the sill dam, right?

1 A Well, the sill dam test is to stop the water up, so you
2 can see if the parts leak ---

3 Q Sure.

4 A --- the parts that come together in the window frame.

5 Q Sure, but before you do the test, the intent is for that
6 dam to sort of be a secondary protection after the sash,
7 right?

8 A Yeah, that sill dam -- if the back dam wasn't there and
9 you close the window, there are still gaps around the window
10 that aren't watertight, so when water blows against the
11 window, it would flow down to the bottom and try to go left
12 and right, and if that vertical piece wasn't there, it would
13 continue to come in.

14 Q Sure. Okay. And so, those sill dams, the back here that
15 we're talking about, that is just bent up -- it's up there to
16 keep that -- again, water, wind, whatever, from getting under
17 or around the sash and coming into the house, right?

18 A Right.

19 Q Okay. And it's designed differently depending on the
20 manufacturer, but essentially it could be short, it could be
21 medium, it could be high, right?

22 A That's right.

23 Q Okay. And so, a sill dam test -- you can see, you put
24 duct tape on the outboard edge of the sill, right?

25 A That's the dam.

1 Q That's the dam. And then you put water actually in the
2 sill with the sash up.

3 A Yes, and you can see that level of the water inside the
4 sill on that fin that's about midway to the outside.

5 Q And then it -- depending on what the design rating is of
6 the window is how you put the appropriate amount of water in
7 it to see if it, in fact, performs to that design rating,
8 right?

9 A Yes.

10 Q Okay. All right. And so -- and here that back dam has a
11 gasket on one side, right?

12 A The vertical gap is supposed to be filled with a foam
13 gasket.

14 Q Yeah, up there, that vertical part. And then below that
15 as it goes diagonal into the corner is what's supposed to be a
16 heat-welded seat, right?

17 A Yes. The vertical jam and the horizontal piece are two
18 different pieces, and they saw them in the factory, and then
19 heat-weld that diagonal piece -- pieces together.

20 Q Right. Okay. It's not me, Your Honor. I'm not trying
21 to get anybody in trouble. All right. And so, at this house
22 at 106 Berwick, we've already talked about it, but you did
23 this sill dam on that test and filled it to the top of the
24 sill dam, correct?

25 A I don't know if I got to the top in this one. I might

1 have. But it leaked before I got there. It leaked at about a
2 quarter of an inch, as you can see in the picture.

3 Q All right, sir, if it says top of sill dam on your
4 report, did you fill it to the top of the sill dam?

5 A I might have, I don't know. That -- I probably should
6 have been more clear in the report on what I did, but ---

7 Q Nobody else there to see it or document it, right?

8 A My staff.

9 Q Nobody else who may disagree with your opinions was there
10 ---

11 A No.

12 Q --- to document it, correct?

13 A Correct.

14 Q All right. And we talked about -- next picture, please
15 -- we talked about the fact that there is broken crack -- go
16 one back, please, Max -- there is broken, cracked caulk on the
17 sill side of that sill dam, isn't there?

18 A It's caulk ---

19 Q I'm sorry?

20 A There's caulk that's placed against the drywall, and at
21 one time that caulk was in contact with the window perimeter.

22 Q Right.

23 A That caulk is for appearance. That caulk is not intended
24 to keep water out.

25 Q Well, sir, in fact, what you did is you dumped water well

1 beyond the design rating of that window into that sill, dammed
2 it up with that tape, made it leak, and it went right where
3 you wanted it to, right between that caulk line and the
4 window, and down into the wall, didn't it, Dr. Whitlock?

5 A It did come out of the window. It did drain down into
6 the wall, yes.

7 Q Right. And so, you poured so much water in there knowing
8 that this window is missing a gasket or the heat weld is open,
9 and there's missing caulk, and you got it to go into the wall
10 and come out on the ceiling in the dining below, right?

11 A Just like it did during rainstorms. There's evidence by
12 the damage in the ceiling.

13 Q Except, sir, if that caulk joint had been there, it
14 wouldn't have gone into the interior of that wall, would it?

15 A It would have gone underneath the caulk joint.
16 Absolutely into the wall.

17 Q It would have gone out through that crack, onto the sill,
18 and gone underneath the caulk joint, sir?

19 A That crack extends below that sill. The crack extends
20 below the sill, and water would have drained just like it did,
21 whether that sealant was there or not. That sealant is not a
22 waterproofing sealant. That is for painting purposes to seal
23 against the perimeter of the window frame. It's not
24 waterproofing. And it would not have stopped the water from
25 going into the wall.

1 Q Is caulk water and weatherproofing?

2 A Not this caulk is not.

3 Q This caulk does not provide any weather or waterproofing?

4 A It might stop a little bit of air infiltration, but it's
5 not for waterproofing. If water gets to that caulk, you
6 already have a failure. It's already failed.

7 Q So, you made the window leak through the wall, and onto
8 the dining room ceiling, correct?

9 A The window leaked when it was tested, and drained down
10 exactly the way it did ---

11 Q Did you ---

12 A --- during rainstorms.

13 Q Did you fix the damage from the leak that you caused?

14 A They put the drywall back up, yes.

15 Q Have -- you did not join us for any of our inspections in
16 2023, including in that home, to see if that window has leaked
17 since your test in 2019, did you sir?

18 A My staff was there, but not me.

19 Q Okay. It hasn't leaked in four years, has it?

20 A I don't know.

21 Q You don't know, sir?

22 A I haven't been there, and nobody else has tested it. I
23 don't think you tested this window.

24 Q Sir, there is no water damage from that window in that
25 room or the dining room below it in four years, correct?

1 A You're saying that. That's your testimony. I don't know
2 that that's the case. That window would still leak. I'm sure
3 it still leaks. It leaked before I got there, it leaked when
4 I tested it, and it's going to leak afterwards.

5 Q It is? Okay. So, why didn't you come back after 2019,
6 in the four years that past, and the 100 of home inspections
7 that we had, and destructive testing, so that you could see
8 what's actually happening at these properties so you could
9 testify to the jury?

10 A My company was there. And we saw what your guys did.

11 Q Right. But you can't testify whether or not that window
12 has leaked in the four years since you tested it.

13 A I have not seen that window leak since I've tested it.

14 Q Right. And you didn't bother to come see if the
15 foundations had moved, if the cracks had gotten bigger, if the
16 windows had actually leaked, from your testing four years
17 earlier, correct?

18 A I have not been back since I left there the last time.

19 Q Not one minute on site as we did our inspections and
20 testing, correct?

21 A No, sir.

22 MR. LUCEY: Objection, Your Honor. This has been covered
23 repeatedly.

24 THE COURT: Sustained.

25 BY MR. IMHOFF:

- 1 Q All right, let's go through them fairly quickly, then.
- 2 Next picture, please. Next one, please. Looks like the next
- 3 test that you did was on 101 Berwick Court.
- 4 A 106 Berwick Court.
- 5 Q It's 106, sir?
- 6 A It's what it says on the screen.
- 7 Q I have a different one, Max. One more. The next one
- 8 that you did is 101 Berwick Court. Again, you filled it to
- 9 the top of the sill dam, correct?
- 10 A I might have. I put water in starting at the bottom and
- 11 ---
- 12 Q Your -- could you -- sir, your ---
- 13 A I already testified that may not be exactly accurate. I
- 14 did not fill every one completely to the top, and you can see
- 15 that in the photographs.
- 16 Q Sir?
- 17 A Yes.
- 18 Q Does your report say that you filled it to the top of the
- 19 sill back dam?
- 20 A It does say that, yes.
- 21 Q Okay. Are you testifying to this jury that you don't
- 22 know if you filled it to the top of the sill back dam or not?
- 23 A On some, I did. But not all of them.
- 24 Q So we can't rely on this, sir?
- 25 A Not completely. You can look at the photographs and tell

1 more precisely the level of the water during the leak.

