

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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The Honorable Kristi Lea Harrington, Circuit Court Judge

S.C. Supreme Court

Case No. 201196386

Mark F. Teseniar and Nan M. Teseniar, on behalf of themselves and others similarly situated, and Twelve Oaks at Fenwick Property Owners Association, Inc.,
Respondents,

v.

Professional Plastering & Stucco, Inc., Maria Arias, and Miquel Roasles
Defendants,

Of whom, Professional Plastering & Stucco, Inc. is the Appellant.

Professional Plastering & Stucco, Inc., Appellant,

v.

Maria Ariasm, Miquel Roasles, and APS Enterprises Unlimited, Inc., Third-Party
Plaintiffs,

Of whom APS Unlimited, Inc. is Respondent.

**APPENDIX
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1 buildings. So it's a huge percentage, and
2 therefore that number is going to be the
3 largest number.

4 Q. And of that million-five number for that,
5 how much do you have allocated to the item
6 number three which is the repair of the Magna
7 Wall system?

8 A. For building type two, for one of those
9 buildings, the amount allocated for just line
10 item three, the stucco, the Magna Wall, is
11 \$428,976 dollars.

12 Q. So your estimate, does it also have
13 attached to it subcontractor -- reserves from
14 subcontractors?

15 A. Yes.

16 Q. And this is broken down with all this
17 backup by buildings type one, two, three and
18 four, the leasing center and the pool house?

19 A. It is, yes.

20 Q. And each one of those type buildings has
21 the type of backup that we just went through?

22 A. It does, yes.

23 Q. Mr. Gallagher, did I ask you to go
24 through your estimate and break out the items,
25 the cost items that would be allocable to just

1 the stucco repair alone -- not these other
2 items that were included in the \$15.7 Million
3 dollars, but just the stucco issue? Did I ask
4 you to do that?

5 A. Yes, sir.

6 Q. And is Plaintiff's Exhibit 14 reflective
7 of your work in terms of that compilation?

8 A. It is.

9 MR. Leath: Please admit this.

10 MS. MAHON: Same objection, Your
11 Honor.

12 THE COURT: And that is what
13 number?

14 MR. LEATH: Fourteen.

15 THE COURT: Plaintiff's 14 into
16 evidence over your objection. I'll allow you
17 to place that on the record later.

18 MS. MAHON: Thank you, Your Honor.

19 (SO ENTERED AS PLAINTIFF'S EXHIBIT 14)

20 DIRECT EXAMINATION CONTINUED

21 BY MR. LEATH:

22 Q. Do you have a copy of it?

23 A. I have one.

24 Q. Let's talk about what we did to get to
25 the stucco replacement numbers alone. First

1 of all, let's see how we did this. On the
2 left-hand column are the types of buildings,
3 the leasing center and the pool house.

4 A. That's correct.

5 Q. And do you have the quantities for each
6 one of those buildings?

7 A. I do. That's the next column.

8 Q. And what does the next column represent,
9 where it says items oh-one, oh-three, oh-
10 eight, oh-nine and eleven, stucco-related
11 scope?

12 A. Okay, what I did in order to come up with
13 just the work scope and the costs associated
14 with replacing the stucco system only, what I
15 did was I took all the six estimates, all six
16 spreadsheets, and I started going through them
17 line-for-line, picking out an item that
18 applied to just stucco.

19 So the very first item that we would go
20 to is item number one, such as mobilization.
21 You have to get -- you still need the
22 scaffolding in order to access the walls to
23 remove the stucco. So you have components out
24 of section one.

25 Then we have the next section, three,

1 that we just went through, the Magna Wall
2 system repair recommendation, found on page
3 fourteen of the Myles Glick report. All of
4 section three is included, because that
5 strictly applies to the stucco system.

6 Then we have some components of section
7 eight, which are the new sealants. Because
8 once the new stucco's installed you want to go
9 back and caulk all those areas.

10 You also have a section in nine that
11 apply to just stucco, things like -- some of
12 those remove-and-replace components. You
13 still need to remove them in order to take the
14 stucco off and put those back. So some
15 components of nine would apply.

16 And then section eleven, some of the
17 allowances still need to be included. And
18 as I told you earlier, I said when I did the
19 original estimates, I took my allowances and
20 I broke those out. And for stucco areas I'm
21 allowing so much sheathing replacement, so
22 much framing replacement, so much batt
23 insulation. And then for any siding areas I
24 broke out those quantities in a separate line
25 item in the allowances. So that allowed me to

1 go right back to my section eleven allowances
2 and pull out just those components related to
3 stucco. So then -- then that completes what
4 falls into that first column, under stucco-
5 related scope items.

6 Q. What is item eleven related to? How did
7 you come up with that and what does that
8 represent?

9 A. Okay, 11.2 represents the interior
10 damages, the allowance to go in and fix the
11 interiors. So what I did was, I went through
12 section 11.2 which identifies my allowances
13 for all interior repairs and I took components
14 of that. I actually only used about half the
15 value of that total line item in section 11.2.
16 I took fifty percent of that value. So I
17 didn't try to apply all the repair costs that
18 I had in my estimate to this spreadsheet. I
19 only took a percentage of it, because we're
20 not talking about all the areas. We're only
21 talking about the stucco areas.

22 Q. What's item twelve?

23 A. Item twelve is also -- it's the mold
24 remediation component. Again, I have a total,
25 for example, in here for building type two --

1 I have a total in here for \$42,825 in here
2 dealing with the entire work scope. But when
3 you break it down and you just start looking
4 at the stucco areas, I reduced that number in
5 half, and that's how I got the \$18,405
6 dollars. So I'm not trying to take the total
7 cost estimate and apply it to the stucco
8 repair. I'm taking half of that value.

9 Q. And item thirteen -- and I need to just
10 make sure I make it clear -- these items that
11 we're going over are the same items that we
12 just went through, the same numbers in your
13 backup estimates for a building.

14 A. That's correct.

15 Q. So item thirteen of course handles
16 general conditions.

17 A. Yes.

18 Q. And how did you handle that?

19 A. I took all the general conditions for the
20 entire work scope as outline by Mr. Glick and
21 I went through and I took out a lot of the
22 components that don't apply to stucco. And
23 that was roughly -- so I used about fifty
24 percent, about half of those general
25 conditions. And I listed that in that next

1 column.

2 Q. What's item number fourteen?

3 A. Item number fourteen are the fee
4 structures that we talked about earlier, that
5 is the contractor's operation and overhead,
6 the contractor's profit, contingency, the
7 architectural and engineering fees. And,
8 actually, if you take and add up the first
9 four columns, that number of \$251,000 is based
10 on a mark-up on the first four columns, when
11 you add those together. And then that gives
12 us the total for that type building, over in
13 the far right-hand column, to just address the
14 stucco areas.

15 Q. And did you just take a percentage of
16 that? It says forty percent.

17 A. Well, that was the fee section.

18 Q. Okay.

19 A. What I did was I added up the first four
20 columns and then added forty percent for the
21 fees that are outlined in the spreadsheet.

22 Q. Oh, I see. Essentially, the standard-
23 type fees that you would have in the other ---

24 A. Yes, we reduced all costs in the other
25 columns to just apply to the stucco. And then

1 I added the same fee structure, because we
2 reduced all the other components.

3 Q. And so each line item going across here
4 represents a type of building?

5 A. Yes, you have type one, type two, three,
6 four, the leasing center and the pool house,
7 and you have that spreadsheet.

8 Q. And the type seven is the largest number
9 because there are seven of those buildings?

10 A. Yes, the type two building.

11 Q. Excuse me, type two.

12 A. There are seven of those. So, yes,
13 that's the largest number. You're talking
14 about seven of that same type of building.

15 Q. So what is your total number for just
16 stucco-related repairs, putting all those
17 elements together that are necessary?

18 A. \$8,761,443 dollars.

19 Q. Just a few more questions, Mr. Gallagher.
20 One second. Now, in doing a repair estimate
21 like this, specialty requirements regarding
22 the stucco, is it important to make sure you
23 get the right measurements and the right
24 amount of stucco, the right amount of windows
25 and those kinds of things?

1 A. Yes, you need to be very accurate when it
2 comes to quantifying everything that's there
3 so that your estimate is accurate and you're
4 not missing quantities.

5 Q. Is it also important to get the right
6 number of buildings?

7 A. Yes.

8 Q. Is it also important to get the right
9 number of windows?

10 A. Yes, sir.

11 Q. And how about with regard to removal and
12 replacement of windows and doors,
13 specifically? Is it important to get that
14 right?

15 A. Yes, I mean, that's another critical area
16 when it comes to water intrusion and the
17 building envelope.

18 Q. And if your estimate of square footage
19 for repair and replacement -- excuse me,
20 replacement of the stucco system is low, will
21 that make your estimate low?

22 A. Well, certainly.

23 Q. And do you need to have architectural and
24 engineering fees included in a project of this
25 magnitude?

1 A. Yes, because, first and foremost, you're
2 not going to walk down to the building
3 department and say I want to pull the building
4 permit to do eight million dollars worth of
5 repair if it's over twelve million. They're
6 not going to allow you to do that. You've got
7 to have some level of documentation produced
8 by an architect or an engineer and plans and
9 specifications that you submit to the building
10 department for review before they'll even
11 consider issuing a building permit.

12 Q. I want to just ask you about this job.
13 Is this a large project?

14 A. Yes, sir.

15 Q. And in terms of displacement of folks in
16 the project, could you comment on whether or
17 not that is likely to happen?

18 MS. MAHON: Objection, Your Honor.
19 May we approach?

20 THE COURT: Yes.

21 (OFF RECORD BENCH CONFERENCE)

22 THE COURT: Thank you. Rephrase
23 your question.

24 MR. LEATH: Thank you, Your Honor.

25 DIRECT EXAMINATION CONTINUED

1 BY MR. LEATH:

2 Q. Mr. Gallagher, what I want to know and
3 what I'm trying to get at is what is the
4 magnitude of this project and what is the
5 impact of it in terms of having to remove
6 things like electrical from the units and
7 having to deal with issues?

8 A. This is a very large project. There's a
9 quarter of a million square feet of stucco
10 which represents about eighty-three or eighty-
11 four of the exterior of stucco on the combined
12 buildings. And when you -- the biggest
13 concern is safety if you have tenants in the
14 buildings. And you set scaffolding up around
15 these buildings and you start cutting stuff
16 and you start removing things and you start
17 taking windows out and dealing with the other
18 problems that have been identified in these
19 buildings, in my opinion, based on the history
20 of projects that I've done, the owners need to
21 move out of the building. Number one, there's
22 going to be some code issues that come into
23 play that would require them to move out of
24 the building. Part of the wall system is
25 behind the electric panel service on the

1 outside. And those panels need to be
2 temporarily disconnected from the building,
3 power shut off and the panels temporarily
4 taken off the side of the building so that the
5 work can be done and performed behind the
6 panel. Then the panels go back up after the
7 new wall has been installed. Because that
8 power's shut down, the county's going to make
9 the individuals leave the building. They're
10 not going to be allowed to stay in the
11 building.

12 But aside from that aspect, again,
13 there's safety concerns. You've got this much
14 work going on in this confined space and
15 you're doing this much removal and replacement
16 and construction going on, you've got all this
17 improvement equipment, it's not a safe area
18 for people to stay in.

19 Q. Mr. Gallagher, thank you. I think we're
20 finished with the direct. I appreciate it.

21 MR. ANDERSON: Your Honor, if we
22 may use a pointer.

23 THE COURT: You may.

24 CROSS EXAMINATION

25 BY MS. MAHON:

1 Q. Good morning, Mr. Gallagher. The budget
2 that you have prepared, that is not a
3 competitive bid, is it?

4 A. It's a competitive bid in the sense that
5 I went to subcontractors that do a lot of work
6 for me, and they looked at the scope and the
7 documents and they came back with these
8 estimates.

9 Q. Mr. Gallagher, the one that you prepared
10 called a profile, a profile for that -- you
11 called this -- you call it in your cover
12 letter a "preliminary budget." Is that
13 correct?

14 A. That's correct.

15 Q. And is it a preliminary budget that you
16 prepare for the owners?

17 A. That's correct, because it's not based on
18 the final plans and specifications.

19 Q. And in order -- and you've testified in
20 the past. And in order for this to be a
21 competitive bid, you would need to have --
22 you would have to have a design professional
23 retained, correct?

24 A. Yes.

25 Q. And then you would need to have bidders

1 pre-qualified for a competitive bid?

2 A. That's correct.

3 Q. And you would need to have the scope
4 lookout and the designer make specifications
5 to design and do plans, correct?

6 A. Yes, to identify the types of windows and
7 things that the designer wants to use in the
8 project. It identifies, you know, very
9 specific things about the construction.

10 Q. And once all those other things have been
11 done, once those are done, then you would
12 prepare a bid under those circumstances?

13 A. In a bid situation, yes, that's typically
14 how it's done.

15 Q. In this case no one has done the design
16 yet for the repairs on these buildings,
17 correct?

18 A. No, there's been no design work done.

19 Q. And there's been no plans prepared for
20 the repair of these buildings, has there?

21 A. No, but there's a very detailed scope
22 prepared, outlined and discussed by Mr. Glick.

23 Q. But before you could actually have a
24 competitive bid situation, though, you would
25 actually have to have plans and specifications

1 prepared by a design professional, correct?

2 A. That's preferred, yes.

3 Q. And you do not have that in this case, do
4 you?

5 A. Correct.

6 Q. And no one has done a pre-qualification
7 on the bidders, have they?

8 A. No.

9 Q. Now, you previously testified in your
10 deposition that the preliminary budget that
11 you prepared, you were not prepared to sign a
12 contract at this point with the homeowners
13 based on what you've done to this point,
14 correct?

15 A. That's correct, because, again, you need
16 a few more specifics about that work scope
17 than Mr. Glick has outlined.

18 Q. And to be more specific, once again, you
19 need a design professional involved, correct?

20 A. Yes, like Mr. Glick.

21 Q. You'd need Mr. Glick or whomever to
22 prepare the specifications for the project.
23 Is that correct?

24 A. Yes.

25 Q. And they would to actually prepare plans

1 for the project, correct?

2 A. Yes. The county would require that, yes.

3 Q. Now, in your budget that you prepared you

4 used a subcontractor by the name of Sunbeam

5 Stucco Replacement. Is that correct?

6 A. That's correct.

7 Q. Now, you did not obtain bids or estimates

8 from any other stucco applicators for this

9 budget, did you?

10 A. No.

11 Q. And if you were actually competitively

12 bidding this project, you would put that hard

13 coat stucco out to bid with the plans and

14 specifications and the applicators would use

15 that, correct?

16 A. Yes, Sunbeam Stucco has done several

17 projects for our company in the past very

18 similar to this application. So when I got

19 the work scope from Mr. Glick and we had the

20 plan sheets, Rob who owns Sunbeam Stucco, was

21 kind enough to come by the office, go through

22 the plan sheets and draw up a cost estimate

23 for the purpose of my estimate.

24 Q. And those plan sheets, though, were not

25 the plan sheets that would be used in bidding,

1 correct?

2 A. They would be reasonably correct.

3 Q. Yes, sir, but they would not be plans and
4 specifications that you would need to actually
5 have to bid and that Sunbeam would actually
6 have to bid the project, correct?

7 A. Well, the original plan sheets outline
8 the buildings. I mean, they show exactly
9 what's there, where the stucco walls were
10 located, where the siding was locate, where
11 the windows were located. I walked though the
12 buildings with those plan sheets. The plan
13 sheets are accurate from a dimensions stand-
14 point. So we were able to obtain that type of
15 information for it to have the quantities.

16 Q. Yes, sir, I understand that. You had the
17 correct quantities in order to do the budget.
18 But if you actually wanted to competitively
19 bid this project against other contractors,
20 you would need the plans, the specifications
21 which you would, in turn, give to your
22 subcontractors who would, in turn, give you an
23 actual bid, correct?

24 A. Yes.

25 Q. This is not the first project that you've

1 been involved in with Mr. Glick, is it?

2 A. Correct.

3 Q. And you've been involved with several
4 projects with Mr. Glick, correct?

5 A. I have.

6 Q. Except for one, every time that you've
7 worked with Mr. Glick has been in a litigation
8 context, like we're here today, correct?

9 A. Yes.

10 Q. And you've worked with the attorneys who
11 are present here in the past, correct?

12 A. I have.

13 Q. And I'm talking about the plaintiffs'
14 attorneys. You've worked with them in the
15 past, correct?

16 A. I have.

17 Q. And on more than one occasion, correct?

18 A. That's correct.

19 Q. And in this case you are being paid by
20 the hour?

21 A. I am.

22 Q. And it's the attorneys that you're
23 submitting your bills to, correct?

24 A. Yes.

25 Q. Now, I believe you testified in the past

1 that the largest project that you've ever done
2 in South Carolina has been five million
3 dollars. Is that correct?

4 A. That's correct.

5 Q. And you've never done a repair project in
6 Charleston County before, have you?

7 A. No, I haven't.

8 Q. Repair in a litigation project in South
9 Carolina?

10 A. I've done repair projects in Charleston,
11 but I've not done a litigation project in
12 Charleston.

13 Q. Like the one we're about here today. You
14 haven't done a litigation repair project in
15 Charleston County?

16 A. That's correct.

17 Q. Now, looking at your budget -- in your
18 budget, which you went over for us, you have
19 a section in there for a ten percent
20 contractor's operation and overhead, correct?

21 A. I do.

22 Q. And that ten percent is on top of your
23 entire total, correct?

24 A. That's correct.

25 Q. Now, that contractor's operation and

1 overhead, that's where you've got your
2 telephone?

3 A. Well, I think it's much more than that.
4 That operation and overhead expense, that ten
5 percent that you, typically, in our industry,
6 put on top of the cost of the project. When
7 you develop a process you try to figure out
8 what is it going to physically cost to have
9 people, personnel and equipment on the site to
10 do that work scope. That includes people like
11 supervisors and trucks, cell phones. We have
12 a site office at that construction site.
13 That's where all that cost is.

14 Q. Yes, sir. May I just stop you, I'm
15 sorry, real quick there? You said for your
16 office. If you look at one-point-two, you've
17 got a separate line item for your office,
18 correct?

19 A. I think you're jumping ahead a little
20 bit. Because that's the job-related office.

21 Q. Okay.

22 A. That's a field office that's on site for
23 the superintendent.

24 Q. And you have a separate line item for the
25 truck that's going to be used there.

1 A. Again, I'm trying to identify job-related
2 expenses, things that are directly attributed
3 to you being on that site working. Let's go
4 back to the overhead number. That overhead
5 number is called operation and overhead and
6 it's a ten percent fee. That is for every-
7 thing back at the corporate office. That's
8 my salary, the project manager's salary who's
9 assigned to oversee the project from an
10 administrative standpoint. That's the
11 salaries of the accounting personnel, the
12 controller, the cost of the building that you
13 rent or lease, my electric bills. That also
14 includes my general liability expense.
15 There's no line items in this estimate for
16 insurance. It also includes my completed,
17 operations insurance cost. So there's a lot
18 in that operation and overhead ten percent fee
19 that's being paid for back at the corporate
20 office. And ten percent is a standard rate in
21 our industry.

22 Q. Now, the ten percent for that, the
23 contractor's fee and operation, those are
24 expenses that you as a company incur no matter
25 what, correct?

1 A. That's correct.

2 Q. So, like you said, it's for your
3 electricity back at your office that you're
4 going to incur no matter what, if you do this
5 project or not, correct?

6 A. That and much more.

7 Q. Okay. And it enclosed your e-mail, your
8 fax, your telephone -- it's all the things you
9 will incur, ProCon, no matter whether you get
10 this job or not, correct?

11 A. Yes, my salary, the project manager's
12 salary. Those are big-ticket items.

13 Q. Okay. Talking about the project
14 manager's salary, you actually had a second
15 line item, though, also in your estimate, do
16 you not, by every one of these buildings for a
17 project supervisor -- if you look at 13.8, and
18 an assistant supervisor. You have already
19 delineated on your estimate, correct?

20 A. Yes, those are job-related expenses.
21 Those personnel are assigned to the job site
22 fulltime. They literally live on that job
23 site during the construction process.

24 Q. You have a separate line item for those.
25 And then you have -- also you've got expenses

1 that you incur and you make for other
2 superintendents that you pay for out of your
3 overhead and operations, correct?

4 A. In our industry there's typically a
5 project manager level ---

6 Q. I'm sorry. Could you just answer yes or
7 no on that, and then you can explain all you
8 want. The operation and overhead is for
9 things like your salary, your office back in
10 Myrtle Beach that you incur anyway, correct?

11 A. Correct.

12 Q. Now, on top of the ten percent that you
13 have on your overhead and on top of every one
14 of your line items -- correct?

15 A. Correct.

16 Q. And once you've added that together, then
17 you add in your ten percent of profit,
18 correct?

19 A. That's correct.

20 Q. So out of every hundred dollars that you
21 make, ten percent of that would go -- ten
22 dollars goes into your pocket. Is that
23 correct?

24 A. Not necessarily. And here's why. When
25 you have a small business and if you're doing

1 twenty projects, let's say, you're taking that
2 overhead back to the office and you're
3 spreading it between all of those jobs. But
4 if you've only got job going on or two jobs
5 going on, then those two jobs are supporting
6 all of that overhead back at the office. So,
7 in reality, what's going to happen is your ten
8 percent overhead factor that I put typically
9 put into a cost estimate can sometimes be as
10 much as twenty percent if we don't have a lot
11 of work going on. So these are averages
12 within our industry that over many years,
13 we've gathered the documentation and the
14 information to do the accounting to understand
15 that if you've got more jobs, you're spreading
16 the overhead. If you're not, then, really,
17 you're incurring more than ten percent
18 overhead on a single job.

19 Q. This ten percent, though, that you have
20 in your budget, that is for profit, right?

21 A. It is.

22 Q. And so included on top -- once you add
23 the ten percent on top, then you add another
24 ten percent on top of that for profit,
25 correct?

1 A. Yes.

2 Q. So let's say, hypothetically, that it's a
3 hundred dollars. If you calculate ten percent
4 for your overhead and profit, so you're up to
5 a hundred and ten dollars.

6 A. That's correct.

7 Q. And then if you add ten percent on top of
8 that, you actually are up to a hundred twenty-
9 one, because you're got twenty-one dollars as
10 opposed to twenty percent, correct, because
11 you're compounding.

12 A. Yes.

13 Q. And in your estimate you have compounded
14 the overhead -- and by "compound," I'm talking
15 about the profit, correct?

16 A. Yes, that's how we always do it.

17 Q. And that goes for every one of your line
18 items on your entire \$15.8 Million dollar
19 estimate. Every one of the line items would
20 have a compounded -- ten percent and
21 compounded ten percent again; correct?

22 A. No, compounding only occurs when you get
23 to the percentage of fees.

24 Q. To get a total amount you add up all your
25 line items from the beginning, from one-point-

1 zero all the way up to thirteen. You go all
2 the way through thirteen to get a total.
3 A. Yes, those are hard costs. Those numbers
4 ---
5 Q. I'm sorry. Could you answer yes or no
6 and then you can ---
7 A. Yes.
8 Q. And then on top of what you get as a
9 total, you add ten percent for your overhead
10 and profit and get a number. And you take ten
11 percent again of that, correct?
12 A. That's correct.
13 Q. Now, you have a bidder in here by the
14 name of Rhino. Rhino is actually a company in
15 which you are a majority owner, correct?
16 A. That's correct.
17 Q. And for Rhino you have listed them as a
18 subcontractor, correct?
19 A. That's correct.
20 Q. Now, on top of the Rhino line item, you
21 would have added your ten percent overhead and
22 profit in your -- excuse me, your ten percent
23 overhead and operations and then your ten
24 percent profit, correct?
25 A. Yes. And like I say, items one through

1 thirteen are hard costs. There's no markup in
2 line items one through thirteen. There's no
3 markup put in there for me. Those are
4 subcontractor bids or vendor bids. Those are
5 the estimates that they come to me with.
6 Those are their actual numbers that they would
7 typically perform that service for. Then,
8 once we get to that total, that's when we
9 start putting on the fees that you're
10 referring to.

11 Q. And Rhino, which is your company, which
12 you have put into this estimate to perform
13 work, they then -- you, as ProCon, would then
14 get ten percent off the top of what Rhino's
15 making and ten percent again on the overhead
16 profit, correct?

17 A. That's pretty standard in our industry,
18 yes.

19 Q. Now, Rhino is also -- not only do you
20 have them on the large scope for any
21 remediation, you also have them for the
22 removal of the stucco, correct?

23 A. Yes, Rhino is a select demolition and
24 environmental company.

25 Q. Rhino also is going to do that temporary

1 protection of the building that's up for a
2 short amount of time before you put the stucco
3 up. Rhino's going to do that scope of work
4 also.

5 A. Yes, as a natural sequence in events.

6 Q. And on top of that work that Rhino does
7 in your estimate, your budget here, you would
8 allow your ten percent operations and overhead
9 and your ten percent factor?

10 A. Yes.

11 Q. Now, as we briefly discussed before, line
12 13.8 of your budget, you have a line item for
13 the salary and the benefits of the project
14 supervisor, correct?

15 A. That's correct.

16 Q. And then you would add the ten and ten
17 onto that, too, correct?

18 A. Yes.

19 Q. And then you also have a line item -- and
20 that -- let me stop for a second. That
21 project supervisor, you have a line item for
22 the salary and benefits of the project
23 supervisor for each and every one of the
24 buildings out there, correct?

25 A. That's correct. If you take a look at

1 the total project duration of eighteen months,
2 and if you look at those two line items and
3 add all those quantities up, they do not
4 exceed eighteen months. I am sure that the
5 salary line items for the project supervisor
6 and the assistant supervisor did not exceed
7 eighteen months.

8 Q. Tell me about that. Looking at 13.8,
9 your project supervisor, the line item for one
10 building is \$12,000 dollars, correct?

11 A. Yes.

12 Q. And then you would multiply that times --
13 just for building type two, you would multiply
14 that times seven. So it would be \$84,000
15 dollars, correct?

16 A. Yes.

17 Q. And that's only for one type of building,
18 correct?

19 A. Well, that's seven buildings, correct.

20 Q. Yes, sir, of one type.

21 A. (Affirmative nod).

22 Q. That's one type of building, \$84,000
23 dollars, correct? Now, looking under the one
24 underneath it and you've got an assistant
25 supervisor who you have listed as \$10,500

1 dollars, correct?

2 A. Yes.

3 Q. And that's for one building of one type,
4 correct?

5 A. Well ---

6 Q. Yes or no, Mr. Gallagher? That's for one
7 building of one type?

8 A. Yes. Yes, that's for one building,
9 correct.

10 Q. Yes, sir. And then that would be
11 included in every one of your types for every
12 one of the buildings out there, correct? And
13 you can look at your budget, if you like.
14 He's listed on every one.

15 A. Yes, because the intent of this estimate
16 was to identify the cost per building, which
17 is all-inclusive. That one building can't be
18 done without a supervisor that's overseeing
19 the work that's being done. So the intent of
20 the estimate was to give everyone a breakdown
21 of each building and all the expenses related
22 to do one building.

23 Q. And I believe you testified before that
24 you would not be doing those one-building-at-
25 a-time solely. Your intention as ProCon would

1 be to working on several buildings at a time,
2 as many as you could.

3 A. That has not been determined yet. But
4 the estimate is set up to work on two
5 buildings at a time.

6 Q. Now, you also put it in your budget -- if
7 you look at line 13.15, you have a job site
8 pickup truck for every one of those, correct,
9 a line item for that?

10 A. Well, I have been there for a duration of
11 one-point-five months.

12 Q. For every building out there, correct?

13 A. Yes.

14 Q. Now, once you then calculate your base
15 amount and then your ten percent overhead and
16 operations and then your ten percent profit,
17 you have a ten percent contingency on top of
18 that, correct?

19 A. That's correct.

20 Q. And that's calculated once you've done
21 all the other stuff, correct?

22 A. Yes.

23 Q. So you're going to add that on top of
24 your ten, your ten and you get to your other
25 ten, correct? Yes or no?

1 A. Yes.

2 Q. Now, I just want to make sure I under-
3 stand what a contingency is. A contingency
4 is for something unknown and unforeseen?

5 A. Yes. And I'd like to point out that this
6 budget includes a contingency. It's
7 structured the way that you've described it.
8 But a contingency typically sits outside of my
9 contract. It's not part of my contract. That
10 amount of money is a recommended amount that I
11 recommend to the owners that they set aside as
12 a contingency. Because, as I described
13 earlier, when you do renovation work there's
14 no way anybody in this world can tell you all
15 the conditions or all the problems that you're
16 going to encounter once you start the work.
17 There's just no way physically to identify
18 every problem that you're going to run into.

19 Q. Now, ---

20 A. That contingency is a recommended amount
21 that the owner should carry outside of this
22 contract. It's part of the problem. It's
23 part of the estimate, because it needs to be
24 included.

25 Q. And it's part of your budget, right?

1 A. Yes.

2 Q. Okay. Now, for the Magna Wall, I believe
3 you testified the stucco system that's on
4 there, you're going to remove every square
5 inch of that stucco, correct?

6 A. Yes.

7 Q. Now, on top of that removal of every
8 square inch, a hundred percent of the Magna
9 Wall is going to be removed or replaced, you
10 have a ten percent contingency on top of that,
11 correct?

12 A. In addition, yes.

13 Q. There's your line item for Magna Wall,
14 and you're removing a hundred percent,
15 correct?

16 A. That's correct.

17 Q. And on that particular line item there
18 would still be a ten percent contingency,
19 correct? Yes or no?

20 A. No, it's a ten percent contingency on the
21 total work scope.

22 Q. Yes, sir, I mean your total scope. And
23 included within that total work scope,
24 according to the budget that you prepared,
25 you're going to remove a hundred percent of

1 the stucco, correct?

2 A. Yes.

3 Q. And you're going to remove a hundred
4 percent of the siding, correct?

5 A. Yes.

6 Q. You're going to remove a hundred percent
7 of the building paper?

8 A. Yes.

9 Q. You're going to remove a hundred percent
10 of the lightweight concrete on those decks and
11 on the balconies, correct?

12 A. I'm working from Mr. Glick's scope.

13 Q. Yes, sir. But it's a hundred percent,
14 right?

15 A. Yes.

16 Q. But then on top of a hundred percent that
17 you're removing in every single one of those
18 categories, you still have a ten percent
19 contingency on that? Yes or no?

20 A. Yes, because I can't see inside the
21 walls.

22 Q. You've got a contingency for that,
23 though, too, right?

24 A. I have some allowances for what it might
25 be, but I have a contingency because nobody

1 knows. We just don't know what's inside the
2 wall.

3 Q. Yes, sir. I understand you have a
4 contingency and an allowance and you've got
5 that. But included within your budget you are
6 adding another ten percent for a contingency
7 even though those things will be taken
8 completely off, correct?

9 A. I think you're confusing ---

10 Q. No, sir, I don't believe so. What I'm
11 asking you is this. You're removing ---

12 MR. LEATH: Objection.

13 THE COURT: What's the objection?
14 Counsel approach.

15 (OFF RECORD BENCH CONFERENCE)

16 THE COURT: Thank you.

17 CROSS EXAMINATION CONTINUED

18 BY MS. MAHON:

19 Q. My question was, Mr. Gallagher -- I just
20 want to make sure I understand. Even for all
21 of the areas that you're removing a hundred
22 percent, you have a ten percent contingency on
23 top of those; correct?

24 A. Yes, ma'am.

25 Q. Now, the stucco would have to be removed

1 in order to address the replacement of the
2 windows, correct?

3 A. Yes.

4 Q. And the stucco would have to be removed
5 for replacement of the building sheathing and
6 the studs, correct?

7 A. That's correct.

8 Q. And that's regardless of a stucco issue
9 itself. You would recommend removal of the
10 stucco to get to any alleged issues with the
11 windows and pull those windows to do repair,
12 correct?

13 A. That's correct.

14 Q. You remember when we took your
15 deposition?

16 A. Yes.

17 Q. I just want to talk to you briefly about
18 that. You delineated forty-three of the
19 budget that you prepared in that other
20 litigation. Do you remember that?

21 A. Yes, ma'am.

22 Q. And you remember the testimony that with
23 Tellum (phonetic) you got a bid that was much
24 smaller. It was a much smaller contract than
25 what you've proposed here, correct?

1 A. I believe we addressed that, yes.

2 Q. And that number sounds correct to you,
3 approximately?

4 A. Approximately.

5 Q. You bid but you didn't get the award,
6 correct?

7 A. That's correct.

8 Q. And twenty-six of those you were never
9 even asked to bid on, correct?

10 A. That's correct.

11 Q. Thank you, Mr. Gallagher.

12 MS. MAHON: Just one minute, Your
13 Honor.

14 CROSS EXAMINATION CONTINUED

15 BY MS. MAHON:

16 Q. Mr. Gallagher, what is your hourly rate
17 for the work you've done in this case?

18 A. \$125 an hour.

19 Q. And how much have you been paid to date?

20 A. I would have to check with the office.

21 Q. Do you have an estimate?

22 A. No, ma'am, I'd have to check with the
23 accounting department.

24 Q. Do you at least admit to one bill I saw
25 for \$16,000 dollars? Do you remember that

1 bill?

2 A. Yes, I remember that one.

3 Q. And there would have been additional
4 bills?

5 A. Yes, just for my time preparing for
6 trial.

7 Q. In concluding, the budget that we talked
8 about, you would not sign a contract on that.
9 You would need additional things, correct?

10 A. There are some specific things that are
11 needed, yes.

12 Q. Thank you, Mr. Gallagher. I do
13 appreciate your time.

14 MS. MAHON: Thank you, Your Honor.

15 THE COURT: Mr. Leath?

16 MR. LEATH: I don't think so, Your
17 Honor.

18 THE COURT: All right. Mr.
19 Gallagher, you may step down. Thank you.

20 MR. LEATH: May he be excused, Your
21 Honor?

22 THE COURT: Any objection?

23 MS. MAHON: No, Your Honor.

24 THE COURT: And you are excused.

25 Actually, Mr. Gallagher, I'm releasing the

1 jury. So if you'll sit right there.

2 THE COURT: Ladies and gentlemen,
3 we're reached an appropriate time for us to
4 take our lunch break. Do not bring your
5 deliberations. Do not discuss this case
6 amongst yourselves. Please do not do any
7 independent investigation. Please be back in
8 your jury room at 1:45. Thank you. You are
9 excused.

10 (JURY OUT)

11 (WITNESS STEPS DOWN)

12 THE COURT: Thank you. Be seated.
13 We'll put any objections on the record after
14 lunch. Thank you. Y'all have a nice lunch.
15 1:45.

16 (LUNCH RECESS)

17 MR. ANDERSON: Your Honor, we had
18 objected to some exhibits.

19 THE COURT: Okay.

20 MR. ANDERSON: Your Honor, we
21 made an objection to Exhibits 14 and 15
22 presented by the plaintiffs. And the basis
23 for those objections was ---

24 THE COURT: Can you speak up just a
25 little bit?

1 MR. ANDERSON: I'm sorry. The
2 basis for those objections were that the
3 damages were speculative in both of those and
4 there had not been a proper foundation with
5 respect to those.

6 THE COURT: Thank you. Who's your
7 next witness?

8 MR. LUCEY: Myles Glick.

9 THE COURT: Mr. Glick? All right.
10 You can go ahead and take your seat.

11 MR. LUCEY: We were in Mr.
12 Anderson's cross examination, so I guess
13 technically I should call him back to the
14 stand.

15 THE COURT: I will call Mr. Glick.
16 Thank you. Mr. Glick, I'm not going to place
17 you under oath again. I remind you that
18 you're still under oath from Monday. You may
19 have a seat. Let's go ahead and bring in the
20 jury.

21 (JURY IN @ 1:45 P.M.)

22 THE COURT: Mr. Anderson, you may
23 resume your cross of Mr. Glick.

24 MR. ANDERSON: Thank you, Your
25 Honor.

1 THE COURT: Thank you.

2 MYLES GLICK, continued under his
3 oath and testified, as follows:

4 CROSS EXAMINATION CONTINUED

5 BY MR. ANDERSON:

6 Q. Good afternoon, Mr. Glick. How are you?

7 A. Fine. How are you?

8 Q. I'm great. Thank you. You are
9 testifying as an architect on behalf of
10 Fenwick Homeowners Association. Is that
11 correct?

12 A. Yes, sir.

13 Q. Do you have a contract with the home-
14 owners association or are you working for the
15 attorneys?

16 A. I don't have any written contract to work
17 on behalf of the homeowners association. I've
18 been sending my bills to the attorneys. I'm
19 not exactly where the money comes from.

20 Q. Who initially contacted you?

21 A. Mr. Chakeris.

22 Q. Your billings and so forth on this case,
23 are they under the name of Glick Boehm? Am I
24 pronouncing that correctly?

25 A. It's under Myles Glick, Architect.

1 Q. So it's not through the other company?

2 A. Yes, sir. It's my company, an
3 architectural firm.

4 Q. Now, how is your pay calculated? Hourly?

5 A. Excuse me?

6 Q. What is your contract with the HOA or the
7 attorneys? Are you paid on an hourly basis or
8 how are you paid?

9 A. It varies. The field investigation and
10 the report was a set number.

11 Q. What was that?

12 A. I don't recall what that number was.

13 Q. If I were contracting with you today,
14 would you be able to give me a price?

15 A. On what project?

16 Q. On this project.

17 A. Probably in the \$25,000 dollar range.

18 Q. All right. And for your testimony --
19 you've had your deposition taken a couple of
20 times. That was two days or three days of
21 depositions. How were you charging for that
22 time?

23 A. That's based on an hourly basis. So it's
24 a combination of a fixed fee and hourly rates.

25 Q. And what is your hourly rate?

1 A. \$325 dollars per hour.

2 Q. How much time have you billed to date?

3 A. I don't recall. Probably in the
4 neighborhood of about thirty thousand. It was
5 for the report and then some preparation for
6 the depositions.

7 Q. And does that include your preparation
8 for testimony today and on Monday?

9 A. No, it doesn't.

10 Q. So that will be coming?

11 A. Yes, sir. I have not billed that yet.

12 Q. In your initial testimony you told us
13 about how the walls are assembled. Can you
14 describe for the jury one more time what the
15 layering of a stucco wall is in this project?

16 A. In this project?

17 Q. At this project, yes.

18 A. Well, you have your studs. Then have you
19 have your building sheathing. Then you have
20 your water-management layer which is, in the
21 case of the stucco, the paper-backed felt,
22 lath, rather -- paper-backed lath which is the
23 metal I showed you. Then you have your stucco
24 system which should be about three-eighths to a
25 half inch thick.

1 Q. And on this particular project, though,
2 after you put the sheathing -- is it OSB or is
3 it plywood?

4 A. I think it's a combination of both.

5 Q. So you're saying both OSB and plywood are
6 on that?

7 A. I think I did say that, yes.

8 Q. On top of the OSB and the plywood is
9 there not a layer of Tyvek or Tyvek-similar
10 material as a building wrap?

11 A. There's also Tyvek instead of felt in
12 some cases, yes. That's also a water-
13 management material.

14 Q. So you've got the water management that's
15 over the wood sheathing on top of the studs.
16 And that is throughout the entire project. Is
17 that not correct?

18 A. Yes, sir, it's on all the buildings that
19 I investigated.

20 Q. So, now, underneath -- if I cut open the
21 wall at, say, the HardiPlank seen in the
22 pictures, the siding that we talked about
23 earlier or that you talked about earlier --
24 I'm going to find just the Tyvek underneath
25 that, am I not?

1 A. Yes.

2 Q. And that serves as the water-management
3 plain for the HardiPlank?

4 A. Yes, sir.

5 Q. And then with the stucco you have the
6 paper-backed lath, which you've described in
7 detail and were kind enough to show us an
8 example of. And that is outside the Tyvek?

9 A. Well, when you've got a paper-backed lath
10 there was no Tyvek. So it was either one or
11 the other.

12 Q. You didn't find any Tyvek under the
13 paper-backed lath?

14 A. Not that I can recall. I'd have to look
15 at the pictures again. I did find Tyvek under
16 the stucco.

17 Q. All right. You found Tyvek under the
18 stucco?

19 A. Yes, sir.

20 Q. So what was the stucco held on with?

21 A. The stucco was held on with a lath. It
22 just wasn't paper-backed lath. It was just
23 lath.

24 Q. I see. And where you had paper-backed
25 lath did you also have the Tyvek?

1 A. Not that I can recall. I'd have to look
2 at all the pictures.

3 Q. Mr. Glick, I'm going to hand you what is
4 marked as page twenty-eight of section three
5 of your destructive testing of October 25,
6 2008. Is there not evidence in that picture
7 of both paper-backed lath, Tyvek and then
8 there's also another water shield -- I think
9 it's Protecto Wrap? Is that not also on
10 there?

11 A. Yes, they are in this picture.

12 Q. Does that not refresh your memory?

13 A. Well, (affirmative nod), in this
14 particular picture. I'd have to look at all
15 the pictures to say it was everywhere like
16 that.

17 Q. You testified earlier that the
18 construction was amazingly consistent
19 throughout this project, have you not?

20 A. Correct, in terms of the back laths and
21 the reverse flashing and things of that
22 nature, and the sealant and things of that
23 nature.

24 Q. And those back laths and sealants and so
25 forth were found both under the Tyvek --

1 excuse me, were found both under the
2 HardiPlank and the stucco. Is that correct?

3 A. Yes, I found back laps and reverse laps
4 under the HardiPlank as well.

5 Q. In fact, in your scope of work you're
6 going to remove all the HardiPlank?

7 A. Yes.

8 Q. And that's to repair damaged sheathing,
9 rotted sheathing and to correct the back laps?

10 A. Correct.

11 Q. And throughout the project most of the
12 problems that you saw occurred at the inter-
13 section of either siding and a window or
14 stucco and a window. Is that not correct?

15 A. Correct. That is the most critical parts
16 of the building when it comes to penetration.

17 Q. It's the hardest part to shed water?

18 A. Well, it's not hard. It's just needs to
19 be carefully done.

20 Q. I think you said you consistently find
21 more problems in those areas than in others.
22 Would that be true?

23 A. That's because of the penetration. So if
24 it's done incorrectly, that's where the water
25 source will enter the building, yes, sir.

1 Q. And the damage that you found under the
2 HardiPlank was nearly identical to the type
3 of damage that you found under the stucco?

4 A. It wasn't as pervasive in terms of rot.
5 It was more about the installation of the
6 HardiPlank itself and the reverse edge lashing
7 and things of that nature.

8 Q. Now, at the conjunction of either the
9 siding and the windows or the stucco and the
10 windows, you would have had the coming
11 together of a number of trades, would you not?

12 A. The window's in place. It was stucco
13 trim on the windows. So there was a stucco,
14 of course, and then the window, if that's what
15 you mean. The only trade that came to the
16 window was the stucco or the HardiPlank.

17 Q. All right. Maybe I'm not making myself
18 clear. You start out with a rough opening in
19 the framing wall when you're getting ready to
20 set the window.

21 A. Correct. You have a rough opening in the
22 framing, yes.

23 Q. And then what is done to the rough
24 opening?

25 A. Then you'll wrap that -- well, first you

1 would put sheathing on the building, and cut
2 out the sheathing for the window opening or
3 the door opening. Then you wrap the window
4 wall -- or the wall with the moisture barrier,
5 whether it be Tyvek or felt. And you put
6 whatever cladding on the building, whether it
7 be HardiPlank or stucco. And then, of course,
8 with the stucco you also would add other
9 accessories.

10 Q. And then there is the addition of the
11 sealants. Is that correct?

12 A. That was done as well.

13 Q. Now, in this particular case, the framer
14 would be the one installing the windows, would
15 he not?

16 A. It varied. Typically a framer would do
17 something like that, yes. I don't recall
18 exactly on this job who that was -- who the
19 subcontractor was.

20 Q. When you were working on this file did
21 you review the contract for the framing?

22 A. During my depositions and during earlier
23 parts of this case, yes. But in preparation
24 for today, I just focused on the issue at-
25 hand, which was the stucco.

1 Q. Let me hand you what's Defendant's
2 Exhibit Number 2, please. I'll represent to
3 you that that's the North Florida Framing
4 subcontract. And I was wondering if you could
5 go to section B, which is the scope of work.

6 A. Attachment B?

7 Q. Attachment B, yes, sir.

8 A. Yes, sir.

9 Q. And at paragraph eight does it not state
10 that windows are to be installed by the
11 subcontractor, meaning North Florida Framing.

12 MR. LEATH: Object, Your Honor.
13 Foundation.

14 THE COURT: Let him finish the
15 question first.

16 CROSS EXAMINATION CONTINUED

17 BY MR. ANDERSON:

18 Q. Are to be installed by the subcontractor,
19 which in this case would be North Florida
20 Framing. Is that correct?

21 MR. CHAKERIS: Objection, Your
22 Honor. Same. Also this Exhibit has not been
23 put in evidence, or this document.

24 THE COURT: Overruled on both. You
25 may continue.

1 MR. ANDERSON: Thank you, Your
2 Honor.

3 CROSS EXAMINATION CONTINUED

4 BY MR. ANDERSON:

5 Q. I'm going to start over. Paragraph
6 eight, it says windows would be installed by
7 the subcontractor. In this case that would be
8 North Florida Framing -- "...as per
9 manufacturer's recommendation as outlined by
10 the contract. This is to include but not
11 limited to the following. Then it says set
12 windows in a bead of silicon caulk, fasten
13 with screws, install a single piece of Z-
14 flashing at the top of the window extending
15 over either side by at least one inch, wrap
16 house wrap to the interior of the opening
17 prior to installing window, wrap plastic flash
18 at the sill of the window prior to
19 installation of window." Is that not correct?

20 A. I must have a different copy. My number
21 eight simply says to "provide required
22 caulking, Z flashing, termite shield at the
23 perimeter of the building, plans and specs and
24 at the top of the windows as required by
25 contractor." I must be looking at the wrong

1 place.

2 Q. Let me double check. Are you on page
3 twenty?

4 A. No, I'm on page four of six. It says
5 attachment B. I may be at the wrong place.
6 They're both attachments B. There is another
7 attachment B, yes, sir.

8 Q. Okay. And do have a page twenty there?

9 A. Yes, sir.

10 Q. Would you please review paragraph eight?

11 A. Yes, sir, (reading): "Windows are to be
12 installed by the subcontractor per
13 manufacturer's recommendation and as outlined
14 by the contractor. This is to include but not
15 limited to the following, set windows in a
16 silicon caulk, fasten with screws, install
17 single piece of Z-flashing at the top of
18 window extending over either side one inch,
19 wrap house wrap to the interior of the opening
20 prior to installing window, wrap plastic
21 flashing at the sill of the window prior to
22 installation of window."

23 Q. Now the Z-flashing as referenced there,
24 that is the flashing that is shown in the
25 picture that you indicated in your earlier

1 illustration. Is that not correct?

2 A. I believe I referred to it as head
3 flashing, yes, sir.

4 Q. I believe you called it head flashing,
5 yes.

6 A. Yes, sir.

7 Q. And I would ask you also to look at
8 paragraph twelve on that same one.

9 A. Would you like me to read it or just look
10 at it?

11 Q. If you could read it for us.

12 A. (Reading): "Subcontractor to install all
13 required caulk and Z-flashing, termite shield
14 at the perimeter of the building per plans and
15 specs and operable windows as required by the
16 contract."

17 Q. So we have two places where North Florida
18 Framing is putting in the Z-flashing or the
19 head flashing for the windows. And what would
20 you call the flashing that you put at the base
21 of the wall, the termite shield?

22 A. It's termite shield. I'm not sure where
23 that is. I didn't see any termite shield
24 flashing. It was just a bead that I showed in
25 my pictures.

1 Q. All right.

2 A. I don't think there is any termite
3 flashing on the building, now that I think
4 about it. I didn't see any.

5 Q. Termite flashing would be a solid piece
6 of metal?

7 A. Typically, (affirmative nod), to stop the
8 termite from going further. Yes.

9 Q. And were you aware that North Florida
10 Framing also did the Tyvek covering?

11 A. I don't see it in the subcontract.
12 Somebody had to do it.

13 Q. That would not surprise you?

14 A. No.

15 Q. You have given in earlier depositions
16 several opinions about the responsibilities of
17 various contractors. Do you recall that?

18 A. I recall that, yes, sir.

19 Q. And in this particular case you indicated
20 that "Summit's responsibility for damages
21 would clearly be based on their supervisory
22 responsibilities as they were always in
23 charge, always responsible for the means and
24 methods of coordination." What are means and
25 methods of coordination where you're speaking

1 about in a contract?

2 A. The means and methods are basically the
3 plans, specs, obligations of the Magna Wall
4 construction in this case, building code
5 issues. They are also responsible for
6 sequencing the proper trades to be on the job
7 at the right times so the work could progress
8 properly.

9 Q. They were responsible for the
10 coordination?

11 A. Yes, sir. That's the general
12 contractor's responsibility.

13 Q. And also that they should not approve
14 work of one contractor unless it is correct
15 and allow another contractor to come after
16 that. Is that not another one of their
17 responsibilities?

18 A. That should be an overall responsibility
19 that's more specific to the next subcontractor
20 that comes after the previous subcontractor.
21 Because they're looking at each piece of work
22 as a shared responsibility.

23 Q. Let's look at shared responsibility.

24 MR. ANDERSON: Your Honor, may I
25 approach the witness?

1 THE COURT: You may.

2 MR. ANDERSON: Thank you.

3 CROSS EXAMINATION CONTINUED

4 BY MR. ANDERSON:

5 Q. Now, you believe as a general rule that a
6 general contractor has a duty to inspect every
7 single aspect of the work performed by a
8 subcontractor hired by the general contractor,
9 and that the general contractor has to inspect
10 every inch of the work performed by the
11 subcontractor, do you not?

12 A. I don't think they have to inspect every
13 inch, but it would be my hope that both the
14 superintendent or the subcontractor would
15 inspect the work before he allows his people
16 to start work, as well as the superintendent
17 for the general contractor has a more overall
18 responsibility with other trades at the same
19 time in multiple buildings. So it's why the
20 general contractor should have the right to
21 rely on the subcontractor's specialty.

22 MR. ANDERSON: May I approach?

23 THE COURT: Yes, you may.

24 CROSS EXAMINATION CONTINUED

25 BY MR. ANDERSON:

1 Q. Mr. Glick, do you recall that on Friday,
2 November 13, 2009, you had your deposition
3 taken in a case called Ellington Woods versus
4 Allison Daley.

5 MR. CHAKERIS: Objection.
6 Relevance. Improper use of deposition
7 testimony.

8 THE COURT: Counsel approach.

9 (OFF RECORD BENCH CONFERENCE)

10 CROSS EXAMINATION CONTINUED

11 BY MR. ANDERSON:

12 Q. Mr. Glick, do you recall having your
13 deposition taken on that date?

14 A. I remember my deposition being taken.
15 I couldn't tell you when it was, what year or
16 what date. No, sir.

17 Q. Would you take a minute to look at that?

18 A. Is there a place you want me to look?

19 Q. Yes, I would like you to look at Page 17,
20 Lines 14 through 20.

21 MR. CHAKERIS: Could you give the
22 date of this particular deposition.

23 THE COURT: What's the date, Mr.
24 Anderson?

25 MR. ANDERSON: I believe it's

1 November 13 of 2009.

2 THE COURT: Would you look at the
3 front cover to make sure?

4 MR. ANDERSON: Yes, ma'am.

5 November 13, 2009.

6 THE COURT: Thank you.

7 CROSS EXAMINATION CONTINUED

8 BY MR. ANDERSON:

9 Q. I believe in that deposition, starting at
10 Line 14 you were asked the question whether a
11 contractor has a duty to inspect every single
12 aspect of the work performed by contractors
13 hired by the general contractor. And what was
14 your response?

15 A. As we stated to you, I would stand by
16 this, yes, sir.

17 Q. You said yes. And I believe you were
18 then followed up with a general contractor has
19 the right -- excuse me, "the general
20 contractor has to inspect every single inch of
21 work performed by the subcontractor." Is that
22 not correct?

23 A. He should. It's just a little bit
24 impractical. The third one is, "Does the
25 general contractor have the right to rely on

1 his abilities of a subcontractor", and the
2 answer is yes. So it's consistent.

3 Q. Mr. Glick, I'm going to show you a
4 picture that you showed us earlier. Do you
5 recall that picture?

6 A. Yes, I think I labeled it as a typical
7 window detail.

8 Q. I believe that you did, yes. And you
9 indicated in response that the flashing on
10 that window was not right. Is that correct?

11 A. That's one of the issues, yes, sir.

12 Q. And, in fact, at the earlier presentation
13 by you that was the primary issue that was
14 presented by that picture, was the fact that
15 the Z-flashing or the head flashing had
16 actually been caulked shut at that location.

17 A. Correct. You need to have that joint
18 open. But you have to look at all the other
19 issues behind this wall as well in the other
20 pictures that I showed. And I explained to
21 the jury on Monday that the water management
22 plane needs to lap on top of the flashing so
23 the water can get onto the flashing and get
24 out through the weep hole. And, in fact, the
25 pictures I showed the other day to complement

1 this picture, showed that it wasn't lapped
2 properly. So the water, in fact -- I would
3 say ninety-five percent of the water that got
4 in this wall goes behind the flashing. So the
5 fact the weep was caulked shut didn't really
6 matter because it never got there to get out
7 of the wall anyway. It was already back of
8 the water management plane because of the back
9 laps. And that's why we had the rotted
10 sheathing.

11 Q. But actually ---

12 A. So you have to look at the totality of
13 the issues as well as that particular picture.

14 Q. But actually the picture that you have
15 shown us was in that fashion. Was that not
16 correct?

17 A. No, I believe that was in my report. But
18 to try to streamline things, I just labeled
19 that a typical window for the presentation.

20 Q. But that was the original labeling on it
21 in your report?

22 A. Yes, sir. I was trying to be concise and
23 say that this condition exists everywhere.

24 Q. In fact, this flashing being troublesome
25 is an important aspect of your report, was it

1 not?

2 A. Well, it shows that it shouldn't be
3 there. But, again, in terms of the actual
4 reasons for water intrusion, this has very
5 little to do with it. The water's already in
6 back of the system before it gets to that
7 flashing to be stopped by the caulking or the
8 sealant. And in this case, it never got
9 there. I didn't find any moisture behind the
10 sealant that would indicate it was being
11 stopped. Because it never got on top of it.
12 It got behind it because there was no lapping
13 properly in back.

14 Q. And that would have been done by the
15 individual installing the window. Is that not
16 correct?

17 A. My interpretation was the other way
18 around. The window installer would not have
19 done that necessarily, because you had to do
20 that in conjunction with the stucco. And
21 actually, I showed pictures of the stucco
22 coming down on that flashing without a bead.
23 So, clearly, the flashing was there when the
24 stucco subcontractor did his work.

25 Q. So the flashing was installed prior to

1 the stucco contractor being ---

2 A. Well, I don't -- it's prior to the
3 installation of the stucco -- installation.
4 I don't know if it was there prior. It could
5 have been prior to the stucco subcontractor.
6 I don't know that. The contracts seemed to be
7 somewhat overlapping.

8 Q. The contract that you just read, the
9 North Florida Framing, that sounded pretty
10 clear that they were to install the Z-flashing
11 over the heads of the windows.

12 A. Correct. And then you do your paper-
13 backed lath. And that piece of paper in back
14 of the lath should come down the front side or
15 the outside of the flashing. So you'd have a
16 shedding effect. If they had done that, then
17 water would have been caught properly by the
18 sealant joints. But it wasn't like that. It
19 was in back of it which meant the water got in
20 back of the flashing, so the flashing being
21 caulked shut wasn't relevant to the damage to
22 the buildings.