2 Q Can we rely on these reports at all, sir?

3 A Yes.

4 Q All right. Let's take a look at that one. Looks like
5 you did the bottom left-hand corner, is that right?
6 Photograph 4?

7 A That photograph -- there's two photographs. Photograph 1
8 and photograph 2. There's no photograph 4 in this -- on this
9 screen. Now there is.

10 Q There it is. So, it leaked at the bottom left-hand
11 corner, sir, correct?

12 A Yes.

13 Q And that has either a missing gasket, an open weld joint,
14 or a crack, correct?

15 A Well, I can see the gasket, but the gasket is not
16 effective, and is leaking.

17 Q Is it cracked?

18 A I don't think so. Not from this photograph, I don't see
19 cracks.

20 Q Is the weld joint open?

21 A Don't see an opening.

22 Q So, you think this window is in perfect shape?

23 A No. It leaks. It's not perfect.

24 Q Now, let's tell the jury how you got to these houses in
25 September of 2019. You were taken there by Natalie Zitek,

1 were you not?

2 A I don't remember if she was at this house or not. There
3 was someone who escorted us to some of the homes, but not all
4 of them.

5 Q You were taken to homes to test windows in those homes,
6 correct?

7 A I chose the windows in the homes to perform the test.

8 Q You were taken to homes to test the windows in that home,
9 correct?

10 A I was -- yeah, I was escorted to homes -- various homes
11 throughout the neighborhood.

12 Q Right. And those homes that you were escorted to were
13 not chosen randomly, correct?

14 A They were chosen by my client based on availability.

15 Q Your client, the lawyer, or Natalie Zitek, sir?

16 A One or the other, or both.

17 Q You don't know?

18 A No.

19 Q Let's go to the next one, 16 Kettering. 16 Kettering,
20 did you fill this one to the top of the sill back dam, sir?

21 A I might have.

22 Q We can't rely on that statement that you filled it to the
23 top ---

24 A I've already told you, I don't think that's completely
25 correct, because some of them leaked very early in the test

1 and I stopped.

2 Q Okay. That looks like an interior view, on photograph 3,
3 Max, of a window that has issues and is previously leaking, is
4 that correct, Dr. Whitlock?

5 A That is absolutely correct.

6 Q So you tested again a window that you already know what
7 the result was going to be, right?

8 A That was my purpose of doing the test. I've told you
9 that. I saw what appeared to be leaks. I confirmed that they
10 were.

11 Q Let's go to the next one. 16 Kettering. Again, it says,
12 top of sill back dam, correct?

13 A It does.

14 Q And this one, if you look at photograph 4, again, has
15 issues, does it not, Dr. Whitlock?

16 A That window displays some signs of prior leakage, and it
17 shows some sealant that someone had applied within the window.

18 Q You never actually tested windows in homes at random, did
19 you?

20 A No.

21 Q You could have gone and -- I'm not going to say that you
22 necessarily are going to do Bingo, but you could have put all
23 the addresses in a hat, picked out an address, and then picked
24 a window at random, so that this jury or anybody that wanted
25 to recreate your testing could actually see randomly which

1 windows are leaking and which are not, correct?

2 A That's correct.

3 Q And you chose not to do that. You chose to only test
4 windows that you knew had issues, correct?

5 A I chose to do diagnostic testing as outlined in ASTM E-
6 2128, which you went through portions of this morning, to
7 determine what the source of the water penetration -- what
8 appeared to be water penetration was. And that's what I
9 confirmed through diagnostic testing.

10 Q Right. On those seven or eight houses that you knew had
11 problems, right?

12 A They did, yes.

13 Q That doesn't tell us anything about the extent or number
14 of windows that would leak in the other 215 or so houses,
15 correct?

16 A It tells me that all of the other windows I saw with
17 similar stains and similar damage also leak.

18 Q All of the other windows that look like these, right?

19 A Yes. And there are lots of them.

20 Q But there are thousands of windows that don't look like
21 that, right, Dr. Whitlock?

22 A No, that's not correct.

23 Q Thousands, sir, correct?

24 A There are approximately 4,000 windows total.

25 Q Do you know how many windows are in Rose Hill?

- 1 A Approximately 4,000.
- 2 Q Do you know specifically how many there are?
- 3 A I can't tell off the top of my head exactly, no.
- 4 Q Have you ever actually done any investigation to
- 5 determine how many windows are in Rose Hill?
- 6 A Approximately 4,000 windows. That's what I remember. I
- 7 might have an exact count.
- 8 Q Sir ---
- 9 A We did photograph every single home there, so we ---
- 10 Q You don't have an exact count, do you?
- 11 A No.
- 12 Q No. But you prepared a damage estimate that says 4,000
- 13 windows, correct?
- 14 A I think that's about right, yes.
- 15 Q But that's not the correct number, is it, sir?
- 16 A It's probably a little more or little less.
- 17 Q That could be thousands, maybe hundreds of thousands of
- 18 dollars off, correct?
- 19 A Not hundreds of thousands, no.
- 20 Q Have you done an analysis of how many windows have issues
- 21 like this, and how many windows do not, sir?
- 22 A I believe that well over 15 percent, which was testified
- 23 earlier, have cracks. Well over 15 percent. And another 15
- 24 percent have leaking vertical joints. I think it's in excess
- 25 of 30 percent as we sit here today that have a leakage

1 problem. They didn't have that when it was installed, as you
2 testified -- or you asked me about before lunch. They were
3 not cracked before they were installed. They have cracked
4 since they were installed, and they started leaking since they
5 were installed. And I expect more will do the same.

6 Q Sir, the reason that you suspect it's 15 percent have
7 issues like this is because of the testing and inspections
8 that were done by the defendants without you, correct?

9 A No. It was just a claim that someone else made, and I
10 believe it's in excess of 15 percent.

11 Q Sir, you did no catalog of all of the windows in Rose
12 Hill, one by one, in each house, to see which one had issues
13 like this and which ones did not, correct?

14 A Correct.

15 Q You have not performed that analysis. The only people
16 that have performed the analysis were there at the inspections
17 in January, February, and March, correct?

18 A There were people there during those dates.

19 Q But that's where you got that 15 percent, correct?

20 A I heard that 15 percent testified to, but I said I think
21 it exceeds that.

22 Q Now ---

23 A And that's an unacceptable amount, by the way.

24 Q Your testimony -- your testimony and opinion is that
25 every single window needs to come out of every single one of

1 these houses, correct?

2 A I do believe that, yes. These are cheap, flimsy windows
3 that have a high failure rate and should not -- these people
4 shouldn't have to live with them.

5 Q Even though 85 percent of them, according to your
6 testimony -- 85 percent of 4,000, in your opinion, do not have
7 these issues, correct?

8 A No, I didn't say that. I said more than 15 percent are
9 cracked, and another -- more than another 15 percent have the
10 vertical joint problem. I think it exceeds 30 percent in
11 total as we sit here today.

12 Q You think, and maybe -- sir, could you have done a house-
13 by-house catalog of every window in the neighborhood?

14 A Is that possible?

15 Q Yes.

16 A It's possible, but I didn't do it.

17 Q And if you have not done that, or laid your eyes on the
18 pictures that the defendants took, you are speculating that
19 it's higher than 15 percent, aren't you?

20 A I am confident it's higher than 15 percent.

21 Q You are speculating, sir. You have no data or
22 investigation to support that opinion, do you?

23 A I've been through my photographs, and it exceeds 15
24 percent in the photographs I've took -- well over 15 percent.