23 Q. Would that sequencing also be true of the
24 Tyvek?

25 A. Which sequencing?

1 Q. The fact that the water management paper
2 should be over the top of the flashing?

3 A. At the head of the window it should be on
4 top of the flashing. But if you want it out,
5 there's paper-backed lath on top of the Tyvek.
6 So the white Tyvek really wasn't the primary
7 water management system. It was really the
8 felt, the paper-backed lath -- which was
9 backwards, as I explained Monday.

10 Q. All right. Do you know whether or not
11 the individual putting in the Tyvek and the
12 flashing would have known what material was
13 going on top at that particular location?

14 A. Well, I think he could read the plans and
15 he would have recognized that stucco was going
16 on that wall. He may not have cared. Whoever
17 put that flashing in, whether it was the
18 framing subcontractor or the stucco gentlemen
19 or subcontractor, rather, they would have seen
20 the flashing over it. So, yes, they would
21 have known that.

22 Q. And behind the HardiPlank, with the Tyvek
23 being the only paper that was required in the
24 overhead flashing. Is that not correct?

25 A. Correct, since no felt. It was just

1 Tyvek.
2 Q. And you did not find that condition
3 there?
4 A. I'm sorry.
5 Q. You found that the Tyvek was behind the
6 flashing under the HardiPlank also, did you
7 not?
8 A. Yes, sir. It was backed as well.
9 Q. Now, as far as the application of
10 sealants, were you aware that a subcontractor
11 by the name of Los Compos provided and did the
12 sealant?
13 A. Once again, I'd have to see the
14 contracts. I really only focused on the
15 defendant here today.
16 Q. I hand you what has been marked as
17 Defendant's Exhibit Number 9. I would ask
18 you again to go to the Attachment B and to
19 paragraph four of Attachment B. I believe
20 it's again on page nineteen.
21 A. I have page nineteen, yes, sir.
22 Q. Paragraph four, would you read that for
23 us?
24 A. Four?
25 Q. Yes, please.

1 A. (Reading): "It is the intent of the
2 subcontract to convey to the subcontractor..."
3 -- I'm sorry. "It is the intent of this
4 subcontract to convey to the subcontractor
5 that the installation of work of all stucco is
6 the responsibility of the subcontractor. This
7 is to include but not limited to all areas
8 where stucco meets like or unlike surfaces
9 where paint may or may not be applied."

10 Q. And number five?

11 A. (Reading): "All parties hereby agree
12 that the subcontractor is to furnish and
13 install required caulking with the specified
14 type of caulking at all areas of the project.
15 These caulked areas are to include but are not
16 limited to windows, doors, exterior siding,
17 exterior trim, interior trim, exterior door
18 sills, between exterior trim and fascia
19 boards. Further, subcontractor shall use
20 caulking compound in color to match the
21 building finish or paint."

22 Q. And so it's clear, then, Los Compos was
23 responsible for the sealants and caulking?

24 A. That's what this says, yes.

25 Q. And that would include the areas that we

1 just looked at above the windows?

2 A. It would indicate that, yes, sir.

3 Q. And there was a similar caulking issue at
4 the flashing in the HardiPlank, was there not?

5 A. I believe those head flashings were
6 caulked shut as well.

7 Q. Now, have you reviewed the contract
8 between the owner and the architect?

9 A. (Affirmative nod), a long time ago.

10 Q. And there was an extensive examination of
11 you on the applications in this case in one of
12 your depositions about that contract.

13 A. I recall a lot of questions, yes, sir.

14 Q. And I believe that it's your conclusion
15 that the architect had contract administration
16 and should have seen some of the defects that
17 you have outlined for the stucco applicator,
18 the framer and a number of other sub-
19 contractors. Is that not right?

20 A. Well, I think seeing the caulked window
21 head flashing shots should have alerted the
22 architect to at least raise some questions.
23 He would not necessarily have seen all the
24 other construction installation deficiencies
25 of the stucco, because he's not going to be

1 standing there eight hours a day, day after
2 day. That's not what an architect does. An
3 architect visits the site on a periodic basis
4 to look for general compliance. That's why I
5 had said in my deposition that I believed,
6 even at the very end of the job, he should
7 have alerted someone that at least the caulked
8 joints were sealed shut, and they should not
9 have been. And that may have led to further
10 investigations.

11 Q. When a fee application is completed, the
12 subcontractor submits his fee application to
13 the general contractor. And then the general
14 contractor will approve it or disapprove it
15 and then pass it to the architect. Is that
16 not correct?

17 A. You say a subcontractor will submit his
18 invoice to the contractor?

19 Q. To the general contractor.

20 A. No, the architect never sees a bill from
21 a subcontractor to a general. He only sees an
22 application for payment of the general
23 contractor's work in place.

24 Q. All right.

25 A. Typically. You may see it in a cost-plus

1 job, but not in this job.

2 Q. All right. So the subcontractor would
3 deal with the contractor. The contractor,
4 then, would submit a pay application with a
5 cover sheet that looks like this. Is that
6 correct?

7 A. Yes.

8 Q. And behind that would have a percentage
9 of the work completed and the cost to complete
10 the work?

11 A. Correct, typically.

12 Q. And there's a certification that's given
13 by the contractor. It's given under oath and
14 it's sealed by a notary. Are you familiar
15 with that?

16 A. It's sealed by a notary.

17 Q. On this one it was done by a Florida
18 notary.

19 A. That's pretty standard protocol.

20 Q. And the language up there is that the
21 "undersigned contractor certifies that to the
22 best of the contractor's knowledge,
23 information and belief, the work covered by
24 this application for payment has been
25 completed in accordance with the contract

1 documents and all of the amounts as paid by
2 the contractor for which previous certificates
3 for payment are issued, and payments received
4 from the owner, and that current payments
5 shown herein are now due." And it's given
6 under oath in this particular case. Is that
7 right?

8 A. That's what it says.

9 Q. And that is a certification that goes to
10 the architect. And then the architect has
11 signed off on the following language,
12 (reading): "In accordance with the contract
13 documents, based on onsite observations and
14 the data comprising the application, informa-
15 tion and belief, the work has progressed as
16 indicated. The quality of the work is in
17 accordance with the contract documents, and
18 the contractor is entitled to payment for the
19 amount asserted." Is that not what the
20 architect signed?

21 A. That's the language on this certificate,
22 yes.

23 Q. And that is a certification that goes to
24 the owner, is that not correct?

25 A. Typically, what the owner's paying for is

1 a separate, distinct group from any other
2 contractor, yes.

3 Q. The architect is actually the owner's
4 representative on the site, or one of the
5 owner's representatives?

6 A. Correct. It's a contractual
7 relationship. He has an obligation to the
8 contractor, but he's typically the owner's
9 representative.

10 Q. So there's a contract between the owner
11 and the general contractor.

12 A. (Affirmative nod).

13 Q. And then there's a contract between the
14 owner and the architect that is separate?

15 A. Yes, that's standard.

16 Q. And in this particular case, I believe
17 that you went through approximately six months
18 worth of pay applications in one deposition
19 with Mr. Stair and Mr. Sequi?

20 A. Correct.

21 Q. And in that you went from the percentage
22 being paid for the stucco, from zero to
23 ninety-eight percent. Do you recall that?

24 A. I remember the conversation. I don't
25 remember percentages. But at some point it

1 went from zero to almost completeness.

2 Q. And as a result of that, it was your
3 conclusion there were six visits that the
4 architect would have seen all the various
5 stages of the stucco application during that
6 time period?

7 A. He should have, yes. That was my
8 contention and my belief that he bore the
9 responsibility and was accountable for those
10 issues.

11 Q. In fact, you gave an affidavit on the
12 filing of the complaints against the architect
13 supporting that, did you not?

14 A. Absolutely. He should have seen some of
15 this. It does beg the question that the
16 applicator was an approved applicator of the
17 material he was putting on. And he, himself,
18 didn't know what was right or wrong. And
19 maybe the subcontractor did not train his
20 people to do it properly. So.

21 Q. That's your opinion.

22 A. Having others look at your work and
23 expect them to catch your errors, which you're
24 responsible for leaving there, that's an
25 interesting argument.

1 Q. But then again, if you are the low man on
2 the totem pole, which a subcontractor is on a
3 job like this, and you have the five layers of
4 individuals above you who are, by law,
5 certifying under oath that you've done your
6 job correctly, and -- you think that they
7 should be able to rely on that?

8 A. First of all, I wouldn't say that the
9 subcontractor was low man on the totem pole.
10 I think he's a professional and should be
11 treated with respect, just like everybody else
12 in the construction industry.

13 Second of all, there are layers of review
14 -- not necessarily inspection, but review.
15 And it's periodic and it's not extensive nor
16 exhaustive.

17 And, again, these are the people that are
18 supposedly trained to be an approved
19 applicator of a specific proprietary product.
20 They should know how to put it on. They said
21 they know. They said they do it in accordance
22 with the law. So I think responsibility for
23 this type of issue certainly starts with the
24 subcontractor.

25 But there are others that I'm going to

1 testify to that have some responsibility. And
2 my understanding is they were accountable and
3 they did what they needed to do.

4 Q. So -- and that is your opinion on this
5 matter?

6 A. Yes, sir.

7 Q. Thank you very much, Mr. Glick.

8 A. Thank you.

9 MR. CHAKERIS: Your Honor,
10 plaintiffs have no additional questions of
11 this witness, and we would ask that he be
12 excused.

13 THE COURT: Any objection, Mr.
14 Anderson?

15 MR. ANDERSON: No objection, Your
16 Honor.

17 THE COURT: Mr. Glick, you may step
18 down and you're excused or you are free to
19 remain with us.

20 THE WITNESS: Thank you.

21 (WITNESS STEPS DOWN)

22 THE COURT: Call your next witness.

23 MR. LUCEY: Your Honor, the
24 plaintiffs would call Jeff Jessup. He's the
25 Association's board president.

1 (WITNESS TAKES STAND)

2 JEFFREY JESSUP, being duly sworn to
3 tell the truth, the whole truth and nothing
4 but the truth, testified, as follows:

5 DIRECT EXAMINATION

6 BY PLAINTIFF COUNSEL:

7 Q. Good afternoon, Mr. Jessup.

8 A. Good afternoon.

9 Q. Do you own in a unit in this complex?

10 A. Yes, sir, I do.

11 Q. And what unit is that, sir?

12 A. It's 218.

13 Q. Is that a three-bedroom unit?

14 A. Yes, sir, it is.

15 Q. And when did you purchase that unit?

16 A. In December of 2007.

17 Q. And what did you pay for that unit?

18 A. \$138,000.

19 Q. Can you tell us in what capacity you're
20 here to testify today?

21 A. I'm actually here in three capacities.
22 I'm here as the HOA board president. I'm also
23 here as the representative of two hundred and
24 sixteen unit owners in Twelve Oaks and finally
25 I'm a unit owner and homeowner at Twelve Oaks.

1 Q. Thank you, sir. Can you tell us

2 generally what type of people live out at

3 Twelve Oaks?

4 A. Really just everyday people. We have law

5 enforcement officers, nurses, teachers --

6 really just all walks of life, just folks that

7 purchased out there looking for, you know, a

8 nice place to live at a fair value.

9 Q. And why is there a board of directors at

10 Twelve Oaks? Can you explain that to us?

11 A. Well, in simple terms, the Twelve Oaks --

12 the plantation is a condominium development.

13 And as a condominium development, there is a

14 master deed and bylaws developed. And once

15 that's developed it's recorded in Charleston.

16 And, really, those documents are our roadmap

17 and our dictionary of how the property is

18 rated applying to ownership, what the common

19 elements are and so on. It also provides that

20 we have to establish a non-profit corporation

21 and a board of directors to administer the

22 master deed and to take care of the common

23 elements.

24 Q. Can you explain to us what the common

25 elements are generally at Twelve Oaks, please?

1 A. Generally speaking, the common elements
2 would be the parking lot, the pool, the
3 clubhouse, the exterior skins or envelopes of
4 the buildings. That would include the roofs,
5 the stucco, the HardiPlank, the sheathing and
6 so on.

7 Q. How does each owner own an ownership
8 interest in those common elements?

9 A. In simple terms, it would be that as an
10 owner of Twelve Oaks I would own potentially
11 one percent of the common elements. Of that
12 common elements, I would say that I would own
13 one percent of the pool, one percent of the
14 parking lot, one percent of, say, the
15 clubhouse. And I would also own one percent
16 of all the buildings that are at Twelve Oaks,
17 not just the building that I live in. But I
18 would own, you know, one percent of all of the
19 buildings or all the common elements of Twelve
20 Oaks development.

21 Q. How is a unit defined in the master deed?

22 A. It's essentially defined as it's the
23 living space of the unit owner. It would be
24 typically the drywall in, and it is the space
25 that is owned specifically by that owner.

1 Q. And how did you become the board
2 president at Twelve Oaks?

3 A. The developer maintained control of the
4 development or of the Twelve Oaks condominium
5 development, and, of course, they had their
6 own board appointed through their own people.
7 When the last unit was sold at Twelve Oaks the
8 developer turned that homeowners' board over
9 to the actual homeowners. And I became a
10 board member at that time.

11 Q. Approximately when was that?

12 A. That would have been in January of 2008.

13 Q. And when that turnover occurred were you
14 nominated as board president at that time?

15 A. Yes, sir, I was.

16 Q. And have you been the board president
17 consecutively since that time?

18 A. Yes, sir, I have.

19 Q. How many other unit owners are board
20 members and serve along with you?

21 A. There are two other board members.

22 Q. And who are those folks?

23 A. Bob Haney (phonetic) and Paula Edwards.

24 Q. Are any of you paid for your services
25 serving on the board?

1 A. No, sir, not at all.

2 Q. And what are your responsibilities as a
3 board member and as a board itself?

4 A. Primarily, we're charged with administer-
5 ing the master deed and caring for the common
6 elements. We would make sure that they're
7 kept in good order and execute the
8 instructions of the master deed accordingly.
9 We would take care of the -- you know, make
10 sure that those common elements are maintained
11 to a standard of care.

12 Q. And how do you go about maintaining the
13 common elements?

14 A. Every year we develop a budget, if you
15 will. That budget contains items such as pool
16 maintenance, property manager. These are
17 costs -- it would contain landscaping costs,
18 building insurance and so on. Once we have
19 those costs developed, we would develop the
20 entire budget and then we would come back and
21 set HOA fees or regime fees, as would be
22 another definition of it. And those would be
23 billed to the unit owners on a monthly basis.

24 Q. So, in essence, each month each owner
25 would pay their prorata share of the expenses

1 to maintain the common elements?

2 A. Yes, sir, that's correct.

3 Q. I show you what's been marked as
4 Plaintiff's Exhibit Number 1. Do you
5 recognize that document?

6 A. Yes, sir, I do.

7 Q. And can you tell us generally what that
8 document is?

9 A. Generally speaking, it's a site plan and
10 defines the units by number of the Twelve Oaks
11 development.

12 Q. And does that site plan generally show
13 the building locations, clubhouse and ingress/
14 egress to the project?

15 A. Yes, sir, it does.

16 Q. And do you believe that that's an
17 accurate depiction?

18 A. Yes, sir, it is.

19 MR. SEQUI: Your Honor, I would
20 move that into evidence, please.

21 THE COURT: What number?

22 MR. SEQUI: One, Plaintiff's 1.

23 THE COURT: Any objection?

24 MR. ANDERSON: Your Honor, that's
25 the ---

1 MR. SEQUI: It's the site plan.

2 MR. ANDERSON: No objection.

3 THE COURT: Plaintiff's 1 into

4 evidence without objection.

5 (SO ENTERED AS PLAINTIFF'S EXHIBIT 1)

6 DIRECT EXAMINATION CONTINUED

7 BY MR. SEQUI:

8 Q. And, Mr. Jessup, can you tell us how many
9 units and how many buildings are out at Twelve
10 Oaks, please, sir?

11 A. There's two hundred sixteen units in
12 twelve buildings.

13 Q. And what happens in the event that
14 there's an extraordinary type of repair that's
15 not contemplated in the annual operating
16 budget? How does the board handle that?

17 A. The board would look at that expense or
18 that cost of repair. And typically, in a
19 hardship case like that, we would take that
20 expense and divide it equally or as specified
21 by the master deed among the two hundred
22 sixteen unit owners as a special assessment,
23 and bill that special assessment accordingly
24 to the two hundred sixteen unit owners of
25 Twelve Oaks.

1 Q. Now, would this special assessment that
2 you're talking about be in addition to the
3 monthly regime fees?

4 A. Very much so, yes, sir.

5 Q. And how did the board become a party to
6 the lawsuit we're here about today?

7 A. Well, originally, as I stated earlier,
8 the development was controlled by the -- the
9 board was developer controlled. And then once
10 the last unit was sold, the board was turned
11 over to the homeowners.

12 There was an ongoing suit, if you will,
13 brought by the Teseniars and several other
14 owners of the Twelve Oaks units. In view of
15 that, and in accordance with what we believed
16 the master deed had been, we also joined that
17 suit. And we took, as the board, the lead to
18 ensure that the common elements -- there would
19 be funds to repair those. And the Teseniars
20 also maintained their position as class reps
21 and also cared for their common elements.
22 They also took the lead, if you will, for the
23 loss of use of the property -- the loss of use
24 of the unit when repair begin and the units
25 become uninhabitable, as has been described in

1 earlier testimony by Mr. Glick.

2 Q. Generally, can you give us an understand-
3 ing of what the board is here about today
4 claiming as far as the construction defects in
5 these buildings?

6 A. We're here today in looking at the shell
7 or the outer -- the envelope of the building
8 and the stucco as it was applied, and as --
9 that water would intrude or be allowed to
10 intrude into those buildings and cause ---

11 MR. ANDERSON: I would object,
12 Your Honor. May we approach?

13 THE COURT: You may.

14 (OFF RECORD BENCH CONFERENCE)

15 THE COURT: Overruled. You may
16 answer.

17 DIRECT EXAMINATION CONTINUED

18 Q. Mr. Jessup, would you generally explain
19 to the jury what the board is complaining
20 about regarding the construction defects?

21 A. The board is here today to protect the
22 interest of the common elements as it would
23 relate to the skins or the outer envelope of
24 the building, whether that would be the roofs
25 in back of the stucco application and the

1 intrusion of water, and how that water
2 intrusion has degraded wood and structural
3 members of our buildings.

4 Q. And has the board obtained a cost to
5 repair those deficiencies?

6 A. Yes, sir, we have.

7 Q. And from whom did the board obtain that
8 repair estimate?

9 A. That repair estimate was obtained in
10 roughly 2009.

11 Q. I'm sorry, from whom?

12 A. I'm sorry. Excuse me. It was obtained
13 from ProCon.

14 Q. And what's your understanding on behalf
15 of the board as to what the cost to repair is?

16 A. It round numbers, \$15.7 Million dollars.

17 Q. And as part of the process of this law-
18 suit, has the board obtained any settlements?

19 A. Yes, sir, we've obtained settlements
20 from all parties except for Professional
21 Plastering.

22 Q. Can you tell us what those settlement
23 were at this time?

24 A. The settlements are eight million twenty-
25 five thousand dollars (\$8,025,000) in round

1 numbers.

2 Q. Was there any allocation to that
3 settlement?

4 A. Yes, sir, there is. There's actually an
5 allocation that ninety percent of those monies
6 would go to the repair of the common elements
7 and ten percent would be for the loss of use
8 claims of the individual owners. Or, again,
9 when the repairs were undertaken and they
10 would lose the habit (sic) of their unit.

11 Q. And do you believe on behalf of the board
12 that the ProCon estimate is fair and reason-
13 able?

14 A. I do.

15 MR. SEQUI: Thank you, Your Honor.
16 Nothing further of this witness.

17 THE COURT: Mr. Anderson.

18 MR. ANDERSON: Thank you, Your
19 Honor.

20 CROSS EXAMINATION

21 BY MR. ANDERSON:

22 Q. You're an owner, Mr. Jessup?

23 A. Yes, sir, Mr. Anderson.

24 Q. When did you first move in there?

25 A. We took possession of that unit in

1 December of 2007.

2 Q. Were you made aware of the property
3 condition evaluation reports that were done
4 at the conversion of these apartments to
5 condominiums?

6 A. Not that I recall.

7 Q. You were offered -- did you buy your unit
8 from the owner/developer, or did you buy your
9 unit from an individual?

10 A. I bought my unit from an agent at the
11 condo store.

12 Q. Did they provide you with the conversion
13 report?

14 A. I do not recall that.

15 Q. Did you realize that these same
16 conditions were reported in part in 2008 and
17 in 2003?

18 A. If I had realized that, I can tell you I
19 would have not have spent \$138,000 dollars for
20 that unit.

21 Q. And who was the owner at the time that
22 you purchased?

23 A. As I understood, it was Tarragon.

24 Q. And is that the same Tarragon that built
25 these as apartments back in 2002?

1 A. I just know Tarragon as the developer at
2 that time.

3 Q. And I think I told you that that report
4 was for 2003. It's actually for 2005. I
5 don't know if that changes your answer at all
6 or not.

7 A. I don't see where it would affect my
8 answer.

9 Q. The homeowners association does not have
10 a maintenance program, do they?

11 A. I'm not sure that I understand the
12 question. Could you expand on that a little
13 bit?

14 Q. You were asked that question during your
15 deposition.

16 A. Yes, sir.

17 Q. And you indicated that maintenance was
18 provided for pool and landscaping, but there
19 was nothing for the upkeep of the buildings.

20 A. Well, I mean ---

21 Q. Is that not correct that you indicated
22 that?

23 A. Maintenance would not cure the problems
24 that are exhibited in those buildings.

25 Q. I understand that that's your opinion and

1 that's the opinion of Mr. Glick. However, my
2 question is do you have a maintenance program
3 or has there ever been a maintenance program
4 to your knowledge?

5 A. Not to my knowledge. But I would expand
6 on that again that -- (pause).

7 Q. In your tenure has the sealant been
8 replaced, checked?

9 A. It has been repaired where possible. But
10 the scope and the needs of the sealant repair,
11 as I understand, there's not enough caulking
12 to take care of that.

13 Q. So you are aware that caulking/sealant is
14 a problem out there?

15 A. I'm aware that there's water intrusion
16 that's a problem out there.

17 Q. Have the buildings ever been painted?

18 A. No, sir, not to my knowledge, not during
19 my tenure -- not during my tenure, no.

20 Q. And how long has your tenure been?

21 A. Again, since January of 2009.

22 Q. When were you made aware of the problems
23 that you've just testified to?

24 A. I think, generally, in bits and pieces
25 through 2008. But significantly aware, I

1 would say, latter on in 2008, there was some
2 materials circulated. And again, through the
3 talk of the ownership and there was also the
4 class action by the owners.

5 Q. And were you involved in the preliminary
6 workup to the class action filing?

7 A. I attended one, maybe two general meet-
8 ings. But, no. Other than informational
9 meetings, no.

10 Q. Who presided at those informational
11 meetings?

12 A. It's my -- you know, I think it was just
13 a -- it was a group of owners, if you will. I
14 don't know that there was any one particularly
15 that presided over them as far as a president,
16 if you will. There was different folks that
17 participated during that time.

18 Q. Were there presentations made?

19 A. Not that I recall at the meetings that I
20 attended.

21 Q. Are you aware of any presentations?

22 A. I heard that there were presentations,
23 but I can't speak to them because I didn't see
24 them, that I recall.

25 Q. And as board president, the people would

1 not come to you to have permission to hold
2 those meetings?

3 A. That was prior to my being the board
4 president.

5 Q. The individual you bought your unit from
6 -- or not the individual, but the group that
7 you bought it from, was Tarragon?

8 A. I never saw a Tarragon representative at
9 all, other than -- I bought the unit from the
10 condo store.

11 Q. So you just know that whoever was running
12 the condo at the time, that's who you bought
13 it from?

14 A. Yes, sir.

15 Q. You've spoken of problems about the
16 stucco. And you've said that several times.
17 You are aware that there were also problems
18 with the roofing?

19 A. Yes, sir, I am.

20 Q. And problems with the HVAC?

21 A. Yes, sir.

22 Q. And there were problems with the concrete
23 decks and platforms and stairs or the landings
24 and the stairs. Are you aware of that?

25 A. I'm aware of some of those issues, yes.

1 Q. And that there was also problems with the
2 HardiPlank?

3 A. Yes, I'm aware as it relates to the skin
4 on the building, yes.

5 Q. And then also with the installation of
6 the windows. Is that not correct?

7 A. Yes, sir.

8 Q. And so, basically, the HOA's lawsuit was
9 against everybody who built the condos or were
10 involved in the original construction. Is
11 that correct?

12 A. I don't know that it states everybody.
13 It's everyone that would not have completed a
14 job as you would expect it to be completed,
15 you know, to a standard of work and a standard
16 expectation. In other words, I would have
17 bought something and expected it to be
18 constructed properly.

19 Q. Now, you did not have, nor did the
20 homeowners association have a contract with
21 any of these people, did you?

22 A. Not the current homeowners association,
23 no.

24 Q. And you, individually, did not have a
25 contract with Professional Plastering?

1 A. Not to my knowledge.

2 Q. You didn't have one with Summit
3 Construction?

4 A. Not to my knowledge.

5 Q. And, actually, the only one who had a
6 contract with them was Tarragon. Is that not
7 correct?

8 A. That would be as I understand it.

9 Q. And so the owner in the material that
10 you're referring to has been Tarragon up until
11 the time that they turned over the homeowners
12 board to you or to the homeowners?

13 A. As you've framed that statement, yes.

14 Q. Do you want to correct it?

15 A. I'll let it stand.

16 Q. Okay. Thank you. So at no time did you
17 receive a promise either from Summit
18 Contracting, from Professional Plastering or
19 any of the other subcontractors, North Florida
20 Framing, Los Compos, any of those people on
21 how they would build this building?

22 A. In a simple sense, no. But I think in
23 going back and looking at it from a
24 contractual point or my expectation of the
25 units, I would expect the standard of work.

1 Q. And that's based on the representations
2 that Tarragon made to you, is that not
3 correct?

4 A. That would be correct.

5 Q. Thank you very much.

6 A. Yes, sir.

7 MR. SEQUI: Nothing further, Your
8 Honor.

9 THE COURT: Mr. Jessup, you may
10 step down.

11 THE WITNESS: Thank you, Your Honor.

12 (WITNESS STEPS DOWN)

13 THE COURT: We're ready for a
14 break. We'll take our mid-afternoon break.
15 Do not begin your deliberations. Do not
16 discuss this case amongst yourselves. Please
17 rise for the jury. We'll take fifteen
18 minutes. Thank you.

19 (JURY OUT)

20 (BRIEF RECESS)

21 THE COURT: Thank you. Please
22 remain standing for the jury.

23 (JURY IN)

24 THE COURT: Thank you. Please be
25 seated. Call your next witness.

1 MR. LEATH: Thank you, Your Honor.
2 Mark Teseniar, class representative.

3 MARK TESENIAR, being duly sworn to
4 tell the truth, the whole truth and nothing
5 but the truth, testified, as follows:

6 DIRECT EXAMINATION

7 BY MR. LEATH:

8 Q. Thank you, Mr. Teseniar. Where do you
9 work, sir?

10 A. I'm a teacher at Charleston County School
11 District. I teach at the School of the Arts.

12 Q. What grade do you teach?

13 A. High school, ninth through twelfth.

14 Q. Do you and your wife own a unit at Twelve
15 Oaks?

16 A. We do.

17 Q. What unit is that?

18 A. Unit 224.

19 Q. And your wife is a title owner as well?

20 A. She is.

21 Q. And where does she work?

22 A. She works at Harborview Elementary School
23 on James Island.

24 Q. What grade does she teach?

25 A. She teaches fifth grade.

1 Q. Can you tell us how you and your wife
2 became class representatives in this matter?

3 A. We became class representatives after
4 becoming aware of these problems and sought
5 legal counsel, and -- that's the direction
6 that it took, legal counsel. And we decided
7 several years ago to -- the case was certified
8 by a judge making us class representatives,
9 and my wife and I both serve in that capacity.

10 Q. What's your understanding of the role of
11 a class representative?

12 A. We represent ourselves and we represent
13 the homeowners at large. We're all similarly
14 situated, and that's our role. We make
15 decisions on behalf of the class as needed.

16 Q. And when you brought this claim, you
17 brought this claim for damages to the common
18 elements and loss of use?

19 A. That's correct.

20 Q. And what are you asking this jury to do
21 for the owners of Twelve Oaks?

22 A. We're asking them to find the stucco
23 application to be -- well, we are asking to
24 award -- excuse me, find the stucco
25 application to be ---

1 MR. ANDERSON: Objection. May we
2 approach?

3 THE COURT: Sure.

4 (OFF RECORD BENCH CONFERENCE)

5 THE COURT: All right. The
6 objection is withdrawn. You may continue.
7 You may need to repeat your question.

8 THE WITNESS: I think I can probably
9 explain this better. Go ahead.

10 DIRECT EXAMINATION RESUMED

11 Q. What are you asking this jury to do on
12 behalf of the owners of Twelve Oaks?

13 A. To award damages for installation -- for
14 the problems associated with the stucco
15 application.

16 Q. The stucco installation and the resultant
17 damages?

18 A. And the damages accrued from that, yes.

19 Q. Please answer any questions Mr. Anderson
20 may have for you.

21 THE COURT: Mr. Anderson.

22 CROSS EXAMINATION

23 BY MR. ANDERSON:

24 Q. When did you buy your unit?

25 A. 2007. I think November or December.

1 excused.

2 (JURY OUT)

3 THE COURT: Thank you. Be seated.

4 Are there motions or matters?

5 MR. KIRCHNER: Would you like to
6 hear from the plaintiffs first? We have some
7 motions for a directed verdict, Your Honor.

8 THE COURT: Let me see what Mr.
9 Anderson has.

10 MR. ANDERSON: Your Honor, at
11 this time we would move for -- make a motion
12 for directed verdict based on failure to
13 prove.

14 THE COURT: Based on what?

15 MR. ANDERSON: Failure to prove.

16 THE COURT: Let me hear your
17 response to his failure of proof argument.

18 MR. KIRCHNER: Sure, Your Honor.
19 If I may, we have a counter-motion for a
20 directed verdict that will actually respond to
21 their motion. We would move for directed
22 verdict on negligence, on the grounds of
23 liability, and also on negligence per se for
24 building code violations, and also for
25 violation of implied warranty of workmanlike

1 service. I'll start with that one. Your
2 Honor, the case law in South Carolina is very
3 clear. Any time that a contractor or
4 subcontractor undertakes work it comes with an
5 implied warranty, a warranty that all the work
6 is done in a workmanlike manner.

7 Clearly, that was not the case here.
8 You saw ample evidence from Mr. Glick. We
9 also have admissions from Mr. King himself
10 that he violated the NER report, the
11 manufacturer's installation instructions.
12 He violated the promises in his contract to do
13 the work in accordance with the manufacturer's
14 installation instructions. And he also
15 acknowledged that he violated the building
16 code.

17 And, again, negligence *per se*, we
18 have a statute that is enacted to prevent the
19 exact type harm that occurred. Violation of
20 that statute is negligence *per se* under South
21 Carolina law.

22 In particular, Mr. King admitted
23 that the fact that there was no casing bead at
24 the jamb of the window was in contravention to
25 his contract. He acknowledged the kick-out

1 flashings should have been at the roof
2 terminations. He acknowledged that Magna Wall
3 does not allow stucco to contact shingles. He
4 acknowledged that Magna Wall says that weep
5 screeds should be there at the base of the
6 walls, and that that was a violation of NER
7 Magna Wall specifications and his contract.

8 When we were discussing the variable
9 thickness of the stucco, Mr. King acknowledged
10 that anything less than a quarter inch is too
11 thin per the manufacturer's installation
12 instructions. There was ample evidence from
13 Mr. Glick about the thickness of the stucco
14 issues.

15 Mr. King acknowledged that the
16 reverse weather wrap condition with the
17 building paper and the paper-backed lath is
18 a violation of the building code.

19 Mr. King acknowledged that there was
20 a need to remove the extra four inches from
21 the paper-backed lath before they keyed the
22 lath in together so that the panels would
23 actually hold themselves together. That's a
24 violation of the manufacturer's installation
25 instructions. In fact, Mr. Glick said those

1 instructions are actually printed on the very
2 paper-backed lath that was installed. And the
3 rusted staples, the staples to hold the lath
4 to the building are supposed to be corrosion
5 resistant.

6 Mr. King acknowledged all those
7 deficiencies in the examination by Mr. Lucey.
8 He acknowledged that those were violations of
9 the National Evaluation Report 459, the Magna
10 Wall installation instructions and the
11 applicable building code in South Carolina.

12 On those grounds we think it's clear
13 that we should be granted a directed verdict
14 on liability, on negligence per se for
15 violation of the building code and for breach
16 of the implied warranty of workmanlike
17 service.

18 THE COURT: Mr. Anderson.

19 MR. ANDERSON: Thank you, Your
20 Honor. Mr. King may have admitted to a simple
21 negligence violation. However, Mr. Kirchner
22 has, I believe, overstepped the actual result
23 of the testimony on some of his responses,
24 particularly with the corrosion of staples, as
25 an example. It's my recollection that Mr.

1 King responded by saying that even if it was
2 stainless steel, if you put it in water it's
3 going to show rust, which is I think easily
4 interpreted as making a reply to that. And
5 then the examination went on from there.

6 As to the warranty of workmanlike
7 services, this is not a residential -- at the
8 time of building it, the building -- it was a
9 commercial project and not a residential
10 project and therefore it would not fall under
11 the *Kennedy v. Local Lumber*.

12 THE COURT: How is it a commercial
13 project?

14 MR. ANDERSON: It's an apartment
15 complex, building for a single owner.

16 THE COURT: And that's commercial,
17 not residential?

18 MR. ANDERSON: That falls under
19 commercial as opposed to residential. As far
20 as the contract violations, that should not be
21 applicable on the case as far as what Mr.
22 King's responsibilities on the worksite were
23 in attributing responsibility among the
24 various workers. However, he had no duty to
25 these particular owners. There was no

1 contract between them. His contract was with
2 Tarragon and -- well, actually, his contract
3 was with Summit, and his obligations would
4 then flow to Tarragon through Summit. But
5 they certainly do not flow to these owners.
6 Again, part of that is based on the fact that
7 it was a commercial project at the time that
8 it was built.

9 And I didn't quite keep up with Mr.
10 Kirchner's list. There was some testimony in
11 a couple of locations that there were weep
12 screeds missing. Mr. Glick did not check all
13 the buildings. We have evidence to present to
14 the contrary and will be doing so.

15 And the -- there was a discussion on
16 the thickness and cracking with Mr. Lucey.
17 And we believe that that is not an admission
18 or an indication that caused the cracking. He
19 did acknowledge that if it was a quarter of an
20 inch that it would violate the manufacturer's
21 instructions.

22 And we believe that the motion for a
23 directed verdict is premature and we should be
24 able to present our case and there's evidence
25 that will be contrary to several of the

1 assertions.

2 And to his question about specific
3 items -- and, Your Honor, I would ask you to
4 remember that Mr. Glick only made six cuts and
5 showed pictures of stucco from -- made twelve
6 cuts in total, but had, I believe, due to his
7 testimony, four cuts that involved the stucco
8 application. We have his opinions in relation
9 to the paper-backed lath, and that with the
10 number of buildings there are, that there is
11 other information out there concerning the
12 application that we will be presenting through
13 our expert.

14 THE COURT: How do I consider
15 information that I haven't heard for your
16 motion for a directed verdict?

17 MR. ANDERSON: Your Honor, we
18 haven't been given a chance to respond on
19 those. And it appears as though that they
20 would rely solely on the testimony of Mr. King
21 in their motions. Ultimately, we think that
22 it's premature and inappropriate to direct a
23 verdict on negligence at this time.

24 THE COURT: Thank you.

25 MR. KIRCHNER: Your Honor, I

1 think there's one thing to remember here. Mr.
2 King has conceded liability. Mr. Lucey's
3 final question or questions on redirect was
4 that he confirmed that he violated the
5 building code. The only question was how many
6 building codes he violated and how many
7 instances.

8 And there was absolutely no evidence
9 in the record that only four of Mr. Glick's
10 test holes were talked about. Mr. Glick said
11 these problems were pervasive and consistent
12 throughout the building, based on his
13 observations.

14 In terms of the commercial -- this
15 being a commercial project, one, it doesn't
16 matter. The implied warranty of workmanlike
17 service applies to commercial buildings and
18 residential buildings. But even after that,
19 these are apartments. It's not a commercial
20 building. They are residential units.

21 Again, Your Honor, I'd just like to
22 remind you that -- oh, and Mr. Anderson also
23 mentioned the fact that he believes his client
24 doesn't owe any duties to our clients because
25 they were not in privity to contract with

1 them. The case law in South Carolina is
2 abundantly clear that a subsequent owner can
3 sue a builder and subcontractor for a tort.
4 We haven't sued him for breach of contract.
5 We sued him for negligence, negligence *per se*
6 and breach of the implied warranty of
7 merchantability. So the fact that he
8 contracted with Summit has no bearing on our
9 complaint against him whatsoever -- on the
10 implied warranty of workmanlike service
11 culpability, if I misspoke.

12 THE COURT: Mr. Kirchner, assuming
13 that the Court believes your argument that Mr.
14 King's statement that 'I violated the building
15 code', what causes of action do you believe
16 the directed verdict should be granted on?

17 MR. KIRCHNER: Negligence.
18 Clearly, when he undertakes work, he has a
19 duty to undertake that work with due care.
20 And due care means following the building
21 code. So when he admits that he violates the
22 building code, we're absolutely entitled to a
23 directed verdict on the negligence cause of
24 action.

25 In addition, in South Carolina, the

1 building code, as you heard Mr. Glick testify,
2 has the force and effect of law. And the case
3 law very clear. When you have a safety
4 statute that is enacted to prevent the exact
5 type of harm that occurs, violation of that
6 statute is negligence *per se*. So we're
7 entitled to a directed verdict on negligence
8 *per se*, because the building code is there to
9 prevent exactly the kind of damage that you
10 saw in all these photographs. And he admitted
11 that he violated the building code.

12 Also, in implied warranty of
13 workmanlike service, that implied warranty is
14 that the subcontractor will perform his work
15 in a careful, diligent and workmanlike manner.
16 He's acknowledged that he violated the
17 building code, and he has absolutely not
18 performed his work in a careful, diligent and
19 workmanlike manner. And therefore we're
20 entitled to directed verdict on that cause of
21 action as well.

22 THE COURT: All right. Mr.
23 Anderson, what am I supposed to do with the
24 statement that your client made that he
25 violated the building code? Why does that not

1 indicate to the Court that I should grant
2 their Motion for a directed verdict?

3 MR. ANDERSON: Your Honor, the
4 plaintiffs have not shown anything that makes
5 the building code a safety statute, for one
6 thing. And as far as what ---

7 THE COURT: Does there need to be
8 a safety statute if he's admitted that he's
9 violated the building code? Does there need
10 to be a safety statute?

11 MR. ANDERSON: That goes to the
12 issue of negligence *per se*. I was responding
13 to that aspect of his argument, on negligence.

14 I think that there -- Your Honor, in
15 his testimony there was an admission as to
16 simple negligence. I think that it's still
17 for the jury to make a determination as to
18 whether or not there would be an application
19 of negligence *per se* or gross negligence at
20 that point.

21 THE COURT: Are you conceding, now,
22 Mr. Anderson, that he was negligent?

23 MR. ANDERSON: I don't want to do
24 that. But, Your Honor, I think on the basis
25 of his testimony that he has given -- Your

1 Honor, the problem that I have, it was all
2 premised on testimony given by Mr. Glick that
3 such-and-such a condition occurred. My client
4 did not concede that that condition occurred
5 within the building. He conceded that if that
6 condition existed, then there would be -- then
7 that would be a violation.

8 I don't think that that gets you to
9 the point of granting a directed verdict. I
10 think that there's still an issue there that
11 the jury can decide whether or not the
12 condition actually exists. And that is why I
13 mentioned the testimony that we have coming
14 up, where I think that we'll be able to
15 present an issue to the jury on that.

16 THE COURT: Anything further, Mr.
17 Anderson?

18 MR. ANDERSON: No, Your Honor.

19 THE COURT: Anything on that issue,
20 Mr. Kirchner?

21 MR. KIRCHNER: Just very briefly.
22 On the negligence *per se* issue, there's un-
23 controverted evidence from Mr. Glick that the
24 building code has the force of law. And under
25 *Kincaid v. Landing Development Corp.* -- the

1 cite, if Your Honor would like it, is 289 S.C.
2 89, 344 S.E.2d 869. It's a 1986 Court of
3 Appeals. It basically says that the violation
4 of a building code adopted and implemented by
5 local authority is negligence *per se*. Yet Mr.
6 King admitted at least no less than seven
7 violations of the building code at the project
8 that he worked on.

9 In all candor, I don't see how we're
10 not entitled to directed verdict based on his
11 own admissions. And these are admissions by
12 the defendant. I'm not just talking about Mr.
13 Glick's testimony.

14 THE COURT: All right.

15 MR. ANDERSON: Your Honor, may I
16 make one addition?

17 THE COURT: Briefly.

18 MR. ANDERSON: Your Honor, as far
19 as the building code goes, they have to, as an
20 owner, prove that they have been violated.
21 They have to show that it's proper adoption.
22 It's like a city ordinance. It is a local
23 ordinance. It's not a statute under state
24 law. And, as such, they have to prove that.
25 And the Court should not even take judicial

1 notice of it. It has to be -- it's an element
2 of proof that has to be shown. And that has
3 not been done in this case. They have not
4 shown the acceptance or the enactment of that
5 particular building code.

6 Mr. Glick gave his opinion with
7 regard to the building code. But there's not
8 proof that that had been properly adopted.
9 And we do not believe that that can be the
10 basis of a directed verdict.

11 THE COURT: Counsel, let me take
12 just a few moments. Let's be back at 4:30.
13 Thank you.

14 MR. LUCEY: Can we be instructed to
15 stay here and work on the qualifications to
16 make sure we have done them all?

17 THE COURT: You need to stay here
18 and work on the deposition to that tomorrow,
19 if need be, if we need to continue into
20 tomorrow, that that will be addressed and that
21 we can smoothly finish tomorrow. And perhaps
22 y'all may work on other things that we've
23 discussed in Chambers. Thank you.

24 (BRIEF RECESS)

25 THE COURT: Based upon my review of

1 the testimony that has been presented as well
2 as arguments of counsel, I deny the Motions
3 for directed verdict on behalf of the
4 defendant.

5 And of plaintiff, I am concerned
6 with the existence or non-existence of the
7 evidence as to the cause of action of
8 negligence. There was testimony that Mr. King
9 indicated that he had violated the building
10 code. But the Court is concerned that there
11 was no testimony that the violation of that
12 building code was the actual proximate cause
13 of the injury. So based upon that, I deny the
14 motions for directed verdict at this time.

15 I note your exceptions for the
16 record, and yours as well, Mr. Anderson.

17 Anything before we break for the
18 evening? (No response).

19 Mr. Anderson, have you had an
20 opportunity to accomplish the designations of
21 the depositions?

22 MR. ANDERSON: Your Honor, we
23 have received them on, I believe, three of the
24 depositions. And we're in the process of
25 going through those and we'll be able to

1 MAY 12, 2011 9:00 A.M.

2

3 THE COURT: Please bring in our
4 jury.

5 (JURY IN)

6 THE COURT: Please be seated. Good
7 morning, ladies and gentlemen. As you heard
8 last evening before we retired, you have heard
9 all the evidence and testimony for the
10 plaintiffs' case. Now you will hear from the
11 defendant. Mr. Anderson, if you will please
12 call your first witness.

13 MR. ANDERSON: Thank you very
14 much, Your Honor. At this time we would call
15 Chris Dawkins.

16 THE COURT: Hold on one second.
17 Does everybody have their notepads?

18 (WITNESS TAKES STAND)

19 CHRISTIAN NATHAN DAWKINS, being duly
20 sworn to tell the truth, the whole truth and
21 nothing but the truth, testified, as follows:

22 DIRECT EXAMINATION

23 BY MR. ANDERSON:

24 Q. Good morning, Mr. Dawkins. What is your
25 occupation?

- 1 A. Civil engineer and building consultant.
- 2 Q. And where are you currently employed?
- 3 A. I'm currently employed in Duluth,
- 4 Georgia.
- 5 Q. And what company are you with?
- 6 A. Engineering Solutions International.
- 7 Q. And where is their home office?
- 8 A. Their home office is in Atlanta. I work
- 9 in their Duluth office.
- 10 Q. Do they have a South Carolina branch?
- 11 A. They do not have a South Carolina branch
- 12 here in South Carolina.
- 13 Q. And do you do work in South Carolina?
- 14 A. Yes.
- 15 Q. Now, would you please give the jury the
- 16 benefit of your education?
- 17 A. Sure. I've got a bachelor's of science
- 18 in civil engineering from N. C. State in 1981,
- 19 then a master's in civil engineering with a
- 20 construction management specialty from Georgia
- 21 Tech in 1987.
- 22 Q. And are you a licensed professional
- 23 engineer?
- 24 A. Yes.
- 25 Q. And how long have you been an engineer?

1 A. Since 1981, pushing thirty years now.

2 Q. And where are you licensed?

3 A. I'm licensed in North Carolina and
4 Georgia.

5 Q. And when did you first get your first
6 license?

7 A. I think about 1990, '90 or '91.

8 Q. And would you please give us your history
9 of your employment?

10 A. Sure. From 1981 to 1993 I was employed
11 with the U.S. Navy Civil Engineer Corps. And
12 I had assignments in California; Studebay
13 Creek, Greece; Norfolk, Virginia. The Navy
14 sent me back to school. That was a blessing.
15 I went to Georgia Tech for a year with them.
16 Then I went down to Gulfport, Mississippi
17 where I was employed with the Navy Seabees to
18 Sigonella, Sicily and to Puerto Rico,
19 Roosevelt Ridge, Puerto Rico. Then I finished
20 that assignment and finished as a public works
21 officer at Camp David. In these roles -- they
22 were varying roles, some facilities
23 management, some contracting, some actually
24 doing the work with the Navy construction
25 battalion, also known as the Seabees. So

1 varying roles during those twelve years, all
2 kinds of facilities management, construction,
3 repair, that type thing.

4 Q. Did any of that work involve stucco?

5 A. Some.

6 Q. What was your position at Camp David?

7 A. I was a public works officer -- was my
8 title, sort of like being a public works
9 director of a small, little enclave.

10 Q. What was your actual job there? What did
11 you do?

12 A. Managed all the building, utility
13 systems, grounds, anything -- any type of
14 building, roof, walls, anything like that.
15 We had a crew that maintained and also
16 coordinated with contractors to do bigger
17 projects than we could do with our in-house
18 staff.

19 Q. And could you please tell the jury that
20 as an engineer in senior building and
21 construction, what do you do?

22 A. Since I left the Navy in 1993, I've
23 practiced basically as a construction -- a
24 civil engineer and a construction consultant.
25 I'd say -- that's from '93 to present, so

1 that's about eighteen years. Most of that
2 time has been in building diagnostics with a
3 specialty in looking at roofs and walls and
4 water intrusion and those types of issues.
5 Although I've done some design here and there,
6 mostly -- most of my practice is built around
7 diagnosing problems with buildings.

8 Q. And when you say "diagnose" would that be
9 similar to the phrase that we've heard
10 earlier, forensics?

11 A. I call it forensics. But forensics is
12 such a general term, I would like to maybe get
13 more specific and say specific to water
14 intrusion, how to repair something that's
15 broken, that type of thing.

16 Q. And how many stucco projects have you
17 been involved in?

18 A. I've worked on maybe about fifty over the
19 years. Some of those would be one building.
20 Some of those would be as many as a hundred
21 buildings. The high-water mark there is a job
22 down in Jacksonville, Florida, looking at
23 about a hundred stucco-clad residences. And
24 I've looked at condos such as the one we're
25 talking about today, with multiple buildings,

1 or sometimes just one building. But about
2 fifty projects, all said.

3 Q. And when you say that you have been
4 involved with a project, did that involve
5 diagnosing issues with the stucco?

6 A. Yes, diagnosing either issues with the
7 cladding itself or water intrusion behind the
8 cladding -- cladding meaning the stucco.

9 Q. Now, did that also include repairs?

10 A. Yes. Sometimes it was just diagnosing
11 what's broken, what's wrong, what the source
12 of either the cracking is or water or maybe
13 just diagnosing the problem. Other times it
14 was diagnosing the problem and then
15 establishing what an appropriate repair
16 methodology would be.

17 Q. Were you hired by the Sweeney Wingate law
18 firm and then subsequently with my law firm to
19 review and evaluate the allegations made
20 against Professional Plastering and Stucco and
21 to review reports dealing with a site visit
22 and diagnostic visit to the Fenwick
23 properties?

24 A. Yes, sir.

25 Q. And when were you hired?

1 A. I was hired back, I believe, in March or
2 April or so -- somewhere around that time
3 frame I got the phone call from this man --
4 March or April of 2010.

5 Q. Now, you are charging for your services.

6 A. Yes, sir.

7 Q. And what are you charging?

8 A. Our billing rate is \$175 per hour.

9 Q. And how much approximately have you
10 billed to date?

11 A. To date, for the site visits back in
12 June, and a site visit in December -- this is
13 of 2010, of course -- around \$11,000 dollars
14 to date.

15 Q. Would you please tell the jury what
16 you've reviewed in this case?

17 A. Sure. I've reviewed a number of
18 documents. I have kind of written myself a
19 few notes here of what we've done, and I've
20 got some of them with me. I've got my entire
21 file here.

22 Did a little bit of initial review of
23 Myles Glick's report and PowerPoint
24 presentations.

25 Then visited the site on June 8 through

1 June 11, 2010 to observe wall cuts that were
2 being done by other parties.

3 Then revisited the site in December of
4 2010, just with knowledge of having visited
5 the site and looked at a lot of documents in
6 between, to establish what a scope of repair
7 might be.

8 Read reports by S&ME, Engle Martin, G. R.
9 McManus, H2L Engineers, some correspondence
10 between Summit Contracting and multiple
11 parties during the construction phase or even
12 after the construction phase.

13 I've looked at some of the building
14 plans, not every sheet, but the pertinent
15 sheets of the plans and the same with some of
16 the specification sections.

17 Then I've reviewed the Magna Wall litera-
18 ture. The stucco system is a proprietary
19 system called Magna Wall. So I've looked at
20 their technical literature.

21 And then looked at the scopes of repair
22 -- I'm sorry, excuse me, scopes of work for
23 Professional Plastering, Johnson Roof, Los
24 Campos. I feel like there's one more -- North
25 Florida Framing.

1 I've also looked at the manufacturer's
2 installation document by General Aluminum,
3 the manufacturer of the windows here on this
4 project.

5 Q. And have you also reviewed the engineer-
6 ing reports that were produced for the stucco
7 system by Magna Wall?

8 A. Yes, that's in the technical literature I
9 was referring to.

10 Q. Now, in the course of your practice as an
11 engineer, do you rely on information and data
12 that's been collected and reported by others?

13 A. Yes.

14 Q. And is that something that's normally
15 done in the engineering field?

16 A. Yes. Because you can't be everywhere all
17 the time. So it's very helpful to look at
18 other reports and photographs and those types
19 of things to take a look at what you might not
20 be able to see when you're on site.

21 Q. And did you do that in this case?

22 A. I did do that in this case.

23 Q. And the engineering reports and Mr.
24 Glick's report were included in those that you
25 have derived information from to do what we've

1 asked you to do?

2 A. Yes.

3 MR. ANDERSON: May I approach the
4 witness?

5 THE COURT: You may.

6 MR. ANDERSON: Thank you.

7 DIRECT EXAMINATION CONTINUED

8 BY MR. ANDERSON:

9 Q. Mr. Dawkins, I'm going to hand you what
10 has been marked as Plaintiff's Exhibits 4, 5
11 and 6 and ask you if you can identify these.

12 A. Sure. Exhibit 4 is a National Evaluation
13 Service, Incorporated report, NER 459, April
14 1997, for the Magna Wall fiber-reinforced
15 stucco system.

16 Number 5 is a similar national evaluation
17 report from the National Evaluation Service,
18 Incorporated, NER 459, issued in July of 2002.
19 Also it's an evaluation of the Magna Wall
20 fiber-reinforced stucco system.

21 Number 6 is an ICDO Evaluation Services,
22 Incorporated report, NER 4776, issued July
23 1st, 2000 for the Magna Wall fiber-reinforced
24 stucco product system.

25 Q. And you have reviewed those?

1 A. I have reviewed them, yes.

2 Q. And do they apply to this project?

3 MR. KIRCHNER: Objection, Your
4 Honor. This witness has not been offered as
5 an expert. We object him offering any opinion
6 testimony.

7 THE COURT: Sustained.

8 MR. ANDERSON: Your Honor, at
9 this time we would offer Mr. Dawkins as an
10 expert.

11 THE COURT: As an expert in ---

12 MR. ANDERSON: In the field of
13 engineering and construction.

14 MR. KIRCHNER: Excuse me, Your
15 Honor, if you'll permit me, I'd like to voir
16 dire the witness.

17 THE COURT: You may.

18 VOIR DIRE EXAMINATION

19 BY MR. KIRCHNER:

20 Q. Good morning, Mr. Dawkins. I'm Jesse
21 Kirchner. I represent the plaintiffs, along
22 with others in this matter. How are you?

23 A. Doing okay.

24 Q. I understood from your testimony you're
25 from Duluth, Georgia. Is that correct?

- 1 A. That's correct.
- 2 Q. That's where you practice engineering?
- 3 A. That's where our office is.
- 4 Q. And your office or your firm has no
- 5 office in South Carolina. Is that correct?
- 6 A. Engineering Solutions does not at this
- 7 time have an office here in South Carolina.
- 8 That's correct.
- 9 Q. Sir, and as an engineer, you've never
- 10 designed a multi-family project, like Twelve
- 11 Oaks Condominium. Is that correct?
- 12 A. I have not designed -- I'm not a building
- 13 designer, no.
- 14 Q. And you've never designed any building in
- 15 Charleston, South Carolina. Is that correct?
- 16 A. That's correct.
- 17 Q. And you've never designed any building
- 18 anywhere in South Carolina, correct?
- 19 A. Not buildings, no.
- 20 Q. Have you ever been qualified as an expert
- 21 in a court of law here in South Carolina?
- 22 A. No.
- 23 Q. And as I understood your testimony, you
- 24 didn't perform any destructive testing of your
- 25 own at Twelve Oaks. Is that correct?

1 A. I observed destructive testing by others.
2 I was on site when they were doing it, but I
3 did not actually -- well, I may have actually
4 made a couple of cuts here and there, assist-
5 ing while we were up on a bucket observing.
6 But I was not cutting it myself.

7 Q. You observed, but you didn't make any
8 cuts of your own, correct?

9 A. I did not make specific cuts of my own.

10 Q. You said you had some sheets of the
11 plans. Did you review those plans for
12 construction compliance?

13 A. I just reviewed -- yes. The answer to
14 your question is yes.

15 Q. And have you proposed a scope of repair
16 for those problems?

17 A. I've discussed it with C. A. Winman.

18 Q. Is that the only person you've
19 communicated your scope of repairs to?

20 A. I've discussed it with the attorneys
21 also.

22 Q. And you're here today offering expert
23 technical testimony, correct?

24 A. Yes.

25 Q. You're not a licensed architect. Is that

1 correct?

2 A. I am not a licensed architect.

3 Q. And you're not a licensed general
4 contractor.

5 A. That's correct.

6 Q. And I think you testified that you are a
7 construction consultant. Is that correct?

8 A. That's correct.

9 Q. Do you have any certifications as being a
10 construction consultant?

11 A. No, I'm just trying to define what I do.

12 Q. Do you happen to have a business card on
13 you?

14 A. I believe I do.

15 Q. May I see it?

16 A. Sure.

17 MR. KIRCHNER: May I approach the
18 witness, Your Honor?

19 THE COURT: You may.

20 WITNESS: (Tendering)

21 DIRECT EXAMINATION CONTINUED

22 BY MR. KIRCHNER:

23 Q. Can you tell me your professional
24 engineering license for South Carolina?

25 A. I don't hold a professional engineering

1 license here in South Carolina.
2 Q. You're not licensed in the state?
3 A. I am not.
4 Q. Do you know if Georgia has any laws or
5 regulations against unlicensed experts
6 testifying in Georgia courts?
7 A. I do not know.
8 Q. Are you familiar with any such laws in
9 South Carolina?
10 A. No.
11 MR. KIRCHNER: May I approach the
12 witness again?
13 THE COURT: Yes.
14 MR. ANDERSON: May we approach?
15 THE COURT: You may.
16 (OFF RECORD BENCH CONFERENCE)
17 THE COURT: You may continue.
18 MR. KIRCHNER: Thank you, Your
19 Honor.
20 VOIR DIRE EXAMINATION CONTINUED
21 BY MR. KIRCHNER:
22 Q. If you could take the binders I've handed
23 you.
24 A. Sure.
25 Q. This is entitled South Carolina's Board

1 of Registration for Professional Engineers and
2 Surveyors, Division of Professional and
3 Occupational Licensing, Department of Labor,
4 Licensing and Regulation of South Carolina.

5 And it's titled Engineering and Survey of
6 Statutes and Regulations. It's from the Code
7 of Laws of South Carolina. Do you see that?

8 A. Yes.

9 Q. Sir, if you go to page four of the
10 document, please, where it has definitions.

11 A. I'm there.

12 Q. This document states South Carolina Code
13 Section of South Carolina law 40-22-20,
14 definitions. Do you see that?

15 A. Yes.

16 Q. Look to page six, item number twenty-
17 three in those definitions. It says "Practice
18 of engineering." Do you see that?

19 A. Yes.

20 Q. Would you read that for the jury, please?

21 A. Sure, (reading): "Practice of engineer-
22 ing means any service or creative work the act
23 or performance of which requires engineering
24 education, training and experience and the
25 application of special knowledge in

1 mathematical, physical and engineering
2 sciences to such services for creative work as
3 consultation, investigation, expert testimony,
4 evaluation, design and design coordination of
5 engineering works and systems designed for
6 development and use of land and water,
7 performing engineering surveys and studies and
8 the review of construction for the purposes of
9 monitoring compliance with drawings and
10 specification, any of which embraces such
11 services or work, either public or private, in
12 connection with any utilities, structures,
13 buildings, machines, equipment processes, work
14 systems, projects, industrial or consumer
15 products, work equipment, control systems,
16 communications, mechanical, electrical,
17 hydraulic, pneumatic or thermal nature insofar
18 as they involve safeguarding life, health or
19 property, and including such other
20 professional services as may be necessary to
21 the planning, progress and completion of any
22 engineering services. The mere execution as a
23 contractor of work designed by a professional
24 engineer or supervision of the construction of
25 such work as a foreman or superintendent is

1 not considered the practice of engineering. A
2 person must be construed to practice or offer
3 to practice engineering within the meaning and
4 intent of this chapter." This is pretty long.
5 Do you want me to continue?
6 Q. You can stop there.
7 A. Okay.
8 Q. And what Section 23 says is that the
9 practice of engineering means investigation,
10 correct? It says investigation in there?
11 A. Yes.
12 Q. So the practice of engineering means
13 offering expert technical testimony, correct?
14 A. Yes.
15 Q. And so the practice of engineering means
16 evaluating construction for the purposes of
17 compliance with drawings and specifications?
18 A. Sure.
19 Q. All of which you're here to do today,
20 right?
21 A. I'm doing that.
22 Q. And you are not licensed in this state.
23 A. I'm not licensed in the state. I'm
24 working under a responsible charter, Wade
25 Anderson, our principal, who is.

1 Q. He's not here today, is he?

2 A. He's not here.

3 Q. Sir, if you'd look to page fourteen of
4 the same document, please.

5 A. Okay.

6 Q. If you would read South Carolina law,
7 Code Section 40-22-200 to the jury, please.

8 A. (Reading): "A person who violates the
9 provisions of this Chapter or regulation
10 promulgated pursuant to this Chapter or who
11 commits any of the following violations is
12 guilty of a misdemeanor and, upon conviction,
13 must be imprisoned for not more than six
14 months or fined not less than \$500 dollars and
15 not more than \$2,000 dollars for each
16 violation or both. However, the total imposed
17 for these violations may not exceed \$10,000
18 dollars." And it continues.

19 Q. And just under that it says (reading)
20 "...practices or offers to practice
21 engineering or surveying in the state without
22 being registered applies to this chapter."

23 Correct?

24 A. Yes.

25 Q. Mr. Dawkins, you testified earlier that

1 you have your entire file here with you?

2 A. Yes, I do.

3 Q. Did you take any photographs of your own?

4 A. You know what? I've got my photographs
5 on a little drop drive, but I don't have them
6 in the file.

7 Q. They're not here with you today?

8 A. They are not. I've got some in the file.

9 Q. What is in your file that you have with
10 you today?

11 A. I've got some select photos that are
12 printouts of my photos.

13 Q. Is that it?

14 A. That's it.

15 Q. The photos that you just referenced, have
16 you ever produced those to the lawyers who
17 hired you?

18 A. I believe I have sent them to Ms. Mahon.

19 MR. KIRCHNER: Your Honor, we
20 would object to this witness being offered as
21 an expert.

22 THE COURT: All right. Ladies and
23 gentlemen, that indicates that there's a
24 matter of law that I need to take up outside
25 of your presence. Do not begin your

1 deliberations. Do not discuss this case
2 amongst yourselves.

3 Please rise for the jury. Mr. Dawkins,
4 remain seated.

5 (JURY OUT)

6 THE COURT: Thank you. Be seated.
7 Mr. Anderson, I'll be happy to hear from you.

8 MR. ANDERSON: Thank you, Your
9 Honor. We would direct Your Honor's attention
10 to the case of *Bagley v. CSX Transportation* in
11 the Supreme Court in South Carolina. And in
12 that the Court found that the engineering
13 licensing statute which prohibits an
14 individual from engaging in the practice of
15 engineering in South Carolina without being
16 registered, which includes expert technical
17 testimony in its definition of practice of
18 engineering but did not include ---

19 THE COURT: I'm sorry?

20 MR. ANDERSON: Professional
21 engineering expert from testifying in a
22 railroad damages case, expert services were
23 being offered to a South Carolina jury not
24 to the state's citizens seeking traditional
25 professional engineering services. It's on

1 that basis that we are offering Mr. Dawkins.
2 In addition, he is a member of a firm that is
3 licensed in South Carolina. Mr. Wade Anderson
4 is the qualifying engineer for that. And he
5 is permitted to make site visits and so forth
6 under that license. And we believe that he is
7 qualified to testify under that.

8 We believe also, Your Honor, that the
9 exclusion of his testimony would contravene
10 Rule 702 and that it is scientific, technical
11 or other specialized knowledge that will
12 assist the trier of fact in understanding the
13 evidence.

14 COURT REPORTER: I'm sorry, I
15 cannot hear over the projector.

16 THE COURT: All counsel, from where
17 we're sitting, and I'm at the same level as
18 the court reporter, y'all have got to speak
19 up. Mr. Anderson, I'm going need to repeat
20 the last statement that you made so that we
21 have a very complete record. The way that the
22 overhead projector, with it being on, it's
23 very hard to hear you unless you are speaking
24 very loudly. Thank you, Mr. Anderson.

25 MR. ANDERSON: Thank you, Your

1 Honor. What I was referring to, Your Honor,
2 was Rule 702. The Supreme Court had found
3 that the failure to allow him to testify would
4 contravene that Rule. That Rule states that
5 if scientific, technical or other specialized
6 knowledge would assist the trier of fact in
7 understanding the evidence or to determine a
8 fact in issue, a witness qualified as an
9 expert by knowledge, skill, experience,
10 training or education may testify. And we
11 believe that he has shown the education, skill
12 and experience and technical training
13 necessary to do that.

14 THE COURT: Mr. Anderson, that's
15 just one of the factors that I need to
16 consider whether or not he should be qualified
17 as an expert. Is that correct?

18 MR. ANDERSON: Your Honor, I
19 think that's the primary factor that needs to
20 be considered. And if Your Honor would like
21 me to address another specific factor, I will
22 be happy to do so.

23 THE COURT: Certainly.

24 MR. ANDERSON: I was asking
25 whether there was a specific one.

1 THE COURT: You want me to tell you
2 what else I need to know? Did I hear how many
3 times he's been qualified as an expert in
4 Court?

5 MR. ANDERSON: Your Honor, if I
6 may ask that question. He was asking him in
7 South Carolina only. If he has been
8 qualified, I would ask to make that voir dire
9 of him.

10 THE COURT: You may ask the
11 witness.

12 MR. ANDERSON: Mr. Dawkins, have
13 you ever been qualified in any court in the
14 United States to give testimony?

15 THE WITNESS: Yes.

16 MR. ANDERSON: In which courts?

17 THE WITNESS: They are all in
18 Georgia, all state courts. I think about four
19 times. And I've got a testimony log on record
20 which we could go back and look.

21 MR. ANDERSON: Do you have it
22 with you?

23 THE WITNESS: I sent it to you
24 electronically. I do not have a hard copy of
25 it here.

1 MR. ANDERSON: And those were in
2 the circuit courts of Georgia?

3 THE WITNESS: I believe so.
4 They're in state courts, two magistrate and a
5 couple of state.

6 THE COURT: Mr. Dawkins, have you
7 ever not been qualified as an expert in any
8 court?

9 THE WITNESS: I have not. The answer
10 to your question is no. I've always been
11 qualified, or I've not been disqualified.

12 THE COURT: And the best of your
13 recollection and understanding is you've been
14 asked to be qualified as an expert four times.

15 THE WITNESS: I believe that's
16 correct. It's in my log. I'm sitting here
17 thinking back. I believe -- I believe it is
18 four times.

19 THE COURT: And you've been asked
20 four times to be qualified as an expert, and
21 each of those four times you were able to be
22 qualified?

23 THE WITNESS: Yes.

24 THE COURT: And all of those times
25 have been in Georgia. Is that correct?

1 THE WITNESS: Yes.

2 THE COURT: Thank you.

3 MR. ANDERSON: Thank you, Your
4 Honor. At this time we would offer him as an
5 expert.

6 MR. KIRCHNER: Your Honor, as you
7 correctly pointed out -- I'm coming up here so
8 you can hear me.

9 THE COURT: Thank you.

10 MR. KIRCHNER: As you correctly
11 pointed out, Your Honor, that's only one of
12 the factors to consider. Rule 702 says the
13 trial court must determine whether or not the
14 offer of testimony will assist the trier of
15 fact. Respectfully, Mr. Dawkins is a
16 professional who came from another state.
17 He's been qualified as an expert four times
18 in that state, and that's a state where he's
19 licensed. He's not licensed here. He
20 investigated the buildings. That's a
21 violation of the Code Section that we cited.
22 He reviewed the construction plans in
23 violation of the Code Section that we cited.
24 He's offered a scope of repair to two hundred
25 and sixteen South Carolina homeowners in

1 violation of those Code Sections we've cited.
2 He's never designed a building of the type
3 that is in issue here. He's never designed a
4 project in South Carolina at all. He's not a
5 licensed architect. He's not a licensed
6 general contractor. Again, he's never been
7 qualified as an expert in South Carolina.
8 He's a construction consultant and he has no
9 certifications for that designation
10 whatsoever. Actually, specific to this
11 project, he did none of his own testing. All
12 he did is observe the testing of others.

13 So for expert qualifications that's
14 our comment arguments. In addition, Your
15 Honor, we never received any discovery
16 production or anything from this expert except
17 a two-page C.V. We never got any photos. We
18 never got any reports. We never got any
19 opinions. They never gave us any scopes of
20 work, nothing. A two-page C.V. is all we ever
21 received in discovery. So he ought not to be
22 able to testify at all, on those grounds.

23 THE COURT: Mr. Anderson, your
24 response?

25 MR. ANDERSON: Your Honor, the

1 scheduling order in this case did not require
2 reports, and he did not prepare a report in
3 this case. And he is able as an expert -- an
4 expert may base their opinions under Rule 703
5 on the work of others -- and if, in fact,
6 that's what they do in their normal practice.

7 As an example, a surgeon can testify
8 as to what a radiologist told him, which would
9 obviously be hearsay except that he's relying
10 on that information in his professional
11 capacity.

12 This is one step closer in that he
13 was personally there and observed the actual
14 cuts being made.

15 The photos are not being offered.
16 We had initially proffered those and there was
17 an objection and we discovered that they had
18 not been produced. Those have been withdrawn
19 and will not be offered. We are actually
20 using Mr. Glick's photos.

21 He has been known to the plaintiffs
22 for a very long time. They have not requested
23 to take his deposition or made any other
24 inquiries ---

25 THE COURT: Mr. Anderson, was that

1 a factor into whether or not he's an expert
2 and should be qualified as an expert to give
3 opinion testimony in the trial of the case?

4 MR. ANDERSON: Your Honor, I'm
5 sorry. I was trying to answer Mr. Kirchner's
6 objections.

7 THE COURT: Mr. Kirchner's not the
8 one that's going to be making the decision of
9 whether or not he's an expert.

10 MR. ANDERSON: I understand, Your
11 Honor. But one of the factors that he held
12 out did go to Rule 703 ---

13 THE COURT: Mr. Anderson, how many
14 cuts did he personally observe?

15 MR. ANDERSON: He was on site
16 for, I believe, five days or four days.

17 THE WITNESS: Four days.

18 MR. ANDERSON: Four days, I'm
19 sorry. And that was testimony that was coming
20 up and whether or not he can tell us how many
21 cuts he observed.

22 THE WITNESS: Maybe twenty to thirty.
23 The other parties made a lot of cuts
24 throughout the buildings. But I have not
25 written down every single cut in my notes.

1 MR. ANDERSON: And that is a
2 number greatly in excess of the cuts made by
3 Mr. Glick from his testimony. So we had more
4 than twice the number of cuts that were
5 observed.

6 THE COURT: Mr. Dawkins, how many
7 cuts did you personally do? And if you didn't
8 do them, then who was doing those twenty-plus
9 cuts?

10 THE WITNESS: I believe it was
11 McGee Engineering, I believe, is the name of
12 the company. George McGee was ---

13 THE COURT: Mr. Dawkins, I know and
14 I do this myself. But "I believe" and "I
15 think" -- I need you to know. So who was it
16 that did the cuts?

17 THE WITNESS: His name is George
18 McGee. I'm not sure I know the exact name of
19 the engineering company that was doing those
20 cuts, but that was the person that was in
21 charge of those cuts.

22 THE COURT: Mr. Anderson?

23 MR. ANDERSON: Mr. McGee is a
24 licensed contractor -- or, excuse me, a
25 licensed professional engineer in South

1 Carolina.

2 Your Honor, also as Mr. Glick
3 pointed out in his testimony, the construction
4 actually performed the physical labor of doing
5 the cuts and placing the cuts in his
6 investigation. And in Mr. McGee's
7 investigation, Watkins Construction and Steve
8 Watkins performed the actual cuts, physically
9 cutting into them to demonstrate. So, looking
10 at it, it's a licensed contractor who's
11 physically performing the cuts, and then the
12 engineers come in and do the analysis. So his
13 observation of the cuts is identical to the
14 observation made by Mr. Glick.

15 THE COURT: Except Mr. Glick's
16 licensed in South Carolina; isn't he, Mr.
17 Anderson?

18 MR. ANDERSON: Yes, he is, Your
19 Honor.

20 THE COURT: So how do I know --
21 what do I know about Mr. Dawkins as to his
22 knowledge and understanding of the licensures
23 in South Carolina?

24 MR. ANDERSON: Your Honor, I
25 believe that he has already testified that his

1 firm is licensed to work in South Carolina.

2 THE COURT: I understand that. But
3 his firm's not here to testify. I need to --
4 you're requesting that Mr. Dawkins personally
5 be qualified as an expert. That really
6 doesn't say just because you are or are not
7 licensed that you are qualified to be an
8 expert. You've got to have the requisite
9 skill before you can assist the trier of fact.

10 MR. ANDERSON: Your Honor, he's
11 testified to having participated in various
12 levels of stucco investigations and projects
13 having over a hundred buildings.

14 THE COURT: That was objective,
15 though, Mr. Anderson. I need to know what his
16 expertise in stucco is in South Carolina.
17 Just, again -- and I've read *Bagley*. I
18 understand. Just because he's not licensed
19 doesn't mean that I can't find him as an
20 expert. But just because he's not licensed
21 doesn't make him an expert in South Carolina.
22 He's got to have the requisite checklist in
23 order for him to be qualified as an expert.
24 I haven't heard those.

25 MR. ANDERSON: Well, Your Honor,

1 we have presented his education. He's ---

2 THE COURT: Mr. Anderson, perhaps
3 I'm not -- I need to know what particular
4 skills and understanding of South Carolina
5 licensure and building codes that this
6 individual -- this individual has.

7 DIRECT EXAMINATION CONTINUED

8 BY MR. ANDERSON:

9 Q. Mr. Dawkins, are you able to provide us
10 with your knowledge and your understanding of
11 the licensing and building codes in South
12 Carolina?

13 A. I feel like I can.

14 Q. Please do.

15 A. Well, with regard to -- anything I've
16 been doing has been under the responsible
17 charge of the principle in charge of
18 Engineering Solutions International. That's
19 Wade Anderson. So my services have been under
20 his responsible charge. He is a licensed
21 engineer here in South Carolina.

22 Q. Is that ---

23 A. Let's put that to rest. Any of the
24 services I've been doing, I've not been
25 representing myself as a licensee. But

1 Engineering Solutions is, in fact, registered
2 as an engineering firm here in South Carolina.

3 Q. As far as the building codes in South
4 Carolina, do you know what building codes
5 apply to this project?

6 A. Yes, the International Building Code of
7 2000 applied to this project.

8 Q. And has that International Building Code
9 of 2000 been accepted in Georgia?

10 A. Yes, it's common for both states.

11 Q. And the requirements of that code deter-
12 mine the means and methods of construction as
13 well as evaluation of how the construction was
14 performed?

15 A. Yes.

16 Q. And you are familiar with those?

17 A. Yes.

18 Q. What differences are there between the
19 analysis that you would do in Georgia and the
20 analysis that you would do in South Carolina,
21 either by the virtue of geographic location
22 and counting in the environment, or by the
23 code?

24 A. There would be no distinction between one
25 place or the other.

1 Q. And you have done work in the coastal
2 areas of Georgia?

3 A. Yes.

4 Q. And also -- and how many projects have
5 you participated in in South Carolina?

6 A. Probably -- I'd say thirty to fifty. I'm
7 guessing. I mean, during the synthetic stucco
8 -- there was a time when synthetic stucco was
9 a huge issue across the whole southeast. And
10 I looked at a number of synthetic stucco homes
11 and I looked at a number of hardcoat stucco
12 homes also more recently.

13 Q. Have those been here in South Carolina?

14 A. They have been in South Carolina and in
15 coastal Georgia, both. Quite a bit of work
16 done in the Hilton Head Island area.

17 Q. And in those did you provide testimony by
18 deposition or in court?

19 A. Deposition only. I think in maybe one of
20 those -- I'm trying to remember, specific to a
21 hard-coat stucco case. It was one. It was up
22 in Greer. I'm sorry. I don't have my log in
23 front of me. But I've looked at hard-coat --
24 specifically looked at a hard-coat stucco case
25 on behalf of an owner up in Greer, South

1 Carolina.

2 Q. And you were deposed in that case?

3 A. Yes.

4 MR. ANDERSON: Your Honor, we
5 believe that at this time we would offer Mr.
6 Dawkins as an expert and his opinions on
7 engineering and construction.

8 MR. KIRCHNER: Your Honor, if I
9 may briefly respond.

10 THE COURT: You may.

11 CROSS EXAMINATION

12 BY MR. KIRCHNER:

13 Q. Mr. Dawkins, are you familiar with any
14 local modifications to the IRC 2000 that may
15 not have been adopted in Georgia?

16 A. No. IRC?

17 Q. Yes, sir, IRC 2000.

18 A. No.

19 MR. KIRCHNER: And, Your Honor,
20 if I may, the -- concerning the working under
21 authority registered here -- I'm citing from
22 40-22-250. It says that, (reading): "An
23 individual working through a firm offering
24 engineering services is permitted if all
25 personnel of the firm are licensed under this

1 Chapter."

2 So it doesn't matter that he's
3 acting under the direction of the other fellow
4 who's licensed. It says all persons must be
5 licensed in South Carolina.

6 Your Honor, I appreciate Mr. Dawkins
7 understanding the building codes. Obviously,
8 he doesn't have a complete understanding of
9 any local modifications that might be
10 applicable to Charleston County. But I
11 understand the building codes, and I've never
12 swung a hammer. And neither has Mr. Dawkins.
13 He's not a general contractor. He said that
14 he's a construction consultant, but he has no
15 certifications to be a construction
16 consultant. We think it's highly prejudicial
17 for the jury to hear opinions from him about
18 construction and him not being a licensed G.C.
19 or any type of certified construction
20 consultant.

21 Aside from the expert issue, Your
22 Honor, the additional sustaining grounds for
23 him not to testify at all, again, we've never
24 been produced his file. He just testified
25 that he had field notes. We've never been

1 given those. We sent a discovery request that
2 asked for copies of any and all written notes,
3 memos, reports of any expert witnesses which
4 they may use at trial or identified with the
5 witnesses, all documents, photographs and
6 everything. We've gotten none of it. We have
7 no notes to cross examine -- none of his field
8 notes to cross examine him on, none of his
9 photographs that he took himself to cross
10 examine him on. It's highly prejudicial to
11 allow him to testify at all.

12 THE COURT: Your response to that
13 issue only, Mr. Anderson, not whether or not
14 he's an expert, but as to whether or not the
15 information was provided in discovery.

16 MR. ANDERSON: Your Honor, he has
17 listed things that I do not hold and I do not
18 believe this man holds. And we deny in this
19 case that he will be -- Your Honor, we don't
20 have it. If I could make one comment on the
21 IRC.

22 THE COURT: Mr. Anderson, my
23 concern now, right, is not whether or not he's
24 qualified as an expert. He can still qualify
25 and he can still testify as to what he

1 personally observed. But my concern now is
2 that there's information that he's going to
3 testify to that he has indicated a couple of
4 times he had electronically sent to you that
5 has not been provided to the plaintiffs.

6 MR. ANDERSON: He indicated that
7 he sent photographs to Ms. Mahon. And she is
8 shaking her head that that is not correct. I
9 have not personally seen his photos or his
10 notes. I have interviewed him extensively a
11 couple of times.

12 THE COURT: Here's what we're going
13 to do. We're going to take a short break.
14 And you need to identify what he has and has
15 not sent to you and make sure and send it,
16 just so the record is clear. If he's saying
17 he sent photos and Ms. Mahon is shaking her
18 head in disagreement, then we've got some
19 other issues that we need to be concerned
20 about before I even make that leap to qualify
21 him as an expert.

22 So we're going to take ten minutes.
23 Thank you. Mr. Dawkins, you need to go over
24 what you have and have not provided to Mr.
25 Anderson, just so the record is clear.

1 THE WITNESS: Okay. Thank you.

2 MR. LUCEY: May we observe that or
3 witness that, please?

4 THE COURT: Could you give him just
5 a few moments to kind of go and make sure.
6 And then what whatever is turned over, Mr.
7 Lucey, then Mr. Anderson will let you know.
8 You may step down. Thank you.

9 THE WITNESS: Thank you, ma'am.

10 (WITNESS STEPS DOWN)

11 (WITNESS CONSULTS WITH COUNSEL)

12 (BRIEF RECESS)

13 (IN CHAMBERS CONFERENCE)

14 THE COURT: Please be seated. We
15 are going to move on to the next witness. Mr.
16 Dawkins will not be testifying at this time.
17 Have you had an opportunity to determine when
18 or if Mr. Glick is available?

19 MR. KIRCHNER: I have spoken to
20 him, Your Honor. Mr. Glick is on his way
21 here. He might be here in about ten minutes.
22 He does have an appointment at 12:00 and an
23 appointment at 2:00. We're still waiting on
24 the photographs, and they are on the way. And
25 there are other file materials in that box.

1 We'd like time to review it. What was
2 contained in Mr. Dawkins' file is a -- I guess
3 some charts and so forth and photographs that
4 he's reviewed and he has notes to them as to
5 whether there was visible moisture damage and
6 things like that. And Myles has our report,
7 so it might take us some time to match up the
8 chart with the photos and discuss those with
9 Mr. Glick. He's on the way.

10 THE COURT: After you speak with
11 Mr. Glick we'll make the determination if it
12 is possible for Mr. Glick to review what is
13 contained as your expert in those files.

14 And, Mr. Kirchner, we have had some
15 discussion in Chambers that it is your
16 representation to the Court that you have not
17 received what is contained in that file. Is
18 that correct?

19 MR. KIRCHNER: That is absolutely
20 correct, Your Honor. This is the first time
21 I've seen this.

22 THE COURT: And you had requested
23 that information from counsel pursuant to your
24 discovery requests. Is that correct?

25 MR. KIRCHNER: That's correct.

1 It was actually Mr. Sequi's office that
2 generated the discovery request. But, yes,
3 Your Honor, plaintiffs requested it.

4 THE COURT: And, Mr. Dawkins, I
5 remind you you're still under subpoena. So
6 I'm going to have you -- any objection to
7 allowing Mr. Dawkins to remain in the court
8 room, from the plaintiffs? We have not
9 invoked the rule.

10 MR. KIRCHNER: Your Honor, I think
11 we would like him sequestered while their
12 other expert, Mr. Pusheck testifies.

13 THE COURT: Mr. Anderson?

14 MR. ANDERSON: I don't object to
15 that.

16 THE COURT: Mr. Dawkins, what I
17 need you to do is just remain outside in the
18 hallway, in close proximity so if counsel
19 needs to discuss with you anything.

20 And, again, do not discuss your
21 testimony, either what you have already
22 testified to or what you plan to testify to,
23 until you are back on the witness stand.

24 You may, of course, talk about
25 scheduling or anything of that nature. But

1 if you have any questions, I always tell my
2 witnesses please err on the side on caution
3 and just come back in and the Court will be
4 happy to address any questions that you may
5 have. Thank you, Mr. Dawkins.

6 THE WITNESS: Thank you, Your Honor.

7 THE COURT: You may wait outside.
8 Who is our next witness?

9 MR. ANDERSON: Your Honor, we are
10 going to publish the deposition excerpts of
11 Mr. McNabb. We handed those up to you
12 earlier. And I believe that there are some
13 objections to his testimony. I take it at
14 Your Honor's pleasure as to when you want to
15 do those.

16 MR. KIRCHNER: Your Honor, Mr.
17 Glick has arrived. May I be excused to talk
18 to him?

19 THE COURT: You may. We will
20 handle the issues. Mr. Sequi?

21 MS. MAHON: I will be assisting
22 him. May I be excused?

23 THE COURT: You are excused as
24 well.

25 MR. SEQUI: Your Honor, may it

1 please the Court.

2 THE COURT: Yes, sir.

3 MR. SEQUI: Our objections, with
4 the exception of one, are basically the same.
5 And I don't know if Your Honor has had a
6 chance to look at the designations that they
7 proposed. But there are repeated instances,
8 and one may say it's almost a theme, in the
9 excerpts to take documents for which no real
10 identification or foundation, or more
11 importantly or any context has been set forth
12 in the deposition, and certainly in these
13 excerpts. And either counsel is reading it is
14 an attempt, I think, to maybe try to get
15 something before the jury that otherwise they
16 would not be allowed to hear. These people
17 are not experts. It seems like they are
18 trying to get things pertaining to documents
19 that there's not been any foundation, that
20 have not been admitted into evidence, there's
21 no context, just an isolated sentence --
22 before the jury. And we feel that referencing
23 things with no context and in complete
24 isolation is both going to be very confusing
25 for the jury, but also is going to be unfairly

1 prejudicial to the plaintiffs.

2 The other is just one section, Page
3 73, line 23 through Page 74, Line 2 -- and
4 that was just simply that that's stating facts
5 not in evidence, as to the hypothetical,
6 particularly the fact that it's the same
7 thing. There's been no foundation and in
8 isolation from the context.

9 Your Honor, also I'm not sure if
10 opposing counsel has made this available to
11 the Court, but I have some proposed excerpts
12 if I were not to prevail, or even if I do
13 prevail, I guess, to give additional
14 background about Mr. McNabb, at least maybe
15 develop what kind of person he is and his
16 background since he's, in essence, testifying
17 in front of the jury. I have given those to
18 opposing counsel. May I approach the Bench?

19 THE COURT: You may.

20 MR. ANDERSON: Those have been
21 handed up and are included in the consolidated
22 transcript.

23 THE COURT: Thank you.

24 MR. SEQUI: Your Honor, that
25 primary objection that I've just set forth

1 would also apply to the other excerpts for the
2 other two -- as I understand there's two more
3 witnesses, maybe, that are coming.

4 And I'm going to tell you my brain
5 was mushy last night as I was doing this, so
6 it's not real polished. I was doing the best
7 I could. So I apologize to the Court if it's
8 not as professional, maybe, as it might have
9 been if we had had more time.

10 THE COURT: Mr. Anderson?

11 MR. ANDERSON: Your Honor, I am
12 not certain as to -- I know the documents were
13 referenced and that the questions were based
14 on the text of some of the documents. And I
15 do not believe that there are any documents
16 that are actually be offered into evidence as
17 a result of this testimony.

18 And other than -- in flipping
19 through the first reference to any document
20 that I see is at ---

21 MR. SEQUI: May I approach, Your
22 Honor?

23 THE COURT: You may.

24 MR. SEQUI: I have my actual e-mail
25 objections. Again, these are in the form of

1 an e-mail, and I apologize -- that I sent Mr.
2 Anderson early this morning. And the first
3 one begins with Page 62. I can't say that
4 that's the most flagrant example which we're
5 complaining of. It's just the first one.

6 THE COURT: All right, counsel.
7 Mr. Anderson, what is the exhibit that you are
8 referencing on Page 62?

9 MR. ANDERSON: Page 62 ---

10 THE COURT: Let me ask you this
11 way, Mr. Anderson. Mr. Anderson, let me ask
12 it this way. Are you attempting through the
13 deposition to introduce any documents?

14 MR. ANDERSON: No, Your Honor.
15 We are not going to be offering exhibits. And
16 I believe some of these are already in. The
17 exhibit, we have reference to the paragraph
18 3.1.2 is the contract. Because it says "in
19 the contract that Tarragon had with Summit,
20 the general contractor." So that identifies
21 the document. And then they just ask a
22 question concerning the language of it. And
23 the answer is, "Yes, that's correct."

24 THE COURT: Mr. Sequi, just so I
25 understand, your objection is ---

1 MR. SEQUI: That if it's not going
2 into evidence they shouldn't be allowed to
3 talk about it. It's hearsay. And it's
4 confusing and prejudicial. The jury's not
5 going to know what in the world they're
6 talking about. So I'll just leave it at that.

7 THE COURT: But the document that
8 Mr. Anderson says that is referenced is
9 already in evidence.

10 MR. SEQUI: I'm not aware of the
11 document -- I might be mistaken, but the
12 contract between -- was this Summit and
13 Tarragon?

14 MR. ANDERSON: Summit and
15 Tarragon. I know it's been referenced several
16 times.

17 MR. SEQUI: That's the developer,
18 Tarragon, and the general contractor, Summit.
19 It is not the contract that's been marked as
20 Exhibit 3, which was Professional Plastering's
21 contract regarding their scope of work. It's
22 an entirely different subject matter and the
23 witness has got to authenticate that and lay a
24 foundation for it or otherwise give us some
25 context. And they're not here.

1 THE COURT: And that's the only
2 exhibit, Mr. Sequi, or you believe that -- all
3 of the other ---

4 MR. SEQUI: I think he's doing the
5 same exact kind of thing -- some document from
6 somewhere that's not going to be in evidence;
7 that they're cherry-picking parts of it, Your
8 Honor. These were discovery deposition, Your
9 Honor. So all the formalities that we might
10 have had if it were *de bene esse* are gone.
11 And we certainly didn't realize they going to
12 try this when we were taking discovery
13 deposition because otherwise we would have
14 made an objection to the form of the question
15 or about leading, foundation, all of those
16 would be proper objections. But the thing --
17 there's a lot of leading in there that I'm not
18 sure -- we probably made leading question
19 objections, because they actually led the
20 witness down the primrose path.

21 THE COURT: Mr. Anderson, do you
22 agree that if the exhibits are not in evidence
23 that they should not be referenced in a
24 deposition?

25 MR. ANDERSON: No.

1 THE COURT: No, you do not?

2 MR. ANDERSON: I do not agree
3 with that.

4 THE COURT: Explain to me why you
5 should be able to reference exhibits that are
6 not in evidence.

7 MR. ANDERSON: Your Honor, I
8 believe that the court -- Your Honor, a lot of
9 this is refreshing recollection. And we did
10 not go through the formalities of refreshing
11 the recollection, but a lot of is. Because
12 the witnesses would come in and testify 'this
13 happened eleven years ago.' We had a
14 document. And then we showed a document and
15 asked questions and they would respond. And
16 in refreshing recollection, you don't put that
17 document into evidence. And that is more of
18 what is going on here than anything else.
19 Other than that, the documents I believe
20 within the question are identified within the
21 question. I don't think it has to go into
22 evidence. And as far as the notice of the
23 depositions indicate that the deposition could
24 be used for trial. And the Rule is that all
25 objections except as to the form of the

1 question are reserved. So they're required
2 to make that objection, as far as leading,
3 anytime they feel that it's appropriate.

4 THE COURT: I'm trying to do the
5 best I can going through these that have just
6 been presented to me. Page 105, Line 14, Mr.
7 Anderson, can you tell me -- Deposition
8 Exhibit 95, the witness indicates that he had
9 not seen the document before. How is that
10 refreshing his recollection?

11 MR. ANDERSON: I would agree with
12 you on that, Your Honor, that he has not seen
13 the document before.

14 THE COURT: So that's Page 105,
15 Lines 14 through 107. That would be stricken
16 from the deposition.

17 Again, he indicates "they all look
18 the same", the drawings all look the same.
19 "I couldn't say yes or no" that he recognized
20 that. Again, Mr. Anderson, I'll be happy to
21 hear from you.

22 MR. ANDERSON: Well, Your Honor,
23 he did say -- he then goes on and says would
24 you agree with me, and his response is yes.

25 THE COURT: Mr. Anderson, you're

1 going to need to speak very loudly.

2 MR. ANDERSON: I apologize. I
3 believe that his identification as a part of
4 his interest in Fenwick broadens and allows
5 him to go ahead and answer that. I think he
6 said that all drawings looked the same. 'I
7 could say yes or I could say no.' Then he
8 went on to identify it. And I believe that
9 that would qualify as to that particular
10 section.

11 THE COURT: I disagree. Based upon
12 the question and answer "They all look the
13 same. I couldn't say yes or no." And then he
14 said "but you would agree with me." Your
15 question was, "You would agree with me." And
16 he said, "Part of it, yes."

17 You say there's no clarification. I
18 think it is confusing as to whether or not it
19 indicates part of it is part of the detailed
20 drawings. So 108, 2 through 109, 3 will be
21 stricken from the reading of the deposition.

22 Eighteen (18), 9 through 19, 6, I do
23 not see that there's any discussion of
24 exhibits, so that would be allowed.

25 The next section, 23, one through 18

1 will be allowed. 62, 11 through 64, 25 will
2 be allowed.

3 71, 14 through 72, 17 will not be
4 allowed. He indicates he has never seen the
5 document before. That would not be allowed.

6 MR. SEQUI: Excuse me, Your Honor.

7 THE COURT: Yes.

8 MR. SEQUI: On the next set, 73,
9 23, there actually was an objection to the
10 form of the question in the deposition. That
11 is not in the transcript before you. So as to
12 what Mr. Anderson excerpted for reading, and I
13 understand why he didn't want the objection
14 read to the jury. But I wanted to point out
15 that the actual copy of the transcript does
16 have the objection.

17 THE COURT: Thank you.

18 MR. ANDERSON: Your Honor ---

19 THE COURT: Mr. Anderson?

20 MR. ANDERSON: (No response).

21 THE COURT: The objection is an
22 improper hypothetical. Is that correct, Mr.
23 Sequi?

24 MR. SEQUI: And assumes facts not
25 in evidence and then the other one is there no

1 foundational context reference in the exhibit.

2 THE COURT: I'm sorry.

3 MR. SEQUI: No foundation or
4 context given within the excerpt and that read
5 in isolation will be confusing and unfairly
6 prejudicial to the plaintiffs.

7 THE COURT: I'll be happy to hear
8 from you, Mr. Anderson.

9 MR. ANDERSON: I'm sorry, Your
10 Honor. Which line are we on?

11 THE COURT: We are in the section
12 73, 23 -- at Page 73, Line 23 through Page 74,
13 Line 2. And the objection is improper
14 hypothetical and facts not in evidence. Can
15 you indicate to the Court, Mr. Anderson, how
16 it is an appropriate hypothetical?

17 MR. ANDERSON: I'm reading that
18 section, Your Honor. Your Honor, as a follow-
19 on to the question above, it appears that they
20 had knowledge that Summit was selecting the
21 windows. And my hypothetical is a follow-on
22 from that acknowledgment that Summit was
23 selecting windows in Line 72, 7, I think,
24 above -- 73, 7, I'm sorry.

25 THE COURT: Mr. Sequi, do you have

1 any response?

2 MR. SEQUI: I agree that the
3 additional answer referenced by Mr. Anderson
4 cures at least the improper hypothetical and
5 assuming facts not in evidence, because he's
6 established those. But we may still be
7 dealing with hearsay and doing the same thing,
8 the context in isolation.

9 THE COURT: I'm going to allow that
10 one. But I note your objection, Mr. Sequi. I
11 believe that's all your objections. Is that
12 correct?

13 MR. SEQUI: That is, Your Honor.

14 THE COURT: And do you have any
15 objection to the plaintiff's proposed
16 inclusions?

17 MR. ANDERSON: No, Your Honor.

18 THE COURT: All right, great.

19 MR. ANDERSON: I would ask Mr.
20 Sequi that we have this one.

21 THE COURT: All right. Thank you.
22 So anything before we bring in the jury.
23 We'll read the deposition of Mr. McNabb.

24 MR. LUCEY: Nothing from the
25 plaintiff, Your Honor.

1 THE COURT: And, Mr. Anderson, how
2 are you going to read it? How are you going
3 to do it?

4 MR. ANDERSON: Your Honor, Mr.
5 Barton from our office is going to be Mr.
6 McNabb today.

7 THE COURT: All right, let's bring
8 in the jury. Mr. Sequi and Mr. Anderson,
9 approach just briefly.

10 (OFF RECORD BENCH CONFERENCE)

11 THE COURT: Please rise for the
12 jury.

13 (JURY IN)

14 THE COURT: Please be seated.
15 Again, ladies and gentlemen, we're going to
16 take some testimony out of order. Now, ladies
17 and gentlemen, you're going to hear testimony
18 presented to you by deposition.

19 A deposition is a document contain-
20 ing sworn testimony given by a witness outside
21 of court in the presence of lawyers for each
22 party who may ask question of that witness.
23 If any objections were made at the deposition
24 I will rule on them when they are read.

25 This testimony is entitled to the

1 same consideration and is to be judged as to
2 the credibility and weighed by you in the same
3 way as if the witness were present and gave
4 that testimony on the witness stand. It is up
5 to you, the jury, to determine the effect,
6 value and weight and the truth of the
7 testimony that is given in the deposition.

8 Mr. Anderson, please call the
9 witness by deposition, and then, just for the
10 record, indicate who will be reading the
11 deposition.

12 MR. ANDERSON: Thank you, Your
13 Honor. We will be calling Claude McNabb, and
14 Mr. Barton will be reading the answers.

15 THE COURT: Mr. Barton, please come
16 forward. And, Mr. Barton, my only question to
17 you is that you will fairly and accurately
18 read what is contained in the deposition. Is
19 that correct?

20 MR. BARTON: Yes.

21 THE COURT: Thank you. Mr.
22 Anderson?

23 MR. ANDERSON: Thank you, Your
24 Honor. I will be reading verbatim from the
25 transcript.

1 CLAUDE McNABB, (via deposition)

2 being duly sworn to tell the truth, the whole
3 truth and nothing but the truth, testified, as
4 follows:

5 Q. Could you give your current address,
6 please?

7 A. It is 5700 MacDougall Drive, Haltom City,
8 Texas.

9 Q. Could you tell me your educational
10 background?

11 A. GED.

12 Q. What year did you get your GED?

13 A. '58, '57, '58.

14 Q. Any education in the construction
15 industry at all?

16 A. My father's a builder.

17 Q. Okay, formal education? Any classes,
18 anything like that?

19 A. No.

20 Q. And your dad was a builder, so you
21 started working with your father when you were
22 younger?

23 A. Yes.

24 Q. Okay, have you worked in the construction
25 industry your entire life?

- 1 A. Yes, ma'am, all except ten years.
- 2 Q. Okay, and what did you do for those ten
- 3 years?
- 4 A. I was in the United States Army.
- 5 Q. Okay, what rank did you achieve?
- 6 A. I was -- I was in the Army.
- 7 Q. What was your ---
- 8 A. Staff sergeant.
- 9 Q. Okay, tell me about your -- starting when
- 10 you were younger working with your father,
- 11 what did you do in the construction industry?
- 12 What kind of work did you do?
- 13 A. We built houses on the lakes, built
- 14 docks.
- 15 Q. And how many years did you do that?
- 16 A. Well, I suppose probably about seven
- 17 years.
- 18 Q. And after -- so when you say "builder,"
- 19 are you talking about that you actually
- 20 supervised the project?
- 21 A. No, I built those myself.
- 22 Q. You entered in ---
- 23 A. And sold them. I was the owner.
- 24 Q. And how many years did you do that?
- 25 A. Twelve.

1 Q. What did you do after that?

2 A. Went back into construction and
3 remodeling.

4 Q. Okay, when you say you went back into
5 construction, you were doing construction
6 before?

7 A. Yeah.

8 Q. You just started working for somebody
9 else?

10 A. I just started working -- I just started
11 contracting after that.

12 Q. Okay, remodeling, were you working for
13 any particular company?

14 A. Different companies.

15 Q. And was that interior and exterior?

16 A. Yes.

17 Q. Okay. How many years did you do that?

18 A. I did that up until '98.

19 Q. And '98, did you start working for
20 Tarragon?

21 A. Yes.

22 Q. And it's my understanding you had an
23 injury that ---

24 A. Yes, that's what caused me to leave.

25 Q. Was that a job-related injury?

1 A. Yes.

2 Q. Okay, I apologize for how this question
3 is going to sound. I don't mean it -- that
4 was a physical injury as opposed to some sort
5 of mental or psychological injury? Were you
6 physically injured?

7 A. Yes.

8 Q. Just give me a brief sketch on ---

9 A. Psychological, I was also injured like
10 that.

11 Q. What exactly -- what was the injury that
12 you suffered?

13 A. I forgot everything.

14 Q. Okay did you forget everything from --
15 does your memory for the Fenwick project, is
16 that affected at all by this injury?

17 A. I think I can answer questions on it. My
18 long-term, I pretty much have got back.

19 Q. Yes, sir.

20 A. My short-term is still bad.

21 Q. I understand.

22 A. Okay, okay.

23 Q. Let's do it this way. I'm going to ask
24 you a series of questions regarding your
25 involvement and I've got documents. Since you

1 don't live in South Carolina, we'll be reading
2 your transcript to the jury when we try this
3 case, okay?

4 A. Yes, ma'am.

5 Q. What I need is a clear record. So if you
6 don't remember something, just tell me "I
7 don't remember that."

8 A. Okay.

9 Q. And we'll move on from there. Because
10 what I want to do is I want to make sure that
11 the answers that you give me are the best of
12 your recollection so that I can read those to
13 the jury and say this is what you remember.

14 A. Yes, ma'am.

15 Q. Okay, is that fair enough?

16 A. Sure.

17 Q. Okay, just from a timeframe purpose, you
18 were involved with Fenwick until you left the
19 end of July of 2003, '03?

20 A. Yes.

21 Q. Okay, in 1998, when you started with
22 Tarragon, what was your job title?

23 A. I started out as vice president.

24 Q. Okay.

25 A. Of new development.

- 1 Q. I'm sorry? Of new development.
- 2 A. Vice president of new development.
- 3 Q. And what was your job responsibility?
- 4 A. To build apartments.
- 5 Q. Did Tarragon only build apartments?
- 6 A. At that time that's all we were doing,
- 7 yes.
- 8 Q. Okay, and did that change?
- 9 A. Yes.
- 10 Q. What did they branch out to?
- 11 A. They went into mid-rise and high-rises.
- 12 Q. Still apartments or ---
- 13 A. Condos.
- 14 Q. Condos, okay. When you say mid-rise and
- 15 high-rise, how many stories do ---
- 16 A. Mid-rises is five stories. High-rises
- 17 are five stories up.
- 18 Q. And in what states was Tarragon building?
- 19 A. Mainly in Florida. They built in
- 20 Tennessee, Alabama, New Jersey, of course
- 21 Florida and South Carolina. That's all I can
- 22 recall.
- 23 Q. South Carolina, I'm aware of two
- 24 projects? Did Tarragon build more than two?
- 25 A. I just know of one.

1 Q. Okay, that would be Fenwick?

2 A. Yes, ma'am.

3 Q. Did your job title change at all while
4 you were with Tarragon?

5 A. No, ma'am.

6 Q. Okay, did your responsibilities change
7 during the time that you started and you were
8 basically building apartments and when you
9 were building condos? Did you go -- did you
10 do anything else for Tarragon?

11 A. No, ma'am.

12 Q. When you say you were building apartments
13 and condos, tell me specifically what that
14 entails.

15 A. Going to -- I'd go to the job and see
16 what the job was. Then I call and let them
17 know the ground work was done, the utilities
18 were in, the slabs were going in, they're
19 putting down the driveways, and then they'd go
20 to framing, doing the structure of the
21 building.

22 Q. Was it -- other than reporting -- well,
23 let me ask this first. You reported on the
24 status of the project to whom?

25 A. Most of the time, Tim Burns.

1 Q. Okay, and other than reporting on the
2 status of completeness and where the project
3 was, did you actually inspect the work of the
4 subcontractors and contractors?

5 A. Yes, I went out and looked at it.

6 Q. And I assume, given your -- pretty much
7 your entire life's work in the construction
8 industry is that you are knowledgeable about
9 how a building goes together?

10 A. Yes, ma'am.

11 Q. And by that, were you knowledgeable from
12 framing all the way out to how to waterproof
13 and how the exterior cladding goes on?

14 A. Oh, yes.

15 Q. And in this case the exterior cladding
16 was Magna Wall, which is a proprietary stucco
17 system?

18 A. Yes.

19 Q. Were you familiar with Magna Wall at all
20 before Fenwick?

21 A. No, hadn't done that.

22 Q. Had you done hard-coat stucco before
23 Fenwick?

24 A. Oh, yeah.

25 Q. So would you say extensive experience

1 with hard-coat stucco prior to Fenwick?

2 A. Yeah, they're similar. Yeah.

3 Q. That was going to be my next question,
4 but have you had the extensive experience with
5 hard-coat?

6 A. Yes.

7 Q. Okay, and you would agree with me that a
8 hard-coat system or a proprietary Magna Wall
9 system is, in fact, similar as you stated?

10 A. It's similar, yeah.

11 Q. You're going to have lath in both and
12 you're going to have some sort of cement --
13 I mean, some sort of Portland cement or some
14 sort of cementitious product?

15 A. Yeah.

16 Q. Correct?

17 A. Yes, ma'am.

18 Q. Okay. How often would you have been on
19 the site at Fenwick?

20 A. Sometimes -- sometimes I'd be there three
21 or four days and then sometimes maybe two
22 days. Some weeks I did not go.

23 Q. How many weeks in a given month would you
24 have been there?

25 A. I'll say at least two and a half weeks

1 out of every month.

2 Q. And did you actually stay in Charleston?

3 A. Yes, ma'am.

4 Q. So as I understand it the project was
5 originally slated to be about four hundred
6 twenty days. It was finished ahead of
7 schedule, and was at about, I think, two
8 hundred seventy-five, approximately, when they
9 finished construction. Would you have been
10 there two and a half weeks for all of those
11 nine to ten months that the project was going
12 on?

13 A. Oh, probably so, yeah.

14 Q. And did you have involvement with the
15 subcontractors or just with Summit?

16 A. I only -- the only one I deal with was
17 the superintendents for the general
18 contractor.

19 Q. Okay, so that would have been Mr. Bobby
20 Reece or Darrell Parnell?

21 A. Yeah, um-humm.

22 Q. For Summit?

23 A. Yes.

24 Q. Okay, so -- just so I can make sure I'm
25 clear, if hypothetically you saw a problem

1 with the way something was installed you would
2 never talk to the subcontractor. You'd go to
3 Summit?

4 A. Yes.

5 Q. Tell me why. Why it is you would go to
6 Summit as opposed to the subcontractor?

7 A. Because the contractors didn't work for
8 me.

9 Q. You mean the subcontractors?

10 A. The subcontractors, yes.

11 Q. And Summit worked for you?

12 A. Yes.

13 Q. Okay, Summit was in charge of the
14 project?

15 A. Yes.

16 Q. And Summit had entered into a contract
17 with your company, correct?

18 A. Yes.

19 Q. Okay, and Summit was in charge of
20 supervision of the project?

21 A. Yes.

22 Q. Summit was in charge of oversight of the
23 project?

24 A. Yes, ma'am.

25 Q. Summit was in charge of if those trade

1 come together properly?

2 A. Yes.

3 Q. And Summit would be in charge of the
4 integration of the project?

5 A. Yes.

6 Q. It was Summit's responsibility for that
7 project?

8 A. Yes, sir.

9 Q. And Summit was responsible for the
10 sequencing of the project?

11 A. To ---

12 Q. Summit was responsible for the sequencing
13 of the project, how it moved along?

14 A. Yes.

15 Q. That was Summit's job?

16 A. Yes, ma'am.

17 Q. Okay, what I am specifically interested
18 in ---

19 MR. SEQUI: I'm sorry to interrupt.
20 Can we approach the Bench, Your Honor?

21 THE COURT: You may.

22 (OFF RECORD BENCH CONFERENCE)

23 MR. ANDERSON: Go forward to Page

24 61.

25 MR. BARTON: 61, 1?

1 MR. ANDERSON: 61, 1, yes,
2 please.

3 MR. BARTON: Okay.

4 READING OF DEPOSITION RESUMED

5 Q. Okay, and is the building wrap actually
6 attached to the OSB and framing?

7 A. Yes, ma'am.

8 Q. Okay, if in ---

9 A. Which is very good.

10 Q. In this case, if you had -- and I will
11 represent to you that it's my understanding,
12 at least, on some if not all buildings you had
13 building wrap and then the stucco that was
14 installed actually as -- has a paper-backed
15 lath product.

16 A. Okay.

17 Q. Would you agree with me, though, it's the
18 building wrap that is -- primarily protecting
19 the sheathing and the framing?

20 A. Yes.

21 Q. Were you -- do you, sitting here today,
22 do you remember if there was an elastomeric
23 paint put on the top of the stucco system?

24 A. No, ma'am.

25 Q. Okay, would you agree with me that hard-

- 1 coat stucco that you referred to before, that
2 it is -- that is a water-permeable product?
3 In other words, water can get through it?
4 A. Yes, it can without it sealed.
5 Q. Yes, sir. And what would the elastomeric
6 coating do to the stucco system?
7 A. Really, I don't know.
8 Q. In the contract that Tarragon had with
9 Summit, the general contractor -- sorry,
10 paragraph 3.2.1, it states the contract
11 documents are complementary and before
12 starting each portion of the work, the
13 contractor shall carefully study and compare
14 the various drawings and other contract
15 documents relative to that portion of the work
16 as well as the information provided by the
17 owner. And then it goes on to say -- well,
18 I'll stop there. But are part of the contract
19 carefully studied to compare the drawings and
20 the contract documents?
21 A. Yes, ma'am.
22 Q. And that's what the owner expected Summit
23 to do?
24 A. Yes.
25 Q. And if there was any inconsistencies

1 between any of the manufacturers' specifica-
2 tions, the drawings or the architect's
3 specifications, Summit was to carefully study
4 that and note those?

5 A. Right.

6 Q. And they were supposed to take care of
7 any problems that were observed?

8 A. Yes.

9 Q. Okay ---

10 A. How they went about that, was they would
11 have went to the architects.

12 Q. That would have been the responsibility
13 of Summit and the architect to work out those
14 issues?

15 A. Yes, ma'am.

16 Q. Also, if you'll look at the contract
17 paragraph 4.2.1 it states that the architect
18 will provide administration of the contract as
19 described in the contract documents and will
20 be the owner's representative during
21 construction and until final payment is due
22 and with the owner's concurrence. So the
23 owner expected the architect to have contract
24 administration and to do inspections during
25 construction, correct?

- 1 A. Yes, ma'am.
- 2 Q. Okay, under 12.1.1 of the contract
- 3 between Tarragon and Summit it states -- it's
- 4 entitled uncovering of work. If a portion of
- 5 the work is covered contrary to the
- 6 architect's request or to a requirement
- 7 specifically expressed in the contract
- 8 document, it must -- it required in writing by
- 9 the architect be uncovered for the architect's
- 10 examination and be replaced at the
- 11 contractor's expense without change in the
- 12 contract time. So the architect had the
- 13 authority to have the work uncovered, correct?
- 14 A. Yes, ma'am.
- 15 Q. 12.3.1 has an acceptance of conforming
- 16 work. And it states if the owner prefers to
- 17 accept work which is not in accordance with
- 18 the requirements of the contract documents,
- 19 the owner may do so instead of requiring its
- 20 removal and correction in which case the
- 21 contract sum will be reduced as appropriate
- 22 and equitable. So the owner could, in fact,
- 23 accept non-conforming work, correct?
- 24 A. They could have.
- 25 Q. They can according to -- can they not, if

1 the owner prefers to accept work which is not
2 in accordance with the requirements of the
3 contract documents, the owner may do so
4 instead of requiring its removal and
5 correction, in which case the contract sum
6 will be reduced as appropriate and equitable.

7 A. They could, but I don't remember it.

8 Q. Okay, you don't know whether that
9 happened in this case?

10 A. Yes, I don't.

11 Q. But it could? It could happen?

12 A. On my end it couldn't have. On somebody
13 else's end, it might have.

14 Q. Somebody higher up than you could have
15 said ---

16 A. Yes.

17 Q. But you personally would want it
18 corrected?

19 A. Yes.

20 MR. ANDERSON: Page 73; Line 18,

21 (resumes reading):

22 Q. Okay, it's my understanding that these
23 windows what the plaintiff's expert was
24 referring to as a double flange. There's a
25 flange that would go against the substrate and

1 then ---

2 A. Yes.

3 Q. There's another flange out a little bit
4 further, so it kind of has a channel. Do you
5 remember that that's how those windows were
6 configured?