25 Q Sure. Because, as you said, the houses were selected by

1 Plaintiff or Plaintiff's attorney, right?

2 A I went into almost 90 homes. Almost half of the homes
3 that I photographed and inspected.

4 Q Did you ever put that in your notes?

5 A It's in my summaries.

6 Q In your notes, sir, when you would walk into a house, did
7 you walk through all the houses and look at all the windows to
8 see which windows were not failing or exhibiting these issues?

9 A I photographed those windows.

10 Q Have you done the calculations, sir? Have you tabulated
11 them?

12 A No.

13 Q You've never actually read the testimony of Andrew Karr,
14 the witness for Silver Line Windows, have you, sir?

15 A I don't think so.

16 Q And you've never looked at the Silver Line documentation
17 about their testing and about their warranty plan, correct?

18 A I've looked at 1,700 pages of their testing.

19 Q Do you know, sir, as we sit here today, whether any owner
20 in Rose Hill has ever sent a warranty request for their
21 windows to Silver Line Windows?

22 A I do not know.

23 Q And you testified earlier that you didn't do it, correct?

24 A No, I didn't.

25 MR. LUCEY: Objection, Your Honor. May we approach?

1 THE COURT: Yes, sir.

2 [Whereupon, a bench conference was held off the record.]

3 BY MR. IMHOFF:

4 Q Sir, if you didn't read Silver Line's testimony, do you
5 know that these Silver Line model windows are in tens of
6 millions of homes?

7 A I don't -- I wouldn't doubt that.

8 Q You believe that's true?

9 A I wouldn't have any reason not to believe that.

10 Q Okay. Do you know, since you didn't actually read the
11 testimony, that they've been in homes for decades?

12 A Not aware of that.

13 Q Do you know that they are in homes and used by every
14 general contractor that Andrew Karr, on behalf of Silver Line
15 Windows, can think of?

16 A Not aware of that.

17 Q You don't know any of those things because you didn't
18 bother to read it, correct?

19 A I don't think I did. I did not read Andrew Karr's
20 deposition.

21 Q Okay. Let's explain to the jury if we can -- you also
22 did, using ASTM E1105-15 test report, something called spray
23 rack testing, is that correct?

24 A Yes.

25 Q Okay. Now, spray rack testing -- Max, could you go

1 forward and show the spray rack from outside, please? So,
2 it's a contraption that you lean against the house that sprays
3 with nozzles of water against the window, is that right?

4 A That's right.

5 Q Is the sash down and closed?

6 A Yes.

7 Q Is it locked?

8 A Yes.

9 Q Okay. Is that required in the ASTM?

10 A It's required you open and close it five times and lock
11 it, at each cycle of opening and closing.

12 Q Okay, so you're opening and closing it during the spray
13 testing?

14 A No. Before you do the test, just to make sure things are
15 seated, you're to open it, close it, lock it, open it, close
16 it, lock it, for five cycles. And that's what we did.

17 Q And then does it stay closed for the entire spray rack
18 test?

19 A Yes.

20 Q Okay. How many of these did you do? Do you know?

21 A Seven to nine, I can't remember the exact number.

22 Q Seven to nine. This first one was done in June of 2020,
23 and it took you about 30 days to do your report, is that
24 right?

25 A I don't remember how many days it took.

1 Q Can you zoom in? So, the date of the test here at 404
2 Rowley Court, is June of 2020. And the report is June 30th of
3 2020, is that right?

4 A Okay. Yes.

5 Q Okay. Now, so it took you 30 days to do the report,
6 correct?

7 A That's right.

8 Q And you didn't take contemporaneous notes for us to
9 review, correct?

10 A I believe this report, or a paper version of this was
11 filled out during the testing by staff. I didn't do it.

12 Q You believe it was.

13 A Yes.

14 Q Okay. Doing this report 30 days later is not
15 contemporary notes, correct?

16 A No, this is a report of results.

17 Q Okay. And again, now, certainly by June of 2020, you
18 know that DR Horton is involved in this case, correct?

19 A I was well aware DR Horton built the homes, yes.

20 Q You knew they were involved in this case, correct?

21 A I can't tell you that I knew there was a lawsuit filed at
22 this time or not.

23 Q Okay. You were there alone, though, weren't you? There
24 were no defendants there to watch what you were doing,
25 correct?

- 1 A That's correct.
- 2 Q And that violates ASTM E1105, also, doesn't it?
- 3 A It's not a violation.
- 4 Q Not a violation?
- 5 A No.
- 6 Q It's just a guideline?
- 7 A That's what it is, a guideline.
- 8 Q A guideline you chose not ---
- 9 A And it's not ---
- 10 Q Go ahead, sir.
- 11 A It's not a guideline for purposes of litigation. It's a
- 12 guideline for diagnosing building problems. That's what it
- 13 is.
- 14 Q Let me ask you this, because -- well, it's just common
- 15 sense, sir, isn't it, that if you're going to test a product
- 16 or test something, you want to have everyone there to look at
- 17 it and do their testing and make sure that the testing is done
- 18 right and make sure the testing is documented, so that you
- 19 don't have questions like this, right?
- 20 A Well, that's not my decision. It's not my choice. It's
- 21 the client's choice.
- 22 Q The client being the lawyer?
- 23 A Yes.
- 24 Q Are you testifying to this Court that you were told by
- 25 Justin Lucey not to invite the defendants to your testing,

1 sir?

2 A I was not given any authorization to invite anybody. I
3 was just asked to do the testing.

4 Q Did you ask if the defendants were invited to comply with
5 the guideline of ASTM that interested parties see and are
6 present at your testing?

7 A I did not ask the question for that purpose. I always
8 ask who's going to be on site during the testing.

9 Q Okay. And sir, you were told no one, correct?

10 A Probably.

11 Q And you didn't say, why, or pursuant to ASTM testing
12 guidelines, they need to be invited, correct?

13 A That's not my job, no.

14 Q It's not your job?

15 A It's not.

16 Q Sir, you are a committee member of the American Society
17 for Materials and Testing, and they repeatedly put in their
18 documents that you need to invite interested parties, and
19 you're telling this jury that it's not your job?

20 A That is not. It is not my job to go outside around my
21 client and invite people to come to the job site. It's not my
22 role.

23 Q Have you reviewed the testing done by the other parties
24 in this case?

25 A I have seen that testing, yes.

1 Q They were not able to get one window to leak, were they,
2 Dr. Whitlock?

3 A They did have water penetration in several tests.

4 Q Sir, they did not get one window to leak in the spray
5 rack testing that was done with multiple engineers,
6 architects, your son, video cameras, cameras, paralegals, and
7 lawyers, correct?

8 A You said spray rack testing.

9 Q That's right.

10 A That is correct. The spray rack testing, I don't think
11 showed any leakage, but their seal dam testing did.

12 Q You didn't go to that testing, did you, sir?

13 A I did not.

14 Q And you didn't go because you didn't want to see what
15 everyone else could see, which is the windows do not leak if
16 you do the spray rack test correctly, right?

17 A That's not true.

18 Q Now, you're aware that a whole section of Rose Hill was
19 built by Poinsett Builders years before DR Horton got there,
20 right?

21 A I don't know what homes they built. I know that there
22 was another builder there before DR Horton. And I don't know
23 how many homes they built.

24 Q You -- do you know that there are houses in there built
25 by other builders?

1 A I am informed that Poinsett -- a company called Poinsett
2 built some homes in there, yes.

3 Q But you didn't take any steps or measures to make sure
4 that when you're testifying to this jury or doing your
5 investigation, you're not including houses built by a
6 completely different builder at a different time, did you,
7 sir?

8 A At the time I took my photographs, I didn't know who
9 built the houses -- those other houses.

10 Q So ---

11 A And I photographed everything I saw, basically.

12 Q So, it's very possible that in addition to at least one
13 picture that you put up here to show bad stone installation,
14 there are multiple pictures of other builders' houses out
15 there that you put in front of this jury to show them DR
16 Horton's construction defects, right?

17 A I don't think that's correct, except for the photographs
18 I took down the streets to give a general reference of the
19 locations.

20 Q You didn't think that was correct this morning before I
21 showed you that 102 Amesbury doesn't exist, and it's, in fact,
22 a different address and a home built by Poinsett Builders,
23 right?

24 A That's correct.

25 Q Can -- you have every single floor in the neighborhood

1 identified in your damages to be taken up, correct?

2 A On the ground level ---

3 Q Yes, sir.

4 A --- is that what you're asking?

5 Q Yes, sir.

6 A To get to the cracks that we talked about this morning.

7 Q Every single one, right?

8 A I think so, yes.

9 Q But you don't know if those floors have been replaced, if
10 those cracks exist, or those cracks have been repaired when
11 the new floor went down, right?

12 A That's correct.

13 Q And if those floors have been replaced and those cracks
14 either don't exist or they've already been fixed, that should
15 not be in your damages, correct?

16 A Those cracks have been fixed shouldn't be -- but I didn't
17 see any fixed cracks. I couldn't see any signs of crack
18 injection on the sides of the homes or in the garages, or in
19 the homes where the flooring was missing.

20 Q Well, sir, in fact, you used a book to estimate this \$28
21 million claim, correct? It's a book.

22 A A publication. It's more than a book. I think some of
23 the information comes from their online resources, but it
24 could have come from a series of their books, yes. Some of
25 it.

1 Q Well, it was a book at one point, correct? It may be
2 online now, is that fair?

3 A I think you can get it both ways now.

4 Q That's how you did you estimating for this \$28 million,
5 right?

6 A My staff did, yes.

7 Q Oh, you didn't do it?

8 A It was under my direction. I didn't personally do it. I
9 reviewed it.

10 Q You've never sent this work out to a local contractor to
11 actually price it, did you?

12 A I didn't. I think the Lucey Law Firm may have.

13 Q I'm sorry?

14 A I think the Lucey Law Firm may have had it sent out and
15 had it checked.

16 Q But you've never done that?

17 A I didn't.

18 Q You said you didn't know if the Lucey Law Firm has or
19 not?

20 A I'm pretty sure they did.

21 Q To a general contractor, or a residential builder?

22 A That's my understanding.

23 Q You have costs in your damages that you presented to this
24 jury for replacing rotten sheathing, framing, and insulation
25 behind the stone and brick, correct?

1 A Under the windows, yes. Primarily.

2 Q Okay. But you don't have one picture, sir, of rotten
3 sheathing, rotten framing, wet, deteriorated insulation, do
4 you, sir?

5 A I have -- I showed a picture yest -- or last week of wet
6 insulation that was removed after our test. Also showed
7 photographs of sills beneath windows that were saturated and
8 dark. They'd been wet before in those photographs of leaking
9 window sills.

10 Q Let's make sure the jury understand this, sir. The
11 window sills in Rose Hill are actually made of drywall, aren't
12 they?

13 A That's just the trim. That's the covering. Beneath that
14 is wood.

15 Q Right. On top of the sill, painted white -- the sill is
16 not wood ---

17 A Underneath it is wood.

18 Q --- it is dry -- Sir. The sill -- you can stop. This
19 white sill on the interior of Natalie Zitek's home, that is
20 drywall, correct?

21 A That's covering wood.

22 Q Yes.

23 A Underneath that is wood.

24 Q Okay. Dr. Whitlock, I'm going to ask you a yes or no
25 question again, because I don't want to delay this all

1 afternoon for the jury. Is what we see in that photograph on
2 the sill drywall, sir?

3 A It's a drywall covering over wood.

4 Q There's wood underneath that drywall, but the top part is
5 drywall, correct?

6 A That's right.

7 Q Drywall, when it gets wet, expands and cracks, correct?

8 A No, it gets soft.

9 Q It swells, doesn't it, sir?

10 A Not really. The wood beneath it swells, but ---

11 Q Drywall is not resistant to water at all, is it, sir?

12 A No.

13 Q No. So, if you get it wet, you will absolutely see
14 damage, correct?

15 A And we did.

16 Q Now, wood on the other hand, is resistant to water, much
17 more so than just -- I'm sorry, drywall, correct?

18 A It doesn't soften as much, it just absorbs the water. It
19 swells and begins to deteriorate.

20 Q Well, for hundreds of years, people built houses out of
21 wood, correct, Dr. Whitlock?

22 A Yeah, still do.

23 Q Has anyone ever built a house out of drywall, sir?

24 A No.

25 Q Wood is much more resistant to water than drywall, isn't

1 it, sir?

2 A Sure.

3 Q So, when you were talking about we saw water damage to
4 the sill, what you're talking about is water damage to
5 drywall, correct?

6 A I removed the drywall and showed the wood beneath it.
7 The wood that's supposed to be covered with membrane
8 waterproofing, and it wasn't.

9 Q All right, sir. Behind the brick and the stone, you have
10 found no damaged, deteriorated sheathing, framing, or
11 insulation, correct?

12 A I found wet sheathing and corrosion of fasteners. I
13 haven't found rot. That's correct.

14 Q And that's like number one for a Plaintiff's forensic
15 expert is to go find the rot, correct?

16 A Well, if there was rot there, I would have shown it to
17 you.

18 Q Absolutely, you would have, and you had access to 221 or
19 220 homes, didn't you, sir?

20 A I had access to a good number of them, not all of them.

21 Q And you done?

22 A I did not access all of them.

23 Q Sir, you would have put that picture up here if these
24 buildings were deteriorating and rotting from water intrusion
25 through brick and stone in a heartbeat, correct?

- 1 A I would have given you every picture I took, and I did.
- 2 Q And you don't have them, sir, correct?
- 3 A That's right.
- 4 Q And that's part of that performance evaluation, isn't it?
- 5 Are the buildings performing, correct?
- 6 A They are not.
- 7 Q Sir, water intrusion into framing, sheathing, and
- 8 insulation is part of your evaluation of whether or not the
- 9 buildings are performing, correct?
- 10 A Yes.
- 11 Q Yes. And so, as to that part of the evaluation, the
- 12 stone and the brick is performing to keep water intrusion out
- 13 of these houses, correct, sir?
- 14 A No. Water is intruding into the houses. We found water
- 15 into the sheathing and the framing. We found wet areas in the
- 16 sheathing and the framing. Very wet areas, particularly below
- 17 the windows.
- 18 Q You would have showed those to the jury, as you just said
- 19 ---
- 20 A And I did last week.
- 21 Q --- if they were deteriorated and rotten, sir?
- 22 A Absolutely. If there was rot there, I would have shown
- 23 it. I showed wet wood to the jury last week -- dark, wet wood
- 24 beneath these windows.
- 25 Q And many of these houses are now a decade old, aren't

1 they, sir?

2 A Yes.

3 Q Okay. And you have -- going back to my original question
4 -- you have put in your damages that you're going to ask this
5 jury to award, replacement of the exterior sheathing, the OSB
6 or plywood, framing, and insulation, haven't you, sir?

7 A Some. Not all of it. Not taking it all off, but an
8 estimate of below the windows, I think 20 percent, which
9 equates to a strip of about one-foot high by the width of the
10 window.