7 A. No, ma'am.

8 Q. Would you have had any discussion with
9 anybody about how you would integrate a window
10 with a double flange with an exterior siding
11 of stucco or of the HardiPlank that was used?

12 A. No, ma'am.

13 Q. Okay, would Tarragon have relied on
14 Summit who was selecting those windows to
15 ensure that they were properly integrated with
16 the exterior cladding?

17 A. Yes, ma'am.

18 Q. Okay, assume for me for the purpose of
19 this question that Summit is the one that
20 proposed those windows be used for Fenwick.
21 Would Tarragon rely on Summit for the proper
22 integration?

23 A. Yes.

24 Q. Even if Summit did not select those
25 windows, whatever windows were to be used and

1 were, in fact, used at Fenwick, Tarragon
2 relied on Summit to make sure that were
3 properly integrated?

4 A. Yeah, they would have had to properly,
5 you know -- yes, the answer would be yes.

6 Q. Okay, thank you. I'm sorry. You can
7 keep that. It's my understanding that the way
8 that windows are integrated with a stucco
9 system is that there is no casing bead, but
10 that the stucco is inside the double flange.
11 And then there is a filler bead of caulk
12 between the stucco and the exterior flange of
13 that window. Did you have a problem at all
14 with the way those windows were installed with
15 the exterior cladding?

16 A. No, I didn't see no problem.

17 Q. If you would have had a problem with it,
18 you would have brought it to Summit's
19 attention?

20 A. Yes.

21 Q. Okay, but as I described it -- you don't
22 see a problem with your vast experience in the
23 construction industry with the stucco being
24 inside the double flange with just a filler
25 bead and caulk?

- 1 A. No, I don't.
- 2 Q. Okay, you said I don't?
- 3 A. I don't see no problem with it.
- 4 Q. And that installation would have been
- 5 approved by you on behalf of Tarragon and
- 6 Fenwick, assuming that's how it is, in fact,
- 7 installed?
- 8 A. I didn't see no problem with it.
- 9 Q. Okay, assume that you had no involvement
- 10 at all in the drawings that were prepared for
- 11 Fenwick.
- 12 A. No, ma'am.
- 13 Q. Okay, it's my understanding that some if
- 14 not all the windows at Fenwick had head
- 15 flashing. You would agree with me that when
- 16 head flashing is being installed, you can
- 17 actually see that installation.
- 18 A. Yeah, you can see your ---
- 19 Q. Okay, if you had a problem with the way
- 20 the head flashing was installed would you have
- 21 had the ability, as the representative of the
- 22 owner, to point that out to Summit?
- 23 A. Yes.
- 24 Q. Do you remember having a problem at all
- 25 with the way the head flashing was being

1 installed?

2 A. No, ma'am, I don't.

3 Q. That would have been -- would head flash-
4 ing have been an area of concern, though, for
5 you on behalf of the owner for the inspection
6 that you were performing?

7 A. Yes.

8 Q. What was the state of construction when
9 the smell of mildew was observed by you?

10 A. Pretty much at a hundred percent.

11 Q. Okay, so the buildings were ---

12 A. Ninety-nine.

13 Q. Ninety-nine percent complete?

14 A. Yes.

15 Q. Do you remember what your involvement was
16 in that?

17 A. No, I know they had to remove some stuff.
18 They'd removed some of the plaster board
19 underneath the walkways. What was happening
20 -- where the smell was coming from was on the
21 exterior. It was getting in the walkway, up
22 in between the rafters at the joists.

23 Q. At the joists?

24 A. At the joists.

25 Q. Again, we were talking about the second

1 floor and the third floor?

2 A. In between floors.

3 Q. Okay, and ---

4 A. And on the balcony floors, breezeways.

5 Q. I was going to say can we call that
6 breezeways?

7 A. Yes, ma'am.

8 Q. What do you remember about -- what do you
9 remember was the investigation that led you to
10 your statement that said you think it was
11 coming at breezeways? What transpired before
12 then?

13 A. I opened one of them.

14 Q. Who did? I assume you didn't personally.
15 Who did you direct to do that?

16 A. Summit.

17 Q. Okay, and were standing on the second or
18 third-floor breezeway when you cut in the
19 breezeway?

20 A. No, I was standing on the ground level.

21 Q. Okay.

22 A. One, because the ground unit, we smelled
23 this mildew. And it was a ground unit. And I
24 said 'take that out', you know, because we're
25 searching. You search, you know, because

1 that's what I do when go to find what's wrong
2 with a job. They sent me up here to find out
3 what's going on, what it is. And when I took
4 it down, you can see it. It was moisture.

5 Q. What's that?

6 A. And the smell, you could smell it.

7 Q. Did you take out the exterior cladding or
8 drywall from the inside of the unit?

9 A. Took out the outside and then we took out
10 the inside, changed the insulation and it --
11 because if it gets in the insulation then you
12 have to take that insulation out too.

13 Q. When you were standing on the -- and you
14 took it off, did you take off the intersection
15 where the concrete walkway carries on the
16 first floor and the wall? Was it off ground
17 that you took off the stucco?

18 A. Took the ceiling out of it. And then we
19 took -- also took the light-weight off too.

20 Q. So we're talking about when you were --
21 you said you were standing on the ground
22 floor. But does that mean y'all got the --
23 somebody got up on a ladder and cut off
24 between the first and second floor?

25 A. Yeah, your first level was at five feet.

1 That's where the stair landing goes up --
2 turns and goes up.

3 Q. Did y'all cut at a stair landing?

4 A. You call it the stair landing, yeah.

5 Q. Okay, so the stair landing is where y'all
6 cut?

7 A. Um-humm.

8 Q. All right, okay. Where did you cut at
9 the stair landing and you removed the -- was
10 that stucco or HardiPlank there?

11 A. That was stucco.

12 Q. Okay. When you took away the stucco,
13 when you removed that, what was your
14 observation as to what had occurred that was
15 causing the water in that area?

16 A. You couldn't find a place. We searched.
17 We searched it. But then the -- once we went
18 ahead and went in there and painted it with
19 that mildew paint that you put on, it cleared
20 it up.

21 Q. So y'all cut into a stairwell and looked
22 but ---

23 A. Yeah. All them wasn't that way. It was
24 just pure -- you know, different ones.

25 Q. How many stairwell locations or how many

1 locations did y'all cut in?
2 A. I can't remember that. That was on -- on
3 the first one we was doing -- and then what
4 happens is I get hurt.
5 Q. Okay, you remember though you're cutting
6 into more than one location?
7 A. Yeah, I think we cut in -- if I remember
8 right -- it seems like I told them six.
9 Q. Okay, on six different buildings?
10 A. Yeah.
11 Q. And if I understand your testimony
12 correctly -- please correct me if I'm wrong --
13 with those cuts, you did not -- you weren't
14 aware of a determination of where the water
15 was coming from.
16 A. No.
17 Q. Did, in all those cuts -- do you remember
18 that there was actually damage in the wall
19 cavities on all six locations?
20 A. No, there wasn't no damage there. There
21 was moisture because -- as far as damage,
22 there was no damage to the materials, nothing.
23 You just had to retreat the material with a
24 paint that absorbed that.
25 Q. You weren't just correcting, you were ---

- 1 A. Yeah.
- 2 Q. Y'all only removed lightweight concrete
3 and drywall on the interior of the buildings?
- 4 A. Yes.
- 5 Q. When you were there on the six cuts, on
6 the six different buildings, you do not recall
7 actually cutting into the stucco itself.
- 8 A. No, the stucco was on the bottom of it.
- 9 Q. Underneath?
- 10 A. That's the saw that I took out. That was
11 stucco, okay?
- 12 Q. Underneath the stairwell?
- 13 A. Yes, ma'am.
- 14 Q. So there was a stucco ceiling there?
- 15 A. Yes, ma'am.
- 16 Q. So you removed that?
- 17 A. Yes, ma'am.
- 18 Q. But no stucco on the exterior walls?
- 19 A. No.
- 20 Q. Of any building?
- 21 A. No.
- 22 Q. As I understand your testimony, the
23 extent of work that was done under your
24 direction when you were still with Tarragon
25 was to make construction cuts into the

1 lightweight concrete and then on the interior.
2 And the fix was to repaint the interior units?
3 A. Treat it for it, yeah.
4 Q. Treat it?
5 A. They had someone come out to treat it.
6 Q. With mildew-resistant paint or something
7 like that?
8 A. I don't know what they used, but it did
9 the job.
10 Q. Okay, so you were satisfied with the work
11 that was done?
12 A. Yes.
13 Q. Okay.
14 A. When I was there.
15 Q. And Tacy reviewed several buildings, and
16 that there were complaints of condensation on
17 the windows. Do you remember any issues with
18 condensation on the windows?
19 A. Yes, ma'am, I do.
20 Q. Do you remember how that was addressed?
21 A. I remember some condensation being in the
22 windows, but I don't remember what was done.
23 Q. Okay, do you remember considering that to
24 be an issue at all, that there was
25 condensation on the windows?

1 A. Yeah, I told them it was an issue and
2 because there shouldn't have been no
3 condensation on the windows.

4 Q. Okay, did Tarragon expect Summit would
5 permanently resolve the condensation issue?

6 A. They said they would get it solved. I
7 remember that.

8 Q. Okay, Summit through Tacy McGinty?

9 A. Yes.

10 Q. Do you remember any discussion at all
11 when those allegations of mold and mildew came
12 up about any installation problems with the
13 stucco cladding?

14 A. No, ma'am.

15 Q. That's fine. I will tell you what it
16 purports to be if that helps. This is the
17 certificate of substantial completion. And
18 what I wanted to ask you is if that is your
19 signature on the certificate of substantial
20 completion?

21 A. Yes, ma'am.

22 Q. And it states above your signature that
23 the owner accepts the work for designated
24 portions as substantially complete and will
25 assume full possession at 12:00 a.m. on

1 December 17, 2002. And then you signed that,
2 correct?

3 A. Yes, ma'am, I did.

4 Q. And you remember the discussions that we
5 had just about the mold and mildew in the
6 certain units. That was going on at the same
7 time as I understand it? Do you remember any
8 discussion at all about not signing the
9 certificate of substantial completion and
10 continuing to do some investigation? Do you
11 remember any discussions like that at all?

12 A. I just remember that, that Summit said
13 they would take care of it.

14 Q. So based on Summit's representation ---

15 A. Yes.

16 Q. --- that they would take care of the
17 problem?

18 A. Yes.

19 Q. You signed the certificate ---

20 A. Yes.

21 Q. --- of substantial completion? Was that
22 a representation made directly to you by
23 somebody else at Summit?

24 A. I guess it was made.

25 Q. You have a recollection of somebody. Was

1 it Tacy McGinty?

2 A. Yeah, Tacy.

3 Q. You remember that Tacy McGinty made a
4 representation to you on behalf of Summit to
5 Tarragon that they would take -- that Summit
6 would take responsibility for the problems?

7 A. Yes, they were taking care of the problem
8 that was going on. They were working on it.

9 MR. ANDERSON: Your Honor, that
10 completes the testimony for Mr. McNabb.

11 THE COURT: Is that correct, Mr.
12 Sequi?

13 MR. SEQUI: Yes, Your Honor.

14 THE COURT: You may step down.
15 Thank you.

16 (MR. BARTON STEPS DOWN)

17 THE COURT: What is your next
18 deposition, Mr. Anderson?

19 MR. ANDERSON: Your Honor, I have
20 one other witness I wanted. Your Honor, may
21 we approach?

22 THE COURT: You may.

23 (OFF RECORD BENCH CONFERENCE)

24 THE COURT: Call your next witness,
25 Mr. Anderson.

1 MR. ANDERSON: Thank you, Your
2 Honor. We'd call Mr. Pusheck. I had him sit
3 out in the hallway.

4 THE COURT: Okay. Ladies and
5 gentlemen of the jury, you may take this
6 opportunity to stand and stretch, if you need
7 to do so.

8 MR. LUCEY: Your Honor, can we
9 request a hearing at the Bench outside the
10 presence of the jury?

11 THE COURT: Ladies and gentlemen
12 of the jury, please do not begin your
13 deliberations. Do not discuss the case
14 amongst yourselves. Please rise for the jury.

15 (JURY OUT)

16 THE COURT: Thank you. Be seated.
17 Mr. Lucey?

18 MR. LUCEY: Your Honor, we've just
19 been handed a thumb drive from the defendants
20 with Mr. Pusheck's file portions of which have
21 never been previously produced. My co-counsel
22 is looking at the contents of the thumb drive.
23 But I can tell you there's a \$5.6 Million
24 dollar estimate on there that's never been
25 produced. It's obviously germane. That's

1 what this is all about.

2 We'd ask that this witness be
3 excluded on the same basis that we've already
4 argued this morning. At this point, Your
5 Honor, this isn't an isolated instance. This
6 is habit. They have failed to produce the
7 expert material. And I can't tell the Court
8 now -- we're looking at the rest of this. But
9 among other things, there's a \$5.6 Million
10 dollar estimate that's never been produced.
11 We actually just got an estimate at 7:00 a.m.
12 this morning that differed from the one we got
13 last January. So this is a third estimate, a
14 third stucco estimate that we've never seen.

15 Again, Your Honor, interrogatories
16 were sent to the defendant, this defendant,
17 this morning requesting all the expert
18 materials. And I know there is a phrase in
19 there that actually says "each and every
20 estimate, document", et cetera, et cetera, et
21 cetera.

22 THE COURT: Mr. Anderson, I'll be
23 happy to hear from you.

24 MR. ANDERSON: The only thing I
25 can say, Your Honor, is it was our

1 understanding that this material had been
2 produced. If it hasn't been, then ---

3 THE COURT: I'm going to Chambers.
4 Let me see you in Chambers. Thank you.

5 (IN CHAMBERS MEETING)

6 THE COURT: Please be seated. All
7 right, please call your next witness, Mr.
8 Anderson.

9 MR. ANDERSON: Robert Pusheck.

10 ROBERT PUSHECK, being duly sworn to
11 tell the truth, the whole truth and nothing
12 but the truth, testified, as follows:

13 MR. ANDERSON: Your Honor, they
14 want to voir dire him.

15 THE COURT: Mr. Lucey.

16 VOIR DIRECT EXAMINATION

17 BY MR. LUCEY:

18 Q. Mr. Pusheck, when were you hired in this
19 matter, please?

20 A. May of last year.

21 Q. May of 2010?

22 A. Yes, sir.

23 Q. Who were you hired by?

24 A. Sweeney and Wingate law firm.

25 Q. And, sir, when did you finalize your

1 first estimate in this matter?

2 A. Can you first define "estimate?"

3 Q. Sure. What was your first one, sir?

4 A. I've done several different versions of
5 pricing proposed budgets and estimates. So
6 I'm asking which one you're asking me so I can
7 answer your version of the question.

8 Q. Sure, price proposal, budget, whatever
9 you want to call the document, when was your
10 first one complete, please?

11 A. In late June of 2010.

12 Q. Okay, and what was the scope of that
13 particular document?

14 A. Mr. Gallagher's firm, ProCon -- Mr.
15 Gallagher had provided a "budget", I believe
16 is the term he used, of approximately \$15
17 Million dollars.

18 So the first task I was given was to take
19 that and give my opinion and give some
20 feedback as to what my response was to the \$15
21 Million budget estimate, review of it. What I
22 did was I took line-by-line and looked at his
23 scope and then prepared some budgetary pricing
24 to match his.

25 Q. You essentially analyzed his work. Is

1 that correct?

2 A. That's correct.

3 Q. And then you prepared comparative
4 pricing?

5 A. Pricing, estimate, budget. I provided a
6 breakdown, yes, line-by-line.

7 Q. And what would you call your draft, so I
8 can refer to it properly?

9 A. I would say that I was reviewing his
10 budget. I wasn't preparing my budget. I was
11 reviewing his budget and providing feedback on
12 it.

13 Q. And did you accept his scopes and his
14 quantities in doing that?

15 A. In general, yes; not in every case.

16 Q. And was that document transmitted to your
17 client?

18 A. Yes.

19 Q. And what was the next estimate, budget or
20 similar such document that you prepared in
21 this matter?

22 A. The document that just came up on the 13th
23 of January, and then the 14th of January at
24 the same time.

25 Q. And what was the amount of the 13th of

1 January estimate-type document?

2 A. Approximately \$5.6 Million.

3 Q. What was the amount of the 14th of January
4 estimate-type document?

5 A. Four-point-two (\$4.2) Million.

6 Q. And I'll come back to those. But let's
7 go forward in time for a moment. Have you
8 prepared any other estimate-type or budget-
9 type documents in this matter besides the
10 three you've described to me?

11 A. Recently, I provided a \$4.9 Million
12 dollar proposal. It was actually an add-on to
13 the -- whatever the second date in January.
14 It was one day, the next day we issued a
15 proposal for the \$4.2. I just recently
16 supplemented that with an add/alternate which
17 the \$4.2 -- not changing that. And then
18 adding additional information that got it to
19 \$4.9 as an add/alternate.

20 Q. Now, what was the scope -- going back,
21 now, to January 13th and 14th. Let's do the
22 13th first. What was the scope of the January
23 13th document at \$5.6 Million?

24 A. You've got my files. I don't have a copy
25 in front of me. The general nature of that

1 proposal was to more address Mr. Glick's
2 repair scope and the contract scope. So if
3 you look at that file, you'll see a lot of
4 not-in-contract line items.

5 Q. I'm going to hand this one to you as
6 being your file, a two-inch stack of
7 documents. None of those repair scopes are
8 in the box of documents?

9 A. No, because I had them electronically
10 with me. It wasn't -- I didn't go ahead and
11 do them in print form.

12 Q. So you brought these other three repair
13 scopes or budgets here to Court only in
14 electronic form?

15 A. Yes, sir.

16 Q. And they're on the thumb drive that
17 counsel is looking at in the other room?

18 A. Yes, sir.

19 Q. And is there any other documents on that
20 thumb drive besides the three different repair
21 scopes that you described to me and the stack
22 of two-inch documents of discovery produced by
23 other parties?

24 A. Yes, sir.

25 Q. What else is on that, please?

1 A. Mr. Glick's report. Pictures, I believe,
2 produced by Mr. Glick. That happened this
3 morning. They were produced by counsel to me.
4 And I can go through it -- I'd have to look
5 through it. But the Glick report, the
6 pictures associated with the project provided
7 through my counsel and then the latest is the
8 comparison that Mr. Gallagher of ProCon
9 produced recently for \$8 Million dollar
10 stucco. So there's worksheets that address
11 that -- in response to that.

12 Q. Your worksheets?

13 A. Yes.

14 Q. So that's a fourth document, a fourth
15 estimate-type document?

16 A. It is not an estimate. It's a comparison
17 of the January 11th versus what he produced
18 within the last -- I guess last Thursday.

19 Q. Just so I'm clear, you've got five sets
20 of numbers now in this case:

21 You've got your June 2010 set of
22 numbers.

23 You've got a January 13th, 2011 set
24 of numbers.

25 A January 14th, 2011 set of numbers.

1 You've got this morning's 7:00 a.m.
2 set of numbers.

3 And you've got this final comparison
4 you just told me about, correct?

5 A. (Affirmative nod), all those numbers are
6 on there.

7 Q. Is that the entirety of the numbers that
8 you've run on this case?

9 A. Yes.

10 Q. Did you do any further site visits after
11 your original June 2010 numbers?

12 A. I did.

13 Q. I'm sorry?

14 A. I did.

15 Q. How many times did you go, sir?

16 A. I believe I was on site a total of three
17 times. The first time was in mid-June,
18 sometime after the hire and before the June
19 24th report. I had several people from CRW.
20 That's one of my firms -- with me. And then
21 again in late December, and I had a gentleman
22 with me. And in between those, in November I
23 was in Charleston and I went by and looked at
24 something specific.

25 Q. You went by in November unescorted by

1 anybody from plaintiff's counsel?

2 A. I don't think so. I think I had
3 permission or they came. I don't just drive
4 by onto people's property.

5 Q. And did you do any test cuts during any
6 of these three visits?

7 A. No, I did not do any test cuts.

8 Q. Now, returning again to your second set
9 of numbers, January 13th, 2011 -- the ones
10 that just got produced a few moments ago and
11 it's now \$5.6 Million dollars, it's your
12 testimony that that is based upon the Glick
13 scope. Is that correct?

14 A. No, it incorporates the Glick scope.
15 It's not everything that Mr. Glick was
16 recommending, no.

17 Q. So what scope is it based upon, please?

18 A. I'm going to -- it's based on my
19 recommendations of the repair scope or the
20 repair scope to address Mr. Glick's damage
21 from his investigation. But Mr. Glick and
22 Mr. Gallagher went beyond what the contract
23 required of Professional Plastering.

24 Q. Beyond Professional Plastering's
25 contract?

1 A. They were adding bells and whistles.

2 Q. Okay.

3 A. And I was also recommending the potential
4 bells and whistles, as well.

5 Q. So the \$5.6 Million dollar scope is your
6 analysis of the Glick scope with some -- well,
7 you believe the bells and whistles removed.

8 Is that correct?

9 A. I'm sorry. Say it again.

10 Q. Yes, sir. The January 13th, 2011, \$5.6
11 Million dollar estimate that just got produced
12 a few minutes ago is, as I understand it,
13 based upon the Glick scope except that you
14 have removed from the Glick scope, for
15 purposes of the \$5.6 Million dollar estimate,
16 certain items that you deemed to be bells and
17 whistles. Is that correct?

18 A. No.

19 Q. Okay. I'm trying to understand what is
20 the scope of the \$5.6 Million dollar estimate.

21 A. The \$5.6 Million, if you put it in front
22 of us where we could all look at it, has
23 several items that ---

24 Q. Did you bring it here to put it in front
25 of us, sir?

1 A. I did not.

2 Q. So let's do the best we can since we're
3 trying to go over all these electronic
4 documents.

5 A. It has, from memory, as many twelve items
6 that listed as not in contract. Those, to me,
7 are betterments.

8 Q. And that's actually listed on the face of
9 the \$5.6 Million dollar estimate?

10 A. It is.

11 Q. And other than what you've excluded as
12 betterments or not in the contract, is the
13 \$5.6 Million dollar estimate based upon the
14 Glick scope?

15 A. The scope, no. Because, again, Mr. Glick
16 is -- or ProCon is saying you need to remove
17 all the stucco on the entire project. And
18 that does not address all of the stucco on the
19 entire project.

20 Q. The January 13th scope does not address
21 all the stucco?

22 A. It does not address a hundred percent
23 removal of all stucco.

24 Q. Is the January 13th scope a stucco-only
25 estimate? In other words, you've already told

1 us how you did it. You got the ProCon \$15.7
2 Million dollar estimate -- that is for all the
3 problems at the job site. Is your January
4 13th scope just a stucco-related scope?

5 A. No.

6 Q. Does it include, for instance, roofs?

7 A. No.

8 Q. In what manner is it not just a stucco-
9 related scope?

10 A. It addresses windows, stucco, siding and
11 similar allowances that they had. When I say
12 "similar", similar description, not similar
13 quantity of items that they had for hidden
14 damage, stud removal, insulation removal. So
15 not just the studs and not just the stucco,
16 but the work related underneath and did an
17 allowance for them. What comes to mind for
18 your next question is it doesn't include the
19 roof. And there's a third item that it
20 doesn't, but because it's not in front of me,
21 I can't remember.

22 Q. And then putting aside the January 13th
23 scope for a second, sir -- January 14th.

24 Let's direct our attention to January 14th.
25 Describe for me, please, the scope of the

1 January 14th estimate, either in the abstract
2 -- in other words, tell me about that
3 estimate, or in comparison to the January
4 13th? In other words, what have you changed?
5 A. Two -- without having them side-by-side,
6 two things. I cut out all the not-in-
7 contract, all the betterments. And then I
8 addressed the -- only buildings one through
9 nine and took out all the buildings ten,
10 eleven and twelve.
11 Q. And why did you do that, please?
12 A. Because in reviewing the destructive
13 testing, nobody tested buildings ten, eleven,
14 twelve. I'm sorry, they did not test
15 buildings ten or eleven. Building twelve, the
16 indication is that the test cuts proved no
17 damage at all. And all three of those
18 buildings are a different construction than
19 buildings one through nine. So the assumption
20 is that if you build building one, building
21 two's going to be the same. Buildings ten,
22 eleven and twelve are built with different
23 configurations.
24 Q. Did you transmit the January 13th \$5.6
25 Million dollar estimate to your client at any

1 time?

2 A. I don't recall.

3 Q. Did you transmit the January 14th \$4.5
4 Million dollar estimate to your client at any
5 time?

6 A. I did.

7 Q. When did you actually finalize your most
8 recent estimate?

9 A. Over the weekend.

10 Q. That would be as of last Saturday or
11 Sunday?

12 A. Yes.

13 Q. When did you transmit that to counsel?

14 A. Tuesday afternoon, Tuesday night.

15 Q. Is there any reason why these haven't
16 been transmitted to your client?

17 A. I have another case, just didn't get to
18 it.

19 Q. So the estimate I got this morning that
20 has twelve buildings in it was actually
21 transmitted to your client two days ago, on
22 Tuesday afternoon?

23 A. From memory, yes.

24 Q. What is the scope of the estimate that
25 was produced at 7:00 a.m. this morning,

1 please?

2 A. I don't know that it was produced at 7:00
3 a.m. I've already told you I produced it on
4 Saturday night and I believe that I sent it to
5 them on Tuesday.

6 Q. What is the scope of the estimate you
7 prepared last weekend, please?

8 A. It is full removal of all stucco and
9 siding on the exterior vertical faces that
10 face out from the building, including the
11 replacement of all of the windows.

12 Q. Does the scope of the stucco repair in
13 the estimate you did last weekend equate to
14 the same scope on the January 14th estimate,
15 with the sole exception being the addition of
16 the three additional buildings?

17 A. Yes.

18 Q. Have you received any information
19 regarding a proposed scope of repair from any
20 person or entity besides Myles Glick?

21 A. They sent me ProCon's estimate, okay? I
22 believe they produced an estimate -- I don't
23 know the players names all that well, but I
24 believe it was a general contractor they
25 hired, an expert. And they may have produced

1 the report and there may have been an estimate
2 in that.

3 Q. Have you received a scope of repair or
4 any information related to any portion of a
5 scope of repair from any design professional?
6 In other words, an engineer or an architect,
7 besides the scope of repair that was issued by
8 Myles Glick?

9 A. No.

10 Q. Thank you.

11 MR. LUCEY: Nothing further.

12 THE COURT: Do you have an
13 objection? Does that clarify for you his
14 testimony?

15 MR. LUCEY: Yes, ma'am. I would
16 particularly -- the defense has offered up
17 reports, including the newly-released \$5.6
18 Million dollar estimate -- exclude it from
19 the evidence.

20 THE COURT: Mr. Anderson?

21 MR. ANDERSON: Your Honor, he
22 said the \$5.6 that they just came across
23 today. Which one was that?

24 MR. LUCEY: The \$5.6 Million dollar
25 estimate that was just found in the documents

1 today.

2 THE COURT: Other than that, are
3 there objections to his testimony here today?

4 MR. LUCEY: No.

5 THE COURT: Thank you.

6 MR. LUCEY: Yes, Your Honor, but
7 we'll agree to those documents.

8 THE COURT: Okay, let's bring in
9 the jury. I'm going to have you -- you can
10 leave your stuff there, but we'll start again
11 and I'm going to swear you in in front of the
12 jury.

13 (JURY IN)

14 THE COURT: Thank you. Be seated.
15 Mr. Anderson, call your next witness.

16 MR. ANDERSON: Thank you, Your
17 Honor. At this time we'd call Robert Pusheck.

18 ROBERT PUSHECK, being duly sworn to
19 tell the truth, the whole truth and nothing
20 but the truth, testified, as follows:

21 THE COURT: Mr. Anderson.

22 MR. ANDERSON: Thank you, Your
23 Honor.

24 DIRECT EXAMINATION

25 BY MR. ANDERSON:

1 Q. Mr. Pusheck, where are you from?

2 A. I reside in Maryland.

3 Q. And how long have you resided there?

4 A. Since 1986.

5 Q. And were you raised in Maryland?

6 A. I'm a military brat.

7 Q. Who do you currently work for?

8 A. I'm the president of C.A. Winman

9 companies, including C. A. Winman, Inc.,

10 Carolina Restoration and Waterproofing, C. A.

11 Winman South Florida, LLC and I'm affiliated

12 with but not president of C. A. Winman, LLC in

13 New York.

14 Q. What do the C. A. Winman companies do?

15 A. We specialize in exterior restoration.

16 Q. And could you give the jury some idea as

17 to the volume of business that you do in a

18 year? If you want to take 2010 as an example

19 or some other year, please let us know.

20 A. The companies together have averaged just

21 over \$42 Million dollars a year in

22 restoration. And that was over the last four

23 year. Last year it was just in the mid-

24 thirties because the economy's down. Three

25 years ago it was just shy of \$60 Million a

1 year.

2 Q. And what's the volume of work that's
3 represented by those figures? How many
4 contracts do you make a year and how do you
5 do?

6 A. We average three hundred signed and
7 executed contracts a year. They range for
8 \$2,000 dollars to the largest single job,
9 which was \$22 Million.

10 Q. And how many bids do you process a year?

11 A. I review bids for each of the offices
12 except for New York. As I said, I'm not
13 affiliated with that. I review up to two
14 thousand bids a year.

15 Q. Have you ever done a job that involved
16 the types of issues that have been presented
17 at Fenwick?

18 A. There are many issues at Fenwick. If we
19 isolate it to stucco, I can answer the
20 question. There are HVAC and other issues, so
21 I can't say yes to that. But as it relates to
22 the stucco and exterior work, which is my
23 firm, we've done several jobs a year of
24 similar size and scope to the issues at
25 Fenwick.

1 Q. Have you done any of those recently?

2 A. We're under contracts on similar jobs
3 right now.

4 Q. And where are those contracts?

5 A. We have a couple of projects in Myrtle
6 Beach. We have offices in Ft. Lauderdale, and
7 so there are related stucco projects in the
8 south. We have an office in Pridmore,
9 Raleigh, and that services from Wilmington
10 down here. We're actually doing the Market
11 Street, we're doing the exterior brick
12 restoration now, which is not stucco. But
13 we're here in Charleston. We've got work in
14 Myrtle Beach, North Myrtle Beach going on
15 right now.

16 Q. Would you give the jury the benefit of
17 your education?

18 A. I have a degree in Civil Engineering from
19 the University of Maryland.

20 Q. Do you hold any license?

21 A. I hold multiple licenses. I'm a license
22 holder for all of the offices except for New
23 York, and I hold a contractor's license in New
24 York as well. So that is Florida, Georgia,
25 South Carolina, North Carolina, Virginia,

1 Maryland, D.C., West Virginia, Pennsylvania,
2 Delaware, New Jersey and then if you go out
3 west, Ohio, Alabama, Oklahoma and Texas, I'm
4 sure.

5 Q. And that's a general contractor's
6 license?

7 A. It's an unlimited general contractor's
8 license.

9 Q. As I understand, the work at Fenwick
10 involves a wood-framed stucco restoration,
11 is that correct?

12 A. Yes.

13 Q. And have you done a similar job in
14 Florida or any other coastal environment?

15 A. As I told you, we completed a project for
16 about \$4.2 Million dollars in Destin recently
17 that was very similar. The difference was the
18 buildings were facing the ocean and they were
19 connected by walkways. But the actual number
20 and size of the buildings were almost -- I
21 mean, very similar. The main difference was
22 that the windows here are a much larger square
23 footage of the exterior in Twelve Oaks. The
24 other windows were smaller. That's really the
25 only difference.

1 Q. And how many building were in the project
2 before?

3 A. That one had eight. They counted them as
4 one building, but it had eight -- nine
5 structures, four wings and a main building.

6 Q. Now, were you asked to review material
7 concerning the Fenwick project?

8 A. I was.

9 Q. And what material have you reviewed?

10 A. I reviewed the Glick report. I reviewed
11 -- I was provided all these documents. But
12 it's mainly the Glick report and the ProCon
13 estimate and I believe there's one other
14 report I reviewed, the contract between
15 Professional Plastering and the GC, and I
16 reviewed the specifications that the original
17 work was supposed to be done under.

18 Q. And have you ever testified in court?

19 A. I have.

20 Q. Where have you testified?

21 A. In Maryland.

22 Q. Have you ever been qualified as an expert
23 in Maryland?

24 A. I have.

25 Q. And in what field were you qualified as

1 an expert?

2 A. In exterior restoration and in pricing
3 estimating.

4 Q. Any place other than Maryland that you've
5 been qualified as an expert?

6 A. I work as an expert witness all the time.
7 Unfortunately or fortunately, very few of them
8 get to court. So the work you do in each
9 state, you can't say that you've been
10 qualified.

11 MR. ANDERSON: At this time, Your
12 Honor, we would offer Mr. Pusheck as an expert
13 in the field of construction and restoration.

14 MR. LUCEY: No objection.

15 THE COURT: This witness will be
16 qualified as an expert in those areas. Mr.
17 Anderson?

18 MR. ANDERSON: Thank you, Your
19 Honor.

20 DIRECT EXAMINATION CONTINUED

21 BY MR. ANDERSON:

22 Q. You were hired to do a review of
23 documents and to do a site visit at Fenwick
24 by Sweeney Wingate, were you not?

25 A. I was.

1 Q. And what arrangements do you have with
2 them for payment for your fees?

3 A. I'm on an hourly rate.

4 Q. And what is that hourly rate?

5 A. \$175 dollars an hour.

6 Q. And approximately how much have you
7 billed them to date?

8 A. \$12,000.

9 Q. Now, have you actually been to the
10 Fenwick property?

11 A. Three times.

12 Q. Could you please tell us when the first
13 time was?

14 A. In the late-May to mid-June timeframe. I
15 had a crew out there. My branch manager from
16 CRW and one other person was there for, I
17 think, two days. And I was there for a short
18 period during the middle of that timeframe to
19 see what they were doing and then to tell them
20 what I really wanted them to do. And then I
21 believe, but I can't remember, but I had a
22 specific question, counsel. And I believe I
23 was there in November very briefly. And then
24 I was there at the end of December for an
25 entire day myself, a full day.

1 Q. What was the purpose of your visit?

2 A. The first one, I had been given just a
3 big stack of documents and I was hired to
4 review the pricing proposal provided by
5 ProCon. So the first one was just to get the
6 gist of what a \$15 Million dollar project
7 looked like, and I wanted to break it down so
8 I could compare apples to apples on specific
9 line items. Then as I got into that and
10 produced the first report, I had several
11 questions and discussions with the attorneys.
12 And so I wanted to go back in November.
13 Something -- and I couldn't say today what it
14 was. And as a result of that, I didn't get to
15 go in November. We went -- I met counsel and
16 I believe that -- I know I was with counsel
17 and we met another counsel there. There was a
18 group of people walking the project.

19 Q. And what are you looking for when you
20 make these visits?

21 A. Well, the first visit you're just looking
22 and -- you can look at drawings all day. You
23 need to look at the building, at least I do.
24 Paper's worth a thousand words, and if you
25 walk around twelve buildings, and having --

1 you know, I've done that for thirty years. It
2 gives me a good feeling of what I'm looking at
3 on paper. So the first one was specifically
4 just -- you can't look at a picture and put
5 together an estimate or a scope or review
6 other cut tests, to look to see what people --
7 what you agree with people and what you're not
8 sure you agree with and what you disagree
9 with. So that was the purpose of the first
10 meeting. Then, again, the second and third
11 meeting, the issue was I don't agree with
12 everything that ProCon did, and specifically
13 the inclusions that Glick or ProCon made. So
14 I was specifically not following what they
15 said a hundred percent, looking at what the
16 differences were and trying to define those.
17 Q. Were you able to -- have you created any
18 documents that might be helpful to the jury in
19 seeing the layout of Fenwick?

20 A. Yes.

21 MR. ANDERSON: Your Honor, may I

22 ---

23 THE COURT: You may.

24 DIRECT EXAMINATION CONTINUED

25 BY MR. ANDERSON:

1 Q. While that's warming up, you reviewed the
2 report by Myles Glick, did you not?

3 A. I did.

4 Q. And after you review of that report did
5 you draw some conclusions as to what the scope
6 of a fix should be?

7 MR. LUCEY: Objection, Your Honor.
8 He's not been qualified as an expert in
9 architectural engineering? He's asking him to
10 critique Mr. Glick's work and his scope.

11 THE COURT: Rephrase your question,
12 Mr. Anderson.

13 DIRECT EXAMINATION CONTINUED

14 BY MR. ANDERSON:

15 Q. After reviewing Mr. Glick's -- within Mr.
16 Glick's report was there a scope of repair?

17 A. Without seeing something, I'm not sure I
18 remember a scope of repair, as far as
19 something that gets you to \$15 Million
20 dollars, as it relates to specific -- this
21 needs to be done this way here or this is done
22 incorrectly there, yes. But a summary, I
23 don't remember from his report.

24 Q. So the information as going to a scope
25 was provided in his report, but you don't

1 recall whether or not there was a summary?

2 A. I do not remember a summary.

3 Q. And from that were you able -- would you
4 be able to then draw information that would
5 allow you to draw a conclusion as to which
6 buildings would need to be fixed?

7 A. From his report?

8 Q. From his report, yes.

9 A. I don't believe -- again, he did test
10 cuts. He made comments. And then he may have
11 had a general statement. But I don't remember
12 him saying all the buildings need to be fixed
13 this way because of this.

14 Q. Now, have you had -- to allow you to make
15 the determinations as far as -- would you
16 describe for the jury the process that you
17 underwent to determine -- to derive the
18 information that you needed to produce an
19 estimate or to do pricing.

20 A. When you get to a restoration project,
21 you see the results and you don't know what
22 the result is. You don't know how bad it is
23 or anything else.

24 So in this case, there's moisture on the
25 inside in certain locations. As a contractor,

1 I need to know that when I do a fix that I'm
2 doing enough of a fix to address that need.
3 And that's not as easy as it sounds. And so
4 -- and consultants come in. We do test cuts
5 and we look to address that.

6 The issue here is that when I went and
7 reviewed the test cuts, I found no test cut on
8 two of the three orange buildings. Nothing in
9 the records that have been produced to me that
10 either of those two buildings have ever had
11 any investigation, and I don't have any
12 indication there's any leaks. And they're
13 built slightly differently than the green ones
14 are. One's the pool house, and it has a large
15 overhang that would be difficult for water to
16 leak in, at least in many of the areas that
17 they want to take stucco out. And then the
18 larger of the two small orange ones is their
19 -- it's not a clubhouse. It's not a rental
20 facility. But the building that they have the
21 office in and a meeting room. And, again,
22 that's built much differently than the green
23 ones. Then the last one, twelve, is up across
24 the top. Again, there were two test cuts in
25 the information provided to me that

1 demonstrated that they opened it up and there
2 was no damage and there was no moisture. The
3 only testing they did that I saw said there's
4 no -- we didn't find anything.

5 So my question is in my repair estimate,
6 I want to repair what's going to stop the
7 leaks. I want to repair what's creating the
8 issue that we're here. But I don't want to
9 tear off all the stucco on all the buildings
10 if it's not related to the leaks and it's not
11 going to be related to the leaks.

12 And so that's -- this graphically showed
13 to counsel the issue I was struggling with
14 during the January estimate is I've got three
15 buildings that are totally unrelated, and I
16 don't have any evidence that we should be
17 fixing those. So I did this graphically so
18 that they could see.

19 The second thing this shows is -- and the
20 buildings one through nine are -- there are
21 leaks. There's tests that I saw and that
22 everybody saw. The configuration -- and, if
23 I may, I did a second drawing that would
24 illustrate this. It's not a lot better, but
25 it's better.

1 Q. All right.

2 A. The red, as you'll see, is all the faces
3 of the building that face out. And you're
4 going to have to blow this up to really get
5 it. But that's what you see in all the
6 outside pictures.

7 Now, the yellow or orange is the elevated
8 walkways, once you climb up the stairs to get
9 to the building. Now, those are covered by
10 roofs.

11 And the only leaks that I found in any
12 investigations are all at the same detail.
13 If you look at the pictures, you walk in on
14 the ground level and above you, when you get
15 partway into this hallway, there's the first
16 floor. And at the railing -- if has a balcony
17 or it has a railing on each end. And right in
18 that detail they found substantial leaks.

19 All the rest of that, anywhere else that
20 I saw, anywhere on the outside edge, anywhere
21 above it -- there are no windows. The doors
22 are underneath the roof. Other than the water
23 that got in it at that detail -- and it's a
24 very -- from a contractor's viewpoint, it's a
25 terrible detail to get right. It is

1 difficult. You've got railing. You've got
2 movement. You've got a concrete slab here.
3 You've got wood frame here. You've got a
4 lot going on. So that that leaks is not
5 surprising. But that that needs to be fixed
6 and that everything related to that needs to
7 be fixed is not surprising.

8 The ProCon estimate, from what I was able
9 to ascertain, takes all the stucco off that
10 entire hallway all the way to the roof -- I
11 found puzzling.

12 That's what these pictures were. So I
13 talked to counsel as to how do you want to do
14 this? This is my concern. I'm not fixing
15 where they proved they've got leaks. I'm just
16 taking the whole thing and redoing the whole
17 job. And when I do these jobs, if I'm coming
18 to this client, that's not the proposal that I
19 want to do or I'm going to do. You don't redo
20 a complete stucco job unless there's other
21 issues that they haven't shown me yet. And he
22 didn't. These buildings are ten years old.
23 They've had leaks right there at that leading
24 edge and at the windows.

25 Q. Would it be helpful if I provide you with

1 a laser pointer?

2 A. I don't know if it would be helpful or
3 not.

4 Q. (Tenders)

5 A. When you walk up and -- let's see, this
6 is the road side here.

7 MR. LUCEY: Objection. The witness
8 is repeating a narrative. I think he's
9 already been through this.

10 THE COURT: I'm going to allow it.
11 Thank you.

12 THE WITNESS: This is the parking lot
13 side. And these are the garages and these are
14 the steps where the garages are.

15 This is how you would walk into your
16 unit.

17 There's a set of stairs that get you up
18 to this next level.

19 When you get to this level you're on the
20 first floor. You're standing on concrete. It
21 has a coating on it, but it's a concrete slab.
22 On the front edge of this it looks just like a
23 balcony and it has a railing fastened into
24 each wall. Right at the base of that is where
25 they found substantial leaking. And I believe

1 -- I believe that.

2 All of this has stucco on it. This wall
3 here -- it's not in red has -- I believe the
4 ceilings are nine feet tall. They have nine
5 foot on one side, a blank wall nine foot tall.
6 All the way here and all the way here, and
7 then on each side.

8 Now, this is not clear to you, but what I
9 have on this drawing is I included in my
10 estimate from that edge -- if this is the edge
11 of the balcony, I took the stucco on this wall
12 all the way back to the door, because that's
13 an easy place for me to do a transition. I
14 took it all the way out to the control joint
15 that runs all the way from the ground up. And
16 the reason that we do that is there's no
17 patch. It's a full replacement. So in that
18 area, that's what I've included.

19 I haven't included any of the rest of
20 that. And this is what I struggled with when
21 I was out there for two days. How did they
22 get 300,000 square feet of stucco, when I
23 don't? So I went through the take-off several
24 times. We still don't agree on the exact
25 scope or the exact quantity. But at least I

1 understand where their quantity is versus my
2 quantity.

3 The areas right here are included in
4 their stucco repair. And mathematically, I'm
5 going to drop fifty-five percent of their
6 quantity.

7 The item that's not clear on there is,
8 according to the contract, the ceilings are
9 also stucco. And they haven't clarified
10 whether since they say they're taking out all
11 stucco, are they also taking out the ceilings.
12 So that's the difference. That's where the
13 struggle was and where the numbers -- I'm
14 trying to figure, first, what the other
15 expert's number is and what I agree with it
16 and disagree it. The first issue was what
17 scope are we talking about so I can sort of
18 compare at least somewhat apples to apples.

19 DIRECT EXAMINATION CONTINUED

20 BY MR. ANDERSON:

21 Q. From the information you've provided us,
22 the area in yellow, then, is an area that you
23 would not perform stucco restoration?

24 A. Other than -- and you've got to get up
25 close. Other than that fifteen feet

1 approximately right on the leading edge. It's
2 on there, but you may not be able to see it.
3 The rest of it, no.

4 Q. And ---

5 A. Unless they have test cuts that I didn't
6 see that show that water's leaking.

7 Q. What percentage of the total area of the
8 stucco is comprised by the -- are you
9 representing in yellow?

10 A. Forty-five percent is my belief of what
11 their number includes, of their total is
12 related to the areas that I'm saying that we
13 shouldn't -- that I see no indication need to
14 be repaired.

15 Q. And as a result of your investigation
16 were you able to make a determination about
17 the testing?

18 A. I was.

19 Q. And when you give an estimate, is this an
20 estimate -- I guess in the industry they might
21 call it a proposal and you would be willing to
22 perform the work for the price stated in the
23 estimate?

24 A. You asked me if I did an estimate. I
25 then turned around and sent you a proposal.

1 And in that, it's executable. If this settles
2 today and this client wants to hire us, the
3 contract can be signed.

4 Q. I'm going to hand you ---

5 MR. ANDERSON: May I approach,
6 Your Honor?

7 THE COURT: Certainly.

8 MR. ANDERSON: Thank you.

9 COURT REPORTER: Defendant's
10 Exhibit 3 for identification.

11 DIRECT EXAMINATION CONTINUED

12 BY MR. ANDERSON:

13 Q. Mr. Pusheck, I'm going to hand you what's
14 been marked as Defendant's Exhibit number 3.
15 Do you recognize that?

16 A. I do.

17 Q. And can you tell the jury what that is?

18 A. This is a proposal that outlines
19 specifically what I just went through
20 graphically, that we will do the exterior --
21 eliminate the existing stucco or siding, felt,
22 building wrap materials. The limit of the
23 removal will be from each window to either
24 side as opposed to vertical. In other words,
25 if there's a window in a 16-foot section,

1 we're taking it all the way to the corner.

2 And in buildings one through nine, there may

3 be one end unit on one side, maybe two, that

4 don't have a window. Every other external

5 face that faces out has at least one window.

6 So this proposal addresses a hundred percent

7 of those, from corner-to-corner, which is in

8 our industry how the repairs are best done.

9 Q. And are you replacing the windows in

10 this?

11 A. We are.

12 Q. And how are you able to price that type

13 of window?

14 A. Well, the total has changed this

15 proposal. So I sent the proposal to my window

16 suppliers that we're using on the other jobs

17 and got educated that we're actually providing

18 a little bit better window.

19 Q. How was that selection made?

20 A. We had the contract and we had the

21 specifications. We know what we had to do to

22 meet the contract. But, as I said, I believe

23 from memory that the code may have changed or

24 did change. Because they weren't provide the

25 exact window. They were providing a little

1 bit better window.

2 Q. And what about in this contract? Does it
3 reflect that change?

4 A. It does.

5 Q. Now, in this contract are you doing
6 anything with the HVAC units?

7 A. No.

8 Q. Are there other areas that are not in
9 this contract that were in Mr. Gallagher's or
10 ProCon's?

11 A. In which one? The \$15 Million dollar
12 one?

13 Q. The \$15 Million dollar one?

14 A. Yes, there are several areas. The ones
15 that come to mind are, other than a small
16 electrical allowance, he had a lot more
17 electrical that I don't have. He had the HVAC
18 and he had roofing that was not related to the
19 kickout flashing. I included kickout
20 flashing, but I'm not including the roof.

21 Q. Is that showing up for you? On this one
22 the writing is not quite so small. If you
23 could help us, and if you need to, use the
24 laser pointer at specific areas if you want to
25 point them out. What is your total on this?

1 A. Down here, the numbers that you had
2 trouble seeing is \$4,276,922.75. And then I
3 included engineering fees of \$149,602.00.

4 Q. Have you used a percentage to calculate
5 the design professionals that you need to use?

6 A. Typically, the owner hires the designer.
7 He's independent. So we don't typically hire
8 consultants. The reason is that the
9 consultant is supposed to be the independent
10 representative of the condo owner. And if
11 they take paychecks from me, then it doesn't
12 work out so well. But we do -- I do this
13 quite often. And in a case like this, the fee
14 is typically between three and five percent.

15 Q. Is that approximately the same fee that
16 you're receiving in the projects that you're
17 doing here in South Carolina today?

18 A. We don't receive this fee. This is a
19 breakout that includes that. But that's not
20 going to be paid to me.

21 Q. Right. That was very inartfully worded.
22 Is that within the price range that you are
23 seeing in the projects that you are doing in
24 South Carolina?

25 A. Yes.

- 1 Q. The three to five percent?
- 2 A. Yes.
- 3 Q. Are you seeing any design professionals
- 4 coming in at a ratio of ten percent?
- 5 A. Not in anything related to this, no.
- 6 Q. Now, this is for buildings one through
- 7 nine?
- 8 A. If you slide it down they probably can
- 9 read it -- other way. It's buildings one
- 10 through nine.
- 11 Q. Now, were you also asked to include
- 12 buildings ten, eleven and twelve in their
- 13 proposal?
- 14 A. After we got ProCon's number that
- 15 included all of their stucco-only, per the \$8
- 16 Million dollars, we then had to include
- 17 buildings ten, eleven and twelve as I tried
- 18 to, again, look at more apples-to-apples.
- 19 Q. And would it help you in comparing
- 20 pricing?
- 21 A. Yes.
- 22 Q. In this second number, can you tell us
- 23 about that?
- 24 A. In preparing the second estimate, I
- 25 increased the mobilization, the general

1 conditions and the bond a little bit because
2 we were protecting and dealing with three more
3 buildings, even though their volume wasn't
4 that much. Other than that, I modified the
5 quantities, but the unit prices and everything
6 else are the same as the estimate that was
7 prepared in mid-January. This just reflects
8 adding that and the costs associated with
9 adding those three buildings. So it reads
10 \$4.81 Million. The fees as a percentage go
11 up. And the total is \$4.978 Million.

12 Q. Okay, that is the anticipated full price
13 to the owner including a design professional?

14 A. And that includes a design professional.

15 Q. Who would be independent of the
16 contractor?

17 A. Correct.

18 Q. And your company would perform this work
19 at this price today?

20 A. Yes.

21 MR. ANDERSON: May I approach?

22 THE COURT: Yes.

23 DIRECT EXAMINATION CONTINUED

24 BY MR. ANDERSON:

25 Q. I hand you that and ask you whether or

1 not you recognize that document.

2 A. I do.

3 Q. And could you tell us what that is?

4 A. Once Mr. Gallagher had provided his
5 \$8.761 Million dollar summary of stucco only,
6 it got me thinking. And I was trying again to
7 get to the point and try to explain to myself
8 first, but to any of the attorneys when they
9 were going to ask me, how do you get from \$8.5
10 down to less than \$4 Million by the time you
11 look at this? And so I spent a lot of time
12 and made a few assumptions that I'll explain
13 to you. And I feel I can explain the
14 differences in the five million dollar
15 difference.

16 MR. LUCEY: Your Honor, may we
17 approach, please?

18 THE COURT: You may.

19 (OFF RECORD BENCH CONFERENCE)

20 THE COURT: Ladies and gentlemen,
21 this is an appropriate time for us to take our
22 lunch break. Do not begin your deliberations.
23 Do not discuss the case amongst yourselves.
24 Please be back in the jury room at 2:00 p.m.
25 Please rise for the jury.

1 (JURY OUT)

2 THE COURT: Thank you. Please be
3 seated. Mr. Lucey, this will give you time to
4 go over it. Hopefully, it will be more clear
5 after you've had some time to understand it.
6 We just admitted at the bench conference the
7 document you've just been given. So at 2:00
8 p.m., hopefully that'll give you an hour and a
9 half to review the information. You
10 indicated, Mr. Anderson, that you have about
11 another thirty minutes with this witness?

12 MR. ANDERSON: I can hopefully go
13 through this document and then wrap up his
14 testimony and I'll be through.

15 THE COURT: And please use the
16 lunch hour to go over -- I understand that
17 there's a possibility of a stipulation on the
18 next deposition. Is that correct, Mr. Sequi?

19 MR. SEQUI: As related to the
20 deposition, yes.

21 THE COURT: And we will have the
22 issue with Mr. Dawkins at some point. Is that
23 correct?

24 MR. ANDERSON: That's correct.

25 THE COURT: And that should be all

1 of your witnesses. Is that correct?

2 MR. ANDERSON: That should be all
3 of our witnesses. Yes, Your Honor.

4 THE COURT: So we should have your
5 testimony and defendant's case wrapped up
6 today. Is that correct?

7 MR. ANDERSON: That is correct.

8 THE COURT: And I'm not going to
9 hold you to this, but do you anticipate any
10 rebuttal at this time?

11 MR. ANDERSON: Your Honor,
12 depending on the ruling on Mr. Dawkins, we
13 would be offering a substitute witness that
14 has been previously properly identified.

15 THE COURT: And who is that
16 substitute witness?

17 MR. ANDERSON: That would be
18 Steve Watkins.

19 THE COURT: Would plaintiffs
20 propose to call Mr. Watkins in place of Mr.
21 Dawkins?

22 MR. ANDERSON: On some of his
23 information. The scope of his testimony is
24 not as broad as Mr. Dawkins' because he is not
25 a professional engineer. But he's the one

1 that performed the actual test cuts.

2 MR. LUCEY: Your Honor, he's a
3 contractor. We object. It's cumulative.
4 He's got his contractor. I don't understand
5 how he's alleged that a contractor is going to
6 be a substitute witness for an engineer who
7 tries to testify from out of state without a
8 license.

9 THE COURT: We'll address that as
10 it comes. You may step down, please.
11 Remember that you may not discuss your
12 testimony with anyone. Thank you. 2:00 p.m.
13 Thank you.

14 MR. ANDERSON: Your Honor, may we
15 use the courtroom?

16 THE COURT: You may. Please be
17 courteous of my staff so that they all have an
18 opportunity to go to lunch. Thank you.

19 MR. ANDERSON: Yes, ma'am.

20 (LUNCH RECESS)

21 THE COURT: Please be seated. Mr.
22 Lucey, any further objections regarding the
23 witness's testimony?

24 MR. LUCEY: Just that the letters
25 that they had on the screen at the time of the

1 break, Your Honor, seeks to pit the witnesses
2 against each other.

3 THE COURT: Mr. Anderson?

4 MR. ANDERSON: Your Honor, it is
5 merely a spreadsheet display of the
6 differences in their pricing. And I don't see
7 how that actually pits them in that it's just
8 a comparison between the two pricing
9 techniques, and it would be edifying for the
10 jury.

11 THE COURT: I agree. Note your
12 exception. Mr. Pusheck, please come forward.

13 (WITNESS RESUMES STAND)

14 THE COURT: Did we have an
15 opportunity to discuss the deposition
16 testimony and the stipulation?

17 MR. SEQUI: Your Honor, we're just
18 going to withdraw all our objections to
19 anything dealing with Ms. McGinty.

20 THE COURT: Say it one more time.

21 MR. SEQUI: We are going to with-
22 draw any of our objections to anything with
23 Ms. McGinty's deposition. They can read what
24 they want. I just ask that they put in the
25 few ones that I added.