11 Q But you haven't actually showed the jury pictures of that
12 rotten framing, have you, sir?

13 A No.

14 Q No. And you haven't removed the houses from your damages
15 that don't have the brick issue, correct?

16 A I think every brick house has brick issues. Every stone
17 house has stone issues.

18 Q Does every house have the brick lintel issue?

19 A Every brick lintel over every garage has that issue, yes.

20 Q Even if it's two or three rows of brick that have no
21 cracking in them, your proposal is to rip all of that brick
22 off, sir?

23 A There is no flashing, and they do have cracking. Those
24 homes have cracking as well. And you can see that if you go
25 through the rest of my photographs. Over every garage door,

1 at each end and over the top, there's cracked masonry.

2 Q Sir, let me just make sure that I have your testimony
3 correct, okay. Every brick over every garage has cracking, is
4 that what you said?

5 A Not every brick, but there's cracking over every double-
6 wide garage door. Every large garage door has cracks.

7 Q You ---

8 A Over -- that has brick over it has cracks.

9 Q You've looked at all of the homes that have brick on
10 them?

11 A Every one I looked at, I should say.

12 Q Oh, wait a minute, wait a minute.

13 A Because I probably didn't look closely at every single
14 one, but every single one that I looked at had the same common
15 problem.

16 Q Sir, let's make sure the jury understands your testimony
17 so that we can be spot on and there's no confusion. Did every
18 brick house you looked at have the brick cracking, or does
19 every brick house out there have brick cracking from the
20 lintel issue?

21 A Every single one I looked at had brick cracking issues.

22 Q Every one you looked at. And you didn't do it randomly,
23 did you, sir?

24 A I looked at almost all of the brick houses from the
25 exterior. I looked at a hundred and some. So, I may have

1 seen every one. I just can't say for sure that I saw every
2 single brick house, but I saw a lot all of them. If not all,
3 close to all.

4 Q All right. You've also testified that everybody needs to
5 move out of every one of their houses, correct?

6 A To do all this work, yes.

7 Q Every single house?

8 A Every single house that has this level of work I've
9 proposed, it would be very difficult for people to live in
10 those houses and unacceptable for their work to go on.

11 Q Well, that's assuming that the jury agrees with you and
12 wants to pull up all the floors to do an investigation, right?

13 A And everything else along with that, yes.

14 Q Well, let's do them one by one, sir. If this jury does
15 not agree with you to pull up and replace everyone's first
16 floor floors, those homeowners would not need to move out of
17 their homes, correct?

18 A There's some other work that ---

19 MR. IMHOFF: I would like to do one issue by -- at a
20 time, please.

21 MR. LUCEY: Objection, Your Honor.

22 THE COURT: Let the witness finish his -- let him finish
23 his answer.

24 DR. WHITLOCK: I'm sorry, can you repeat the question?

25 MR. IMHOFF: Are you finished with your answer, sir?

1 DR. WHITLOCK: I thought you were asking me a question,
2 maybe I ---

3 THE COURT: Repeat the question, Mr. Imhoff.

4 BY MR. IMHOFF:

5 Q If the flooring in every single house isn't pulled up and
6 replaced with new, do all of the homeowners have to move out
7 of those houses due to the flooring issue?

8 A Theoretically, people can live in the homes while the
9 other work is being done, but it would be very disruptive and
10 uncomfortable.

11 Q If the brick needs to be spot repaired above the garage,
12 or somewhere else, that doesn't require the homeowners to move
13 out, either, does it?

14 A If I were to assume that spot repairs were all that you
15 did to the brick, again, it would be uncomfortable for the
16 people living there, but it's possible.

17 Q Well, we don't have to speculate, because the Zitek's did
18 it. They stayed in their house, didn't they, sir?

19 A For the brick over the end of their home and part of the
20 back, I think.

21 Q An entire side, and in your testimony, also the back,
22 correct?

23 A I think part of the back was removed.

24 Q And they didn't move out, did they, sir?

25 A No.

1 Q And that's millions of dollars in your estimate, isn't
2 it?

3 A Yes.

4 Q For a very long period of time, isn't it?

5 A Six weeks, I think, on average.

6 Q To have people move out of every single house, no matter
7 what, for six weeks, for millions of dollars, correct?

8 A Correct.

9 Q How good are you at math, Dr. Whitlock?

10 A Pretty good.

11 Q How much is \$28.5 million divided by 221 homes, sir?

12 A Over \$100,000.

13 Q Closer to \$128,000 for each homeowner in Rose Hill is
14 what you're proposing, isn't it, sir?

15 A That's what the total comes out to be after the
16 adjustments that were made, that I was instructed to make.
17 That's correct.

18 Q And that is despite the fact that you have never told
19 these homeowners or counseled these homeowners that at least
20 as to the window issues, they have a lifetime warranty on
21 these windows, correct?

22 A Well, you told me they had a lifetime warranty. I don't
23 know anything about that, and I wouldn't counsel them on
24 warranty issues.

25 Q You didn't bother to look at that, did you, sir?

1 A I didn't look at that.

2 Q Instead you put together a multi, multi-million-dollar
3 estimate from a book based on ignoring guidelines from the
4 American Society for Testing and Materials that you're a
5 committee member of, right?

6 A I won't agree to that.

7 Q In 2019, if you had told these homeowners that there are
8 window issues and that you would help document them and submit
9 warranty to Silver Line, it's possible that these windows
10 could have been resolved years ago, isn't it, Dr. Whitlock?

11 A I don't know.

12 Q You don't know, because you didn't try, right?

13 A I did not try.

14 Q Now, throughout your testimony on Friday, and today, you
15 have repeatedly said that these windows do not have a design
16 pressure rating, correct?

17 A That's correct.

18 Q Have you, in fact, done any investigation into the Silver
19 Line Window sticker process, sir?

20 A I have looked at the windows and I've looked at the
21 testing they've provided. I found no certifications for the
22 windows that provide one single window certification, and none
23 of the windows had the required label -- not a sticker, a
24 label attached to it.

25 Q Not one?

1 A Not one.

2 Q They all have to be removed because they don't have a
3 label on it, correct, Dr. Whitlock?

4 A Because they don't work, that's why they need to be
5 removed. They crack. The cracks are propagating, and they're
6 causing damage, and they need to be removed.

7 Q You told me -- at your deposition, did you tell me that
8 you would withdraw removal of all of the windows from your
9 damages if you were shown that there were appropriate labels
10 on those windows.

11 A If they didn't have a leakage problem. If they were
12 otherwise good windows without leakage problems, I would not
13 say that they need to be replaced just because of the labeling
14 issue.

15 Q I'm sorry, I thought that's exactly what you said.

16 A I misunderstood.

17 Q Go ahead and let's put the labels up, if we can, please.
18 Again, sir, you didn't take the time to read the testimony of
19 Andrew Karr, the witness on behalf of Silver Line, correct?

20 A I don't remember reading his deposition, no.

21 Q Right. So, you probably have not seen the Silver Line
22 labels that he testified are on the windows, correct?

23 MR. LUCEY: Objection, can we have an identification on
24 the exhibit --- exhibit number?

25 MR. IMHOFF: This is a demonstrative from Silver Line.

1 MR. LUCEY: I still need to know the exhibit so we can
2 follow along.

3 THE COURT: What's the date and the number, Mr. Imhoff?

4 MR. IMHOFF: Your Honor, this is a demonstrative for
5 Silver Line. It doesn't have a date necessarily or ---

6 MR. LUCEY: He was referring to the deposition when he
7 was pointing out Silver Line's ---

8 THE COURT: All right, Counsel, approach. Counsel
9 approach.

10 [Whereupon, a bench conference was held off the record.]

11 BY MR. IMHOFF:

12 Q Dr. Whitlock, have you ever seen these labels before?

13 A They're gone. I've seen labels similar to these on new
14 windows. I don't think I've ever seen these exact labels that
15 you're showing me.

16 Q What is WDMA, sir?

17 A Window and Door Manufacturers' Association.

18 Q The Window and Door Manufacturing Association is a
19 certifying agency for windows, correct?

20 A They can be, yes.

21 Q Okay. And do you see labels -- or do you see places on
22 these labels, sir, for design pressure ratings?

23 A I see the word rating, but I can't read what's beneath
24 it.

25 Q Max. Rating - Window and Door Manufacturers'

1 Association, WDMA, you see that, sir?

2 A I see that.

3 Q Do you see Silver Line Windows, sir?

4 A I see that on the slide, temporary performance label
5 images. But are these from Rose Hill?

6 Q Sir, does it have a rating on there?

7 A It says rating, but I can't read what's underneath it,
8 and my question is, are these from Rose Hill?

9 Q Answer the question for me if you will, please, Max.

10 THE COURT: Is this directed to the witness, Mr. Imhoff?

11 MR. IMHOFF: No, I'm trying to get my IT guy to put the
12 pictures up.

13 THE COURT: The IT guy is not on the witness stand. The
14 questions need to be addressed to the witness under oath.

15 BY MR. IMHOFF:

16 Q 102 Dartford, Exhibit 18.13; 102 Dartford, 183, sir.
17 Have you ever seen this photograph before?

18 A I don't remember seeing it.

19 Q Okay. Do you know if 102 Dartford is in Rose Hill?

20 A That is an address there.

21 Q Okay. Do you see the labels in the windows, sir?

22 A I see labels. I do see labels in the windows, but I
23 cannot read them.

24 Q Can you see that it says Silver Line on the right-hand
25 one?

1 A I do see that, backwards Silver Line reversed.

2 Q And then can you see on the left side, sir, the same
3 label that you just looked at that has Silver Line and a
4 design pressure on it?

5 A I see that there's a label there, and I see WDMA, but I
6 don't see anything about design pressure in that photograph.

7 Q Right. Well, when the owner of 102 Dartford was taking
8 these pictures, he probably didn't know you were going to come
9 along. So, this is the best we can do from his house. Will
10 you agree, sir, and for this jury, that those labels look
11 identical to the Silver Line labels that have the design
12 pressure rating on them?

13 A They look similar, yes.

14 Q And you've never seen this picture before, right?

15 A No.

16 Q Have you asked the homeowners, sir, if they have pictures
17 of their house during construction?

18 A I've asked for those -- for any construction ---
19 photographs, and I've gotten a whole lot, and if I have this,
20 I overlooked it, but I don't remember seeing it.

21 Q Did you ask Natalie Zitek for her husband, Paul's
22 pictures?

23 A I think I have them.

24 Q Have you looked at them?

25 A I've looked at everything I have.

1 Q And your opinion is still that those labels have not been
2 on there for four years of this litigation now, correct?

3 A I have not seen one certification label on any window.

4 Q --- photograph of Natalie Zitek's house. This is Exhibit
5 29.1. Max, I'm not sure the jury can see that.

6 A Nor I.

7 Q So, here are their labels on windows. Did you see that?

8 A I saw a glimpse of it.

9 Q Max, I assume you're going to try move in, right? Sir,
10 you're aware that Paul Zitek took hundreds of pictures of his
11 house during construction, are you not?

12 A I've seen a lot of photographs during construction of his
13 home.

14 Q Hundreds, and you said -- actually --- and you just
15 testified that you looked through Paul Zitek's pictures,
16 correct?

17 A I did.

18 Q And for four years, you have an opinion that these labels
19 with the design pressure rating on them are not on these
20 houses?

21 A I have not seen one.

22 Q Sir, this is Paul Zitek's home, 104 Sturbridge, sir.
23 During construction, will you concede to the jury now that the
24 labels were on the windows with the appropriate designation,
25 WDMA certification, at the time of this -- the times these

1 homes were built?

2 A I can't read that label. This label you want me to read,
3 there's nothing on there I can read.

4 Q Does it look similar to the Silver Line stickers that we
5 saw earlier, sir?

6 A It looks similar, but I couldn't tell you what it says.

7 Q Okay. So, do you still believe that these homeowners
8 should be awarded millions of dollars because the windows
9 don't have WDMA stickers on them, Dr. Whitlock?

10 A I believe the windows should have had a certification
11 label on them, and they don't, and that they leak at an
12 excessively high rate and are cracking and failing, and that's
13 why they should be replaced. I think it's the same thing I
14 told you in my deposition.

15 Q Can you say that the labels were not put on the windows
16 or on the windows when they were in the houses during
17 construction?

18 MR. LUCEY: Objection, asked and answered, Your Honor.

19 MR. IMHOFF: Your Honor, I -- he did not answer my
20 question.

21 THE COURT: Yeah, I'll overrule the objection.

22 DR. WHITLOCK: I see a label on this window. I don't
23 know if they all had a similar label, and I don't know what
24 the labels says, but that's not a certification label as
25 traditionally provided by a window manufacturer. They are

1 normally a small, foil label appended to the top of the window
2 head, and they are somewhat permanent. They can't be scraped
3 off or washed off during cleaning of the window.

4 BY MR. IMHOFF:

5 Q Certainly, sir, you are not going to tell this jury that
6 they should award millions of dollars for these windows
7 because you're not sure that this label that looks really
8 similar to Silver Line's label is the appropriate label,
9 right?

10 A I think I've already said that. I said if labeling was
11 the only issue, I wouldn't recommend removing them. If that
12 was the only issue, no.

13 Q But it's an opinion you've had, sir, for four years,
14 correct?

15 A Correct.

16 Q And you didn't even bother to look at the pictures of the
17 window stickers in Natalie and Paul Zitek's house, and that is
18 the house for the class representative of this class to
19 determine if it looked like there may have been window
20 stickers there, correct?

21 A I may have seen a window sticker like that, but I never
22 would have considered that a certification label. You can't
23 even read what that sticker says.

24 Q And you did no investigation into whether Silver Line was
25 putting those stickers on and sir, in this \$28.5 million case,

1 you didn't even bother to read the testimony of Silver Line,
2 correct?

3 A I did not read the testimony.

4 MR. IMHOFF: Thank you, Dr. Whitlock. I don't have any
5 further questions, Your Honor.

6 THE COURT: Any redirect?

7 MR. LUCEY: Yes, sir.

8 REDIRECT EXAMINATION

9 BY MR. LUCEY:

10 Q Sir, you used the term in front of the jury several times
11 that you were not given an opportunity to explain. You
12 referred to third-party validators. Tell the jury ---

13 MR. IMHOFF: Your Honor, we object, leading.

14 THE COURT: Overruled. Go ahead.

15 Q Tell the jury what a third-party validation is and what
16 they're role is in the certification of window products for
17 legal use under the building code in effect in Anderson
18 County, South Carolina.

19 A When a manufacturer submits window samples to a testing
20 agency -- approved testing agency, and they put the windows
21 through a battery of different types of tests and produce
22 reports to a third-party validator, which is a certified
23 company that then takes those results, checks them to make
24 sure that the testing was performed and reported properly, and
25 then provides an opinion on whether those windows are suitable

1 for certification.

2 Q And do you see any evidence in the thousands of pages of
3 Silver Line documents relating to these windows, that these
4 windows were ever validated?

5 A No.

6 Q Have you ever seen a third-party validation on the
7 manufacturer's label on a window?

8 A No.

9 Q And tell the jury which of these labels I'm holding up is
10 a typical third-party validator's label.

11 A The gold label on the left is a typical foil label that
12 you see on windows that have been subjected to the proper
13 testing and validation.