1 THE COURT: All right. Thank you.
2 And, just for the record, what is that exhibit
3 number, Mr. Anderson, that there was an
4 objection to?

5 MR. ANDERSON: Excuse me, Your
6 Honor. The one on the screen doesn't have an
7 exhibit number. I haven't marked it yet, I
8 apologize. I believe it will be Defendant's
9 Exhibit 4.

10 COURT REPORTER: Defendant's
11 Exhibit 4 for identification.

12 THE COURT: Let's bring in the
13 jury.

14 (JURY IN)

15 THE COURT: Please be seated. Mr.
16 Anderson, your witness.

17 MR. ANDERSON: Thank you, Your
18 Honor.

19 DIRECT EXAMINATION CONTINUED

20 BY MR. ANDERSON:

21 Q. Mr. Pusheck, at the time of the break we
22 had just begun speaking about what has now
23 been marked as Defendant's Exhibit 4. I would
24 ask you if that is what is displayed on the
25 screen for the jury?

1 A. It is.

2 Q. Can you tell us basically how -- just
3 give us a broad overview of what information
4 is provided on this Exhibit and then we'll get
5 into the specifics.

6 A. Typically, each -- in each of these white
7 spaces it's a type of building. So this is
8 type one. This is type two. This is type
9 three. And then this is nothing more than the
10 summation of these three types. This next
11 line is the information produced by ProCon
12 last week. And so I put this information in,
13 and I did the math exactly off their sheets.
14 And so the total of those is \$8.751. That's
15 all the way down here. The yellow -- it's
16 \$8.764, I'm sorry. \$8,761,443. I believe
17 that's straight off their sheet.

18 Q. That's the number that's actually at the
19 bottom in the far right-hand corner.

20 A. That's right. So specific to the nine
21 buildings, I addressed those nine based on the
22 proposal that I'd sent in January, because I
23 was trying to get to apples-to-apples.

24 So I had to take the windows out, and
25 then put in -- from ProCon's estimate -- this

1 is the information they gave us that was
2 included in this. And then they tell us that
3 they included fifty percent of the interior
4 work, fifty percent of the mold remediation,
5 fifty percent of the general conditions. I
6 added this line that's not on here. Their
7 sheet has item fourteen, fees at forty
8 percent, and then a total.

9 So, then each item through, I took, based
10 on the proposal I had sent, and tried to get
11 apples-to-apples as far as the breakdown the
12 way I did it versus the way they did it, in
13 these columns. I struggled, as I said, how
14 then they were at \$8.7 and the subtotal for
15 the nine buildings is \$8,068,000 for ProCon
16 and for CRW it was \$3,293,000, a difference of
17 almost five and a half million dollars. The
18 whole purpose of this was for me to be able to
19 figure out where it is.

20 So what I did was I put for the CRW
21 breakdown from our January proposal, not
22 including windows.

23 Q. So the new one is in yellow and ---

24 A. ProCon, on top is what they sent us. And
25 then what I did then was -- they may not agree

1 to this. But I went through and took my take-
2 off of the quantity difference that I've shown
3 you. And I prorated it to what their unit
4 cost was for their quantity. And I used
5 basically almost forty-five percent. I did
6 the math, but it comes out to roughly forty-
7 five percent less. And what that showed me is
8 if you do all of that improvising -- and I
9 know they'll get a chance to question to --
10 but if I understood their proposal right, at
11 this tier, before we get to the fees, we're
12 eight-point-seven percent different. And
13 maybe I misunderstood what they sent me last
14 week. But that gave me confidence that I
15 think that we're at least doing the same job,
16 if you change the scope.

17 They had \$870,000 more than I do in what
18 they call fees. And I'll discuss that. The
19 delta here is \$275,000, if we're looking at
20 the same job and same quantity.

21 Q. Mr. Pusheck, I need to interrupt you,
22 because you're using some phrases that I think
23 maybe we may need some help in understanding.
24 You've used the quantity take-off. Can you
25 tell me what that means?

1 A. In their proposal from last year, they
2 had -- and I'd have to add it up. But let's
3 say 240,000 square feet or 260,000 square feet
4 of stucco. So that was their take-off.

5 Q. So that's the amount -- when you say
6 "quantity take-off," that's the amount of a
7 certain material?

8 A. That's included in their price.

9 Q. All right. And then you also used the
10 phrase "delta." Are you using that for
11 "change?"

12 A. Change, difference. What I'm trying to
13 get is to some place where I can that we're
14 looking at the same job the same way to see if
15 we're headed to a scope question or a mark-up
16 question or a fee question. And that's what
17 I'm trying to do, is the delta between what I
18 think is our way of the exact same thing that
19 they did. What's the difference?

20 Q. Thank you. Please proceed.

21 A. So I'm not saying they'd agree to it.
22 But if I took their numbers and prorated their
23 270 down to my 136,000 ---

24 Q. What is that? 270?

25 A. Again, I don't have their -- nobody's put

1 their number, and I don't remember their exact
2 quantity from last year. But in my proposal
3 that's Exhibit Number 3 for the buildings one
4 through nine, there is a total of 136,000 plus
5 18,240 or 154,000 square feet of stucco versus
6 their -- and I'm going to say again that I
7 don't remember the exact number, some 260,
8 270. So prorating that, at this level we're
9 very close. So a big discrepancy is in the
10 fees. When they did their proposal last year
11 they added ten percent for overhead, ten
12 percent for a fee. But on top of that --
13 they're built on top of each other. So ten
14 plus ten is 21, not 20. Ten and then you mark
15 that up to get to 21. You mark that up ten
16 percent more for a contingency. And then you
17 mark it up ten percent for engineering. And
18 they ended up with a forty-four percent mark-
19 up previously. And that's with no back-up.
20 They just marked it up to a flat forty
21 percent.

22 And so assume it's the same ten plus ten
23 plus ten figured slightly different.

24 Q. Without compounding, I believe.

25 A. Without compounding. Versus what I have.

1 Again, if you go back to the January 14th
2 proposal modified for the one through nine, my
3 general allowance said ten percent was
4 150,000. The fees that I'm including in here
5 are 150,000 which, I believe, is three and a
6 half or four percent versus ten percent.

7 Q. How were you able to do that?

8 A. Well, from my experience the engineering
9 fees for this kind of project are not going to
10 be ten percent. Historically, they're between
11 three and five percent. The contingency -- we
12 are both taking large areas of quantities of
13 stucco. The risk of it overrunning is
14 substantially zero. In their case it's zero.
15 They're taking every square foot of stucco
16 off. So compounding it with a ten percent
17 contingency in effect says we might find ten
18 percent more stucco in a building where we're
19 taking all the stucco off. And that's -- it's
20 really difficult to support in this case.
21 There are contingencies once you take the
22 stucco off, that you'll find something damaged
23 by the water. And you need to address that.
24 But a blind contingency on something that has
25 \$14 or \$12 Million dollars for the lump sum,

1 guaranteed you're not going to run into any
2 extra quantity on the stucco is not the
3 industry standard. That's not what we do.
4 So that's that ten percent.

5 And so when I did this and this, I came
6 up with a million and I was still struggling
7 with it. So what I did over here is I took
8 what the forty-five percent reduction was.
9 Take out what they had in for all the things
10 I'm not doing. And they had \$3.6 Million.
11 \$3,630,723.75, if I did the math exactly
12 right, for the areas that I showed you on the
13 previous slide for the interior stairwells,
14 the interior hallway. And, again, I haven't
15 been able to take off whether there's stucco
16 on the ceilings included in that or not. And
17 so as you look at the two for you or anybody
18 to look at, that's a big component that either
19 their number or my number -- it's not
20 estimating work. We're close on the
21 estimating, when we get down to. We're within
22 90 percent other than these fees. We're just
23 looking at two completely different scopes.

24 And so these are the other buildings,
25 because as they sent their proposal, they

1 included nine, ten, eleven and twelve. And so
2 I did that and I also included that we're
3 700,000 dollars over here. When you add it
4 altogether we're \$700,000 dollars apart on
5 those three buildings. So there's a huge
6 discrepancy there too. When you add the 3.6,
7 the 275 and the 870 and the 7.693, you get a
8 little bit more, actually -- about 30,000
9 more than the exact different between our two
10 numbers.

11 Q. Once again, the 274 number represents the
12 difference where?

13 A. Well, to me, this represents my job with
14 overhead and profit. This represents their
15 job without their ten percent and ten percent.
16 But in my experience, these numbers that we
17 have here are what these jobs would be bid
18 for. And we're ten percent apart, which is
19 reasonably close in this industry and in the
20 environment that we're in today.

21 Q. How do you -- you did not include a ten
22 percent for profit?

23 A. I did, but I don't break it out
24 separately because I'm self-performing.
25 ProCon says that they are only performing a

1 few items. And they have maybe 60 small items
2 that they're performing. But they add ten
3 percent and ten percent on it, which is their
4 method. I'm not saying it's right or wrong.
5 I'm saying that my method includes my ten. In
6 this market, if you can make a profit it's
7 pretty aggressive. But my mark-up and a
8 reasonable profit at this level. And I'm
9 self-performing almost all of it. So why
10 would I mark myself up again?

11 Q. So that includes -- the number that
12 you're giving there includes the profit
13 number?

14 A. It includes the overhead and, yes, an
15 aggressive for profit in this marketplace.

16 Q. What type of profit are you seeing on
17 contracts in this market?

18 A. Right now, it's getting a little better
19 this year. Last year we were seeing people
20 take jobs at a loss to keep their people.
21 This year, we are at least doing reasonably
22 well in the marketplace and we hope to turn a
23 reasonable profit. In our industry if you
24 make five percent above volume you had a great
25 year.

1 Q. And so are you seeking five percent on
2 your new contracts?

3 A. No.

4 Q. What percentage are you seeking?

5 A. As I said, we lost money last year.
6 We're hoping to make money this year:

7 Q. Any other information we can glean from
8 this comparison?

9 A. I'm sure there is. I've illustrated
10 points that I was trying to understand myself.

11 Q. Now, can you explain the difference
12 between -- or is there another difference in
13 the stucco square footage numbers that you
14 used and the ones that ProCon used, other than
15 the hallways and breezeways that we have
16 discussed?

17 A. In the original proposal they explained
18 that they take the gross square foot quantity,
19 where I take the net square foot quantity.
20 And so, even back then, we were off by about
21 thirty -- at least from my math, about 37,000
22 square feet.

23 Q. And how do you define "gross square
24 footage?"

25 A. If I did this room and I was doing stucco

1 on all the walls, I would take the measurement
2 from the ceiling to the floor all the way
3 around and I wouldn't take out for the doors
4 and wood panels, any of the penetrations that
5 you don't put stucco on. That's the gross
6 number. The net method is I take out -- I
7 measure and take out each of the openings
8 because I'm not putting stucco there.

9 Q. And what was the square footage number
10 difference when you did net as opposed to
11 gross on the stucco at Fenwick?

12 A. Again, we've not reconciled -- I've not
13 talked to ProCon and I don't have a full
14 understanding of everything they did. My
15 opinion is that the difference between gross
16 and net would be 37,000 square feet.

17 MR. ANDERSON: Your Honor, at
18 this time we would move to admit Defendant's
19 Exhibit Number 4.

20 MR. LUCEY: Objections for the
21 reasons already on the record, Your Honor.

22 THE COURT: Counsel approach.

23 (OFF RECORD BENCH CONFERENCE)

24 THE COURT: Sustain your objection,
25 Mr. Lucey.

1 DIRECT EXAMINATION CONTINUED

2 BY MR. ANDERSON:

3 Q. Do you still have Defendant's Exhibit 3,
4 your proposal?

5 A. Yes, sir.

6 MR. ANDERSON: Your Honor, at
7 this time we would move to admit Defendant's
8 Exhibit 3 into evidence.

9 MR. LUCEY: No objection.

10 THE COURT: Defendant's 3 into
11 evidence without objection.

12 (SO ENTERED AS DEFENDANT'S EXHIBIT 3)

13 DIRECT EXAMINATION CONTINUED

14 BY MR. ANDERSON:

15 Q. Would you, if you can, briefly, tell the
16 jury the general configuration of the wall
17 system that you're going to be taking out and
18 the new one that you'll be putting up out at
19 Fenwick -- if you had just a generic wall.
20 I'm talking specifically and focus on the
21 stucco, and then I'll ask you some questions
22 about the HardiPlank.

23 THE COURT: Mr. Pusheck, hold up
24 one second. I know I had a very big lunch.
25 So, ladies and gentlemen of the jury, just

1 take a moment if you need a little stretch
2 break and let the stomach get stretched and
3 make sure your blood's flowing. Thank you.
4 You may answer.

5 THE WITNESS: Can you repeat the
6 question?

7 DIRECT EXAMINATION CONTINUED

8 BY MR. ANDERSON:

9 Q. What I'm asking is if you can give a
10 short synopsis or an overview of the structure
11 of the walls that will be removed as in your
12 proposal, and then the structure of the wall
13 that's going to replace it. And if you would
14 focus on stucco first and then for the Hardi-
15 Plank.

16 A. The current system is called Magna. It's
17 already been discussed. It's a little bit
18 more than a one-coat system. We're going to
19 remove all of that. That includes the lath,
20 the paper associated with the lath, the wrap.
21 We'll expose the OSB and we have allowances in
22 for the OSB to be repaired on an as-needed
23 basis. Once we've repaired the damaged OSB,
24 we'll be putting back the wrap. Then we'll be
25 putting back basically the same paper and lath

1 system. But we'll be putting on a three-coat
2 system, two base coats and a top coat, a base
3 brown and a top coat.

4 Q. Was that what was originally spec'ed for
5 this building?

6 A. That's what's in the specifications. It
7 appears that that was modified, but that's
8 what the specs originally say.

9 Q. And have you ever viewed the original
10 drawings in this case?

11 A. I did.

12 Q. And please tell us about whatever work is
13 going to be done on the HardiPlank.

14 A. In general, we're going to take the
15 HardiPlank off. The damage seems to be less,
16 but we'll assume we're taking the HardiPlank
17 and the wrap off at the back, doing the same
18 OSB damage, and then putting back the
19 equivalent HardiBoard plank.

20 Q. And the current system has both a
21 building wrap and paper-backed lath. Is that
22 correct?

23 A. That's my understanding.

24 Q. And the new system will have the same or
25 similar?

1 A. It will.

2 Q. What is the purpose of having the two
3 layers?

4 A. From a waterproofing standpoint?

5 Q. From a waterproofing standpoint. When
6 you're doing renovation, why would you go back
7 with a building wrap and a paper-backed lath?

8 A. I've heard architects argue about this
9 repeatedly. But the general consensus is that
10 the wrap is the primary and that the paper is
11 the secondary wrapping in localized areas.

12 Q. And as far as the installation of new
13 windows, what will change between what is
14 currently out at Fenwick and what you propose
15 to put in, if anything?

16 A. Well, one, the biggest issue in windows,
17 from my experience is that a window guy puts
18 in one side. A stucco guy puts in the other.
19 They can't see each other. They are not
20 watching each other. So there always seems to
21 be conflict. We'll be doing both. We'll be
22 monitoring both. And that's the biggest
23 thing. As I said, from memory, when I talked
24 -- I was out on site, I called a guy that was
25 quoting on another job, read him the spec and

1 told him that it was 2000 and that we were
2 doing it now. From memory, I believe he said
3 ---

4 MR. LUCEY: Objection. Hearsay.

5 THE COURT: Sustained.

6 DIRECT EXAMINATION CONTINUED

7 BY MR. ANDERSON:

8 Q. But did you explain the sequencing issue
9 that you were describing to us between having
10 two separate companies put in the windows and
11 the stucco and what your company would do?

12 A. Again, it comes into the details and
13 who's responsible and who understands what the
14 other person is doing. When it's one
15 contractor doing both, it's different. That's
16 what restoration contractors do.

17 Q. And when you say that it's different,
18 there's less chance of misunderstanding?

19 A. There's a lot less chance of
20 misunderstanding.

21 Q. Now, I'd like to -- could you turn to
22 page four of your proposal? The way you're
23 looking it seems like you may not have page
24 four?

25 A. My page four does not look like your page

1 four.

2 Q. I'm sorry.

3 MR. ANDERSON: May I approach,
4 Your Honor?

5 THE COURT: You may.

6 THE WITNESS: I stand corrected. It
7 is the third page in, but it's labeled page
8 four.

9 DIRECT EXAMINATION CONTINUED

10 BY MR. ANDERSON:

11 Q. It's hard to keep things straight here
12 sometimes. So and what is this page? What
13 does this signify?

14 A. This is our offer of contract. They can
15 execute this or they can decide to negotiate
16 or use a different contract form. But this
17 allows them -- when we send out proposals,
18 they're not all for four million dollars. But
19 if we're doing a job for ten thousand dollars
20 or four million dollars, some people sign this
21 proposal.

22 MR. ANDERSON: Your Honor, if I
23 could check, I believe that Exhibit 3 is in
24 evidence. Is that correct?

25 THE COURT: That is correct.

1 DIRECT EXAMINATION CONTINUED

2 BY MR. ANDERSON:

3 Q. Mr. Pusheck, would you answer any
4 questions that counsel for plaintiffs may have
5 for you.

6 A. Yes.

7 THE COURT: Mr. Lucey?

8 CROSS EXAMINATION

9 BY MR. LUCEY:

10 Q. Mr. Pusheck, I've actually seen Exhibit 3
11 before. It was admitted into evidence. Is it
12 the one you sent us last January or is it the
13 one I got at 7:00 a.m. this morning?

14 A. I can't tell you what you got at 7:00
15 a.m. this morning.

16 Q. What's the date on it, sir?

17 A. May 11.

18 Q. May 11. And you transmitted it to this
19 group after this trial started?

20 A. Yes.

21 Q. This estimate, this Exhibit Number 3?

22 A. The trial started on Monday, yes.

23 Q. Sir, tell the jury when the first time
24 was that you actually included buildings ten,
25 eleven and twelve in any estimate that you

1 prepared.

2 A. I believe the answer to that is June 24th,
3 2010.

4 Q. So it was in your first estimate, came
5 out of your second estimate and went back into
6 your third estimate. Is that what it is? Is
7 that the deal?

8 A. In 2010, I was reviewing ProCon's
9 estimate and putting apples-to-apples. They
10 had it in, so I, line-by-line, provided what I
11 thought their costs were line-by-line.

12 Q. I'm sorry, excuse me.

13 A. I wouldn't call that necessarily an
14 estimate. But the word "estimate" is on that
15 piece of paper.

16 Q. The piece of paper does say "estimate."

17 A. It does.

18 Q. And that's produced by you?

19 A. Yes.

20 Q. But you wouldn't call it an estimate?

21 A. No.

22 Q. Okay. But at any rate, whatever you're
23 going to call it, you include buildings ten;
24 eleven and twelve in the first numerical
25 document you've produced. You then exclude

1 them from the second numerical document you

2 produced. Would you call that an estimate?

3 A. That's a proposal.

4 Q. Proposal. And then you put them back

5 into the third document you produced, correct?

6 A. It's doesn't have them in the second one.

7 Q. But if, in fact -- on this Defendant's

8 Exhibit 3, breaking it down into its simplest

9 terms, that is a prepared proposal by you for

10 the stucco repairs at Fenwick, correct?

11 A. Yes.

12 Q. And if we take the alternate B proposal,

13 you're saying I can fix the stucco -- my

14 company can fix the stucco at Fenwick for five

15 million dollars, correct? I'm going to use

16 rounded numbers if that's okay with you. You

17 say \$4.9 Million and some change and I'm going

18 to round it up to five. Is that okay with

19 you?

20 A. It's okay to round it. Are you asking my

21 response to your statement?

22 Q. Yes. In the alternate B, you're saying I

23 can fix all twelve buildings, the stucco on

24 all twelve buildings at Fenwick for five

25 million dollars, correct?

- 1 A. That's incorrect.
- 2 Q. Okay. What is the amount of alternate B?
- 3 A. The amount is \$4.978, but that includes
- 4 windows. Your question was stucco.
- 5 Q. Stucco and related problems, correct.
- 6 Thank you for that clarification. It includes
- 7 the stucco, the windows and the little bit of
- 8 HardiPlank that's on there, correct?
- 9 A. It's not a little bit, but it includes
- 10 40,000 square feet of HardiPlank.
- 11 Q. Those exterior walls, the perimeter walls
- 12 for all those, correct?
- 13 A. Yes.
- 14 Q. And you can do that, all twelve buildings
- 15 for five million dollars, correct?
- 16 A. Yes.
- 17 Q. Now, you have an issue as to whether
- 18 three of those twelve buildings actually need
- 19 any repairs, if I understand you correctly.
- 20 Is that right?
- 21 A. I see no proof that they need repair.
- 22 That's correct.
- 23 Q. You're not a forensic architect or a
- 24 forensic engineer, correct?
- 25 A. I'm neither of those.

1 Q. But let's talk about the first nine
2 buildings. You do agree that the first nine
3 buildings need repair, correct?

4 A. There's damage that needs to be
5 addressed. That's correct.

6 Q. There is external wall damage, correct?

7 A. Yes.

8 Q. And there's damage underneath the stucco,
9 correct?

10 A. Yes.

11 Q. And there's damage to studs?

12 A. Yes.

13 Q. And you agree that that's caused, at
14 least in part, by the improper application
15 of stucco at Fenwick on those first nine
16 buildings, correct?

17 A. No.

18 MR. ANDERSON: Your Honor, I
19 would object.

20 THE COURT: Are you withdrawing
21 your objection?

22 MR. ANDERSON: I'm withdrawing my
23 objection.

24 THE COURT: Thank you.

25 CROSS EXAMINATION CONTINUED

1 BY MR. LUCEY:

2 Q. Sir, that first, what you called apples-
3 to-apples, that's the one you did in June of
4 2010. I'd like to use a different word to
5 make sure the jury's with us. It essentially
6 was a global estimate of repairs at Fenwick,
7 correct? In other words, not just stucco and
8 windows, but everything that is allegedly
9 wrong, correct?

10 A. That's a reasonable characterization.

11 Q. And you took your scope for that global
12 estimate off of the ProCon global estimate,
13 correct?

14 A. In general, yes.

15 Q. In general, correct. You made some
16 changes, right?

17 A. Right.

18 Q. But for starters you were handed a \$15.7
19 Million dollar ProCon estimate and you started
20 working on it, correct?

21 A. I had walked around and looked at the
22 twelve buildings and then started working on
23 it.

24 Q. And off of that you did your own version
25 of a global estimate, correct?

1 A. Again, I reviewed it and I prepared that
2 piece of paper that says "estimate" on it,
3 yes.

4 Q. Well, you excluded a number of ProCon's
5 items, but you still came up with \$9.5 Million
6 dollars, correct?

7 A. Correct.

8 Q. And that's excluding, for instance, their
9 environmental remediation protocol to make
10 sure that none of that stuff gets into the
11 living units, correct?

12 A. I don't think that I excluded that. I
13 didn't put any pricing there. I put it in the
14 insulation.

15 Q. You didn't put any pricing under this
16 environmental protection column, is that
17 correct?

18 A. No.

19 Q. And there's various other things that you
20 made a judgment, that you didn't price them
21 too in your global estimate, correct?

22 A. Yes.

23 Q. But it still came out to \$9.5 Million
24 dollars, correct?

25 A. It did.

1 Q. So at least at that point in time,
2 roughly speaking, you're estimating -- your
3 estimates were coming out at about two-thirds
4 of what the ProCon estimates were coming out,
5 correct?

6 A. Based on that math, yes.

7 Q. And now you've got an alternate B
8 estimate of five million dollars for all
9 twelve buildings, correct?

10 A. Including other items, yes.

11 Q. And that compares to the \$8.5 Million
12 dollar estimate that ProCon's put up for this
13 case, correct?

14 A. Again, they don't have the windows. They
15 don't -- it's not the same.

16 Q. Your estimate, your five million dollar
17 estimate is just under sixty percent of the
18 ProCon estimate for this case, correct?

19 A. I'm sorry. Say that again, because I
20 think you're wrong, but I don't want to
21 misstate.

22 Q. Your current Alternate B estimate is just
23 under sixty percent of ProCon's estimate for
24 this case, correct?

25 A. Which estimate for this case?

- 1 Q. The \$8.5 Million dollars?
- 2 A. The \$8.7?
- 3 Q. Yes, sir.
- 4 A. No. Again, they don't include HardiPlank
- 5 that I included in mine. They don't include
- 6 windows that I included in that five million
- 7 dollars.
- 8 Q. Sir, is estimate turnkey?
- 9 A. No.
- 10 Q. It's not a turnkey? Tell the jury what
- 11 it means that your estimate's not a turnkey.
- 12 A. It's not a design-build estimate.
- 13 Q. Is there any components in this estimate
- 14 for the proper remediation of the external
- 15 walls at Fenwick, in your opinion?
- 16 A. No.
- 17 Q. Well, let's go to Exhibit Number 3,
- 18 Defendant's Exhibit Number 3, your estimate
- 19 that got produced this week. Tell the jury
- 20 what your square foot price is in your newest
- 21 estimate for the installation of three-coat
- 22 stucco.
- 23 A. Ten dollars and fifty cents (\$10.50), if
- 24 I'm understanding the question right.
- 25 Q. Does that include the actual stucco

- 1 itself?
- 2 A. Yes.
- 3 Q. Does that include the lath?
- 4 A. Yes.
- 5 Q. Does that include the primer and the
- 6 caulk?
- 7 A. Yes.
- 8 Q. Does that include the moisture barrier
- 9 underneath?
- 10 A. Yes.
- 11 Q. Does that include sealants around the
- 12 perimeter?
- 13 A. Around the perimeter of what?
- 14 Q. The stucco, for instance at the windows.
- 15 A. That would be in the windows. There's
- 16 primer, and there's an argument as to who
- 17 picks up the outside of the window. But, yes.
- 18 Q. And so ten dollars and fifty cents does
- 19 not include the sealant, but includes the
- 20 other four items I mentioned. Is that
- 21 correct?
- 22 A. That's not what I said earlier.
- 23 Q. I'm sorry?
- 24 A. That's not what I said.
- 25 Q. Ten dollars and fifty cents does include

1 the stucco, lath, primer and caulk, and the
2 moisture barrier underneath, correct?

3 A. And the outside sealants at the windows.
4 The additional primer area would be done by
5 the window installer.

6 Q. So some sealant. Is that correct?

7 A. Yes.

8 Q. Now, sir, do you happen to have your June
9 2010 estimate with you?

10 A. You have my electronic copy, so -- no.

11 Q. Do you believe that the June 2010 numbers
12 -- I mean the one under CA Limited, do you
13 believe that those numbers that you've put
14 under your company's name are reasonable
15 costs?

16 A. No, again, they were budgets based on a
17 preliminary review.

18 Q. You don't believe that the numbers under
19 your name in the June 2010 estimate were
20 reasonable costs, unit costs?

21 A. They were budgets.

22 Q. Budgets. Let me hand you a copy of your
23 June 2010 estimate. Let's look at those four
24 items that you say is included in the ten
25 dollars and fifty cents today, this week at

1 trial. Tell the jury, if you would, please,
2 the square foot unit cost for the installation
3 of the stucco, just the plaster itself, under
4 the C. A. Winman column.

5 A. On the 3.1 line?

6 Q. Yes, sir.

7 A. Eight dollars and fifty cents (\$8.50).

8 Q. Tell the jury what the original budget
9 cost was for the installation of lath in June
10 of 2010.

11 A. Two dollars and seventy cents (\$2.70).

12 Q. Tell the jury, if you would, please, what
13 the original budget cost was for the primer
14 and caulk in June of 2010.

15 A. A dollar twenty-eight (\$1.28).

16 Q. And tell them what, briefly, your cost
17 was for the moisture barrier in June of 2008
18 (sic)?

19 A. A dollar forty-eight (\$1.48).

20 Q. So those four components there, included
21 in your trial estimate at ten dollars and
22 fifty cents (\$10.50) a foot, in June of 2010
23 were budgeted by you at thirteen dollars and
24 thirty-three cents (\$13.33) per foot, correct?

25 A. I'm checking. I'm having trouble with

1 this calculator.

2 Q. You can't use the calculator?

3 A. I'm sorry. What did you say the total
4 was?

5 Q. I got \$13.33. What did you get?

6 A. I had twelve (\$12.00), but I added
7 something to it and ended up with nine dollars
8 and seventy-eight cents (\$9.78). So I think
9 your number's right, but I can't get this to
10 verify it.

11 Q. I'll go through it right here. Eight
12 dollars and fifty cents (\$8.50), right, plus
13 two dollars and seven for ten dollars and
14 fifty-seven cents, add one forty-eight. We're
15 at 12-oh-five, and then add the one-twenty for
16 \$13.33, correct?

17 A. Right.

18 Q. So your stucco price per square foot that
19 you produced for trial this week, two days
20 after trial started, is thirty percent less
21 than that which you put out under your C. A.
22 Winman name in June of 2010, correct?

23 A. I put this price out in January, but the
24 rest of it is correct.

25 Q. And I haven't even added in the

1 accessories yet, have I? The accessories in
2 the June 2010 estimate?

3 A. That's correct.

4 Q. That would make it even more of a
5 difference between what you told the world six
6 months ago and what you're telling this jury
7 this week at trial, after this trial starts,
8 correct?

9 A. That's not the way I'd characterize it.

10 Q. We would have to add in a dollar seventy-
11 one (\$1.71) a linear foot for the waterline
12 flashing, according to your June 2010
13 estimate, correct?

14 A. I'm sorry, what line are you on?

15 Q. I'm on 3.9 of your estimate, sir.

16 A. You wouldn't add a dollar seventy-one.
17 That's on a linear foot basis. But you could
18 take that number and divide it by the square
19 foot if you're trying to get to where you're
20 trying to go.

21 Q. However you do it, it's not in that ten
22 dollars and fifty cents (\$10.50) or in that
23 thirteen thirty-three cents (\$13.33) that we
24 were just talking about, correct?

25 A. That is correct.

1 Q. And we still have one more set of
2 accessories that were priced into your June
3 2010 estimate, correct?

4 A. Yes.

5 Q. And that would be the corner -- inside
6 corner, outside corner and penetration
7 accessories and flashing, correct?

8 A. Right.

9 Q. And that would be another ninety-five
10 cents (\$.95) a foot, correct?

11 A. Isn't that on a linear foot basis as
12 well?

13 Q. It is. But it's not in that \$13.33 a
14 square foot price we've already got, is it?

15 A. So that would have to be added in. It's
16 not ninety-five cents a square foot times
17 300,000 square feet.

18 Q. So there's even more of a difference
19 between your June 2010 stucco installation
20 estimate and the one you prepared and produced
21 during trial, correct?

22 A. Again, I produced this in January. But,
23 yes, that low-ball point is that number would
24 change also.

25 Q. Well, tell us if you would, please, what

1 the "detailed window framers" line contains
2 conceptually that's in Defendant's Exhibit
3 Number 3, the new estimate?

4 A. New and estimate -- first, let me say,
5 this is ProCon's estimate. I'm just
6 responding to the way they estimated.

7 Q. Sir, read to the jury the name above the
8 yellow column in the document you just held up
9 and told them was the ProCon estimate.

10 A. C. A. Winman.

11 Q. Your company's name, correct?

12 A. Right.

13 Q. Your parent company's name, correct?

14 A. Absolutely.

15 Q. Just so the jury's clear, that's not
16 actually the company that's allegedly giving
17 a bid to repair my clients' work, correct?

18 A. It's a wholly-owned subsidiary. But
19 technically, it's a different company.

20 Q. Well, we're going to talk more about
21 that, I assure you, before we're done. But
22 just to make sure they're clear on it now, the
23 name of the wholly-owned subsidiary is for
24 this?

25 A. Carolina Restoration Limited.

1 Q. And that is the name on the letterhead of
2 the estimate that you told counsel was your
3 offer to my clients, correct?

4 A. Correct.

5 Q. C. A. Winman is the parent company,
6 correct?

7 A. Correct.

8 Q. A different corporation?

9 A. Correct.

10 Q. Now, back to the new bid, Defendant's
11 Exhibit Number 3, tell us conceptually,
12 please, what the detailed window perimeters
13 in the new bid includes.

14 A. The double bead that you were trying to
15 replace on either the stucco or the windows.
16 And the detailing of the waterproofing that's
17 spec'ed in the specifications.

18 Q. So it's caulk and waterproofing.
19 Waterproofing, is that what some people call
20 peel-and-stick or Visi-Pane (phonetic) or
21 self-adhering flashing?

22 A. Visi-Pane.

23 Q. It's about a six-inch wide strip of putty
24 stuff?

25 A. Yes.

1 Q. And, sir, you've got four dollars and
2 fifty cents (\$4.50) in your trial estimate for
3 that item, correct, those two items?

4 A. In the proposal, yes.

5 Q. Tell the jury, if you would, please, what
6 you have budgeted as a reasonable amount for
7 that particular item six months ago.

8 A. Referring to three-point-seven (3.7)?

9 Q. I'm asking you, sir.

10 A. Wrap all rough openings with membrane
11 flashing and another coat.

12 Q. And what other detailing is in your June
13 estimate that is required for a proper
14 installation of those windows?

15 A. I submit that this came from ProCon.

16 This is the way they broke it down. So I'm
17 responding to you and trying to tell you how
18 they broke down their estimate.

19 Q. You put your number for how much it would
20 cost to put sealant in those windows joints in
21 June 2010 in the yellow column, correct?

22 A. Correct.

23 Q. And would that be the caulk at dissimilar
24 materials, line 8.1, four dollars and seventy-
25 five cents (\$4.75) a foot?

1 A. At 8.1?

2 Q. Yes, sir. Install new caulk details at
3 all fenestrations and areas of dissimilar
4 materials. The window is a fenestration,
5 isn't it, right?

6 A. I believe that's correct.

7 Q. Windows, doors or anything that pierces a
8 wall is a fenestration?

9 A. That's not my terminology. That's
10 ProCon's, but, yes, a fenestration is a
11 window.

12 Q. You price it at four dollars and seventy-
13 five cents (\$4.75) a foot, correct?

14 A. I did.

15 Q. In addition to the wrap of the opening
16 that we just saw for a dollar-ten (\$1.10) a
17 foot, correct? So that would be five-eighty-
18 five (\$5.85) a foot.

19 A. If that's what that is, yes.

20 Q. Compared to the four-fifty (\$4.50) that's
21 in the detailed window perimeters in the trial
22 estimate, correct?

23 A. Correct.

24 Q. But we're not done yet, are we? Window
25 head flashing is also required for a proper

1 installation, is it not? Tell the jury what
2 you were going to charge for window head
3 flashing in June of 2010.
4 A. Item 7.4?
5 Q. Yes.
6 A. Fifteen dollars and sixty-five cents
7 (\$15.65).
8 Q. So we're up to twenty-two dollars
9 (\$22.00) a foot for the top four feet of a
10 window, to detail that, as opposed to the
11 four-fifty a foot you put in the trial
12 estimate, correct?
13 A. This is compared to ProCon?
14 Q. Sir, read to the jury your first sentence
15 underneath working conditions in the proposal
16 that you provided to this Court.
17 A. Beginning with "All work..." ---
18 Q. Yes.
19 A. (Reading): "All work to be performed by
20 CRW is to be performed without union
21 affiliation. No applicable minimum wage scale
22 for publicly-funded projects and union-
23 influenced projects is included in this
24 proposal unless specified in the contract."
25 Q. Why did you dictate to my client that

1 there would be no union affiliation in a
2 repair job on their premises?

3 A. Every proposal that we send out has this
4 in it.

5 Q. You all even operate in the northeast and
6 you do that too, right?

7 A. That is correct.

8 Q. Let's go to your allowance for the
9 interior trim and paint touch-up. The jury
10 heard on, I think, Monday or so from Mr. Glick
11 about nail pops. Are you familiar with those?

12 A. Yes.

13 Q. And about damages that can happen to an
14 interior when a bunch of workers are banging
15 on the exterior -- nail pops and separating
16 drywall seams and things of that nature?

17 A. I'm not -- we do millions of dollars this
18 year. In the way you just characterized it,
19 I'm not at all familiar with that.

20 Q. Well, just in case you're wrong, sir,
21 tell the jury what your allowance is for
22 repair of the interiors after you get through
23 with pulling out all the windows, pulling out
24 all the window trims, putting the window trims
25 back, banging on the studs, repairing the

1 rotten studs, pulling out any trusses that
2 aren't stable any more. Tell the jury what
3 your total interior repair allowance in
4 Defendant's Exhibit Number 3 is; please.

5 A. In which of the two?

6 Q. In -- let's use -- let's stick with
7 twelve buildings so we can be consistent. I'm
8 going to ask you about twelve buildings all
9 afternoon. And that would be your Alternate
10 A, would include buildings ten, eleven and
11 twelve; correct?

12 A. Alternate A, yes, sir.

13 Q. Correct.

14 A. The general allowance, not including the
15 allowances for the studs, OSB and insulation
16 is \$200,000.

17 Q. Sir, I'm asking about your interior
18 allowance. It's the third from bottom line
19 item in your estimate.

20 A. Okay, the interior allowance for just the
21 trim and touch-up as it relates to the windows
22 is \$51,840.

23 Q. And if we divide that by the two hundred
24 and sixteen units there -- in other words, if
25 we forget about the clubhouse and a few other

1 places -- if we just divide that by the two
2 hundred and sixteen residential units, you've
3 allowed \$240 per two and three-bedroom condo
4 for, quote, "interior trim and paint touch-
5 up." Correct?

6 A. That's correct.

7 Q. You can't get your washing machine
8 repaired for \$240 anymore, can you?

9 A. I haven't tried. Do you want me to
10 respond to that or are you just ---

11 Q. If you're not familiar with the repair
12 costs of service people, then, -- no, you
13 don't need to respond. But if you are, I
14 would love you to. You can't get a washing
15 machine fixed for \$240, can you?

16 A. I have no idea.

17 Q. So we have seen that your estimates
18 changed a fair amount, correct? --

19 A. You're characterizing them both as the
20 same. So you're characterizing them as
21 changed.

22 Q. That's not unusual for you, is it? I
23 mean, you testified in a case nearby here
24 called Bay Club last year, correct?

25 A. I did.

- 1 Q. You provided the same service to the
2 defendants or one or more defendants in Bay
3 Club, correct?
- 4 A. I don't believe that's the case, but I
5 think you'll remind me.
- 6 Q. And you gave a deposition in Bay Club
7 too, correct?
- 8 A. That is correct.
- 9 Q. And you produced two different estimates
10 in Bay Club too, didn't you?
- 11 A. At least.
- 12 Q. And the first estimate, before you were
13 put under oath, was \$567,000, was it not?
- 14 A. I have no idea.
- 15 Q. Let me refresh your memory, (tendering).
- 16 A. This is a proposal from CRW that I worked
17 on. I don't have my copy from it, but you
18 handed me a copy that says it's \$567,248.40.
- 19 Q. And the date on that, please?
- 20 A. 1/21/2010.
- 21 Q. And then you were put under oath on
22 February 16, 2010 in that case, correct?
- 23 And I'll show you the cover page of your
24 deposition, if you don't remember the date.
- 25 A. February 16, 2010.

1 Q. And the day after the deposition you
2 produced a new estimate, after you got put
3 under oath, correct?
4 A. I did.
5 Q. You produced it on February 17, 2010,
6 correct?
7 A. I did. Can you hand me a copy of that?
8 Q. And your new estimate totaled \$1.8
9 Million dollars, almost four times the
10 estimate that you produced before you were put
11 under oath, correct?
12 A. There is an estimate for -- on 1/21 for
13 \$567,000. There is an estimate on 2/17 for
14 \$1.8 Million. That is correct.
15 Q. And 2/16 you were placed under oath,
16 correct?
17 A. That is correct.
18 Q. A three hundred fifty (350) percent
19 change, correct?
20 A. That is correct.
21 Q. Let's talk about who Carolina Water-
22 proofing really is, right.
23 A. Carolina Restoration and Waterproofing.
24 Q. Thank you. You, through the company,
25 L. A. Winman.

1 A. C. A. Winman.

2 Q. C. A. Winman. Thank you. You operate in
3 four or five places across the east coast,
4 correct?

5 A. More than that. C. A. Winman, Inc.,
6 C. A. Winman.

7 Q. And each of those is a different company,
8 correct?

9 A. That's correct.

10 Q. And you all weren't in the Carolina
11 market very much about five years ago,
12 correct?

13 A. We were licensed, but we were not in the
14 market.

15 Q. You weren't really doing business here,
16 were you?

17 A. We were not.

18 Q. So y'all went out and bought a company,
19 right?

20 A. A friend of mine retired and I bought his
21 company.

22 Q. And that company is commonly referred to
23 as CRW?

24 A. That's correct.

25 Q. And for the first couple of years your

1 friend -- is it Herb? The gentleman that sold
2 it to you?

3 A. Robert.

4 Q. Robert? He ran the company for you the
5 first couple of years, correct?

6 A. There was an agreement, yes.

7 Q. And you didn't actually become the
8 license holder for that company until about
9 March of 2009, correct?

10 A. Not that company. You may be right.

11 Q. And he's no longer there, correct?

12 A. He currently is no longer.

13 Q. His daughter Sarah is no longer there
14 either, is she?

15 A. I'm not sure why that's pertinent, but
16 that is correct as well.

17 Q. Nobody's there anymore, are they?

18 A. That isn't correct.

19 Q. Carolina Restoration has no employees,
20 does it?

21 A. That is correct.

22 Q. I'm sorry?

23 A. That is correct.

24 Q. Carolina Restoration has no employees,
25 correct?

1 A. That is correct.

2 Q. You keep it in place purely for liability
3 purposes, correct?

4 A. That is correct.

5 Q. It's a corporate shell for you, correct?

6 A. That is correct.

7 Q. And you keep it there so you don't have
8 liability for restoration projects, correct?

9 A. No. I have no liability either way, but
10 that's not it.

11 Q. Do you deny telling under oath that you
12 keep the corporate shell, CRW, in place to
13 insulate the parent company from liability
14 from being sued for repairs?

15 A. I don't believe that's what I said, but
16 I'm sure you will show me.

17 Q. Sir, I direct you to page ten, please
18 (tendering).

19 A. This has notes in it.

20 Q. It has what's been what, in legal terms,
21 are redactions, sir. And, yes, you are. And
22 on Page 11, Line 7, you were asked:

23 "Okay, so your answer is yes, just
24 to protect yourself from lawsuits and exposure
25 to litigation on repair projects. You set up

1 CRW to protect the parent company, right?"

2 Answer, "We bought CRW, and, yes,
3 we're using it," correct?

4 A. That part is correct. Your characteriza-
5 tion of why we need to be insulated is
6 incorrect. On repair projects, the actual
7 cause is mold and the fact that you can't buy
8 insurance for mold. That's the exposure, not
9 the restoration projects.

10 Q. Sir, CRW now has no employees with either
11 CRW or C. A. Winman. Is it C. A. Winman?
12 Neither one of them, whatever they are --
13 neither one of them have employees in South
14 Carolina, correct -- based in South Carolina?

15 A. We have employees that live in South
16 Carolina. Our office is in North Carolina.

17 Q. Are those employees your dad and Simpson
18 Bay Publications?

19 A. I doubt it.

20 Q. And, sir, you're, in part, proposing
21 what's called a cut-and-paste for this repair
22 job, correct? You're not removing all the
23 stucco.

24 A. I'm removing all the stucco on the faces,
25 but not all the faces. That's correct.

1 Q. It's referred to in your industry as a
2 cut-and-paste job, correct?

3 A. That's not what I would consider a cut-
4 and-paste job.

5 Q. CRW did do several reclads, stucco
6 reclads in Myrtle Beach before you became the
7 license holder for CRW, correct?

8 A. Before we bought it, while Robert was
9 there? I'm not sure what time frame you're
10 talking about.

11 Q. While your parent company owned it but
12 before you became the license holder. For
13 instance, between approximately January of
14 2007 and March of 2009, your company was
15 involved in three Myrtle Beach projects, some
16 of which were stucco reclads, correct?

17 A. I'm sure that we were, but I can't tell
18 you which ones.

19 Q. None of them were cut-and-paste jobs,
20 were they?

21 A. That part I know is correct.

22 Q. You are the license holder for both the
23 parent company and CRW, correct?

24 A. Correct.

25 Q. In other words, you have the construction

1 license, correct?

2 A. That is correct.

3 Q. You are the person that the state looks
4 to -- at least this state looks to -- to
5 ensure that construction projects go properly,
6 correct?

7 A. Correct.

8 Q. And we know what happens -- after this
9 week we know what happens when construction
10 projects don't go properly, correct?

11 A. Correct.

12 Q. You get the kind of damage that you
13 yourself have seen at Twelve Oaks, correct?

14 A. They have damage out there.

15 Q. And you are the only license holder for
16 CRW, correct?

17 A. Currently, I believe that is correct.

18 Q. But you don't go to job sites, do you?

19 A. In general, I don't. At lunchtime I went
20 down the street to a job there.

21 Q. In general, the license holder, the one
22 that's supposed to make sure that the South
23 Carolina Code of Laws related to construction
24 are adhered to on every Winman and CRW job
25 site, doesn't go to those job sites, correct?

1 A. I do not go the job site on a regular
2 basis.

3 Q. What's the design pressure rating of the
4 windows in your proposal to place into Twelve
5 Oaks, please?

6 A. I do not know.

7 Q. I'm sorry?

8 A. I do not know.

9 Q. Well, then how do you know they're
10 building code compliant?

11 A. Because I sent the specifications to the
12 supplier and told them this is what we had to
13 meet.

14 Q. You relied on the supplier to calculate
15 the wind zones that usually engineers or
16 architect calculate?

17 A. Yes.

18 Q. You don't even know what they calculated
19 or what the rating is of the product, but
20 you're proposing to put them in my client's
21 buildings?

22 A. I am.

23 Q. Are you aware of how important design
24 pressure ratings are for windows in coastal
25 South Carolina which are called hurricane

1 prone regions?

2 A. Sir, we do window replacements in south
3 Florida. So I am familiar with that. I'm
4 also familiar with the requirements here
5 compared to the requirements down there.
6 As to the specific question, I am not going to
7 be able to tell you the window on this
8 specific case without reviewing the file.

9 Q. Well, let me ask you this. Did he at
10 least specify for you different window
11 products for zone five on the buildings than
12 to zone four of the buildings?

13 A. I do not recall.

14 Q. Tell the jury what a zone five is?

15 A. I do not know.

16 Q. You what?

17 A. I do not know.

18 Q. You do know that zone five has a
19 different design pressure rating requirement
20 in the state of South Carolina, do you not?

21 A. No, I can't sit here and testify under
22 oath that I do.

23 Q. You're not going to warrant any of the
24 areas that you don't do work on, are you?

25 A. Are we switching subjects, or are we

1 still with windows that I'm not doing?
2 Because I'm doing all the windows on buildings
3 one through nine. And if I'm not doing nine
4 through twelve, I'm not warranting those
5 windows.

6 Q. Sir, you suggested to this jury that
7 buildings ten, eleven and twelve, in your
8 opinion, don't need work; correct?

9 A. I've not seen any evidence that they need
10 work.

11 Q. You're not going to provide my clients
12 with any warranty on these buildings that
13 you're saying to the jury don't need work, are
14 you?

15 A. No, I'm definitely not going to warrant a
16 building I'm not doing any work on.

17 Q. And CRW doesn't typically have jobs of
18 this size, does it?

19 A. I don't believe that's correct.

20 Q. In 2009, they had thirty-five to sixty
21 jobs and grossed between six and eight
22 million, correct?

23 A. That sounds reasonably close.

24 Q. That works out to \$172,000 per job, does
25 it not?

1 A. Yes. If you did the math, yes. It's
2 better to average overall a hundred forty
3 thousand than we did last year we did a seven
4 million dollar job.

5 Q. Sir, your firm has a web page, does it
6 not?

7 A. It does.

8 Q. And your firm quotes with approval on
9 your web page and has for some time a quote
10 that your firm calls, quote, "John Ruskin's
11 famous advice from Engineering News Record,
12 March 29, 1984," correct?

13 A. That is correct.

14 Q. And that quote that you put on your
15 website for everybody in the construction
16 industry and otherwise is, as follows: "It is
17 unwise to pay too much. But it's worse to pay
18 too little. When you pay too much you lose a
19 little money and that is all. When you pay
20 too little you sometimes lose everything,
21 because the thing you bought was incapable of
22 doing the thing it was bought to do. The
23 common law of business balance prohibits
24 paying a little and getting a lot -- it can't
25 be done. If you deal with the lowest bidder,

1 it is well to add something for the risk you
2 run. And if you do that, you will have enough
3 to pay for something better." Correct?

4 A. In this case you'd be adding five million
5 dollars. But, in general, I put it on our
6 website and think people should consider it
7 before they take a low bidder.

8 Q. You've warned people to be careful about
9 taking that lowest bid, correct?

10 A. I did.

11 Q. Thank you, sir.

12 THE COURT: Mr. Anderson?

13 MR. ANDERSON: Thank you, Your
14 Honor.

15 REDIRECT EXAMINATION

16 BY MR. ANDERSON:

17 Q. Mr. Pusheck, what you did in this case is
18 to compare an estimate of repair and also a
19 proposal. Is that correct?

20 A. That's correct.

21 Q. You did not do a forensic analysis of the
22 buildings.

23 A. Not a complete forensic analysis in any
24 stretch of the imagination, no.

25 Q. In fact, you relied on the report of the

1 plaintiff's expert in deriving some of the
2 information that you used in preparing the
3 estimate.

4 A. Right. Plaintiffs typically try to tell
5 you everything that's wrong. So they're a
6 good place to start if you're looking for
7 everything that's wrong.

8 Q. Okay. Now, the -- do you still have the
9 June 2010 document in front of you?

10 A. It doesn't have an exhibit number. This?

11 Q. Yes, the one without the exhibit number.

12 A. Yes, sir.

13 Q. Can you tell us how that was prepared,
14 please?

15 A. ProCon sent me and I haven't counted, but
16 I'll say it's almost thirty pages of an
17 estimate that they provided. They were hired
18 by the other side, to try to isolate, first,
19 their client and then find out what, if
20 anything, I had to question about this.

21 Should the other side -- so my side, I could
22 say all right, here's the damages, or do we
23 look at it to see if they were inflated or if
24 I disagreed with anything. So the first thing
25 I did -- and I do this often, is I try to

1 conduct the review the way the other side
2 thinks, as opposed to just giving them my
3 side. I try to get at their side and use all
4 of their terminology and try to go line-by-
5 line so that there's -- if you get to the
6 issue and get where the two sides can talk,
7 they're talking on somebody's home field. And
8 that's what this first approach was. All of
9 this terminology is Mr. Gallagher's. It's not
10 the way I estimate. It's a different way.
11 I'm not saying it's right or wrong. So the
12 first thing I did was try and take what I do
13 exactly at his method. And I was trying to go
14 line-by-line, being conservative, but see
15 where the big bucks were. And that's what
16 that approach was.
17 Q. And so you were trying to -- you were
18 comparing prices or, excuse me, take-offs?
19 A. I wasn't doing a take-off. I used his
20 scope first. And I was just going through and
21 seeing if I could justify, in a budget
22 environment, the numbers and where the
23 disputes were.
24 Q. Was this ever intended, or the one that
25 you have in front of you dated June 2010, ever

1 intended to be a proposal as a fix?

2 A. No, not from my viewpoint. I had assumed
3 it was for Mr. Gallagher's. But mine was
4 here's something, put the numbers down, see if
5 you can figure out where you guys disagree.

6 Q. And that June 2010 document was your
7 first attempt to do that.

8 A. It was my only attempt to do it. From
9 there on, I just went with the way that I
10 provide proposals and turned them into
11 proposals and said this is what I will charge
12 you. If you accept it, I will do the work.

13 Q. Your current proposal addresses more than
14 just stucco.

15 A. It does.

16 Q. And for the jury's benefit, that proposal
17 would be balanced against the \$15 Million
18 dollar proposal from Mr. Gallagher at ProCon.
19 Is that correct?

20 A. Yes. It's a difficult balance, but, yes
21 -- the answer is yes.

22 Q. His total-fix proposal is \$15 Million.

23 A. It's \$15 Million.

24 Q. And your total-fix proposal minus the
25 HVAC or the non-building envelope issues is

1 the \$4.9 Million.

2 A. Excluding the roofing as well. But, yes,
3 it is.

4 Q. Now, Mr. Lucey seemed concerned that you
5 were excluding environmental fixes. In the
6 \$4.9 is there, have you included environmental
7 remediation or reformation of the building?

8 A. In the projects that he made reference
9 to, we've done Beach Club to Seamount Towers,
10 four projects deep in Myrtle Beach. And the
11 mediation -- mold mediation in all of those
12 cases is done by spraying fungicide from the
13 outside. We've not had one incident in five
14 million dollars -- in Myrtle Beach, of that.
15 And none of those -- those all had similar
16 damage to what this did. They were partial,
17 not full replacement stucco. In the project
18 I referenced before, the four million dollar
19 job, that had substantial active leaks
20 throughout the property. We completed it with
21 no interior damage reported to us of any kind,
22 and no interior mold damage. So I have the
23 spraying of the fungicide. That's what it
24 sounds like. You take the insulation out.
25 You see the mold. You spray it. You wait.

1 It's tested. You're done. You move on. It's
2 not expensive. It's not what mold used to be
3 many years ago where they come in and put in
4 complete servos and black mold and all that.
5 We don't find that in this environment. I've
6 never seen it.

7 Q. Now, are the stucco accessories and the
8 HardiPlank accessories included in your \$4.9
9 Million?

10 A. They are.

11 Q. Now, would you have ever put up the June
12 2010 numbers as a serious proposal for your
13 company?

14 MR. LUCEY: Objection. Leading.

15 THE COURT: Rephrase your question.
16 Sustained.

17 MR. ANDERSON: Thank you, Your
18 Honor.

19 REDIRECT EXAMINATION CONTINUED

20 BY MR. ANDERSON:

21 Q. Was the June 2010 exercise and the
22 numbers that you produced on that in any way
23 intended to be set out as a proposal to the
24 client?

25 MR. LUCEY: Objection. Leading,

1 Your Honor.

2 THE COURT: Rephrase your question.

3 MR. ANDERSON: I'll move on, Your
4 Honor.

5 REDIRECT EXAMINATION CONTINUED

6 BY MR. ANDERSON:

7 Q. Now, when CRW does a job, your responsi-
8 bility for that job is to the company. Is
9 that not correct?

10 A. Yes.

11 Q. And so any liability for mistakes that
12 might occur, any accidents that occurred and
13 so forth, still rests with CRW.

14 A. Yes.

15 Q. If, in fact, CRW were to be liable on the
16 job for some type of injury to my client.

17 A. Yes, right.

18 Q. And so when you talked about being
19 insulated from liability, what you're actually
20 talking about is something that CRW does that
21 would affect C. A. Winman's responsibility.

22 MR. LUCEY: Objection. Leading.

23 THE COURT: Sustained as to
24 leading.

25 REDIRECT EXAMINATION CONTINUED

1 BY MR. ANDERSON:

2 Q. Could you explain to us what you mean
3 when you say that CRW was set up to limit
4 liability?

5 A. The -- ten years ago when EIFS, most of
6 your synthetic stucco, EIFS, first hit in the
7 Carolinas, the lawyers, tort reform and
8 everything, everybody was suing everybody over
9 it. And you couldn't buy insurance for that
10 work and for mold. And so Winman is a
11 successful company and we do work in this
12 environment. So we were not insulating
13 ourselves from failure to perform our
14 liability. We can't buy insurance for mold.
15 No one can. Insurance companies won't touch
16 it. The lawyers love it. And that's what I'm
17 talking about.

18 What the other gentleman failed to
19 outline to all of us is that I had included
20 payment of a performance bond in the proposal
21 for CRW. I'm personally liable in the event
22 that they sign this proposal and pay that
23 bond. I'm not insulated in any way in the
24 event that this is not performed in accordance
25 with the contract.

1 What the company is set up for is to
2 insulate us from an exposure that's turned
3 very litigious, and we can't buy insurance for
4 it.

5 Q. On what line item is that bond?

6 A. Well, the bond is on -- is the third item
7 down in both -- on both pages, \$35,000 if they
8 want to pay the performance bond for buildings
9 one through nine and \$61,500 for Alternate A,
10 buildings one through twelve. And the way
11 that works is they pay the performance bond,
12 and if they make a claim against CRW, the
13 bonding company steps in. The bonding company
14 has my personal guaranty, my house, my kids,
15 my kids' kids.

16 Q. Now, in the determination of windows and
17 other portions of the building, you were to
18 rely on the engineer that is hired.

19 A. That is how we get to the permit from the
20 specs, is the engineer.

21 Q. And the firms that you windows from and
22 that commercially produce windows, they have
23 engineers on staff. Is that correct?

24 A. That's correct.

25 Q. And so it's not unusual for any large

1 project for a request to go out to a window
2 company, say like Andersen or something like
3 that, to then prepare a proposal for a
4 schedule of windows that would be acceptable
5 in your environment.

6 MR. LUCEY: Objection, leading,
7 Your Honor.

8 THE COURT: You need to rephrase
9 your question, Mr. Anderson.

10 REDIRECT EXAMINATION CONTINUED

11 BY MR. ANDERSON:

12 Q. What's the normal procedure used in
13 ordering windows?

14 A. In ordering them or in preparing a
15 budget?

16 Q. I'm sorry, in preparing a proposal.

17 A. The engineer isn't going to provide --
18 the engineer is not involved in providing you
19 all the details until after you're the
20 successful bidder on the contract. Window
21 manufacturers have in-house people and that's
22 all they do every day. You call them up. You
23 send them the spec. You tell them where you
24 are. And they provide budgets of the windows
25 that are going to meet the spec.

1 Q. What's the largest project that your
2 company or any of your companies has
3 performed?

4 A. I think I testified before that it was a
5 little over twenty million.

6 Q. And what did that involve?

7 A. It was the exterior stucco on a high-rise
8 in South Florida which is slightly different
9 construction. It was in litigation. It was
10 terrible. We actually pinned all the existing
11 stucco and put a new STO system over the
12 entire thing with a twenty-year warranty.

13 Q. When you say "high-rise," what size
14 building was it?

15 A. I believe they were forty-three storied
16 apiece.

17 Q. And how many buildings?

18 A. Two.

19 Q. Any other buildings, other than the two
20 towers?

21 A. AS a part of the contract, we did the
22 plaza that shared all -- everything, and the
23 parking garage that was associated with the
24 buildings.

25 Q. Thank you.

1 THE COURT: Mr. Lucey?

2 MR. LUCEY: Briefly, Your Honor.

3 Madam court reporter, may I mark this as the
4 next exhibit, please?

5 COURT REPORTER: Plaintiff's
6 Exhibit 24 for identification.

7 RECROSS EXAMINATION

8 BY MR. LUCEY:

9 Q. Sir, I'm handing you Exhibit 24 which is
10 the document that you prepared, correct, in
11 June of 2010?

12 A. That's right.

13 Q. This is the one we referred to earlier
14 with the C. A. Winman column in yellow with
15 your numbers?

16 A. That's correct.

17 MR. LUCEY: Your Honor, at this
18 time Plaintiffs would move Exhibit 24 into
19 evidence.

20 MR. ANDERSON: Your Honor, we
21 would object at this time.

22 (BENCH CONFERENCE)

23 THE COURT: Mr. Lucey, that will be
24 24. Is that correct?

25 MR. LUCEY: Yes, Your Honor.

1 THE COURT: Plaintiffs' 24 into
2 evidence without objection.

3 MR. LUCEY: Thank you.

4 (SO ENTERED AS PLAINTIFF'S EXHIBIT 24)

5 RECROSS EXAMINATION CONTINUED

6 BY MR. LUCEY:

7 Q. Those Myrtle Beach jobs you just
8 testified about, they haven't gone so well,
9 have they?

10 A. Why is that?

11 Q. One of those jobs was with Kaiser
12 Troutman, correct?

13 A. That's the engineer. They weren't the
14 plumbers.

15 Q. You've been called back on that job, have
16 you not?

17 A. Which project are you talking about?

18 Q. Is it Beach Club Three that Kaiser
19 Troutman was on?

20 A. We've done several jobs. Beach Club
21 Three was in litigation.

22 Q. And just so the jury's absolutely clear,
23 Exhibit 24 that just got entered in evidence
24 was printed off of your computer, correct?

25 A. This copy wasn't, but I printed -- I sent

1 this electronically to the counsel, yes.

2 Q. It's your work product, correct?

3 A. Yes.

4 Q. Tell the jury what the very last number
5 is under the yellow column on the last page
6 under the name C. A. Winman.

7 A. \$9,528,782 dollars.

8 Q. Thank you, sir.

9 THE COURT: You may step down. You
10 are now free to leave the court room.

11 THE WITNESS: May I take these?

12 THE COURT: You may take your items
13 with you.

14 (WITNESS STEPS DOWN)

15 THE COURT: Call your next witness.

16 MR. ANDERSON: Your Honor, we
17 have another witness by deposition, Tacy
18 McGinty.

19 THE COURT: Your Honor, we have
20 another witness by deposition. It would be an
21 appropriate time for us to take a break. Mr.
22 Foreman, do you wish to take a break?

23 THE FOREMAN: I believe so.

24 THE COURT: Please rise for the
25 jury.

1 THE COURT: Please be seated. Call
2 your next witness, Mr. Anderson.

3 MR. ANDERSON: Your Honor, at
4 this time, we will be publishing by deposition
5 the testimony of Tacy McGinty. And Lisa
6 Reynolds will read Tacy McGinty and Ms. Mahon
7 will read the questions.

8 THE COURT: Thank you. If you will
9 just state your name for the record and spell
10 your last name, please?

11 MS. REYNOLDS: My name or the
12 deponent's?

13 THE COURT: Your name.

14 MS. REYNOLDS: Lisa Reynolds.

15 THE COURT: And, Ms. Reynolds, do
16 you swear that you will accurately state what
17 is contained in the deposition?

18 MS. REYNOLDS: Yes, ma'am.

19 THE COURT: Thank you. Ms. Mahon?

20 MS. MAHON: Thank you, Your Honor.

21 TACY MCGINNIS, (via deposition),
22 being duly sworn to tell the truth, the whole
23 truth and nothing but the truth, testified, as
24 follows, (reading):

25 Q. It sounds like originally there was a

1 company called Summit Contractors, and then at
2 some point a new company came into existence.

3 THE COURT: Please tell the Court
4 what deposition you are reading.

5 MS. MAHON: Tacy McGinty, Your
6 Honor. It's M-C-G-I-N-T-Y. First name is
7 T-A-C-Y.

8 THE COURT: And do you have a copy
9 of the deposition to give the court reporter?

10 MR. ANDERSON: Your Honor, I
11 believe they are actually five volumes of her
12 deposition filed with the Court.

13 THE COURT: Thank you. You may
14 continue.

15 (Reading of deposition resumed)

16 Q. It sounds like originally there was a
17 company called Summit Contractors, Inc., and
18 then at some point the new company came into
19 existence called Summit Contractors Group.

20 Does that sound correct to you?

21 A. Yes, it does.

22 Q. When did you begin employment with either
23 of those two Summit entities?

24 A. It started in January of 2000.

25 Q. And which of those two entities would

1 that have been?

2 A. Summit Contractors, Inc.

3 Q. Okay, and with whom are you employed
4 today?

5 A. Summit Contracting Group.

6 Q. So at least, as you sit here today
7 reflecting back, would it be fair to say that
8 Twelve Oaks/Fenwick Plantation would be the
9 only construction project that you had
10 supervision duties in that has become in a
11 lawsuit? Is that fair?

12 A. I would use the word management duties,
13 not supervision duties.

14 Q. All right. Now, I'll say the same
15 question, but management and/or supervision
16 duties?

17 A. Correct.

18 Q. Okay, and I think I understood what your
19 distinction is between those two. But would
20 you tell me what your distinction is between
21 those two to make sure I understand it
22 correctly, between project management and
23 project supervision?

24 A. I consider project supervision the hand-
25 on day-to-day management of the project. And

1 I consider project manager the -- dealing more
2 with the business end of construction.

3 Q. Okay, does the project manager supervise
4 the supervisors?

5 A. Yes, they do.

6 Q. Tell me a little bit about your back-
7 ground? Where are you from?

8 A. I'm from St. Petersburg, Florida.

9 Q. Okay, and tell me a little bit about your
10 educational background, please.

11 A. I graduated from high school in St.
12 Petersburg. I graduated from college from the
13 University of Florida.

14 Q. Okay, and what was your degree in?

15 A. I got a degree from the College of
16 Architecture.

17 Q. Okay, and what was your degree?

18 A. Design.

19 Q. Okay, architectural design?

20 A. Architectural and interior design.

21 Q. Tell me what you mean by interior design.

22 Are we talking about selecting window

23 treatments to go with sofa fabric, or are we

24 talking more about laying out offices and

25 floor plans for apartment buildings and high

1 rises, that kind of thing?

2 A. It was doing basically interior space,
3 planning, drafting, the whole works in that.

4 Q. Okay, did you have any classes that
5 actually dealt with construction or design of
6 buildings, the structures of the buildings?

7 A. Yes, we did.

8 Q. How many would you think you had in that?

9 A. Five. Four or five.

10 Q. All right, what year did you finish?

11 A. '83, 1983.

12 Q. Have you gotten any formal education or
13 training since finishing the University of
14 Florida?

15 A. No.

16 Q. And where you go to work after school?

17 A. Where?

18 Q. Yeah, where or what? I guess combine the
19 question to save time.

20 A. I went to work for a job -- for a company
21 in Tampa called Design Concepts.

22 Q. Okay, what sort of work did they do?

23 A. They did space planning, architectural
24 renovations of buildings.

25 Q. Okay, and just so you kind of know where

1 I'm going -- and, again, I'm trying to save
2 time, we've got a lot of lawyers. I don't
3 need even know, but I'm going to try to come
4 around. I'm going to try to divide the world
5 into things that dealt with just the inside of
6 the building and the world that ---
7 A. Okay.
8 Q. --- deals with the outside of buildings.
9 And I'm talking about the exterior wall
10 assemblies and the skins, weatherproof,
11 waterproofing and then, of course, both. Was
12 your work in 1983, at the Tampa Design, was
13 that exclusive inside?
14 A. It was exclusively inside.
15 Q. And how long were you there?
16 A. Probably two years.
17 Q. Okay, and where did you go after that?
18 A. Where did I go?
19 Q. Right.
20 A. I moved to New York City and I worked for
21 J. Garden Clark.
22 Q. Okay, what was your position?
23 A. I did building renovations and rehab on
24 the interiors.
25 Q. Okay, inside only?

1 A. No, I did some exterior work.

2 Q. Okay, what kind of work was that?

3 A. What I did up there was I would take a
4 lot of the public spaces, the lobbies, the
5 exteriors, and redesign them.

6 Q. Okay, was that cosmetic changes only, or
7 did it also have to do with ---

8 A. It was not structural. It was, I mean,
9 it was cosmetic. It was not structural to the
10 building, but it was structural in the fact
11 that it was construction.

12 Q. Okay, did you involve the moving or
13 changing the actual cladding of the plane of
14 the building that resisted weather?

15 A. At the entrance, it would have.

16 Q. And would that be like removing -- if it
17 had a marble slab veneer, you'd put some other
18 bit of veneer on it?

19 A. Correct.

20 Q. Was it deeper than that?

21 A. Correct, it was probably about that deep.

22 Q. Okay, and how long were you in that
23 position in New York City?

24 A. I was at that company for two years. And
25 then I went to another company, J.S.C. Design

1 and did the same type of work.
2 Q. Okay, was that also in New York?
3 A. It was also in New York City.
4 Q. We're getting close to 1990. Does that
5 sound about right?
6 A. Yeah, we're getting there, aren't we?
7 Q. Yeah. Where did you go after that?
8 A. After that I went to -- I went from there
9 to Atlanta, Georgia, and I worked as a
10 creative writer for a company called Mode,
11 M-o-d-e.
12 Q. What kind of work did they primarily do?
13 A. We designed all the interior optical
14 shops throughout the United States. It was
15 very specialized type construction.
16 Q. All right, that --
17 A. It was purely interior furniture-type
18 work.
19 Q. Okay. The companies in New York, where
20 you were in the management structure?
21 A. I was a designer.
22 Q. Did you have any construction supervision
23 responsibilities?
24 A. I oversaw construction, yes. I did for
25 the projects I had designed in a design

1 capacity over installation and so forth.

2 Q. Okay. When you guys did -- I'm going to
3 limit it to New York City. When I say "you
4 guys" your company -- was your role in that as
5 design professionals, or was there a general
6 contractor of both?

7 A. Design professionals. We hired general
8 contractors or we helped the owners of these
9 buildings hire the general contractors to do
10 the work.

11 Q. So it would have been in the traditional
12 contractor/owner/design professional
13 relationship?

14 A. Correct.

15 Q. In your firm -- you were already solely
16 in the design professional role for New York
17 City projects?

18 A. Correct.

19 Q. All right. How long were you at Mode?

20 A. Maybe two years.

21 Q. And where did you go after that?

22 A. I worked for a company called Paul Davis
23 Systems. There had been a flood in Crystal
24 River, Florida over about ninety -- I think it
25 was about -- just ballparking, a hundred

1 twenty units.

2 Q. Okay.

3 A. And I was put in charge of renovating or
4 rehashing, I should say, after the storm that
5 came through.

6 Q. Okay.

7 A. And that was in 1992.

8 Q. All right. How long did that work last?

9 A. That was one year.

10 Q. There's a company I've run across called
11 Paul Davis Restorations. Is that related?

12 A. Yes. Yes, it is.

13 Q. Where were you in the matrix structure of
14 that with regard to the work that was being
15 done? Were you a superintendent?

16 A. No.

17 Q. Project manager type?

18 A. I was the project manager on that
19 project.

20 Q. And that would have been on the general
21 contracting side of versus the ---

22 A. That was on the general contracting side.

23 Q. Versus the design professional side?

24 A. Yes, the general contracting side.

25 Q. And I realize some of my questions are

1 going to very predictable, but if you'll try
2 to bear with me and let me finish just for the
3 benefit of the record, what did you do after
4 Paul Davis?

5 A. I went to work for Cameo Homes in
6 Gainesville, Florida.

7 Q. That sounds like residential single
8 family.

9 A. I was a superintendent.

10 Q. And it indeed was residential single
11 family?

12 A. Indeed, residential.

13 Q. Detached? You've got to say detached,
14 right?

15 A. Single family, detached.

16 Q. And were you a superintendent?

17 A. Yes.

18 Q. All right. And what kind of market were
19 those houses in as far as price range, size or
20 however you want to characterize it?

21 A. Probably about \$125,000.

22 Q. Were these slab, on grade or crawl space?

23 A. Slab and grade.

24 Q. What was the predominant type of
25 cladding?

1 A. T-111.

2 Q. So all spec homes, or would you buy your
3 lot and agree to do it and we'd build it for
4 you?

5 A. It was a combination of spec homes and
6 homes that were pre-purchased. And I built
7 for the owners.

8 Q. This was part of, I guess, new develop-
9 ment, new neighborhood kind of situation?

10 A. Yes, it was a neighborhood. And I built
11 in a neighborhood.

12 Q. Was the project's vertical construction
13 at least prior to your coming on board with
14 Cameo Homes, or were you involved in the ramp-
15 up?

16 A. No, they were under construction when I
17 came in. I just -- people were already living
18 in the community.

19 Q. Percentagewise, for the build-out for
20 this neighborhood, what percentage do you
21 think that were finished -- had finished homes
22 when you came on board?

23 A. Probably only about two or three percent.

24 Q. And how long were you with Cameo Home?

25 A. About a year and a half.

1 Q. Okay. And were you in the same position
2 the entire time?

3 A. Yes.

4 Q. Where did you go after that?

5 A. Birmingham, Alabama, Myrick and Batson.

6 Q. All right. Let me go back up to Cameo
7 first. Was all that work, excluding maybe
8 punch lists, done by subcontractors?

9 A. Yes.

10 Q. And did you typically have assistant
11 superintendents under you, or was there just a
12 superintendent supervising the construction?

13 A. Because of the size of the community
14 there were two superintendents -- myself and
15 another guy, and then we had two laborers more
16 I would say than assistants working for us.

17 Q. Okay. So as far as the eyeballing of the
18 subs' work it would have been you and the
19 other superintendent at Cameo Homes?

20 A. Correct.

21 Q. I've forgotten the name, I'm sorry.

22 A. My name?

23 Q. No, the name of where you went after
24 Cameo Homes.

25 A. Myrick and Batson.

- 1 Q. Okay. What kind of business were they?
- 2 A. General contractors.
- 3 Q. Okay. At this point had you left the
- 4 design work for good, at least up to today?
- 5 A. Absolutely.
- 6 Q. What kind of work did -- and that was
- 7 Birmingham, I believe you said. What kind of
- 8 work did Myrick and Batson -- what kind of
- 9 projects did they have?
- 10 A. We built churches, primarily.
- 11 Q. Okay, churches and ---
- 12 A. Churches and pre-commercial work.
- 13 Q. All right. Did the Myrick and Batson
- 14 involve any residential multi-family at all?
- 15 A. Yes, they did. At probably the last few
- 16 months I was there, I was working on
- 17 townhouses.
- 18 Q. Okay, why did you leave Myrick and
- 19 Batson?
- 20 A. We moved back down to -- we moved to
- 21 Jacksonville, Florida.
- 22 Q. Okay, what did you do at that point?
- 23 A. I mean, '96?
- 24 Q. Okay.
- 25 A. Then I went to work for John Stokes.

- 1 Q. All right. Is John Stokes a person or a
2 company or both?
- 3 A. Both.
- 4 Q. Okay, what kind of company was that?
- 5 A. It was a construction company.
- 6 Q. All right, what type of construction?
- 7 A. I built churches.
- 8 Q. Okay, how long were you with John Stokes?
- 9 A. A year, year and a half.
- 10 Q. Okay, and what was your position there?
- 11 A. Project manager.
- 12 Q. Was project manager also your position at
13 Myrick and Batson?
- 14 A. Yes, it was.
- 15 Q. All right, why did you leave John Stokes?
- 16 A. I didn't care for the work.
- 17 Q. Okay, where did you go after that?
- 18 A. Where did I go? I went to Price -- Price
19 Construction. Yeah.
- 20 Q. And when did that project end?
- 21 A. '99.
- 22 Q. Okay, where did you go next?
- 23 A. Summit.
- 24 Q. Okay, that's where I was headed.
- 25 A. There we go.

1 Q. All right, were you the superintendent
2 for Price Construction?

3 A. No, I was a project manager.

4 Q. It sounds like that it at least involved
5 construction of two of the four walls to the
6 new roughing building of the old model, right?

7 A. All four. It was literally split. We
8 demolished probably 90 percent of it and
9 rebuilt all of the underlying.

10 Q. All right, what is your current title --
11 employment title?

12 A. Project manager.

13 Q. And what was your initial position with
14 Summit?

15 A. Project manager.

16 Q. Have you been basically in that title
17 position the entire time you've been with the
18 two companies?

19 A. No.

20 Q. Okay, what else were you?

21 A. I was a senior project manager and a vice
22 president.

23 Q. How long were you a senior project
24 manager?

25 A. Two or three years.

1 Q. And then how long were you a -- you said
2 a vice president?

3 A. Yes.

4 Q. Okay?

5 A. One or two years.

6 Q. I assume that was after the senior
7 project manager?

8 A. Correct.

9 Q. So it sounds like you went up the chain
10 and then came back down the chain?

11 A. I left for two years.

12 Q. Okay, when did you leave? I knew this
13 wouldn't be easy. I thought I was home free
14 at this point.

15 A. I believe in 2006.

16 Q. Okay, where did you go?

17 A. I didn't work for awhile, and then I went
18 to work for Group Four Properties.

19 Q. Okay, what was the reason you left
20 Summit?

21 A. I mean, I just decided I wasn't going to
22 work any more.

23 Q. Okay, how long were you not working?

24 A. Probably about a year.

25 Q. And then you went to Group Four?

1 A. Group Four Properties.

2 Q. What kind of work was that?

3 A. Developers.

4 Q. Okay, and what was your position?

5 A. I was the vice president in charge of new
6 development and construction.

7 Q. All right, what kind of development did
8 Group Four do?

9 A. Multi-family.

10 Q. Okay, similar to Twelve Oaks?

11 A. Correct.

12 Q. Okay, how long were you with Group Four?

13 A. About a year.

14 Q. And then did you go straight from there
15 back to Summit?

16 A. Summit.

17 Q. Is that a "yes?"

18 A. Yes, I went back to Summit in, I believe
19 it was May of '08.

20 Q. I guess that means you left on good
21 terms?

22 A. Correct.

23 Q. They wanted you back?

24 A. Correct.

25 Q. Tell me what not onsite work a project

1 manager would typically do -- what kind of
2 things?

3 A. Write contracts. Sometimes we're
4 involved in writing owner contracts. When I
5 say "contracts," I mean subcontracts,
6 scheduling submittals.

7 Q. Submittals, are we talking about proofing
8 bids?

9 A. No.

10 Q. Awarding contracts?

11 A. Awarding contracts to subcontractors.
12 Writing that contract, then getting the
13 submittals together to submit to the architect
14 or engineers.

15 Q. Okay, and as far as the approval of
16 payments to subs and the cutting of checks, I
17 assume someone else cuts the checks in the
18 accounting department?

19 A. Right.

20 Q. But is the project manager a person
21 that's got to check off or officiate that
22 process?

23 A. The project managers approve the pay
24 applications submitted by the subcontractors.

25 Q. Okay, take me through the process by

1 which after a subcontractor completes whatever
2 portion of his work is needed to be completed
3 to get paid for that portion of the work,
4 whether it's an intermediate stage or final --
5 take me through that -- what he does and the
6 process he goes through when he gets his
7 check.

8 A. We have a process where they submit.
9 They're given a date to submit their
10 invoicing. At that point I'll -- if I haven't
11 seen, if I haven't been to the site at that
12 time or I need verification, I would call
13 their superintendent and ask what percentage
14 complete is the subcontractor.

15 Q. I'm sorry to stop you. But are your
16 subcontractors typically of the type that
17 they're going to have an invoice submitted
18 from some home office somewhere and it goes
19 straight to the project manager? Or is that
20 something they give a guy in a trailer -- the
21 superintendent on the jobsite?

22 A. No, it's submitted to me.

23 Q. Okay.

24 A. Or it's submitted to Summit.

25 Q. Okay, so it bypasses the guys on the

1 site?

2 A. Correct.

3 Q. Okay, all right, and then if I understood
4 your testimony, if you had been on site
5 recently enough and you feel comfortable that
6 the amount of work would be satisfactory, you
7 don't need to contact the supers, or do you
8 always contact the supers too?

9 A. Usually, I contacted the supers to
10 discuss it.

11 Q. And was that process documented in any
12 way?

13 A. No.

14 Q. And assuming everything is filed, what
15 happened next?

16 A. Then after that, I do my payment of an
17 application to the owner.

18 Q. Okay.

19 A. And I date -- and based on his invoicing,
20 I'll bill the owner.

21 Q. Okay, what if a contract calls for an
22 architect to sign off? How does that
23 integrate with what you're saying?

24 A. The payment application that I produced
25 with the breakdown of all the trades and then

1 submitted to the owner, the architect and
2 whomever else the owner needs that needs to
3 see it.

4 Q. Okay, and then if the architect signs off
5 on it, what happens next, or whoever else
6 needs to approve it approves it?

7 A. Correct.

8 Q. What happens next?

9 A. Then we're paid.

10 Q. Are you wanting to get that approval
11 before you approve the check going to the
12 subs?

13 A. Yes.

14 Q. Okay, the approved payout to the owner
15 that goes to the architect or whoever else may
16 need that approval, such as a bank or
17 whatever, does that come back to the project
18 manager, or does that bypass the project
19 manager and go straight to accounting?

20 A. Well, once my pay application is
21 approved, it goes to accounting and we wait
22 for the check.

23 Q. Okay, and the check goes to them, and
24 then what triggers them to pay the sub?

25 A. Correct.

1 Q. Okay, then these -- the requests for
2 payment you're talking about are the AIA
3 documents. Was it 507? Do you remember the
4 number?

5 A. Probably.

6 Q. I never remember it. But is there any
7 other documentation of approvals of work at
8 Summit that is an actual document that says
9 we've looked at the sub's work and it's
10 satisfactory? Are there superintendent
11 reports or anything like that separate?

12 A. No.

13 Q. Okay, so it sounds like the only
14 documentary evidence that somebody from your
15 company has approved the work of any
16 individual subcontractor is going to be the
17 AIA request?

18 A. I guess.

19 Q. I said it wrong. G702, is that the only
20 document that you're aware of that evidences
21 your company's approval of the subcontractor's
22 work, are these G702 AIA request for payment
23 documents?

24 A. It's what we paid the subcontractors
25 from.

1 Q. Okay, if I were to look at a construction
2 file from your company would I expect to see,
3 as a normal course of business, any other
4 documentary evidence of approval of work,
5 other than these G702's?

6 A. G702 is not a subcontractor approval. It
7 is a submit. It is a payment form to the
8 owner.

9 Q. Right. But that's a representation to
10 the owner that the work has been completed
11 satisfactorily, correct?

12 A. Correct.

13 Q. And I'm asking is there anything else
14 that would do that, or anything similar to
15 that by way of saying a subcontractor's work
16 was complete to some degree or stage and it's
17 satisfactory to your company, that is
18 generated as a regular activity or a regular
19 course of business?

20 A. Submittal for payment to the owner for
21 work in place.

22 Q. But other than that, is there any other
23 document?

24 A. No.

25 Q. That I could look to see that tells me

1 your company has approved work of a
2 subcontractor?

3 A. That is the submittal for payment.

4 Q. From the subcontractor.

5 A. To the owner, to get paid from the owner
6 to Summit.

7 Q. Okay, and I'm not trying to get bogged
8 down in semantics too much. I understand that
9 this document -- or at least I think I
10 understand this document is so you guys get
11 paid.

12 A. Correct.

13 Q. But as part of that, there's a
14 representation to the owner and a belief that
15 is evidenced by this document, that some
16 portion of the work on site has been completed
17 satisfactorily, correct?

18 A. Correct.

19 Q. All right, I'm asking you is there any
20 other document that does that in any way,
21 that's generated as a regular course of
22 business for your company?

23 A. No, not -- no.

24 Q. All right, is there a specific form that
25 a subcontractor that works on your projects --

1 when I say "you," I mean projects that you are
2 overseeing, that the subcontractors or
3 suppliers are required to use for requests for
4 payment?

5 A. Yes.

6 Q. Okay, what is that?

7 A. It's similar to ours, the pay applica-
8 tion.

9 Q. Okay, is there anything else that they're
10 required to use other than that pay
11 application?

12 A. No.

13 Q. And what happens to that paperwork?

14 A. That paperwork is submitted to
15 management.

16 Q. Directly to you?

17 A. Yes.

18 Q. Is that the same paperwork you talked
19 about earlier?

20 A. Yes.

21 Q. Okay, is that anything that you actually
22 write on to indicate that you received it or
23 that you approve it?

24 A. Yes, I signed off on it.

25 Q. Okay, where does it go from there?

1 A. It goes to the vice president that was
2 above me to approve.

3 Q. All righty. And for either the original
4 construction or the repair work did you have
5 the same vice president that you reported to
6 for Fenwick/Twelve Oaks?

7 A. He might have left.

8 Q. During?

9 A. During, I don't recall. I don't recall.

10 Q. And you would have just signed off or
11 give a stamp of approval?

12 A. Yes.

13 Q. And then it would go to accounting?

14 A. Yes.

15 Q. Okay, but you didn't get involved with
16 the process them, from his office to the
17 accounting department, did you?

18 A. No, I mean, I would approve the invoices.
19 It comes in a folder. I would forward it to
20 him. He would review it and review it. And
21 if there were questions, he would ask me. And
22 then it would be forwarded to accounting.

23 Q. All right, now moving on then to
24 clarifications. We're starting on 1290 and it
25 goes through 1293. Who came up with these

1 clarifications?

2 MS. MAHON: I think we missed some
3 plaintiffs' submittals. He agreed to not use
4 the rest of ---

5 THE COURT: Ms. Mahon, please
6 direct your witness as to what line she needs
7 to respond.

8 MS. MAHON: We need to go to the
9 other document, the excerpts of deposition of
10 9/20/10 and 9/21/20, starting at page 36.
11 It's page seven at the end of the document.

12 MS. REYNOLDS: I'm with you, I
13 think.

14 MS. MAHON: Page 36 at the top.

15 MS. REYNOLDS: Yes.

16 (Reading of deposition resumed):

17 Q. All right, flipping on to clarifications
18 which starts on 1290 and goes through 1293,
19 who came up with these clarifications?

20 A. I did.

21 Q. And on the clarifications, on page 1292,
22 division nine, this proposal includes the use
23 of standard two-coat stucco system where
24 stucco is dry with elastomeric paint using
25 standard tread materials. Do you remember how

1 it was -- what was originally called for on
2 the FKA drawings?

3 A. I don't recall.

4 Q. Okay, I will represent to you for the
5 purposes of this question that was a
6 traditional hard-coat stucco system. At least
7 that's my understanding. So let's assume
8 that, for these questions, how was it
9 determined once FKA called for a traditional
10 hard-coat stucco system to them become a two-
11 coat, which I guess is a proprietary system,
12 being a two-coat? How is that determined?
13 Did anyone discuss with the owner any
14 difference between the use a proprietary two-
15 coat system as opposed to a traditional
16 Portland cement product, advantages,
17 disadvantages, changes?

18 A. I don't understand your -- what are you
19 asking me?

20 MS. REYNOLDS: I'm sorry, where?

21 MS. MAHON: 38, at the end, line 7.

22 Excerpt at the bottom of page 38.

23 MS. REYNOLDS: Right, I've got
24 page 38. I've got your question, but I don't
25 -- I don't have the rest of that.

1 MS. MAHON: Do you have page eight?

2 May I approach the witness?

3 MS. REYNOLDS: I'm sorry. I do.

4 I have it. I had it out of order, excuse me.

5 I'm sorry, Your Honor.

6 (RESUMING READING OF DEPOSITION):

7 A. Tarragon had had other projects that the
8 two-coat system was used.

9 Q. So in the past, do you remember any
10 discussions, though, with Tarragon about the
11 differences between a traditional three-coat
12 hard-coat stucco and a proprietary system?

13 A. The owner was familiar with the two
14 products.

15 Q. And what is your bonus based on at the
16 end of the project?

17 A. Completing it on time, resolutions of
18 issues, meeting fees, that sort of thing.

19 Q. Okay, and did you get a bonus at the end
20 of Fenwick Plantation?

21 A. Yes.

22 Q. How much was your bonus?

23 A. Twenty thousand, I believe.

24 Q. Is there a changing scale of how much
25 your bonus is? Or if you meet those things,

1 it is always 20,000 dollars?

2 A. No, it's a fluctuating scale.

3 Q. And 20 pretty typical of it, or was that
4 high?

5 A. That was high.

6 Q. Can you give me a percentage of how much
7 your bonuses are that you get for completion
8 of projects against your base salary?

9 A. It probably adds 20 to 25 percent.

10 Q. In any given year how many bonuses would
11 you typically get?

12 A. Two, three.

13 Q. I'm sorry? Two or three?

14 A. No.

15 Q. Or one?

16 A. No, it just varied. Bonuses were based
17 on completion of the project.

18 Q. Yes, ma'am.

19 A. So you would get one, sometimes two.

20 Q. But the value engineer would determine
21 those? You determined that and submitted it
22 to the owner for them to decide?

23 A. I submitted the suggestions and they
24 accepted them or they didn't.

25 Q. Did the owner have experience with

1 construction?

2 A. Yes.

3 Q. This was not the owner's first project?

4 A. No, it was not.

5 Q. And the owner had knowledge about

6 different construction techniques?

7 A. Yes.

8 Q. And when the owner sent a representative

9 -- let me back up. Did the owner send a

10 representative during the project to inspect

11 it at different stages?

12 A. Yes.

13 Q. Was that Claude McNabb that came?

14 A. Yes.

15 Q. Yes, ma'am. The addendum to the AIA

16 contract -- there was an AIA contract entered

17 into between Tarragon and Summit, correct?

18 You took an AIA form?

19 A. Correct.

20 Q. Then there are, on pages 305 to 309,

21 there are changes worked into that AIA

22 document, correct?

23 A. Correct.

24 Q. Under that, 3.9.1, the contract provides

25 "Delete this in its entirety and substitute

1 the following: The contractor shall employ a
2 competent superintendent and necessary
3 assistants who shall be in attendance at the
4 project site during performance of the work."
5 That's one of the terms of the contract with
6 the owner, correct?

7 A. Correct.

8 Q. And was that actually done?

9 A. Repeat yourself, please.

10 Q. Was that done? Did the contractor employ
11 a competent superintendent and necessary
12 assistants to be at the site for the
13 performance of the work?

14 A. Yes.

15 Q. Who was that competent superintendent?

16 A. Buddy Reeves.

17 Q. And who were his necessary assistants?

18 A. Darrell Parnell.

19 Q. And the contract provided, under
20 paragraph 3.1.2, that the contractor shall
21 perform the work in accordance with the
22 contract documents. Is that correct?

23 A. Correct.

24 Q. And look to the next page, 1322, Summit,
25 3.4.3. The last paragraph on that page, the

- 1 contractor shall not permit employment of
2 unfit person or persons not skilled in tasks
3 assigned to them. Is that correct?
4 A. Correct.
5 Q. And as far as you know that did not occur
6 at Fenwick Plantation. Is that fair to say?
7 A. Correct.
8 Q. FKA did accept the use of a two-coat
9 system.
10 A. Correct.
11 Q. The as-built drawing that we have --
12 they're stamped "as-built" -- they would show
13 the use of a three-coat system as opposed to a
14 two-coat system. Did FKA, after the knowledge
15 of the fact that a two-coat system was going
16 to be used instead of a three-coat system, did
17 they change their drawings at all?
18 A. No.
19 Q. Why not?
20 A. Typically, the owner would have to pay
21 the architect to do that. And they determined
22 that it was not necessary.
23 Q. The owner deemed it not necessary?
24 A. Or someone did.
25 Q. FKA actually did inspections during the

1 construction work, correct?

2 A. Correct.

3 Q. Exhibit 56, do you recognize that
4 document?

5 A. Yes.

6 Q. What is this document?

7 A. It is a contract for Los Campos for
8 paint.

9 Q. Now, if you flip to 16-180?

10 A. Okay.

11 Q. Look at paragraph five for me, please.

12 And it says all parties hereby agree that
13 subcontractor is to furnish and install all
14 required caulking, and it specified the type
15 of caulking, at all areas of the project.

16 These caulked areas are to include but not
17 limited to windows, doors, exterior siding,
18 interior trim, exterior door sills, between
19 exterior trim, tubs and masonry at the fascia
20 board. Los Campos did the caulking on the
21 project, correct?

22 A. Correct.

23 Q. And as I understand their scope of work,
24 wherever you had an intersection between
25 exterior cladding and something such as a

1 window or window flashing, Los Campos was the
2 subcontractor that did the caulking.

3 A. Correct.

4 Q. So Los Campos was the subcontractor
5 responsible for any caulking that was required
6 at the project on the exterior?

7 A. Correct.

8 Q. On paragraph four of that page, it is the
9 intent of -- there's a type -- this sub-
10 contractor to convey to the subcontractor,
11 meaning Los Campos, that the exterior water-
12 proofing of all stucco is the responsibility
13 of the subcontractor, referring to Los Campos,
14 correct?

15 A. Correct.

16 Q. And that says, "This is to include but
17 not limited to all areas where stucco meets
18 like or unlike surface where paint may or may
19 not be applied."

20 A. Correct.

21 Q. So it was Los Campos's responsibility for
22 the exterior wall waterproofing of all stucco,
23 correct?

24 A. Correct.

25 Q. As said in paragraph four of page

1 nineteen of their contract.

2 A. As said in this.

3 Q. That's what the contract says, correct?

4 A. That's what the contract says.

5 Q. Now, to make sure that the waterproofing
6 and caulking was correct, is that Mr. Reeves
7 who would have inspected the work to make sure
8 it complied with your subcontract agreement?

9 A. Yes.

10 Q. So when you had a subcontract agreement
11 with any subcontractor that worked on Fenwick
12 Plantation, Mr. Reeves would have been
13 familiar with what the scope of work of each
14 subcontractor would have been?

15 A. Correct.

16 Q. As well as you, correct?

17 A. Correct.

18 Q. Yes, ma'am, thank you. Let me hand you
19 573 through 576 which we will mark as Exhibit
20 57. Now, this is a purchase order between
21 North Florida Framing subcontractors. And, if
22 you would, flip to page 576, number two.

23 A. Okay.

24 Q. If you look at the materials that were to
25 be installed with this flashing -- do you see

1 that? It's on the third line down.

2 A. Yes.

3 Q. All right. Do you recall whether that
4 would have been -- and then it says it again
5 on ---

6 A. Eight.

7 Q. And then also six. All parties hereby
8 agree that vendor shall furnish and install
9 all different types of fasteners, flashing,
10 and then eight -- you're right -- that's the
11 next one. Vendor to provide all required
12 caulk and Z-flashing or termite shield at the
13 perimeter of the buildings per the plans and
14 specifications and at the top of all windows,
15 as required by the contract. Did Summit
16 purchase from North Florida the Z-flashing
17 that was to be used at the perimeter of the
18 buildings and at the top of the windows?

19 A. Correct.

20 Q. Did Summit purchase from North Florida
21 the flashing that was to be used on the
22 project, according to paragraph three and
23 paragraph six?

24 A. Correct.

25 Q. Was this the only subcontractor that you

1 recall that you had any bid or contract with
2 for the purchase of flashing?

3 A. I believe this one was the only one.

4 Q. Tell me in -- we'll go into that a bit
5 later. But why were the materials purchase
6 separately from North Florida Framing as to
7 including it in their contract?

8 A. Typically, on a purchase order we don't
9 hold retainage.

10 Q. So that was just a way of getting the
11 money more quickly to North Florida Framing?

12 A. Correct. When you purchase lumber you're
13 not allowed -- you know -- they -- you have to
14 purchase lumber. You can't hold ten percent
15 retainage, and so that's why we did it this
16 way.

17 Q. Do you remember anyone having discussions
18 with you about the cost of the project being
19 too high?

20 A. Yes.

21 Q. Who was that? Tarragon?

22 A. Tarragon.

23 Q. Okay, and then that would have been --
24 page 75 -- okay, and then that would have been
25 the fact that these windows have a double

1 flange, that would have been submitted to
2 Summit who, then, approves it and sends to FKA
3 for their approval on to submittal?

4 A. Correct.

5 Q. Once those windows are actually installed
6 and went to integration, was Mr. Reeves the
7 one who would have been put on site to look at
8 that and how it was integrated?

9 A. Yes.

10 Q. I'm going to hand you bates number Summit
11 374 through 362. Is that the contract that
12 was entered into with Johnson Roofing?

13 A. Yes.

14 Q. If you would, flip to page 362 of this.
15 If you look under number seven, there's
16 handwritten notes that says -- under the
17 provision that says "subcontractor shall
18 employ a competent superintendent to be on
19 site." That's what it says. It says Blaine
20 Steigert will be the contact, but not on site
21 100 percent of the time. And it appears that
22 you agreed to that provision.

23 A. Correct.

24 Q. Why was that?

25 A. One hundred percent of the time, meaning

1 they don't need to be there if they're not
2 doing roofing. One hundred percent of the
3 time they are roofing, he had to be there, but
4 not 100 percent of the time.

5 Q. Okay, so your understanding of that
6 provision was that if Johnson Roofing is doing
7 work, that they needed to be there.

8 A. Correct.

9 Q. But if Johnson Roofing was not doing
10 work, that you didn't require them to be on
11 site.

12 A. Correct.

13 Q. Didn't you then -- FKA doesn't draw
14 kickout flashing, doesn't show kickout
15 flashing whatsoever on the drawings. All
16 right? Does that mean that FKA wasn't
17 requiring the installation of kickout
18 flashing?

19 A. I would say correct.

20 Q. Summit relied, in turn, on their
21 subcontractors would have relied on the
22 drawings that showed no kickout flashing,
23 correct?

24 A. Correct.

25 Q. So could we say, though, that you relied

1 on the drawings of FKA to determine whether
2 kickout flashing should have been installed?

3 A. I would say yes.

4 Q. Now, look at those set of drawings that
5 are exhibit 64 and tell me whether FKA called
6 for kickout flashing.

7 A. I don't see it.

8 Q. So Summit, and in turn, the
9 subcontractors would have relied upon the
10 drawings of FKA and relied upon the fact that
11 they don't call for kickout flashing. And
12 therefore the kickout flashing would not have
13 been installed, correct?

14 A. I don't see any.

15 Q. So if Summit and its subcontractors would
16 have relied upon the FKA drawings and not
17 installed kickout flashing because it's not
18 called for, correct?

19 A. In this ---

20 Q. In this instance meaning for Fenwick
21 Plantation, correct?

22 A. For kickout flashings?

23 Q. Yes, ma'am, for kickout flashings for
24 Fenwick Plantation.

25 A. Correct. Am I still looking at those --

1 63?

2 Q. I'm sure, yes. And those drawings that
3 we just looked at, those would have been the
4 same drawings that would have been supplied to
5 the roofer, but also to the other sub-
6 contractors, such as the exterior cladding
7 subcontractors, correct?

8 A. Correct.

9 Q. For the inspection of and the
10 coordination of when the lightweight concrete
11 goes in and when the stucco goes in, was Mr.
12 Reeves in charge of that coordination between
13 subcontractors?

14 A. Yes.

15 Q. For any coordination issue where you have
16 more than one subcontractor working, for
17 example, you'd have the installation of the
18 windows and you'd have the installation of the
19 exterior cladding. When those different subs
20 come together and integrate, that's Mr. Reeves
21 who supervised that work.

22 A. Correct.

23 Q. It's Mr. Reeves who inspected that work.

24 A. Correct.

25 Q. That was his responsibility with the

1 subcontractors.

2 A. Right.

3 Q. I'm going to hand you Summit 545 to 575,
4 exhibit 69 which, if you would, identify
5 whether -- I'm sorry, to 578 -- whether this
6 is the contract with North Florida Framing for
7 March 20th of 2002, or one of the contracts
8 with it?

9 A. Exhibit 69? Yes.

10 Q. Yes. Now, if you would, flip with me to
11 page 564, attachment B, scope of work.

12 A. I'm there.

13 Q. We talked about that before, with that
14 vendor subcontract, that there were North
15 Florida Framing was the subcontractor
16 responsible for the flashing.

17 A. Supplying the flashing.

18 Q. Is this the supplying or the installa-
19 tion?

20 A. This is the installation.

21 Q. So this is the part we talked about
22 before, where North Florida was responsible
23 for the installation of the flashing that we
24 looked at in the vendor contract, correct?

25 A. Correct.

1 Q. Now, the inspection of the installation
2 of the flashing, once again, that would have
3 been Mr. Reeves for Summit, correct?

4 A. Correct.

5 Q. Mr. Reeves would have been there on a
6 day, every day.

7 A. Correct.

8 Q. If there was a subcontractor out there
9 working, Mr. Reeves was supposed to be there,
10 or if he's not there, Darrell Parnell was
11 there?

12 A. Yes.

13 Q. Now, the installation of the windows,
14 that's within the North Florida Framing scope
15 of work, correct?

16 A. Correct.

17 Q. If you would, look -- in fact, it says
18 subsection eight. So we'll be specific. When
19 it is to be installed by the subcontractor as
20 per the manufacturer's recommendations and as
21 outlined by the contractor, correct?

22 A. Correct.

23 Q. And the contractor there is Summit,
24 correct?

25 A. Correct.

1 Q. And this is to be included -- this is to
2 include but not limited to the following, set
3 windows in a bead of silicon caulk, fasten
4 with screws, install a single piece of Z-
5 flashing at the top of the window extending
6 over either side at least one inch, wrap house
7 wrap to the interior of the opening prior to
8 installing the window, wrap plastic wrap and
9 seal the window prior to installation of the
10 window, correct?

11 A. Correct.

12 Q. Now, whether that was installed
13 correctly, that was something that Mr. Reeves
14 would have been inspecting for Summit,
15 correct?

16 A. Correct.

17 Q. And then, if you look at the next page,
18 page Summit 565, that's where we're talking
19 about per the vendor contract, subsection
20 twelve. There -- that the Z-flashing and the
21 termite shield at the perimeter of the
22 buildings per the plans and specifications at
23 the top of the windows, as required by the
24 contractor, correct?

25 A. Correct.

- 1 Q. And the contractor, once again, is
2 Summit.
3 A. Correct.
4 Q. That Z-flashing, do you know whether Z-
5 flashing was installed at the perimeter of the
6 buildings or not?
7 A. I believe so.
8 Q. And Mr. Reeves would have inspected the
9 installation of that, correct?
10 A. Correct.
11 Q. Number 39, on the next page, 566, if you
12 look at that paragraph it has that the
13 subcontractor shall install all building
14 flashing in strict accordance with the plans
15 and specification and governing authorities'
16 requirements and all other flashing required
17 by the contractor, correct?
18 A. Correct.
19 Q. Summit was the contractor, correct?
20 A. Correct.
21 Q. And Summit was the one that could direct
22 where flashing would go or not go in regard to
23 that paragraph, correct?
24 A. Correct.
25 Q. Let me hand you the purchase order from

1 that, exhibit eight, in the contract. Is that
2 your husband, David McGinty?

3 A. Yes.

4 Q. That purchase order is dated April 15,
5 2002. Who was that building wrap installed
6 by? Do you know? Do you remember?

7 A. North Florida Framing.

8 Q. Now, would you agree with me that the
9 installation of building wrap is something
10 that can be observed by Summit's
11 superintendent, correct?

12 A. Correct.

13 Q. And whether it was properly lapped can be
14 observed before it the exterior of that
15 cladding goes on, correct?

16 A. Correct.

17 Q. And whether it's in the proper locations
18 can be observed by Summit's superintendent,
19 correct?

20 A. Correct.

21 Q. If the building wrap is not installed
22 properly, does Summit have the ability to stop
23 the work and have it redone?

24 A. Absolutely.

25 Q. And, in fact, that's Summit's

1 responsibility. If you see non-compliant work
2 that you're aware of, that they can stop and
3 have it redone, correct?

4 A. Right.

5 Q. Does exhibit 81 contain the approval of
6 the General Aluminum windows that were used at
7 Fenwick Plantation by the architect?

8 A. It appears to be.

9 Q. Now, February 28th of '02, I assume that
10 windows would have had to have been approved
11 before they were installed.

12 A. Correct.

13 Q. Do you remember FKA ever having an issue
14 at all with these windows?

15 A. No.

16 Q. FKA -- they did site inspections, did
17 they not? Part of their contract was contract
18 administration, was it not?

19 A. Yes.

20 Q. And given their frequency out there, they
21 would have seen windows being installed or
22 once they were installed.

23 A. Correct.

24 Q. And how the windows were integrated with
25 the stucco system and with the siding, FKA

1 would have observed that.

2 A. Correct.

3 Q. Do you recall any changes having to be
4 made on how those parts were installed next to
5 the windows?

6 A. No.

7 Q. Buddy Reeves would have been the one
8 watching how that's installed.

9 A. Correct.

10 Q. Let me hand you exhibit 84 which is
11 Summit 9610 through 9626. These were
12 documents contained within Summit's file that
13 was produced in this case. It's got
14 installation of fin products. My question is
15 do you know whether this was the installation
16 instructions that Summit received in regard to
17 the installation of the windows at Fenwick?

18 A. These look pretty generic.

19 Q. Do you think that there were more
20 specific ones for Fenwick Plantation?

21 A. No, it's just the generic installation of
22 this product.

23 Q. Do you know whether -- do you know either
24 way whether exhibit 84 would have been the
25 installation instructions for Fenwick

1 Plantation or not?

2 A. It would appear to be.

3 Q. Do you know how Summit would have
4 obtained exhibit 84?

5 A. General Aluminum would have faxed it to
6 us.

7 Q. Does Summit then provide those
8 instructions to the window installer?

9 A. Oh, absolutely.

10 Q. And Summit would retain a copy of the
11 installation instructions.

12 A. I would believe so.

13 Q. So Buddy Reeves would have had those in
14 order to look at the window installed against
15 the General Aluminum installation
16 instructions.

17 A. Yes.

18 Q. And if you had a problem with how these
19 were being installed, that's Mr. Reeves' job
20 with Summit to point that out?

21 A. Yes.

22 Q. And onto page 143. So as far as you
23 remember, a mockup was done of the stucco?

24 A. I believe so.

25 Q. And would the architect have approved

1 that?

2 A. Yes.

3 Q. Would the architect have to have approved

4 the way the stucco was being installed prior

5 to the installation work in stucco actually

6 occurring?

7 A. That would have been part of the

8 submittal package. So that would have been.

9 Q. Let me hand you exhibit 95. Now, that is

10 -- you have a fax cover sheet to you. And

11 then it looks like -- does that say -- is that

12 your initials on the bottom?

13 A. Yes.

14 Q. So on page 5727 it says "ok." Is that

15 TMC 6/7/02?

16 A. Yes.

17 Q. Now, that's a letter from Professional

18 Plastering Stucco to you. And it says "If the

19 building wrap is not installed at the time of

20 the lath and stucco, we have been directed to

21 proceed with our work without any delays by

22 Tacy McGinty." Is that correct?

23 A. That's what it says.

24 Q. And you've got an "ok" at the bottom of

25 that, correct?

1 A. Correct.

2 Q. And it has "We have been directed by
3 Buddy Reeves to proceed with the lath and
4 stucco before the lightweight flashing in the
5 breezeway corridors. We will not be held
6 responsible for any damage or repair due to
7 the sequence of work." Do you see that?

8 A. Correct.

9 Q. I read that correctly, didn't I?

10 A. Yes, you did.

11 Q. You've got an "ok" next to that down
12 there, right?

13 A. I do.

14 Q. "This is my interpretation of our
15 conversation today on site. Unless advised
16 otherwise, we will proceed with the above
17 directives," correct?

18 A. Correct.

19 Q. And you okayed that, correct?

20 A. I did.

21 Q. Okay. But you had given the permission
22 on behalf of Summit that that could be done,
23 correct?

24 A. Yes.

25 Q. Do you remember why you selected

1 Professional Plastering as opposed to any
2 other subcontractors who bid?

3 A. I had successfully used them in the past.

4 Q. When you were talking to Mr. Raby or to
5 others for Tarragon, was it always presented
6 to you by the representative of Tarragon that
7 they would be apartments as opposed to
8 condominiums?

9 A. It was never discussed that it would
10 anything but apartments.

11 Q. We were talking about the fact that it
12 was always Summit's, as far as you know,
13 Summit's understanding that Fenwick Plantation
14 would be apartments owned by Tarragon as
15 opposed to sold for condominiums, correct?

16 A. Correct.

17 Q. And may I assume that Summit, as far as
18 you know, never had any discussions at all
19 with any subcontractors that these would be
20 anything other than apartments?

21 A. I did not.

22 Q. Let me hand you exhibit 101. Do you
23 recognize that form?

24 A. Yeah, I've seen it before.

25 Q. This forms goes to a different -- it

1 looks like a checklist or the checklist that
2 if a subcontractor has a violation, it looks
3 like you could write up a subcontractor for.
4 Is that what that form is?
5 A. It appears to be.
6 Q. Under that you actually have one for not
7 following Summit Contractor's schedule or
8 order sequence, correct?
9 A. Correct.
10 Q. The quality of work does not meet Summit
11 Contractor's standards. Do you see that?
12 A. Yes.
13 Q. So if a subcontractor did not meet Summit
14 Contractor's standards, a violation letter
15 would be issued?
16 A. A violation letter could be issued.
17 Q. And then it goes on, "Your company is in
18 violation of Schedule B, scope of work." So
19 another thing that Summit was looking at was
20 whether the scope of work was being properly
21 followed and employed by the subcontractors,
22 correct?
23 A. Yes.
24 Q. The superintendent manual, 1999, that
25 we've marked as deposition exhibit 102, would

1 this have been the superintendent manual in
2 effect at the time that Fenwick Plantation was
3 constructed?

4 A. Yes.

5 Q. I want to go through some of the
6 provisions, if we could. If you look at
7 Summit 2959, this goes through the Summit
8 Contractor's job description. The first
9 paragraph there says, "The superintendent is
10 the person in charge of the entire project and
11 is responsible for administering the contract,
12 safety, production, scheduling, quality,
13 supervision of the other field positions,
14 coordination with the owners, architects,
15 engineers and management, control
16 subcontractors in coordination with
17 contracts." Do you see that?

18 A. Yes.

19 Q. That's part of the project superintendent
20 for Summit, correct?

21 A. Correct.

22 Q. And it goes on to say that, "We are
23 obligated to build exactly by the plans and
24 specifications," correct?

25 A. Correct.

1 Q. It also goes on to say that the
2 superintendent for Summit is responsible for
3 reviewing all scopes of work and familiarizing
4 himself -- in this case, herself -- with the
5 details of the contract, correct?

6 A. Correct.

7 Q. "The superintendent must review shop
8 drawings with each subcontractor in his work
9 to assure himself the subcontractor is
10 installing his product correctly and the
11 product is correct and has been approved by
12 the architect," correct?

13 A. Correct.

14 Q. It also goes on to state in bold letters
15 at the bottom of that paragraph, "Do not take
16 anyone's word that their work is complete."
17 Some wrote "CSI," which is Summit, "must see
18 that the work -- see that it is complete,"
19 correct?

20 A. Correct.

21 Q. It goes on to say that the superintendent
22 is responsible for, and that they should talk
23 directly with the person if they are not
24 performing correctly, correct?

25 A. Correct.

1 Q. And that poor performance by the project
2 team is the responsibility of the project
3 superintendent. Do you see the bold capital
4 letters at the end of the paragraph?

5 A. Yes.

6 Q. It says, "Poor performance will not be
7 blamed on subordinates."

8 A. Correct.

9 Q. And this is the job, the operation manual
10 that Summit Contracting would have used for
11 Fenwick Plantation, correct?

12 A. Correct.

13 Q. Look at page 29591, please; last
14 paragraph, bold letters. "The
15 superintendent," meaning Summit's
16 superintendent, "is responsible for
17 subcontractor performance and adherence to
18 plans and specifications." Do you see that?

19 A. Correct.

20 Q. Did you say "correct?"

21 A. Correct. Correct. Correct.

22 Q. Next page, assistant superintendent,
23 29592. The assistant superintendent's
24 essential duties and responsibility is to
25 assist in coordinating the work of both Summit

1 employees and subcontractors.

2 A. Correct.

3 Q. The assistant superintendent's essential
4 duties and responsibilities include assisting
5 and monitoring the quality of workmanship and
6 materials on the project, correct?