14 Q And where have you seen these labels located on the
15 window product throughout your four decades of engineering?

16 A The top of the window where the sash would go up and down
17 into the top of the window head.

18 Q And with regards to the Silver Line warranty that you
19 were asked about, let's take a look at that. I'm going to
20 show you what's been marked as -- for -- as Plaintiff's
21 Exhibit 245 for purposes of identification only at this time,
22 sir. Do you see that the very first section of the warranty
23 document says what's covered?

24 A Yes.

25 Q And it lists two conditions, A and B, that are covered?

1 A Yes.

2 Q And read condition A that's covered warrantable items to
3 the jury, please.

4 A Blistering, peeling, flaking, rotting, or corrosion.

5 Q Does that describe any of the defects that you saw in
6 these windows?

7 A No.

8 Q Well, let's go to B. Read that for the jury.

9 A B, material obstruction of vision on the internal
10 surfaces of the insulated glass unit caused by seal failure of
11 the insulated glass unit.

12 Q Is that part of your criticism of these windows?

13 A No.

14 Q Read the third covered condition in paragraph C to the
15 jury, please.

16 A I do not see paragraph C.

17 Q There is no paragraph C?

18 A No.

19 Q There's not a third covered condition?

20 A No.

21 Q Do you see it anywhere in that first paragraph that
22 fractured window frames are a covered condition under the
23 Silver Line warranty?

24 A I don't see anything like that.

25 Q Do you see anywhere in the coverage paragraph, this first

1 paragraph in the Silver Line warranty, that displaced gaskets
2 in the slot are a covered condition under the warranty?

3 A No.

4 MR. IMHOFF: Your Honor, objection to leading.

5 THE COURT: Overruled.

6 BY MR. LUCEY:

7 Q Do you see anywhere in this coverage section A and B that
8 leaking is a warrantable event?

9 A I do not.

10 Q You were asked about the South Carolina Residential
11 Construction Standards in your examination, and let me hand
12 you a copy of the 2022 construction standards. Are you
13 familiar with this document?

14 A Yes, I've seen this.

15 Q Let's go to page 7, please.

16 A Okay.

17 Q Can you read to the jury what footnote 7 says on page 7
18 of the South Carolina Residential Standards?

19 A Footnote 4?

20 Q Footnote 4, thank you.

21 A If there is a conflict between a performance standard and
22 the applicable building code, the building code requirement
23 takes precedence as a matter of law.

24 Q What does that mean in plain English?

25 A That nothing in this document supersedes the building

1 code and the building code requirements.

2 Q Okay. Well, to the extent that this is applicable to any
3 condition at Rose Hill, I think you might have been asked
4 about cracking in this thing, is there any provision that you
5 see in this document that covers the requirements for radon
6 systems?

7 A No.

8 Q Do you learn about gases as an engineer?

9 A Yes.

10 Q Do gases care how wide a crack is?

11 A No, they'll permeate any size crack.

12 Q Is there a tolerance -- do gases know a tolerance for the
13 width of a crack?

14 A No.

15 Q Let's talk about the Anderson County building code
16 official and his authority. I'm going to hand you Chapter 1
17 of the 2012 Residential Building Code. This is an excerpt
18 from one of the three codes in effect in Anderson County
19 during the buildout of Rose Hill, correct?

20 A Yes.

21 Q Let's go to page 1. It's actually -- it's numbered page
22 1, but it's two-thirds of the way back, I guess it's after the
23 Roman numeral pages.

24 A Okay.

25 Q And let's go look at section R 102.4. Do you see that?

1 A I do.

2 Q Could you read that first paragraph to the jury, please?

3 A R 102.4, referenced codes and standards. The codes and
4 standards referenced in this book shall be considered part of
5 the requirements of this code to the prescribed extent of each
6 such reference and as further regulated in sections R 102.4.1
7 and R 102.4.2.

8 Q Did I hear you correctly, it says that the reference
9 standards quote, shall be considered part of the requirements
10 of this code, end quote?

11 A Yes.

12 MR. IMHOFF: Your Honor, we object to leading.

13 DR. WHITLOCK: Would you like me to read it again?

14 THE COURT: Hold on. Don't lead the witness. Go ahead.

15 BY MR. LUCEY:

16 Q And what applicability, if any, does that have as to the
17 ASTM standards with regards to the application of stone
18 veneer?

19 A It makes those ASTM standards that are referenced in this
20 code part of this code.

21 Q And going to paragraph R 104.1 on the bottom of the page,
22 please.

23 A Okay.

24 Q Would you read that paragraph until you get to the red
25 sentence and then stop?

1 A R 104.1, general, the building official is hereby
2 authorized and directed to enforce provisions of this code.
3 The building official shall have the authority to render
4 interpretations of this code and to adopt policies and
5 procedures in order to clarify the applications of its
6 provisions. Such interpretations, policies and procedures
7 shall be in conformance with the intent and purpose of this
8 code.

9 Q Okay. Read that last sentence again, one time, please.
10 Just slowly.

11 A Such policies and procedures shall not have the effect of
12 waiving requirements specifically provided for in this code.

13 Q And tell us in plain English what R 104.1 means.

14 A That the building official has responsibility, but if he
15 happens to miss something, it doesn't waive the requirements
16 of the code. The code requirements still are applicable.

17 Q Okay. And let's go to R 104.10, modifications in this
18 code section of 2012 IRC, and you can either read that first
19 paragraph to the jury, or just explain it to them, either one
20 will work for me.

21 A I'll just read it. Modifications, whatever -- wherever
22 there are practical difficulties involved in carrying out
23 provisions of this code, the building official shall have the
24 authority to grant modifications for individual cases,
25 providing the building official shall first find that the

1 special, individual reason makes the strict letter of this
2 code impractical and the modifications is in compliance with
3 the intent and purpose of this code, and that such
4 modifications does not lessen health, life, and fire safety or
5 structural requirements. The details of action granting
6 modification shall be recorded and entered in the files of the
7 Department of Building Safety.

8 Q Have you seen any evidence that there is any modification
9 granted by the building code official for the installation of
10 brick or stone veneer in Rose Hill?

11 A No.

12 Q Does the building code as you understand it, is it a
13 requirement for such a modification to be documented
14 somewhere?

15 A That's what it requires. It requires that any
16 modification be documented.

17 Q Now, you were shown a bunch of pictures about some stone
18 veneer going up on a neighborhood nearby, and I think there
19 was a sign that said Calcedonia in one of those pictures. Do
20 you recall that series of pictures?

21 A Yes.

22 Q A couple of questions about that. First of all, were you
23 able to tell in those pictures whether those stone veneer
24 walls were missing the weep screeds at the base of the wall
25 like all the Rose Hill stone veneer walls?

1 A I could not tell.

2 MR. IMHOFF: Your Honor, objection. He's testifying,
3 Your Honor, and that was leading.

4 THE COURT: Overruled.

5 BY MR. LUCEY:

6 Q Secondly, are you aware that those walls have started
7 failing?

8 A I have no idea. I did not know that.

9 Q You didn't have any insight as to whether they were using
10 the same subcontractors that DR Horton used over there in
11 Calcedonia and the Stanley Martin neighborhood?

12 A I don't know if they were the same subcontractors or not.

13 Q Do you have any insight as to whether those neighborhoods
14 were actually copying what happened in Rose Hill?

15 A I don't know.

16 Q Let's go to Exhibit 25.34F, and we're going to start at
17 photo 55. I'm going to bring you a copy of the contact sheet,
18 sir, just in case you want to look at a photo in front of or
19 behind the one that I actually put on the screen. And this is
20 the June 1, 2020 Rhett Whitlock photos at 406 Rowley. Now
21 first, I want to use this photo as an exemplar for you to tell
22 the jury about what you mentioned in your testimony a couple
23 of hours ago about geolocating. Would you hit the properties
24 button and bring up the properties on this photograph? Can
25 you see that, sir? He's going to try and enlarge it for a

1 second, but can you see the properties there?