7 A. Correct.

8 Q. Next page. The finish superintendent.
9 Who was the finish superintendent for Fenwick?

10 A. We did not have one.

11 Q. If you didn't have one, does that mean
12 that that work is not done, or does that mean
13 that it's picked up by the superintendent or
14 assistant superintendent?

15 A. It's picked up by either the assistant or
16 the superintendent.

17 Q. So either Buddy Reeves or Darrell Parnell
18 for the project?

19 A. Correct.

20 Q. So one of them would have been
21 responsible for preparing the final punch list
22 for all trades.

23 A. Correct.

24 Q. And they would have been responsible for
25 conducting management walks and ensure

1 building acceptance.

2 A. Correct.

3 Q. And they had to have good knowledge of

4 construction building codes.

5 A. Correct.

6 Q. It also says "to walk the building" means

7 all day, make sure work is complete. Do not

8 take sub's work, correct?

9 A. Correct.

10 Q. That was what Summit did. They walked

11 the buildings. They didn't just take the

12 subcontractor's word for anything.

13 A. Correct.

14 Q. Go to page 59608, number 16. It says

15 about the project manager, "the buck stops

16 here," in bold caps. Do you see that?

17 A. Yes, I do.

18 Q. And that was Summit's motto, for lack of

19 a better term, that the buck stops with the

20 project manager at Summit, correct?

21 A. Correct.

22 Q. Look with me, if you would, at Summit

23 29614. That's at least one of the -- and then

24 through 69621. That is at least part of what

25 Summit would be looking for for the quality

1 control checklist, correct?
2 A. Correct.
3 Q. And that includes, if you look at 29616,
4 that includes check proper window wrap.
5 First, peel and seal bottom piece, then side
6 piece, then top piece. Check procedure.
7 A. Correct.
8 Q. Check head flashing is also on there,
9 correct?
10 A. Correct.
11 Q. The next page, 29617, check all roof
12 flashings.
13 A. Correct.
14 Q. And then under lightweight concrete,
15 you've got once again, check flashing?
16 A. Correct.
17 Q. Then 29618, the lath and the stucco was
18 to be inspected and signed off on, correct?
19 A. Correct.
20 Q. Was there any part of the building for
21 Fenwick Plantation that Summit would not have
22 inspected?
23 A. No.
24 Q. Look, if you would, to 29630, please,
25 number eight. It says -- this is under the

1 site clearing and demolition. It's got, "The
2 superintendent has been designated to monitor
3 the work of the subcontractors." Do you see
4 that?

5 A. Yes.

6 Q. Would that be for the entire project, not
7 just for site clearing and demolition, to
8 monitor the project?

9 A. Yes.

10 Q. Okay, now flip with me to Summit 29649,
11 please. It has in there that the project
12 manager -- that was you for Fenwick
13 Plantation.

14 A. Yes, it was.

15 Q. "Should review the plans and
16 specifications to determine what items require
17 a submittal approval."

18 A. Correct.

19 Q. And did you do that?

20 A. Yes.

21 Q. So before a submittal would go from
22 Summit to the architect, Summit would have had
23 to have approved that submittal?

24 A. Yes.

25 Q. If it wasn't approved, Summit would not

1 have forwarded it on to FKA?

2 A. Correct.

3 Q. And when you were looking at the
4 submittals, what were you looking at, to make
5 sure that they met the plans and
6 specifications?

7 A. Yes.

8 Q. Was it the responsibility of the
9 superintendent to take those submittals and go
10 compare it to the work that was being done in
11 the field?

12 A. Yes.

13 Q. So it was his responsibility to inspect
14 and ensure that they were meeting the
15 submittals?

16 A. Correct.

17 Q. We'll move on, then, to Summit 59658,
18 please. This is the sheet for Summit, for
19 RFI's, requests for information. It has, "The
20 project manager and superintendent should
21 review the plans and specifications prior to
22 job's start for discrepancies between the
23 plans and specifications, notes and mentions,
24 et cetera. If there any discrepancies, it
25 should be sent to the architect for an RFI,"

- 1 correct?
- 2 A. Right.
- 3 Q. And that was the project manager and
- 4 superintendent's responsibility for Fenwick.
- 5 Plantation, to look at the plans and
- 6 specifications, submittals, dimensions, et
- 7 cetera, to make sure that there weren't any
- 8 discrepancies that needed to be brought to the
- 9 architect's attention.
- 10 A. Correct.
- 11 Q. Next one, 59666, job site meeting. Were
- 12 job site meetings held at Fenwick Plantation?
- 13 A. Yes.
- 14 Q. Who's in charge -- who was in charge of
- 15 the job site meetings?
- 16 A. I had one every two weeks, and Buddy
- 17 Reeves had one every Monday.
- 18 Q. Okay, what was the purpose of those
- 19 meetings?
- 20 A. Just to get together and discuss
- 21 schedules and discuss any issues.
- 22 Q. If there were any quality of work issues
- 23 would that have been brought up?
- 24 A. Absolutely.
- 25 Q. Let me show you exhibit 104. It's got --

1 I want to make sure that this is a record such
2 as what would have been kept to show that
3 Claude McNabb was, in fact, inspecting the
4 work for the owner, correct?

5 A. Correct.

6 Q. And then the next one, the next page. It
7 says, "Building envelope checklist." And
8 that's 21695 through 21697. Is that -- did
9 you compile that?

10 A. This is it. This is the it.

11 Q. Okay, so exhibit -- tell me, then, what
12 pages 21695 through 21697, what that is?

13 A. That is just an agenda.

14 Q. Is this an agenda for the ---

15 A. --- waterproofing meeting.

16 Q. And you would have gone through all the
17 issues?

18 A. Correct.

19 Q. Such as like, under number five, review
20 flashing details. You would have reviewed
21 flashing details?

22 A. Correct.

23 Q. With the subcontractors?

24 A. Correct.

25 Q. And FKA would have been present?

1 A. They were.

2 Q. And then you also have -- the next page
3 has to do with your viewing installation of
4 the windows.

5 A. I'm sorry, what number are you on?

6 Q. 21696.

7 A. Correct.

8 Q. Okay, and you would have gone over that
9 with the window installer?

10 A. Correct.

11 Q. On Page 178, if look at that -- at the
12 bottom of that page, the pace of construction
13 continues to be excellent and is currently
14 tracking about a hundred twenty days ahead of
15 our scheduled bar graph. Were you that far
16 ahead? Is that accurate, as far as you know,
17 that you were that far ahead of schedule?

18 A. I wouldn't be surprised.

19 Q. So it was moving. Let's mark that as
20 107. So that was moving, that project. You
21 at least have it a hundred twenty days ahead
22 at that point, for report number eight?

23 A. Approximately, yes.

24 Q. It was important for Summit to ensure
25 that the installation of the windows was done.

1 correctly. Would that be fair to say?

2 A. Yes.

3 Q. Windows are arguably one of the main
4 sources -- and the installation of windows are
5 one of the main sources of water intrusion
6 into exterior cladding.

7 A. I would say that's a true statement.

8 Q. Would you inspect the installation of the
9 Magna Wall when you were there?

10 A. Yes.

11 Q. So you would actually also look at the
12 installation of the Magna Wall system, how it
13 was installed?

14 A. Correct.

15 Q. Let me hand you Defendant's Exhibit 113,
16 the pay applications. Tell me who handled the
17 submittal of pay applications?

18 A. I did.

19 Q. And was there ever a problem with the
20 payment of any pay applications?

21 A. Not that I recall.

22 Q. Now, the pay applications provide that --
23 I'll hand you a pay application just so --
24 we'll mark this one. It's an executed pay
25 application number three and deposition

1 Exhibit 113. Now, look, if you would, there's
2 an architect's certificate for payment. And
3 it says that, "Architect, in accordance with
4 the contract documents, based on onsite
5 observations," and I can't read the next word.
6 It says, "The architect certifies to the
7 owner, to the best of the architect's
8 knowledge, information and belief, the work
9 has progressed as indicated, the quality of
10 work is in accordance with the contract
11 documents, and the contractor is entitled to
12 payment of the amount certified," correct?
13 A. Correct.
14 Q. So the architect for Fenwick Plantation
15 was out there checking on the progress of the
16 work, correct?
17 A. Correct.
18 Q. And the architect for Fenwick Plantation
19 was inspecting the quality of the work,
20 correct?
21 A. Correct.
22 Q. And he is certifying that, to the best of
23 his knowledge, in accordance with the contract
24 document, correct?
25 A. Correct.

1 Q. And under that, it says, "Summit
2 guarantees that the materials and labor which
3 have been installed as work under the above-
4 referenced contract has been performed in
5 accordance with the drawings and
6 specifications, and the work as installed will
7 fulfill the requirement of the guarantees
8 included in the specifications." Correct?
9 A. Correct.
10 Q. And Summit actually did inspect in order
11 to be able to make that guarantee, right?
12 A. Correct.
13 Q. So the owner's representative went out to
14 Fenwick Plantation and then do they actually
15 do an inspection of the buildings prior to
16 executing the acceptance of this?
17 A. Absolutely.
18 Q. So they would have walked the buildings
19 and said whether they had any problems with
20 the way Summit did its work?
21 A. What happens is they walk the buildings.
22 We create a punch list from their walks. That
23 was their initial walk. And after they do the
24 initial walk, we do the punch list. And then
25 they'd come back for the final acceptance.

1 Q. And so with the punch list, though, if
2 they have a problem with any area, that's the
3 time that they're going to point it out?

4 A. Correct.

5 Q. Exterior or interior?

6 A. Correct.

7 Q. We're not talking about just a limited
8 punch list where you walk through and they're
9 just looking at the paint looks good. They're
10 actually looking at how the buildings were
11 constructed and raised?

12 A. They're looking for issues.

13 Q. Any issues?

14 A. Any issues.

15 Q. And so once we've done the punch list and
16 come back, exhibit 115 is then signed, once
17 they are accepting the building?

18 A. Correct. But keep in mind that they've
19 also been walking -- Claude has been walking
20 the whole time as well.

21 Q. Claude has been out there inspecting on a
22 monthly or even twice a month basis?

23 A. Minimal.

24 Q. And he's out there looking at the quality
25 of work to see if it meets the contract

1 documents?

2 A. Correct.

3 Q. And he's accepting these buildings and
4 saying that they meet the contract documents
5 and he's willing to pay the contractor.

6 A. Correct.

7 Q. And, in turn, Summit's paying the
8 subcontractors.

9 A. Correct.

10 Q. And Exhibit 115 is his acceptance of
11 those buildings.

12 A. Correct.

13 Q. This question goes for the questioning
14 yesterday and also the rest of today. May I
15 assume that you are the individual most
16 knowledgeable at Summit about the original
17 construction at Fenwick Plantation and also
18 the repairs?

19 A. Correct.

20 Q. And then for more of a day-to-day thing
21 that maybe someone else. But when we're
22 talking about the decisions of how the project
23 actually worked and came together, that would
24 be you, correct?

25 A. Correct.

1 Q. There were a number of photographs in the
2 H2L file that have been produced that shows
3 the stucco is varying in thickness as
4 installed. Do you remember any discussions at
5 all about the variation in stucco thickness?

6 A. I recall.

7 Q. And about it varying to too high in that?

8 A. There really is no high.

9 Q. So, as I understand your testimony,
10 Summit, as a general contractor, didn't have a
11 problem with it being over half an inch?

12 A. Correct.

13 Q. Is there a point at which Summit would
14 have a problem with it being a certain
15 thickness? Because it's my understanding that
16 those -- once again, perhaps I'm incorrect --
17 but the build-outs that we're talking about,
18 they may have seen an inch in thickness.

19 A. We just don't want it go below a half
20 inch. How much is on it is not as important
21 as how much is not on it.

22 Q. Did you read anything?

23 A. Yes. Magna Wall allows three-eighths inch
24 minimum thick stucco.

25 Q. So, would we change your testimony or

1 maybe clarify your testimony from before that
2 it's your opinion that stucco thickness as low
3 as three-eighths of an inch would be a proper
4 application of the Magna Wall system at
5 Fenwick Plantation?

6 A. Yes, I would.

7 Q. And Summit, then, does not have a problem
8 with stucco thickness being three-eighths of
9 an inch at Fenwick Plantation?

10 A. Correct.

11 Q. Page 269. And as we just went over,
12 under Professional Plastering and Stucco,
13 there's some discussion about tape around
14 windows. Why does it separate it in the
15 contract so that a different subcontractor
16 will install the windows, flash the windows,
17 tape the windows the first time, and then
18 that's separated out. And then Professional
19 Plastering comes on and tapes again for the
20 stucco. How is that decided that it would be
21 split like that?

22 A. What happens is that North Florida
23 Framing did the original installation of the
24 windows and the house wrap and everything
25 else. And what happens is time will go by

1 from the time North Florida Framing starts,
2 you know, finishes their job, and then by the
3 time the stucco subcontractor comes in. And
4 in case anything happens, any rips, any tears,
5 anything like that, it was the responsibility
6 of the last sub touching that window to make
7 sure that it was still in compliance.

8 Q. So Professional Plastering and Stucco, as
9 I understand what you're saying -- the job was
10 to look at the windows, make sure that there's
11 no tears around it of the building wrap, and
12 to tape before installing their work?

13 A. I believe so. They might have been
14 requested to actually do the taping of the
15 windows.

16 Q. Well, looking at exhibit 123, which is
17 drawing A7.01, is that correct?

18 A. Correct.

19 Q. Would you agree with me that that exhibit
20 123 depicts the architectural drawing so the
21 building wrap should go in and wrap the head
22 of the window and go to the inside?

23 A. Let me see yours because ---

24 Q. Certainly. And you can enlarge that even
25 more, if necessary.

1 A. Yes, I do agree with that.

2 Q. For the purposes of this question, if the
3 building wrap actually does wrap in at the
4 head of the window at Fenwick Plantation, it
5 would be done according to the FKA drawing.

6 A. I would agree with that.

7 Q. Certainly, if FKA, the architect of the
8 project, calls for the building wrap to going
9 into the building at the head of the window,
10 that's what the drawings that we're looking at
11 say. Summit doesn't have a problem with the
12 building wrap going into that head of the
13 window, does it?

14 A. I would say not.

15 Q. Now, it's my understanding that you
16 weren't involved in negotiations at all to
17 this contract. But you are aware of the fact
18 that Fugleburg Koch was making inspections and
19 had contract administration at Fenwick, were
20 you not?

21 A. Yes.

22 Q. So what is laid out in 2.5.5.1 and
23 2.5.5.2 in regard to contract administration
24 by Fugleburg Koch (ph), that's what actually
25 was happening in practice in the field, right?

1 A. Correct.

2 Q. Would you agree with me that the fact
3 that the building wrap was behind the baling
4 bib, would be something that could be observed
5 by the architect when they'd come to the site?

6 A. Yes.

7 Q. That's something that came be seen?

8 A. Yes.

9 Q. Now, the same thing that would be
10 apparent to the architect would also have been
11 apparent to Summit as the general contractor
12 also, correct?

13 A. Correct.

14 Q. Did Summit ever raise any concerns or
15 objections at all to how that was sequenced?

16 A. I don't recall.

17 Q. Okay, if Summit had a problem with it,
18 what would Summit have done?

19 A. Buddy Reeves would have dealt with it on
20 site with whoever was installing it.

21 Q. And he would have had the authority to
22 say, "Uh-uh, we're not installing windows that
23 way," or "we need to pull that building wrap
24 out on top."

25 A. Absolutely.

1 Q. And the architect would also have that
2 authority to do that?

3 A. Yes.

4 Q. Back on the scope of work issue that we
5 were talking about, the final decision as to
6 how the scopes of work would, in fact, be
7 separated amongst the different subcontractors
8 was the final decision of Summit.

9 A. Right.

10 Q. And when Summit makes the final decision
11 as to which subcontractor's scope of work
12 would include which, is it also Summit's
13 responsibility to make sure all of the areas
14 are, in fact, covered?

15 A. Right.

16 Q. And then when you take those scopes of
17 work, Summit was responsible for sequencing
18 and coordinating those subcontractors in order
19 to make sure that those were done in the
20 proper sequence.

21 A. Correct.

22 Q. Wouldn't you agree with me that the more
23 trades that come together at a certain
24 location, and the more detail at a particular
25 location there is, that there needs to be more

1 observation of that area by the general

2 contractor?

3 A. Right.

4 Q. Specifically, regarding the J-mold which

5 you keep -- I'm sorry.

6 A. Specifically, regarding the J-mold which

7 you keep pulling out. We did not feel like it

8 was an issue.

9 Q. We will make as exhibit 159 the

10 acceptances of the units by the owner after

11 the work was completed. Is that correct?

12 A. Correct.

13 Q. If you would, under the contractor's

14 application for payment it has that, "The

15 undersigned contractor certifies that, to the

16 best of the contractor's knowledge,

17 information and belief, the work covered by

18 these applications for payment has been

19 completed in accordance with the contract

20 documents, that all amounts have been paid by

21 the contractor for which previous certificates

22 for payment were issued and payments received

23 from the owner, and that current payment shown

24 herein is now due." Did I read that

25 correctly?

- 1 A. Yes.
- 2 Q. All right. Looking at pay application
3 number 12, is that your signature?
- 4 A. Yes.
- 5 Q. Okay, the pay application number 11,
6 whose signature is that on behalf of the
7 contractor?
- 8 A. Steve Gammons.
- 9 Q. And Steve is somebody at Summit, correct?
- 10 A. He was.
- 11 Q. And he was -- he was over you?
- 12 A. Correct.
- 13 Q. Okay, but he went ahead and authorized
14 and signed the certificate of payment on
15 behalf of Summit, right?
- 16 A. Correct.
- 17 Q. Okay, and then how about pay application
18 number ten? Is that a Mr. Gammons' signature
19 again on the application for payment on behalf
20 of the contractor?
- 21 A. Yes.
- 22 Q. And then number nine, that's your
23 signature?
- 24 A. Okay, yes.
- 25 Q. And number eight is your signature?

- 1 A. Yes.
- 2 Q. Number seven, is that Steve Gammons?
- 3 A. Yes.
- 4 Q. Number six, is that your signature?
- 5 A. Yes.
- 6 Q. Number five, whose signature is that?
- 7 A. Paul Sowders.
- 8 Q. Who is Paul Sowders?
- 9 A. Sowders, S-O-W-D-E-R-S.
- 10 Q. Who is Paul Sowders?
- 11 A. He was, I believe, a vice president for
- 12 Summit at the time.
- 13 Q. Okay, he would have been authorized to
- 14 execute the application and certificate for
- 15 payment on behalf of Summit.
- 16 A. Yes.
- 17 Q. And then pay application number four, is
- 18 that your signature? Revised, I should say.
- 19 Is it the one you have?
- 20 A. Yes.
- 21 Q. And pay application three, is that Steven
- 22 Gammons again? I think that's actually the
- 23 top one?
- 24 A. Yes.
- 25 Q. Okay, now, number two, that's Paul

- 1 Sowders on behalf of Summit?
- 2 A. Correct.
- 3 Q. And number one is Steve Gammons?
- 4 A. Correct.
- 5 Q. Okay, and then Juanita Ellis actually
- 6 notarized all these signatures, correct?
- 7 A. Correct.
- 8 Q. And she would have been a notary for the
- 9 state of Florida.
- 10 A. Correct.
- 11 Q. If the plans called for diverter flashing
- 12 or kickout flashing, that would have been
- 13 under the scope of the roofer.
- 14 A. Correct.
- 15 Q. Okay, now, Fugleberg Koch, they're the
- 16 architect, correct?
- 17 A. Correct.
- 18 Q. And they had contract administration for
- 19 the project?
- 20 A. Correct.
- 21 Q. And can you explain to me what contract
- 22 administration is?
- 23 A. Contract administration is when an
- 24 architect is a designated representative from
- 25 the firm to review the construction and review

1 the pay applications.

2 Q. Now, we had talked about this before in
3 your deposition that you were the individual
4 in charge of the project for Summit, correct?

5 A. Correct.

6 Q. Okay, and it was your understanding, as
7 the person in charge of the entire project for
8 Summit, that the architect was, in fact, going
9 to review the construction that was going on.

10 A. Correct.

11 Q. And was it your understanding that the
12 architect was to inspect the work that was
13 being completed by Summit and the
14 subcontractors?

15 A. Correct.

16 Q. Looking back at Exhibit 113 to your
17 deposition, we spoke about the fact the
18 signatures are notarized by Juanita Ellis who
19 was a notary in Florida. But regardless of
20 whether it was signed in South Carolina or
21 Florida, that is a certification of a sworn
22 statement, correct?

23 A. Correct.

24 Q. And of those signed in Florida and
25 notarized in Florida, you understand that it

1 was a sworn statement that was valid in South
2 Carolina for a South Carolina project?
3 A. Correct.
4 Q. I'm going to hand you what's been marked
5 as deposition exhibit 183 and it's Summit
6 9547. Okay, it has in there that, "I would
7 like to use a General Aluminum double-pane
8 window in lieu of the General Aluminum 1100
9 series as requested by Bob Root," correct?
10 A. Correct.
11 Q. Now, as far as you know, you would have
12 been the individual for Summit who would have
13 been involved in the selection of the windows.
14 A. Correct.
15 Q. Okay, would any subcontractor have been
16 involved at all in the selection of the
17 windows?
18 A. No.
19 Q. Now, you're familiar with what a casing
20 bead is for stucco?
21 A. Yes.
22 Q. Okay, if there were or were not a casing
23 bead around the windows for the project at
24 Fenwick, that would have been something that
25 you could have observed.

1 A. Correct.

2 Q. Did you ever have -- it's my
3 understanding that there is not a casing bead
4 between the hard coat -- excuse me, between
5 the stucco, the proprietary stucco system at
6 Fenwick, and the windows. Did you ever have
7 an issue with the fact a casing bead was not
8 used between where the stucco terminates and
9 the windows, that have that -- what the
10 plaintiffs' expert has referred to as a double
11 flange? Did you ever have a problem with
12 that?

13 A. I don't recall.

14 Q. If you would have had a problem with
15 that, that would have been something that you
16 would have brought to the attention of the
17 stucco subcontractor.

18 A. Correct.

19 Q. And as stated before, as shown in exhibit
20 113, the pay application, you did, in fact,
21 accept the work of Professional Plastering and
22 Stucco.

23 A. Correct.

24 Q. Also, whether -- you would agree with me,
25 having been on numerous construction sites in

1 your years of experience, that you can tell
2 the difference when you see an intersection
3 where there is a filled bead of caulk, or
4 whether you have an engineered sealant joint.
5 A. Correct.
6 Q. Okay, did you have any problem at all
7 with -- in going back, it's my understanding
8 that Los Campos was, in fact, the
9 subcontractor who was responsible for the
10 installation of the caulk at the project,
11 correct?
12 A. I believe so.
13 Q. Okay, and if you would have had a problem
14 with the filled bead of caulk, that you would
15 have brought to the attention of Los Campos if
16 noticed.
17 A. Correct.
18 Q. And you, in fact, did approve or someone
19 did, in fact, approve the work of Los Campos,
20 correct?
21 A. Correct.
22 Q. Let me hand you what I've marked as
23 exhibit 184. I believe that has been
24 previously marked, but let me hand you 184, if
25 I may. And that's Summit 27992 through 27994.

1 Now, look at the first page of exhibit 184.
2 And I would ask you to identify that document,
3 please.
4 A. It's a fax to Donnie King from Tacy
5 McGinty.
6 Q. And Donnie King with Professional
7 Plastering?
8 A. Correct.
9 Q. And is that your signature next to your
10 name, correct?
11 A. Correct.
12 Q. It has in the "re" line, it's "flashing
13 at breezeways under the Magna Wall," correct?
14 A. Correct.
15 Q. Now, in this letter you apparently had a
16 discussion with Donnie King in regard to the
17 installation of the flashing -- installation
18 of the flashing under the Magna Wall system
19 and paper-backed lath at the breezeway bottom
20 edges.
21 A. Correct.
22 Q. Okay, we're going to go over the actual
23 document that you wrote. But do you remember
24 anything about the discussion with Donnie King
25 that is not embodied in this fax?

1 A. No.

2 Q. Now, in the fax that you wrote, you have
3 that the installation of flashing under the
4 Magna Wall stucco and paper-backed lath at the
5 breezeway bottom edges will be the
6 responsibility of Summit Contractors, Inc.,
7 correct?

8 A. Correct.

9 Q. And then it goes on to state that you are
10 requesting the use of labor only from your
11 company, Professional Plastering, correct?

12 A. Correct.

13 Q. And that Summit will supply all the
14 materials, supervision and will be responsible
15 for obtaining all engineering approval of the
16 underlying flashing system. Is that correct?

17 A. Correct.

18 Q. And then Professional Plastering will
19 install under Summit Contractors' direction
20 and is not liable for this flashing or the
21 installation of this flashing, correct?

22 A. Correct.

23 Q. Page 40. It's the subcontractor
24 agreement between Summit and Los Campos. Do
25 you see that?

1 A. Correct.

2 Q. All right. And are those your initials
3 under the contractor initials throughout this
4 document?

5 A. Correct, yes.

6 Q. I'd like you to go to page 19, please.
7 And this is attachment to the scope of work
8 for painting, correct?

9 A. Correct.

10 Q. So this would have been Los Campos's
11 scope of work with regard to the painting on
12 the project, correct?

13 A. Yes.

14 Q. And if you would, I'm going to read item
15 number four. Under the scope of work -- make
16 sure I read it correctly -- it says, "It is
17 the intent of this subcontract to convey to
18 the subcontractor that the exterior
19 waterproofing of all stucco is the
20 responsibility of the subcontractor. This is
21 to include but not limited to all areas where
22 stucco meets like or unlike surface where
23 paint may or may not be applied." Did I read
24 that correctly?

25 A. Yes, you did.

1 Q. And so this is detailing that it was Los
2 Campos's responsibility on this project to
3 waterproof the exterior of the stucco and the
4 intersections of the stucco and any other
5 materials, correct?

6 A. Correct.

7 Q. Let's read -- I'm going to read number
8 five as well. "All parties hereby agree that
9 subcontractor is to furnish and install all
10 required caulking with the specified type of
11 caulking at all areas of the project. These
12 caulked areas are to include but not limited
13 to windows, doors, exterior siding, exterior
14 trim, interior trim, exterior door sills,
15 between exterior trim, tubs and fascia board."
16 Did I read that correctly?

17 A. Correct.

18 Q. So it was Los Campos's responsibility on
19 this project to install all the caulking,
20 correct?

21 A. Correct.

22 Q. All right. When you were contracting
23 with Los Campos, it was Summit's understanding
24 that Los Campos would be applying the
25 elastomeric coat of the caulking all over the

1 top of the Magna Wall installed stucco,

2 correct?

3 A. Correct.

4 Q. And that was Summit's expectation, and
5 that was Los Campos's responsibility, was to,
6 in essence, seal the face of the stucco,
7 correct?

8 A. Correct.

9 Q. And that was the work that Summit
10 directed Los Campos to perform on the project,
11 correct?

12 A. Correct.

13 Q. Let me hand you what's previously marked
14 -- what's marked previously as Exhibit 106 to
15 your deposition. And this is the memorandum
16 from Summit, actually from you, dated April 4,
17 2002. And it references coordination meeting
18 will be held for the referenced project. I
19 really want you to turn to page that's labeled
20 Summit 21695, and the label of it is "building
21 envelope checklist." Do you see that?

22 A. Okay, yes.

23 Q. From your previous testimony, my
24 understanding is that this checklist was
25 something that you went over with the

1 subcontractors during this meeting. Is that
2 correct?

3 A. Correct.

4 Q. The first topic under this checklist is
5 roofing, correct?

6 A. Correct.

7 Q. All right. When you go down to number
8 five, it says "review flashing details with
9 particular emphasis on special conditions."
10 And it's got three bullet points. The first
11 is "check flashing step value, et cetera," and
12 the second is "turrets" and the third is
13 "penetration in curves." That's correct,
14 right?

15 A. Correct.

16 Q. And so this is something that both Summit
17 and John Saluki would have been responsible to
18 look for during the project.

19 A. Correct.

20 Q. Okay, what is Exhibit 63 to Pat Fitch's
21 deposition?

22 A. It's the general architectural and
23 general specifications.

24 Q. For the Village at Fenwick?

25 A. Village at Fenwick.

1 Q. Just, if you would, flip to page 5017 of
2 that exhibit, that's FKA 5017.

3 A. Okay, where it says "FKA" on the bottom?

4 Q. Yes, yes.

5 A. All right.

6 Q. And there's a section "quality assurance"
7 on that page. Do you see where I'm referring
8 to?

9 A. Yes.

10 Q. There is mockups listed under the stucco
11 section, correct?

12 A. Correct.

13 Q. Okay, it was my understanding from
14 deposition testimony that there was a mockup
15 done. Do you recall either way?

16 A. I do not recall.

17 Q. Okay, now, the mockup, though,
18 requirement -- if you look at number three on
19 page 5018, it requires -- number two, the
20 erection of mockups. And then, number three,
21 notify architect seven days in advance of date
22 entitled mockups will be constructed. Do you
23 see that on page FKA 5018?

24 A. What -- yes, I do see that.

25 Q. And then, number five, the architect had

1 the responsibility to approve the mockups
2 between the plaster work, correct?

3 A. Correct.

4 Q. Okay, and a mockup is where you actually
5 have a product installed and the architect can
6 come review it and see how it's actually going
7 to be installed on the project, right?

8 A. Correct.

9 Q. And under the specifications for the
10 project prepared by the architect, FKA, they
11 were to approve how the stucco was to be
12 installed prior to installation.

13 A. Correct.

14 Q. On page 4855 of the specifications there
15 is a section called "project coordination."
16 Is that something that the contractor, Summit,
17 would have been responsible for, the
18 coordination section under the specifications?

19 A. Correct.

20 MS. MAHON: That's all.

21 THE COURT: You may step down.

22 Thank you.

23 Ladies and gentlemen of the jury, we
24 have reached an appropriate time for us to
25 break for the evening. Do not begin your

1 deliberations. Do not discuss this case
2 amongst yourselves. Please be back in the
3 jury room at 9:30 in the morning. Thank you.
4 Please rise for the jury.

5 (JURY OUT)

6 THE COURT: You may be seated. You
7 may step down. Thank you.

8 Briefly, we need to address issue of
9 Mr. Dawkins, the remaining witness. Is that
10 correct?

11 MR. ANDERSON: Yes.

12 THE COURT: And you still have a
13 rebuttal witness. Is that correct?

14 MR. LUCEY: That is correct.

15 THE COURT: Let me hear you.
16 You're still objecting to Mr. Dawkins being
17 qualified as an expert?

18 MR. SEQUI: We are, Your Honor,
19 yes.

20 THE COURT: Mr. Anderson, if he is
21 not qualified as an expert, can you -- do you
22 still intend to call him?

23 MR. ANDERSON: Your Honor, we
24 probably will call him, but his testimony will
25 a bit abbreviated..

1 THE COURT: All right. And if he's
2 not qualified as an expert have you made the
3 determination that you're going to attempt to
4 call another witness in his place? You had
5 mentioned that you were going to call -- I
6 can't recall his name at this time.

7 MR. ANDERSON: Mr. Watkins.

8 THE COURT: Mr. Watkins, yes.

9 MR. ANDERSON: Thank you. And we
10 are determining that approach. And so if he
11 is available, we would do that.

12 THE COURT: And you're objecting to
13 Mr. Watkins being called. Is that correct?

14 MR. KIRCHNER: That's correct,
15 Your Honor. If you will recall Mr. Lucey
16 indicate Mr. Watkins is a general contractor.
17 He's not an architect or a professional
18 engineer. Mr. Pusheck is a general
19 contractor. He's already testified. So Mr.
20 Watkins' testimony would be cumulative and
21 redundant. We've already had a GC testify.

22 THE COURT: First, they need to
23 make the determination whether or not Mr.
24 Dawkins is qualified as an expert. I'll be
25 happy to hear from you.

1 MR. KIRCHNER: Thank you, Your
2 Honor.

3 THE COURT: Anything additional,
4 now that you've had the opportunity to review
5 what's in his file.

6 MR. KIRCHNER: Nothing additional
7 from the arguments we placed on the record
8 this morning, in terms of his qualifications.

9 THE COURT: Thank you.

10 MS. MAHON: Your Honor, the
11 standard is whether an expert has indeed
12 acquired the requisite knowledge and skill to
13 qualify as an expert in a particular subject
14 matter. And it can be acquired by either
15 study or experience. Such knowledge or skill
16 in a profession or science that he is better
17 qualified for the jury before the opinion on a
18 particular subject of his testimony. In
19 *Watkins v. Ford Motor Company*, which is 699
20 S.E.2d 169, the Supreme Court, as I'm sure you
21 know -- there was expert testimony that was
22 attempted to be given in that. The Court
23 found that that expert was not qualified. But
24 that was because Williams admitted that he had
25 no professional experience with working on a

1 cruise control system prior to admission. He
2 admitted he had not conducted any comparison.
3 His theory had, in fact, been generally
4 rejected by the science. Williams had no
5 knowledge, skill, experience, training or
6 education specifically related to cruise
7 control issues. And that court cited the
8 *Williams* holding that the trial court -- in
9 that case the trial court erred in refusing to
10 qualify a medical doctor as an expert in
11 biomechanics, where the doctor had training in
12 biomechanics, had been qualified as a
13 biomechanics expert in other states and had
14 some educational background in biomechanics.

15 Now, in *Fields v. Hayes*, which was a
16 case after the one we handed up to Your Honor
17 this morning -- in *Fields v. Hayes*, what
18 happened in that case was the trial court did
19 not allow a home inspector who was not
20 licensed in the state of South Carolina to
21 testify. Now, it went up to the Supreme Court
22 and the Supreme Court said that was error.
23 But in that case what happened was there was
24 already cumulative evidence. In this case, we
25 haven't put up a liability expert. Mr.

1 Dawkins is our liability expert. And as he
2 testified about his qualifications, he has
3 been trained as a professional engineer. He
4 has an education of a professional engineer.
5 He has testified in courts a lot in the state
6 of Georgia. He works under the license of
7 someone in South Carolina. He has twenty-
8 seven years of experience in building
9 construction systems and civil engineering.
10 He's practiced as a building consultant since
11 1973. He's got the educational background.
12 He has a myriad of projects that he's worked
13 on in this state and in other states which
14 would qualify for the fact that he has,
15 indeed, acquired the requisite knowledge skill
16 in order to qualify as an expert, and that by
17 study and experience he has such knowledge.

18 Now, back to *Fields v. Hayes*, in
19 that case the Court did say -- the Court said
20 it should have qualified the out-of-state home
21 inspector to testify simply because he did, in
22 fact, as I understood it, have more knowledge
23 than the jury would, just like Mr. Dawkins.
24 Mr. Dawkins is going to have more knowledge
25 than the jury will.

1 And Mr. Pusheck was our cost
2 estimator. We designated, pursuant to the
3 Scheduling Order, Mr. Dawkins. He has been
4 named for a over year, Your Honor. He was
5 named in liability and damages. And it
6 appears that through inadvertence his
7 photographs were not sent to the other side.
8 We realized that when we designated the
9 photographs for the trial exhibit. Plaintiffs
10 objected and said you did not give those to
11 us. And we said we are so sorry. We will not
12 use his photographs at trial. We won't even
13 use those for his opinions. He will rely on
14 Myles Glick's set. And he's going to take
15 Myles Glick's photographs and, as an engineer,
16 licensed in another state but qualified in
17 this state -- he's going to say -- well, I
18 shouldn't say qualified in this state, Your
19 Honor, but who has worked in this state. He's
20 going to say that looking at that, with my
21 knowledge, experience and expertise, I can
22 tell you what I see in that as a professional
23 engineer. We don't have any other expert
24 who's testified about that.

25 And then, finally, Your Honor --

1 just one more point -- so the holding in
2 *Fields v. Hayes* would not apply. Because in
3 that case it was only harmless error to not
4 have allowed that expert to testify, only
5 because it was cumulative. And in this case,
6 as you heard Mr. Pusheck say, he didn't do any
7 forensic investigation. He didn't testify
8 about what codes apply. He didn't testify
9 about if our clients' work met the code or
10 didn't meet the code. He didn't testify about
11 the manufacturer's specifications. And those
12 are all things that Mr. Dawkins, as our
13 liability expert, will, in fact, depose.

14 One more point, Your Honor, and then
15 I'll be done. The question about us
16 unfortunately, by inadvertence, apparently
17 they did not get the photographs and the
18 notes. The fact that they didn't have that --
19 they have to prove that they were prejudiced
20 by that.

21 There was a case about that. It's
22 not selected for publication. But it is
23 *Michelin v. Des Morris*. And it's a federal
24 court case. It's 25 Fed.Appx. 155. And it
25 says -- I'm sorry -- pardon me, Your Honor.

1 I want to cite the case that actually was used
2 by the court. This is *Jenkins v. Pugh*. It's
3 391 S.C. 209, 705 S.E.2d 457. And it a Court
4 of Appeals 2010 case. In that case, the Court
5 held that -- this was failure to actually
6 disclose an expert. And the Court was --
7 counsel had to disclose an expert witness and
8 had to do a supplement. And the Court said
9 that the sanction of excluding a witness
10 should never be lightly applied. Before
11 excluding a witness as a sanction for
12 violating continuing duty to disclose
13 information, the trial court should ascertain
14 the type of witness involved, the content of
15 the evidence, the explanation for the failure
16 to name the witness in the answer to the
17 interrogatory, and the importance of the
18 witness's testimony and the degree of surprise
19 to the other party. The Court decided that
20 counsel had inadvertently failed to supplement
21 his interrogatory response, but that the
22 degree of surprise and prejudice to Pugh was
23 low. Because they found out and then they
24 were able to do it in camera, had time to do
25 it in camera, like a deposition and I think

1 they got to ask questions.

2 It's the same in this case, Your
3 Honor. We even have tonight now. If they
4 want to review documents, we'll even set up a
5 deposition if that's something that they want
6 to do. But what we don't want to have happen,
7 though, Your Honor, is we do not want this to
8 deny our liability expert. We are severely
9 prejudiced by that. We need to have him for
10 the crux of our case, as to whether there was
11 any liability on the part of Professional
12 Plastering.

13 THE COURT: Ms. Mahon, if he's so
14 important, what didn't you make sure all that
15 information was given and turned over?

16 MS. MAHON: Your Honor, I sincerely
17 apologize. I did not realize it had not been
18 until they had e-mailed back and they said --
19 and at that time, Your Honor, they didn't say
20 "we're going to move to exclude your witness."
21 They just said "you can't use these." And we
22 said "we're so sorry, we will not use these."

23 But here's the thing. He has been
24 designated as an expert on liability for over
25 a year. They could have deposed him, if they

1 wished to. It wasn't a surprise that we were
2 going to use him. It's not even a surprise
3 what he's going to testify to. I'm sure they
4 can tell you themselves the crux of what his
5 testimony will be. And if they had that
6 notice, they could have deposed him.

7 But, Your Honor, we will be severely
8 prejudiced if we cannot use him in order to
9 contest liability in this case.

10 THE COURT: All right, briefly.

11 MR. KIRCHNER: Very briefly, Your
12 Honor. In the *Watkins v. Ford Motor Company*
13 case that Ms. Mahon cited where that
14 particular expert admitted that he had no
15 professional experience, it's exactly what we
16 have here. Mr. Dawkins has admitted that he's
17 not a licensed general contractor. He's not a
18 licensed architect. He has this -- he calls
19 himself a construction consultant, but has no
20 certification for it. He has never, ever
21 designed a project like the one that is at
22 issue here. He's never designed anything in
23 coastal South Carolina, never anything in
24 Charleston County or anything in all of South
25 Carolina, for that matter. And again, he's

1 never been qualified as an expert in a court
2 of law in South Carolina.

3 Again, the crux of the rule on
4 experts is to determine whether or not that
5 witness will assist the trier of fact. You
6 have someone who is testifying in violation of
7 South Carolina law about technical issues. It
8 absolutely is prejudicial to our case, and
9 should not be allowed.

10 THE COURT: It's your position, Mr.
11 Kirchner, that he's not licensed in South
12 Carolina is a violation of South Carolina law
13 for him to testify?

14 MR. KIRCHNER: Yes, the statute
15 we read this morning says it's a misdemeanor
16 and he's guilty of a fine or imprisonment. If
17 he offers expert technical testimony, if he
18 evaluates buildings and construction plans for
19 clients with ---

20 THE COURT: Let me look at that,
21 Mr. Kirchner.

22 MR. KIRCHNER: Your Honor, I can
23 hand up my marked copy, if you like.

24 THE COURT: Ms. Mahon, do you agree
25 that that that's what the statute says?

1 MS. MAHON: I agree that's what the
2 statute says. I will point out, though, Your
3 Honor, *Baggerly*, 370 S.C. 362 precisely looked
4 at 40-22-20, the engineering licensing statute
5 which prohibits an individual from engaging in
6 the practice of engineering in South Carolina
7 without being registered and which includes
8 expert technical testimony in the deposition
9 and did not preclude out-of-state professional
10 engineering expert from testifying in other
11 states. Expert services were being offered to
12 a South Carolina jury not to the state's
13 citizens seeking traditional professional
14 engineering services. So the Court has
15 already looked at that statute and said "that
16 statute is not sufficient to bar an engineer
17 from testifying in South Carolina." And
18 that's what they're seeking to do.

19 Your Honor, what we would be
20 designating him as would be in the field of
21 professional engineering, where he has his
22 expertise, where he has his experience and
23 where his education is.

24 MR. KIRCHNER: And, Your Honor,
25 I'm not saying that this statute is the sole

1 basis for you to exclude him. It's all those
2 other factors I just mentioned.

3 THE COURT: All right. Let's be
4 back at 9:00 a.m. I have an appointment I
5 need to meet this evening. Come back at 9:00
6 a.m. and I'll rule on that. And I'll also
7 hear as to anything else. Who is your
8 rebuttal witness?

9 MR. KIRCHNER: Myles Glick.

10 THE COURT: All right, thank you.

11 MR. KIRCHNER: Your Honor, if I
12 may take up one matter. I understand you want
13 to have the evening to rule. But if you were
14 to admit him, I would like to take the
15 defendants up on their offer and have him for
16 a deposition.

17 THE COURT: He's available for a
18 deposition.

19 MS. MAHON: Yes, Your Honor.
20 Depending on admitting him, we will be glad to
21 make him available for the deposition tonight.
22 But we want to go ahead and do it.

23 THE COURT: Very well.

24 (COURT IN RECESS)

25 (TRANSCRIPT CONTINUED NEXT PAGE)

1 MAY 13, 2011 9:00 A.M.

2

3 THE COURT: Counsel, Mr. Kirchner
4 and Mr. Anderson, Ms. Mahon, be seated.

5 Counsel, just for the record, I've
6 received three notes from the jury this
7 morning. They are very concerned that they're
8 going to be extended till Monday. And one of
9 the jurors must be out of court by 5:00 p.m.
10 today. So just for scheduling I wanted to let
11 you know that. There has been some discussion
12 about one juror is performing a wedding
13 ceremony at 5:00 p.m. We have two alternates,
14 so it may be that we'll have a discussion if
15 we are close to let that individual go and put
16 an alternate in. All right?

17 The remaining matters are -- is
18 everyone ready? I see some missing seats.
19 Is everyone ready?

20 MR. LUCEY: We are, Your Honor.

21 THE COURT: The question was
22 whether or not Mr. Dawkins would be qualified
23 as an expert at this time based upon my review
24 of the voir dire -- in camera voir dire as
25 well as the background of the case. I am

1 declining to grant your request to have Mr.
2 Dawkins qualified as an expert in the areas of
3 engineering and construction. I am not
4 relying solely on the fact that he is not
5 licensed in South Carolina. I am taking all
6 of the information as a whole, in its
7 entirety, in order to make my decision.
8 I note your exceptions for the record.

9 Also, Mr. Dawkins, I understand that
10 there has already been some agreement that he
11 would not be testifying to or relying on the
12 photographs as well as the field notes which
13 have not been produced. Is that correct, Mr.
14 Anderson?

15 MR. ANDERSON: That is correct.

16 THE COURT: Is that correct?

17 MR. LUCEY: That's correct, Your
18 Honor.

19 MR. ANDERSON: Your Honor, if I
20 may, just add last night we extended and Mr.
21 Kirchner took up, he has had an interview with
22 Mr. Dawkins and was able to ask him whatever
23 questions he wanted. I believe it lasted
24 about thirty minutes or so. Mr. Kirchner's
25 one of the attorneys.

1 THE COURT: Thank you for making
2 the record very clear. And we had had some
3 discussions that you would make him available
4 for a deposition and, again, based upon my
5 ruling and the lateness of the hour yesterday
6 afternoon when we broke, and the earliness of
7 resuming Court, and the fact that this had
8 been set for a date certain substantially in
9 the past. I understand that the record is
10 clear.

11 Also, my one question -- I have
12 worked on the charges, and my one question is
13 as to defendants' request to charge number 17,
14 which is the negligent construction request to
15 charge. Does the plaintiff have an object to
16 that one?

17 MR. LUCEY: Yes, Your Honor.

18 THE COURT: We're shifting gears a
19 little bit, but I'm trying to get as much done
20 before 9:30 as we can. And, Mr. Anderson, the
21 reason why -- the law is correct that they
22 have not pled and did not plead negligent
23 construction. So I'm just requesting and
24 inquiring as to whether or not they request
25 for me to charge it.

1 MR. McCANTS: I'm John McCants on
2 behalf of Master Fire and Marine Insurance
3 Company. Do you want to take up my matter
4 after you finish with the case?

5 THE COURT: I will simply -- I can
6 take up your matter very quickly. I am not
7 going to entertain any suggestions as to
8 requests to charge or as to verdict forms from
9 parties not listed in the case and not parties
10 to the case. I will, out of an abundance of
11 caution, mark your request to charge and your
12 verdict form as a Court's exhibit. Thank you.

13 MR. McCANTS: Note my objection.
14 Thank you, Your Honor.

15 THE COURT: Thank you. Hold on one
16 second. One more time -- we need your name,
17 and if you could spell your last name for this
18 court reporter. I believe my previous court
19 reporter got everything. Stand right there.
20 If you'll just spell it.

21 MR. McCANTS: Your Honor, I'm John
22 McCants. I'm here on behalf of National Fire
23 and Marine Insurance Company. My last name is
24 M-C-C-A-N-T-S.

25 THE COURT: Thank you, Mr. McCants.

1 MR. MCCANTS: Thank you, Your Honor.

2 THE COURT: Mr. Kirchner?

3 MR. ANDERSON: Your Honor, I have
4 one other matter. We are going to need to
5 make a proffer of testimony of our witness,
6 Mr. Dawkins, and wondered when you wanted to
7 do that.

8 THE COURT: I'm trying to
9 accommodate the jury's schedule, because one
10 individual, who is our foreperson, that needs
11 to be out by 5:00 o'clock. So I'm trying --
12 we could -- while they deliberate you could
13 proffer Mr. Dawkins. That's my inclination.

14 MR. KIRCHNER: Your Honor, I just
15 want to make it clear for the record that what
16 I'm concerned with is the sequence, in that
17 the proffer has not been made prior to -- the
18 proffer is being made after the opportunity
19 for him to testify. And I wanted to make sure
20 that there was no waiver of any issue
21 concerning that.

22 THE COURT: The record will be very
23 clear as to what we're doing, and I will allow
24 him to be proffered at an appropriate time if
25 it does not delay the proceedings any further

1 and that it will not indicate a waiver of any
2 objections that you may have. Thank you, Mr.
3 Anderson.

4 MR. LUCEY: Your Honor, may I
5 approach and hand you our jury charges?

6 THE COURT: I have one question to
7 you is as to Defendants' 17. That's the only
8 question I have.

9 MR. LUCEY: We've reviewed that and
10 have no objection, Your Honor.

11 THE COURT: You have no objection
12 to including Defendant's 17. Is that correct?

13 MR. LUCEY: That's correct.

14 THE COURT: Thank you. All the
15 jurors are here. Are we ready to proceed?

16 MR. MCCANTS: Your Honor, I just want
17 to make sure what you're marking. Is it the
18 document I sent your law clerk in the e-mail?

19 THE COURT: The letter. It's a
20 stack of papers. And, Mr. McCants, I will
21 take that up. I'm really trying to get this
22 trial concluded to accommodate my jurors so
23 that we don't have to -- that I don't have to
24 sequester them. All right? Because they're
25 getting a little antsy.

1 MR. ANDERSON: Your Honor, we
2 intend to go ahead and call Mr. Dawkins who
3 will be able to testify as to his observa-
4 tions. I just wanted to make you aware of
5 that.

6 THE COURT: Thank you. Mr.
7 Dawkins, let's go ahead -- I'm going to put
8 you on the stand. Let's bring our jury in.
9 And, Mr. Dawkins, I remind you that you are
10 still under oath. I am not going to swear you
11 in. If you'll come in and have a seat on the
12 witness stand.

13 (WITNESS TAKES STAND)

14 THE COURT: Mr. Anderson, I'm going
15 to allow you just to review briefly with Mr.
16 Dawkins -- we don't need to go over all of his
17 -- who he is and all of that. So just the
18 preliminary, and I will allow leading
19 questions to get that through so that Mr.
20 Dawkins -- that the jury's familiar with who
21 he is.

22 MR. ANDERSON: Yes, Your Honor.
23 Thank you.

24 THE COURT: Mr. Kirchner, you and
25 Mr. Anderson may approach. Mr. Dawkins, be

1 seated.

2 (OFF RECORD BENCH CONFERENCE)

3 (JURY IN)

4 THE COURT: Thank you. Please be
5 seated. Ladies and gentlemen, this is Mr.
6 Dawkins. So we are continuing his testimony.
7 Mr. Anderson, I'm going to allow you to
8 refresh the jury's memory briefly on who Mr.
9 Dawkins is. Thank you.

10 MR. ANDERSON: Thank you, Your
11 Honor.

12 THE COURT: Mr. Dawkins is still
13 under oath from yesterday. Thank you.

14 MR. ANDERSON: Your Honor, may I
15 approach the witness?

16 THE COURT: You may.

17 MR. ANDERSON: We have culled
18 through Exhibits 19 and 20 and selected some
19 photos that would be easier if we could show
20 him the photo. Thank you.

21 CHRISTOPHER DAWKINS, being duly
22 sworn to tell the truth, the whole truth and
23 nothing but the truth, testified, as follows:

24 DIRECT EXAMINATION

25 BY MR. ANDERSON:

1 Q. Mr. Dawkins, could you just briefly tell
2 us again who you work for and what your
3 position is.

4 A. I work for Engineered Solutions
5 International, LLC. I practice as a
6 construction consultant and engineer.

7 Q. You are a licensed engineer in what
8 states?

9 A. In North Carolina and Georgia.

10 Q. And you've had an opportunity to visit
11 the Fenwick properties that are in this
12 litigation. Is that correct?

13 A. Yes.

14 Q. And during your visits did you have an
15 opportunity to observe the construction of the
16 wall sections and the test cuts that were
17 being made?

18 A. Yes. There were four days of cuts
19 between June 8th and July 11th of 2010. And I
20 counted up how many cuts the McGee cut. There
21 were about thirty-six cuts spread over a
22 number of buildings and a number of locations.
23 And I believe most of those -- I mean, of
24 those thirty-six, I think they reopened some
25 of the cuts that had been done by Mr. Glick

1 earlier. So we got to see both firsthand some
2 of the cuts that Mr. Glick had taken, plus new
3 cuts.

4 Q. Did you have an opportunity to observe
5 the primary weather barrier?

6 A. Yes.

7 Q. Could you tell us what a primary weather
8 barrier is?

9 A. Sure. It's the ---

10 MR. LUCEY: Objection, Your Honor.
11 I believe this calls for an opinion.

12 THE COURT: I'm going to allow
13 that. Thank you.

14 DIRECT EXAMINATION CONTINUED

15 BY MR. ANDERSON:

16 Q. Would you go ahead and tell us what a
17 primary weather barrier is?

18 A. A primary weather barrier is going to be
19 what's to ultimately stop water from getting
20 to the sheathing, the wall sheathing, plywood
21 or OSB and the framing behind that. It's what
22 stops water from getting into an interior
23 cavity of the wall.

24 MR. LUCEY: If I may renew my
25 objection. I think he testified about what a

1 water barrier's function is.

2 THE COURT: I'm going to allow
3 that. Thank you.

4 DIRECT EXAMINATION CONTINUED

5 BY MR. ANDERSON:

6 Q. I have handed some photos to you that
7 were taken by Mr. Glick. I would ask if you
8 can tell me if there's one there that gives
9 you -- that illustrates what the water barrier
10 was.

11 A. Sure. Let me look through them. Start
12 with photo 36 or page 36. Let me see if I can
13 find one a little better. A better one might
14 be two later, Page 95.

15 Q. Page 95.

16 A. Let's see.

17 Q. I'm sorry. I have two 95's.

18 A. Here we go. Cut 36 first to show the
19 view. Where that cut is taken is the lower
20 back corner of a window. You see there at the
21 lower part of the photograph is ---

22 MR. ANDERSON: Excuse me. May I
23 approach, Your Honor?

24 THE COURT: You may.

25 DIRECT EXAMINATION CONTINUED

1 BY MR. ANDERSON:

2 Q. I'm going to give you a laser pointer to
3 help. Please proceed.

4 A. Okay. Here -- what I'm pointing at here
5 is the wall sheathing which, in this case, is
6 an OSB wood product. And then right up here
7 is the weather barrier, the primary weather
8 barrier, which is Tyvek or -- it's a building
9 wrap. I don't believe this is Tyvek. It was
10 something like it.

11 Q. Tyvek being a brand name?

12 A. That's a brand name of a building wrap.
13 That's it. If you put up the next photo ---

14 Q. Ninety-five.

15 A. Which is 95. This is that same paper
16 right here. And then there's some aluminum
17 tape that was placed over that. It's part of
18 the system as well, starting with this paper
19 right here.

20 Q. Now, in the wall system that's been
21 described to us and that you observed, what
22 was the next layer going to the outside of the
23 building?

24 A. It's not -- this entire system was paper-
25 backed lath and Magna Wall stucco system that

1 went over the top of that. Or in some cases
2 on the buildings, HardiPlank siding. In some
3 locations over that white building paper
4 system was either HardiPlank siding at some
5 locations on the buildings or hard-coat
6 stucco.

7 Q. Can you tell the jury from this picture
8 what you observed the layering?

9 A. Sure. The white paper's been cut away.
10 I'll put it up here.

11 Q. Fifty-six.

12 A. Fifty-six, okay, sorry. Okay, good. The
13 top has the aluminum tape second coat. That
14 is the -- right at the bottom of this photo is
15 a piece of the white building wrap that has
16 been cut and pulled downward. So it was up
17 against the -- it was up against the -- at
18 this location, that's ordinary strand-board
19 sheathing right there.

20 Q. So that would be your first layer?

21 A. That's the first layer. And then we've
22 got aluminum tape that has tied this paper to
23 the -- that's the aluminum flange of the
24 window system at the sill of the window. And
25 then this is another peel-and-stick tape

1 called PermaBarrier which was installed later.

2 Q. So in this picture we have how many
3 layers if you can tell?

4 A. If you count the ---

5 Q. Please start with the wood and work your
6 way out.

7 A. Okay. Wood is one. The building paper
8 is two. The aluminum tape is three. And then
9 the PermaBarrier is four.

10 Q. Now, is there any -- do you see any of
11 paper-backed lath?

12 A. No, that would be over the top of all
13 this.

14 Q. All right. Could you tell us what you
15 observed in these pictures?

16 A. Sure. This -- you can see the paper-
17 backed lath and the stucco system here. This
18 is the stucco and paper-backed lath that's
19 being cut away. There's where you see the
20 Magna Wall stucco, right where I'm pointing
21 the pointer. They've cut this. So we've got
22 black paper for the metal lath that that
23 stucco's embedded into. They've cut that
24 away. And so he's pulling that cut up. And
25 then this is the work over here that's the

1 same location. And there again is the white
2 building wrap, the layer under the paper-
3 backed lath with the stucco.

4 Q. Do you know in this location whether the
5 building wrap extends below the paper-backed
6 lath?

7 A. This paper ---

8 Q. Yes.

9 A. --- does extend below. It goes on down
10 the wall.

11 Q. How extensive is the application of the
12 building wrap?

13 A. It's very extensive. It covers the
14 entire wall. It turns into the windows. It
15 turns into the window openings, the square
16 openings that the window fits in. It turns
17 into those and ties in with the floor systems,
18 where there are floor systems. And it ties
19 into the roof system -- to the flashing to the
20 roof.

21 Q. Mr. Dawkins, I'm going to ask you to
22 speak up a little bit or into that mic.
23 Because it doesn't sound like you're being
24 picked up.

25 A. I'm not sure if it's on, but maybe it's

1 just the flow.

2 Q. But please speak up.

3 A. I will.

4 Q. We're fighting with the projector here.

5 A. Okay, very good.

6 Q. So how -- does the building wrap extend

7 the entire height and length of the building?

8 A. Yes.

9 Q. And it goes from the roof to the ground?

10 A. It goes essentially from the roof to the

11 ground. And it also turns into the rough

12 openings at the windows in a proper manner,

13 and some of that was done improperly. But

14 that was done by North Florida Framing. But

15 the answer is yes. It goes from floor to

16 ceiling, and it ties into any opening in the

17 wall.

18 Q. Did you have an opportunity to make some

19 general observations of the entire buildings?

20 Can you give us what you observed about the

21 stucco surfaces themselves?

22 A. The stucco system?

23 Q. The stucco surfaces.

24 A. I'm having a hard time hearing you.

25 Q. Would you describe for us what you saw in

1 the field of the wall of the stucco?

2 A. Sure.

3 Q. And I would ask if you mind looking at
4 photograph page 12 or two, I'm sorry.

5 A. Yes. That shows a typical -- typical
6 condition from a distance albeit of the wall
7 system. This is stucco. I believe this
8 portion of the facility is all stucco. I
9 don't see any HardiPlank siding in any of
10 these photos.

11 Q. And what were your observations of the
12 condition of the stucco while you were there?

13 A. It was in good condition, looked good
14 from the exterior, looks great.

15 Q. Were there any cracks?

16 A. I don't remember there being any cracks
17 at this location. We did see a few cracks in
18 a few locations, but not specifically here.

19 Q. Where did you see those cracks?

20 A. Typical cracks occur where there's water
21 intrusion under the wall. That's the wrong
22 way to put it -- essentially, because the wood
23 OSB ---

24 MR. LUCEY: Objection, Your Honor.

25 This is clearly an expert opinion.

1 THE COURT: I'm going to sustain
2 that. He may testify as to his observations.
3 He's a lay witness. Thank you.

4 MR. ANDERSON: Thank you, Your
5 Honor.

6 DIRECT EXAMINATION CONTINUED

7 BY MR. ANDERSON:

8 Q. Please tell us what you observed about
9 the cracks.

10 A. Cracks typically occurred where there was
11 damage to the sheathing, a staining and rot of
12 the sheathing below.

13 Q. And you were able to observe that through
14 the cuts that were made?

15 A. That's correct.

16 Q. And did you find those essentially in
17 relationship to corridors of the building and
18 the windows?

19 A. Basically, the cracks typically occurred
20 below some of the roof-to-wall terminations,
21 where there was flashing issues, and then down
22 below, at the lower corners, or around corners
23 of windows where there was also -- once the
24 cut was pulled, damaged sheathing.

25 Q. And were you able to observe any

1 relationship between the OSB or plywood wood
2 sheathing of the building and the thickness of
3 the stucco?

4 A. No. Maybe I don't understand your
5 question.

6 Q. Was there any relationship between the
7 condition of the wood sheathing and the
8 thickness of the stucco?

9 MR. LUCEY: Objection, Your Honor.
10 It's both leading and calling for a conclusion
11 of a lay witness.

12 THE COURT: Sustained.

13 DIRECT EXAMINATION CONTINUED

14 BY MR. ANDERSON:

15 Q. Do you have a photo that would illustrate
16 the Z-flashing at the head of the windows?

17 A. Yes.

18 Q. Could you tell which one you would like
19 to use for that.

20 A. I think number seven -- page 74.

21 Q. Is that the photo -- (indicating)?

22 A. Yes.

23 Q. And can you please tell the jury what you
24 observed concerning the assembly of that area
25 -- what your observations are of that area,

1 what are we seeing there?

2 A. We're seeing the main building wrap,
3 primary building wrap over the OSB sheathing.
4 And we're seeing a piece of flashing over the
5 head of the window. This is at the top right
6 corner of a window. And that's the flashing
7 that's called for and supposed to be
8 installed. It should be lapped behind ---

9 MR. LUCEY: Your Honor, objection.
10 He can't talk about what should be done.

11 THE COURT: I'm going to sustain
12 the objection. He can testify as to what he
13 observed as a lay witness. Thank you.

14 DIRECT EXAMINATION CONTINUED

15 BY MR. ANDERSON:

16 Q. Just give me what you observed.

17 A. What you're seeing here is the reverse
18 lap of the sheathing.

19 Q. Mr. Dawkins, if you can please just tell
20 us without a conclusion.

21 A. I understand. I'm trying hard to do
22 that. It's on the front side of the building
23 wrap.

24 Q. All right. And when we say "Z-flashing,"
25 what are we talking about?

1 A. We're talking sort of about how that
2 piece of flashing is formed. It looks like --
3 there's a little lip here and then there's a
4 horizontal side and then there's a vertical
5 from that. When you put all those together it
6 looks a little bit like a Z.

7 Q. So if you look at the end of it, it looks
8 like a Z?

9 A. Correct. It would look like a strange Z.

10 Q. Tell us how you interpret that fit ---

11 THE COURT: Hold on one second. Do
12 you need some water?

13 JUROR: I have water. Could I just
14 step out one second?

15 THE COURT: All right. Do not
16 begin your deliberations. Please rise for the
17 jury.

18 (JURY OUT)

19 THE COURT: Please be seated. Mr.
20 Anderson, I apologize. You may continue.

21 MR. ANDERSON: Thank you, Your
22 Honor.

23 DIRECT EXAMINATION CONTINUED

24 BY MR. ANDERSON:

25 Q. I believe that the question pending dealt

1 with what you observed and how the Z-flashing
2 fits in relationship to the window.

3 A. That's correct. This piece of Z-flashing
4 is on the front side of the building wrap.

5 Q. Tell us what you observed as far as the
6 assembly of that.

7 A. Well, there was aluminum tape covering
8 that, and then there was a second layer of
9 tape over that aluminum tape. And then
10 essentially over that was the paper-backed
11 lath with the stucco embedded into it which
12 you're seeing here. You also have a build-out
13 of stucco at this location, a thickened
14 portion of stucco at that location. And, if I
15 may, behind this -- if you pull this back --
16 this Z-flashing back, the paper was tucked
17 into the rough opening.

18 Q. And you were able to observe that?

19 A. I was able to observe that at several
20 locations.

21 Q. You have made reference to the aluminum
22 tape several times.

23 A. Yes.

24 Q. Where would we find the aluminum tape?

25 A. The aluminum tape appeared to be applied

1 at the same time as the -- or closely at the
2 same time as the paper. In other words, the
3 building wrap was put up first, tied into the
4 openings at the jambs. Also tied into the
5 opening at the head, and then aluminum tape
6 was placed over those -- over those nailing
7 flanges. We've got a window here.

8 Q. We will do that. Is there any diagram or
9 drawing that may help illustrate what you
10 observed?

11 A. There are two that I found. One is in
12 the General Aluminum installation instructions
13 and the other is in the drawings.

14 MR. KIRCHNER: Your Honor, may we
15 approach?

16 THE COURT: You may.

17 MR. KIRCHNER: I have an
18 objection.

19 (BENCH CONFERENCE)

20 THE COURT: Sustained.

21 MR. ANDERSON: Your Honor, my
22 next step would be to use this particular
23 window as an illustration of some observations
24 made by Mr. Dawkins. I anticipate that there
25 may be an objection to this.

1 THE COURT: Mr. Kirchner, are you
2 going to have some objection?

3 MR. KIRCHNER: It looks like it.

4 THE COURT: Counsel approach.

5 (BENCH CONFERENCE)

6 THE COURT: You may continue.

7 MR. ANDERSON: Thank you, Your
8 Honor. May the witness step down?

9 THE COURT: If he will maintain an
10 appropriate voice level so that members of the
11 jury can hear him.

12 MR. ANDERSON: Actually, I was
13 going to show this in front of the jury, if I
14 may.

15 THE COURT: Why don't you move, Mr.
16 Anderson, closer to Mr. Dawkins and both of
17 you speak fairly loudly.

18 DIRECT EXAMINATION CONTINUED

19 BY MR. ANDERSON:

20 Q. Mr. Dawkins, is this a window that is
21 similar to the ones at the project?

22 A. Yes, similar.

23 Q. And I would ask you, if you can -- if you
24 can step down right in front.

25 THE COURT: If you need to step

1 down.

2 THE WITNESS: (Complies)

3 DIRECT EXAMINATION CONTINUED

4 BY MR. ANDERSON:

5 Q. And if you could please point out to the
6 jury where the stucco application contacted
7 the window area or what you observed of the
8 stucco?

9 A. Right. The only place the stucco really
10 touched this window was in this little cavity
11 right here on both side of the window. If you
12 turn it around you see this little cavity on
13 both sides. That's about the only place the
14 stucco touched it, because everything else --
15 there's the Z-flash up at the top of the
16 window. It's making contact with the Z-flash
17 at the bottom. And it may be making a little
18 bit of a contact -- it is making a little bit
19 of contact right here at the base of the
20 window. But there's Z-flashing in between it
21 at the top, and then on all the faces there's
22 tape.

23 Q. When you say "faces" ---

24 A. I'm sorry. Faces of this nailing flange,
25 because this nailing flange where my hand is

1 right now would be where the OSB sheathing
2 would be in that picture. So this is
3 basically put in a hole, if that's the right
4 way to put it. If there's a hole the size of
5 this window, it would be put in.

6 Q. Thank you. Mr. Dawkins, were you able to
7 observe the assembly or the wall assembly
8 below the HardiPlank?

9 A. Yes.

10 Q. Can you describe for us what that wall
11 assembly -- how it was -- excuse me, could you
12 please describe the walls, starting with the
13 OSB?

14 A. Sure. From the OSB out you had the same
15 building wrap that was behind -- that we
16 talked about already and the aluminum tape
17 around the windows also.

18 Q. And was there anything between the Hardi-
19 Plank and the building wrap or the aluminum
20 tape?

21 A. No. The HardiPlank was attached over
22 those two things.

23 Q. If you would look at picture 88.

24 A. Yes, I can see that pretty well. I had
25 photo 88 in here. There's two 88's. Both of

1 them show similar views.

2 Q. Could you please tell us what we're
3 observing and what you observed in this
4 picture?

5 A. What we're observing in this picture are
6 the OSB, the paper's been cut away and it's
7 flopped down. That's paper that's been just
8 pulled down. And then these are two pieces of
9 HardiPlank siding that have been cut. There's
10 also a disparity -- I don't know -- I hope
11 everybody can see it, but there's some gaps
12 and openings in the sheathing in this
13 particular location and the sheathing is not
14 all flush, if that's the right way to put it.

15 Q. So there's a disparity in the height in
16 the sheathing?

17 A. There's some disparity in the openings
18 and the sheathing is not planed against the
19 way. There may be a better photo.

20 Q. Let me ask you to look at the other 88,
21 if you could.

22 A. I like the other 88, because you can see
23 quite -- you can see more wall. Again,
24 there's a window. There's some trim around
25 the window. There's sort of like two-by trim

1 around the window. And then here is the
2 building wrap that we've been talking about
3 and there is the aluminum tape which has been
4 taped over the nailing flange of the window we
5 were looking at a minute ago, or a similar
6 window that we were looking at a minute ago.
7 So that tape's essentially taping the building
8 wrap to the nailing flange that's on the face
9 of the OSB. Actually, it's on the face of the
10 building wrap, excuse me.

11 Q. There appears to be a transition into a
12 stucco wall below. Is that correct?

13 A. That's correct.

14 Q. And were you able to observe how below
15 the HardiPlank and the stucco, what the wall
16 assembly was at that transition?

17 A. The wall assembly -- the OSB behind both
18 -- I'm sorry. There's OSB sheathing behind
19 both claddings, whether it be hard-coat stucco
20 below or HardiPlank above. And then the
21 building wrap is covering all of those. The
22 building wrap doesn't care what cladding goes
23 over it. So it's over the whole wall, and the
24 claddings are on the outside of the building
25 wrap.

1 Q. Did you observe any difference between
2 the window assembly in the HardiPlank wall and
3 the window assembly in the stucco wall?

4 MR. KIRCHNER: Objection, Your
5 Honor. That calls for -- first of all, it's
6 leading. It also calls for an opinion.

7 THE COURT: Sustained.

8 DIRECT EXAMINATION CONTINUED

9 BY MR. ANDERSON:

10 Q. What did you observe was the assembly
11 around the windows under the stucco wall?

12 A. The windows under the stucco wall would
13 have been similar to this window. The
14 difference would be that there was a second
15 layer of the peel-and-stick tape that was
16 wrapped around these windows. And then the
17 paper-backed lath and stucco would be placed
18 over that. So it started like this. But then
19 additional materials were added to it.

20 Q. And then the HardiPlank wall, what
21 additional materials were added?

22 A. None. That's what the HardiPlank walls
23 looked like.

24 Q. In the cuts that you observed did you
25 observe any damage below at the HardiPlank?

1 Did you see any cuts to the HardiPlank that
2 demonstrated damage?

3 A. Yes.

4 Q. And is there an illustration of that in
5 the pictures?

6 A. Well, I think the best one I can find
7 fast is 96.

8 Q. All right.

9 A. Ninety-six is below -- you can see the
10 window sill above. That's the sill trim above
11 the window, and this is sheathing which is
12 obviously missing due to the cut. And then
13 here is the sheathing and it's water-stained
14 to indicate that it's got wet. It's also got
15 openings that we talked about a minute ago --
16 another view of the issues with the sheathing
17 where it possibly not being in the same plane,
18 and you can see openings and gaps in the
19 sheathing.

20 Q. Did you observe other cuts around windows
21 or any place else where the HardiPlank also
22 demonstrated damage?

23 A. The answer is yes. That's a representa-
24 tive photograph, but the answer is yes.

25 Q. I show you what's Exhibit Number 19,

1 Plaintiffs' Exhibit 19, photo number 66, and
2 ask you if that is something that you would
3 have observed under the HardiPlank?

4 A. I believe so. I've got that photo up
5 here. I've got them all out of order. I
6 apologize. Do you have, by chance, got the
7 number on that?

8 Q. It's 116.

9 A. Okay.

10 Q. Can you, from the screen?

11 A. I was trying to find it. I can tell
12 that's a piece of wood trim. I just can't
13 tell what's --- Yes, if you put it back up,
14 I've found it now. Those are HardiPlank laps
15 right there that I can see very well. I saw
16 those cuts. That's lapped HardiPlank. That's
17 another lapped HardiPlank below it. So, yes,
18 that's consistent with other locations we saw
19 during the cuts back in June of 2010.

20 Q. Now, as far as general locations within
21 the building, was there any difference -- did
22 you observe any difference between the
23 location of this type of damage in the
24 HardiPlank and the location of this type
25 damage in the stucco?

1 MR. KIRCHNER: Objection, Your
2 Honor. Number one, it's leading and it calls
3 for an opinion.

4 THE COURT: Sustained.

5 DIRECT EXAMINATION CONTINUED

6 BY MR. ANDERSON:

7 Q. The damage that you observed, where did
8 you observe the damage under the HardiPlank?

9 A. At window corners, below window corners
10 and in some of the locations where the roof
11 wall -- the roofs and walls tied together.

12 Q. And where did you observe the damage
13 below the stucco?

14 A. Also at window corners, the stucco, and
15 then also at roof-to-wall terminations, and
16 then also a third location where the balconies
17 -- where the second-story balconies and
18 breezeways terminated with walls.

19 Q. Where did you see damage to the wood
20 structure in relationship to the other wall
21 components that you've described?

22 A. There's damage ---

23 Q. Please speak up.

24 A. Sure. The damage was on the OSB
25 sheathing or, in a few cases, some framing

1 behind the OSB sheathing. That was behind the
2 building paper, the white building paper,
3 which was that first layer we talked about
4 earlier.

5 Q. The primary building wrap?

6 MR. KIRCHNER: Objection, Your
7 Honor. Calls for an opinion, what is primary
8 versus secondary.

9 THE COURT: Sustained.

10 MR. ANDERSON: May we approach,
11 Your Honor?

12 THE COURT: You may.

13 (BENCH CONFERENCE)

14 DIRECT EXAMINATION CONTINUED

15 BY MR. ANDERSON:

16 Q. Mr. Dawkins, did you have an opportunity
17 to observe the base of the wall, the stucco
18 wall?

19 A. Yes.

20 Q. And could you please describe what you
21 were able to see at the base of the stucco
22 wall?

23 A. We're talking about outer walls, not the
24 ones that make contact with the slabs?

25 Q. That's correct, that's the outer walls.

1 MR. KIRCHNER: Your Honor, we
2 have an objection. May we approach?

3 THE COURT: Yes.

4 (BENCH CONFERENCE)

5 DIRECT EXAMINATION CONTINUED

6 BY MR. ANDERSON:

7 Q. Mr. Dawkins, would you please describe,
8 as opposed to labeling -- do not name the
9 piece that you may have seen, merely describe
10 what you saw.

11 A. Okay.

12 Q. There was a piece of metal accessory at
13 the base of the walls. In some cases it was
14 -- it did not have holes in the bottom of it.
15 In other cases, it did. I checked at a number
16 of locations using a mirror to put up under
17 the accessory or up under where the stucco was
18 stopped above the ground along the edges of
19 the building slabs. So there's a gap maybe of
20 four to six inches below where the stucco
21 stops and then there's dirt. You're basically
22 looking at the concrete, the edge of the
23 concrete slab at those locations. So I stuck
24 a mirror up under and looked under at a lot of
25 places throughout the buildings. At some

1 places we had no holes in the bottoms -- on
2 the bottom of that metal accessory. In a
3 number of other locations, we did have holes
4 maybe every two or three inches along the
5 bottom.

6 Q. Were you able to make any particular
7 observations concerning the contact of the
8 stucco to the flashing at the header of the
9 window?

10 A. Yes.

11 Q. Again, please do not use any technical
12 terminology. But sort of describe the
13 condition which you saw.

14 A. The condition was that there was a
15 thickened portion of stucco typically at the
16 heads of the windows, the tops of the windows.
17 And the plaster that made up that thickened
18 portion came into contact with the Z-flashing
19 that we looked at in the photos a few minutes
20 ago. It was terminated flush with the
21 horizontal portion of that Z-flashing.

22 Q. And did you observe any condition in the
23 stucco, in its contact with what you've
24 described or what you call the flashing or the
25 metal piece at the top?

1 A. I'm sorry. Might you repeat that
2 question?

3 Q. Okay. What, if anything, were you able
4 to observe about the area where the contact
5 between the stucco -- the hardened stucco, and
6 the piece of metal you called the Z-flashing
7 -- what did it look like?

8 A. It was just basically a termination. So
9 it was a little termination of plaster with
10 metal at that location.

11 Q. Thank you. Mr. Dawkins, would you answer
12 any questions that counsel for the plaintiffs
13 may have for you?

14 THE COURT: Mr. Kirchner?

15 CROSS EXAMINATION

16 BY MR. KIRCHNER:

17 Q. Mr. Dawkins, I'm just going to talk to
18 you really briefly about your observations.
19 This is photograph 116 that Mr. Anderson asked
20 you about. I believe you testified to the
21 jury that this is HardiPlank and that you can
22 see laps of HardiPlank underneath it?

23 A. Right.

24 Q. Is that correct? That was your
25 testimony?

- 1 A. It was.
- 2 Q. Let's go back to photograph 115 that's
- 3 just before that.
- 4 A. Okay.
- 5 Q. So you see the same laps of HardiPlank?
- 6 A. Yes, I do.
- 7 Q. What's that that's behind it?
- 8 A. That's behind stucco.
- 9 Q. So it's not behind HardiPlank, is it?
- 10 A. No, it wasn't. I didn't see that photo
- 11 before.
- 12 Q. Let's talk again about your observations.
- 13 Did you not observe sixty test cuts while you
- 14 were out at Twelve Oaks that had damage behind
- 15 the stucco?
- 16 A. I've got a list I made of the cuts, where
- 17 they were. But I don't have sixty on that
- 18 list. Some of those may be, you know -- we
- 19 were at a top right corner of a window, they
- 20 cut here, and then they drilled hole and
- 21 drilled another hole. I didn't call that
- 22 three cuts. So they cut a lot of places.
- 23 Q. You said you made a list of those
- 24 observations?
- 25 A. I did make a list of those observations.

1 MR. SEQUI: May I approach the
2 witness, Your Honor?

3 THE COURT: You may.

4 CROSS EXAMINATION CONTINUED

5 BY MR. SEQUI:

6 Q. Is that the list that you made?

7 A. That is the list I made.

8 Q. In that list you have, on the left-hand
9 column, the test cuts that you observed,
10 correct?

11 MR. ANDERSON: I have an
12 objection, Your Honor.

13 THE COURT: What's the basis of
14 your objection? What's the basis, Mr.
15 Anderson?

16 MR. ANDERSON: The basis is on
17 one of your earlier rulings.

18 THE COURT: Approach.

19 (BENCH CONFERENCE)

20 MR. SEQUI: May I approach the
21 witness, Your Honor?

22 THE COURT: You may. Ladies and
23 gentlemen,, that last question has been
24 withdrawn. Thank you.

25 CROSS EXAMINATION CONTINUED

1 BY MR. SEQUI:

2 Q. Do you remember how many observations you
3 made of the test cuts with damage behind
4 sheathing?

5 A. Say that again, please.

6 Q. Do you recall how many observations you
7 made of test cuts that had damage to
8 sheathing?

9 A. No, I don't. I can't do that from
10 memory.

11 Q. Do you know if there was sixty or more?

12 A. I have no idea. I can't.

13 MR. SEQUI: That's all. Thank you.

14 THE COURT: Mr. Anderson.

15 MR. ANDERSON: We have no further
16 questions, Your Honor.

17 THE COURT: Mr. Dawkins, you may
18 step down. Call your next witness, Mr.
19 Anderson.

20 (WITNESS STEPS DOWN)

21 MR. ANDERSON: Your Honor, I
22 believe that that concludes our case.
23 However, prior to closing -- I believe that
24 the plaintiffs may have another witness. But
25 prior to actually closing our case, I would

1 like the opportunity to look at the exhibits.

2 THE COURT: I will allow you to,
3 just for the purposes of the record, you will
4 have time to make sure that all of your
5 exhibits have been properly admitted into
6 evidence and you are reserving all motions and
7 matters. I understand plaintiffs have a
8 rebuttal witness. Is that correct?

9 MR. SEQUI: That's correct, Your
10 Honor.

11 THE COURT: Thank you. And there's
12 one rebuttal witness. Is that correct?

13 MR. SEQUI: Just one, Your Honor.

14 THE COURT: Ladies and gentlemen,
15 at this time the defense has rested. The
16 plaintiff has an opportunity to present a
17 rebuttal argument. At this time they have
18 chosen to call one additional witness in their
19 rebuttal.

20 MR. SEQUI: The plaintiff calls
21 Myles Glick, architect, to the stand, Your
22 Honor.

23 THE COURT: Thank you. Mr. Glick,
24 I remind you that you're still under oath from
25 your previous testimony earlier in the week.

1 Please come forward and take the witness
2 stand.

3 (WITNESS TAKES STAND)

4 MYLES GLICK, having been previously
5 sworn, continued under his oath and testified,
6 as follows:

7 DIRECT EXAMINATION

8 BY MR. SEQUI:

9 Q. Good morning, Mr. Glick. I want to go
10 through a few points and I'm going to try to
11 be quick. First I want to ask you to look at
12 Exhibit 3.

13 MR. SEQUI: May I approach the
14 witness, Your Honor?

15 THE COURT: You may.

16 DIRECT EXAMINATION CONTINUED

17 BY MR. SEQUI:

18 Q. Mr. Glick, would you identify Exhibit 3
19 for us, please?

20 A. This is the contract between the
21 architect and the builder.

22 Q. Say again?

23 A. I'm sorry. It's the subcontractor's
24 contract between Professional Plastering and
25 Summit, the general contractor.

1 MR. ANDERSON: Your Honor, may we
2 approach?

3 THE COURT: You may.

4 (BENCH CONFERENCE)

5 DIRECT EXAMINATION CONTINUED

6 BY MR. SEQUI:

7 Q. Mr. Glick, would you turn to the latter
8 part of that Exhibit 3, under Exhibit D which
9 is the scope of work for the stucco applicator
10 in this case. Specifically, I want to ask you
11 about line -- or paragraph numbers four and
12 seven, please.

13 A. You said page 19?

14 Q. Yes, sir. If you would read for us --
15 and I want to get you to the bottom of the
16 page, because that's why I'm asking you to
17 read it -- number four for us, please.

18 A. (Reading): "All parties hereby agree
19 that the subcontractor is the party to install
20 all appropriate flashing and tape around
21 window and door openings or garages."

22 Q. I hand you an actual picture, number 74,
23 1810, including number seven, which is also on
24 the screen. Could you, based on the part of
25 the contract you just read -- can you show us

1 what, first, around this window, what the tape
2 is referring to, please? Where do we see tape
3 in that picture?

4 A. The tape is on the flashing at the head
5 of the window on part of the Z-flashing.

6 Q. And could you show us in that same
7 picture where the flashing is that's
8 referenced in scope of work for the stucco
9 applicator?

10 A. The flashing is immediately in front of
11 the tool where the picture is right now.

12 Q. And also if you could go to paragraph
13 seven of that same part of Exhibit 3 and read
14 that for us, please.

15 A. (Reading): "All parties hereby agree
16 that subcontractor shall furnish and install
17 a six-inch-wide self-adhering membrane
18 permabarrier sealing tape as manufactured by
19 W. R. Grace & Company at all windows which are
20 to be stucco encased."

21 Q. Something similar to what we just read
22 also done behind the HardiPlank portions of
23 the buildings at Twelve Oaks?

24 A. Correct.

25 Q. And who would have been responsible for

1 this work behind the HardiPlank?

2 A. According to this contract, it would be
3 somebody else. Number seven, to put all the
4 tape on behind the stucco-encased parts.

5 Q. Does this indicate for the stucco
6 portions of the buildings that Professional
7 Plastering was responsible for the tape and
8 flashing in those areas?

9 A. Yes, it does.

10 Q. Thank you.

11 MR. SEQUI: Also, Your Honor ---
12 may we approach the Bench, Your Honor?

13 THE COURT: You may.

14 (BENCH CONFERENCE)

15 THE COURT: Move on, Mr. Sequi

16 DIRECT EXAMINATION CONTINUED

17 BY MR. SEQUI:

18 Q. What is the standard range of
19 contractor's fees that you see as far as an
20 overhead line item or a profit line item for
21 projects of this nature here, in the
22 Charleston area?

23 A. It's been my experience through about
24 twenty of these type of replanings that it's
25 approximate ten percent profit and ten percent

1 overhead.

2 Q. Okay. Is that pretty much an industry
3 standard for here?

4 A. I'd say it was an industry standard for
5 an average. There's some higher and some
6 lower because that's the nature of this
7 process of recladding. It's probably three
8 times as difficult as building the buildings
9 from scratch.

10 Q. Thank you. Also, I believe in the
11 estimate in your scope of work in this case
12 there was a ten percent contingency that was
13 referenced. Is that something that's supposed
14 to be broken out by line item, or is that
15 project-based?

16 A. The way we do these type of budgets is
17 that we take ten percent of the overall
18 project budget. It's clearly several line
19 items, such as the wide sheathing or the
20 improper sheathing installation or the
21 improper stucco installation in this case.
22 Some will go up. Some will go down. So we
23 take an average of ten percent across the
24 board and you don't deal with line items.
25 It's not practical.

1 Q. So that's for things beyond the
2 allowances?

3 A. Correct. It's very standard. I have
4 seen -- again, depending on the type of damage
5 it could be 15 percent.

6 Q. Is there generally always something
7 unexpected in a construction project?

8 A. In this type of project, absolutely.

9 Q. Thank you. Have the buildings at issue
10 in this case been subjected to a designed wind
11 event?

12 A. Not since Hurricane HUGO.

13 Q. Hurricane HUGO was in 1989?

14 A. Yes, sir.

15 Q. There's also been some reference or
16 discussion in this trial about what makes up
17 the primary drainage plane behind the stucco
18 at Twelve Oaks, whether it's the wrap or
19 whether it's the black paper that's part of
20 the paper-backed lath system with the stucco.
21 What is your opinion as to what the primary
22 drainage plane for the stucco courses of the
23 buildings that are at issue in this case?

24 A. The primary plane would be the felt at
25 the back of the lath. That is the first

1 primary surface that the water hits if it gets
2 beyond the stucco. So it has to the primary
3 water management system.

4 Q. I'm going to ask you to draw your
5 attention to the photo that we've been
6 speaking of primarily because it deals with
7 the missing kickout flashing. For
8 identification purposes, we show the test hole
9 on six, exposed building wrap, October 25,
10 2008. It's also the same picture up there.
11 I'm going to ask you, for purposes of what
12 this building wrap as shown in this photograph
13 -- what's it made of? How's it constructed,
14 in other words?

15 A. It's a chemical-based man-made product.
16 It's called Tyvek. It's the white material
17 that's on the buildings. It comes as molded
18 sheets. I'm not sure of the exact chemical
19 make-up of it, but it's what appears in that
20 photograph where my arrow is.

21 Q. It appears to me like it's woven.

22 A. It's ---

23 MR. ANDERSON: Objection,
24 leading.

25 THE COURT: Hold on one second, Mr.

1 Glick. Your objection is leading?

2 MR. ANDERSON: Yes.

3 THE COURT: Please rephrase your
4 question. Sustained as to leading.

5 DIRECT EXAMINATION CONTINUED

6 BY MR. SEQUI:

7 Q. Based on what you see in this picture is
8 there any indication of how this product is
9 made?

10 A. It is a woven product and that indicates
11 that it's coming apart, and there's no felt as
12 seen in back of the stucco. You're actually
13 looking at the sheathing right above it.
14 There's basically a hole in the building. And
15 as was said yesterday in the testimony that I
16 heard in the latter part of the afternoon, the
17 subcontractor that comes on top of the
18 previous subcontractor assumes the responsi-
19 bility. And the stucco man was the last
20 person to see that hole.

21 Q. Does the stucco, in your opinion, need to
22 be removed and replaced in the breezeway
23 corridors at Twelve Oaks?

24 A. Absolutely. The test calls that I took
25 indicated that the stucco insulation is

1 against the building code. It references the
2 insulation methodologies. It is a primary
3 cause of the damage to these buildings. If
4 the lath is not embedded like I discovered in
5 my holes in the corridors, you have -- likely,
6 there's an excellent opportunity during a wind
7 event, hurricane-force winds with negative and
8 positive pressure, literally ripping the
9 stucco off the building and having a very
10 dangerous situation.

11 Q. There's been an issue about whether these
12 breezeways are totally protected. What
13 happens when the wind's blowing in a
14 breezeway?

15 A. It basically is a wind tunnel, and you
16 have negative and positive pressure where the
17 tunnel's connected at both ends. And it
18 becomes -- it basically will suck the finish
19 off of buildings, which did happen with
20 different cladding systems during Hurricane
21 HUGO.

22 Q. What happens when we have less than a
23 designed wind event, but maybe a wind event
24 like we had two nights ago when we had that
25 deluge and the bottom dropped out, as they say

1 -- when the wind's whipping through these
2 breezeways, how much moisture in your thinking
3 gets on the walls?

4 MR. ANDERSON: Objection, Your
5 Honor. May we approach?

6 THE COURT: You may.

7 (BENCH CONFERENCE)

8 THE COURT: Overruled. Thank you.

9 DIRECT EXAMINATION CONTINUED

10 BY MR. SEQUI:

11 Q. Mr. Glick, I don't think I heard your
12 answer. Did you answer?

13 A. Could you repeat the question?

14 Q. When we have the -- not a designed wind
15 event, but just a good old South Carolina
16 thunderstorm like we had two nights ago, where
17 you've got wind and a lot of rain coming down
18 at the same time, do the portions of the
19 stucco that's within these breezeway
20 corridors, do you have an opinion as to
21 whether or not they'd get significantly wet?

22 A. It all depends on the direction of wind
23 and the direction of rain and the pressures
24 created during the wind event. They could get
25 wet or they could not get wet. It depends on

1 -- in a hurricane situation, which is more
2 comprehensive than what we had two nights ago
3 -- I felt that at my house at West Ashley --
4 it probably wouldn't do much in a normal
5 event, a wind event. We can't forget the fact
6 that I have no confidence in this stucco
7 system. It's on wrong everywhere. It's a
8 code violation. It cannot stay on the walls.
9 Q. Thank you. Mr. Glick, do you have an
10 opinion as to whether or not the stucco needs
11 to be removed and replaced on buildings ten,
12 eleven and twelve at Twelve Oaks?
13 A. Yes. All the buildings appear to be
14 built the exact same way, based on my
15 destructive testing and my visual observations
16 of the buildings that I did test. It was
17 consistent and the problems were pervasive.
18 There's actually no reason why all of a sudden
19 one building may be built differently. And
20 number twelve is really interesting because
21 number twelve is an all-stucco building. And,
22 remember, as I pointed out and you can see in
23 DT number twelve when you fully look at the
24 picture, there's a disconnect between the band
25 at the first floor level and the stucco.

1 There's a joint at every single building at
2 Twelve Oaks.

3 Q. Thank you. Is a ten percent architecture
4 and engineering allowance for those fees
5 typical for projects such as what is needed at
6 Twelve Oaks?

7 A. Yes. Once again it's a typical fee
8 because it's very comprehensive. It includes
9 engineers. It includes reimbursable expenses,
10 some of the things we have to do to create a
11 set of drawing or prepare drawings. To do
12 that, we have to measure all the buildings
13 again and draw them up. I cannot take the old
14 plans and make everything correct in that
15 regard. It's my responsibility from my
16 standpoint with the drawings to make sure
17 they're correct. So I've got to take as-builts
18 for five to six different building types.
19 There's different details on all the
20 buildings. And after we get done with the
21 repair drawings, we'll be involved with
22 engineers as well as the architects whose main
23 focus is this type of project in the field.
24 It would probably take somebody from my office
25 four or five days a week just on this project.

1 As you can imagine, when we start taking the
2 buildings apart there's going to be damage in
3 places we haven't seen. The DT number six
4 shown on the screen, right below this picture
5 -- next to this picture that's on the screen,
6 there is a truss plate that's fully rusted.
7 That's the roof truss that I described earlier
8 this week. It holds up the roof, the
9 shingles. At this point we don't know where
10 that damage goes. So what happens is you stay
11 in the field so you can keep the process
12 moving. This is going to be slow. This is
13 going to be agonizing. This is going to be
14 very messy for the people that live there. We
15 would try to get through the process with as
16 much manpower that it takes. And it takes ten
17 percent which is equivalent to the effort in
18 terms of manhours.

19 Q. Thank you.

20 A. I might just say this that anything less
21 than that would probably produce the same kind
22 of results that we have here today. So it'd
23 probably be good for me in business as well as
24 for these owners. You have to have the proper
25 design fees for the building to be built

1 properly.

2 Q. Mr. Glick, do you have an opinion as to
3 the approximate cost of the damage that we've
4 discussed this week at Twelve Oaks in
5 photographs?

6 A. Yes, I do.

7 Q. And what is that opinion?

8 A. The installation of the Magna Wall system
9 is a proximate cause of damage to the
10 buildings that I have shown in my photographs
11 that have to do with stucco.

12 Q. And was the Magna Wall installation
13 defects pervasive?

14 A. They were pervasive throughout the entire
15 complex that I saw.

16 Q. And were they in violation of the
17 manufacturer's requirements, both to the NER
18 field reports that we've referenced as well as
19 the installation requirements?

20 A. Yes, sir.

21 Q. Is that a violation of the contract that
22 governed Professional Plastering's work?

23 A. Yes.

24 MR. ANDERSON: Objection, Your
25 Honor.

1 THE COURT: What's the basis?

2 MR. ANDERSON: I'm sorry, Your
3 Honor. I'll withdraw it.

4 DIRECT EXAMINATION CONTINUED

5 BY MR. SEQUI:

6 Q. Is that also a violation of the building
7 code?

8 A. Yes, it is.

9 Q. Has the opinion you've just given me, as
10 all the opinions you've given me throughout
11 this week, been to a reasonable degree of
12 certainty in your field of architecture,
13 forensic architecture and construction?

14 A. Absolutely.

15 Q. Thank you. That's all the questions I
16 have for you, Mr. Glick. I appreciate you
17 being here.

18 THE COURT: Mr. Anderson, any
19 questions?

20 MR. ANDERSON: Thank you, Your
21 Honor.

22 CROSS EXAMINATION

23 BY MR. ANDERSON:

24 Q. Good morning, Mr. Glick. How are you
25 today?

- 1 A. Good morning. I'm good. Thank you.
- 2 Q. Mr. Glick, you've done four or five or
- 3 six of these cases with the plaintiffs'
- 4 attorneys here today. And in each one of
- 5 those cases there's been -- the cladding where
- 6 there's stucco siding, synthetic stucco --
- 7 there's always been some type of building wrap
- 8 beneath it. Is that correct?
- 9 A. There's been building wrap as a water
- 10 management system in virtually all the cases
- 11 I've been involved in, yes.
- 12 Q. You just did a project for Ellington
- 13 Woods?
- 14 A. I provided the forensic investigation,
- 15 yes.
- 16 Q. And that was with Mr. Sequi and Mr.
- 17 Chakeris. Is that correct -- any other
- 18 attorneys?
- 19 A. I was working with Mr. Stevens.
- 20 Q. Mr. Stevens and Mr. Weeks were ---
- 21 A. Correct. I'm not sure he was involved in
- 22 that case.
- 23 Q. And the building wrap in those buildings
- 24 basically covered the entire OSB/plywood,
- 25 whatever the sheathing was. Is that correct?

1 A. No, it didn't. It was left out in the
2 corners of windows where it was folded in,
3 similar to this project.

4 Q. And now when you say it's folded in in
5 the corners, you're talking about at the sill?

6 A. At the head of the windows. Typically,
7 what happens with that Tyvek is they cut it an
8 X fashion and just fold the corners the back
9 and then they don't protect the corners.
10 That's been my experience.

11 Q. And so when you do the X and pull it
12 back, you leave a gap, do you not?

13 A. I'm not sure a gap would be right.

14 Q. Well, you'd leave a piece of exposed OSB
15 or whatever is making up the rough opening.

16 A. That's correct. That's what I was
17 referring to. It did not cover all the OSB
18 because the way they cut it.

19 Q. And that's similar to what you found
20 here.

21 A. I believe so, yes, sir.

22 Q. And so you've got -- after you pull the
23 sheathing in, you've got this gap?

24 A. Correct.

25 Q. Now, in order to take care of that,

1 there's a piece that's sometimes used at the
2 base of the window called sill flashing. Is
3 that correct?

4 A. Most windows don't have sill flashing.

5 Q. The plans in this case called for a peel-
6 and-stick style of sill flashing, do they not?

7 A. I wouldn't call it sill flashing. It's a
8 peel-and-stick membrane.

9 Q. What is it -- is it not -- but they
10 required the membrane to be wrapped at the
11 sill?

12 A. I would have to look at the instructions
13 for those windows. But, typically, yes, it
14 would be wrapped, but you had to wrap it a
15 special way.

16 Q. And part of the reason for that wrap
17 would be to divert water and keep it away from
18 the openings where you cut the Tyvek. Is that
19 correct? Or does it have a different
20 function.

21 A. That's what a lot of the contractors use
22 it for. I'm not a proponent of that because
23 what happens is you're taping these joints
24 together. And what happens is the tape gets
25 formed, so the water is not properly lapping

1 -- the fall of the rain, the fall of water is
2 not going to going over the opening. It gets
3 caught behind the tape in certain situations
4 and then it just starts a hole through the
5 membrane that goes into the building. So I
6 believe you should take the Tyvek and wrap the
7 Tyvek over the head flashing. So you have
8 positive lapping action. And then you could
9 tape the Tyvek to the structures.

10 Q. And that was not done.

11 A. That was not done.

12 Q. Were you on site at Fenwick back in 2002
13 when this building was going on. Were you on
14 site then?

15 A. No.

16 Q. Did you observe any of the construction
17 going on?

18 A. In 2002?

19 Q. In 2002, yes.

20 A. No. The first time I saw the project was
21 in 2008.

22 Q. And you never saw who was actually doing
23 the work that's described in the various
24 contracts.

25 A. No, I did not.

1 Q. Now, Tacy McGinty, you know that she was
2 the project manager for the owner then,
3 Tarragon. Is that correct?

4 A. I just learned that yesterday when I was
5 listening to the reading of the deposition.

6 Q. Again, she was on site quite frequently.
7 Did you pick that up from the deposition?

8 A. I don't recall that exact language, but
9 it may have been said. Yes, sir.

10 Q. What was the appropriate building code?

11 A. It's 2000 IBC, which is the International
12 Building Code.

13 Q. And it would be IBC rather than the IRC.
14 Is that not correct?

15 A. Correct.

16 Q. The IRC is the International Residential
17 Code?

18 A. That's correct.

19 Q. So these would be considered commercial
20 buildings?

21 A. Correct. The IRC is for one and two-
22 family dwellings.

23 Q. Now, an engineer and architect, when
24 you're inspecting an existing building and you
25 find a dangerous condition, you've got the

1 authority to actually the duty to close down
2 the building, do you not?

3 A. Actually, first of all, we don't inspect
4 construction. We observe construction by
5 contract and by tradition. If there is a
6 dangerous situation, we'll let the building
7 inspector know and they will shut it down.

8 Q. So, but you do have an obligation to tell
9 the building inspector?

10 A. I think that would be the appropriate
11 thing to do, yes.

12 Q. And did you contact the building
13 inspector about this?

14 A. No, sir.

15 Q. Now, in your presentation on Monday you
16 indicated or you showed us how -- the stucco
17 material is not waterproof. And I believe you
18 had a diagram with arrows going through it up
19 against the membrane, whether it was the
20 building wrap or the paper-backed lath. Am I
21 not correct?

22 A. Correct. Stucco is not waterproof.
23 Water gets through it.

24 Q. So when you use stucco you anticipate
25 that water's going to pass through it.

1 A. Yes, that's why you provide the water-
2 management system.

3 Q. And on this building they had basically
4 two water-management systems as is recommended
5 by the Portland Cement Association for stucco
6 for walls.

7 A. Well, what the Portland Cement
8 Association recommends is that the water-
9 management system be done properly. And if
10 it's not done properly, it doesn't matter how
11 many systems you have. If you got back laps
12 of the felt and your water's behind your
13 system, it's going to find a hole which is
14 every sixteen inches -- most likely the
15 staples, holding the Tyvek on the building.
16 And you need the water on the face of the felt
17 in this case. And we can see that in the
18 damage in the photographs.

19 Q. Thank you. And we'll go back to my
20 question. My question was does in the
21 Portland Cement Association recommendations,
22 do you -- do they not recommend that you have
23 a building wrap against the sheathing, the
24 wooden sheathing, and then also the use of
25 paper-backed lath?

1 A. I would have to go back and look at their
2 instructions. But if you do, it would mean
3 they have to be installed properly.

4 Q. I understand that. You used the term
5 "allowance," and we heard that term yesterday.
6 What is an allowance?

7 A. An allowance is, for instance, for wide
8 sheathing, or an allowance for wide studs. In
9 other words, you can't specify the quantity,
10 because we don't have x-ray vision. So based
11 on our experience -- in my case, about forty
12 years of experience, and based on the type of
13 damage and the type of construction defects
14 we've witnessed for the last week, you assign
15 an allowance for sheathing -- to replace -- I
16 don't know the exact numbers for the line
17 items. And then what you do is you get people
18 out in the field -- another reason for those
19 fees I mentioned earlier -- who are doing
20 quantities. Because you'll bid a job based on
21 unit prices and quantities. You don't want
22 the contractor telling you I replaced five
23 sheets of plywood. You want to see those five
24 sheets of plywood. That's what an allowance
25 is. It's a best guess, based on experience

1 and based on the specifics of this project.

2 Q. And you would have someone from your
3 office. Would that be the Myles Glick or
4 would that be Glick and Boehm?

5 A. It's usually Glick and Boehm, but it's
6 usually Myles Glick. I'll be doing that in
7 Barnwell County Courthouse myself.

8 Q. And you will actually be onsite. And how
9 long will you be onsite?

10 A. Well, we're going to use the term
11 "forensic actors." We're going to fix the
12 whole building. So I'll be onsite probably
13 once every two weeks. That's what they asked
14 me to do. My guys from the office will be
15 onsite too.

16 Q. So you'll have them just once a week?

17 A. We haven't worked out those details yet.
18 We're working on it now.

19 Q. So is there an agreement that plywood
20 isn't put up unless you're there to watch?

21 A. Well, we'll know what the quantities are
22 and we'll have some controls in place to keep
23 the project moving, require photographs.
24 Depending on if it's a minor issue, we'll just
25 take a photograph of it. With the

1 communication networks we have, we look at it.
2 immediately on the Internet. So there's
3 different ways to handle different projects.
4 This project's so close we'll probably onsite
5 this jobsite the whole week.

6 Q. The whole week. And how many weeks do
7 you anticipate?

8 A. I think this is a sixteen to eighteen-
9 month job, depending on construction, what we
10 find -- it could easily be twenty to twenty-
11 four months.

12 Q. And for that, the architect/engineering
13 fees are, according to the ProCon estimate --
14 they would be a million five hundred thousand.
15 Is that not correct?

16 A. With that ten percent, yes.

17 Q. And when you're doing these projects, is
18 that the only project you're going to do?

19 A. Could you clarify that for me?

20 Q. Yes, do you run multiple projects?

21 A. Absolutely. We'll have twelve or
22 fourteen projects at any one time. Some under
23 construction, some not.

24 Q. And do you have any projects going in
25 Charleston today?

1 A. We're finishing up the Air National Guard
2 project that's next to the stadium.
3 Q. What was your fee arrangement on that?
4 A. I think that was about an eight-and-a-
5 half percent for the total job, new
6 construction.
7 Q. I'm sorry?
8 A. New construction.
9 Q. New construction.
10 A. We just finished up Baker Motors in Mt.
11 Pleasant. We sealed it up two weeks ago.
12 Q. Do you recall your affidavit that you
13 gave in this -- when filing this case?
14 A. I remember signing one. I don't remember
15 what it said. I don't have it memorized.
16 Q. I'm going to hand you a copy of that
17 affidavit and ask you if you could
18 authenticate whether that is, in fact, the
19 affidavit?
20 A. This looks like my signature.
21 Q. And in that affidavit you enumerate how
22 the architect was negligent. Is that not the
23 purpose of this affidavit?
24 A. I feel like he violated the standard of
25 care during the construction administration

1 phase, yes.

2 Q. And that's required under statute, that
3 you have to file an affidavit, you have an
4 architect file an affidavit if you're suing an
5 architect. Is that not correct?

6 A. That's my understanding.

7 Q. That was the purpose of this affidavit?

8 A. Probably.

9 Q. I'm sorry?

10 A. Probably. I haven't read the details of
11 the affidavit. There may be some other items
12 in there as well.

13 Q. And in that affidavit, in Paragraph ---

14 MR. SEQUI: Your Honor, I am going
15 to make an objection. This is cumulative and
16 beyond the scope of the rebuttal direct.

17 THE COURT: I'm going to give him
18 some leeway. You may answer.

19 CROSS EXAMINATION CONTINUED

20 BY MR. ANDERSON:

21 Q. Your conclusion in that affidavit was
22 that, as a result of this negligent, an
23 improper exterior building envelope was
24 installed on the subject buildings requiring
25 extensive demolition and repair. Is that not

1 true?

2 A. I don't have a copy.

3 Q. I'm talking about the last sentence.

4 A. Yes, sir, that's what it says.

5 Q. And that was given under oath.

6 A. Absolutely.

7 Q. Now, the stucco on this building had a

8 elastomeric paint coating, did it not?

9 A. It had a paint coating. I don't know if

10 it was elastomeric or not. I haven't analyzed

11 it.

12 Q. Did you know from your review of the

13 documents that you told us about on Monday

14 that a subcontractor by the name of Los Compos

15 put on the elastomeric coat or the paint that

16 you have seen?

17 A. I don't know who painted it. I just know

18 that when I was here that company did the

19 sealants.

20 Q. I hand you what was marked as Defendants'

21 Exhibit Number 9 and ask you if that is not,

22 in fact, the contract for Los Compos, or the

23 subcontract?

24 A. It appears to be the subcontract, yes.

25 Q. I wonder if you could go to the

1 Attachment B and tell me whether or not it
2 has, as part of their scope of work, the
3 painting of the stucco as well as the sealing
4 of the stucco, or I should say applying the
5 sealants?

6 A. Page 19?

7 Q. Page 19, yes.

8 A. All parties hereby agree that the paint
9 as used herein includes all the coatings,
10 materials, primers, emulsions, and the sealers
11 on the buildings and any other materials,
12 including any essential polymers needed for
13 finished coats. It looks like they were the
14 paint subcontractor.

15 Q. And their paint would have been applied
16 after the stucco had been put on and cured,
17 would it not?

18 A. It would be put on after the stucco,
19 correct. I would hope that it would be cured.

20 Q. But the stucco would be in place at that
21 time.

22 A. Yes.

23 Q. Did you take any pictures of the
24 hallways?

25 A. I have a little piece of a hallway on the

1 October 10th visit. I believe it's slide 25.

2 Q. I'm going to hand you Plaintiffs' Exhibit
3 19 which I believe is your photos in this
4 case. You say the October?

5 A. I believe it was October 10th. There's
6 two slides. One slide is number 15. It shows
7 water intrusion in a closet in a unit and
8 opposite that wall is a corridor showing no
9 drainage at the stucco system. That's 25.

10 Q. It appears to be another number.

11 A. I'll get the right one. It's got a
12 picture of the hallway next to unit 431.
13 Fifteen is all the mold and mildew from the
14 water coming from the top of the walkway/
15 breezeway common wall.

16 Q. Does that have a breezeway or is that in
17 the hallway?

18 A. It's a breezeway. And then later on in
19 the sequence I have a picture of -- yes, I do.
20 I'm sorry, it's 22, not 25. It's hard to
21 remember hundreds of pictures. A lack of
22 stucco drainage opposite the vent space going
23 out to the breezeway.

24 Q. So you don't have any -- and this is the
25 photo of the railing. And I think we showed a

1 cut at that railing during your Monday
2 presentation.

3 A. It's a typical railing. I don't know if
4 that was that particular one.

5 Q. Right. And that would be the leading edge
6 of that balcony. Is that correct?

7 A. It would be further out from where that
8 picture's taken, yes. Maybe two feet.

9 Q. So you haven't taken any pictures down
10 the long hallway that runs through the center
11 of the building.

12 A. No, I have not.

13 Q. And that is -- how wide is that hall?

14 A. I do not know. Six feet.

15 Q. Six to eight feet wide? And how tall?

16 A. I don't have those stats in my head.
17 Probably eight and a half feet. Maybe nine.
18 I don't know.

19 Q. Do you have eight-foot ceilings here?

20 A. I'd have to look.

21 Q. And so to do the repair job you would
22 have someone out on the job four to five days
23 per week?

24 A. Correct. It's a major undertaking --
25 this type of repair. You have to keep the

1 contract moving.

2 Q. So you anticipate that it's going to need
3 some fairly close supervision.

4 A. I will need close supervision by the
5 general contractor and close supervision by
6 the superintendents of the subcontractors and
7 they observation by the architects and
8 engineers.

9 Q. But you are the owner's representative.
10 Is that correct?

11 A. That's what the contract says.

12 Q. And so you are seeing for the owner when
13 you're on the site.

14 A. Well, we have to do if there's any
15 issues, we have to talk to the owner who has
16 the contractual relationship with the
17 contractor.

18 Q. But your authority onsite is that of the
19 owner, and you can move the project along, I
20 think was your term.

21 A. There are limits to that authority. I
22 can't stop the work, but I can point out
23 deficiencies of construction, yes.

24 Q. Well, can an architect have the ability
25 to stop work in his contract? Can that be

1 given by the owner?

2 A. I've never seen any owner give the
3 architect that kind of authority. You can't
4 stop the construction of a job.

5 Q. You actually stop the workers?

6 A. I've never seen anybody or any architect
7 have that kind of authority.

8 Q. And, again, you were not ever out on the
9 site during the actual construction of these
10 buildings.

11 A. No, I was not.

12 Q. And at the time that you gave your
13 affidavit, in 2008, how many years had the
14 buildings been in place?

15 A. I'd have to look at my report. I don't
16 have all those dates memorized.

17 Q. Let's assume that the CO date was --
18 certificate of occupation is in December of
19 2002.

20 A. Then it would be six years.

21 Q. So you were evaluating a six-year-old
22 project?

23 A. Correct. And six-year-old damage.

24 MR. ANDERSON: Thank you, Your
25 Honor. That completes the cross.

1 MR. SEQUI: One quick question,
2 Your Honor.

3 REDIRECT EXAMINATION

4 BY MR. SEQUI:

5 Q. Mr. Glick, you previously testified that
6 the IDC 2000 was in effect for this project.
7 Had that been adopted by the County of
8 Charleston and the City of Charleston?

9 MR. ANDERSON: We object, Your
10 Honor.

11 THE COURT: What's the basis?

12 MR. ANDERSON: I don't believe
13 the competency of this witness extends to
14 that.

15 THE COURT: If he knows, he may
16 answer.

17 THE WITNESS: Yes, it was adopted
18 after some Rules of Engagement that architects
19 would follow at that time for requirements in
20 the City.

21 MR. SEQUI: Thank you, Mr. Glick.
22 That's all the questions I have.

23 THE COURT: Recross.

24 MR. ANDERSON: None, Your Honor.

25 THE COURT: Mr. Glick, you may step

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

Case No. 2011196386

Mark F. Teseniar and Nan M. Teseniar, on
behalf of themselves and others similarly
situated, and Twelve Oaks at Fenwick
Property Owners Association, Inc.,
Respondents,

v.

Professional Plastering & Stucco, Inc., Maria
Arias, and Miquel Rosales,
Defendants,

Of whom Professional Plastering & Stucco, Inc. is the Appellant.

Professional Plastering & Stucco, Inc., Appellant

v.

Maria Arias, Miquel Rosales, and APS Enterprises Unlimited, Inc., Third-Party
Plaintiffs,

Of whom APS Enterprises Unlimited, Inc. is the Respondent.

RECORD ON APPEAL VOLUME IV of IV
(Pages 1446 - 1820)

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