2 A Yes.

3 Q All right, can you go back up to the top? Tell the jury
4 what we're showing them with this property button on your
5 photograph 55 that we're looking at.

6 A That gives detailed information of the photograph, the
7 date and time, the resolution that the photograph was taken
8 at. It also has the coordinates -- the GPS coordinates of the
9 location.

10 Q Where would we find the GPS coordinates, please?

11 A They're down at the bottom. Sometimes it comes up as a
12 map, depending on the software you're using.

13 Q Okay, longitude and latitude?

14 A Yes.

15 Q So, how exact is the longitude and latitude?

16 A Within a couple meters.

17 Q Couple meters, and that would be within six feet or so?

18 A Yes.

19 Q A meter is a little over three feet?

20 A Yes.

21 Q So -- and is that information the jury just saw, the
22 date, the time, and the longitude and latitude, is that
23 transmitted to the defendants with every photograph you took?

24 A Yes.

25 Q So, literally they could see minute by minute where you

1 were located in Rose Hill?

2 A Yes.

3 Q What all the adjoining properties were?

4 A Yes.

5 Q Whether you standing at 80 -- was it 86 Duxbury where
6 there's ---

7 A I don't remember.

8 Q Eight -- number 8 Duxbury, whether you standing there
9 when you took the other pictures?

10 A Yes.

11 Q And then going back to the photo itself, photo 55,
12 please, you were asked about notes. What's that little white
13 placard over there in the corner of the photograph?

14 A Photo location.

15 Q Let's go to photo two so we can -- 52, so we can read it.
16 Okay, and tell us the information on here, please.

17 A It gives the address and the date, and that shows that
18 it's a second brick that I removed from there, and the
19 location is at the first course of weeps at ground level.

20 Q Now, let's go back to 55. And then, let's go into photo
21 59, please. What's that there, sir?

22 A It's the moisture content in the sheathing, just above
23 the flashing level.

24 Q And what's the significance, if any, of 16.8?

25 A It shows that it's slightly elevated above what it should

1 be.

2 Q And why do you say that?

3 A In this environment, without adding moisture to wood, it
4 should be in the 12 percent range. That's the equilibrium
5 moisture content that's approximate for this atmosphere.
6 Anything above that, particularly above 15 percent, indicates
7 that it's absorbing some moisture.

8 Q Now, let's go to 106 Berwick. We'll go to photo 89,
9 please. Let's go to the next photo with this window, photo
10 90. Tell the jury what the reading is on that moisture meter
11 on this windowsill, please.

12 A It's 31 percent.

13 Q What's the significance of that?

14 A It means that it's getting wet at that point, during the
15 spray test.

16 Q Go please to 17 Kettering, let's go to photo 147. And
17 let's go a close-up on that window at 158, please. What is
18 the moisture meter reading here?

19 A It's maxed out. It limits at 40. That's as high as it
20 will go. It's wet.

21 Q Let's go to two-seven -- excuse me, 207 Buxton, photo
22 345, please. And tell the jury where you're testing and what
23 the test result is.

24 A That is in the wood sheathing just below the window after
25 a brick was removed, and the moisture is very high at about 24

1 percent.

2 Q And let's go to photo 361, please. Let's back to 360
3 first, to show where you are. Okay, and then back to 361.

4 A That's a couple of brick courses below the windowsill in
5 the sheathing, and it's the lower 15 percent.

6 Q And going to photo 36 point -- excuse me, 390, please, at
7 314 Amesbury. And then to the photo 395. Can you read that
8 upside down?

9 A That's a little over 36 percent.

10 Q And how many inches back from the actual window product
11 itself is it?

12 A Approximately two inches.

13 Q And then photo 396, please.

14 A That's now at 40 percent wet.

15 Q And photo 507 at 5 Harwick, please. And then move to
16 512, please, same location.

17 A That reads 28 percent.

18 Q How much?

19 A Twenty-eight.

20 Q 28 percent moisture content?

21 A Yes.

22 Q And 514, please. What's that showing the jury?

23 A That's where the paint peeled off because of moisture
24 that came in during the spray.

25 Q 520, please.

- 1 A That's wet, darkened gypsum sheathing that I pulled off.
- 2 Q 521, please.
- 3 A That's the wet area below the gypsum.
- 4 Q 522, please.
- 5 A That's the appearance of the wood below the windowsill.
- 6 Q 523.
- 7 A Same location, just a different angle.
- 8 Q Now let's go to photo 628, please, at 203 Buxton. And
- 9 then to photo 633. Can you read the moisture content?
- 10 A Yeah, that's 23 and a half percent, and that was during
- 11 the spray test of that area.
- 12 Q And photo 635, please.
- 13 A Water was coming down from the top and wetting the side
- 14 of the window.
- 15 Q What is the moisture content on the reading?
- 16 A Thirty percent.
- 17 MR. LUCEY: And when we looked at 26.28, we stopped
- 18 halfway. I can see the 25.28, I want to finish that and we
- 19 will be at -- starting at 204 Marshfield, which would be at
- 20 5PF24.
- 21 MR. IMHOFF: Your Honor, may we approach?
- 22 THE COURT: Yes, sir.
- 23 [Whereupon a bench conference was held off the record.]
- 24 BY MR. LUCEY:
- 25 Q 25.32, please. We're going to take it from the

1 beginning. Sir, I'm going to go through the first ten homes.
2 I'll do ten pictures at a time to save time. Please -- log --
3 page for the ten pictures. I want to confirm these are your
4 window pictures as he goes through them, sir.
5 A Yes. Those are mine. Yes. Correct. Yes. Yes. Yes.
6 My pictures. They're all my pictures.
7 Q Next ten, Lawton. Stop. Go back one. Go back to the
8 yellow -- yes, that one, and then one before, please. At 311
9 Amesbury, and one forward, please.
10 A Correct.
11 Q What is that orange-brown discoloration that they're
12 seeing on the sill here?
13 A It's a stain. I don't know what the source of the color
14 is, something out of the window, probably.
15 Q Okay. And let's go to page 4 until you see the moisture
16 meter at 314 Amesbury, please, Lawton. Right there, can you
17 read that moisture meter?
18 A Forty.
19 Q And page forward to the next moisture meter, please,
20 Lawton. Back one, please. What is that? Is that reading
21 out?
22 A That's a different moisture meter, but it's also
23 indicating it's maxed out pretty high moisture.
24 Q Back up one photo, please, Lawton. Is that the area
25 you're testing?

- 1 A Yes.
- 2 Q And what is the black the jury sees on the wood on the --
- 3 underneath the sill?
- 4 A It's water staining the wood. Been wet for a while.
- 5 Q And Lawton, go forward, please, to 120 Berwick. Right
- 6 there. What are we seeing? What is the black stuff in the
- 7 corner of this window, sir?
- 8 A It's just some kind of growth coming through the crack in
- 9 the window.
- 10 Q Two photos forward, Lawton, please. What do we see here,
- 11 please?
- 12 A Similar substance.
- 13 Q One more to 130 Berwick.
- 14 A Same thing.
- 15 Q And forward to 200 Buxton, the second picture, please.
- 16 More of the same?
- 17 A Yes.
- 18 Q Forward, please, to 209 Buxton. What is -- what's the
- 19 distress that the jury sees in the windowsill here?
- 20 A Peeling paint.
- 21 Q Sir?
- 22 A Peeling paint.
- 23 Q And what about the next photo, Lawton, please.
- 24 A Peeling paint.
- 25 Q And next photo, Lawton, please. What are you pointing